

THE HIGH COURT

[Record No. 13886P/2002]

BETWEEN

EAMONN KIRBY

PLAINTIFF

AND

GILES J. KENNEDY AND COMPANY SOLICITORS

DEFENDANT

Judgment of Mr. Justice Herbert delivered on the 17th day of February, 2005

1. In this action, the Plaintiff, litigating in person, claims damages for negligence, breach of duty and, breach of contract against his most recent Firm of Solicitors in connection with the compromise of an action in the Circuit Court on 31st October, 1996. This action bore the record number and title, 10901/96 Dublin Circuit, County of the City of Dublin, Between, *Dermot G. O'Donovan, Michael Sherry Adrian Frawley, practising as Dermot G. O'Donovan and Company v. Edmund Kirby*. In that compromised action the Plaintiff in the present proceedings was being sued by a Firm of Solicitors who had previously represented him in proceedings taken against him by the Trustee Savings Bank. That Firm of Solicitors had claimed an Order restraining the Plaintiff from picketing, watching or besetting their place of business, from intimidating their staff and clients and, from publishing defamatory material concerning their Firm. A full Defence and a Counterclaim had been delivered on behalf of the Plaintiff alleging negligence, breach of duty and, breach of contract on the part of that Firm of Solicitors as having allegedly failed to properly conduct his case against the Trustee Savings Bank, as a result of which he had allegedly suffered loss and damage. The long and complex history of the Plaintiff's interconnected litigation since the early part of the decade commencing 1980, is set out in a Judgment of His Honour Judge Patrick McCartan delivered on 25th May, 2001, in which he dismissed as an abuse of the court process and devoid of merit the Plaintiff's application in the above entitled Circuit Court Action to set aside the Order of the Circuit Court made by Consent on 31st October, 1996. An appeal by the Plaintiff to this Court from the decision of His Honour Judge McCartan was dismissed on or about 14th October, 2002 by O'Donovan, J.

2. The Plaintiff now alleges in the present proceedings that he was, "railroaded into consenting to an agreement with Mr. O'Donovan, [principal of the Firm of Dermot G. O'Donovan and Company], on evidence which was falsely produced by Mr. O'Donovan and which was never contested", by his Counsel. This evidence, he claims, was given under oath by Mr. O'Donovan at the hearing before Smyth, J., President of the Circuit Court on 31st October, 1996. It is common case between the parties that Mr. O'Donovan had stated in his evidence in-chief that his staff had received death threats, that is to say that if £10,000 (former currency), was not handed over to a person in a quarry at South Hill heads would be blown off. The Plaintiff alleges that the learned President of the Circuit Court then asked Mr. O'Donovan who he claimed was making these threats and Mr. O'Donovan turned in the witness box and pointed directly towards him and stated that he had no doubt but that it was Mr. Kirby. He alleges that the learned President of the Circuit Court then asked Mr. O'Donovan what was the present situation as regards these threats to the staff of Dermot G. O'Donovan and Company. He claims that Mr. O'Donovan replied that Detective Garda Dan Haugh and Inspector Rooney had sent a file to the Director of Public Prosecutions to have the Plaintiff prosecuted for making these threats. It was common case between the parties that the Plaintiff had at all times denied that he uttered or was in any manner responsible for or associated with these threats.

3. The Plaintiff contends that this evidence should have been objected to, challenged and, tested by Counsel retained on his behalf who should also have sought an adjournment of the case for the purpose of making inquiries as to what documents, if any, had been sent concerning him to the Director of Public Prosecutions by Detective Garda Haugh and Inspector Rooney. Instead, the Plaintiff alleges that his Solicitors and Counsel coerced him into a Settlement by telling him that the learned President of the Circuit Court was believing every word that Mr. O'Donovan was saying; that he had made up his mind in the matter; that he would dismiss his counterclaim and would award costs against him which would come to £30,000, (former currency), together with a similar sum for damages or would impose a heavy fine or even possibly commit him to prison for breach of his earlier undertaking to the Court.

4. In the case of *Cooke v. Cronin*, (unreported), Supreme Court, 14th July, 1999, it was stressed that in professional negligence cases there was a particular duty of care on a Plaintiff and on his or her legal advisors, to act reasonably and to ensure that the proceedings had an appropriate basis. In the course of his judgment, to which I have already adverted, His Honour Judge McCartan at pp. 24-26 held as follows:-

"From the history of his matter and the evidence heard by this Court on this motion, it may be concluded that the Defendant is determined to relentlessly pursue his differences with the Plaintiffs. His determination is driven by his own misconstruction of statements made or events occurring at various stages throughout the proceedings.

The two misconstructions of most significance are those that arose from the evidence given and recorded in the note of the original hearing. They have been referred to already in the summary of the evidence given in the hearing of this application, - the question of what arose anew at the meeting between the parties and *the existence of a file on the complaint arising from the threat to Ms. Conway* [the emphasis is mine]."

