Neutral Citation: [2016] IEHC 539

THE HIGH COURT

[2008 No. 809 S]

BETWEEN

W. L. CONSTRUCTION LIMITED

PLAINTIFF

AND

CHARLES CHAWKE

AND

EDWARD JOSEPH BOHAN

DEFEENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of October, 2016

1. This application is made by the defendants for a non-suit and dismissal of the plaintiff's claim at the conclusion of the plaintiff's case. Counsel for the defendants has indicated that if this application is unsuccessful, the defendants intend to go into evidence.

Background

2. The plaintiff's claim in these proceedings is for sums allegedly due on foot of a building contract entered into between the parties in late 2005. The defendants are and were at all material times the owners of a licensed premises known as the Lord Lucan at Finnstown Shopping Centre, Lucan. In 2005, they had sought and obtained planning permission for renovations to the public house including the construction of an extension. They retained an architect, Mr. Gary Solan to act on their behalf in relation to the planning application and subsequent execution of the works. Mr. Solan practised under the title of Architectural Construction Technology.

3. The principle of the plaintiff company is Mr. William Loughnane who was known to Mr. Solan, they having been involved in previous building projects together. Mr. Solan invited Mr. Loughnane to tender for the Lord Lucan job and furnished him with a number of drawings, originally prepared for a planning application, for that purpose. After some toing and froing between the parties, Mr. Loughnane ultimately submitted a document entitled "Provisional Estimate" dated 10th November, 2005, in which he quoted a sum of €583,000 plus VAT for the contract works. These works were referred to throughout the course of the trial as Phase 1 of the project. The plaintiff's Provisional Estimate was accepted by the defendants and the work commenced on 1st February, 2006.

4. It is a matter of dispute between the parties as to the precise nature of the contract documents that passed between them. Mr. Loughnane's evidence is that no formal written contract was executed and the contractual documentation consists solely of his Provisional Estimate, the correspondence leading up to it and in particular the drawings furnished by Mr. Solan to him. It was put to Mr. Loughnane in cross-examination that Mr. Solan's evidence will be that in fact, quite detailed and elaborate contract documentation was furnished to Mr. Loughnane leading up to the conclusion of the contract, such documentation being allegedly a modified version of the standard RIAI building contract. This was denied by Mr. Loughnane. The drawings included typed on them, narrative notes relating to various aspects of the work to be carried out. Of considerable significance, the type written narrative contained on the drawings makes provision for a number of defined amounts that are described as "PC Sums".

5. In the normal way, in building contracts, and certainly those governed by the RIAI standard form, PC sums are understood to mean prime costs sums which have a particular meaning and significance. However, in the present case, it was agreed by both parties that the expression "PC Sums" was in fact intended to refer to provisional amounts which would ultimately require vouching by the contractor.

6. Again it is common case that the various heads of claim advanced by the plaintiff were either provisional sums requiring vouching or alternatively what are described as lump sums, being a fixed price for the work undertaken, not requiring vouching. Consequently where an item falls to be treated as a lump sum, the contractor is entitled to payment of that amount when the work is done, irrespective of the cost of that work to the contractor. One of the major controversies in this case has been whether certain of the items claimed constitute lump sums or alternatively provisional sums. Where in the course of this judgment I refer to the vouching of provisional sums, I do so on the basis that it has emerged from the evidence to date that both parties agree that this is the correct classification of such item of claim.

7. As noted above, the works commenced on 1st February, 2006, and almost immediately, difficulties were encountered. It is not necessary for the purposes of this application to rehearse these in detail but suffice it to say that throughout the spring and summer of 2006, relations between Mr. Solan and Mr. Loughnane became strained. This tension arose on Mr. Loughnane's evidence as a result of difficulties, as he perceived it, with getting Mr. Solan to certify for sums allegedly due to the plaintiff. Although it was originally envisaged that the contract works would take some fifteen weeks bringing matters up to the end of May 2006, inevitably as a result of the various difficulties encountered there were delays. However, by August 2006, the Phase 1 works were nearing completion so that the premises were ready for fit out. This aspect of the work has been described as Phase 2. Mr. Loughnane's evidence was that he had no interest in undertaking the Phase 2 works if Mr. Solan was going to be involved in the matter having regard to the problems he had already encountered with Mr. Solan, as he saw it.

