Neutral Citation Number: [2008] IEHC 208

THE HIGH COURT
COMMERCIAL

2007 No. 192 P
[2007 No. 78 COM]

BETWEEN

BULA HOLDINGS, BULA TRUST, LOIRE INVESTMENTS, BULA LIMITED, MICHAEL J. WYMES, MICHAEL T. WYMES AND RICHARD F. WOOD

PLAINTIFFS

AND

THOMAS J. ROCHE, CRINDLE INVESTMENTS, THOMAS J. ROCHE AND FRANCIS PLUNKETT DILLON

DEFENDANTS

Judgment of Mr. Justice John Edwards delivered on the 6th day of May, 2008

Introduction

1. This is my judgment in respect of a motion brought by the defendants in the above entitled proceedings by a notice of motion dated 11th July, 2007 seeking the following reliefs:-

> "(a) An order pursuant to Order 19 Rule 28 of the Rules of the Superior Courts striking out or dismissing the plaintiffs' claims on the grounds that the Statement of Claim delivered herein discloses no reasonable cause of action and/or is shown by the pleadings to be frivolous and/or vexatious;
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> (b) Further or in the alternative, an order pursuant to the inherent jurisdiction of the Court dismissing or, alternatively, striking out the plaintiffs' claims against the defendants on the grounds that the proceedings have no reasonable prospects of success, are bound to fail and are an abuse of the process of the Court;
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> (c) Further or in the alternative, an order pursuant to Order 19 Rule 27 of the Rules of the Superior Courts striking out the Statement of Claim in entirety on the grounds that it contains matters which are unnecessary and/or scandalous and which may tend to prejudice, embarrass or delay the fair trial of the action;
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> (d) Further or in the alternative, an order pursuant to the inherent jurisdiction of the Court dismissing the plaintiffs' claims against the defendants on the grounds that the Statement of Claim fails to comply with the provisions of Order 19 Rule 5 of the Rules of the Superior Courts in that it purports to make allegations of (*inter alia*) fraud, deceit, misrepresentation, conspiracy, breach of fiduciary duty and other matters in respect of which particulars are necessary without setting out the necessary particulars,
>
> (e) Such further and other order as to the Court shall seem fit or appropriate,
>
> (f) An order providing for the costs of this application and of the proceedings including an order for such costs to be paid as between solicitor and client.

2. The motion was grounded upon five affidavits of Isobel Foley, Solicitor, on behalf of the defendants, together with the documents exhibited in those affidavits. Ms Foleys's said affidavits were sworn on 11th June, 2007; 11th of July, 2007; 24th of July, 2007; 19th of September, 2007 and 21st of November, 2007, respectively, It was further grounded upon affidavits of Thomas J. Roche, sworn on 11th July, 2007 and 24th July, 2007, together with the documents exhibited in his said affidavits. Further, it was grounded upon an affidavit of Stephen Hegarty, Solicitor, sworn on 24th July, 2007.

3. The motion was vehemently opposed by the plaintiffs and the following affidavits were put before the court in reply to those of the moving parties. There were three affidavits of Michael J. Wymes sworn on 18th July, 2007; 24th August, 2007 and 9th November, 2007, together with documents exhibited therein. Reliance was also placed upon an affidavit sworn by Gregory Ryan, Solicitor, on 14th June, 2007.

4. The matter was argued before me over five days on 27th of November, 2007; 28th November, 2007; 29th November, 2007; 20th November, 2007 and 18th December, 2007, respectively. Further, the court was provided with extensive written legal submissions by both sides, which have been of considerable assistance and for which the court is grateful.

The pleadings

5. The Plenary Summons was issued on 11th January 2007, and the General Endorsement of Claim thereto claims the following substantive reliefs:

> "(1) Damages for fraud, misrepresentation, conspiracy, negligence, breach of duty, including fiduciary duty and unlawful interference with the interests including economic interests of the plaintiffs, and obstruction and/or perversion of the course of justice.
>
> (2) Declarations that the Judgments and Orders obtained by the defendants in certain proceedings brought in or about 1993 and again in or about 1997 be set aside, including any ancillary costs orders.
>
> (3) An injunction directing that the defendants refrain from taking any steps to enforce any costs orders extant on foot of the above mentioned proceedings."

Various ancillary reliefs are also claimed but it is not necessary to recite them.

6. A Statement of Claim was delivered on 27th June, 2007. I propose to describe the general scheme of the document and, insofar as it seems to be appropriate, to selectively quote parts of it. Paragraphs 1 to 10 thereof simply identify and describe the various parties. The following matter is then pleaded, *inter alia*, in paragraph 11 of the document:

> "11. In each of the years 1993, 1994 and 1997, the defendants caused to be instituted High Court proceedings by way of petitions under Section 205 of the Companies Act, 1963, against Bula Holdings, Bula Trust, Loire Investments, Michael J. Wymes, Michael T. Wymes, Francis Plunkett Dillon and Donald Godson (the Oppression Proceedings)."

7. The plaintiffs then proceed, in paragraphs 12, 13, 14, 15, 16 and 17, to proffer a description of the course of the proceedings referred to in paragraph 11. The description pleaded represents a view from the plaintiffs' perspective and it is not necessarily one with which the defendants would agree. Be that as it may, nothing turns on it, insofar as it goes.

8. The following matters are then pleaded at paragraphs 18 to 34 inclusive. As the defendants take serious objection to these paragraphs, it is (unavoidably) necessary to recite them in full:

> "18. At all material times during the course of the said oppression proceedings, the first, second and fourth-named defendants (in their various capacities) represented to the plaintiffs and averred to this Honourable Court that they owned and controlled or alternatively were entitled directly or indirectly to the entire beneficial interest of the shares in the second-named defendant, the subject of the oppression proceedings. The said representations and averments were also made on behalf of Crindle Investments (Crindle). These representations and averments were accepted as being true and relied upon, and which are now known to be false and/or were known to be false by the defendants at the time made, or alternatively became false but were not corrected at the earliest opportunity, or at all, thereby seriously and fatally misleading this Honourable Court and the plaintiffs herein, whereby this Honourable Court was induced into error to make decisions it would not or might not have made had it not been kept out of the true facts.
>
> 19. The fact is that at material times, the first, third and fourth-named defendants (in their various capacities) were not, in fact, the owners or alternatively were not entitled, either directly or indirectly, to the entire or any beneficial interest in the said shares, as same had been sold, transferred, assigned or otherwise disposed of to third parties or otherwise dealt with in circumstances where the said defendants were no longer the owners of the said shares or entitled to the beneficial interest therein directly or indirectly.
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> 20. In or about 1995, there were changes in the ownership of the second-named defendant whereby legal ownership was vested through Delaware in a US limited partnership (Seafield Partnership) and a US limited corporation (Wellington Investments).
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> 21. In the premises, at the time of the institution or alternatively during the course of the conduct of the said oppression litigation, the first, third and fourth-named defendants (in their various capacities) were not shareholders such as would allow them to make the aforesaid averments and representations, or entitle them to the necessary locus standi to institute, maintain or otherwise conduct the said oppression proceedings and claims of oppression on their behalves, or to obtain the orders granted to them by the High Court and Supreme Court.
>
> 22. In the premises, matters set forth in the pleadings in the said oppression proceedings were not accurate and known by the defendants not to be accurate at the time. Pleadings to the effect that defendants in those proceedings were shareholders or entitled directly or indirectly to the entire beneficial interest in the said shares in Crindle, were false and known to be false, at the time of the institution of the said proceedings. In the alternative, during the course of the said proceedings and by reason of the disposal or agreement to dispose of the said shares, the said facts relied upon and averments made were no longer and could no longer be true and correct, as the defendants well knew. In the premises, the defendants and each of them were required and obliged to bring these changed circumstances to the attention of the Court, to amend the pleadings and/or discontinue the entire or alternatively the bulk of the said action which they failed to do.
>
> 23. At all material times, the defendants as aforesaid had transferred or agreed to transfer their shareholdings to an undisclosed and covert third party or parties, and to act in the oppression proceedings on behalf of those parties.
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> 24. At all material times, therefore, the defendants, together with an as yet undisclosed third party or parties, sought to undermine and compromise the plaintiffs in the conduct of the Tara and Bank proceedings and in the bona fide pursuit of their constitutional right to either litigate the said proceedings to a conclusion, to settle them, or to reject the terms of such offers of settlement as might have been proposed by the defendants in the Tara and Bank.
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> 25. In the premises, the defendants herein who instigated and instituted the oppression proceedings and complained of conduct by the respondents prejudicial to their corporate and personal interests, did not have, or no longer had grounds, or a stateable case to support the complaint of oppression, which fact was kept secret or otherwise concealed from this Honourable Court and kept secret from the plaintiffs.
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> 26. The misrepresentations which constituted the active concealment of material facts and so made, were acted upon both by this Honourable Court and the plaintiffs herein, were representations made either without belief in the truth of said representations or recklessly, careless as to whether they were true or false or knowing such statements to be untrue with intent to induce both the plaintiffs and this Honourable Court to act upon same, and/or knowingly were made in the absence of any genuine belief that the said representations were true or otherwise negligently and in breach of duty and without regard or any regard as to whether the said averments were either true or false.
>
> 27. At all material times, the defendants herein conspired or otherwise acting in concert with the said undisclosed and covert third party or parties to maliciously, and or acting with other injurious intent to defeat the legitimate claims of the plaintiffs, and thereby damage the plaintiffs by engaging and distracting them in otherwise unnecessary, redundant and moot proceedings as was the fact. The plaintiffs acting upon such false statements and averments thereby sustained damage, the said third party acting with the defendants to give effect to the disposal or agreement to dispose of the said shares, and acting in the execution of their common purpose thereby giving rise to the misrepresentations complained of, the said misrepresentations having been relied on when the facts relied upon and averments made were no longer and could no longer be true and correct as the defendants well knew.
>
> 28. At all material times, it was an object of the said secret transfer or disposition of the shares in Crindle and/or other interests therein, that the same would defeat the claim of the plaintiffs herein, bring about a situation whereby an undisclosed third party or parties could and would obstruct and/or prevent the plaintiffs from realizing their ambition, not only of resolving the existing proceedings, but of exploiting the enormous resources of the lead/zinc ore body underlying such proceedings.
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> 29. On or about the 5th day of March, 1997, Mr Thomas J. Roche, in the course of the said oppression proceedings, swore an affidavit verifying the facts, which at paragraph 26 (a) set out in the oppression Petition dated 5th March, 1997, stated:

'The entire issued share capital of the petitioner is as and from 13th January, 1995 beneficially owned by Mr Roche Junior through a structure involving a US Limited Partnership and US Liability Corporations'.

Which facts were false and known to be false at the material time, which averment was not true and which verification was untrue.

30. In support of the said pleadings, and in pursuit of the claim to be allowed take over the conduct of the Tara and Bank Proceedings and thus be in a position to control or influence the ownership of the ore body and/or its disposition, the said defendant swore an affidavit confirming to this court:

a) the veracity of the complaint of oppression of him as a shareholder; and

b) affirmed in that sworn affidavit that the matters set out both in the pleadings and in the same affidavit were true in circumstances, where he knew same were not true and could not possibly be true and which were, in fact, false and were known by the defendants to be false, and were persisted with in an attempt to obtain benefit for and on behalf of the covert third party or third parties, and thereby sought to usurp the inherent jurisdiction of this Honourable Court by means of the order of this Honourable Court, and control of both the Tara and Bula litigation and the subject orebody in a manner inimical to the administration of justice.

31. The fact is that the said averments were not true. They were false. The said defendants made these averments in the knowledge that the matters averred to were in fact not true, were in fact false, could not in fact be true and were intended to mislead the Court in the conduct of the litigation and in the administration of justice. The false averments were made deliberately to pervert the course of justice, compromise the plaintiffs' legitimate litigation, undermine the plaintiffs in the conduct of their lawful commercial and personal affairs, cause them damage and bring about, *inter alia*, serious financial embarrassment and ruin as a direct result of this illegal interference with the plaintiffs' legitimate interests.

32. An Affidavit in support of the 1997 Petition was also sworn by Mr. Roche Senior, on 18th March, 1997.

33. In the premises, the defendants and each of them conspired to injure the plaintiffs, and to injure the plaintiffs in the way of their business.

34. The defendants and each of them conspired to take advantage of pleadings and averments which they knew were not true and were, in fact, false, to facilitate and bring about the transfer of the Bula ore body to a third party or third parties at a considerable undervalue, as subsequently transpired.

Particulars of Complaint

A. In the premises, the defendants herein did not have, or no longer had a stateable case to support the complaint of oppression, which fact was kept secret from the plaintiffs herein and kept or otherwise concealed from this Honourable Court. The misrepresentations thereby arising constituted the active concealment of material facts and so made, were acted upon both by the plaintiffs herein and this Honourable Court. They were representations made either without belief in the truth of said representations or recklessly, careless as to whether they were true or false or knowing such statements to be untrue with intent to induce both the plaintiffs and this Honourable Court to act upon same, and/or knowingly were made in the absence of any genuine belief that the said representations were true or otherwise negligently and in breach of duty and without regard, or any regard, as to whether the said averments were either true or false.

B. At all material times, the defendants herein conspired, or otherwise acting in concert with the said covert third party or parties, to maliciously and/or with other injurious intent to defeat the legitimate claims of the plaintiffs and thereby damage the plaintiffs by engaging and distracting them in otherwise unnecessary, redundant and moot proceedings, as was the fact. The plaintiffs, in acting upon such false statements and averments, thereby sustained damage, the said third party acting with the defendants to give effect to the disposal or agreement to dispose of the said shares, and acting in the execution of their common purpose thereby giving rise to the misrepresentations complained of, the said misrepresentations having been relied on when the facts relied upon and averments made were no longer and could no longer be true and correct as the defendants well know, and:

i) Swearing an Affidavit on the 5th day of March, 1997, that the matters set out in the Affidavit sworn by him were true when same in all the circumstances were not in fact true, and were not subsequently rectified;

ii) Swearing an Affidavit on the 5th day of March, 1997 that the matters set out in the Affidavit sworn by him were true when same in all the circumstances could not be true and were known to the defendant not to be true, and were not subsequently rectified;

iii) Swearing an Affidavit on the 5th day of March, 1997 that the matters set out in the Affidavit sworn by him were true when same in all the circumstances could not be true and were recklessly stated by the said defendant to be true and were not subsequently rectified.

C. As a result of the matters aforesaid, the plaintiffs suffered considerable harm, loss, distress and damage.

Particulars of Damage

The costs of the Section 205 proceedings: €0.5 Million (estimated)."

9. The prayer to the statement of claim reiterates and expands upon the substantive reliefs claimed in the plenary summons. Among other things, the claim for damages is amplified to include punitive and exemplary damages. Further, the plaintiffs have added a claim for "Declarations that the Judgments and Orders obtained by the Defendants" in the 1993 and 1997 proceedings, "be set aside, including any ancillary costs orders".

Background To The Proceedings

10. There is a very long and involved background to the present proceedings that requires to be appreciated and understood. That background is well summarised in the affidavit sworn by Isobel Foley on 11th July, 2007, (hereinafter referred to as Ms Foley's second affidavit), and, for the most part, I propose to adopt and use Ms. Foley's summary. Mr. Michael J Wymes has contended in his affidavit sworn on 18th July 2007, that Ms. Foley's history is lacking in fairness and balance, and is in part inaccurate, incomplete and distorted. I do not accept that it lacks fairness and balance, or that it is materially inaccurate or distorted. Insofar as the merits of various proceedings are concerned, her affidavit does, of course, reflect the perspective of her clients. However, the court is not concerned with the merits of the proceedings in question, and is conscious that the plaintiffs have a different perspective reflected in the affidavits filed by Mr. Wymes and others on their behalf. Insofar as it may be incomplete, Ms. Foley does not purport to set out a definitive account of the relevant history. What she offers to the court is a summary and insofar as it describes the litigation history between the parties, I am satisfied that it is a fair summary. However, the authoritative version of the background history to the proceedings is to be found in the judgments and rulings given by Mr. Justice Francis D. Murphy on 2nd March, 1993; 28th January, 1994 and 1st February, 1994, respectively, in High Court proceedings bearing Record No. [1993] No. 586 P, Ct 6, based upon a petition pursuant to s. 205 of the Companies Act 1963, and entitled, "*In the matter of Bula Holdings, between Crindle Investments*, petitioner, *and Bula Holdings, Bula Trust, Loire Investments, Michael J. Wymes, Michael T. Wymes, Richard F. Wood, Francis Plunkett Dillon and Donald Godson*, respondents", together with the judgments delivered by the Supreme Court on 21st June, 1994 in respect of certain appeals against Mr. Justice Murphy's said judgments and rulings. (For convenience, these proceedings will hereinafter be referred to as the "1993 s. 205 proceedings".) Further, regard should also be had to the judgment of Mr. Justice Murphy delivered on 27th May, 1997, in subsequent High Court proceedings, bearing Record No. [1997] No. 48 COS, Ct 6, which said proceeding were again based upon a petition pursuant to s. 205 of the Companies Act 1963, and involved the same parties as had been involved in the 1993 s. 205 proceedings; and in respect of an appeal to the Supreme Court in the same matter, the judgment of Mr. Justice Keane delivered on 5th March, 1998 (Hamilton C.J. and Barrington J. concurring). (These proceedings will hereinafter be referred to as the "1997 s. 205 proceedings".) All of the aforementioned judgments are unreported.

11. Finally, and for completeness, regard should also be had to the judgments in certain related proceedings, which are reported, namely *Crindle Investments, Thomas C. Roche and Thomas J. Roche v. Michael J. Wymes, Richard F. Woods, Bula Holdings and Bula Ltd* [1998] 4 I.R. 567.

12. In the description of events that follows, the names of certain of the parties to the present proceedings will be abbreviated for convenience. In the interests of consistency, the court will adopt the same abbreviations as used by Ms. Foley in her affidavits.

13. Bula Limited ("Bula") is a limited liability company incorporated in 1971. The original purpose of Bula was to acquire certain lands situated at Nevinstown, County Meath, comprising approximately 120 acres, under which there were valuable mineral deposits, from Patrick Wright, and to exploit the sale of the mineral deposits. The shareholders in Bula, at all material times were, and are, the State, Bula Holdings ("Holdings") and representatives acting on behalf of Patrick Wright (deceased). Voting control of Bula was at all material times vested in Holdings, Holdings being an unlimited company, ultimately beneficially owned by the late Thomas C. Roche deceased ("Mr. Roche Snr"), Thomas J. Roche ("Mr. Roche"), Michael J. Wymes ("Mr. Wymes"), and Richard F. Wood ("Mr. Wood"). The interest of Mr. Roche Snr. and Mr. Roche in Holdings was held through an investment company, Crindle Investments ("Crindle") Holdings was formed as a vehicle through which the shares were held in Bula for the purposes of the venture between Mr. Roche Snr, Mr. Roche, Mr. Wymes and Mr. Wood, and to govern their relationship with the State and the other shareholder in Bula. Voting control of Bula was at all material times held by Mr. Wymes and Mr. Wood.

14. Banking facilities were afforded to Bula by a number of banks ("the banks"). The banks took charges from Bula to secure its indebtedness. Bula's indebedness to the banks (up to certain limits) was also personally guaranteed by Mr. Roche Snr, Mr. Roche, Mr. Wymes and Mr. Wood. Bula defaulted on its liabilities to the banks and each of the guarantees was called in and judgment was obtained by the banks on foot of the guarantees. The financial difficulties of Bula continued until the banks called the debt in September 1985, and thereafter appointed Laurence Crowley as Receiver to Bula on 8th October, 1985.

Litigation History July 1986 – June 1994

15. On 2nd July, 1986, proceedings, which are referred to below as the "Bank proceedings", were initiated. These proceedings (Record No. 1986/6624 P) were as between Bula, Holdings, Mr. Roche Snr., Mr. Roche, Mr. Wymes and Mr. Wood (plaintiffs) and Laurence Crowley, Northern Bank Finance Corporation, Ulster Investment Bank, Allied Irish Investment Bank and McKay and Schnellman (defendants). The plaintiffs in those proceedings sought damages and other reliefs, including declarations that all loan agreements, securities, guarantees and judgments in favour of the banks should be set aside.

16. On 17th November, 1986, separate proceedings, which are referred to below as the "Tara proceedings", (Record No. 1986/10898 P), were issued by Bula, Holdings, Mr. Roche Snr, Mr. Roche, Mr. Wymes and Mr. Wood (plaintiffs) against Tara Mines Ltd. and the Minister for Energy and Ors. (defendants). The Tara proceedings concerned a dispute with Tara Mines Ltd. ("Tara"), the owner of a mine adjoining the Bula lands.

17. In 1990, Mr. Roche and Mr. Roche Snr. (the "Roches") became concerned about the manner in which both those proceedings were being conducted on behalf of the plaintiffs and about the prospects of success of those proceedings. In September, 1990, the Roches appointed James O'Dwyer, then a partner in, and Chairman of, Arthur Cox, Solicitors, to review the litigation and advise them on the steps that they might take with a view to bringing the Tara proceedings and the Bank proceedings to a satisfactory conclusion.

18. Mr. O'Dwyer subsequently commenced negotiations with the banks to explore the possibility of settling the Bank proceedings. . Mr O'Dwyer did not have authority on behalf of either the corporate plaintiffs or of Mr. Wymes and Mr. Wood and their interests (the "W Group") to engage in these discussions. When the W Group learned of what they later characterised as "the clandestine negotiations", they regarded them as an act of disloyalty by the Roches that could have jeopardised the litigation. As Murphy J later put it:

> "If Mr O'Dwyer's overtures had been rejected, could anyone doubt the tactical and psychological damage that would have been done to the plaintiffs in seeking to mount this burdensome litigation." (unreported judgment of 2nd March 1993, in

the 1993 s.205 proceedings, previously referred to).

In the circumstances, Mr O'Dwyer's discussions were repudiated by the W Group.

The Roches also endeavoured to bring about a realistic assessment by the legal teams retained on behalf of the plaintiffs of the prospects of success of the Tara proceedings and the Bank proceedings and of the minimum settlement terms which would be acceptable to the plaintiffs. The Roches have long maintained that all efforts to carry out such an assessment were unreasonably and irresponsibly frustrated by the W Group and their legal advisers. As previously stated, the W Group hold a completely different perspective. From their point of view, the Roches had been disloyal, and, moreover, were perceived as having reneged on an alleged commitment to fund, on an unlimited basis, both the Bank proceedings and the Tara proceedings (a suggestion vehemently denied by the defendants), and so could not be trusted to faithfully manage or direct any aspect of the litigation. In the circumstances, the W Group felt justified in withholding their co-operation. I merely record the existence of these conflicts and the court is not to be taken as expressing any view whatsoever as to merits.

19. By February, 1992, the banks had confirmed the basis on which they would be prepared to settle the Bank proceedings, namely, that the debts due to all of the banks would be settled for a sum of IR£4 million (€5.08 million) and all securities would be released. In November 1992, Tara presented a settlement offer under which they would pay Holdings IR£28.5 million (€36.19 million) for its shareholding in Bula (parallel offers were to be made to the other shareholders in Bula), the result of which would be that the Bula Mine would transfer to Tara and the Tara proceedings would be settled.

20. Both of these settlement offers were rejected by the W Group and their legal advisors, although their acceptance would have resulted in the release of very substantial sums of money (at least IR£23 million (€29.20 million)), to the W Group and the Roche Interests (the "R Group"). Again, both plaintiffs and defendants have markedly different perspectives as to whether the rejections were justified or reasonable. It is not necessary to set out their respective positions and it sufficient to simply record the fact that the offers were rejected.

21. Having regard to the rejection by the W Group of the offers of settlement, the Roches then endeavoured to gain control of the litigation and the ability to settle the proceedings. On 26th of January, 2003, Crindle commenced s. 205 proceedings against the W Group (the "1993 s. 205 proceedings"). Those proceedings were resisted by the W Group. Moreover, the W Group, in turn, contended that it was being oppressed by the R Group. Their claim in that regard alleged, *inter alia*, that contrary to an inter-party agreement, the R Group had engaged in unauthorised and unilateral negotiations with the defendants to settle one or both sets of the proceedings then pending, namely, the Tara proceedings and the Bank proceedings. The W Group openly admitted a refusal to permit information and advice to be given to the Board of the company in relation to the legal proceedings at certain times, but expressed a grave concern that the disclosure of confidential information and tactics involved in the proceedings to the R Group could, in effect, prejudice the conduct of the whole of the litigation. During the course of the hearing, a crucial piece of evidence emerged as appears from the following passage in the judgment of Murphy J., delivered on 2nd of March, 1993:-

> "What the petitioners seek is a detached, reasonable, objective assessment of the offers of comprise negotiated by Mr. O'Dwyer. Apart from the reluctance which the W Group have to engage in such an exercise, the fact is that an indispensable ingredient for that exercise would be the opinion of counsel as to the prospects of success in the pending litigation and perhaps some indication as to the quantum of damages or the relief which the plaintiffs' might obtain in the event of their succeeding in one or other of the actions. It is not a question of the company or some directors refusing to part with such an opinion for reasons which are valid or otherwise. The incredible fact is that no such opinion was ever obtained or sought."

22. In the light of this evidence, Murphy J. concluded that Crindle was being oppressed by the W Group "because of the basic failure to obtain legal advice". With a view to bringing this oppression to an end, Murphy J., directed that opinions be obtained from counsel as to the prospects of success of the Tara proceedings and the Bank proceedings, in that counsel should also be asked to offer any observations they might have in relation to the offers of settlement in the Tara proceedings and the Bank proceedings. Murphy J. also directed that when the advices of counsel had been obtained, they should be considered fairly and objectively by the board which should then decide what action should be taken.