5. The Defendants in this action denied that the learned President of the Circuit Court had asked Mr. O'Donovan who he claimed was making the death threats to his staff and denied also that Mr. O'Donovan in reply had stated that he had no doubt that it was the Plaintiff and had pointed to him. They also denied that Smyth J., had asked Mr. O'Donovan what was the present situation as regards these threats to his staff and further denied that Mr. O'Donovan in reply had stated that Detective Garda Dan Haugh and Inspector Rooney had sent a file to the Director of Public Prosecutions to have the Plaintiff prosecuted for uttering these threats.

6. The Defendants in this case, - properly in my judgment, - did not seek to rely on the finding by His Honour Judge McCartan that the Plaintiff had misconstrued the evidence regarding the existence of a file on the complaint arising from the threat to Ms. Conway. There is compelling evidence on the face of his judgment that in dismissing the Plaintiff's application in the former proceedings, that is, Circuit Court Action Record Number 10901/96, His Honour Judge McCartan had adjudicated on the same claim as is now raised by the Plaintiff in the present proceedings that a file had been sent by Detective Garda Haugh and Inspector Rooney to the Director of Public Prosecutions to have the Plaintiff prosecuted for uttering the death threats. However, the parties in the present proceedings were not the same as those in the former proceedings, nor could the present Defendants properly be considered privies of the Defendants to the Counterclaim in the former action, so that no issue estoppel could properly arise. The Defendants in this action did not, - again in my judgment properly, - seek to rely on the finding of His Honour Judge McCartan in the former action, that is, Circuit Court Action Record Number 10901/96, where he held as follows at pp. 25 and 26 of his judgment speaking of the present Defendants:-

"The Defendant, [the Plaintiff in the present action], was represented throughout by competent lawyers who took every step necessary to fulfil his instructions and he came to the hearing of the action with clear and oft repeated advice that his prospects at hearing were bleak. The evidence given by the first named Plaintiff, [Mr. O'Donovan, Solicitor], at Court was damning and the Defendant, [the present Plaintiff], was given firm and clear advices to settle on terms that were in the context of the proceedings and their history generous in the extreme. He had the opportunity to reflect alone over the lunchtime on the advices, terms of settlement and his decision to accept, a decision he had indicated in writing to his lawyers. On returning to Court, he confirmed his acceptance of the settlement and was present when the presiding Judge made binding orders affecting him, based on the terms agreed. It is no argument acceptable or believable that he was railroaded into compromising his position. The advices were certainly given in a robust way, he was well able to comprehend what was being said, none of it was new or surprising to him and he was well capable of rejecting those advices, if he wished.

In short there is no basis in law or fact to enable the Court to accede to this application...", [to set aside the Settlement]

7. I consider it to be important for the purpose of this judgment to set out in full the first 4 paragraphs of the Defence delivered by the Defendants on 3rd January, 2003 which are as follows:-

"PRELIMINARY OBJECTION

1. The Plaintiff's claim is Statute Barred by virtue of the provisions of S. 11(1) of the Statute of Limitations Act, 1957 as amended by the Statute of Limitations (Amendment) Act, 1991.
2. The Plaintiff discloses no cause of action against the Defendant herein and the Defendant will apply to this Honourable Court exercising its inherent jurisdiction for an Order dismissing the Plaintiff's claim in due course.
3. Further or in the alternative, the Plaintiff's claim is frivolous and vexatious and the Defendant will call upon this Honourable Court to dismiss the Plaintiff's claim on the said grounds.
4. Without prejudice to the foregoing, it is denied that the Defendant its servants or agents were negligent and in breach of duty, and in breach of contract, in the manner as alleged or at all and each of the particulars of same are denied as if set out herein and traversed seriatim."

8. Section 11 of the Statute of Limitations, 1957, as amended by the Statute of Limitations (Amendment) Act, 1991, provides that actions based on simple contract and actions founded on tort, with certain exceptions, "shall not be brought after the expiration of six years from the date on which the cause of action accrued". For the purpose of this action the limitation period fixed by S. 3(1) of the Statute of Limitations (Amendment) Act, 1991 as regards a claim for damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty, (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or of any such provision), was three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured of the various matters set out in S. 2 of that Act.

9. In the case *Irish Equine Foundation Limited v. Robinson & Ors.* [1999] 2 I.R. 443, it was held by Geoghegan, J., (then of the High Court), at p. 444 that, "it is trite law that the limitation period commences on the date of the breach of contract and not on the date when the damage is caused. In other words, a breach of contract per se gives rise to a cause of action". In the present action the alleged breach of contract undoubtedly occurred on 31st October, 1996. The Plenary Summons was issued in this case on 31st October, 2002.

10. The claim founded in Tort encompasses a claim for, "severe personal upset and strain" causing stress and nervousness for which the plaintiff was obliged to attend his doctor and a specialist, this is therefore a claim for personal injuries caused by the alleged negligence and breach of duty. The Plaintiff also claims special damage in the sum of €80,000.00 for loss of business and home, €5,000.00 for travelling expenses, €200,000.00 for loss of business and, €2,000.00 for doctors accounts.

11. In the course of the hearing before me a Report or Certificate dated 16th June, 1999 from Dr. J.K. Holmes regarding the Plaintiff was admitted into evidence and stated as follows:-

"To Whom It May Concern...

