Neutral Citation Number: [2007] IEHC 69

**THE HIGH COURT**
**DUBLIN**

**Record No: 2005/1528P**

**IN THE MATTER OF THE COMPANIES ACT 1963-2003**

**BETWEEN**

**DEREK EARL, LIQUIDATOR FOR CEDARLEASE LIMITED, IN LIQUIDATION**

**PLAINTIFF**

**AND**
**PATRICK CORNELIUS CREMIN, ALEX CREMIN, JOHN SINCLAIR WILLIAMS, JUSTIN SINCLAIR WILLIAMS AND GARETH SINCLAIR WILLIAMS**

**AND BY ORDER**

**MCLEAN & APPLETON (HOLDINGS) LIMITED AND ROBERT (OTHERWISE BOB) CLEMINSON**

**DEFENDANTS**

**Judgment of Mr. Justice T.C. Smyth delivered on Tuesday, the 27th February 2007**

**Introduction**

1. These proceedings were commenced by Plenary Summons issued on 29th April 2005. That Plenary Summons was amended on 1st June 2005 pursuant to an Order made by Mr. Justice Clarke on 31st May 2005 and again on 11th April 2006 pursuant to an order made by Ms. Justice Finlay Geoghegan on 7th April 2006. The effect of the amendments made on 1st June was to add the Sixth and Seventh Named Defendants to the proceedings whereas the effect of the amendments on 11th April 2006 was to abandon the claim for certain reliefs which had been advanced against the Defendants. A conditional appearance was entered on behalf of the 3rd, 4th, 5th and 6th Defendants on 12th May 2006 and 25th May 2006. The Plaintiff purported to serve a Statement of Claim and Notice For Directions returnable before the Court on 20th May 2006.

2. The Amended Plenary Summons served on the 3rd, 4th, 5th and 6th Defendants set out the following reliefs against them:-

> "(a) A declaration that the Third, Fourth and/or Fifth Named Defendant and/or the Sixth Named Defendant and/or Seventh Named Defendant are directors and shadow directors within the meaning of that term pursuant to Section 27 of that the Companies Act, 1990.
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> (b) A declaration that the Defendants (and/or each of them) were knowingly a party to the carrying on of business of Cedarlease Limited in a reckless manner.(c) A declaration that the Defendants should be made personally liable without any limitation of liability for all or part of the debts of Cedarlease Limited.
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> (d) Damages for misfeasance pursuant to Section 298 of the Companies Act 1963, and
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> (e) (An order directing the Defendants and/or each of them) to a repair or restore the money or property or any part thereof respectively with interest at such rate, or pay compensation in respect of the breach of Section 298 as the court thinks just."

3. The Plaintiff effectively seeks relief in these proceedings against the Defendants pursuant to Sections 297(a) and 298 of the Companies Act, 1963. However, under Order 74 rules 49 and 136 of the Rules of the Superior Courts, an application for relief pursuant to those sections ought to be brought by way of originating Notice of Motion supported by affidavit(s) rather than Plenary Summons. Accordingly, it was submitted by all the Defendants that these proceedings are improperly constituted and should be struck out on that basis.

4. In summary, the submissions of the Defendants are that the proceedings are a nullity, not having been issued in accordance with the Rules of the Superior Courts and that the Court has no power under Order 124 r.1 or otherwise to cure that nullity. Alternatively, if the Court decides that the proceedings are irregular rather than a nullity, then it was submitted that the proceedings should be struck out because of the deliberate decision of the Plaintiff to adopt the wrong procedure, a decision which has prejudiced the Defendants.

5. I am satisfied and find as a fact, on a consideration of the case as a whole and on the submissions made in court, that as at the time the various applications were made concerning the summons neither Counsel, the Court Registrar or the particular Judge adverted to the specific provisions of the rules and that this was a matter of oversight, not a matter of deliberate choice to place the Defendants or any of them at a disadvantage. There was certainly no mala fides of any description in this regard.