23. Counsel's opinions were obtained in August, 1993, but all attempts to consider them realistically were frustrated by the W Group. This occurred because the W Group secured control of the board of Holdings, due to two particular circumstances. The first was that Murphy J., had directed that Kevin McCourt and Tom Shaw (who had been appointed to the board of Holdings on the nomination of the R Group), should have no voting power at board level. The second was the appointment of Michael T. Wymes to the board of Holdings.

24. The 1993 s. 205 proceedings were re-entered by Crindle before Murphy J. on 5th November, 1993. No order was made at this stage. However, Murphy J. stated that the proceedings should be re-entered before him at once if counsel retained by the plaintiffs in the Tara proceedings formed the view that there were no prospects of success and if the other side of the board insisted in going on with the case. The Tara proceedings went to hearing in early December, 1993. After ten days, the parties entered into further settlement negotiations. The proceedings were then adjourned to January 1994, to enable discussions to proceed. Settlement terms subsequently became available on which it would have been possible to settle both the Tara proceedings and the Bank proceedings. Again, the W Group rejected the offers.

25. The R Group re-entered the matter before Murphy J., as a matter of extreme urgency on 25th January, 1994. In the interests of speed, that application was heard on oral evidence, including the evidence of three of the senior counsel retained by the plaintiffs, all of whom unequivocally recommended settlement on the terms then available. In addition to the senior counsel retained by the plaintiffs (Brian McCracken S.C., John Gordon S.C. and Michael Collins S.C.), Mr. Roche, Mr. McCourt and Mr. Shaw all gave evidence. The relief sought by the R Group on that occasion was an order requiring all of the parties, whether as directors or as personal litigants, to settle the proceedings on the terms proposed. This was because the W Group had indicated that they would frustrate a settlement by continuing to prosecute their personal claims. On 28th January, 1994, Murphy J. directed that the conduct and compromise of the Tara proceedings and the Bank proceedings (including the discontinuance of those proceedings) insofar as they related to the corporate plaintiffs should be entrusted exclusively to the R Group. Murphy J., declined, however, to make an order directing Messrs. Wymes and Wood as personal plaintiffs to settle their claims. The High Court reserved the costs of the re-entered application.

26. The W Group appealed Murphy J's order to the Supreme Court, the effect of which was to stay the terms of the High Court order. The R Group cross-appealed. The appeals were heard by the Supreme Court in April, 1994, and judgment was delivered by the Supreme Court on 21st June, 1994. The Supreme Court dismissed the appeals and varied the order of the High Court so as to provide

that the R Group should be in control of any negotiations to be conducted on behalf of Holdings for the settlement of the Tara proceedings and the Bank proceedings, and be entitled to settle those proceedings on behalf of the corporate plaintiffs if that could be done on terms broadly similar to those already offered, but not on any less advantageous terms unless agreed by all members of Holdings or approved by the High Court. The Supreme Court declined to make an order directing Mr. Wymes and Mr. Wood to compromise their personal claims.

Litigation History July 1994 – February 2003

27. From July 1994 onwards, the R Group continued to try to resolve matters. However, because Mr. Wymes and Mr. Wood would not agree to compromise their personal claims, and both the High Court and the Supreme Court had declined to force them to do so, and because Tara, the State, the banks and the Receiver all insisted that any settlement would have to involve the settlement of the personal claims of Mr. Wymes and Mr. Wood, it was not possible to resolve matters.

28. On 4th October 1994 the Tara proceedings, which had adjourned to that date to allow for both the conduct of settlement negotiations and the conclusion of the 1993 s. 205 proceedings, recommenced. On the opening day, the R Group withdrew their personal claims against both Tara and the State, leaving the question of costs over to the conclusion of the litigation.

29. The Tara proceedings were at hearing for 277 days. Judgment was delivered by the High Court (Lynch J.), on the 6th February, 1997. That judgment dismissed in trenchant terms the entirety of the Tara proceedings. On 24th February, 1997, orders for costs were made in favour of Tara and the State against the R Group up to and including 4th October 1994, when they had withdrawn from the proceedings. These costs were subsequently taxed and paid by the R Group at a cost to them of IR£1.29 million (€2.44 million). In doing so, the Roches paid the costs liabilities of all of the plaintiffs to all of the defendants in the Tara proceedings, up to and including 4th October, 1994. Orders for costs were also made in favour of Tara and the State against the W Group and the corporate plaintiffs from 4th October, 1994, onwards. The W Group appealed the Tara proceedings to the Supreme Court.

30. In the light of the trenchant dismissal of the Tara proceedings and the fact that the Bank proceedings were then listed for hearing on 8th April, 1997, the R Group issued fresh s. 205 proceedings by the presentation of a further petition to the High Court on 5th March, 1997 (the "1997 s. 205 proceedings"). In addition, the R Group commenced separate plenary proceedings with a view to obtaining orders in those plenary proceedings directing the personal plaintiffs to compromise their claims. Ms. Foley deposes that it was felt that the structuring of the proceedings in this way might bring about the desired result, namely, a negotiated settlement of all proceedings. The 1997 s. 205 proceedings were again defended by the W Group and were heard and determined by Murphy J who gave judgment on 27th March, 1997. Murphy J. ordered that the R Group should be entitled to initiate, control and conclude any negotiations on behalf of the corporate plaintiffs for the settlement of the Bank proceedings and the appeal (if any) in the Tara proceedings, on terms to be agreed by all members of the company or approved by the High Court. He declined, however, to make the order sought in relation to the personal claims and the plenary proceedings. Murphy J's orders were appealed to the Supreme Court and on 5th March, 1998, the Supreme Court dismissed the said appeals and upheld Murphy J's decisions and orders in both the 1997 s. 205 proceedings and the plenary proceedings. The Tara proceedings and the Bank proceedings proceeded to an ultimate conclusion and by February, 2003, all claims had been dismissed.

Litigation History March 2003 to 27th June 2007.

31. Throughout the 1993 s.205 proceedings and the 1997 s. 205 proceedings, the costs of the various motions, petitions and court hearings involved were either reserved by Murphy J., or he made no order in respect of them. Subsequently, Murphy J. was appointed to the Supreme Court where he served with distinction until his retirement from the bench on 17th October, 2002.

32. In anticipation of the imminent retirement of Murphy J. on 17th July, 2002, the 1993 s. 205 proceedings were re-entered by Crindle for the purpose of applying for Costs against the second to sixth named respondents inclusive (namely Bula Trust, Loire, Mr Wymes, Mr Michael T Wymes, & Mr Wood) pursuant to orders made by Murphy J. on 26th of January, 1993; 20th of April, 1993, 9th of March 1993 and 28th January 1994, respectively. The matter having been re-entered, a motion seeking costs was duly filed and made returnable before Murphy J. (sitting as a judge of the High Court for the purposes of the motion) on Tuesday 30th July 2002, at 10.15am.

33. In or about the time of service of the said notice of motion, and certainly before the said return date, the W Group's solicitor, Mr. Michael Peart, was nominated by the Government for appointment to the High Court bench. In consequence of this, Mr Peart, as he then was, could no longer continue to act in the matter. On 26th July 2002, a Notice of Change of Solicitor was filed and Messrs. Pearts, Solicitors, came off record and Ryan Smyth & Co came on record for the second to the sixth named respondents inclusive and also for the seventh named respondent, Mr. Francis Plunkett Dillon.

34. On 29th July 2002, Mr. Ryan sent a fax to Arthur Cox , Solicitors, requesting copies of certain documents. These were immediately faxed to Mr. Ryan. Mr. Ryan then sent a further fax to Arthur Cox, Solicitors, later on the same day requesting consent to an adjournment of the motion on the basis that he needed time to properly read himself into the matter, and because he was not sure if he had received all relevant documentation from Mr. Peart. The applicants were not prepared to consent to an adjournment.

35. When the motion came on before Murphy J. on 30th July 2002, it was put back until 2nd August, 2002. At the sitting of the Court on 2nd August 2002, the respondents, represented by Mr Ryan, Solicitor, applied to Murphy J for an adjournment on the grounds Mr Ryan needed time to take full instructions, to collate necessary documentation and to be fully briefed in order to deal properly with the matter. Murphy J. refused the application for an adjournment. The hearing of the substantive application then proceeded. Counsel for the applicants applied for the costs that were reserved in the 1993 s. 205 proceedings on 9th March, 1993; 20th April 1993, and 28th January 1994, respectively. The application was opposed on behalf of the respondents by Mr. Ryan. This court does not accept the contention advanced by Mr. Ryan in his affidavit that the respondents "were essentially unrepresented in the circumstances", and is satisfied that if, in the interests of justice, it had been necessary to adjourn the proceedings, Murphy J. would have acceded to the adjournment application. Following due consideration of the substantive application, Murphy J. granted the costs sought to the applicants.

36. The costs were subsequently taxed in December 2006 and January 2006. The Taxing Master's Certificate of Taxation in the sum of €462,642.98 and dated 1st February 2007, has been exhibited before me. To date, the costs in question have not been discharged and interest is accruing daily.

37. On 5th February 2007, Arthur Cox, on behalf of Crindle, wrote to Ryan Smyth & Co. on behalf of Bula Trust, Loire, Mr Wymes, Mr Michael T Wymes and Mr Wood demanding payment of the taxed costs with interest to the date of payment.

38. On 22nd February 2007, Ryan Smyth & Co. replied to Arthur Cox alleging:

> "that your clients have been guilty of fraud, misrepresentation, conspiracy and obstruction/perversion of the course of justice, by reason of the concealing of the non-Roche involvement and ownership in Crindle Investments from the court. Representations of oppression made by your clients to the Court, which clearly influenced the decision of the Court were similarly fraudulently made."

The letter alleged that the actions of the Roches and Crindle had caused their clients "enormous loss and damage" and "substantial distress", for which their clients were holding Mr Roche Snr, Mr Roche Jnr and Crindle wholly responsible. The letter called upon those parties to admit liability and pay compensation. The letter stated finally that a Plenary Summons had been issued "for Statute of Limitations reasons" on 11th January 2007, and that the Plenary Summons included a claim for injunctive relief restraining Arthur Cox's clients from taking any steps to enforce the costs orders obtained in the 1993 s. 205 proceedings.

39. A course of correspondence then ensued between the respective solicitors which it is not necessary to particularise. It is sufficient to state in general terms that Arthur Cox vehemently rejected the allegations made in the letter from Ryan Smyth & Co. and continued to press for payment of the outstanding costs with interest. For their part, Ryan Smyth & Co. proceeded to serve the Plenary Summons herein and, in correspondence, to some extent further particularised the allegations being made. On 26th April 2007, Arthur Cox wrote to Ryan Smyth & Co. characterising the proceedings as frivolous, vexatious and a clear abuse of the process. They demanded immediate discontinuance of the proceedings, alternatively service of a Statement of Claim within fourteen days, while reserving their clients' right to seek to have the proceedings dismissed as being frivolous and vexatious. Ryan Smyth responded on 9th May 2007, stating that "Mr Wymes is away on vacation" and accordingly, "this firm and Counsel are not in a position to progress the Statement of Claim pending his return". Arthur Cox's response was to express incredulity and immediately thereafter to issue a motion seeking to have the proceedings admitted to the Commercial Court. The Statement of Claim herein was delivered on 27th June 2007.

The "Battlelines" As Drawn In The Present Litigation

40. In very broad terms, the plaintiffs' case is that the defendants are not entitled to enforce their costs orders against the plaintiffs because the substantive judgments, orders and rulings, or at least some of them, obtained by the defendants in the 1993 s. 205 proceedings and the 1997 s. 205 proceedings, were obtained by means of perjured testimony and fraudulent misrepresentations.

41. In equally broad terms, the defendants' case is that the plaintiffs' allegations are entirely without foundation and that the present proceedings are entirely strategic, representing, on the one hand, an attempt to delay insofar as possible the payment of costs and interest lawfully due, and, on the other hand, an attempt to re-open and have re-litigated cases which have already been judicially determined, and which the W Group lost.

42. Before proceeding to examine the parties' respective cases in any detail, it would seem appropriate, as a preliminary to doing that, to examine what representations were made to the various courts concerned with both the 1993 s. 205 proceedings and the 1997 s. 205 proceedings concerning the petitioner, and when those representations were made.

Representations concerning The Petitioner in the s.205 proceedings

43. Crindle was the petitioner in both the 1993 s. 205 proceedings and in the 1997 s. 205 proceedings. Crindle was one of five shareholders in Holdings. Crindle held 36%, Bula Trust held 36%, Loire held 24% and Don Godson and Mr. Plunkett-Dillon held 4%. Bula Trust is primarily owned by Mr. Wymes and Loire is primarily owned by Mr. Wood.

44. At paragraph 19 of the petition presented to the High Court on 26th January 1993, for the purpose of the 1993 s. 205 proceedings, Crindle was described as follows:-

> "The Petitioner is an unlimited company which has an issued share capital of IR£1,100,000 divided into 100,000 ordinary shares of IR£1 each and 1,000,000 10% preference shares of IR1 each. Conor Holdings Limited owns 51,000 ordinary shares and all of the issued 10% preference shares and Mr. Roche Junior and Mr. Roche Senior each own 15,000 and 34,000 ordinary shares respectively. Conor Holdings Limited is the holding company of the Roche family, which includes as its shareholders Mr. Roche Senior, Mr. Roche Junior and (through Unity Trust) the daughters of Mr. Roche Senior including Mrs. Wymes. The directors of the Petitioner are Mr. Roche Senior, Mr. Roche Junior and Mr. Dillon."

45. At paragraph 33 of the said petition, the following circumstances were relied upon by the petitioner:

> "Mr. Roche Senior and Mr. Roche Junior are individual plaintiffs in the Bank Proceedings and the Tara Proceedings having been joined as individual plaintiffs in such proceedings on the advice of Gore and Grimes. They also are liable for the deficiencies ultimately in the assets of [Bula Holdings] and the Petitioner, as both are unlimited companies. They have also guaranteed the great majority of the indebtedness of Limited to the Banks. The Roches have been seriously concerned for a substantial period of time as to the downside risk of continuing with the Bank Proceedings and the Tara Proceedings in the absence of clear legal advice as to the likely outcome of each set of proceedings. In addition, the Roches and the Petitioner are concerned that there is no information available to the boards of either the Company or Limited as to the current status of the Bank Proceedings, the Bank Subsidiary Proceedings and the Tara Proceedings."

46. Mr. Roche swore an affidavit on 26th January 1993, verifying the facts set out in the Petition in the 1993 s. 205 proceedings.

47. In his judgment of 2nd March 1993, Murphy J. refers to the ownership of Bula and of Crindle in the following terms:

> "Bula Holdings is, in turn, owned or controlled by the promoters by means of various investment companies. The interest of Mr. Roche Senior and Mr. Roche Junior (sometimes referred to as the Roches or the R Group) is held through Crindle Investments, the Petitioner herein. The interest of Mr. Michael Wymes is held through Bula Trust and that of Mr. Wood through Loire Investments. Again, in percentage terms the shareholdings in Bula Holdings are distributed as follows: 36% Crindle Investments; a further 36% Bula Trust; and 24% Loire Investments. It follows that the combined interests of Mr. Wymes and Mr. Wood (sometimes hereinafter referred to as "the W Group") controls more than 50% of the voting rights in Bula Holdings. The other point to be emphasised is that Bula Holdings, Crindle (and its superior company), Bula Trust and Loire Investments are all companies whose members are exposed to unlimited liability."

48. In his judgment of 1st February 1994, (following the re-entry of the 1993 s. 205 proceedings) Murphy J. referred to the unlimited liability of the companies involved in the following terms:

> "In the present case, the company in question is not one which enjoys limited liability. Each of its members is liable without limit and, as it happens, the corporate members themselves are unlimited companies so that this liability reaches through to underlying individual shareholders. However, from the corporate point of view it is sufficient to say that the

liability of members is unlimited. That is an interest of members to which proper regard must be had by those controlling the affairs of the company."

49. As previously indicated, the judgment of Murphy J. dated 1st February 1994, was appealed to the Supreme Court. In delivering his judgment in the Supreme Court on 21st June 1994, Finlay C.J. referred to the ownership issue in the following terms:

> "The Petitioner is an unlimited company owned by Mr. Roche Senior and Mr. Roche Junior and is the owner of 365,625 shares of the £1million issued shares of Bula Holdings. Bula Trust is a company owned by Mr. Wymes Senior and Junior and is the owner of 365,625 shares in Bula Holdings, Loire Investments is a company owned by Mr. Richard Wood and is the owner of 243,750 shares in Bula Holdings. Mr. Dillon and Mr. Godson are each the owner of 12,500 shares in Bula Holdings."

50. Later in his judgment, Finlay C.J. stated:

> "Amongst the findings made by Murphy J. in his judgment of 2nd March 1993, was one which does not appear to have been contested either in the High Court hearing of January 1994, nor upon this appeal to the effect that if the proceedings in both these actions were unsuccessful, either in establishing any liability or in establishing a liability which resulted in the effective clearing of the debts of Bula Limited to the Banks which have been guaranteed by the individual plaintiffs, that it was probable that the plaintiffs would be made bankrupt, but more significantly still, that in the event of such partial or complete failure of the action, in the words of the learned trial judge in that judgment at page 12, 'the Roches who would now suffer to the greater extent'. He based that conclusion on a letter which had been written by Mr. Wymes to Thomas J. Roche on 28th August 1991, in effect demanding further legal costs of the action and pointing out that if the action were to be discontinued it would entail liability 'for all our opponents costs to-date estimated at IR£1million to IR£2 million' and added the significant phrase 'you alone would be a mark for such costs'."

51. The evidence of the defendants is that once the Tara proceedings recommenced, the Roches decided to implement a restructuring of Crindle. Ms. Foley deposes at paragraph 36 of her second affidavit that, as and from 13th January 1995, the entire issued share capital of Crindle was beneficially owned by Mr. Roche through a structure involving a US limited partnership and US limited liability corporations. Two of these entities were subsequently identified by name in evidence as Seafield Partnership LP (in the case of the limited partnership) and Wellington Investments Inc. (in the case of the limited liability company, or, if there be more than one of them, one of the limited liability companies – the evidence is not clear on this). The court has also been given to understand, both from the evidence, and from the submissions of counsel, that the corporations in question are "Delaware corporations", namely, they were incorporated and registered within the State of Delaware in the USA, a State whose highly developed company laws and partnership laws can , *inter alia*, facilitate shareholder/partner anonymity. However, and notwithstanding this, Ms. Foley deposes that the corporations in question were, and are, owned by Mr. Roche and that that position was disclosed to the High Court when the 1997 s. 205 proceedings were commenced.

52. I should, incidentally, mention that I have no evidence from either side concerning whether or not a Delaware corporation can be formed with just one incorporator. That may or may not be the case, but in any event, nothing turns on it that is of crucial importance to the issues that I have to decide.

53. In support of her contention that details of the restructuring were disclosed to the High Court during the 1997 s. 205 proceedings, Ms. Foley referred the court to the following matters.

54. In the petition presented to the High Court for the purposes of the 1997 s. 205 proceedings on 5th March 1997, the ownership of Crindle was dealt with as follows at paragraph 26(a):

> "The Petitioner is an unlimited company which has an issued share capital of IR£11,000 divided into 1,100,000 A ordinary shares of 1p each. The entire issued share capital of the Petitioner is, as and from 13th January 1995, beneficially owned by Mr. Roche Junior through a structure involving a U.S. limited partnership and U.S. limited liability corporations."

55. Mr. Roche swore an affidavit for the purpose of verifying the facts set forth in the Petition on 5th March 1997. He dealt with the issue of the ownership of Crindle in the same terms as in the Petition at paragraph 17 (a) of his affidavit. There was, however, a typographical error at paragraph 17 (a) of his affidavit and that was corrected in an affidavit which he swore on 10th March 1997. In that affidavit, Mr. Roche made the following statement (at paragraph 4):

> "I also beg to refer to paragraph 17(a) of my affidavit of 5th March 1997. There is a typographical error in that '13th January 1997' should read '13th January 1995'".

56. Mr. Wymes swore an affidavit in response to Mr. Roche's affidavit of 5th March 1997, on 10th March 1997. He dealt with the ownership of Crindle at paragraphs 29 to 32 of his affidavit under the heading, "ABSENCE OF EXPOSURE OF THE ROCHES TO UNLIMITED LIABILITY". In this regard, Mr. Wymes stated as follows:

> "29. I say and believe that it is significant that in the 'Old Petition" the following particulars were given concerning Crindle (paragraph 19(a))…"
>
> "30. I say that it is significant that in the 'New Petition' it is stated of the Petitioner, as follows (paragraph 26(a)) …."
>
> "31. I say and believe that it is noteworthy that the parties other than Mr. Roche Junior who stood to benefit from ownership of the Petitioner at the date of the 'Old Petition' no longer appear to have any direct or indirect personal interest or shareholding in the Petitioner. Furthermore, I say and believe that it would appear that the Petitioner has had a significant reduction of capital (down to £11,000) and that such beneficial ownership as Mr. Roche Junior above has in the company is now held through a U.S. limited partnership and U.S. limited liability corporations. I say and believe that while Mr. Roche gives no detail as to the precise ownership structure of the Petitioner, that I believe it is clear that Mr. Roche Junior is no longer exposed to unlimited personal liability in respect of its holding in the Petitioner, as was stated to be the case at the date of the presentation of the original petition. I say and believe that on 1st March 1996 an article in 'the Phoenix Magazine' disclosed that the Roche Group had managed to rearrange its ownership of its family interest in the Petitioner and in this regard I beg to refer to a copy of a letter dated 6th March 1996 from my solicitors to Mr. Roche's solicitors, Arthur Cox & Co., upon which marked with the letters 'MW9' I have endorsed my name prior to swearing hereof. I say and believe that replies were eventually received from Arthur Cox & Co by letters dated 15th July 1996 and 1st August 1996 along with enclosures confirming that T.J. Roche was the sole and ultimate beneficial owner of the Roche

interest in the Petitioner. I beg to refer to copies of the said inter partes correspondence upon which marked with the letters 'MW10' I have signed my name prior to the swearing hereof."

32. In all the circumstances I say and believe that it now appears that the circumstances of Crindle in the 'New Petition' are significantly different from those that existed at the time of the 'Old Petition' in that its own shareholders are no longer exposed in any real sense to unlimited liability and I say and believe that the views previously expressed by Mr. Roche that the failure of the Bank and Tara Proceedings would expose him to ultimate bankruptcy no longer holds true. I say and believe that having regard to what I understand to be the value of the assets to which Mr. Roche Senior and Junior have recourse (being in the order of £40 million to £50 million) that even if full unlimited exposure to the amount of the guarantee judgment (IR£2.3 million) and/or to limited costs in the Tara Proceedings (up to the date of their withdrawal) would not cause them the level of financial ruin that Mr. Roche referred to in his affidavit sworn in support of the 'Old Petition'. In particular, I say and believe that even if all of the Statute of Limitations points fail and Bula Limited were held indebted to the Banks in the full sum of their claim (in excess of £50 million) that Mr. Roche Junior could have no liability for same (not being a shareholder of Bula Limited) and any liability of Bula Holdings arising cannot prejudice him either, by virtue of what would appear to have been the alienation of his interest in the Petitioner.".

57. Later, at paragraph 36(c), Mr. Wymes stated:

"36(c) With regard to paragraph 26 of the petition I have already made observations in relation to the change in the shareholding of the Petitioner and I believe it to be significant that neither of the Roches appear to have any direct personal liability any longer arising out of any potential collapse of Bula Holdings."

58. With respect to the correspondence which was exhibited at "MW10" and referred to in paragraph 31 of Mr. Wymes' said affidavit, Ms. Foley points out that Mr. Roche confirmed in that correspondence, and in particular in letters of 12th July 1996, and 31st July 1996, respectively, that the "entire beneficial interest of the R Group in the Bula companies is now held solely by myself" and that he was the "sole and ultimate beneficial owner of the interest in Bula Holdings formerly held by my father, Conor Holdings and myself and that no outside third party has had any involvement in such ownership".

59. Ms. Foley also points out that in a replying affidavit sworn by Mr. Roche on 14th March 1997, Mr. Roche stated the following at paragraph 13 thereof:

"13 In relation to paragraphs 29 to 31 I say and believe that this aspect is wholly irrelevant to the matters in issue. It is noteworthy in this context that, although devoting a significant number of paragraphs in his affidavit to the shareholding of Crindle, Mr. Wymes at no stage discloses that Mr. Justice Lynch found that his shareholding in Bula Trust ended at least partly in a limited company".

60. The W. Group then issued a motion in the 1997 s. 205 proceedings on 14th March 1997, seeking the following relief:

"An order discharging and/or varying such orders as have been hereinbefore made in the above-entitled proceedings at the suit of the Petitioner pursuant to which orders the R Group have been granted control of negotiations conducted on behalf of the corporate plaintiffs for the settlement of the Tara Proceedings and/or of the Bank Proceedings by reason of the changed circumstances disclosed in the affidavit of Michael J. Wymes sworn in proceedings entitled The High Court 1997 Record Number 48COSCT6 on 10th March 1997."