This 48 year old man attended me on 1/6/1999. I found that he was suffering from depression and I prescribed anti-depressant tablets for him. He seems to be responding slowly to this treatment. It appears that this depression relates to ongoing stresses in his life, and ongoing problems with outstanding legal cases."

12. I find on the evidence and, in particular the letters dated 25th March, 1998, 4th December, 1998, 16th February, 1999 and, 29th March, 1999, from the plaintiff to Dermot G. O'Donovan and Company Solicitors: 27th July, 1998 to the then President of the High Court; an undated letter in 1998 to Judge Michael Moriarty, (as he then was), and, an undated letter in 1998 to the late Mr. Justice F. Spain, then President of the Circuit Court, all admitted into evidence, that the "ongoing problems with outstanding legal cases", to which Dr. Holmes makes reference could only relate to the plaintiff's various attempts to have the Consent Order of 31st October, 1996, set aside.

13. The negligence and breach of duty alleged against the defendants in the present action which consists in their allegedly having railroaded the plaintiff into consenting to an agreement with Mr. O'Donovan on evidence which was falsely produced by Mr. O'Donovan and which was never contested by the plaintiff's Counsel clearly relates to the events of the 31st October, 1996, only. The damage claimed in tort unrelated to the claim for personal injuries, clearly relates to the alleged failure on the part of the defendants to prosecute the plaintiff's claim against Dermot G. O'Donovan and Company and must also have been caused on 31st October, 1996. Accordingly, in my judgment the cause of action in respect of that damage accrued on 31st October, 1996, even if it was not until he received the letter dated 10th January, 1997, from Inspector Roe that the Plaintiff was informed that the writer could not find any record of any Garda inspection in which he was subject from April, 1995.

14. As regards the claim for damages for personal injuries for negligence and breach of duty, I find that the alleged negligence and the breach of duty must have occurred on 31st October, 1996. I find on the evidence that injury flowing from this alleged negligence and breach of duty was caused to the Plaintiff prior to 1st June, 1999, when he consulted Dr. Holmes. I find on the evidence that not later than 16th June, 1999, the date of the Medical Certificate or Report from Dr. Holmes to which I have already adverted, that the Plaintiff knew that he had suffered and was suffering from a significant injury attributable in whole or in part to what he alleges was

the negligence and breach of duty of the defendants in this action. I therefore find that the tort of negligence was completed on or before the 1st June, 1999, (see *Hegarty v. O'Loughran and Edwards* [1990] 1 I.R. 158, Supreme Court), and that the plaintiff had the necessary knowledge at the latest on the 16th June, 1999. In my judgment the limitation period, then three years, commenced to run with respect to the plaintiff's claim for personal injuries for negligence and breach of duty from 16th June, 1999 at the latest and, the limitation period of six years in respect of his other claim for damages in tort commenced to run from 31st October, 1996.

15. In the case of *McGuinness v. Armstrong Patents Limited* [1980] I.R. 289, McMahon, J., held as follows at p. 292 and 293 of the report:-

"When a period of time prescribed by a statute is defined as a period "from" a particular event, the well-settled rule of law in England is that the day of the event is excluded in computing the period. On that basis a period of three years from the accrual of a cause of action expires on the third anniversary of the accrual. The principle that the day on which a cause of action arises or an offence is committed is to be excluded in computing a limitation period thereafter was established by the decision of the divisional court in *Radcliffe v. Bartholomew*. In *Marren v. Dawson, Bentley and Company*, the principle was held by Havers, J. to apply to computing a period of three years from the date on which the cause of action accrued which is the time limited by s. 2, ss. 1 of the Limitation Act, 1939 as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954, for bringing an action for damages for negligence causing personal injuries; that decision was approved by the Court of Appeal in *Pritam v. S. Russell and Sons*.

16. In answer to these authorities counsel for the third defendant relied on the Interpretation Act, 1937, which provides:-

'11 - The following provisions shall apply and have effect in relation to the construction of every Act of the Oireachtas and every instrument made wholly or partly under any such Act, that is to say...

(h) Periods of time. Where a period of time is expressed to begin or to be reckoned from a particular day, that day shall, unless the contrary intention appears, to be deemed to be included in such period, and where a period of time is expressed to end or to be reckoned to a particular day, that day shall, unless the contrary intention appears, be deemed to be included in such period'.

I would gladly adopt any construction of this provision which would achieve uniformity in the laws of England and of Ireland in computing periods of time, but I do not see how the provisions can be construed in that way. The period of time specified in s. 11, ss. 2(b), of the Act of 1957 is expressed to be a period "from the date on which the cause of action accrued" and not from the accrual of the cause of action. I cannot distinguish the period so defined from a period specified in the manner described in the Act of 1937, namely a period of time "expressed to begin on or be reckoned from a particular day". The legislature must be presumed to have intended that the periods of limitation in the Statute of 1957 should be calculated in accordance with the rules of construction contained in the Act of 1937. I can not regard resultant shortening of each period of limitation by part of a day, compared with the length of the period if counted from the actual time when the cause of action accrued, as indicating any contrary intention on the part of the legislature. Therefore, I must reluctantly conclude that the period of three years from the date when the cause of action accrued expired on 20th June, 1975".