**Factual Background**

6. The First and Second Defendants were at all material times the Directors of Cedarlease Limited ("the Company"). All reliefs sought by the Plaintiff in these proceedings as against these Defendants are pursuant to Sections 297(a) and 298 of the Companies Act, 1963 in respect of alleged reckless trading and misfeasance respectively, and the relief sought against the Seventh Defendant is of the like character.

7. The Company was one which was established in order to implement a VAT avoidance scheme (the details of the background of the scheme are set out in a letter dated 10th June 2005 from Eugene F Collins, Solicitors, to Lennon Heather & Company, Solicitors, exhibited as part of "TL" of the affidavit of Terry Leggett of 12th June 2006). The details of this complex and elaborate scheme are set out in extensor at paragraphs 11-19 of the Statement of Claim of 25th May 2006.

8. The scheme was challenged by HM Custom & Excise and VAT assessments were raised by it which were not discharged. The gravamen of the Plaintiff's claim is that the Company allowed payments to be made to Brog Leasing Limited, another company which participated in the scheme in February and September 2000 in the combined sum of Stg£1,326,100 in circumstances where the Defendants knew or ought to have known of a possible liability on the part of the Company to pay value added tax to HM Customs & Excise.

9. It is common case that the instant proceedings were issued by Plenary Summons which issued on 29th April 2005 but which was not served on the First and Second Defendants' solicitors until about 18th April 2006, and other Defendants were not served when the summons issued either. It is equally clear from the documentation that the decision to institute proceedings by way of Plenary Summons was a conscious one, which was made in an attempt to stop time running under the Statute of Limitations. I am satisfied that such was the purpose of the issue of the summons, but I am equally satisfied that there was no intendment to disadvantage the Defendants or any of them by reason of choosing the issue of Plenary Summons rather than a Notice of Motion grounded upon affidavit. In my judgment proceedings sanctioned by the court in accordance with the exact terms of the rule would be proceedings that would have had the self same effect as inhibiting the effect of the Statute of Limitations.

10. I am satisfied on the facts as disclosed to me in this case that there was no improper motive in the withholding of serving of the proceedings until all the requisite evidence was available to the Plaintiff to issue and serve the Statement of Claim. Indeed, the very proprietary of this conduct by the Plaintiff is illustrated by their omitting from the Statement of Claim certain charges which presumably on the state of the evidence as they then knew it at the time they first applied to Ms. Justice Finlay Geoghegan on 29th April 2005 existed.

**The relevant provisions of the Rules**
11. Order 74 r.49 of the Rules of the Superior Courts provides:-

> "An application made to the Court under:
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> (a) Section 184;
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> (b) Subsections (2) of Section 297;
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> (c) Section 298, or
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> (d) subsection (2) of Section 391, shall be made by motion in which shall be stated the nature of the declaration or order for which application is made and the grounds of the application, a notice of such motion, together with a copy of every report and affidavit upon which it is intended to be grounded, shall be served personally on every person against whom an order is sought, not less than seven clear days before the date named therein for hearing the application. Where the application is made by the Official Liquidator, he may make a report to the Court stating any relevant facts and information which he shall verify by affidavit. Where an application is made by any other person, it shall be supported by affidavit to be filed by him. The Court may give such directions as to the procedure for the hearing of the application and may direct that the date fixed for the hearing shall be advertised in such form as the Court may approve, and on the hearing the Court may allow any person interested to appear either by counsel or in person to cross-examine any of the witnesses giving evidence or to give evidence."

12 Similarly Order 74 r.136 as amended, provides:-

> "In any winding up, an application under Sections 297(A), 298 ... of the Companies Act 1963 [or under various sections] shall in the case of a winding up by the Court, be made by motion on notice and in case of a voluntary winding up by originating Notice of Motion."