61. In addition, in a further Motion issued in the 1997 s. 205 proceedings in March 1997, the W Group sought discovery against the R Group of material which had previously been sought from the R Group in correspondence and, in particular, in a letter dated 12th March 1997, in the following terms (*inter alia*):-

"All documents relating to the changes in the ownership of the shareholding of Crindle Investments referred to at paragraph 26(a) of the 'New Petition' when contrasted with the matters set forth at 19(a) of the 'Old Petition'. In this respect we also require discovery of all documents relating to the identity of the U.S. limited Partnership and the Members thereof and the terms of membership (including all Articles of Association, Partnership Agreements and Contractual Documents connected therewith) and the U.S. limited corporations referred to at paragraph 26(a) of the 'New Petition' and/or relating to or establishing the beneficial ownership by Mr. Roche Junior of Crindle Investments through the medium suggested. In addition, we require discovery of all documents relating to the manner in which the former shareholders transferred their shares leading to the current ownership structure and/or relating to the consideration payable on the said transfers. In addition, we require discovery of all relevant documents relating to the reduction in share capital of Crindle Investments and the reasons underlying that reduction and to all advices (including professional advices) relating to all of the above."

62. By letter dated 14th March 1997, Arthur Cox, Solicitors, on behalf of Crindle, replied to the discovery request in the following terms:

"The situation in relation to the present ownership of Crindle Investments is set out clearly in the Petition and Grounding Affidavit. The documents which you now seek are not relevant to any issue which must be determined by the Court at this stage. We note in this regard that despite the lengthy affidavit of 10th March 1997 Mr. Wymes does not address the ownership of Bula Trust. We now require the relevant information in that regard."

63. By a further letter dated 18th March 1997, Pearts, Solicitors, on behalf of the W. Group, replied as follows:

"The position in relation to the present ownership of Crindle is not set out clearly in the Petition and Grounding Affidavit and must be addressed by your clients by discovery. It is clear that your client's potential for exposure to unlimited personal liability through Crindle is not what it was in 1994. However, whether they have any continuing potential to suffer through Crindle at all must be clarified in detail, as must the true ownership position. Our client, Mr. Wymes, has no difficulty concerning the ownership of Bula Trust, which will be addressed in his replying affidavit to be delivered shortly."

64. It would appear that the motion for discovery was not proceeded with. In his affidavit of 18th July 2007, Mr. Wymes explains that, "it was not proceeded with when Murphy J. decided to treat the petition motion before him as a full hearing of the petition, thereby dispensing with our discovery motion."

65. In a first supplemental affidavit sworn by Mr. Wymes on 19th March 1997, Mr. Wymes stated as follows:

"27(ii) The Roches are no longer faced with unlimited liability exposure in the way that they had suggested in 1994."

66. Later, at paragraph 30 of that affidavit, Mr. Wymes stated:

"30. With regard to paragraph 13 of Mr. Roche's supplemental affidavit may I say the issue as to whether or not the Roches continue to face personal exposure through Crindle to potential unlimited liability is indeed of central relevance to these proceedings and is not at all irrelevant as he states. The matter of unlimited exposure through Crindle formed a crucial part of the Roches's justification for presenting the 'Old Petition'"

67. At paragraph 37 of that Affidavit Mr. Wymes further stated:

"37. Lastly, I say and believe that, given the fact that it does not appear to be disputed that the Roches's have rendered themselves 'Judgment Proof' by virtue of the alteration in the ownership of the Shareholding of the Petitioner referred to in paragraphs 29 to 31 of my first affidavit and having regard to the claim that Bula Holdings is insolvent and thereby valueless, that the appropriate means to remedy the complaints made by the Roches in these proceedings (the validity of which is denied) is for this Honourable Court to direct that Crindle should transfer to Bula Trust and Loire Investments in proportions to be agreed by those companies and which can be notified in due course, all its shares, rights and shareholding in Bula Holdings for a nominal consideration to be fixed at £1 or some other nominal sum and for Mr. Roche to resign from the board of directors of Bula Holdings and from Bula Limited."

68. Murphy J. gave judgment in the 1997 s. 205 proceedings on 27th March 1997. He addressed the change in the ownership structure of Crindle in the course of his judgment. In this regard, he stated as follows:

"A change which had occurred since the earlier proceedings and one to which the W Group attach very considerable importance was the alteration in the shareholding in Crindle Investments. As conceded in paragraph 26(a) of the 'New Petition':-

> 'The entire issued share capital of the Petitioner is as and from 13th January 1995, beneficially owned by Mr. Roche Junior through a structure involving a U.S. limited partnership and the U.S. limited liability corporations'.

This is a significant change. No doubt it was made with the intention of protecting the R Group and such wealth as they or any of them may possess from even further losses and liabilities incurred by Holdings. Assuming that this arrangement achieves its purpose, the Roches will be insulated from further loss. I accept that this is a factor which should be taken into account. It will affect the extent to which the R Group might be damnified by the continuation of hopeless and expensive litigation. On the other hand, it does not affect the principle that the determination of the W Group to pursue such litigation may constitute conduct oppressive to Crindle Investments. It relates only to the extent of the oppression.

Counsel on behalf of the W Group drew attention to the change in shareholdings for the protection which it affords to the R Group but also in the context of the attitude adopted by the R Group since the commencement of the mining venture…..

…..It is my judgment that the changed circumstances have rendered the relief granted by the Supreme Court inoperative, but that the same changes have resulted in a similar oppression by the W Group of the R Group calling for a similar type of relief….

I accept too that the steps taken by the R Group to insulate themselves against personal liability from the losses and liabilities of Bula Holdings has reduced their exposure to liability for current outgoings of that company…." (page 10 et. seq. of the judgment).

69. As indicated earlier, both sides appealed to the Supreme Court. The Supreme Court upheld the judgments of the High Court (Murphy J.) in the 1997 s. 205 proceedings and in the related plenary proceedings on 5th March 1998. Keane J. (as he then was) delivered the judgment on behalf of the Supreme Court on the appeal in the 1997 s. 205 proceedings. There are a number of relevant references to the change in the ownership structure of Crindle in the course of his judgment. At page 15 of his judgment, Keane J. stated as follows:

"The 'New Petition' was presented on 5th March 1997 and the proceedings heard by Murphy J. on 20th March 1997: again, he directed that the proceedings be heard in camera. It transpired at the hearing before Murphy, J that there had been a change in shareholding in the Petitioner: it was now beneficially owned by Thomas. Roche Junior through a structure involving a U.S. limited partnership and U.S. limited liability corporations. It was accepted on behalf of the R Group that this change was effected so as to protect such assets as the individual members of the R Group may possess from any further losses or liabilities incurred by Bula."

At page 25 of his judgment, Keane J. stated:

"Secondly, it was urged that, since the R Group had insulated themselves from personal liability arising out of their former involvement in Bula through the transfer of ownership of the Petitioner to the U.S. entities, justice required that the W Group rather than the R Group should be given control of the litigation."

At page 26 of his judgment, Keane J. stated:

"…the W Group have, in any event, contended on the hearing of the appeal to this Court that two circumstances have arisen since the last hearing in Court – the raising of the Statute of Limitations issue and the change in the shareholding of the Petitioner – which should have led to the conclusion in the High Court that the affairs of Bula were now being conducted in an oppressive manner by the R Group and that this conduct could be brought to an end by requiring the Petitioner to sell his shares in Bula to the W Group for a nominal consideration."

At page 28, Keane J. stated:

"It is not in dispute that the R Group, by altering the share ownership of the Petitioner have protected themselves from future personal exposure arising out of this litigation. It is also evident that much of the acrimony and suspicion which has developed between the R Group and the W Group derives from the belief of the W Group that they were saddled with the unfair burden of actually pursuing this litigation while the R Group were engaged in quite separate, and the W Group claim,

hugely profitable activities…… What had to be determined on the hearing of the 'Old Petition' and must be considered again in the altered circumstances which have led to the 'New Petition' is whether allowing the W Group by reason of their majority shareholding to have control over any negotiations for a possible compromise of the two sets of proceedings will be oppressive to the Petitioner and disregard of its interests as a member."

70. The court has also been referred to selected transcript references from the hearings in the 1997 s. 205 proceedings, both before Murphy J. in the High Court, and before the Supreme Court in the appeal in the same proceedings. The references in question relate to submissions made by counsel on both sides, and they are set out in Ms. Foley's second affidavit. As they are lengthy, I do not propose to recite them.

71. It is sufficient to record that they provide further support for the defendants' contention that the relevant courts were informed, to the extent demonstrated in affidavit and judgment extracts already quoted, that there had been a restructuring of Crindle and that members of the R Group had taken steps to insulate themselves against personal liability from the losses and liabilities of Holdings.

The Evidence offered by the Plaintiffs in support of the Allegations pleaded

72. In his affidavit of 18th July 2007, (Mr. Wymes's 1st affidavit) Mr. Wymes states that the fact that there was disclosure in the 1997 application of the alteration to the ownership structure of Crindle is not contested by the plaintiffs, and it is accepted that in the course of the Petition changes in the ownership of the shareholding in Crindle through the Seafield Partnership (US Limited Partnership) and Wellington Investments (US Limited Corporation) were disclosed. He goes on to say, however, that the actual complaint in, and kernel of, these proceedings relates to an entirely different matter namely, "the fact of false evidence and representations to the effect that the entire issued share capital of Crindle was beneficially owned by Mr Roche."

73. Mr Wymes asserts that contrary to what was sworn in support of the 1997 Petition and represented to the courts in that Petition, he has established a secret (non-Roche) ownership of Crindle. The basis for his claim to have "established" this is set out at paragraph 55 of Mr Wymes's first affidavit. Though paragraph 55 is lengthy, the contents of it are so central to the issues that I have to decide that I believe it must be quoted in full. It is organised in two parts (a) and (b) respectively, and the contents of each part are contained in subparagraphs numbered with roman numerals:

"(a)

(i) Arthur Cox (in the person of a partner, Stephen Hegarty) disclosed in the offices of Arthur Cox on 15th January 2001, that Crindle was not actually in the sole beneficial ownership of Mr. Roche Junior. The immediate background to this milestone was the negotiation and drafting of a Deed of Settlement involving the main parties hereto. The W Group was professionally represented by Mr. Michael Peart. Solicitor, (as he then was) in the matter. The R Group was represented by Mr. James O'Dwyer and Stephen Hegarty. Mr. O'Dwyer was the Managing Partner, and Mr. Hegarty a Partner in Arthur Cox. I say that Ms. Foley was not included in the negotiating and legal team which dealt with Mr. Peart, Mr. Wood and myself on the Deed in 2000/2001. [The court is omitting a further sentence in this paragraph as irrelevant]

(ii) The Deed incorporated a settlement offer worth £15 million on behalf of the parties to Bula's banks and the Receiver, pursuant to which the assets of Bula would come under the control of the W Group (now differently defined as Mr. Wood, myself, our respective companies and Wymes Family Trusts). The R Group was contributing £5 million and the W Group were writing off much larger amounts of bank realised monies. As part of the transaction, a mortgage covering the R Group contribution was to be granted to the R Group (now differently defined as Mr. Roche Junior, the Estate of T. C. Roche, Crindle and Conor Holdings) over the Bula assets. This latter facet caused Mr. Wood and myself to be extremely sensitive as to the ownership of Crindle (the ownership of Conor was known to us), and in particular any possible involvement of Mr. Brendan Hynes, the former Chief Executive of Tara Mines Ltd. The reason for this sensitivity towards Mr. Hynes is explained later at paragraph 59.

(iii) On 11th January 2001, my request that the ownership of Crindle be inserted in the Preamble of the Deed was refused by Mr Hegarty. This request was again refused on 13th January 2001 by him, when he declared that "he had discussed the possibility and was told no".

(iv) In the course of the finalisation and execution of the Deed, Arthur Cox and Mr Roche were not prepared to accept a provision in the Deed affirming that Crindle was 100% owned by Mr Roche Junior, although he had previously sworn he was the sole owner of that company, albeit through Delaware.

(v) On 15th January 2001, Mr Hegarty was not willing to identify the full extent of the ownership of Crindle or the non-Roche beneficial ownership in the context of the proposed loan and mortgage. At that stage, there was a serious stalemate, which I described as a "cow on the line". I complained that we were being asked to sign a contract with parties whose identity was not being disclosed, and in fact refused. I added that we thought we were dealing with Mr Roche Junior, but for all we knew it could be Mr. Hynes, whereby the risk profile was increased enormously from our viewpoint. In reply to a question as to who actually owned Crindle, Mr Hegarty said that he did not know, and that if he did know, he could not say. However, by way of a compromise accepted by us, Mr Hegarty said he could be willing to give "the gist" as to where the non-Roche beneficial ownership in Crindle did *not* lie. He stated that if I identified a party such as Mr Hynes, that this would be "doable", and thereby give us some comfort.

(vi) At a later meeting on the same day, Mr. Hegarty was prepared to make a representation within the Deed in respect of certain other interests identified by me, namely O'Reilly interests. This was after he had taken time-out to obtain the required information and instructions from a person who did have the knowledge of the beneficial ownership of Crindle. As I understood it, that person was Mr. O'Dwyer. As a result paragraph 12.3 of the seventh draft of the Deed dated 15th January 2001 was inserted in the following terms:

> "*None of Mr Brendan Hynes, Sir A. J. F. O'Reilly or any person or entity acting in concert with both or either of them, or on their behalf, nor any business competitor of Bula or Holdings, whether actual or potential, has any interest in Crindle or the shares it holds in Holdings, nor is Mr Roche Junior, nor is Crindle acting as a proxy for, or on behalf of any such person or entity*". (Emphasis added)

I beg to refer to a copy of the said seventh draft, upon which marked with the letters "*MW5*" I have signed my name prior to the swearing hereof. I say that Clause 12(3) was in exactly the same terms in both the final draft and the Deed as executed on the following day, 16th January 2001. The executed Deed is exhibited by Ms Foley at "IF13".

(vii) The time limit for final agreement on the terms of the Deed was set by Arthur Cox for 15th January 2001. This was for the stated purpose of enabling an adjournment application to Barr J. on Statement of Claim and Discovery Motions against the Banks which were due to be heard in the Bank proceedings on 16th January 2001. The Motions were seeking amendments to the Statement of Claim pleading changes to the beneficial ownership of (a) the securities comprised of the Bula Mine mortgages at Navan, and (b) the guarantees of the individual guarantors, and in particular the Roche guarantees. Discovery in respect of (a) and (b) was being sought including any payment in respect of or on foot of the Roche guarantees by a related party, namely Ann Roche (nee Doyle), the wife of Mr Roche Junior. Accordingly, the time limit of 15th January 2001, was statedly dictated by the timing of the Motions on 16th January before Barr J.

(viii) In a nutshell (having let us know of the non-Roche ownership of Crindle), Mr. Roche and his legal advisers, in order to rectify the stalemate and secure the execution of the Deed by the time limit of 16th January set by the Motions before Mr Justice Barr, were satisfied to say where the non-Roche ownership did not lie, but not divulge where it did factually lie. To put it another way, they were prepared to certify who it was not, but not who it was.

(b) The offer to the Banks was to be open to 19th January 2001, or any agreed later date. After its transmission to the Receiver and the Banks, certain communications with relevance to the Crindle ownership status and generally took place between our Solicitors, Pearts, and Mr O'Dwyer. These included as follows:

(i) In a letter dated 17th January 2001, Mr Peart referred to "*the problems which arose in relation to the ownership of the R Group in recent days*" as having been a factor in the delays encountered in getting the document finalised and which were no responsibility of his clients. (the Arthur Cox reply was dated 18th January 2001).

(ii) By letter of 22nd January 2001, Mr Peart, wrote, *inter alia*, as follows:

> *"It is a cause of increasing apprehension and disquiet to the W Group that they are still being kept in the dark on the full identity (which could conceivably embrace Banks/State) of the R Group, and thus the true ownership of those you represent and are instructed by. There is also dismay at the previous testimony and written representations to the effect that Crindle was in the sole beneficial ownership of Thomas J. Roche in Delaware. It might help sentiment if, even at this stage, you were able to be frank and forthright on the full ownership of the R Group".*

In his reply dated 24th January 2001, Mr O'Dwyer said that the suggestions implicit in the above quoted paragraph had no basis.

(iii) In a letter of 30th January 2001, Mr Peart pointed out that, "*Arthur Cox had not been prepared to accept a provision in the Deed affirming that Crindle was 100% owned by Mr Roche Junior, although he had previously sworn that he was the sole owner of that company, and that on 11th January his clients' request that the ownership of Crindle be inserted in the Preamble to the Deed was refused*". Mr Peart added that his clients were naturally and justifiably alarmed by these developments. He also pointed out that Arthur Cox "*were still not prepared to divulge, as had been sought in his previous letter, the full ownership of the R Group and thus Crindle*". Mr Peart went on to say that "*the ownership of Crindle was being deliberately kept from the W Group*"; that they had learned by chance that Mr O'Dwyer has suddenly ceased to act for three of the four constituents of the R Group; and that Mr O'Dwyer could not confirm the past or present interest of the R Group in the mortgages/charges granted by Bula over its assets. (The Arthur Cox reply was dated 31st January 2001).

(iv) By letter of 14th February 2001, Mr Peart stated to Mr O'Dwyer that "*it was a matter of ever-increasing concern to his clients that the full ownership of the R Group continued to be kept from them.*

(v) At a meeting on 6th February 2001 at the offices of Arthur Cox attended by Messrs O'Dwyer, Hegarty, Wood and myself, in relation to the delay in the Banks coming to a decision on the proposal and the relevance of a pending decision by Barr J. on a Discovery Motion in the Bank Proceedings, whereby the Banks seemed to be twin tracking, I complained that "*there had been misrepresentation, including by Arthur Cox, on the ownership of Crindle*". Mr O'Dwyer stated that "*one of the greatest obstacles" was that the Deed "may not be worth the paper it is written on*". Almost immediately, Mr. O'Dwyer became agitated and got up from the table. He left the room with Mr Hegarty in his wake. No words were spoken. Mr Wood and I made our way to the lift. We had not been afforded the opportunity to seek to ascertain the reason that the Deed (which had been at least six months in gestation and entailed significant time, effort and cost) was deemed by Mr O'Dwyer as possibly not worth the paper it was written on.

(vi) By letter of 15th February 2001, we were notified by the Receiver through Mr O'Dwyer that the Banks were not interested in pursuing the proposal.

(vii) In a letter of 11th September 2001 to me, Arthur Cox referred to, and enclosed by way of service, a Plenary Summons issued a year earlier on 21st September 2000 in the case of 2000 No.10997p. This sought declaratory relief in relation to resolutions and agreements pursuant to a meeting of the Board of Bula Holdings on 29th September 1994. It was proposed in that letter that the proceedings be discontinued against, my son, Michael T. Wymes. In a reply of 13th September 2001, Mr Peart stated that in the circumstances where Arthur Cox "*had disclosed in January of that year that Crindle was not in the sole legal beneficial ownership of Thomas J. Roche, and neither Mr Roche nor Arthur Cox were prepared to disclose the true and full extent of such ownership*", he was not in the position to advise his clients on the matter of my son not continuing to be a party to the proceedings.

(viii) There is no record of a reply to this letter, whereby Arthur Cox did not contest the statement of Mr Peart. This particular correspondence was initiated by Ms. Foley."

The correspondence referred to was all exhibited before me, as was other correspondence referred to at paragraph 58 of the same affidavit to which it is not necessary to specifically refer.

74. The stated basis for the alleged sensitivity of Mr. Wymes and Mr. Wood to the possibility that Mr. Brendan Hynes might be involved in Crindle, is explained at para. 59 of Mr. Wymes's said affidavit. It is not necessary to refer to the particulars of it as, in the absence of evidence to the contrary, the court is prepared to accept that such sensitivity may well have existed.

75. A further matter relied upon by Mr. Wymes as providing evidence in support of his allegations, is referred to at para. 65 of his said affidavit. He states there:

> "With further reference to the ownership of Crindle, I say that, in a different context, it was necessary for Ryan Smyth to make enquiries in the period December 2004 to March 2005, and to take up copies of files from other firms, including Vincent & Beatty, Solicitors. That firm had acted as advisers to Mr. Roche's three sisters, including my wife, Eleanor. An examination of the documents produced a Vincent & Beatty Memorandum in the name of Miriam Delaney, a Partner of that firm, in respect of a meeting in KPMG on 3rd April 1997. At that meeting, she was advised that Mr. Roche had '*extricated himself from Crindle as of 1st January 1995*'. The meeting was attended by Mr. Mike Hayes of Arthur Andersen (Mr. Roche's accountants and tax advisers) and Julie O'Connell of Gerrard Scallan & O'Brien (also acting for Mr. Roche). I beg to refer to a copy of the said Memorandum upon which marked with the letters "*MW9*" I have signed my name prior to the swearing hereof."

Other evidence in the Case

76. In his affidavit sworn on 24th July 2007, Mr. Stephen Hegarty flatly denies Mr. Wymes' assertion that on 15th January 2001, he confirmed to Mr. Wymes (in the presence of Mr. Peart) that Crindle was not actually in the sole beneficial ownership of Mr. Roche Junior. He says the following at paras. 4 and 5 thereof:

> 4. "At paragraph 4 of his Affidavit, Mr. Ryan states that:
>
> > 'Arthur Cox (in the person of Stephen Hegarty, a partner) ultimately disclosed in January 2001 to Mr Wymes that Crindle was not actually in the sole beneficial ownership of Mr. Roche.'
>
> I never said that to Mr. Wymes. Indeed, at paragraph 55(a) (v) of his Affidavit, Mr. Wymes says as follows:-
>
> > 'In reply to a question as to who actually owned Crindle, Mr. Hegarty said he did not know, and if he did know, he could not say.'
>
> 5. That statement by Mr. Wymes at paragraph 55(a) (v) represents the true position with regard to my knowledge of the ownership of Crindle Investments (Crindle). I did not know then, and I do not know now, who owns Crindle. ……"

Moreover, at paragraph 10 of the same affidavit Mr. Hegarty says:

> 10. " I wish to make it absolutely clear, therefore, that at no stage did I disclose to Mr. Wymes or to anyone on his behalf whether in January 2001, or otherwise, that Crindle was not in the beneficial ownership of Mr. Roche or that there was any non-Roche beneficial ownership in Crindle. I simply did not know then (and do not know now) who is the beneficial owner of Crindle ……."

77. The first piece of sworn evidence received by the court with respect to the alleged representation attributed to Mr. Hegarty was contained in the affidavit of Gregory Ryan sworn on 14th of June 2007, based upon instructions that he had received from Mr. Wymes. Mr. Wymes, as we have seen, subsequently offered his own evidence on that matter in his affidavit of 18th July, 2007. However, as Mr. Hegarty was unavailable to swear an affidavit in immediate response to Mr. Ryan's affidavit, and as she felt that an immediate response was appropriate, Ms. Foley sought to deal with the issue that had been raised in her second affidavit, sworn on 11th July, 2007. She makes the following relevant averments at paras. 56 to 59 inclusive:

> 56. "…….. . Reference was made in correspondence from Ryan Smyth & Co. and in Mr. Ryan's Affidavit of 14th June 2007, to Stephen Hegarty (a partner in the firm of Arthur Cox) and to alleged statements by Mr. Hegarty as to the alleged knowledge of Mr. Hegarty that there was non-Roche ownership of Crindle (see, in particular, the letters from Ryan Smyth & Co to Arthur Cox of 2nd April 2007 and 9th May 2007 and paragraph 4 of Mr. Ryan's Affidavit of 4th June 2007). Curiously, no reference is made in the statement of claim to Mr. Hegarty and it is entirely unclear on what basis it is alleged comments allegedly made by Mr. Hegarty (which I am informed by Mr. Hegarty and believe were not made) have any bearing on the issue as to whether representations made to the court concerning alterations in the ownership structure of Crindle were false and misleading, as alleged, even if that could provide any basis for interfering with either the order for costs made on 2nd August 2002 (in respect of the reserved costs in the course of the 1993 Section 205 proceedings), or any of the judgments and orders in either the 1997 Section 205 proceedings or the 1997 Section 205 proceedings. I should, at this stage, briefly explain the limited involvement of Mr. Hegarty in matters concerning Mr. Wymes.
>
> 57. I am informed by Mr. Hegarty and believe that he met with Mr. Wymes on three occasions in December 2000 and January 2001, namely, 12th December 2000, 8th January 2001 and 11th January 2001. His involvement in those meetings arose from the fact that James O'Dwyer was unable to attend the first and third of those meetings. Mr. O'Dwyer requested Mr. Hegarty to attend those meetings as the parties did not wish negotiations which were then being conducted to be delayed on account of his unavailability. Furthermore, Mr. O'Dwyer asked Mr. Hegarty to attend as he had in the past advised Conor Holdings in relation to matters which were unrelated to the Bula litigation. In attending those meetings, Mr. Hegarty's instructions were to take down the comments of Mr. Wymes, Mr. Wood and Mr. Peart who was then acting as solicitor to the W. Group.
>
> 58. I am further informed by Mr. Hegarty and believe that at the meeting on 11th January 2001, Mr. Wymes stated that he wanted to know who they were dealing with with regard to certain loans which were to be provided for in a deed which was subsequently executed on 16th January 2001, and which was a final attempt to resolve the disputes between the parties and who would be holding shares in Crindle and Holdings while the loans were outstanding. I am informed by Mr. Hegarty and believe that in order to address those concerns, there was a discussion concerning the drafting of various undertakings which Mr. Wymes wanted included in the agreement and which were eventually reflected in Clause 8 of the Deed of 16th January 2001.