17. There is nothing, in my judgment, in the terms of the Statute of Limitations (Amendment) Act, 1991, which indicates that the period of limitations should be calculated otherwise than in accordance with the provisions of the Interpretation Act, 1937. Neither is there anything in that Act indicating an intention on the part of the Oireachtas that the period of time should no longer include the date on which the cause of action accrued or, (if later), the date of knowledge.

18. The Plenary Summons in this case was not issued until 31st October, 2002. I am therefore satisfied that all these claims are statute barred as expressly pleaded by the defendants in their defence.

19. While this finding is sufficient to dispose of the plaintiff's claim against the defendants in this action I am acutely aware that this is a claim in which professional negligence is being alleged against a Firm of Solicitors. I am also conscious of the fact that at the hearing before me the plaintiff's claim was fully contested on the merits by the defendants. In these circumstances I believe that justice and fairness demand that I should go on to deal with the merits of this claim.

20. Superintendent Joseph Roe of An Garda Síochána gave evidence that in November, 1996, he has been asked to investigate a complaint made by Mr. Kirby by a letter dated 7th November, 1996, to the Chief Superintendent at Henry Street, Garda Station, Limerick. A copy of this letter was admitted in evidence and it reads as follows:-

"Dear Superintendent,

I attended the Circuit Court No. 23 last Thursday October 31st. During the court case it was alleged that I rang Mr. O'Donovan demanding money from him in a very threatening manner, it was also stated that Detective Dan Haugh was investigating same and that he had referred the case to the D.P.P.

I have at all times denied any such involvement in these allegations. I would invite you to interview me on any matters you have concerning me as long as my solicitor is present.

I want a clear and unequivocal answer to my query.

Yours sincerely".

21. Superintendent Roe said that he had checked through garda records and had spoken to the record keepers and had found that there had been no garda investigation of Mr. Kirby in the period April, 1995 to 21st November, 1996 and no papers concerning him had been sent by any member of An Garda Síochána to the Director of Public Prosecutions. He had written to Mr. Kirby to this effect in a letter dated 10th January, 1997, which letter was admitted into evidence.

22. Mr. Michael Delaney, Solicitor, of the Firm of Giles J. Kennedy and Company, Solicitors, told the court that he had acted on behalf of Mr. Kirby, - then a defendant counter claimant, - in the action before the Circuit Court presided over by Smyth, J., President of that Court on 31st October, 1996. He stated that he was present during the evidence of Mr. O'Donovan, Solicitor. He told this court that Mr. O'Donovan made no reference to any file having been sent concerning the plaintiff to the Director of Public Prosecution or any reference to a prosecution against the plaintiff as a result. Mr. Delaney told this court that Mr. O'Donovan did not mention, or in

any manner indicate to Smyth, J., who he thought had made the, "death threat" phone call to his office which had upset Ms. Conway and which had led Mr. O'Donovan to summon the assistance of Detective Garda Dan Haugh.

23. Mr. Delaney gave evidence that he considered the case before Smyth, J., was going badly for Mr. Kirby because of the evidence of Mr. O'Donovan in the course of examination in the chief of what appeared to Mr. Delaney to be clear and extremely serious breaches by Mr. Kirby of an undertaking given by him to Smyth, J., in June or July 1995, not to watch, beset or defame the firm of Dermot G. O'Donovan & Company, Solicitors. Mr. Delaney told me that he became particularly concerned when Smyth, J., surmised as to whether the dissemination of certain Notices or Letters around Limerick by Mr. Kirby might be a contempt of Court. He said that he had asked Mr. Kirby to step outside the court and had advised him to settle the case on the terms that had been offered by the defendants that morning. Mr. Kirby had refused and they had gone back into court. When the court rose for lunch he and Mr. James Gilhooly Counsel retained to represent Mr. Kirby, discussed the matter further with Mr. Kirby. Before they parted for lunch Mr. Kirby stated that he would be prepared to settle the case if Mr. O'Donovan withdrew and apologised to him for a statement which he claimed had been made by Mr. O'Donovan that he, (Mr. Kirby), was looking for soft money like he got from the T.S.B. and, if the defendants paid his costs. Mr. Delaney told the court that he and Mr. Gilhooly had advised Mr. Kirby as strongly as they could that the best terms he could possibly hope for was a permanent injunction restraining him from watching and besetting the offices of Dermot G. O'Donovan and Company, a waiver by both sides of any claim to damages and an agreement by each side to pay its own costs. Mr. Delaney told the court that eventually Mr. Kirby agreed to this and he had obtained from him a written authority to settle the case on that basis.

24. After lunch the terms of a Consent Order were drawn up by Mr. Michael McMahon Counsel for Dermot G. O'Donovan and Company. Mr. Delaney said that he had then read these carefully to Mr. Kirby and he and Mr. Gilhooly had fully and carefully explained them to Mr. Kirby and then allowed him to read them again for himself. Mr. Kirby had told them that he was satisfied with the terms of the proposed Consent Order and he signed the terms of Compromise. Mr. Delaney gave evidence that he made a contemporaneous handwritten memorandum concerning these matters from which a typed copy was prepared the following day from his dictation of these original notes which were then destroyed. This typed copy was proved in evidence by Mr. Delaney, Mr. Kirby having waived all solicitor and client privilege.