8. Two meetings took place between the parties in August and September 2006 to discuss the Phase 2 works. I am satisfied from the evidence that these meetings were attended by, inter alia, Mr. Loughnane and his co-director, Mr. Genocchie on behalf of the plaintiff and the defendants personally with some members of their staff. Eventually it was agreed that the plaintiff would undertake the Phase 2 fit out works for the sum of €120,150 plus VAT, the constituent parts of that amount being described as "PC Sums" by the plaintiff in its written quotation of 15th August, 2006.

9. These works were undertaken with a view to the premises being ready for its formal reopening by Halloween 2006, which it was. Thereafter certain further works were carried out by the plaintiff but ultimately the work was completed by the end of 2006.

10. The foregoing represents the briefest synopsis of the factual background to this matter which was contested on a multitude of issues and has, to date, been at hearing for 28 days, although in fact the first two days allocated for the trial were taken up by negotiations between the respective quantity surveyors on both sides. Thus, 30 days of court time have been so far expended on the trial of this case. In addition there have been various interlocutory motions for particulars, discovery, and a contested motion to

dismiss for want or prosecution which resulted in a reserved judgment being delivered by Barr J.

11. The application that is now made by the defendants for a non-suit is essentially based on two grounds, first that the plaintiff has been guilty of litigation misconduct to such an extent, and of such a magnitude, that the claim ought now be dismissed in limine, and second that the plaintiff's evidence has failed to establish either that there is any sum due to the plaintiff by the defendants or if so, what that sum might be. I propose to deal with each of these in turn.

Litigation Misconduct

12. This contention by the defendants arises under a number of headings but most starkly in the context of a number of invoices relied upon by the plaintiff as substantiation of its claim to various provisional sums which are alleged by the defendants to be false and fraudulent. As will appear in more detail from the chronology below, on 12th October, 2007, the plaintiff's solicitor sent two books of invoices to the defendants' solicitors which were claimed to underpin the plaintiff's claims. By Mr. Loughnane's own admission, these booklets contained many invoices which were not relevant to the Lord Lucan contract at all.

13. On 18th March, 2015, the plaintiff's solicitors sent to the defendants' solicitors another booklet of invoices which largely, if not entirely, overlapped with the invoices which had been sent some seven and a half years earlier. These invoices were said to underpin claims by the plaintiff in relation to 50 different variations to the original contract which were not covered by the original contract works quoted for by the plaintiff. This court made an order for discovery against the plaintiff on 27th April, 2015, in which the plaintiff was ordered to make discovery of the following categories of documents:

> (a) All documents vouching the amounts paid by the defendants to the plaintiff in respect of work carried out to the "Lord Lucan" licensed premises, Finnstown Shopping Centre, Lough Road, Lucan, Co. Dublin.
>
> (b) All documents evidencing or vouching or touching upon the variations or alterations in the said premises, to include:-
>
> (i) Any communications relating to such variations or any instructions given;
>
> (ii) Any site meetings recording such variations or alterations;
>
> (iii) Any documents vouching the cost of such additional works.
>
> (c) All documents relied upon by the plaintiff vouching or evidencing or touching upon the value of the claim for variations in relation to PC sums.
>
> (d) All documents vouching or recording the submission of information in relation to valuation, costings or instructions in relation to variations (where by way of addition to the original works or by reference to PC sums).