59. I am informed by Mr. Hegarty and believe that he never advised Crindle and did not know then, and does not now know, who owns Crindle. It came as considerable surprise to Mr. Hegarty that Mr. Wymes was alleging (in the correspondence emanating from Ryan Smyth & Co. referred to earlier) that Mr. Hegarty made a statement to Mr. Wymes in January 2001 with regard to the ownership of Crindle. Mr. Hegarty believes that Mr. Wymes may be confused about this. Mr. Hegarty does recall informing Mr. Wymes that Mr. Roche was not the sole owner of Conor Holdings as that was a matter within Mr. Hegarty's knowledge. Furthermore, Mr. Hegarty has confirmed that what is stated in paragraph 4 of Mr. Ryan's Affidavit of 14th June 2007, makes no sense, as at all times in the three meetings at which Mr. Wymes was present and which were attended by Mr. Hegarty, it was Mr. Wymes who understood the background to the transactions and it was he who was the person who confirmed he was eventually satisfied with the draft terms which he requested be included at clause 8 of the Deed. I beg to refer to a copy of the Deed of 16th January 2001, upon which marked with the letters "IF13" I have signed my name prior to the swearing hereof. Mr. Hegarty is currently away on holidays and will not be back until 16th July 2007. If necessary, on his return, Mr. Hegarty will swear a short affidavit confirming these facts. However, I have checked these facts with Mr. Hegarty before swearing this Affidavit and he has confirmed that they are correct."

78. In his affidavit of 18th July 2007, Mr. Wymes responds to Ms. Foley as follows at paras. 67 to 68 thereof:

"67. Paragraphs 56 to 59 of the Second Affidavit of Ms. Foley make reference to Stephen Hegarty. I regret to have to say that paragraphs 56 to 59 dealing with Mr. Hegarty (who has not as yet sworn any affidavit) are grossly inaccurate, incomplete and most misleading. My evidence in this respect is based on contemporaneous notes of the meetings held on the negotiation and drafting of the Deed dated 16th January 2001, as well as consequent related correspondence, particularly in the immediate aftermath to September 2001. I beg to refer to my copy notes of the meetings upon which pinned together and marked with the letters "MW10" I have signed my name prior to the swearing hereof. The correspondence has already been exhibited at "*MW10*",

In particular:

(a)

(i) Mr. Hegarty did not only meet me on three occasions in December 2000 and January 2001, as is put in evidence by Ms. Foley on behalf of the Defendants. The reality is that during that period, Mr. Hegarty and I had serious and substantive business meetings on seven different occasions. The meetings were variously also attended by Mr. O'Dwyer, Mr. Peart and Richard Wood. The dates of the seven meetings were as follows:

a date prior to 13th December 2000

13th December 2000

8th January 2001

11th January 2001

13th January 2001

15th January 2001 (morning)

15th January 2001 (evening)

(ii) Mr. Hegarty had two further very serious business meetings (which Ms. Foley omits to record) with me in February 2001. These were on the dates as follows:

5th February 2001

6th February 2001

(iii) Accordingly, Ms. Foley only records and takes account of three of the nine meetings which took place involving Mr. Hegarty and myself in the period December 2000/February 2001, all of which were held at the office of Arthur Cox. Mr. O'Dwyer did not attend the meetings held on 13th December 2000, 11th, 13th and 15th January 2001, or the meeting held on 5th February 2001.

(b) To say that Mr. Hegarty's function (as is stated by Ms. Foley) was merely "to take down comments" of Mr. Peart, Mr. Wood and myself, is to entirely understate and completely misrepresent his role. Mr. Hegarty, a partner in Arthur Cox, was not a mere note taker. He was represented by Mr. O'Dwyer and himself as carrying a major responsibility for negotiating and drafting the Deed, and reporting to Mr. O'Dwyer, his fellow partner, and Mr. Roche, his client. In practice, this was the function performed by him, at the meetings with Mr. Peart, Mr. Wood and myself. All seven drafts of the Deed in the period 12th December 2000 to 15th January 2001 bore his initials "SNH". These drafts were dated 12th December 2000, 13th December 2000, 10th January 2001, 12th January 2001, 14th January 2001 and 15th January 2001.

(2). In this respect, I beg to refer to copies of the first page of each of the said seven drafts upon which pinned together and marked with the letters "*MW11*" I have signed my name prior to the swearing hereof.

(c) The fact that Mr. Hegarty was dealing with negotiations and drafting and amendments is also demonstrated by a faxed letter sent by him on 13th January 2001 to Mr. Peart (copied to Mr. Roche and Mr. Wood) in which he stated:

'Further to the re-draft of the Deed which I sent you yesterday evening, I attach another re-draft in

which I have included some further amendments. This draft is marked to show all amendments made today and yesterday.

Please note that the attached draft has not been approved by our clients. Accordingly, this draft is subject to such further comments as they may have.'

I beg to refer to a copy of the said letter and re-draft upon which pinned together and marked with the letters "*MW12*" I have signed by name prior to the swearing hereof.

(d) The discussions on whom we "were dealing with" in respect of the proposed loan and mortgage under the Deed related not only to Clause 8 of the Deed, but also to Clause 5.4, and more critically to Clause 12.3, which as aforesaid at Paragraph 55(a) (vi) reads as follows:

"None of Mr Brendan Hynes, Sir A. J. F. O'Reilly or any person or entity acting in concert with both or either of them, or on their behalf, nor any business competitor of Bula or Holdings, whether actual or potential, has any interest in Crindle or the shares it holds in Holdings, nor is Mr Roche Junior, nor is Crindle acting as a proxy for, or on behalf of any such person or entity". (Emphasis added)

This Clause was inserted in the circumstances already described at paragraph 55(a).

(e) Ms. Foley says that Mr. Hegarty recalls informing me that Mr. Roche was not the sole owner of Conor, and that I may be confused. In this respect, I say that:

(i) the insertion by agreement of Clause 12.3 in the Deed which clause, expressly addresses the ownership of Crindle (and only Crindle), was only called for, and was and is only explicable by Mr. Hegarty having made known that *Crindle* was not in sole Roche ownership.

(ii) I had no need to enquire of Mr. Hegarty in January 2001 as to whether Mr. Roche was the sole owner of Conor. I was fully aware of the ownership of Conor (which was on public record), and knew that my wife (together with her two sisters) held a significant beneficial shareholding of 25% in Conor through a company called Unity Trust.

68. I reiterate the total truth of my dealings with Mr. Hegarty as set out at paragraphs 55 and at 67(a) to (e) above. To conclude on this, I would like to say that I had a good constructive working relationship with Mr. Hegarty. He was complimentary of the way Mr. Wood and I did our business with him, describing it as "old school". He stated that "it was a pity that there was not more like us around the Town".

79. Mr. Hegarty sought in paras. 6, 7 and 8 of his affidavit of 24th July, to respond to the criticisms by Mr. Wymes of Ms. Foley's averments. He stated, *inter alia*, that:

"6. In several places in his affidavit, Mr. Wymes makes reference to the fact that I had to obtain instructions from Mr. O'Dwyer concerning drafting changes which were being sought by Mr Wymes with regard to the Deed which was being prepared. This is correct and reflects my role in the drafting and preparation of the Deed. My involvement in these meetings arose from the fact that Mr. James O'Dwyer, who was, and had been, responsible for this file for many years, was unable to attend all the meetings with Mr. Wymes. Mr. O'Dwyer had called on me to attend these meetings as the respective parties did not wish the negotiations to be delayed on account of his unavailability. Furthermore, Mr. O'Dwyer had asked me to attend as I had in the past advised Conor Holdings in regard to matters which were completely unrelated to the Bula litigation. In attending these meetings, my instructions were to take down the comments of Mr Wymes, Mr Woods and their solicitor at the time, Mr. …Peart.

7. In regard to the number of meetings I attended with Mr Wymes, I must say that the information that was given by Ms. Foley in her affidavit of 11th July 2007, was made in reliance on information I gave her and on a privileged memorandum which I prepared somewhat in haste on the evening of 5th July 2007, which was the end of a very busy period for me and my last full day in the office prior to a week's leave. Having now taken more time to gather all relevant documents which I sent to storage on this matter six years ago, I can confirm that Mr. Wymes' recollection in regard to the number of meetings is correct and that I was incorrect in informing Ms. Foley that there were only three meetings."

Mr. Hegarty then proceeds to outline five reasons for this having occurred, and it is not necessary for the purposes of this judgment to rehearse all of them. However, one of the reasons proferred, which assumes a relevance in the next paragraph of his affidavit, was that his attendance notes in respect of the meeting of 15th January 2001, had been mis-filed and had since been located. He continues at para. 8:

"8. I must say that if Mr. Wymes had instructed his solicitor to make clear in his affidavit of 14th June 2007 that he was alleging that I had " *…ultimately disclosed …that Crindle was not in the beneficial ownership of Mr Roche*" at a meeting on 15th January 2001, I would have undertaken the efforts which I have since done, to locate the misfiled attendance notes of my meetings of 15th January 2001. However, having located them and reviewed them, I must say that I am left with the very real suspicion that this lack of precision on Mr. Wymes' part is because he has known since our meetings in December 2000 and January 2001 that I knew nothing about the ownership of Crindle. I must also say that the inclusion of clause 12.3 in the Deed was requested by Mr Wymes at what was virtually the end of the drafting process for the Deed and the instructions as to its terms came directly from Mr Wymes. Moreover, clause 12.3 was not something that I would have offered by way of drafting or would ever have suggested, given the reference to persons about whom I had no personal knowledge."

80. In his very lengthy affidavit sworn on 24th August 2007, Mr. Wymes responds to Mr. Hegarty as follows at paras. 47 to 49 inclusive thereof :

"47. I say that according to the records and my recollection, Michael Peart was in attendance with me, and took an active part on 15th January 2001 at the offices of Arthur Cox.

48. The first session on that day lasted from about 11am to 1pm. At that morning session, Mr Hegarty suggested that I draft the wordage of a clause acceptable to us, taking account of what he had just told me i.e. that the identification of

a person such as Mr. Hynes would be "doable". The second session was very much shorter, and after its termination, I contemporaneously recorded my conclusion on my notes that the ownership of Crindle was with the Banks or the State (as opposed to Mr. Roche Junior). This general conclusion bore a question mark, and I should stress was entirely premised and dependent on the veracity of Mr. Hegarty's verbal representations to us in relation to Mr. Hynes, O'Reilly interests and concert parties.

49. Contrary to what is suggested by Mr. Hegarty at para. 8 of his Affidavit, I say that mine was not the sole input to Clause 12.3. In the course of the afternoon session on 15th January 2001, and after Mr. Hegarty had come to be able to confirm to us that O'Reilly interests were not involved with Crindle, Mr Hegarty stated that he would amend the draft Clause 12.3 accordingly. During a telephone conversation later at 7.10pm on the same day, Mr Peart informed Mr Hegarty that we were ready to receive the engrossments of the Deed for signing "*subject to Dr. O'Reilly*" interests be(ing) included in Clause 12.3. In the event, the amendment to Clause 12.3 to such effect was made by Mr. Hegarty, and was included in the engrossments of the Deed furnished by him to Mr. Peart for execution."

81. Paragraph 52 of Mr. Wymes' affidavit of 24th August 2007, contains a critical averment. He states:

"52. I say that I am not in a position to confirm conclusively to this Honourable Court where the ownership of Crindle rested in 1997. Arthur Cox/Mr Roche were not prepared to and refused at the meetings in January 2001, and in the subsequent correspondence with Mr Peart, to disclose the full ownership of the R Group, and thus Crindle."

82. Understandably, Mr Wymes places great store in the correspondence between his solicitor, Mr. Peart, and Arthur Cox, Solicitors, in the run up to and in the aftermath of the meeting of 15th January 2001. He states at paras. 53 and 54 of the affidavit just mentioned that:

"53. From the very outset of his correspondence with Arthur Cox (as is demonstrated by his letters of 17th January and 22nd January 2001), Mr. Peart enunciated his understanding, and indeed conviction, of the disclosure having been made (in the context of the problems which he said had arisen in relation to the ownership of Crindle) that the ownership lay other than with Mr. Roche.

54. The fact that Mr. Peart was present on 15th January 2001, and that he and myself were at idem and certain that it had been communicated to us that there was non-Roche ownership of Crindle, underscores, supports and corroborates the evidence of my account and conclusion. This certainty of Mr. Peart is demonstrated by the content and strength of his subsequent correspondence. It is the Plaintiffs' wish to call Mr. Justice Peart as a witness at the trial…."

83. The entirety of the relevant correspondence has been exhibited and I have read all of it. It is may fairly be characterised as being clear and unequivocal in its assertion of a belief on the part of the W group that there had been a disclosure at the meeting in January that Crindle Investments was not in the sole legal/beneficial ownership of Thomas J. Roche. The course of the correspondence from Mr. Peart's end, is accurately summarised in para. 55 of Mr. Wymes' affidavit of 18th July, 2007 (reproduced at paragraph 73 of this judgment). However, Mr. Wymes' affidavit summary does not convey the vehemence and robustness of Mr. O'Dwyer's correspondence in response. To give a flavour of what I am referring to I will quote from just two of Mr. O'Dwyer's letters.

84. In a lengthy letter to Mr. Peart of 24th January 2001, replying to his of the 22nd of January, Mr. O'Dwyer remarked at the outset:

"It is now apparent that the paranoia and misconceptions which obstructed and frustrated all of our previous settlement efforts are now manifesting themselves again in your most recent correspondence. We do not propose, therefore, to devote any time to addressing this arid speculation other than to say that the suggestions implicit in the first paragraph on page 2 of your letter have no basis in substance or in fact."

The letter later concluded with the following:

"Notwithstanding the absurdity of your questions (having regard to what has been said many times before) we confirm again that our clients have no interest whatsoever in the Banks' mortgages, and we are not instructed by or on behalf of any, other than Tom Roche. Your suggestions to the contrary are gratuitously offensive."

85. A further letter to Mr. Peart of 31st January 2001, commenced:

"It is apparent from your letter of 30th January that Michael Wymes is determined to persist with his illusory claims of "hidden agendas". I do not propose, therefore, to expend any more time addressing this absurdity.

With one exception, the entire first page of your letter is devoted to the irrational conclusion that, by reference to what I said in the last paragraph of my letter of 24th January, we only act for Tom Roche and not the other parties mentioned.

It must be apparent to you (and hopefully to Michael Wymes) that the Roche Estate, Crindle Investments and Conor Holdings, being inanimate entities, can only act through a person duly authorised on their behalf. Tom Roche is an executor of his late father's estate and a director of Crindle Investments and Conor Holdings. He is authorised to act on their behalf and has instructed us accordingly."

86. Much of Mr. Wymes' affidavit of 24th August 2007 is devoted to an analysis of the course of correspondence referred to. The analysis offered, naturally reflects his perspective on events. However, there is also another perspective. I do not propose to review it, as the court cannot possibly determine which of the protagonists is correct on a motion of the sort presently before me.

87. I would comment, however, that the following are interesting features of this correspondence, which may or may not be of significance. Firstly, Mr. Hegarty is nowhere mentioned. Secondly, Mr. Peart, though he does unequivocally assert on behalf of his clients a firm belief on their part that there was a disclosure at the January meeting, does not in terms assert that he personally heard it, nor does he purport to quote to Mr. O'Dwyer (who was not there) the terms of what was allegedly said by Mr. Hegarty, (given that he, Mr. Peart, was there and could give first hand testimony).

88. Perhaps understandably, in the circumstances that now obtain, the plaintiffs have not placed an affidavit of Mr. Peart before the court. By the same token, it has been deposed to on oath that he is to be a witness at the trial if the matter does, in fact, goes to trial.

89. Much of day two of the hearing before me was taken up with an examination of, and discussion concerning, the various drafts of the Deed of Settlement. These have all been exhibited before me. The final product is certainly an extraordinary document. The court requested of the defendants, if they were willing to make them available, copies of any notes, attendances or memoranda generated by those involved in the drafting of this Deed, and in particular, by Mr. Hegarty and Mr. O'Dwyer. A booklet of such documents was made available to both the court and the plaintiffs, and the court was grateful to receive it. A perusal of this material reveals that there were persistent demands by Mr. Wymes for reassurance as to "who we are dealing with". Given that this was the case, it begs the question as to why the simple expedient of including a clear statement in the Deed concerning the underlying ownership of Crindle was not resorted to. Instead, the bizarre formula contained in clause 12.3 of the seventh and ultimate draft of the document was employed.

90. In argument before me, counsel for the defendants contended strenuously that there was a perception in Arthur Cox that Mr. Wymes was extremely difficult to deal with, and a belief on the part of Mr. O'Dwyer, in particular, that if they engaged with him at all, in respect of what they perceived to be ridiculous and spurious red herrings, it would be impossible to progress matters. The view was that it was better to remain focussed and, insofar as possible, to ignore the red herrings. It was only when Mr. Wymes' demands for reassurance were presented as a deal breaker, that they agreed to insert what now constitutes clause 12.3. Now, it must be pointed out that this was a submission and not something specifically deposed to on affidavit. However, I do not dismiss it, having regard to the strong circumstantial evidence that exists in both the content and the tone of the letters from Mr. O'Dwyer to Mr. Peart, that Mr. O'Dwyer did indeed find Mr. Wymes to be an exasperating person.

91. Another fact that cannot be gainsaid is that Mr. Wymes signed the Deed.

92. With respect to the Vincent and Beatty memo relied upon by Mr. Wymes, it has been exhibited before me and in is in the following terms:

> "We discussed the Bula situation. Basically, Tom extricated himself from Crindle as of 1st January 1995, and whilst he cannot be absolutely certain, he feels that the Bula Liabilities will stop at Crindle and, because he no longer has an involvement in it that he is safe. However, that is not cast in stone and there is no way he will give any warranty to the girls about there being no other encumbrances attaching to the NTR shares. The girls will have to take his word for it."

In response to Mr. Wymes, Ms. Foley offered the following comments at para. 45 of her affidavit of 19th September 2007, (amplifying a statement to similar effect in her affidavit of 24th July 2007, to which Mr. Wymes takes exception). Again, it must be recognised that these comments reflect her client's perspective only, and that the W Group has a different perspective, but they nonetheless bear reiteration as being her client's response to Mr. Wymes' allegation. Referring to the paragraph just quoted from the Vincent and Beatty memorandum she said:

> "It is clear from the text of that paragraph that what is referred to here, was the change in the ownership structure of Crindle, namely, the fact that the Bula liabilities would stop at Crindle because of the interposition of limited liability companies. In any event, the underlying fact remains unchanged. The ownership structure of Crindle is as it was in January 1995, and as was disclosed to the court at all times. The fact that Mr. Wymes places an alternative interpretation on a memorandum prepared by a party who, on his own account, was only recording information she has been told, does not alter the underlying facts."

Submissions
93. The court has been provided with detailed written submissions by both sides respectively, and each side's submissions were supplemented by oral arguments presented to the court over several days. I have found the submissions to be of great assistance in seeking to untangle the complex web of facts and law in this case, and I express the court's gratitude to counsel for their assistance. It is appropriate, therefore, to rehearse the principal submissions made.

The Moving Party's (i.e. the Defendants') Submissions
94. The defendants' submissions were very focussed and structured and their case was presented under specific major headings, which it seems sensible to adopt.

95. The first major heading:

> **The Statement of Claim discloses no reasonable cause of action and/or is frivolous and/or vexatious.**

96. Introduction
The first relief sought on behalf of the defendants is an Order pursuant to Order 19, rule 28 of the Rules of the Superior Courts, striking out or dismissing the plaintiffs' claims on the grounds that the Statement of Claim delivered herein discloses no reasonable cause of action and/or the action is shown by the pleadings to be frivolous and/or vexatious.

97. The jurisdiction conferred by Order 19, rule 28 of the Rules of the Superior Courts
Order 19, rule 28 of the Rules of the Superior Courts provides as follows:

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

It is clear from the decision of the Supreme Court in *Aer Rianta v. Ryanair* [2004] 1 IR 506 that the jurisdiction conferred by Order 29, rule 28 is a jurisdiction to strike out the whole (as distinct from part only) of a claim. It is also clear from the decision in that case that, although, "*[a] court will exercise caution in utilising this jurisdiction*", "*if a court is convinced that a claim will fail [the] pleadings will be struck out*" at 509 (per Denham J.)

98. In *Adams v. Minister for Justice*, [2001] 2 ILRM 452, the Supreme Court had to consider whether the applicants' claims disclosed any reasonable cause of action against the respondents, were frivolous or vexatious or doomed to fail. In concluding that the claims were frivolous, vexatious and doomed to fail, Hardiman J. stated, *inter alia*, as follows:

> "The Applicants' proceedings are of the baldest kind, without any basis in law or fact, and, with the exception of Mr.

> Iordache's case, without any attempt to rely on proved individual circumstances either in relation to attacking the decisions taken in respect of the individual applicants or on the broader aspects of their claim. In my view they are all frivolous, vexatious and doomed to fail: indeed they are scarcely recognisable as legal proceedings at all."

As regards the appellant's contention that the proceedings should not be struck out if they were capable of being saved by amendment, Hardiman J. stated as follows:

> "In my view, nothing which could properly be described as amendment could save these proceedings. If, hypothetically, the applicants or any of them have any statable cause of action, it would require to be expressed in proceedings in which bear no resemblance whatever to those presently under consideration."

99. In *O'Siodhachain v. O'Mahony*, (Unreported, Supreme Court, 7th December 2001), the Supreme Court upheld a decision of the High Court striking out a claim of deceit against the third named defendant who had acted as solicitor for the first and second named defendants in respect of a property transaction the subject of the proceedings. In delivering the *ex tempore* judgment of the court, Keane C.J. stated, *inter alia*, as follows:

> "The statement of claim delivered in the proceedings and in which the third named defendant was joined as a defendant, claims in paragraph 4b an order for damages against the first, second and third named defendants for deceit. That is effectively a claim of fraud against the third named defendant and the court is satisfied having examined with care the statement of claim filed on behalf of the plaintiff that even if the facts there alleged were proved, it would not in any way substantiate so grave an allegation as an allegation of fraud against any person but particularly a solicitor and an officer of this court.
>
> …
>
> The court is satisfied that the learned High Court judge was perfectly correct in dismissing these proceedings. The court is so satisfied not only because they disclose no cause of action against the third named defendant but because they are also satisfied that in the inherent jurisdiction of the High Court it was proper to strike the proceedings out as being a clear abuse of the process of the court."

100. In *Fay v. Tegral Pipes Ltd.,* [2005] 2 I.R. 261 the Supreme Court allowed an appeal against a decision of the High Court refusing to dismiss the plaintiff's claim on the grounds that it was bound to fail, disclosed no reasonable cause of action, was frivolous and vexatious and an abuse of the process of the court. In addressing the jurisdiction to strike out a plaintiff's claim on the grounds that it is frivolous and vexatious, the court stated, *inter alia*, as follows:

> "While the words 'frivolous and vexatious' are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes, and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second, and equally important, purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."

101. In *Kilcoyne v. Westport Textiles* (Unreported, High Court, Finnegan P., 26th July 2006), Finnegan P. acceded to an application on behalf of the second named defendant to strike out the plaintiff's claim pursuant to Order 19, rule 28. Finnegan P. explained his reasoning as follows:

> "On the Affidavits before me, it is quite clear that the claim against the second named defendant, as at present constituted and pleaded, is unsustainable. I am satisfied that the second named defendant is entitled to relief under Order 19 rule 28, that is to have the claim against it struck out on the grounds that it discloses no reasonable cause of action. Accordingly, I propose to make the order sought.
>
> It was canvassed before me that I should deal with the matter on the basis of the true nature of the claim against the second named defendant and that the plaintiff be allowed to further amend his pleadings at this stage to reflect the true cause of action. Should I accede to this, the second named defendant proposes to rely upon delay. Much of the affidavits before me deal with the subject of delay. However, I have determined that I should deal with the matter solely on the basis of the pleadings as they stand at present. On the information before me, it seems almost inevitable that the plaintiff will obtain judgment in default of pleading against the first named defendant. He can then, if so advised, institute proceedings against the second named defendant as the indemnifier of the first named defendant. In those proceedings, the defendant (the second named defendant in these proceedings) can raise the issue of delay and seek to have the proceedings struck out. Rather than proceed on the basis of a notional further amended statement of claim, I am satisfied that it is preferable that I should allow the matter to proceed on the basis of the proceedings as they stand.
>
> In deciding to strike out the plaintiff's claim, I am influenced by the circumstance that the plaintiff has had from 11th January 2005 to date, to deliver an appropriate amended statement of claim setting out in appropriate terms his claim against the second named defendant but has failed to do so: the amended statement of claim delivered, is totally defective in that it fails to disclose the true basis of the claim against the second named defendant. The defendant in this case has to meet a claim which arose more than 25 years ago and in these circumstances the onus on the plaintiff, having joined the second named defendant, was to proceed promptly and he has not done so.
>
> In the circumstances, it is appropriate that the plaintiff's claim against the second named defendant be struck out pursuant to Order 19 rule 28 of the Rules of the Superior Courts."