25. Mr. Delaney told this court that prior to 31st October, 1996, Mr. Kennedy, the principal of his Firm had advised Mr. Kirby for reasons repeated in two letters dated 30th October, 1996, that Dermot G. O'Donovan and Company would be successful in their claim against him and that his Counterclaim would fail. These letters were proved in evidence by Mr. Delaney. Together with the above mentioned Memorandum they strongly corroborate the evidence of Mr. Delaney as to the circumstances surrounding and the true basis for the Compromise of the Circuit Court proceedings on 31st October, 1996. In cross examination by Mr. Kirby, Mr. Delaney stated that he did not recall Mr. Kirby asking Mr. James Gilhooly, "what about the files sent to the D.P.P." and, Mr. Gilhooly responding, "O'Donovan will forget about it, he has got what he wanted". Mr. Delaney repeated that Mr. O'Donovan had made no reference to the Director of Public Prosecutions in any form or in any context during the course of the hearing on 31st October, 1996.

26. Ms. Elizabeth Anderson, of Doyle Court Reporters gave evidence that she had prepared the, "Transcript of Proceeding heard before Judge Smyth in Dublin on 31st October, 1996", from the notes of the evidence taken by her in court. Mr. Kirby read from p. 18 question 75 of that Transcript which, it is common the case between the parties was prepared at the request of Giles J. Kennedy and Company Solicitors and which records as follows:-

"75 Q. Apart from yourself and your family, what is the position with regard to members of your staff or former members of your staff?

A. I have been and I am continuously concerned, Ms. Conway dealt with him, refer to her as Ms. Conway, she is, in fact, Mrs. McCarthy. She has been married a number of years. She has a young family and her sister Jean, who was also in our practice, at the time, is now practicing in Drogheda. Pardon me. She received calls, she will give evidence but I am satisfied that they were of extraordinary aggressive and threatening nature too. You are to bring money, otherwise heads will be blown off. I saw Ms. Conway, Ms. Jean Conway one day in my office completely broken down in stress, in tears as a result of a call that had just come through."

27. Ms. Anderson denied that there is a lacuna in this Transcript after the answer to question 75. Mr. Kirby put it to her that it does not record that Smyth, J., then asked Mr. O'Donovan who he considered made the threat and Mr. O'Donovan pointed to him and stated that he had no doubt but that it was Mr. Kirby. Ms. Anderson said that it was most unlikely that if such an exchange had occurred she would not have taken it down.

28. Mr. Kirby put it to her that this Transcript failed also at this point to note the question by Smyth, J., to Mr. O'Donovan as to the then present situation as regards these threats and Mr. O'Donovan's reply that Detective Garda Dan Haugh and Inspector Rooney had sent a file to the Director of Public Prosecutions to have Mr. Kirby prosecuted for making these threats. Ms. Elizabeth Anderson said that she believed that she had faithfully recorded everything that was said in court at the hearing on that day and given the stenographer's position immediately under the Judge's Bench and facing the Witness Stand it was unlikely that she did not hear everything said. This Transcript which was so prudently bespoken by Giles J. Kennedy and Company, Solicitors, was proved in evidence by Ms. Elizabeth Anderson. It was not adopted by the Trial Judge. However, I am satisfied that on the balance of probabilities it represents a full and accurate note of the evidence given before Smyth, J., on 31st October 1996. It is altogether unlikely in my judgment that for no apparent reason a professional and experienced Court Reporter would fail to record the entirety of obviously important questions put to a witness by the Trial Judge and the entire of the replies given to the Judge by that witness.

29. Mr. James Gilhooly, Senior Counsel, in his evidence to me accepted, as Mr. Kirby alleges, that Smyth, J., before the court rose for lunch did say directly to Mr. Kirby, "listen carefully to what your Solicitors and Counsel say to you over lunchtime". Mr. Gilhooly said that he was unable to explain why this did not appear at p. 21 of the Transcript. This was not put to Ms. Anderson by Mr. Kirby. These words would clearly interconnect with and continue from what is recorded in the transcript at p. 21 lines 12 to 14 as having been said by Smyth, J., before the court adjourned. I am satisfied that whatever might be the reason why they were not recorded by Ms. Anderson their absence in no manner suggests the existence of other omissions in the Transcript.

30. Mr. Dermot O'Donovan, Solicitor, Senior Partner, in the firm of Dermot G. O'Donovan and Company, Solicitors, Limerick, told me that the present action was due to have been heard in 1995 but was adjourned by Smyth, J., in June or July of that year on the application of Giles J. Kennedy and Company, Solicitors after they had taken over Mr. Kirby's defence from Fair and Murtagh, Solicitors, Athlone. This adjournment for the purpose of obtaining Discovery of Documents was granted on the undertaking by Mr. Kirby not to watch or beset the offices of Dermot G. O'Donovan and Company or publish any defamatory material pertaining to that Firm pending the hearing and determination of the proceedings. An Interlocutory Order in similar terms had been granted by O'Higgins, J., (then of the Circuit Court), on 18th February, 1992. Mr. O'Donovan told me that Mr. Kirby had started distributing notices in the

Limerick area in the following terms:-

"Strictly without prejudice

Eddie Kirby,

formerly of the Hunting Lodge,

Sheehans Cross,

Grange,

Co. Limerick.