14. On 22nd May, 2015, Mr. Loughnane swore an affidavit of discovery in compliance with this order in which he swore to the relevance of these invoices to the categories above. Mr. Loughnane was asked about this in cross-examination on Day 3 at Questions 421 – 441. He confirmed in his evidence that he stood over the manner in which the 50 variations are vouched in this case. Mr. Loughnane further confirmed that this was the first time that the plaintiff's claim was ever vouched properly (Day 5 Q. 173).

15. Because of the seriousness of the issues that arise in relation to the controversial invoices, I will deal with each in turn.

16. (1) Invoice dated the 6th October, 2004, from Richard Long.

This invoice bears the printed serial number "263". Richard Long appears to be a Donegal based supplier of scaffolding services. This invoice in its original format was furnished by the plaintiff's solicitors to the defendants' solicitors in the two books of invoices sent in October 2007. It will be immediately apparent from the date on its face that it could not conceivably relate to the Lord Lucan contract. The client is identified as "Billy Lockhart". Mr. Loughnane's Christian name is commonly known as "Billly". The site to which the invoice is directed is identified as Supervalu, another client of the plaintiff.

17. The handwritten narrative in the body of the invoice reads:

> "erect scaffold on internal walls for beam work and bricking
>
> total = 700 cash sale
>
> job completed"

At the foot of the invoice the total amount due is €700 plus VAT.

18. What is plainly the same invoice, and agreed by Mr. Loughnane to be the same invoice, turns up again in the March 2015 book of invoices, sworn by Mr. Loughnane to be relevant to the Lord Lucan job. However, the second invoice has been clearly altered in the following way. After the word "site:" now appears the words "Lord Lucan" where previously "Supervalu" had appeared. The second alteration that has been made to the invoice is that the price shown at the foot thereof, being €700, has been modified by the addition of a zero so that it now reads "€7,000". This second invoice was submitted by the plaintiff in its booklet of invoices dealing with the 50 variations in support of variation no. 16 being the new ceiling in the premises.

19. In the course of Mr. Loughnane's cross-examination on Day 5 of the trial, the following exchange took place regarding this invoice:

> "406 Q. Can you tell me how an invoice from 2004 which was clearly meant for a completely different client has that client rubbed out or tippexed or whatever
>
> happened to the original and the Lord Lucan is written in and extra nought is put on it and gets presented to us as corroboration for an item in a variation?
>
> A. I can't see how because it clearly says 700 written cash sale.

407 Q. Would you answer the question please, Mr. Loughnane?

A. I don't know.

Mr. Justice Noonan: Who changed the name, Mr. Loughnane?

A. That appears to be the case.

Mr. Justice Noonan: Somebody did it. Was it you, was it somebody else, who did it?

A. The date doesn't correspond or anything Judge.

Mr. Justice Noonan: Do you understand what I am asking you, someone changed the name.

A. I do, yes.

Mr. Justice Noonan: Do you know who it was?

A. I don't at this stage. No.

408 Q. Mr. Sanfey: How is that possible Mr. Loughnane? How is it possible that you don't know who doctored an invoice to put in a false claim in support of variation.

A. I don't know.

409 Q. Who else was dealing with these invoices?

A. Again I don't know. I'll have to come back to you on that.

Mr. Justice Noonan: I am afraid there is no coming back now. We are nine years after the event, Mr. Loughnane, so that the time of reckoning is now I'm afraid.

A. I would have to say it must have been assumed it was for the Lord Lucan.

Mr. Justice Noonan: How could that be if it says Supervalu on it, sorry, Mr. Sanfey.

A. It can't be, my Lord.

410 Q. Mr. Sanfey: that assumption is simply not possible; isn't that right?

A. It is not possible.

411 Q. Can I ask you again who did this?

A. I don't know is my …

412 Q. Who else was dealing with these invoices, who could have done it?

A. I would have gone through a lot of these myself. I would have to take the blame for it but I mean it clearly says "700 cash, Supervalu 2004." I mean then it says Lord Lucan. I don't know would I have put it into Lord Lucan or not, I don't know.