102. Application of the legal principles

The defendants submitted that the statement of claim delivered herein discloses no reasonable cause of action and, further, that the action is shown by the pleadings to be frivolous and/or vexatious. In this context, they have highlighted the following matters and urge upon the court to following specific submissions:

(i) In paragraph 18 of the statement of claim, it is alleged, *inter alia*, that the defendants made representations and averments which, "*are now known to be false and or were known to be false but were not corrected at the earliest opportunity, or at all, thereby seriously and fatally misleading this Honourable Court and the plaintiffs herein, whereby this Honourable Court was induced into error to make decisions it would not or might not have made had it not been kept out of the true facts.*" The plaintiffs omit to state who allegedly knew the representations and averments were false, when they were allegedly known to be false, how they were allegedly false or when they ought to have been corrected. Moreover, the representations and averments were all true, as is apparent from the pleadings and affidavits in the Section 205 proceedings. There is demonstrably no basis for the assertion that any court hearing the Section 205 proceedings was misled or induced into error as the plaintiffs allege. All of the courts were aware of the true facts and accepted those facts.

(ii) In paragraph 19 of the statement of claim, it is alleged that it is a "*fact*" that, "*at all material times, the first, third and fourth named defendants … were not in fact the owners or alternatively were not entitled either directly or indirectly to the entire or any beneficial interest in the said shares, as same had been sold, transferred, assigned or otherwise disposed of to third parties or otherwise dealt with in circumstances where the defendants were no longer the owners of the said shares or entitled to the beneficial interest therein directly or indirectly.*" No basis is set out for this allegation and no particulars thereof have been provided. The owners allegedly entitled to the entire beneficial interest in Crindle are not identified. Nor does the statement of claim identify the person or persons to whom it is alleged the beneficial interest "*had been sold, transferred, assigned or otherwise disposed of*". Despite the significance of the said allegations in the context of the case, the plaintiffs purport to make and despite the time which the plaintiffs have had to assemble the information necessary to plead and properly particularise that case, the plaintiffs are unable even to present a properly pleaded case, let alone prove the extraordinary allegations upon which it is based.

(iii) Throughout the statement of claim, the plaintiffs make a series of extremely serious allegations which are wholly unparticularised. For example, in paragraphs 27, 33 and 34, the plaintiffs make allegations of conspiracy on the part of the defendants which are entirely unsupported by detail or the necessary particulars. Similarly, in paragraph 31, the plaintiffs allege that, "*false averments were made deliberately to pervert the course of justice*". Again, no particulars are provided. It is notable and, for the purposes of the present application, very significant that the plaintiffs' claims are so utterly devoid of the particulars necessary to advance the case which they purport to make.

(iv) As in *Adams v. Minister for Justice*, the plaintiffs' claims in these proceedings "*are of the baldest kind, without any basis in law or fact*". Of course, it is not surprising that the plaintiffs' pleadings are so fundamentally defective in so many respects and that the statement of claim does not disclose any reasonable cause of action: the plaintiffs do not have any reasonable cause of action and their allegations herein are demonstrably devoid of merit. The foregoing is exemplified by the wholly unparticularised nature of the plaintiffs' multifarious allegations in relation to the ownership of Crindle, the fact that those allegations are fundamental to the plaintiffs' entire case and the fact that those allegations are demonstrably false and without substance.

103. The defendants therefore say that in all the circumstances, the court should grant an order pursuant to O. 19, r. 28 of the Rules striking out or dismissing the plaintiffs' claims.

104. The second major heading:

The proceedings have no reasonable prospects of success, are bound to fail and are an abuse of the process of the court.

105. Introduction
The second / alternative relief claimed on behalf of the defendants is an order pursuant to the inherent jurisdiction of the court dismissing or, alternatively, striking out the plaintiffs' claims against the defendants on the grounds that the proceedings have no reasonable prospects of success, are bound to fail and are an abuse of the process of the court.

106. The inherent jurisdiction to strike out a claim which has no reasonable prospects of success, is bound to fail and/or is an abuse of the process of the court

General
It is well established that, apart from the jurisdiction to strike out a claim conferred by O. 19, r. 28 of the Rules, the court also has an inherent jurisdiction to strike out a claim where it has no reasonable prospects of success, is bound to fail and/or is an abuse of the process of the court. As the High Court (Costello J.) stated in *Barry v. Buckley*, [1981] I.R. 306:

> "But, apart from Order 19, the court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp 34-37 and the Supreme Court Practice (1979) at para 18/19/10. The principles on which the court exercises this jurisdiction are well established. Basically, its jurisdiction exists to ensure that an abuse of the process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley LJ in *Goodson v. Grierson* at p 765.
>
> This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the court to avoid injustice."

107. The inherent jurisdiction of the court to strike out a claim in the circumstances under consideration has been reaffirmed and analysed by the courts on a number of occasions: see, e.g., *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R.425; *Flanagan v. Kelly* ¸(Unreported, High Court, O'Sullivan J., 26th February 1999); *Supermac's Ireland v. Katesan (Naas) Limited*, [2000] 4 I.R.273; *Jodifern v. Fitzgerald* [2000] 3 I.R. 321 and *Lynch v. O'Flynn*.(Unreported, High Court, Kelly J., 18th June 2003).

108. It is well established that in considering an application to strike out proceedings on foot of its inherent jurisdiction, the court is not limited to considering the pleadings but can consider and take into account evidence on affidavit. See Costello J. in *Barry v Buckley* [1981] I.R. 306 at 308; see also *Tassan Din v Banco Ambrosiano* [1991] 1 I.R. 569 at 572 and *Landers v An Garda Siochána Complaints Board* [1997] 3 I.R. 347 at 360. The inherent jurisdiction of the court was considered in some detail by the Supreme Court in the case mentioned in the following two paragraphs.

109. In *Jodifern v. Fitzgerald*, Barron J. made the following observations in relation to this jurisdiction of the court:

> "The function of the court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself."(at p.333.)

110. In the same case, Murray J. explained that,

> "[t]he object of [an order striking out proceedings to prevent an abuse of the process of the court from occurring] is not to protect a defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a defendant which would result from an abuse of the process of the court by a plaintiff." (at p.334).

Murray J. stated that, "a primary precondition to the exercise of this jurisdiction is that all the essential facts upon which the plaintiff's claim is based must be unequivocally identified". Murray J. then emphasised that, "where all the essential facts have been so identified, it must also be manifest that on the basis of those facts the plaintiff's case has no foundation in law". In addressing the question of legal issues raised by a plaintiff, Murray J. stated as follows:

> "Certainly, a plaintiff faced with an application to have the proceedings stayed or dismissed in these circumstances is likely to raise, in one form or another, legal issues in response. In a case where there is in effect an abuse of the process of the court, it is quite possible that some at least will be clearly spurious or have no relevance to the facts of the case. Any other legal issues must be clearly discernible as being without merit and readily capable of being resolved in favour of the defendant. It is for the judge hearing the application, within the scope of his discretion, to determine whether any points of law raised can be so clearly and readily resolved in favour of the defendant that to allow the action to proceed would constitute an abuse of the process of the court. Legal issues that are sufficiently substantial as to fall outside that bracket should be left to the trial of that action in those proceedings."

111. The defendants further submitted that judgments of the High Court and Supreme Court in various cases brought by Denis Riordan are particularly relevant to the application before the court in this case. In this regard, the court was referred to the judgments in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463; *Riordan v. Hamilton*, (Unreported, Supreme Court, 9th October, 2002) and *Riordan v. Government of Ireland*, (Unreported, High Court, 6th October, 2006).

112. In *Riordan v. Ireland (No. 5)* the High Court (Ó Caoimh J.) stated that "[i]n assessment of the question whether the proceedings are vexatious, the court is entitled to look at the whole history of the matter and it is not confined to a consideration as to whether the pleadings disclose a cause of action." Ó Caoimh J. continued as follows:

> "The court is entitled in the assessment of whether proceedings are vexatious to consider whether they have been brought without any reasonable ground. The court has to determine whether the proceedings being brought are being brought without any reasonable ground or have been brought habitually and persistently without reasonable ground."

Ó Caoimh J. referred to the following matters which were held by Canadian courts (see *Dykun v Odishaw* (Unreported, Alberta Court of Queen's Bench, Judicial District of Edmonton, 3rd August, 2000); and *Re Lang Michener and Fabian* (Ontario High Court) (1987) 37 D.L.R. (4th) 685 at 691.) to be matters which tended to show that a proceeding is vexatious:

> "(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
>
> (c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
>
> (f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

These principles were reaffirmed by the High Court (Murphy J.) in *McCabe v. Minister for Justice,* (Unreported, High Court, 29th June 2006).

113. In addressing the plaintiff's "intended action to have declared unconstitutional the operation of the Supreme Court in the proceedings previously taken by the intended plaintiff", (a p.473/474) the court concluded as follows:-

> "… I am satisfied that this proposed cause of action is vexatious as it is one seeking first of all to bring one or more actions to determine an issue which has already been determined by a court of competent jurisdiction. Secondly it is one which it is obvious cannot succeed and it is one from which no reasonable person could reasonably expect to obtain relief. Furthermore, I am satisfied that this proposed action if brought would be brought for an improper purpose, namely the harassment and oppression of the parties to the earlier proceedings and not for the purpose of the assertion of legitimate rights."

114. In *Riordan v. Hamilton*, the plaintiff sought to challenge final judgments given by the Supreme Court in proceedings in which he was a party because he was dissatisfied with those judgments. In upholding the decision of the High Court dismissing the proceedings on the grounds that they constituted an abuse of the process of the court, the Supreme Court (per Murray J.) stated as follows:

> "… the fundamental point here is that he seeks to challenge previous judgments of this court and obtain declarations that they are wrong. Of this, the plaintiff said at the hearing of the appeal, 'that is the whole basis of my case plus I am claiming damages.' He appears to have considered that by adding a claim for damages he was entitled to reopen those

issues in these proceedings. Of course, that is patently wrong. The judgments and decisions of which he complains are final and conclusive as regards the issues in those proceedings pursuant to Article 34.4.6 of the Constitution. Those issues cannot now give rise to a claim for damages and, in any event, a claim for damages as an additional form of relief cannot affect the *res judicata* nature of those decisions.

The learned High Court judge firstly had regard to Order 19, rule 28 [… Having quoted Order 19, rule 28, the court continued as follows:]

> This is not the first occasion on which this plaintiff has sought, unsuccessfully, to litigate once again, issues which have been the subject of a final order and judgment of this court. On reading of the long statement of claim delivered by the plaintiff, which raises issues already and finally decided in proceedings between the plaintiff and other parties, it is manifest that the plaintiff's action is both frivolous and vexatious and discloses no reasonable cause of action. Nothing which the plaintiff has said during the course of the hearing of this appeal (which essentially reflected the argumentative nature of the pleadings), disclosed any ground for taking any other view.
>
> In my view, the learned High Court judge was perfectly entitled to come to the conclusion which he did, namely, that these proceedings constitute an abuse of the process of the court and he was entitled to dismiss them on that basis."

115. The Supreme Court also upheld the decision of the High Court to dismiss the plaintiff's claim on the grounds that it disclosed no reasonable cause of action and had no reasonable prospect of success. In this regard, Murray J. stated as follows:

> "Exercising the inherent jurisdiction of the court, the learned High Court judge also struck out the plaintiff's claim on the grounds that it disclosed no reasonable cause of action and had no reasonable prospect of success. In respect of that conclusion he stated, 'The position here is that these matters have already been litigated. There is no new matter and this is an effort to re-litigate the same matters and to effectively ask this court to review the decision of the Supreme Court or to ask another judge to embark on a hearing at a later stage. In my opinion, it is neither open nor would it be appropriate to do so in this case.'
>
> He had before him the affidavit of Lawrence A. Farrell, Chief State Solicitor, filed on behalf of the defendants herein, to which there was no replying affidavit and had regard to the statement of claim of the plaintiff. The trial judge was perfectly entitled to make that finding on foot of that affidavit and the statement of claim. In those circumstances, he was correct in striking out the plaintiff's claim on the grounds that it discloses no reasonable cause of action and has no reasonable prospect of success."

116. The Supreme Court also upheld the order of the High Court restraining the plaintiff from issuing certain kinds of proceedings without leave of the court:

> "As regards the order restraining the plaintiff from issuing certain kinds of proceedings without leave of the court, the learned High Court judge relied on the dictum of Costello J. in *McSorley v. O'Mahony*, (Unreported, High Court, 6th November 1996). It is an abuse of the process of the court to permit the court's time to be taken up with litigation which can confer no benefit on a plaintiff. It is also an abuse to permit litigation to proceed which will undoubtedly cause detriment to a defendant and which can confer no gain on a plaintiff. While every citizen has a right of access to the courts, it is in the public interest and in the interest of the proper use of public resources in the administration of justice that in exceptional circumstances this right be regulated by the courts. In my view, in the circumstances of this case, the learned High Court judge exercised his discretion properly in deciding to make such an order and I do not consider that any of the arguments made by the plaintiff in this appeal disclose a basis for impugning the exercise of that discretion."

117. In *Riordan v. Government of Ireland*, the High Court (Smyth J.) addressed the importance of the jurisdiction to strike out vexatious claims as follows:

> "The right of access to the courts is to be protected, but it is not an absolute automatic right in all and every case and circumstance. In the context of this case the words of Henchy J in *Cahill v Sutton* [1980] I.R.269 at 286 have a particular relevance:
>
> > 'It would be contrary to precedent, constitutional propriety and the common good for the High Court or this Court to proclaim itself an open house for the reception of such claims.'
>
> In vindicating the constitutional rights of any person, it is of importance that the rights of the community as a whole or identifiable persons or officers or offices in it are not disregarded (e.g. by being open to harassment, oppression or scandalous or vexatious litigation). The common good and the respect of society and of the community for a justice system is not served or ensured by a disproportionate concern for the rights of the individual at the almost inevitable expense of a disregard for the rights of society by an over indulgence of every or any complaint of an individual. The courts, in respecting the rights of all those who seek access to the court, must also have some self-respect. Otherwise, there is the real possibility, nay probability, that the justice system will be abused and/or manipulated for unworthy purposes."

The doctrine of *res judicata* and the jurisdiction to set aside final Orders

118. The defendants say that the abuse of process involved in attempting to litigate matters which are res judicata merits particular emphasis in the context of the present application before the court.

119. As the Supreme Court stated in *Dublin Corporation v. The Building and Allied Trade Union*, [1996] 1 I.R. 468, "the doctrine of *res judicata* applicable to […] every final judgment or award of any competent court or tribunal, has the consequence that the parties are estopped between themselves from litigating the issues determined by the award again". The court (per Keane J.) explained the rationale for this doctrine as follows:

> "The justification of the doctrine is normally found in the maxim interest *rei publicae ut sit finis litium* and it is important to bear in mind that the public interest referred to reflects, in part at least, the interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes. However severe the stresses of litigation may be for the parties involved - the anxiety, the delays, the costs, the public and painful nature of the process - there is, at least, the comfort that at some stage finality is reached. Save in those exceptional cases where his opponent can prove that

the judgment was procured by fraud, the successful litigant can sleep easily in the knowledge that he need never return to court again.

That finality is, of course, secured at a cost. The defendant who discovers as soon as the case is over that the award of damages against him is grossly excessive because of facts of which he was wholly unaware and was unable to bring before the court cannot, in the absence of fraud, resist the enforcement of the judgment against him. The plaintiff who similarly finds out that his damages are far less than those which would have been awarded had the court been in possession of evidence not available at the hearing, is equally precluded from disputing the finality of the judgment. The interest of the public in that finality is given precedence by the law over the injustices which inevitably sometimes result." (at p.481).

120. In *Tassan Din v. Banco Ambrosiano S.P.A.*, the High Court (Murphy J.) observed that, "[o]bviously, it would be vexatious and an abuse of the process of the court to litigate any matter which was already concluded by a final and binding order of the court". (at p. 574) In *Riordan v. Ireland (No. 5)*, the High Court (Ó Caoimh J.) refused the plaintiff leave to commence proceedings on the grounds that, *inter alia*, "[the] proposed cause of action [was] vexatious as it [was] one seeking first of all to bring one or more actions to determine an issue which has already been determined by a court of competent jurisdiction."

121. In *Tassan Din*, Murphy J. stated that "[a]s a preliminary step towards re-opening [litigation concluded by a final and binding order of the court], it would be imperative to set aside the previous order and the judgment of the court". (ibid) As appears from the passages from the judgment of Keane J. in *Dublin Corporation v. The Building and Allied Trade Union* referred to above, in "*exceptional cases*" where a litigant can prove that a judgment/order was "*procured by fraud*" the judgment/ order may be set aside. The nature of this jurisdiction has been considered in a number of cases. In this context, the judgments in the following cases are instructive: T*assan Din v. Banco Ambrosiano S.P.A.; L.P. v. M.P.*, [2002] 1 I.R. 219; *Lynch v. O'Flynn*, (Unreported, High Court (Kelly J.), 18th June, 2003) and, in particular, *Bula v. Crowley*, (Unreported, High Court, 10th June, 2005).

122. In *Tassan Din v. Banco Ambrosiano S.P.A.*, the plaintiff sought an order setting aside an order of the Supreme Court in earlier proceedings on the grounds of fraud. The defendants brought an application to dismiss the plaintiff's claim on the grounds that it disclosed no reasonable cause of action or, alternatively, it was frivolous and vexatious and an abuse of the process of the court. The High Court (Murphy J.) acceded to the defendants' application. Having made the observations set out above, Murphy J. stated that the substantive issue on the defendants' motion was whether *Tassan Din* had any reasonable prospect of impugning the order of the Supreme Court.

123. In addressing the defendants' argument on the basis of Article 34 of the Constitution and the finality or conclusiveness of decisions of the Supreme Court provided for thereby, Murphy J. stated that that jurisdiction did not involve an exception to Article 34 of the Constitution since, "[a]n order obtained by fraud is a mere nullity". Murphy J. noted that this was recognised by the Earl of Selborne in *Boswell v. Coakes* (1894) 6 R. 167 in the following terms:

"There are two classes of cases, perhaps, which ought to be distinguished for this purpose. One is that of which the celebrated case of the Duchess of Kingston is an example, in which by the collusion of the parties the process of the courts has been abused, and the whole proceedings may be described as it was described in language used in that case as *fabula non judicium*. This, at all events, is not a case of that kind. The present case falls within the second class, namely, where it is not sought to treat as a nullity what has passed, but to undo it judicially upon judicial ground, treating it as in itself, and until judicially rescinded, valid and final."

124. Murphy J. also referred to the following passages from the speech of Lord Simon in the *Ampthill Peerage* Case [1977] A.C.547:

"As a means of resolution of a civil contention, litigation is certainly preferable to personal violence. But it is not intrinsically a desirable activity, certainly not on the scale on which it raged in the Ampthill family in the early 1920s. The picture drawn by Charles Dickens in *Bleak House* of the long drawn out and ruinous lawsuit, *Jarndyce v. Jarndyce* and of poor Miss Flite, her wits overturned by the strain of litigation, was based on fact. The law itself is fully conscious of the evil of protracted litigation. Our forensic system, with its machinery of cross-examination of witnesses and forced disclosure of documents, is characterised by a ruthless investigation of truth. Nevertheless, the law recognises that the process cannot go on indefinitely. There is a fundamental principle of English law (going back to Coke's Commentary on Littleton) generally expressed by a Latin maxim which can be translated: it is in the interest of society that there should be some end to litigation'.

…

And once the final appellate court has pronounced its judgment, the parties and those who claim through them are concluded; and, if the judgment is as to the status of a person, it is called a judgment *in rem* and everyone must accept it. A line can thus be drawn closing the account between the contestants. Important though the issues may be, how extensive whatsoever the evidence, whatever the eagerness for further fray, society says: we have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end, you must accept what has been decided. Enough is enough." (The second paragraph in the above passages from the speech of Lord Simon was also endorsed by the Supreme Court in *L.P. v. M.P.*

125. Murphy J. also referred to the following passages from the speech of Lord Simon in which he addressed the issue of impeaching a judgment on the ground of fraud:

"To impeach a judgment on the ground of fraud, it must be proved that the court was deceived into giving the impugned judgment by means of a false case known to be false, or not believed to be true, or made recklessly without any knowledge on the subject. No doubt, suppression of the truth may sometimes amount to suggestion of the false: *The Alfred Nobel* [1918] P 293 But, short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient.

Moreover *Janesco v. Beard* [1930] A.C. 298 a decision of your Lordships' House, confirmed that, to impugn a judgment on the ground of fraud, the fraud must be alleged with particularity and proved distinctly. A person is not permitted merely to allege fraud in the hope of discovering it as the case develops.

You cannot go to your adversary and say, 'you obtained the judgment by fraud, and I will have a rehearing of the whole case until that fraud is established'.

…

> The impugner of a judgment as obtained by fraud must adduce evidence of facts discovered since the judgment which show a reasonable probability (which I take to mean a *prima facie* case) of such fraud as would invalidate the judgment, before he can call on the person whose judgment he seeks to nullify to make any sort of disclosure."

126. Murphy J. also referred to the following passages from the speech of Lord Wilberforce in which he considered the nature of the fraud or collusion which would justify setting aside a judgment of the court:

> "What is fraud for this purpose? Learned counsel for John Russell, without venturing on a definition, suggested that some kind of equitable fraud, or lack of frankness, was all that is meant, but I cannot accept so anaemic an ingredient. In relation to judgments, and this case is surely a *fortiori* or at least analagous, it is clear that only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. Authorities as to judgments make clear that anyone wishing to attack a judgment on the grounds of fraud must make his allegation with full particularity, must, when he states it, be prepared to prove what he alleges and ultimately must strictly prove it." (ibid).

127. Against this background, Murphy J. stated that, "nothing short of fraud pleaded with particularity (and ultimately established on the balance of probabilities) would be sufficient grounds in the present case for upsetting the decision [of the Supreme Court at issue]."(ibid).

128. In addressing the application in *Tassan Din*, Murphy J. stated, "even at this preliminary stage it would be necessary for the plaintiffs in the existing proceedings to take up the challenge of demonstrating how documents, which on their face would not be admissible in evidence, could have altered the outcome of the earlier proceedings". Having referred to a similar issue that arose in *St. Albans Investment Co. v. London Insurance and Provincial Insurance Co. Ltd.* (Unreported, High Court, Murphy J., 27 June, 1990), Murphy J. continued as follows:

> "[In *St. Albans Investment Co. v. London Insurance and Provincial Insurance Co. Ltd*.] I examined the documents which it was alleged had been fraudulently omitted from the affidavit of discovery made on behalf of the defendant in that case, and concluded that there was no evidence to support the proposition that the omitted documents would have any impact on the decision which it was sought to impeach. I am equally clear that in the present case, not only the particular document referred to in the statement of claim but also the other documents exhibited in the grounding affidavits already referred to, would not have advanced the case made by *Tassan Din*. I do not accept the far reaching proposition that a document which was not discovered might, for some unexplained reason, have put the other party on a train of inquiry or investigation which might have resulted in the production of vital evidence, and that such a possibility would be a ground for upsetting the order of the Supreme Court. If the omitted documents had that potential, I have no doubt that such inquiries would have been made long since, with the results thereof made available to the court to demonstrate, as I believe would be necessary, that the order of the Supreme Court was obtained as a result of the alleged fraud."

Accordingly, Murphy J. dismissed the plaintiff's claim.

129. In *L.P. v. M.P.*, the Supreme Court (per Murray J.) reviewed the jurisprudence on the jurisdiction to set aside or amend a final order as follows:

> "The jurisdiction of a court at common law to set aside or amend a final order, was considered by this court in *Belville Holdings Ltd. v The Revenue Commissioners* [1994] I.L.R.M. 29. The substance and effect of the judgment of Finlay CJ in that case was conveniently and succinctly summarised by Hamilton CJ in *In re Greendale Developments Ltd. (No 3)* [2000] 2 I.R. 514 at 527. as follows:-
>
> > '… it set out in detail the common law principle concerning [this] question holding that where a final order has been made and perfected it can only be interfered with:-
> >
> > > (1) in special or unusual circumstances, or
> > >
> > > (2) where there has been an accidental slip in the judgment as drawn up, or
> > >
> > > (3) where the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.'

Later in his judgment at p. 529, Hamilton CJ went on to state:-

> "Public policy requires a definite and decisive end to litigation. In spite of the importance of such a principle, it was accepted at common law that an action may be brought to set aside a judgment or order made by the Court which had been obtained by fraud."

He then cited Barrington J. in *Waite v House of Spring Gardens Ltd* (Unreported, High Court, 6th June 1985) who stated, *inter alia*, "There is no doubt that an action may be brought to set aside a judgment obtained by fraud and that no leave is required of the court prior to the institution of such proceedings". Commenting on the judgment of Barrington J. in that case, Hamilton CJ at p. 530 observed:-

> "There is no suggestion in the above passage from the judgment of Barrington J. or the extracts from the judgments therein referred to that the judgment so obtained could be set aside other than in separate proceedings. They are not authority for the proposition that the Court can set aside its own decision."

Accordingly, at common law, the grounds upon which a final order may be impugned is limited in the first instance to correcting, so to speak, the final judgment to ensure that it accurately reflected the adjudication and intention of the court which made it and, in the exercise of a wider and more fundamental jurisdiction to setting aside an order on the grounds that it had been obtained by fraud. Even the setting aside of a final order on the grounds of fraud is not a true exception to the principle of finality, as Murphy J. stated in *Tassan Din v. Banco Ambrosiano S.P.A.*. With reference to Article 34.4.6 of the Constitution which provides that "the decision of the Supreme Court shall in all cases be final and conclusive", Murphy J. stated at p. 580 "the acceptance by Barrington J. in *Waite v. House of Spring Gardens Ltd.* that a decision of the Supreme Court can be set aside for fraud … does not truly represent an exception

to this constitutional provision. An order obtained by fraud is a mere nullity." (at pp 227-228).