REF: Civil Action between Eddie Kirby and D. G. O'Donovan & Company Limerick, Solicitors.

To whom it may concern,

I am making an appeal to you for financial help towards my court expenses concerning the above action. This case has been ongoing for the past five years and has been transferred from the Limerick Circuit Court area to the Dublin Circuit Court as the judge in the Limerick Circuit Court would not hear same, this alone has added extra expenses to my case.

You can send any donations to my solicitors: Giles J. Kennedy, 81 Eccles St., Dublin 7.

I would appreciate your support.

Yours sincerely".

31. One such notice was proved in evidence by Mr. O'Donovan. Mr. O'Donovan told me that Smyth, J., on hearing his evidence in this regard remarked that such activity might amount to contempt of court.

32. Mr. O'Donovan told me that Detective Dan Haugh took details of the "death threat", phone call in his notebook and that this was the last he had heard of it. He said that he did not say to Smyth, J., that, "papers had been sent to the Director of Public Prosecutions". He had read through the Transcript of the Proceedings before Smyth, J., and believed that it was an accurate record of what was said. He told me that though the caller had not identified himself, he believed that it had been Mr. Kirby. He had called in the Garda Síochána made the complaint and left it with them. He said that perhaps he should have followed up the complaint but did not do so probably because he knew his own action was coming up in any case. When it was put to him by Mr. Kirby that he had pointed to him as the person who had made the, "death threat" telephone call to his office, he denied having done so. He denied that he stated that a file had gone to the Director of Public Prosecutions about Mr. Kirby. He believed that Detective Garda Haugh would investigate the complaint and would do something about it but he did not know whether he had and did not say that a file was sent to the Director of Public Prosecutions. He said that he believed himself that Mr. Kirby had made the telephone calls to the Conway family to him and Ms. Jean Conway.

33. In the special circumstances of this case the court decided to call Mr. James Gilhooly, Senior Counsel so that both sides would have an equal opportunity of cross-examining him. He was asked by Mr. Kirby why he had not sought an adjournment of the trial on 31st October 1996 for the purpose of checking whether a file had in fact been sent to the Director of Public Prosecutions. Mr. Gilhooly replied that in his recollection no such evidence had been given. He stated that he would remember this even after the lapse of eight years in that it would be a very serious matter he would have to deal with in cross examining Mr. O'Donovan as in his opinion the learned President of the Circuit Court would not have granted an adjournment to enable such enquiries to be made. Mr. Kirby then put it to Mr. Gilhooly that during a discussion in the court after the case had ended he had drawn to Mr. Gilhooly's attention what Mr. O'Donovan had said about a file being sent to the Director of Public Prosecutions and that Mr. Gilhooly had waved his hand and said forget about it he has what he wanted. Mr. Gilhooly accepted that he probably did say forget all about that, the case is settled. Mr. Gilhooly said that he strongly recommended that Mr. Kirby settle the case at lunchtime as he believed that Mr. Kirby would be unable to refute Mr. O'Donovan's evidence about the Notices or Letters seeking contributions and in his opinion Smyth, J., was obviously concerned that the dissemination of these Notices or Letters amounted to breaches of the undertaking given by Mr. Kirby to him. Mr. Gilhooly said that he was very concerned that there was a very real risk of Mr. Kirby being committed to prison for contempt of court and told him so strongly. He told me that he also felt that Mr. Kirby would lose his counterclaim with costs. He accepted that Mr. Kirby was not anxious to settle the action and said that it took as much persuasion as Mr. Delaney and himself could properly apply to get him to settle. He said that if Mr. Kirby had declined to settle and had instructed him to go ahead with the case he would have done so.

34. Ms. Jean Conway told me that she was in court on 31st October 1996 she said that she did not hear Mr. O'Donovan say anything in court about a file being sent to the Director of Public Prosecutions. She said that she had not read the Transcript. She told me that she believed and understood that Mr. O'Donovan was convinced that Mr. Kirby or someone connected with him had made the, "death threats" to her and her family in 1994 and 1995. She said that Detective Garda Dan Haugh had taken notes when he came to the offices but no statements were typed or signed. She said that she had no understanding that a file had been sent to the Director of Public Prosecutions. She was very surprised that Superintendent Roe had found no record of any complaint in the Garda Records. She said that so far as she was aware Dermot G. O'Donovan and Company had no dispute with anyone called O'Brien and while her father did have a court case with a Mr. Daly concerning title to property and arrears of rent it was never even suggested that Mr. Daly had made the, "death threats".