413 Q. Can I ask you as bluntly as this Mr. Loughnane, did you do it?

A. I would accept responsibility for doing it, yes. I must have done it, yes."

20. Throughout the course of all of the plaintiff's lengthy evidence, it was never suggested on any credible basis that any person other than Mr. Loughnane could have been responsible for the falsification of this invoice. Moreover, I am satisfied that Mr. Loughnane admitted doing so in the passage above referred to. Mr. Loughnane's fellow director of the plaintiff company, Mr. Genocchie, now since retired, gave evidence from which it was clear that he had no involvement of any kind in the drawing up of invoices or the pricing of jobs. His role in the company was quite different. The overwhelming probability therefore is that Mr. Loughnane, and Mr. Loughnane alone, was responsible for this attempt to defraud the defendants of the sum of €7,000.

21. Arising out of the foregoing and following hearing submissions from Counsel on the matter, I administered a warning to Mr. Loughnane that he was not obliged to answer any questions, the answers to which might tend to incriminate him. Thereafter, Mr. Loughnane's cross-examination continued the next day with the rather unedifying evidence from him that he had not in fact admitted altering the invoice during the course of his evidence on the previous day and in fact had misunderstood what he was being asked. I have no doubt that this was a blatant lie by Mr. Loughnane conceived by him during the overnight adjournment having realised the seriousness of the admission he had made on the previous day.

22. (2) Invoice dated the 8th August, 2006, from Richard Long.

This invoice bears serial no. 265 which in sequence is two greater than the previous invoice although this one is dated almost two years later. This invoice is also addressed to "Billy Lockhart" and the site is identified as being the "Lord Lucan". However, in the handwritten narrative the following appears:

"for erect and dismantle of three number houses front elevation and rear elevation."

The invoice is in the amount of €4,000 plus VAT. It is clear from the narrative description of the work concerned that this could not possibly relate to the Lord Lucan and it follows therefore that the identification of the site is incorrect. However, the defendants were unable to establish or at least put in cross examination any suggestion that this amount was actually claimed as part of the plaintiff's

claim and accordingly, despite considerable reservations about how this document came to be included in the book of invoices from 2007, I propose to disregard it.

23. (3) Frontline Services invoice of 15th June, 2006.

Two versions of this invoice were produced by the plaintiff in support of a claim on foot of variation 27 being the cost of moving and repositioning condensing units. Although the invoices purported to be identical, they are in fact for different amounts, the difference being explained by reference to different VAT rates being applied to the total due in one case at 13.5% and in the other at 21%. I am satisfied however, that this was an error which was adequately explained by the evidence of a witness from Frontline Services and that the lower VAT rate was in fact the correct one. Despite that evidence however, the plaintiff continued to persist in claiming the higher amount throughout the trial.

24. (4) Churchtown Engineering Limited invoice dated 20th April, 2006.

The first version of this invoice bears the no. 1165 in handwriting. The narrative contained in the body of the invoice is:

> "supply only steel door in frame, hot dipped galvanised, sheeted.
>
> Agreed price €530."

The total amount plus VAT is €641.30. This invoice was furnished as part of the booklets of invoices given to the defendants in October 2007.

25. The same invoice was again produced to the defendants in March 2015 in support of variation no. 7. Mr. Loughnane agreed in his evidence that it was the same invoice and it is clear from an examination of both documents that they are one and the same. However, in the second version of the document, the invoice number has been evidently changed to 1166 although the heading is otherwise identical. However, the handwritten narrative in the body of the invoice has been entirely obliterated and replaced by a typed and tabulated claim for three items amounting to €4,560 plus VAT, total €5,175.60. Mr. Loughnane agreed that the second invoice had been falsified but denied that it had been done by him. However, barely a few moments later, Mr. Loughnane sought to suggest that he did not accept that it was falsified in direct contradiction of his earlier evidence. I am satisfied that Mr. Loughnane's evidence in this regard was evasive and untruthful.