13. Order 124 r.1 of the Rules of the Superior Courts provides as follows:-

> "Non-compliance with these rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

14. In the course of his submissions to the Court, Mr. Barniville drew my attention, as did Mr. Murphy, to the provisions of Order 70 Rule 1 of the English Rules of the Superior Courts which was until 1964 almost in virtually identical terms to our rule. The English authorities in relation to Order 70 Rule 1 have held that there is a distinction which endures between proceedings which are a nullity, and those which are merely irregular. If proceedings are a nullity, then the Court has no power to cure the defect in the proceedings. The authorities were comprehensively reviewed in *Re Prichard (deceased)* [1963] Ch. 502; [1963) 1 AER 387 where the distinction between proceedings which were a nullity and those which were merely irregular was considered in the context of a defect in the commencement of proceedings. The effect of the majority decision in Prichard was in effect reversed in its result by the ameliorating provisions of new rules which abolished the distinction between a nullity and an irregularity. I have considered the decision in Prichard as reported in the official reports and it is little wonder that the rules making committee brought in amended rules in the light of the majority decision of the Court of Appeal in Prichard. Neither Prichard nor the rules of the English courts are in any way binding upon the courts in this jurisdiction and, in my judgment, the amended rules in England reflected the necessity of spelling out in the rules that which was clearly inferred as existing in the rules then extant as perceived by Denning MR. Rigidity of interpretation of the English rules as they stood before their alteration subsequent to Prichard does not commend itself to me in terms of logic or of justice. Notwithstanding the clear distinction between *Croke v Waterford Crystal & Anor* [2005] 2 I.R. 383, which dealt with an amendment of Pleadings, the more liberal approach of our courts to the interpretation of the Rules seems to me to be the appropriate course to follow and is wholly consistent with the approach of Denning MR in the Prichard case.

15. Mr. Murphy for the Defendant Cleminson drew my attention and made a considerable analysis of the difference between the rules as applicable in this jurisdiction and the new rules brought into effect in England in the 1960s. His submission was that the Irish rules consciously adopted a particular procedure with regard to the four types of proceedings in question and urged that the failure of the Applicant/Plaintiff in the instant case to act timeously is fatal. All Defendants contended that the rules as formulated in this jurisdiction obligated the Plaintiff to make available to them at the time of the application to the Court for leave to issue the proceedings not only the evidence, but all supporting documentation upon which the Plaintiff would seek to rely in the event of the proceedings going to hearing. In fact, what has occurred in the instant case is that some of the information was made available at different stages to different Defendants as the Plaintiff became more appraised of matters.

16. Mr. Black's affidavit sworn on behalf of the Defendants (represented by Mr. Barniville) sworn on 2nd June 2006 puts the case for his clients as follows:-

> "6. It is important to emphasise that the objection raised as to the form of the proceedings is not simply technical in nature as the Third, Fourth, Fifth and Sixth Named Defendants have been prejudiced by the failure of the Plaintiff to adopt the correct procedure. Under Order 74 r. 49 an applicant for relief is required to serve, in addition to the Notice of

> Motion, a copy of every report and affidavit upon which it is intended to ground the application. Therefore, if the plaintiff had proceeded by means of the correct procedure, the Third, Fourth, Fifth and Sixth Named Defendants would have the benefit of detailed reports and/or affidavits setting out the nature of the case made against them. In the absence of that grounding documentation, it is difficult for me to advise any clients in relation to the application or to brief Counsel adequately.
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> 7. Insofar as it might be suggested that the Statement of Claim served herein constitutes a substitute for such reports or affidavits required to be served under Order 74 r.49, I say and believe that it is evidence that its service does not ameliorate the prejudice to my clients. Firstly, it does not contain the level of detail which would be required in an affidavit. Secondly, it does not exhibit the documents upon which the Plaintiff intends to rely. Thirdly, the facts stated therein are not verified by affidavit. These procedural disadvantages have been exacerbated by the refusal of the Plaintiff's solicitors to furnish details of the claim to be made, the status of the liquidation, the funding of same and the procedural history of the proceedings and the papers filed in that regard."