35. Mr. Michael McMahon, Senior Counsel, confirmed that he had acted for Dermot G. O'Donovan and Company on 31st October, 1996 and had conducted the examination in chief of Mr. O'Donovan. He said that he had very little recall of the case after eight years. He said that he had no recollection of the Trial Judge asking Mr. O'Donovan who he believed was making the threats and had no recollection of Mr. O'Donovan pointing down at Mr. Kirby. He did not recall the Trial Judge asking Mr. O'Donovan "what was the present position regarding the complaint" or of

36. Mr. O'Donovan replying that a file had been sent to the Director of Public Prosecutions.

37. It is clear from his evidence to the Court that Mr. Kirby alleges that the exchanges with Smyth, J., which form the basis of his claim and, which do not appear in the Transcript of the Proceedings before Smyth, J., on 31st October, 1996, occurred after Mr. Michael Delaney had taken him outside the Court and had advised him to settle the action, which he declined to do. However, Mr. Delaney told me that it was the matter of the Notices or Letters inviting the public to contribute to his expenses in taking proceedings against Dermot G. O'Donovan and Company Solicitors, and the comment of the Trial Judge about possible contempt of court which caused him to ask Mr. Kirby to step outside the court and to strongly recommend to him that he settle the action. It is clear from the sequence of the questioning as recorded by the Transcript that the issue of the Notices or Letters was raised after and not before the issue of the, "death threats" telephone calls.

38. Mr. Kirby told me that Mr. O'Donovan gave evidence to Smyth, J., that Detective Garda Dan Haugh had taken a statement from Ms. Jean Conway. No such evidence is recorded in the Transcript and, Ms. Jean Conway and Mr. O'Donovan both told this Court that the Detective Garda had made notes of the complaint in his notebook and no Statement was either typed or signed.

39. In his evidence, Mr. Kirby told me that it was Mr. Michael McMahon, Senior Counsel, who had asked Mr. O'Donovan who he thought was making the threatening telephone calls in reply to which, "Mr. O'Donovan pointed silently to me". However, in his letter of 29th March, 1999, to Mr. O'Donovan, the question is attributed by Mr. Kirby to the Trial Judge. This is also the case in Mr. Kirby's letter of 1998 to the late Mr. Justice F. Spain, then President of the Circuit Court. At para. 4 on p.3 of an Affidavit sworn by Mr. Kirby on 3rd April, 2000, he also avers that the question was put by Smyth, J.

40. In his evidence before me, Mr. Kirby stated that in reply to the question, "as to who he thought was making the threatening telephone calls", Mr. O'Donovan had pointed silently to him and Mr. McMahon had stared down intently at him. In his letter dated 29th March, 1999, to Mr. O'Donovan, Mr. Kirby alleged that, "your reply was that you had no doubt it was Mr. Kirby". In the affidavit of 3rd April, 2000, Mr. Kirby avers that Mr. O'Donovan both pointed directly at him and said, "that he had no doubt it was Mr. Kirby, the man in court". In his letter of 1998 to the late Mr. Justice Spain, Mr. Kirby stated as follows:-

"The Judge asked Mr. O'Donovan who was making these calls and he replied that he had no doubt that it was Mr. Kirby and the only way to sort me out was to award him (Mr. O'Donovan) excessive damages".

41. Mr. Kirby told me that during the discussions with Mr. Michael Delaney, Solicitor, and Mr. James Gilhooly, Senior Counsel, before they parted for lunch, both these gentlemen had said to him that he had no chance before Smyth, J., because of what had been said about the threats to kill people and the file sent to the Director of Public Prosecutions. This evidence runs entirely contrary to the evidence given to this Court by Mr. Delaney and by Mr. Gilhooly as to why they advised Mr. Kirby to settle the action. It obtains no support from the two letters dated 30th October, 1996 to Mr. Kirby from Giles G. Kennedy and Company. As regards the issues of a file having been sent to the Director of Public Prosecutions, no such evidence appears on the Transcript and it was denied by all the witnesses who gave evidence before me. other than Mr. Kirby, that any such evidence was given before Smyth, J., on 31st October, 1996.

42. Mr. Kirby told me that Mr. Kennedy, Solicitor, had told him about three weeks prior to 31st October, 1996, that Detective Garda Dan Haugh would be in Court with a massive file against him and that he would be dragged from the Court in chains and lodged in Mountjoy Prison as well as facing an award of IR£30,000 (former currency) damages plus a similar sum for costs. Mr. Kennedy did not give evidence at the hearing before me. The letters dated 30th October, 1996 from Giles J. Kennedy and Company to Mr. Kirby do refer to the fact that IR£12,000 or IR£15,000 (former currency) might be awarded against him. There is reference to, "award of damages and/or awards for costs as against you". One of these letters *inter alia* advised as follows:-

"The Plaintiffs will succeed against you and their case will be supported by the Statement given by you to the Gardaí. In this instance you made Statement where you confirmed you had been telephoning the plaintiff's offices..."

43. There is no reference at all in these letters to Detective Garda Dan Haugh or to a "massive file" against Mr. Kirby.

44. Mr. Kirby told me that after the Trial Judge at about 11.30 am had raised the possibility of his being in contempt of court and of a gaol sentence he formed the opinion that the judge had made his mind up and his only option was to settle even though it was against his wishes as indicated by his earlier refusal to settle when so advised by Mr. Michael Delaney. The Transcript of the Proceedings before Smyth, J., at p. 19, question 81 records the learned Trial Judge as stating as follows:-

"I remember this, he applied for an adjournment on the last meeting and his is still disseminating. The question arises, that is contempt of court. I will finish, I am going to ask you, how recently, have you seen these notices."