26. Here again, I am satisfied that the only credible explanation for this falsified invoice as a matter of overwhelming probability is that it was falsified by Mr. Loughnane in an effort to advance a fraudulent claim for in excess of €5,000 from the defendants.

27. Mr. Loughnane further agreed under cross examination that in addition to swearing an affidavit of discovery exhibiting these fraudulent invoices as relevant to the claim, he also furnished them to the plaintiff's expert quantity surveyor, Mr. O'Kane, with a view to having Mr. O'Kane advance them as part of the plaintiff's claim.

28. (5) Ken Usher Roofing invoice dated 28th August, 2006.

A photocopy of this invoice was furnished to the defendants in October 2007 as part of the corroboration of the plaintiff's claim in response to repeated requests from the defendants' architect, Mr. Solan, for such. The total of the invoice was €27,080. The customer is identified on the invoice as the plaintiff, W.L. Construction Limited. In the description section of the invoice, two words only appear handwritten in green ink "Lord Lucan". The original of this invoice was present in court and I had the opportunity of examining it, as did Mr. Loughnane. It was obvious from an examination of the original that the words "Lord Lucan" were written on a strip which was stuck by adhesive over other writing contained in the original invoice which, by holding the document up to the light, could be seen to be "house in Clonskeagh". Mr. Loughnane agreed that the invoice had been doctored and that in fact the plaintiff had worked on a house in Clonskeagh. Although in fact it ultimately transpired that the amount of this invoice was not actually claimed by the plaintiff as part of its claim in these proceedings, it nonetheless amounts to a clear intention on the part of the plaintiff to deceive the defendants into believing that work had been done on the Lord Lucan premises which never in fact took place. Here again, I am satisfied that Mr. Loughnane was responsible for this attempt at deception and falsified the invoice.

29. (6) Invoice from Hubert Maxwell Haulage Limited dated 20th September, 2006.

This invoice is addressed to W.L. Construction and lists a large number of items, some at least of which could not possibly have been for the Lord Lucan job. The sub total of the invoice before VAT is €15,000 and the total is €17,025. Under the heading of "details" on the invoice, the words "Lord Lucan" appear again handwritten in green pen. This invoice was produced by the plaintiff in support of vouching variation no. 21 which related to increasing the size of the extension. Although the claim on foot of this variation was for a sum in excess of €19,000, the Hubert Maxell invoice was by far the largest item. Here again, the original invoice was available in court and it emerged from a perusal of same that the words "Lord Lucan" had been written on a strip of paper that was stuck over the original site details which were evident from carrying out the same exercise as before as being in fact "Clonskeagh". Mr. Loughnane conceded that the invoice has been doctored and falsified. Here again, I am absolutely satisfied that this invoice was falsified by Mr. Loughnane in an attempt to defraud the defendants of a sum of €17,025.

The Plaintiff's Claim, its Progress and Presentation

30. In order to understand how the plaintiff's claim has evolved and developed over the best part of a decade, it is I think helpful to have regard to a chronology of the relevant events. As already noted, the Phase 1 and Phase 2 works were completed by the end of 2006.

31. 9th January, 2007 - The plaintiff submitted what appears to have been in the nature of a final account to Architectural Construction Technology claiming a balance due of €175,274.66. This figure included VAT.

32. 9th May, 2007 - The plaintiff sent a letter attaching a surveyor's report which appears to have been compiled by a Mr. Maguire, Quantity Surveyor. The sum claimed as being now due on foot of this report was €289,577.45. This document included a rather extraordinary claim for €35,000 made up in the following way:

> (11) Instruction of surveyor to rectify and legalise payments PC 5K 5000
>
> (12) Legal fees associated with the last PC 10K 10,000

(13) Opportunity cost of reduced cash flow 10,000

(14) Administration charge for instructing surveyor and solicitor PC 10K 10,000

33. Subsequently, another document, again apparently emanating from a quantity surveyor, and entitled "Lord Lucan Summary" was submitted by the plaintiff to the defendants in which the balance due was now claimed to be €198,957.03. Subsequently a document in the format of a spreadsheet was delivered to the defendants and this time, the total due was claimed to be €216,505.30.