17. There has been protracted correspondence between the Plaintiff's solicitors and the solicitors for the various other parties over the period of time and I am satisfied that the Liquidator is prepared to verify his claim as against the Defendants on affidavit (paragraph 24 of the affidavit of Hugh Kane filed on 19th June 2006). The argument advanced by the Defendants is that if the documentation had been given to the Defendants in the manner and at the time which is contended it ought to have been given to them, they could have sought to move the Court to dismiss the case on the basis of either failing to disclose a prima facie case or an inadequacy of a case to proceed, or to have sought directions and the assistance of the Court in their Defence. In itself it appears principally to consider directions as to cross-examination and, as was submitted by Mr. McCann on behalf of the Plaintiff in the instant case, the matters in issue in these proceedings, whether they had been originated by Notice of Motion grounded on affidavit or, as they were, by way of Plenary Summons and Statement of Claim would inevitably lead to a situation in which the matter would require to be dealt with by way of oral hearing. There was considerable force in his argument that if the affidavits that might have been filed had the matter proceeded in strict and absolute accordance with the rules arisen, that as a matter of probability and, indeed, inevitability is that the Court would have called upon the parties to formulate Points of Claim and Points of Defence. Whereas, by proceeding as has been done heretofore, the Statement of Claim is extant and the Defendants can plead to such in their Defences. I reject, however, the submission made on behalf of the Plaintiff that by entering an appearance, particularly in respect of Mr. Barniville's clients, that a conditional appearance in any way precludes them from raising the points they did in these proceedings by way of motion before me. The Defendants in their various guises have taken issue with the Plaintiff as to the correctness of the procedure almost from the beginning of their correspondence. The entry of an appearance merely acknowledges the jurisdiction of the Court, not necessarily the correctness of the procedure adopted by the Plaintiff.

18. It was submitted on behalf of the Defendant Cleminson that the drafters of Rule 49, though following the general format of Rule 68 in the United Kingdom, consciously departed from the procedure in the United Kingdom model and placed very clear obligations upon the movers of applications under the relevant sections that they have their evidence in place before commencing proceedings. It is contended that this obligation, though clear, is in no way burdensome given the investigative function and powers in liquidations. In the instant case, I am unable to accept that submission because it seems to me that in many cases the evidence in its totality may not be available before proceedings are commenced. Furthermore, it is clear from the affidavits filed on behalf of the Plaintiff in this case that there were continuing and ongoing investigations made subsequent to the first application made to the Court for leave to issue proceedings and that such when completed indicated to the Plaintiff that certain aspects of the claim originally intended to be advanced could not be sustained and therefore ought not to be made and, accordingly, were the subject of the amended summons and formulated correctly in the Statement of Claim. The condition under the rule is for liquidators to obtain leave of the Court before proceeding against persons such as the Defendants in the circumstances that have arisen. The Court must be satisfied, and clearly was, that there was a sufficiency of information before it to enable the proceedings to issue (albeit not in precisely the form envisaged by the rules).

19. The Irish courts do not appear to have discussed the distinction between nullity and irregularity to the same extent as appears from the reported cases in England. Two cases in particular were drawn to my attention. In *Meares v Connolly* [1930] I.R. 333 proceedings seeking the recovery of premises founded on a notice to quit were commenced by Summary Summons in circumstances where a Plenary Summons was the appropriate originating procedure. O'Byrne J. came to the conclusion:-

> "That these proceedings have been brought in a form that is not only not authorised by the rules but is expressly prohibited by them."

20. In the instant case there is a clear direction in the rules that the proceedings be taken by way of motion grounded on affidavit, but there is no express prohibition against proceedings being issued by Plenary Summons and, in my view, this is a clearly distinguishable case from *Meares*. The other case drawn to my attention by the Defendants was *Bank of Ireland v Lady Leesa (Ireland) Limited* [1992] 1 I.R. 404 where proceedings were brought by way of Summary Summons for recovery of land for non-payment of rent in circumstances where this procedure was erroneous. In the course of his judgment at p.410 O'Hanlon J. by reference to the earlier case of *Meares v Connolly* stated as follows:-

> "It was held that procedure by Summary Summons was not applicable in an action for the recovery of premises founded on a notice to quit, where the right to give the notice depends upon the happening of a contingency. It was further held that the court had no power to amend the Summary Summons and allow the action to proceed as if commenced by Plenary Summons and, accordingly, the case was struck out."