45. No reference is made to any "goal sentence". Mr. Kirby is in my judgment, putting into the mouth of the Trial Judge something which was in fact raised later with him by Mr. James Gilhooly, Senior Counsel, in the course of the pre-luncheon consultation. Mr. Kirby told me that he reluctantly agreed to settle the case because it was his clear impression that Smyth, J., was not going to give him a hearing. He told me that he had complained to the Chief Justice about Smyth, J., and O'Higgins, J. He said he signed the agreement because the impression he got was that if he did so he would not go to gaol or have to pay costs or damages and he felt that he had no option but to sign the settlement.

46. It was put to Mr. Kirby that the whole matter of, "a file having been sent to the Director of Public Prosecutions" was a mere figment of his imagination with a view to reopening the litigation. He denied that this was so and stated that he was 100% certain that this was said. When it was put to him that the Notices or Letters he was circulating were a breach of his undertaking to the court and a contempt of court he stated that this would not have influenced him in deciding to settle because at the worst he would simply go back to gaol and when he came out he would be able to continue with his counterclaim against Dermot G. O'Donovan and Company, Solicitors.

47. Mr. Kirby then said that his Solicitors and Counsel were at fault in not advising him to continue with his Defence and Counterclaim before Smyth, J., and to then Appeal to the High Court. He told me that the first time he thought he had a case against Giles J. Kennedy and Company, Solicitors, was when he received the letter from Superintendent, (then Inspector), Joe Roe, telling him that there was no record of any Garda investigation of which he was the subject after April, 1995.

48. Mr. Kirby stated that he did not issue the Plenary Summons until 31st October, 2002, because he was not aware that he could issue a plenary summons himself and had no money to pay a Solicitor and no solicitor would act for him without money up-front. Between 22nd May, 1997 and 7th October, 1997, Mr. Kirby made an unsuccessful complaint to the Law Society against Giles J. Kennedy and Company, Solicitors, under s. 9 of the Solicitors Amendment Act, 1994, regarding fees. On or about 27th August, 1997 he consulted the Legal Aid Board, Portlaoise Law Centre. Given the history of the involvement of Mr. Kirby in litigation over the past

24 years or so, his demonstrated capacity to complain to and demand information and assistance from individuals and organisations connected with the Administration of Law in this State and, the fact that he issue the Plenary Summons himself on 31st October, 2002, I find these statements of his less than convincing.

49. I find the plaintiff's claim in this case is entirely against the weight of the evidence, which in my judgment establishes well beyond the balance of probabilities that the words complained of and which formed the entire basis of his claim were never spoken by Smyth, J., Mr. Michael McMahon, Senior Counsel or Mr. O'Donovan, Solicitor. I am satisfied on the evidence and I so find that Mr. O'Donovan did not in any circumstances or in any way on 31st October, 1996, indicate to Smyth, J., the person he believed to be responsible for the threatening phone calls even though Mr. O'Donovan fairly admitted to me and, from her evidence clearly indicated to Ms. Jean Conway, that he believed Mr. Kirby to be responsible, either directly or indirectly. I make no finding whatsoever about this belief on the part of Mr. O'Donovan or of Ms. Jean Conway. Mr. O'Donovan accepted before me that Mr. Kirby had at all times denied any involvement in these threatening telephone calls.

50. The evidence given by Mr. Kirby at the hearing before me lacked consistency and contained numerous contradictions. There was a total and serious lack of consistency in his evidence even as to the very words which he alleges were spoken by Mr. O'Donovan and which are crucial to his claim. There was no evidence before me which would suggest any co-operation or collusion between the various witnesses who gave evidence and who came from two different camps, which up to and beyond the 31st October, 1996, had been in opposition to each other in serious and unpleasant litigation relating to the rendering of professional legal services. The most fortunate existence of a Transcript of the Proceedings before Smyth, J., on 31st October, 1996, prepared by a Professional Court Reporter and, which I find, though not adopted by the Trial Judge, on the balance of probabilities to be a true and accurate report of the proceedings, lends in my view the strongest corroboration to the evidence of Mr. Michael Delaney, Solicitor, Mr. Dermot O'Donovan, Solicitor, Ms. Jean Conway, a Solicitor or Legal Executive, Mr. James Gilhooly, Senior Counsel and Mr. Michael McMahon, Senior Counsel. I do not believe that the Learned Trial Judge would have descended into the arena and asked the questions attributed to him particularly as the reply to one of these alleged interrogations would of necessity have to be hearsay.

51. I am fully satisfied that Mr. Kirby's case was very properly and most carefully conducted by Giles J. Kennedy and Company and by the Counsel retained by them to represent Mr. Kirby, and that he received full and appropriate advice on the question of settlement and was not in any manner coerced into a compromise. I find that the words alleged by Mr. Kirby to have been spoken by Smyth, J., Mr. Michael McMahon, Senior Counsel and Mr. O'Donovan, Solicitor, were not spoken as alleged or at all and though possibly believed by Mr. Kirby to have been spoken are based solely on his imaginings or on his misconstruction or misrecollection of the evidence. This claim must be dismissed as utterly baseless and lacking all merit.