34. 5th October, 2007 – A second spreadsheet was delivered amending the claim to €221,477.45.

35. 12th October, 2007 - The two lever arch files containing invoices to which I have already referred were delivered to the defendants purporting to be substantiation and vouching for the claims made. It is common case that many of the invoices contained in these lever arch files, even apart from the ones I have specifically identified above, were unrelated to the Lord Lucan job.

36. 8th April, 2008 - The summary summons herein was issued in which a sum of €191,030.40 was claimed.

37. 22nd May, 2008 - The defendants' solicitors wrote to the plaintiff's solicitors drawing their attention to the fact that the booklets of invoices previously submitted included many that were unrelated to the claim. There was no substantive reply to this correspondence. Instead the plaintiff bought a motion for summary judgment.

38. 18th January, 2009 - Mr. Loughnane swore an affidavit grounding the application for summary judgment in which he averred that the sum due to the plaintiff was the sum claimed in the summary summons, €191,030.40. This figure was calculated on the basis of the total value of the works being €895,771.28.

39. 8th May, 2009 - A further report was prepared, this time by Mr. Andrew P. Nugent, another quantity surveyor which claimed that the balance due now stood at €170,627.14. This included a figure of €21,000 never previously claimed for additional time expended.

40. 19th May, 2009 - Mr. Loughnane swore a further affidavit averring that the latter figure was due.

41. 22nd July, 2009 - The plaintiff delivered its statement of claim again alleging the sum due as €170,627.14 but this time claiming that VAT had to be added to this figure.

42. 11th August, 2009 - The plaintiff furnished replies to particulars confirming that the figure of €170,627.14 was plus VAT.

43. 15th December, 2009 - Further replies were furnished by the plaintiff now claiming the sum of €170,627.14 as being inclusive of VAT.

44. 28th February, 2011 - The court ordered the delivery of further particulars.

45. 2nd March, 2011 - In further particulars, the plaintiff again confirms that the latter figure includes VAT.

46. 20th March, 2014 - The defendants brought a motion to dismiss the claim for want of prosecution.

47. 22nd January, 2015 - Barr J. gave judgment refusing the application for directing further particulars to be furnished.

48. 5th February, 2015 - The plaintiff furnished updated particulars of loss which in effect comprised two expert reports, the first from Mr. Patrick O'Kane, Quantity Surveyor and the second from Mr. Paul Keenan, of Keenan Lynch Architects. Mr. O'Kane's report contained no bottom line but alleged that the total value of the works carried out by the plaintiff was €1,067,614.20. It recorded the payments made as being €696,721.37 making it possible to infer that the amount now being claimed by the plaintiff was €370,892.83. It will be noted that this is more than double the amount that Mr. Loughnane had sworn was due in May 2009. It is also of significance that it emerged during the course of Mr. O'Kane's evidence that all of the figures contained in this report were in effect figures supplied by Mr. Loughnane himself rather than figures independently assessed by Mr. O'Kane.

49. 18th March, 2015 – A second report from Mr. O'Kane was furnished to the defendants. This report concluded that the value of the works was €1,047,677.61 leaving a final balance due of €342,931.73. In the course of his evidence, Mr. O'Kane said that unlike his report of the previous month, this report was based on his own measurement and assessment of the value of the works.

50. Also on this date, the plaintiff's solicitors delivered to the defendants' solicitors the booklet of invoices supporting each of the 50 variations claimed to which I have already referred. In the course of his evidence, Mr. Loughnane confirmed that this was the first time that the plaintiff's claim had ever being properly vouched to the defendants.