21. The *Meares* case and the Bank of Ireland case were considered by Finnegan P. (as he then was) in the course of his judgment "In the Matter of the Proceeds of Crime Act 1996: McKenna v JG, GG, DG & TG" unreported 30th January 2006. The President observes at p.9 of the transcript of the unreported judgment that in those cases Order 124 does not appear to have been considered. It seems to me that is, altogether from any other observations made in the course of his judgment by Finnegan P., a matter that clearly distinguishes *Meares* and *Bank of Ireland* from the instant case where the provisions of Order 124 were put before the Court and urged upon it by the Plaintiff to be applied notwithstanding the submissions of the Defendants. I do not consider myself in any way departing from established case law in situations where; (a) the subject matter of the litigation is radically different, and (b) where specific orders of the rules were not considered. Furthermore, there is a differences between the instant case where the widest possible inquiry can be made under plenary proceedings and those in the case of both *Meares* and the *Bank of Ireland* where a restricted form of procedure was being invoked such as might preclude the Defendant in each case from advancing such evidence as the proceedings of wider scope would have enabled. While it is undoubtedly true, as Mr. Barniville submitted, that under Order 74 Rules 49 and 136 an application for relief under the sections is directed to be brought by way of originating Notice of Motion and no express provision is made for such relief to be sought by way of Plenary Summons, in my judgment, such is directory and not exclusively mandatory and, if mandatory, is not exclusively so.

22. *McDonnell v Dun Laoghaire Corporation* [1991] ILRM 301 although dealing with a completely different matter, i.e. the Planning Code, enabled Costello P. to come to a view that notwithstanding the provisions of the Planning Acts laying down a procedure to be followed by applicants seeking relief under those Acts (i.e. Judicial Review) that did not preclude a person from issuing proceedings by way of Plenary Summons, though the consequence of so doing would delimit the entitlements operating such procedural mechanism to their restraints or limitations of Order 84 Rule 21. In my judgment, it was permissible, if undesirable, in the instant case that proceedings were instituted by way of Plenary Summons rather than by Notice of Motion grounded on affidavit as provided for in the rules.

23. Discretion under Order 124 Rule 1: The Defendants submitted that if the Court were to hold that the proceedings were not a nullity and void but merely irregular and voidable, then the Court should exercise its discretion to strike out the proceedings. It is submitted that in the instant case the Defendants were entitled to that relief *ex debito justitiae* and this point was urged with particular emphasis by Mr. Kennedy in his able submissions to the Court. In this regard the following factors were relied upon:-

> "1. The incorrect procedure was not due to inadvertence or a mistake but was a calculated decision taken by the Plaintiff in order to obtain a procedural advantage which was not brought to the attention of, still less sanctioned, by the Court, and
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> 2. The Defendants have been prejudiced by the failure to adopt the correct procedure."

24. It is, as was correctly submitted by the Defendants, a case in which Plenary Summons was issued in order to avoid a substantial portion of the proceedings becoming statute barred, though I do not think it was absolutely essential to follow that course as early indicated in this judgment. Accordingly, even though there may have been inadvertence as to the correct piece of legal machinery to apply, there was not an inadvertence in seeking to have the benefits or, more correctly, avoiding the disadvantages of the Statute of Limitations. In my judgment, as already determined, it was a matter of inadvertence that the incorrect procedure was adopted but if it was a mistake, and mistake it was, was that step or mistake of a calculated decision in order not to obtain a procedural advantage but merely to stop a statute running? It is clear from the documentation that the mistake was not brought to the attention of the Court, nor did the Court alert itself or its official alert him/her self to the fact that it was a mistaken form of procedure. The fact that investigations might have been incomplete did not and would not mean that the alleged impropriety or illegality or non-compliance with the law by the Defendants would alter. What would alter is the amount of evidence that the Plaintiff could place before the Court if the matter had been called on immediately at that time or very shortly thereafter. In my judgment, as a matter of probability there was an sufficiency of evidence certainly to warrant the issue of the proceedings even if all the evidence had not been obtained and analysed by the Plaintiff.