130. In *Lynch v. O'Flynn*, the High Court (Kelly J.) observed that, "[i]t is in the public interest and in the interest of parties to litigation that once a final and binding determination of issues has been made, such issues should not be re-opened, save in most extraordinary circumstances such as fraud affecting such proceedings."

131. The defendants submit that the judgment of the High Court (Murphy J.) in *Bula v. Crowley* merits particular emphasis, not least because the four plaintiffs in that case are also plaintiffs in the proceedings herein. The facts of that case are of particular relevance to the present application. The defendants point out that Mr. Wymes and others attempted in that case precisely what they have attempted to do in the present case which, they submit, represents an abuse of the process of the court. In that case, the fifth, sixth and seventh named defendants (the bank defendants) sought, *inter alia*: (a) an order dismissing the plaintiffs' claim as constituting an abuse of the process of the court; and, (b) further or alternatively, and order pursuant to Order 19, rule 28 of the Rules of the Superior Courts, dismissing the proceedings on the grounds that they were frivolous and vexatious and/or disclosed no reasonable cause of action against the fifth, sixth and seventh named defendants. Murphy J. granted an order dismissing the proceedings as constituting an abuse of the process of the court. Significantly, Murphy J. also granted an order restraining the plaintiffs and each of them from instituting any further proceedings against the defendants in that case without the prior leave of the court.

132. The reliefs claimed by the plaintiffs in *Bula v. Crowley* were as follows:

"As against all the defendants:

(1) Damages for negligence

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

As against the receiver, the first named defendant:

(3) Damages for breach of duty

(4) Damages for misrepresentation and/or negligent misstatements

(5) Damages for breach of contract.

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

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

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

As against KPMG, the second defendant:

(9) Damages for breach of contract.

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

As against the receiver and Tara Mines Limited:

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

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

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

As against Tara Mines:

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

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

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

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

(17) Damages for breach of duty and negligence.

As against all defendants excepting Outokumpu Oy:

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

As against Navan Mining plc. (Navan):

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

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

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

133. The statement of claim, extending to 52 pages, was delivered over a year after the plenary summons was issued. The reliefs claimed therein were extended to include a claim against all defendants for a declaration that certain judgments and orders of the Supreme Court and the High Court [in proceedings entitled *In The Matter of Bula Limited (in Receivership) and In The Matter of the Companies Acts, 1963-2001 and In The Matter of an Application by Laurence Crowley, the Receiver of Bula Limited,* and related proceedings (Supreme Court Appeal No. 185/02 and the High Court, 2002/108 COS)] had been obtained in circumstances of concealment of information and/or fraud and ought to be set aside. The claims against Outokumpu Oy and NBFC and UIB were recast as against NBFC, UIB and Allied Irish Investment Bank Limited (AIIB) only. The claims for damages for unlawful interference and obstructions against all defendants, excepting Outokumpu Oy, were omitted. In their place the following relief was sought:

"A declaration that the judgments and orders of the Supreme Court and High Court in the proceedings entitled: The High Court 1986/6624P, *Bula Limited (In Receivership), Bula Holdings, Thomas C. Roche, Thomas J. Roche, Richard Wood and Michael Wymes v. Laurence Crowley, NBFC, UIB, AIIB, McKay and Schnellman Limited* having been obtained in circumstances of concealment of information from the court and/or fraud ought to be set aside."

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

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

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

135. In addressing the plaintiffs' "wholly unparticularised" claims of fraud, Murphy J. referred to Order 19, rule 5(2) of the Rules and continued as follows:

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

…

The parties are, of course, aware of the necessity of pleading fraud with particularity. The court has already been addressed on the implication of the first allegation of fraud as against the receiver and on submissions that there are no unchanged circumstances, nor indeed substance, in relation to such an allegation being imputed to the receiver at this, or at any stage.

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

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

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

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

It is clear that there are very limited grounds upon which a decision, a final decision of the Superior Courts can be set aside, apart from appeal. Keane J., as he then was, in *Kenny v. T.C.D.*(Unreported, Supreme Court, 20th June 2003), referred to *L.P. v. L.P.* [2002] 1 I.R. 219 where he summed up the effect of the relevant judgments in relation to which a final order may be impugned. Apart from the slip rule, the only ground upon which a final and conclusive decision of the High Court could be set aside is in separate proceedings on the grounds of fraud."

136. Having referred to the judgment in *Tassan Din v. Banco Ambrosiano S.P.A.*, Murphy J. endorsed the following passage from the speech of Lord Wilberforce in the *Ampthill Peerage* Case:

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

137. Ultimately, Murphy J. concluded that the proceedings constituted an abuse of the process of the court. It is appropriate to set out the reasoning of the court in this regard in *extenso*:

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

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

What is being sought without proper factual foundation is the setting aside of the decision of the High Court and Supreme Court in relation to the consent for the sale to Tara, which consent is a declaration by the court that the receiver is entitled to sell or, at the very least, that the conditions allowing the sale, pursuant to s. 316A, have been complied with by the receiver, and the decision of the High Court and the Supreme Court in the banks litigation.

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

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

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

The court finds that the evidence referred to in Mr. Wymes' affidavits relating to a conflict of interest/Navan involvement is, in any event, not sufficient to ground any claim for fraud.

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

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

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

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

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

12.11 In an application such as this, there is a distinction to be made between: (a) pleadings with particulars with dates and items if necessary; (b) reasonable prospect as evidenced by the replying affidavits, and (c) distinct proof.

Many of the allegations are inappropriately pleaded; others are pleaded without particulars and the remainder lack any reasonable prospect. (see *Ampthill, Tassan Din* and *L.P. v. M.P.*).

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

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

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

12.13 Emphasis was made on the absence of discovery. Discovery was refused in relation to this issue by Barr J. and the High Court in the s. 316A proceedings refused an adjournment for the purpose of an application for discovery. There is no

indication whether, and to what extent the latter or, indeed any future application, differed from the application which was refused. The court, at this stage, has to weigh up unparticularised and vague supposition on the one side, with the averments of Mr. Hayes and Mr. Tully. The dates referred to in their affidavits would seem to be within the "material times" referred to by Mr. Wymes in para. 14.06.

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

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

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

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

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

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

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

Thirdly, even allowing for the ever-increasing complexity of assertions and the extent to which they have been dealt with in previous litigation, it is unclear to what purpose the plaintiffs reiterate them in greater detail. Moreover, the assertions prior to the contract of sale of 9th May, 2001, were clearly known before the s. 316A application. Mr. Wymes says they related to discussions with him, that he was informed by Mr. Calver and Mr. Frizelle that Mr. Calver had told him he had spoken to an executive of Outokumpu and that both Mr. Calver and Mr. Frizelle informed him of the contemplated non-competitive "link ups" among other matters. The three assertions relating to post-contract on 31st May, June and August of 2001, seemingly confirmed what he already knew prior to the contract.

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

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

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

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

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

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

The court is, however, satisfied that even though not appropriately particularised, all of the plaintiffs' claims have already

been dealt with by the courts and are *res judicata*.

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

138. The defendants submit that the facts in *Bula v. Crowley* are very similar to those in the present case and provide ample basis for dismissing the plaintiffs' claims in these proceedings.

Proceedings commenced for an improper purpose

139. The defendants have also submitted that these proceedings have been commenced for an improper purpose and ought to be dismissed or struck out on that basis. It is clear that the jurisdiction to strike out proceedings on the basis that they constitute an abuse of the process of the court encompasses proceedings commenced for an improper purpose. In this context, the judgments of the High Court in *Quinn Group Limited v. An Bord Pleanala* [2001] 1 I.R.505 and *Riordan v. Ireland (No. 5)* are instructive. In *Quinn*, the court acceded to an application by the sixth named defendant for an order dismissing the plaintiff's claim on the ground that it was commenced for an improper purpose and constituted an abuse of the process of the courts. In addressing the jurisdiction of the court to strike out proceedings which constitute an abuse of the process of the court, Quirke J. referred to the following passage from the judgment of Scarman LJ. in *Goldsmith v Sperrings Ltd* [1977] 1 DPP 478 at 498:

"In the instant proceedings, the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out 'to effect an object not within the scope of the process'; *Grainger v Hill* (1838) 4 Bing (N.C.) 212 per Tindal CJ at 221. In a phrase, the plaintiff's purpose has to be shown to be not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought; see In *re Majory*.[1955]Ch 600 at 623."

140. Quirke J. also referred to the following passage from the judgment of Stuart-Smith L.J. in *Lonrho plc. v Fayed (No 5)* [1993] 1 DPP 1489:

"If an action is not brought bona fide for the purpose of obtaining the relief but for some ulterior or collateral purpose, it may be struck out as an abuse of the process of the court. The time of the court should not be wasted on such matters, and other litigants should not have to wait till they are disposed of. It may be that the trial judge will conclude that this is the case here; in which case he can dismiss the action then. But for the court to strike it out on this basis at this stage it must be clear that this is the case."

141. Quirke J. continued as follows:

"It follows that in considering applications such as that which has been made by the sixth defendant herein, the courts may (and perhaps should) take into account the interests of *bona fide* litigants who, regrettably must often compete for comparatively scarce court time in order to have matters which are often of considerable importance litigated to a conclusion. It is, in my judgment, desirable and consistent with proper public policy that the interests of such *bona fide* litigants should have precedence over the rights of parties who wish to litigate points of law which sometimes (as in the instant case) are wholly or largely technical in nature and often flimsy in substance for purposes unconnected with public benefit and wholly concerned with private gain.

In the instant case, I am satisfied on the evidence that the proceedings herein have been commenced by the plaintiff in a cynical, calculated and unscrupulous fashion for the sole purpose of seeking a commercial advantage over its competitor, the sixth defendant. I am further satisfied that the purpose for which these proceedings have been instituted has not been to redress a wrong or a grievance, to right an injustice, to ensure compliance by the sixth defendant and by other potential developers with provisions of national or international legislation, to ensure the proper and lawful planning and development of any particular area or for any other commendable, environmental or civic spirited reason. I am quite satisfied that the sole purpose of the proceedings is to inflict damage upon its competitor, the sixth defendant and I am satisfied that that is an improper purpose for the commencement of proceedings and an improper use of the process of the courts."

142. Quirke J. acknowledged that the jurisdiction of the court was discretionary in nature and that it had to be exercised with great caution in the early stage of the proceedings. He also stated that the courts will be particularly reluctant to exercise this discretion where clear evidence of unlawful activity on the part of the party sought to be restrained has been adduced. However, in the circumstances of the *Quinn* case, he concluded that the proceedings had been commenced, "for the purpose of achieving an end which is improper in itself and that they therefore comprise an abuse of the process of the courts". Accordingly, he dismissed the plaintiff's claim against the defendant.

143. In *Riordan v. Ireland (No. 5)*, the High Court (Ó Caoimh J.) refused the plaintiff leave to commence proceedings on the grounds that, *inter alia*, "[the] proposed action if brought would be brought for an improper purpose, namely, the harassment and oppression of the parties to the earlier proceedings and not for the purpose of the assertion of legitimate rights."

144. Application of the legal principles

Having regard to the legal principles surveyed above, the defendants submitted that the evidence before the court plainly and incontrovertibly establishes that the proceedings herein have no reasonable prospects of success, are bound to fail and are an abuse of the process of the court. In this context, they have sought to highlight the following:

(i) The defendants say that their view that the plaintiffs do not have any reasonable cause of action is strongly reinforced, and the extent to which the proceedings involve an abuse of the process of the court is brought into sharp focus, when the allegations in the statement of claim are considered in the light of all of the sworn evidence before the court including, in particular, each of the affidavits sworn by and on behalf of the defendants.

(ii) In *Riordan v. Ireland (No. 5)*, Ó Caoimh J. set out a number of factors which he considered tended to show that a proceeding is vexatious and an abuse of process. I quoted the relevant section of Ó Caoimh J's judgment earlier at paragraph 95 above. The defendants say it is clear from the evidence before the court that *each* of those factors is applicable to the plaintiffs and their claims herein against the defendants.

(iii) The defendants say it is manifest that, in these proceedings, the plaintiffs are attempting to litigate matters which have already been determined by courts of competent jurisdiction and that the proceedings are, therefore, a serious

abuse of process and contrary to the requirements of the public interest. They submit that four of the plaintiffs herein similarly sought to abuse the process of the court in *Bula v. Crowley* and, on that basis, their claims in that case were dismissed by the court. It is contended that the parallels between that case and the proceedings herein are striking in a number of respects. The defendants point to what they characterise as "the failed tactics employed in that case of making allegations relating to the concealment of information and/or fraud, failures to make proper disclosure of facts to the courts, misleading the courts and attempting to have final orders of the High Court and Supreme Court set aside on the foregoing grounds". They further submit that it is also notable and revealing that, as in this case, the plaintiffs' allegations in *Bula v. Crowley* were, as the court found, "wholly unparticularised" and based on "conjecture and supposition".

(iv) The defendants say that it is clear from the authorities that "anyone wishing to attack a judgment on the grounds of fraud must make his allegation with full particularity, must when he states it be prepared to prove what he alleges and ultimately must strictly prove it". In particular, it is necessary to plead and prove that there was "conscious and deliberate dishonesty" and the relief(s) that were obtained as a result thereof. They contend that as in *Bula v. Crowley*, the plaintiffs have wholly failed to plead their case with the necessary degree of particularity. Echoing Murphy J. in Bula v. Crowley, they submit that many of the allegations are inappropriately pleaded; others are pleaded without particulars and the remainder lack any reasonable prospect.

(v) The defendants say that it is a striking and, for present purposes, very significant feature of the claims which the plaintiffs seek to make herein that, despite the time which the plaintiffs have had to assemble information to support their allegations (which includes a period of over nine months since the proceedings herein were issued), the motion which was issued herein on behalf of the defendants on 11th July 2007, and the length of the affidavits sworn by Mr. Wymes in response to that motion, the plaintiffs have been unable to point to any evidence in support of their allegations and those allegations remain vague and wholly unparticularised. The defendants submit that those allegations must be considered in the light of the specific and emphatic sworn evidence by and on behalf of the defendants including, in particular, the two affidavits sworn by Mr. Roche. In this context, they also highlight the following paragraph from the fourth affidavit of Isabel Foley:

> "At paragraph 52 [of his second affidavit herein], Mr. Wymes states that he is not in a position to confirm conclusively where the ownership of Crindle rested in 1997. He later says (at paragraph 60) that what transpired at the meetings in the offices of Arthur Cox on 15th January 2001, was 'highly evidential, if not confirmatory', that Crindle was not in the sole beneficial ownership of Mr. Roche Junior. Apart altogether from the equivocal nature of this statement, which is based solely on unwarranted inference and supposition, it does not deal at all with the key point as to whether the beneficial ownership of Crindle was misrepresented to the court at any stage. This is to be weighed against the unequivocal sworn statements, by myself and Mr. Roche, that the ownership of Crindle was as stated to the court at all material times and, in particular, in 1993, 1994, 1997 and 1998, that prior to 13th January 1995, Crindle was beneficially owned by Thomas J. Roche, his father and Conor Holdings Limited, and that since 13th January 1995, has been in the sole beneficial ownership of Thomas J. Roche, and the sworn statement on affidavit of Mr. Hegarty that he never made a statement to Mr. Wymes that Crindle was not in the beneficial ownership of Roche or that there was any non-Roche ownership of Crindle."

The defendants say that, as in *Bula and Crowley*, the court here "has to weigh up unparticularised and vague supposition on the one side with the averments of [the defendants]". They submit that, as in that case, the court should prefer "the clear evidence" of Mr. Roche to the "supposition" and "conjecture" of Mr. Wymes. They also seek to remind the court that in the Tara Proceedings, this court (Lynch J.) made the following finding in respect of Mr. Wymes:

> "Having listened to and observed Mr. Wymes in the witness box for 146 days, and throughout the trial, I have come to the conclusion that he is an unreliable witness."

(vi) The defendants say that it is clear from the evidence before the court that these proceedings were commenced for an improper purpose, namely, to avoid the consequences of the orders for costs which were made in August 2002. The court was reminded of the evidence of Ms. Foley at paragraph 59 of her affidavit of the 11th of July 2007, wherein she states:

> "It is noted that Mr. Ryan states that the proceedings were 'in contemplation' and apparently the subject of advices 'long before' the issue and service of the Certificate of Taxation. It is difficult to see if that were the case why the proceedings were not commenced 'long before' the issue and service of the Certificate of Taxation and why the plaintiffs chose to wait more than six years from the date on which it is alleged they obtained information concerning the alleged non-Roche beneficial ownership of Crindle in January 2001. Contrary to what is suggested by Mr. Ryan, I believe the correspondence which I have referred to earlier, and indeed the focus of the reliefs sought in these proceedings, clearly show that the object of the proceedings is an attempt to avoid the obligation to discharge the cost[s] ordered by Murphy J. on 2nd August 2002, in respect of the orders made in the 1993 section 205 proceedings in respect of which costs were reserved in 1993 and 1994. Furthermore, if the proceedings were in contemplation 'long before' the Certificate of Taxation, it is difficult to see why those issues were not raised at the time of the application before Murphy J. in July/August 2002, at the time of the taxation in December 2006/January 2007 or indeed at any time in the intervening period."

In this context, the defendants also highlight the reliefs sought in paragraphs 7 and 8 of the prayer for relief in the statement of claim which, they contend, provide a true indication of the motivation of the plaintiffs in these proceedings. They submit that for these reasons also, the proceedings constitute a clear and serious abuse of the process of the court.

145. In conclusion, the defendants submit that, against this background and having regard to the totality of the evidence which is before the court, the court should grant an order dismissing or, alternatively, striking out the plaintiffs' claims against the defendants on the grounds that these proceedings have no reasonable prospects of success, are bound to fail and are an abuse of the process of the court.

146. The third major heading:

Matters which are unnecessary and/or scandalous and tending to prejudice, embarrass or delay the fair trial of the action.

147. Introduction
The third / alternative relief claimed is an order pursuant to Order 19, rule 27 of the Rules of the Superior Courts striking out the statement of claim in its entirety on the grounds that it contains matters which are unnecessary and/or scandalous and which may tend to prejudice, embarrass or delay the fair trial of the action.

148. The jurisdiction to strike out an indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action
Order 19, rule 27 of the Rules provides as follows:

> "The court may, at any stage of the proceedings, order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client."

149. The defendants have referred the court to *Riordan v. Hamilton and Others,* (Unreported, Supreme Court, 9th October, 2002) wherein Murray J stated:

> "…as regards the order striking out the statement of claim, the learned High Court judge correctly stated that '*The purpose of pleadings is to convey what the nature of the action is. Pleadings should not be used as an opportunity of placing unnecessary or scandalous matters on the record of the court, or as an opportunity of disseminating such matters when they have nothing to do with any dispute between the parties. Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the relief claimed.*'

150. In his judgment in the High Court in the same case Smyth J. had added:

> "The authority for that statement is *Christie v Christie*.(1873) Ch 499. However, any unnecessary matter containing any imputation such as ... may be struck out as scandalous." (see *Murray v Epsom Local Board* (1897) I Ch 35). In the pleadings here, there are allegations which are totally unnecessary to any reasonably balanced or strongly held views of a plaintiff as against a defendant. The imputations of character made here would leave a person open to litigation in defamation had they not been accorded the protection of privilege of the court. The pleadings here, it seems to me, are of the character. I need not go through them but merely highlight further what I would regard as contemptuous language and scandalous allegations. It is perfectly in order for a litigant to say that a defendant has acted in a particular way. However, what has been imputed here is not only over the top, but is being deliberately used for the purpose of trying to advance some view which does not accord with fairness, common sense, justice, constitutional right or with any modicum of decency."

151. Application of the legal principles
The defendants submit that the statement of claim manifestly contains matters which are unnecessary and/or scandalous and which may tend to prejudice, embarrass or delay the fair trial of the action and, for these reasons, the court should strike out the statement of claim in its entirety.

152. The fourth major heading:

Non compliance with Order 19, rule 5

153. Introduction
The fourth / alternative relief sought by the defendants is an order pursuant to the inherent jurisdiction of the court dismissing the plaintiffs' claims against the defendants on the grounds that the statement of claim fails to comply with the provisions of Order 19, rule 5 of the Rules of the Superior Courts, in that it purports to make allegations of (*inter alia*) fraud, deceit, misrepresentation, conspiracy, breach of fiduciary duty and other matters in respect of which particulars are necessary without setting out the necessary particulars.

154. Jurisdiction to strike out claims for failure to comply with Order 19, rule 5 of the Rules of the Superior Courts
Order 19, rule 5 of the Rules of the Superior Courts provides, *inter alia*, as follows:

> "(1) In all cases alleging a wrong within the meaning of the Civil Liability Acts, 1961 and 1964, particulars of such wrong, any personal injuries suffered and any items of special damage shall be set out in the statement of claim or counterclaim and particulars of any contributory negligence shall be set out in the defence.
>
> (2) In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings."

155. The plaintiffs contend that in *Keaney v. Sullivan* (Unreported, High Court, 16th January, 2007), Finlay Geoghegan J. had to consider an application for an order pursuant to the inherent jurisdiction of the court striking out claims of fraud, deceit, misrepresentation and/or undue influence against certain defendants by reason of the plaintiff's failure to particularise the allegations in the statement of claim as required by Order 19, rule 5(2) of the Rules.

Giving judgmentm Finlay Geoghegan J. observed that the express requirement of Order 19, rule 5(2) of the Rules was "in accordance with the long established practice of the courts to require allegations of fraud to be pleaded with particularity". In this context, Finlay Geoghegan J. adopted the following extract from Delaney and McGrath, *Civil Procedure in the Superior Courts* (2nd Ed.) as an accurate statement of the law:

> "Allegations of Fraud:
>
> 5.38 The long established practice of the courts has been to require allegations of fraud to be pleaded with

particularity. Rule 5(2) now provides that, in all cases alleging misrepresentation, fraud, breach of trust, wilful or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) must be set out in the pleadings. The rationale of this requirement was explained by Barrington J. in *Hanly v. Finnerty* in relation to a plea of undue influence as follows:

> 'Undue influence is a plea similar to fraud and it appears to me that it would be quite unfair to require a party against whom a plea of undue influence is made to go into court without any inkling of the allegations of fact on which the plea of undue influence rests. Because of the seriousness of the plea counsel will not lightly put his name to a pleading containing a plea of undue influence so that his solicitor will usually have in his possession some allegations of fact which justify the raising of the plea or at least excuse the plea from being irresponsible.'

5.39 Thus, a party is not only required to expressly plead fraud or misrepresentation etc., but he must also give full particulars of its nature and how it is alleged to have occurred. However, it should be noted that, given the difficulty of proving fraudulent intention, malice or any other condition of the mind (which is often a matter of inference to be drawn from the proven facts), it suffices to allege this as a fact without setting out the circumstances from which the same is to be inferred."

156. The court also adopted as a correct statement of the pleading requirements in this jurisdiction the following passage from Bullen and Leake (12th Ed, 1975) in relation to the equivalent English rule:

> "The Statement of Claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrance v. Lord Norreys* (1890) 15 App Cas 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy v. Garrett* (1878) 7 Ch D. 473 at 489). 'General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice'…
>
> Particulars. Full particulars of any misrepresentation relied on must be given in the pleading (R.S.C., Ord. 18, r. 12 (1) (a)). The Statement of Claim must show the nature and extent of each alleged misrepresentation (*Newport Dry Dock & Engineering Co. v. Paynter* (1886) 34 Ch D 88) and it must contain particulars showing by whom and to whom it was made, and whether orally or in writing, and if in writing, identifying the relevant document (*Seligmann v. Young* [1884] W.N. 93). Where the plaintiff alleged that the entries made by the defendant in certain books were false, he was ordered in the first place to give particulars of entries which he alleged to be false, and subsequently to give further particulars showing in what respects each of these entries was false (*Newport Dry Dock & Engineering Co. v. Paynter*, ante); "all the accounts rendered to the plaintiff are untrue" did not comply with an order for further particulars of fraud (*Harbord v. Monk* (1878) 38 L.T. 411).
>
> Moreover, the necessary particulars of the fraudulent intention relied on must also be contained in the pleading (R.S.C., Ord. 18, r. 12 (1) (b)), and accordingly, the pleadings must set out the facts, matters and circumstances relied on to show that the party charged had or was activated by a fraudulent intention."

157. Finlay Geoghegan J. stated that "the above special requirements in relation to the particulars required where there are pleas of fraud, misrepresentation, undue influence or deceit must also be considered in the context of the general rules as to what ought to be included in a statement of claim". Finlay Geoghegan J. stated that this was well summarised in the following extract from Delaney and McGrath: (2nd Ed. at para 5.74 to 5.75):

> "5.74 The statement of claim must set out the plaintiff's claim and the relief sought with clarity and particularity in accordance with the principles of pleading set out above. Thus, it should state specifically the relief which the plaintiff claims, either simply or in the alternative. It is important to note that a cause of action must be pleaded in the main body of the statement of claim and it will not be regarded as having been pleaded if it is merely mentioned in the prayer for relief at the end.
>
> 5.75 If the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they should be stated, so far as possible, separately and distinctly. It should be noted that there is nothing to prevent the plaintiff setting up two or more separate claims and claiming relief in respect thereto in the alternative."

158. Having considered the pleas at issue, Finlay Geoghegan J. concluded that the fourth named defendant was entitled to an order striking out all of the claims that alleged deceit, fraud, misrepresentation or undue influence against him save to the extent that such claims were included in the claims in certain unobjectionable paragraphs of the statement of claim.