51. 22nd May, 2015 - As previously noted, Mr. Loughnane swore an affidavit of discovery swearing to the relevance of the invoices recently furnished to the defendants.

52. 17th November, 2015 - The trial commenced and an application was made by counsel for an adjournment to the following day to allow both sides' quantity surveyors an opportunity to discuss and narrow the issues with a view to saving court time. I was happy to facilitate this.

53. 18th November, 2015 - When the matter resumed, counsel informed the court that the quantity surveyors were making progress and a further adjournment to the following day was sought which again I was happy to permit.

54. 19th November, 2015 - Counsel for the plaintiff opened the case indicating that the plaintiff's claim was for the sum of €342,931, the amount set out in Mr. O'Kane's March 2015 report. At the conclusion of the day's proceedings, I raised the issue of a Scott Schedule being made available by the parties and was told that progress has already been made in that direction.

55. 20th November, 2015 - (Friday) I directed that a Scott Schedule be prepared and made available to the court when the matter resumed on the following Tuesday 24th November, 2015.

56. 24th November, 2015 - A Scott Schedule Version 1.1 was produced by the parties to the court following discussion and some measure of agreement between the quantity surveyors. The Scott Schedule showed that the claim now being advanced by Mr. O'Kane on behalf of the plaintiff was in the sum of €212,630. On the same date Mr. Loughnane was giving evidence and his cross

examination commenced. In the course of that, he was asked about the quantum of his claim and the following exchange took place (Day 3 pp. 111/112):

> "433 Q. Alright. Do you stand over the claim for €342,000?
>
> A. For how much?
>
> 434 Q. For €342,000?
>
> A. I presume there is going to be discrepancy, yes. No, I don't stand over that.
>
> 435 Q. What do you say then is the plaintiff's claim in this action?
>
> A. I presume it's whatever the surveyors can agree on at this stage.
>
> 436 Q. Mr. Justice Noonan: Do you not know what your own claim is, Mr. Loughnane?
>
> A. My original claim was 170.
>
> 437 Q. Mr. Justice Noonan: That's what I thought and that's what you told me last week and that's still the position; is that right?
>
> A. That's still the position.
>
> Mr. Justice Noonan: Very good. Thanks.
>
> 438 Q. Mr. Sanfey: If you thought last week that your claim was 170,000 why did you allow a claim to go forward in the sum of 342,000?
>
> A Well, as I said, the surveyor has looked at this and that's the figures he came up with so I can go about that the figures he came up.
>
> *439 Q. Right. So you were … (INTERJECTION).*
>
> A. I have - - in that 170,000 there was items I haven't included in that the surveyor picked up, like there was miscalculations.
>
> 440 Q. So while you felt your claim was 175,000, you are happy to let a claim go forward for 342,000 twice that sum?
>
> A. Well I can only base it on what the surveyors would have come up with.
>
> 441 Q. Do you stand over the manner in which the 50 variations are vouched in this case?
>
> A. I do, yeah."

57. 26th November, 2015 - Still under cross examination, Mr. Loughnane agreed (Day 5 Q173) that March 2015 was the first time the plaintiff's claim was ever vouched properly for sums requiring vouching. Mr. Loughnane also agreed (Q190) that the methodology adopted by Mr. O'Kane was to take out the totality of the lump sum or fixed price amounts, being €210,000, with everything else being regarded as a provisional cost sum, requiring vouching, divided into 50 variations.

58. 27th November, 2015 - The case was adjourned to 26th April, 2016 for reasons explained in the transcript.

59. 11th May, 2016 - This was Day 16 of the trial when a revised Scott Schedule Version 1.2 was produced to the court. This showed that the balance now claimed by the plaintiff as computed by Mr. O'Kane was €61,141. However, this figure included seven new items never previously claimed by the plaintiff which were included for the first time on 10th May, 2016. These seven items totalled €32,450 in value. Without these new items, the value of the claim, as conceded by Mr. O'Kane on behalf of the plaintiff on day 16 of the trial, was €28,691. This figure was of course still disputed by the defendants.