25. The wrong, if wrong it be, that was committed by the Defendants was that alleged in the proceedings and such had all occurred before the appointment of the Liquidator. Some weight was put upon the fact that HM Customs & Excise had engaged the firm of solicitors who came to act for the Liquidator and, accordingly, they ought to have been in a position to advance matters more fully and properly from the outset. In my judgment, this is a purely fortuitous circumstance and ought not to affect the validity or proprietary of the step taken by the Liquidator in his capacity as such. The Plaintiff was in a position to institute proceedings using the more correct procedure within the limitation period, but as a matter of probability on the basis of the incomplete investigation should have invoked the assistance of the Court not to refrain from pursuing the Defendants until the correct information in all its particulars was available to him. I do not see the Plaintiff as having circumvented the statutory protection afforded to potential defendants by the Statute of Limitations when in fact the range of inquiry raised in the Statement of Claim is less than that which emerged in the summons. There might be some force in this argument if new causes of action or new allegations were introduced at the Statement of Claim stage. It was suggested at the Bar that, in the event that the proceedings are not a nullity, the Defendants are still entitled *ex debito justitiae* to an order setting aside the summons under Order 124, having regard to the nature of the defect, i.e. that insofar as the remedy sought by the Defendants (and particularly the First and Second Defendant) it is discretionary and can only be exercised in one way: by granting the order sought. In the course of his judgment in *Prichard's* case UpJohn L.J. said that the phrase *ex debito justitiae* means that the Defendant is entitled as a matter of right to have the proceedings set aside. The remarks of Upjohn L.J. are referable to a context of a settled practice (see page 521 of the *Prichard's* case). In the instant case there is no settled practice in this area of law in this jurisdiction.

26. In the instant case the decision to proceed by way of summons had only one conscious reason, i.e. to prevent the claim or claims of the Plaintiff from being barred by the Statute of Limitations (which could, as I have already observed, been achieved as readily by the issuing of proceedings by way of Notice of Motion had such been adverted to). The Court was not informed as to the correct procedure, through omission and not by a deliberate act of commission.

27. The Defendants submitted that if the Court were minded to approach the non-compliance by the Plaintiff as a technicality regard should be had to the fact that on several occasions upon which the Court was moved *ex parte* to make orders in his favour no effort to correct the error was made by the Plaintiff and there was no excusing significance in several orders having been made in the Plaintiff's favour. In my judgment the probabilities were that once leave had been given to issue proceedings by Ms. Justice Finlay Geoghegan no one ever afterwards (until the issue was raised by the Defendants that led to these proceedings) considered whether the proceedings indicated that the rules had been followed.

28. The question of the prejudice stated to have been suffered by the Defendants was the common complaint of all of them. While the provisions of the rules are designed so as to fully appraise those against whom complaint is made, at the time the Court is moved to sanction the issuing of proceedings, so as to enable them to know from the outset what the nature and extent of the case they may have to meet: complex and involved incomplete examinations must from time to time involve the supplementing of such information. Furthermore, on occasion complaints made at the time the Court grants leave to issue proceedings are deleted or 'dropped' when more fulsome information becomes available - this is as possible whether the proceedings are by way of a Notice of Motion grounded on affidavit or Plenary Summons and Statement of Claim.

29. In my judgment this is not a case of Defendants who do not fully understand the case being made against them. Furthermore they have much but not all of the documentation upon which the Liquidator relies, but they certainly have not had it timeously. They are entitled to all the documentation as provided for in the Rules and these proceedings will be stayed until the undertaking given to the Court by Mr. McCann S.C. in accord with the averments of paragraph 24 of Mr. Kane's affidavit sworn on 19th June 2006 is complied with. Furthermore no procedural advantage has in anyway accrued to the Plaintiff by the issue of plenary proceedings even before these motions where issued by the Defendants (or indeed since) and any prejudice perceived by the Defendants lack reality in my judgment.