159. Application of the legal principles
The defendants submit that the statement of claim herein plainly fails to comply with the requirements of Order 19, rule 5 of the Rules of the Superior Courts. Although it purports to make allegations of (*inter alia*) fraud, deceit, misrepresentation, conspiracy, breach of fiduciary duty and other matters in respect of which particulars are necessary, it wholly fails to set the particulars necessary to make such allegations. Accordingly, the defendants submit that the court should dismiss the plaintiffs' claims against them.

The Respondents' (i.e. The Plaintiffs') Submissions
160. Although structured differently to the defendants' submissions, the plaintiffs' submissions are also presented under specific major headings, and so I will adopt the same procedure in reviewing these as for the defendants' submissions

161. The first major heading:

Preliminary Issues

162. The plaintiffs raise several preliminary issues. In the introduction to their written submissions it is firmly asserted that the statement of claim was adequately pleaded in as much as it set forth and particularised:

> (i) The documents which were concerned,

(ii) The dates on which such documents were sworn (being affidavits)

[This is presumed to refer to Mr Roches's affidavits],

(iii) The party or parties swearing the affidavits wherein the misrepresentations complained of, and said to have been relied upon, were set out.

163. The plaintiffs further argue that if the defendants required further particulars, there were two options open to them in that regard. They could have raised a notice for particulars, which they have not done. They could also seek discovery, which they have not done.

164. With respect to the point about raising a notice for particulars, the court was referred to the judgment of MacMenamin J in *Byrne v RTE*, (Unreported, High Court, 3rd March, 2006), and in particular to the following quotation:

> "It is axiomatic that the function of pleadings is to define the issues between the parties so that both the plaintiff and the defendant know what is the other side's case and thus everyone, counsel, judge and jury are able to focus on the real nature of the dispute. Although to some it may seem a startling observation we can see no reason why libel litigation should be immune from ordinary pleading rules."

The plaintiffs also rely on the judgment of Hamilton J. (as he then was) in the libel case of *Cooney v. Browne* [1985] I.R. 185 to the following effect:

> "The ordinary use and purpose of particulars is to define the issues between parties to any action or proceeding and thereby to prevent either party from being taken by surprise and incidentally to limit as much as possible the length and expense of trials. Each party is entitled to know precisely what case the other party is going to make at the trial and be entitled to prepare accordingly."

Giving judgment on appeal, Henchy J. stated:

> "The object of particulars is to enable the party asking for them to know what case he has to meet at the trial and so to save unnecessary expense, and avoid allowing parties to be taken by surprise."

165. With respect to the possibility of discovery, the provisions of the Rules of the Superior Courts (No 2) (Discovery) 1999, S.I. No 233 of 1999, were opened in detail. This instrument inserted a new Order 31, rule 12 in substitution for the then existing Order 31 rule 12 of the Rules of the Superior Courts. The gravamen of the submission in this regard was that it has been open to the defendants at any time to seek particular documents, in the words of the Order 31, rule 12 '*relating to any matter in question therein*' pursuant to these provisions. They have failed to do so.

166. The plaintiffs submit that in circumstances where they have not raised a notice for particulars, or sought discovery, the defendants' motion has been brought prematurely. It is further submitted that the defendants are seeking to pre-empt proper procedures and have not availed of the more efficient and cost-effective alternatives open to them.

167. The second major heading:

Reference relief number 1'The Plaintiffs' Statement of Claim discloses no reasonable cause of action and/or is shown by the pleadings to be frivolous and vexatious'

168 Requirements in respect of a statement of claim

The plaintiffs point out that there are specific requirements with respect to the manner in which a statement of claim is to be drafted, specifically in relation to content. The provisions of Order 19, rule 3 set out with precision the requirements to be set forth in a statement of claim:

> "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel they shall be signed by him; and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person."

The provisions of Order 19, rule 5 set out with precision requirements to be set forth in a statement of claim in respect of misrepresentation, fraud, breach of trust, wilful default or undue influence as follows:

> 'In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings.'

The provisions of Order 19, rule 21 set out with precision requirements to be set forth in a statement of claim in respect of misrepresentation, fraud, breach of trust, wilful default or undue influence as follows:

> "Wherever the contents of any document are material it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material."

The provisions of Order 19, rule 21 set out with precision requirements to be set forth in a statement of claim in respect of misrepresentation, fraud, breach of trust, wilful default or undue influence as follows:-

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

169. The plaintiffs quote Order 19, rules 27 and 28, respectively and then seek to address specific components of the strike out

powers specified therein.

170. Reasonable Cause of Action
The plaintiffs referred the court at some length to the case of M*offit v Agriculture Credit Corporation Plc.* [2007] IEHC 245, with respect to the court's power to strike out in circumstances where it is satisfied that a pleading fails to disclose a reasonable cause of action. The plaintiffs particularly rely upon the following lengthy quotation from the judgment of Clark J:

> "The law
>
> '3.1 The jurisdiction of this court to dismiss proceedings which are bound to fail has been clear since the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306. The relevant principles are well settled. It is a jurisdiction to be exercised sparingly and the onus rests upon the defendant to satisfy the court that there is no prospect of success. In addition the court should not judge the matter on a narrow or technical basis referable to the pleadings. It is well settled that, even if the proceedings as currently drafted might have no chance of success, the proceedings ought not be dismissed if, by an appropriate amendment, the proceedings could be recast in a fashion which would give rise to a prospect of success. (See the judgments of McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425 and Fennelly J. in *Lawlor v. Ross* (Unreported, Supreme Court, Fennelly J., 22nd November, 2001 at p. 10).
>
> 3.2 The principal basis advanced on behalf of ACC for suggesting that these proceedings are bound to fail is that the same issues have already been determined. In that context, it is important to identify the scope of the doctrine of res judicata. It is well settled that in order for a plea of *res judicata* to succeed, the judgment upon which it is founded must be a final and conclusive judgment on the merits. There is no doubt but that the judgment of Murphy J. is a final judgment (at least since any prospect of an appeal from that judgment has disappeared by virtue of the order of the Supreme Court made in October 2006). There is, however, an issue between the parties as to whether it can properly be said that the judgment of Murphy J. in the previous proceedings is a judgment on the merits. In that context, it is clear that the dismissal of proceedings for want of prosecution (see for example *People v. Evans* [1969] 2 Ch. 255) or by virtue of prematurity (see *Barber v. McQuaig* [1900] 31 OR 593) do not give rise to a bar to future proceedings.
>
> 3.3 In that context, there is an issue as to whether a dismissal on the basis that proceedings are frivolous and vexatious or are an abuse of process amounts to a judgment on the merits. Counsel for Mr. Moffitt places reliance on the decision of this court in *Dalton v. Flynn* (Unreported, High Court, Laffoy J., 20th May, 2004). One of the issues which arose in that case was as to whether a counterclaim brought in previous proceedings amounted to a bar to the prosecution of the case under consideration. To that counterclaim an objection was raised in the Reply and Defence to Counterclaim to the effect that the matters raised were 'unnecessary, scandalous and designed to embarrass and furthermore were frivolous and vexatious'. Following an application in that regard, Finnegan P. ordered the counterclaim to be struck out. It is not clear from the judgment of Laffoy J. as to the precise basis upon which the counterclaim was struck out. Laffoy J. concluded, at p. 12, that the counterclaim in the previous proceedings was not adjudicated on the merits and that, therefore, it could not be a bar to the prosecution of the proceedings with which she was concerned.
>
> 3.4 It is suggested, therefore, that *Dalton v. Flynn* is authority for the proposition that a dismissal on the basis that an action is bound to fail does not amount to a dismissal on the merits such as would give rise to a bar to the same issue being raised again. There may well be cases where the fact that proceedings are dismissed as being frivolous or vexatious may not give rise to a bar to further proceedings. However, it seems to me that where proceedings are dismissed as being bound to fail following on from a hearing in which the court considered the merits of the case for the purposes of determining whether the case had any chance of success, then it follows that fresh proceedings on the same basis are barred. In order to determine that proceedings are bound to fail, the court must enter into a consideration of the merits. Indeed, it does so on the basis of allowing the benefit of the doubt concerning any factual or complex legal issues to be determined in favour of the plaintiff. The proceedings will only be dismissed, under *Barry v. Buckley*, where the court is satisfied that there is no prospect of success on the merits. Such a hearing can, in my view, be properly described as a hearing on the merits.
>
> 3.5 There may, of course, be other reasons why proceedings may be dismissed as being frivolous or vexatious which would not require the court to go fully into the merits of the case. In those circumstances a dismissal may not amount to a bar to future proceedings.
>
> 3.6 I am, therefore, satisfied that where a court enters into a consideration of the merits of a plaintiff's claim on a motion to dismiss as being bound to fail and comes to the conclusion, on the merits, that the proceedings are bound to fail, that it follows that the same proceedings cannot be recommenced without infringing the doctrine of res judicata.
>
> 3.7 A second, and analogous, issue arises in relation to the so called rule in *Henderson v. Henderson* (1843) 3 Hare 100. This rule is concerned with a similar, although different, situation than that to which the doctrine of *res judicata* strictly speaking applies. Res judicata per se applies where the matter sought to be litigated has already been decided by a court of competent jurisdiction. *Res judicata* can relate to the cause of action (which may involve a consideration of whether two separate causes of action arise) or an individual issue (issue estoppel). In the latter case, the issue sought to be litigated must be identical to the issue decided in the previous proceedings. (See, for example, *Royal Bank of Ireland v. O'Rourke* (1962) I.R. 159). The rule in *Henderson v. Henderson*, on the other hand, applies where a new issue is raised which was not, therefore, decided in the previous proceedings but is one which the court determines could and should have been brought forward in the previous proceedings.
>
> 3.8 The importance of the distinction lies in the consequences. If a matter is *res judicata* then, in the absence of a defence to the application of the doctrine such as *fraud*, the availability of fresh evidence in respect of issue estoppel only, estoppel, or other special cases, the plea will necessarily succeed.
>
> 3.9 On the other hand, where reliance is placed on the rule in *Henderson v. Henderson* to the effect that it would be an abuse of process to now allow the party concerned to raise a different issue which could have been raised in the original proceedings, it is well settled that the court adopts a more broad based approach. In *A.A. v. The Medical Council* [2003] 4 I.R. 302 Hardiman J. (speaking for the Supreme Court) noted the principle to the effect

> that a party to previous litigation is bound not only by matters actually raised, but matters which ought properly have been raised but were not. However, Hardiman J. went on to determine that a rule or principle so described could not, in its nature, be applied in an automatic or unconsidered fashion and that the public interest in the efficient conduct of litigation did not render the raising of a defence in later proceedings necessarily abusive where in all the circumstances the party was not misusing or abusing the process of the court.
>
> 3.10 The distinction is, therefore, quite material. If the actual matter in issue has been determined in previous proceedings, then in the absence of a specific reason, such as estoppel or *fraud*, it will not be open to the party who lost to re-litigate that question. However, where a party seeks to make a new and different case which, it might be said, ought to have been included in the earlier proceedings, the court enjoys a wider discretion to consider what the result should be having regard to the competing interests of justice.
>
> 3.11 I propose applying those principles to the facts of this case."

171. The court has some difficulty in understanding the point that the plaintiffs are making in reliance on the Moffitt decision. If anything, it seems to support the defendants' case. The lengthy quotation just recited is reproduced in full *three times* within the plaintiffs' written submissions, initially at paragraph 15 and again at paragraph 25, and again at paragraph 72 thereof. However, on the first occasion, there is no explanation at all of its supposed relevance to the plaintiff's case. On the second occasion, it is quoted following an assertion that the defendants (in their criticism of paragraph 34 of the statement of claim) "have ignored the jurisprudence of the court in that the court is obliged to accept the facts as pleaded in the statement of claim and then look to the inference arising from the facts presented". The quotation from *Moffit* is then set out, presumably as representing "the jurisprudence of the court". However, the proposition relied upon does not represent the ratio of *Moffit* and it is hard to see the specific relevance of *Moffit* to the point then being made. Following the third occasion on which the same lengthy quotation is reproduced the submissions merely state (at paragraph 73):

> "In the premise, it is submitted that the proceedings herein should be permitted to proceed in compliance with the rules and requirements of the Rules of the Superior Courts and in the premise that the reliefs sought by the applicants are to be denied."

When Mr Kilty S.C., referred to the Moffitt case in oral submissions on day three of the hearing, the court asked him (transcript d3, p 10), "How do you say that applies in the present case?" In response, Mr Kilty said that Mr. Wymes "takes strong issue with the position of the defendants that this matter has already been determined or is frivolous and vexatious". Accordingly, he (Counsel) said he was "laying the foundation in this judgment and then going to identify the facts arising from Mr. Wymes' affidavit". The court indicated its acquiescence and Mr. Kilty then opened a further lengthy passage from Clark J.'s judgment. He, having done so, the following exchange occurred: (transcript d3, p16):

> Mr Kilty "I referred you in *extenso* to that judgment, Judge, for a number of reasons. Clarke J. has adopted a very practical and workmanlike approach as to where we go from here, which quite clearly shortens the time and the costs by the development of an issue paper….."
>
> Judge: "Are you saying the *Henderson v. Henderson* principle applies in this case?"
>
> Mr Kilty: "No, I am not. And if it does, there are many grounds for the exception and the flexibility that Hardiman J. has mentioned in *AA v. The Medical Council*. I say very definitely, Judge, that the matters that are in issue in this case are not *res judicata* and neither are they scandalous or vexatious."

Thereafter, although the affidavits were extensively referred to, there was no further mention of the *Moffit* case. While the court appreciates clearly that the plaintiffs reject any suggestion that the issues in the present case have already been determined or that the proceedings are scandalous or vexatious, it still does not understand what particular statement of principle is to be distilled from the judgment in *Moffit* and applied to the facts of this case so as to advance the proposition that the plaintiffs' pleadings ought not to be struck out for failing to disclose a reasonable cause of action.

172. *'Frivolous and Vexatious'*
The plaintiffs say that the allegations of misrepresentation, fraud, breach of trust, wilful default or undue influence as pleaded in the statement of claim are demonstrably of a serious nature and, as particularised therein, are such as to have caused the plaintiffs considerable loss, damage inconvenience and expense. It is pointed out that fraud constitutes the tort of *deceit*. That said, the plaintiffs acknowledge that the Supreme Court has held that fraud must be pleaded with the most particularity; it would not be inferred from the circumstances pleaded at all events if those circumstances were consistent with innocence: *Superwood Holdings plc v Sun Alliance* [1995] 3 IR 303.

173. The plaintiffs maintain that in addition to being a tort, a deception perpetrated with fraudulent intent may also be a criminal offence. For example, they say, it is an offence to *obtain services* from another by any deception, where the person dishonestly obtains services with the intention of making a gain for himself or another, or of causing loss to another: *Criminal Justice (Theft and Fraud Offences) Act 2001 s.7*. In that regard, a person *obtains services* from another where the other is induced to confer a benefit on some person by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for *(ibid s.7(2)).*

Similarly, they say, it is an offence to induce another dishonestly by any deception to do or refrain from doing an act with a view to making a gain or causing loss.

The plaintiffs' point, as understood by the court, is that their statement of claim, far from being frivolous and vexatious, alleges specific and definite causes of action. Moreover, many of the matters pleaded are capable of giving rise to both civil and criminal liability.

174. The plaintiffs draw the court's attention to the case of *Aer Rianta v Ryanair* [2004] 1 I.R. 506 dealing with how a court should approach an application to strike out proceedings pursuant to Order 19, rule 28, and in particular the following quotation from the judgment of Denham J:

> "The fact that a purely factual affidavit was filed with the motion does not undermine or enhance the jurisdiction of the court, which is that under Order 19, rule 28. The affidavit sets out the factual situation as to the pleadings and does not seek to advance any matter outside the pleadings."

> "The jurisdiction under O. 19 r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction. However, if a court is convinced that a claim will fail such pleadings will be struck out."
>
> "An application by way of motion under Order 19, rule 28 is decided on the assumption that the statements in the Statement of Claim are true and will be proved at the trial. Thus this motion relates to and is grounded on the Statement of Claim of the plaintiff."

175. The plaintiffs also refer to *Adams & Ors. v The Minister for Justice* [2001] 2 I.L.R.M 452, and point out that a distinction was drawn between judicial review proceedings and plenary proceedings in this particular case. They say that the conclusions of Hardiman J. cited by the defendants in support of their case must be "taken in context for a proper understanding of the matter that was dealt with in these proceedings, it concerned the deportation of an individual and the respondent was the State, the emphasis given by the learned Judge therefore emphasized in context" that:

> "Mr. Iordache has been given leave to seek an order compelling the Irish state to institute proceedings against Romania. I consider that no Court has jurisdiction to direct any such order to the executive. In the words of Article 29.4.1 of the Constitution:-
>
> > 'The Executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government'.
>
> In my view, it would fly in the face of this unambiguous provision if the Courts were to take it upon themselves to issue a mandatory order to the State, the Government or the Attorney General directing the institution of proceedings under the Convention on Human Rights against another sovereign State. To do so would be very specifically to usurp a function which the Constitution reserves to the Government. Any such step would be gravely subversive of the constitutional separation of powers and it would be wrong of the Court to contemplate it.
>
> The applicants' proceedings are of the baldest kind, without any basis in law or fact, and, with the exception of Mr. Iordache's case, without any attempt to rely on proved individual circumstances either in relation to attacking the decisions taken in respect of the individual applicants or on the broader aspects of their claim. In my view they are all frivolous, vexatious and doomed to fail: indeed they are scarcely recognisable as legal proceedings at all."

With regard to this submission, the court would comment that the plaintiffs appear to misunderstand the decision in the *Adams* case. The *Adams* case involved two Romanian nationals (Adams and Iordache) who had arrived in Ireland and had claimed asylum on the basis of persecution and breaches of their human rights in Romania. They also claimed that they had a well founded fear of persecution should they be returned to Romania. Their claims for asylum were examined by the appropriate bodies and were rejected. As they were then facing deportation, they initiated judicial review proceedings in the High Court claiming diverse reliefs directed towards having their deportations halted. Included amongst the reliefs claimed was, in each case respectively, a claim an order of *mandamus* compelling the State to institute proceedings against Romania under the European Convention on Human Rights. The applicants were successful in obtaining leave to apply for judicial review. The named respondents were effectively the State. The State then brought motions on notice before the High Court seeking to set aside the leave that had been granted in both proceedings, and also seeking to have both sets of proceedings struck out as disclosing no reasonable cause of action. The State was successful in both motions and the both applicants then appealed to the Supreme Court.

The Supreme Court had to consider three principal issues: (1) Whether the High Court or the Supreme Court on appeal has jurisdiction to set aside an order giving leave to apply for judicial review. (2) Whether the High Court was correct in holding that the respondents were not obliged to have regard to the European Convention on Human Rights, and (3) whether the proceedings brought by Adams and Iordache disclosed any reasonable cause of action against the respondents, were frivolous or vexatious or doomed to fail.

Now, of course, distinctions may be drawn between judicial review proceedings and plenary proceedings. One important distinction is that the leave application in judicial review proceedings operates as a "filtering process" with respect to matters pleaded, and this was certainly alluded to in *Adams*. However, the *ratio decidendi* of the decision (insofar as it is relevant to the present case), was (i) that it was not appropriate for the respondents to appeal to the Supreme Court against orders made *ex parte* by the High Court, granting leave to apply for judicial review; (ii) that, nevertheless, as parties affected by the orders granting leave to apply for judicial review, the respondents must be entitled to impugn the validity of such orders; (iii) that the High Court did have jurisdiction set aside the leave previously granted *ex parte* if it was satisfied on inter partes argument that the leave was one which plainly should not have been granted, and (iv) that the High Court had been justified in the circumstances of this particular case in setting aside leave and striking out the proceedings as they disclosed no reasonable cause of action and were frivolous, vexatious and doomed to fail. (The Supreme Court also held that as the European Convention on Human Rights was not part of Irish domestic law, and Irish Courts had no part in its enforcement, it was not therefore necessary to consider the arguments made concerning the Convention.)

That was the context in which Hardiman J.'s remarks are to be understood. Moreover, notwithstanding assertions to the contrary in the plaintiffs' submissions, it does not seem to this court that the quotations from *Adams* relied upon by the defendants are being taken out of context, or are being inappropriately applied, or in any way misapplied.

176. Further, with reference to *Fay v Tegral Pipes Limited*, the plaintiffs again say that there must be an appreciation of the context, and they point to the following extract from the judgment of Mr. Justice McCracken:

> "In addition to this provision [Order 19, rule 28], the court has an inherent jurisdiction to stay, strike-out or dismiss pleadings where no cause of action is disclosed or if the claim is frivolous or vexatious. This was explained by Costello J in *Barry v. Buckley* [1981] IR 306 at page 308 where he said:-
>
> > 'But, apart from Order 19, the court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see *Wylie's Judicature Acts* (1906) at pp 34-37 and the Supreme Court Practice (1979), at para 18/19/10. The principles on which the court exercises this jurisdiction are well established. Basically, its jurisdiction exists to ensure that an abuse of the process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley LJ. in *Goodson v. Grierson* at p 765.
> >
> > This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice.'

> In this case, the court had before it affidavit evidence setting out the background facts and the issues in relation to each of the claims made. In the present case, to a large extent, the facts themselves are not in issue; what is in issue is the interpretation of those facts and the question of whether the facts can give rise to any cause of action. Indeed, if any facts are in issue, that is not a matter which can be determined on a motion of this nature, and the court must assume that the facts as pleaded or deposed to on behalf of the plaintiff are correct. However, the court is entitled to examine the inferences which the plaintiff seeks to draw from the facts in ascertaining whether those facts can give rise to any reasonable cause of action.
>
> While the words "frivolous and vexatious" are frequently used in relation to applications such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes, and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second, and equally important, purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."

If the court understands the plaintiff's point correctly, the judgment of McCracken J., taken in context, emphasises that the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Accordingly, on a motion of this sort the court must assume that the facts as pleaded or deposed to on behalf of the Plaintiff are correct, and is concerned only with the interpretation of those facts and the question of whether the facts as pleaded can give rise to any cause of action.

177. The third major heading:

Reference Relief No 2. 'That ..... the proceedings have no reasonable prospects of success and are bound to fail and are an abuse of process'

178. The plaintiffs have referred the court to *Kilcoyne v Westport Textiles* (Unreported, High Court, Finnegan P, 26th July 2006). They have again reiterated the importance of context in motions of this type. They say that the court must assume that the facts are as pleaded, but can consider what inferences are to be drawn, both from the facts pleaded and from the conduct of the parties in the circumstances. They contend that the *Kilcoyne* case well illustrates the importance of context and point to the following quotation from the President's judgment:

> "In deciding to strike out the plaintiff's claim, I am influenced by the circumstance that the plaintiff has had from the 11th January 2005, to date, to deliver an appropriate amended statement of claim setting out in appropriate terms his claim against the second named defendant but has failed to do so: the amended statement of claim delivered, is totally defective in that it fails to disclose the true basis of the claim against the second named defendant. The defendant in this case has to meet a claim which arose more than 25 years ago and in these circumstances the onus on the plaintiff, having joined the second named defendant, was to proceed promptly and he has not done so".

179. A significant portion of the plaintiffs' submissions are devoted to addressing criticisms of specific paragraphs or pleas within the statement of claim with reference to the particular legal principles identified by the plaintiffs as all important, namely, that that the court must assume that the facts are as pleaded, although it can consider what inferences are to be drawn.

180. With reference to para. 18 of the statement of claim, the plaintiffs say the following:

> "[Paragraph 18 of the] Statement of Claim sets forth as a fact that the representations made by the first second and fourth named defendants (in their various capacities) represented to the plaintiffs and averred to this Honourable Court that they owned and controlled or alternatively were entitled directly or indirectly to the entire beneficial interest of the shares in the second named defendant, the subject of the oppression proceedings. The said representations and averments were also made on behalf of Crindle Investments (Crindle). These representations and averments were accepted as being true and relied upon, and which are now known to be false and or were known to be false by the defendants at the time made, or alternatively became false but were not corrected at the earliest opportunity, or at all, thereby seriously and fatally misleading this Honourable Court and the plaintiffs herein, whereby this Honourable Court was induced into error to make decisions it would not or might not have made had it not been kept out of the true facts.'

Once again, the complaint that the defendants have not sought particulars is reiterated.

181. The plaintiffs deal with criticisms of paragraphs 19, 20 and 21 of the statement of claim in the following way:

> [Paragraphs 19, 20 and 21 are first recited in full and it is then stated:] "The applicants have chosen, for their own reasons, to ignore the issues raised in paragraphs 22 - 26 of the statement of claim which, *inter alia*, include confirmation that the applicants herein had transferred, or agreed to transfer, their shareholdings to an undisclosed and covert third party or parties, and to act in the oppression proceedings on behalf of those parties. The said assertions of fact detailed in the said paragraphs by the plaintiffs in the statement of claim substantiate the allegations of ' acting in concert', 'conspiracy' and [have been] selectively ignored by the applicants."

182. Criticisms of paragraphs 27, 33 and 34 of the statement of claim in the following way:

> [Paragraphs 27, 33 and 34 are first recited in full and it is then stated:] "The applicants, by ignoring the context in which the paragraphs are presented, and by the selection of paragraphs thereby ignore what precedes and succeeds the matters pleaded. Paragraph 33 commences with the phrase '*In the premises*' all of which the applicants have chosen to ignore and in respect of paragraph [34] those selectively referred to by the applicants are two paragraphs under the heading '*Particulars of Claim*'.
>
> This approach of selectively using extracts to support the applicant's submissions is further emphasized by the applicant's reference to *Adams v Minister for Justice* whereas what is described in that particular matter by the learned judge would not with any stretch of the imagination be relevant in respect of the proceedings before this court – the correct reference being:" [The quotation referred to at para 175 above is then recited.]

> "The applicants in their submissions refer to a total of 4 paragraphs extracted from the statement of claim to support assertions of pleadings being *'so fundamentally flawed in so many respects and that the statement of claim does not disclose any reasonable cause of action: the plaintiffs do not have any reasonable cause of action and their allegations are demonstrably devoid of merit'*
>
> The applicants continue in the same paragraph stating that, '*The foregoing is exemplified by the wholly unparticularised nature of the plaintiffs' multifarious allegations in relation to the ownership of Crindle, the fact that those allegations are fundamental to the Plaintiffs entire case and the fact that those allegations are demonstrably false and without substance*'.

The applicants have at no time advanced any particulars and or other evidence or argument in support of their spurious allegations as to the veracity of the pleadings as set forth in the statement of claim rather they have instead decided the issue independently of what is pleaded with particularity in the Statement of Claim and have drawn conclusions to support their position.

> Again, the applicants have ignored the jurisprudence of the court in that the court is obliged to accept the facts as pleaded in the statement of claim and then look to the inference arising from the facts presented - the applicants are now seeking judgement from the court in respect of the facts pleaded and doing so on the basis of a simple selection of four extracts from the statement of claim. Again, the position has been set forth by Mr. Justice Clarke in *Moffit v Agriculture Credit Corporation PLC* and is repeated hereunder given the significance of this decision in the context of the matter now before this Honourable Court:"

[The quotation referred to at para 170 above is then recited.]

183. The plaintiffs have further referred the court to Mr. Justice Fennelly's judgment in *Lawlor v. Ross & Others* [2001] IESC 110, and the following passage is particularly relied upon:

> "The legal principles to be applied on an application of this kind are not in dispute. As explained by reference to the judgment of Costello J. in *Barry v Buckley*, at page 308, it must be clear that the plaintiff's claim must fail". The learned judge continued:
>
> > "The jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irreparable wrong to the defendant."

This court, in *Sun Fat Chan v. Osseous Ltd*. [1992] I.R. 425 abstained from ruling on the existence of this kind of jurisdiction, as its existence was not disputed. McCarthy J. commented that the, "High Court should be slow to entertain an application of this kind." In reality, the court exercised the jurisdiction.

Hardiman J, giving judgment in *Supermacs Ireland Limited and another v Katesan (Naas) Limited and another* [2000] I.R. 273, dismissing an application of the kind at present before the court, approved a dictum of Keane J, as he then was, in *Lac Minerals v Chevron Corporation* (High Court, unreported, 6th August 1993):

> "The judge acceding to an application to dismiss must be confident that no matter what may arise on discovery or at the trial of the action the course of the action will be resolved in a manner fatal to the plaintiff's contention."

Hardiman J. commented that this was a very difficult hurdle to clear. This, and the similar remarks of Costello and McCarthy JJ., underline the strictness of the applicable test, namely that the plaintiff's claim is bound to fail. In *Barry v Buckley*, Costello J. found that the test had been satisfied: the offer to contract and all relevant solicitors' correspondence were expressed to be "*subject to contract*." In *Sun Fat Chan v. Osseous Ltd*, this court approved the decision of the High Court to dismiss a claim for specific performance of an agreement for the sale of land, which was expressly subject to a condition as to the obtaining of planning permission. The High Court had rejected the plaintiff's argument that the condition in question was for the benefit of the purchaser only. This court agreed. *Supermacs Ireland Limited* also concerned a contract for the sale of land. This court, in declining to exercise the jurisdiction, rejected a number of submissions regarding the enforceability of contracts where certain terms had not been agreed. These included the claimed need to have an agreement on the amount of a deposit, on the completion date and on the obtaining of vacant possession. Clearly, all of these points were debatable, to say the least. The exercise of the jurisdiction to strike out could not have been justified. Where the claim is, as postulated by the test, clearly bound to fail, the court will normally exercise its jurisdiction to strike out.

It is also clear, and I accept, that the court should be willing to assume in favour of the plaintiff that an appropriate amendment of the pleadings might save his case. Furthermore, it may be difficult to succeed on such a motion based only on the absence of a note or memorandum which satisfies the requirements of the Statute of Frauds. Something may be found on discovery. It is different where, as in *Barry v Buckley*, there is a note but it is headed "*subject to contract*."

184. The plaintiffs place particular reliance on the requirement that a judge, before acceding to an application to dismiss, "must be confident that no matter what may arise on discovery or at the trial of the action" the action will fail.

185. The plaintiffs have also sought to emphasise that the jurisdiction must be exercised with great caution, sparingly, and only in clear cases and have cited dicta to that effect, which I accept, from various judgments. This jurisprudence is reviewed in the judgment of Clark J. in *Price & Anor v. Keenaghan Developments Limited* [2007] IEHC 190, to which I have been referred by the plaintiffs. The plaintiffs' submissions contain a lengthy quotation from this judgment but it is unnecessary for me to quote it in turn as I have accepted without reservation the proposition in support of which it was proffered.

186. At paragraph 36 of their written submissions the plaintiffs assert:

> "The applicants have laid great emphasis on the judgments in both the Supreme and High Courts in the various cases brought by Denis Riordan and have sought by implication to associate the proceedings herein with those of Denis Riordan. Any such submissions are by their nature spurious and without foundation and are therefore absolutely rejected."

This court is of the view that the suggestion that the defendants have sought to associate the plaintiffs' proceedings with those of Denis Riordan is manifestly groundless. They have done no such thing. Rather, quite properly, they have sought to draw this court's attention to relevant judicial statements of principle as contained in the various "Riordan" judgments, and to rely on those in support of their case that the plaintiffs' proceedings ought to be struck out on the basis that they have no reasonable prospects of success and are bound to fail and/or are an abuse of process.

187. The fourth major heading:

The doctrine of *Res Judicata* and the Jurisdiction to set aside final Orders

188. The plaintiffs' submissions under this heading point out, *inter alia*, that the doctrine of *res judicata* reflects the maxim *interest rei publicae ut sit finis litium* (qv) and ensures that a litigant cannot engage in an abuse of process by challenging in other proceedings, *a final decision* against him made by a court of competent jurisdiction in previous proceedings in which he has had a full opportunity of contesting that decision. See *Belton v Carlow Co Council* [1997 SC] 2 ILRM 405.

189. The plaintiffs stress the need for a final decision and have cited the same passage from the judgment of Keane J. in *Dublin Corporation v. The Building and Allied Trade Union* [1996] 1 I.R. 468 as is relied upon by the defendants (previously quoted at paragraph 119 above).

190. The court was further referred to the same lengthy extract from the judgment of Murray J. in the Supreme Court in the case of *P .v. P.* [2001] IESC 76, cited by the defendants (and quoted at paragraph 129 above). In addition the following additional passage was quoted:

> "Constitutional considerations:
>
> > However, the position may be otherwise when a final order is challenged on the grounds that the judicial proceedings in question were gravely flawed by reason of a fundamental breach of fair procedures and justice guaranteed by the Constitution."

This question was expressly addressed by this court in the judgments of Denham, J. and Barron, J. in the Greendale case with whom both Barrington, J. and Lynch, J. agreed.

In that case Denham, J. (at page 542) held that:

> "The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final Order. However, it would only arise in exceptional circumstances. The burden on the Applicants to establish that exceptional circumstances exist is heavy."

Later in her judgment she concluded:

> "It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or Order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."

Barron, J. in the same case held (at 545) that there may be circumstances which might exclude the application of Article 34.4.6 concerning the finality of decisions of the Supreme Court. He then added:

> "Nevertheless, where such circumstances exist, this court must be free to so declare and to indicate the procedures whereby such circumstances should be investigated. Not to be able to do so would conflict with the guarantee of fair procedures enshrined in the Constitution.
>
> The Constitution requires the decisions of this court to be final and conclusive for good reason. There must be certainty in the administration of justice. Uncertainty can lead to injustice. In my view, these provisions must prevail unless there has been a clear breach of the principles of natural justice to which the Applicant has not acquiesced and such that a failure to take steps to remedy such breach would, in the eyes of right minded citizens damage the authority of this court. I believe that the jurisprudence of this court has always been to this effect."

In the *Bula* case McGuinness, J. expressing here agreement with those judgments stated:

> "In summary, whilst very great weight must be given to the principle of finality and to the provisions of Article 34.4.6., this court has a jurisdiction to review and if necessary to set aside what appears to have been a final order in circumstances where the Court's duty to protect constitutional rights or natural justice arises. Such circumstances can only be to a high degree exceptional, and a very heavy onus lies on the Applicants to establish that such exceptional circumstances exist."

The judgments of this court in *Greendale* and *Bula* establish that a final order may be rescinded or varied where a party discharges the burden of establishing that there are exceptional circumstances showing that such a remedy is necessitated by the interests of constitutional justice. If such a remedy is available in respect of final orders of the Supreme Court it must be available for final and unappealable orders of the High Court.

It follows from the foregoing judgments that the courts have an inherent jurisdiction to amend or set aside a final order in exceptional circumstances where those circumstances clearly establish that there has been a fundamental denial of justice through no fault of the parties concerned and where no other remedy, such as an appeal, is available to those parties. Since the court is not in this case concerned with the merits of the contention made on behalf of the appellant that there was such a denial of justice in this case, I do not propose to consider further the criteria according to which such a jurisdiction may be involved. I would, however, just add that such exceptional circumstances could not include rulings made in final instance by a court concerning such matters as the admissibility in evidence even if they have implications for the manner in which a party was allowed to present its case.

Rulings on questions of law and procedure are a matter for judicial appreciation and discretion which are inherent in judicial proceedings and are properly governed by the principle of finality in courts of last instance. Otherwise, I confine myself to saying that the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous

going to the very root of the fair and constitutional administration of justice. In order to emphasise that the remedy is confined to such matters it may be appropriate to recall the observations of Lord Simon in *The Ampthill Peerage* [1977] AC 547 cited with approval by Murphy, J. in *Tasson Din -v- Banco Ambrosiano* (cited above)

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

191. The plaintiffs contend that a similar approach to that of Murray J. was adopted by Clark J in the *Moffit* case.

192. In paragraphs 45 to 48 inclusive of their written submissions, the plaintiffs proffer an analysis of the *Bula v Crowley* case and suggest that the issues in that case were different to those in the present case. They point out that the issues in that case "were legal, did not address a claim for damages on the merits and the parties were different". At paragraph 49 they assert:

> "It is respectively submitted that the facts of *Bula v Buckley* …
>
> (The Court presumes there is a typographical error here and that the intended reference is to *Bula v. Crowley*)
>
> ….are distinct from and separate to the matters now before the Honourable Court, the parties are different, the issues litigated were legal issues , the facts as set forth in the Statement of Claim were not in fact dealt with on the merits and did not in fact give rise to a final determination on the merits. For all of these reasons and the reasons set forth in this part of these submissions this particular aspect of the applicants' submissions are to be ignored, especially where they have sought to adduce new evidence of facts which are not otherwise available to the court and which have no relevance to these proceedings… ."

193. The fifth major heading:

Proceedings commenced for an improper purpose

194. The plaintiffs submit that it is for the defendants to show that the plaintiffs have commenced proceedings for an improper purpose, and cite in support of that the judgment in *Goldsmith v Sperrings Ltd.* [1977] 1 DPP 478.

195. They submit that the following interpretations of 'improper purpose' in the commencement of proceedings have been used by the courts:

> i) 'an ulterior motive, seeks a collateral advantage for himself beyond what the law offers' – *Goldsmith v Sperrings Ltd* [1977] 1 DPP 478 at 498
>
> ii) 'to effect an object not within the scope of the process' (see *Goldsmith* ante)
>
> iii) Interests of *bona fide* litigants should have precedence over the rights of parties who wish to litigate points of law which sometimes are wholly or largely technical in nature and often flimsy in substance for purposes unconnected with public benefit and wholly concerned with private gain' (Quirke J. in *Lonrho plc v Fayed (No. 5)* [1993] 1 DPP 1489)
>
> iv) 'a cynical, calculated and unscrupulous fashion for the sole purpose of seeking a commercial advantage over its competitor' (Quirke J in *Lonrho plc v Fayed (No. 5)* [1993] 1 DPP 1489)
>
> v) ' the harassment and oppression of the parties to the earlier proceedings and not for the purpose of the assessment of legitimate rights' (*Riordan v Ireland (No. 5)* [2001] 4 IR 463)

The plaintiffs complain that the defendants' assertions that the plaintiffs do not have any reasonable cause of action are made without reference to any of the above listed criteria. The plaintiffs then seek to address the defendants' specific allegations, which, ostensibly, have been formulated with reference to criteria listed by Ó Caoimh J in *Riordan –v- Ireland (No 5)* as tending to show that a proceeding is vexatious. With reference to the first criterion, it is reiterated that the plaintiffs join issue with the defendants contention that the proceedings concern an issue (or indeed issues) already determined by the court. With respect to the second criterion they assert their belief that they will be successful in prosecuting their claim(s), and with respect to the third criterion, that they have a legitimate right to pursue the defendants for damages. With respect to the fourth criterion they say that it is demonstrably not the case that they have caused issues to be rolled forward into subsequent actions and to be repeated and supplemented. Somewhat disingenuously, there is an attempt to sidestep Ó Caoimh's fifth criterion, namely, that there has been a failure to pay the costs of unsuccessful proceedings, with the assertion "no submissions have been made in this respect". On the contrary, this court has been given to understand that the defendants are very definitely making the case that one of the improper purposes for which the present proceedings are being maintained is an attempt by the plaintiffs to forestall the execution of the Costs Order made against them by Murphy J. in respect of the 1993 Section 205 proceedings, which costs have not been paid to date by the plaintiffs.

Finally, in respect of Ó Caoimh J's sixth criterion, namely, the persistent taking of unsuccessful appeals from judicial decisions, it is asserted that "this does not arise in these proceedings and therefore has no relevance." This court would beg to differ. The plaintiffs (or most of them) have been enthusiastic litigants over the years and for the most part with little success. The Tara proceedings were unsuccessful. The Bank proceedings were unsuccessful. The *Bula v. Crowley* proceedings were unsuccessful. The 1993 Section 205 proceedings were unsuccessful both at first instance and on appeal. The 1997 Section 205 proceedings were unsuccessful both at first instance and on appeal. It is true and acknowledged that the *Wymes v Crindle* injunction proceedings in 1997 (which concerned a discrete sub-issue to do with the extent of the fiduciary duty owed by the directors and shareholders of certain of the companies involved in the main litigation) were successful, both at first instance and on appeal, but the plaintiffs' dominant track record reflects a largely unsuccessful litigation history. While the court is very conscious of Mr. Justice Roderick

Murphy 's warning about the danger of new claims being smothered by reason of old claims having been rejected, it considers that it is, nevertheless, entitled to have regard to the plaintiffs' litigation history.

196. The plaintiffs complain that the defendants have sought to characterize Mr. Wymes in a perjorative way and it is pointed out that in *Wymes v Crindle* Mr. Wymes was referred to "as an honourable man and essentially a credible witness." Insofar as the present motion is concerned, this court has not had an opportunity of evaluating Mr Wymes as a witness and both his integrity and his credibility are therefore to be taken for granted in the absence of evidence to the contrary. I should also say, in fairness to the defendants, that their complaint about Mr, Wymes, as the court understands it, is not that he is dishonourable but rather that throughout the protracted history of the Bula saga (and various proceedings arising in that context) he has exhibited a lack of judgment and objectivity; that for some time now his disputes with the R Group and others have developed into an obsession; and on account of this obsession he is either unwilling or unable to accept the outcome of battles long over and in which he was decisively defeated. Moreover, it is not his credibility that they seek to impugn but rather his reliability in as much as, in the defendants' perception, Mr. Wymes sees conspiracies everywhere on account of his obsession, though there be none, and unreasonably and unjustifiably is inclined to attribute sinister motives to the words and actions of the defendants (and their agents), though they be entirely benign. It is worth remarking that it was Mr. Wymes' reliability that was criticized by Lynch J. in his judgment in the Tara proceedings, rather than his credibility – see the quotation at paragraph 144 above.

197. The sixth major heading:

Matters alleged to be unnecessary and/or scandalous and tending to prejudice, embarrass or delay the fair trial of the action.

198. While accepting the authorities proffered by the defendants on this issue as appropriate, and that those authorities are succinctly reviewed in *Riordan v. Hamilton*, the plaintiffs contend that the defendants have quoted selectively from that judgment and they now seek to draw the attention of the court to the following additional passage from the judgment of Murray J. and place particular reliance upon it:

> 'The plaintiff has issued these proceedings because he is dissatisfied with the final judgments given by this court in proceedings in which he was a party and to which, it hardly needs to be said, the defendants were not a party. His dissatisfaction with having his claims in previous proceedings rejected by the court is often expressed in the pleadings in language which is intemperate and tendentious. One of the earlier findings of the court of which he complains in his Statement of Claim was that he "appears to take the view that those who act in the manner inconsistent with his interpretation of the Constitution are not only mistaken but corrupt."

Relying on this extract, the plaintiffs contend that defendants' reliance upon selective quotations from *Riordan v. Hamilton* in the present proceedings "reflects the fact that the applicants are seeking to associate the current proceedings with matters raised by individuals who provoked the courts and have abused the right of access to the courts for reasons other than those at the core of the matters being litigated, which in these proceedings are fraud, deceit, misrepresentation, conspiracy, negligence, breach of duty, including fiduciary duty and unlawful interference with the interests including economic interests of the plaintiffs, and obstruction and/or perversion of the course of justice." Now, as the parties are entitled to expect, this court has read in full all of the authorities cited by both sides in their respective submissions and frankly finds the suggestion that the defendants have been attempting in some way to hoodwink or manipulate the court by selectively quoting from the judgment in question to be preposterous. This court is completely satisfied that nothing of the sort has occurred or was attempted.

199. The seventh major heading:

Alleged non-compliance with Order 19 Rule 5

200. The plaintiffs accept that the leading authority is that cited by the defendants, namely the judgment of Finlay Geoghegan J in *Keaney v Sullivan*. Rules 3, 5, 21, 27 and 28 of Order 19 of the Rules of the Superior Courts are recited in paragraphs 67 to 71 of their submissions. This is followed by the statement that, "Again, it is submitted that the position in *Moffit v. ACC* sets out the position" and the lengthy quotation from that judgment, previously alluded to, is reproduced yet again Following the quotation the court is urged "that the proceedings herein should be permitted to proceed in compliance with the rules and requirements of the Rules of the Superior Courts and on the premise that the reliefs sought by the applicants are to be denied."

201. The defendants further submit that they are suing on substantial and *bona fides* causes of action, that there are serious and difficult questions of law involved in the action and that a cause of action based upon fraud, actual or constructive, is *bona fide* sued upon. The plaintiffs further submit that the court, "should look to the deliberate intentions of the plaintiffs in alleging "Fraud", where such accusations are made *bona fides* and with every intent of prosecuting such allegations to a conclusion". They say that in the circumstances the court should allow the matters in dispute to proceed to a plenary hearing.

Decision

202. Let me commence by saying that I accept that the law is accurately set out in the moving parties (i.e. the defendants') submissions to the court. In fact, there was no serious dispute as between the parties as to the law. Insofar as there were differences, they were as to the degree to which statements of principle made in the context of very specific factual circumstances could be given general application or applied in a different context. I have taken on board the plaintiffs concerns about context but I am nevertheless satisfied that the law as set out in the moving party's submissions has been set out fairly and comprehensively.

203. It is not for this court to attempt to resolve the extensive conflicts of fact disclosed in the affidavits filed on both sides. Indeed, it would be impossible to come to any firm view without a plenary hearing. In considering the evidence in the case I have been most conscious that the jurisdiction to strike out either the plaintiffs' pleadings, or, indeed, the proceedings themselves, either in whole or in part, is not to be exercised lightly. The right of access to the courts is to be preserved if at all possible and the proper and appropriate approach is therefore to allow the plaintiffs the benefit of any doubt in respect of factual or legal issues to be determined.

204. I have to consider whether or not, viewing the evidence available to the plaintiffs at its "high water mark" the claims pleaded in the plaintiffs' statement of claim, or any of them, could be sustained. What then is the evidence as to liability available to the plaintiffs?

205. The matter must be approached on the basis that the plaintiff is himself in a position to testify that on the 15th of January 2001 a Solicitor in Arthur Cox, the firm then representing Mr. Roche, gave him to believe that Crindle was not in the sole beneficial ownership of Mr. Roche. He can testify that in response to a question as to who actually owned Crindle, Mr. Hegarty said that he did not know and if he did know, he could not say. He can further testify that when pressed, Mr. Hegarty indicated a willingness to give "the gist" as to where the non- Roche beneficial ownership of Crindle did not lie. Further, he can, apparently, testify that Mr. Hegarty stated that if Mr. Wymes identified to him particular parties about whose possible involvement Mr. Wymes had concerns, he could give

Mr. Wymes some comfort. That much was "doable".

206. Further, as Mr. Peart was present during the meeting on the 15th of January 2001, the matter must be approached on the basis that the plaintiffs will be in a position to call Mr. Peart to give evidence in corroboration of Mr. Wymes' testimony, or at the very least in support of it.

207. Further, Mr. Wymes will be in a position to produce certain real evidence in support of his testimony, not least the Deed of Settlement containing the controversial clause 12.3; the six earlier drafts of that document; the notes, attendances and memoranda generated during the negotiations culminating in the seventh draft, and the course of correspondence between Mr. Peart and Mr. O'Dwyer subsequent to the critical meeting.

208. Though it is capable of a completely benign interpretation, Mr. Wymes may also be able to produce the Vincent & Beatty memo as a piece of circumstantial evidence in support of his claims. There may well be arguments that could be made as to its admissibility, as well as in respect of its relevance and weight, but for the moment Mr. Wymes is entitled to the benefit of the doubt on all of these issues.

209. Further, Mr. Wymes will have no difficulty in establishing the representations and testimony given by, or on behalf of, Mr. Roche concerning the nature and quality of his beneficial interest in Crindle in the course of the 1997 Section 205 proceedings.

210. However, the question must be asked as to where does all of this get him. At its high water mark the evidence could establish on the balance of probabilities that the representations alleged to have been made by Mr. Hegarty were, in fact, made. However, the available evidence would not be sufficient to prove the truth or accuracy of those representations. It would establish that Mr. Wymes may have had grounds for concern or suspicion but no more than that.

211. It is extremely significant that Mr. Wymes admits that he does not know, and cannot produce evidence as to, who is/are the ultimate beneficial owner(s) of Crindle. Yet he has accused Mr. Roche, in explicit terms, of having perjured himself in that regard. He has no evidence whatsoever that there is, or has at any material time been, a non-Roche component in the ownership of Crindle. He has no evidence of fraud. He has no actual evidence of misrepresentation, or of breach of fiduciary duty, or of deceit, or of conspiracy, or of an intention to pervert the course of justice. What he does have is a giant suspicion (and he must be given the benefit of the doubt as to whether on a forensic testing of his evidence that suspicion would ultimately be regarded as justified and reasonable), but there exists a seemingly insurmountable obstacle to him proving the truth of his suspicions.

212. In any case I am completely satisfied that even if Murphy J. had been appraised of a non-Roche component to Crindle, it is very unlikely to have affected the outcome of the 1997 Section 205 proceedings. Murphy J. was aware that the ownership of Crindle had been restructured so that the members were no longer exposed to unlimited liability. While exposure of the members to unlimited liability had significantly influenced his decisions in the 1993 Section 205 proceedings, his decision in the 1997 Section 205 proceedings was based on different considerations. He took the view that Crindle, regardless of the underlying ownership, was a legal person in its own right and as such was entitled to protection from oppression.

213. Having carefully considered the pleadings, the affidavits and the extensive submissions made by both sides I have decided, in all the circumstances, that this is an appropriate case in which to exercise my inherent jurisdiction to dismiss the entirety of the plaintiff's claims. I do so being of the view that the proceedings have no reasonable prospects of success on any of the grounds pleaded and are bound to fail.

214. Moreover, I am further satisfied the proceedings represent an attempt to abuse the process of the court in two particular respects, namely (a) that, despite the protestations of the plaintiffs to the contrary, they constitute a baseless attempt to re-open, and re-canvass the merits of, the 1997 s.205 proceedings, and (b) they are also an attempt to put off the day of reckoning with respect to the enforcement of the costs orders made in favour of the defendants in the 1993 s. 205 proceedings.

215. The court is also of the view that the pleadings in the proceedings are frivolous, vexatious and scandalous, and that the particularisation of the claims of fraud, deceit, conspiracy and attempted perversion of the course of justice is so inadequate and deficient that no reasonable cause of action is disclosed under those headings. Moreover, having considered the evidence available to the plaintiffs in support of their claims at its high water mark, so to speak, I am of the view that the evidential deficit is so significant that there are no alterations or amendments that could be made to the pleadings in order to render them acceptable so as to save the proceedings from dismissal. I am satisfied that on the available evidence these proceedings are fundamentally misconceived and are unjustifiable and that the only proper course is to dismiss them.