30. I am satisfied and find as a fact that while the Plaintiff was sufficiently acquainted with the affairs of the company as to seek leave of the Court to issue the proceedings, he was not so thoroughly acquainted, as evidenced by his requirement to have the

proceedings amended and to delete some complaints made in the first instance before Ms. Justice Finlay Geoghegan. This case is clearly distinguishable from *Geoch's* case (1872) 7 Ch. App. 207, *Adams-v-Director of Public Prosecutions* [2001] 2 ILRM 401, where Kelly J. at p.417 very properly expressed concern in a case where counsel who considered, *inter alia*, the relevant Rules and then decided they were not relevant and did not in such circumstances draw their attention to the judge hearing the matter *ex parte*. There is a clear distinction between innocent inadvertence and deliberation. Neither is the case of *Re Timberland Limited* [1997] 2 ACLR 259 applicable, not only on its facts but on the principles upon which that such case was decided. The inadvertence of counsel, court official or the Court itself to a specific detailed provision of the Rules is not to be in any way equated with the failure in duty of *uberrimae fidei* on an issue of fact applicable to any *ex parte* applications to the Court.

31. The defects in the Plaintiff's proceedings are purely procedural in nature and do not go to jurisdiction. The correct approach to the instant case is, in my judgment, that indicated in the approach of Denning MR in his minority judgment in *Re Prichard (deceased)* [1963] CH. 502 at 513, when he stated:-

> "If a plaintiff has commenced a known genuine case before the time limit has expired, but has made a technical slip in his procedure, then he will be allowed to rectify the defect if it can be done without injustice to the defendant."

32. Again at p.516:-

> "When an officer of the court itself makes a mistake, the consequences should not be visited on the unfortunate litigant, but they should be remedied by court itself."

33. While those factors are not identical to the facts of the instant case the underlying reasoning behind them in my judgment is applicable. The curial part of the original order of 29th April 2005 provides:

> "IT IS ORDERED pursuant to section 231 of the Companies Act 1963 that the official Liquidator be and is hereby at liberty to issue proceedings against Patrick Cornelius Cremin, Alex Cremin, John Sinclair Williams, Justin Sinclair Williams and Gareth Sinclair Williams in the form of the draft proceedings produced to the Court or as amended as advised by Counsel and that service of the proceedings be subject to further direction of the Court."

34. In my judgment no injustice will be done to the Defendants by the Court now ordering that these proceedings be stayed until the Plaintiff do provide to the Defendants within a given limited time the documentation envisaged and provided for under Order 74 rules 49 and 136 not already provided to them. Such an approach in my judgment is in accord with the curative provisions of Order 124 r.1 and the perceived necessary directions in the curial part of the original order made in these proceedings.

35. In coming to this conclusion I have given special consideration to Mr. Barniville's submission that had the exact procedure in the Rules been followed by his clients his clients might have decided not to hand over certain files at a date by which the proceedings were sanctioned but not served. Had such occurred I apprehend as a matter of probability that the Plaintiff would have sought the assistance of the Court to secure them, most especially if they could in the widest sense be categorised as company records or company property. In the events the Order I propose redresses any possible advantage the Defendants might perceive has been gained by the Plaintiff. This is not a case in which a Plaintiff had no reasonable grounds to justify what he had done in seeking the documents in the context of where he had not served the proceedings *(Cavern Systems Limited-v-Clontarf Residents Association* [1984] 1ILRM 24 is clearly distinguishable). I am unable to accept as warranted by the evidence the submission that the Plaintiff exploited the ignorance of the Defendants as to the existence of the proceedings to induce or cause them to hand over files to him. It is clear from the evidence that when the Plaintiff was fully informed he very properly, no doubt on advice, decided to delete unsustainable claims first made on incomplete information.