60. It can be seen from the foregoing that a claim by the plaintiff for €342,931, first notified to the defendants in March 2015 over eight years after the completion of the works, and sworn by Mr. Loughnane to be properly vouched, and stated by the plaintiff's counsel on instructions to be the quantum of the claim, was now conceded as amounting to no more than €28,691. The plaintiff has offered no substantive explanation in the course of its evidence for this extraordinary change of position by Mr. O'Kane on behalf of the plaintiff. The fraudulent invoices I have above referred to, even if excluded by Mr. O'Kane from the reckoning subsequent to Mr. Loughnane's evidence, can only account for a small fraction of the discrepancy. It is also of relevance to note that this collapse in Mr. O'Kane's position from that adopted by him in his February and March 2015 reports and maintained until 10th May, 2016, came about even before he commenced giving evidence and was cross examined. To compound matters further, Mr. O'Kane added seven new items to the claim on 10th May, 2016, never previously claimed or notified to the defendants to a total value of €32,450.

61. Thereafter the matter was adjourned over the Whit vacation and resumed on 2nd June, 2016.

62. 7th June, 2016 - This was Day 19 of the trial when Mr. O'Kane was giving direct evidence. On this date, Mr. O'Kane produced to the court a document entitled "Final Account – Reconciliation". This document recorded the total value of the works as being €872,619, in marked contrast to his reports of February and March 2015, both of which indicated the value of the works to be in excess of €1m. Payments to date were stated to be €704,739 leaving a balance due according to Mr. O'Kane to the plaintiff of €167,880. This represented an uplift of over €100,000 on the figure of €61,141 put forward by Mr. O'Kane as representing the plaintiff's claim four weeks earlier, the majority of that latter figure in itself being a new claim never previously made. This new claim included a figure for preliminaries of €60,000, which was new, in addition to a figure of €15,000 for preliminaries already contained in the Scott Schedule to which Mr. O'Kane had agreed scarcely four weeks earlier.

63. 28th June, 2016 – Day 25 – this was the final day of Mr. O'Kane's evidence. In an exchange which unfortunately typified much of Mr. O'Kane's evidence, he was asked towards the end of his cross examination if he could tell the court what the plaintiff's claim is.

He was unable to do so and required an adjournment to carry out yet a further calculation. When the case resumed, Mr. O'Kane's evidence was that the plaintiff's claim is for the sum of €152,220.05. This figure, never previously mentioned by Mr. O'Kane, was finally arrived at by him on Day 25 of the trial.

Conclusions on the Plaintiff's Evidence

64. All the relevant evidence on the plaintiff's claim and its quantum was given by three witnesses. These were primarily Mr. Loughnane and Mr. O'Kane. A third witness, Mr. Keenan gave evidence in relation to the conduct of the contract, what terms might as a matter of practice be implicit in it and how the defendants' architect, Mr. Solan, carried out his duties on foot of it. In general, Mr. Keenan was of the view that the lack of a proper written contract and the degree of informality adopted by the parties in dealing with matters were prone to disaster, as indeed transpired. In his original report of 13th December, 2011, which he adopted in evidence, Mr. Keenan stated that he had not established the quantum of the claim as a quantity surveyor had been retained for that purpose. However, in the summary of his report, he suggests that the outstanding uncertified variations could account for a sum due in excess of €100,000.

65. In his evidence, he tended to the view that because the amounts certified by Mr. Solan appeared to coincide in fact with the contract price, no account had been taken of the variations and therefore some amount must at least be due in respect of those. However, it seems to me that the difficulty with that argument is that first, many of the items contracted for as part of the original price were not in fact undertaken and second it is directly contradicted by Mr. O'Kane's evidence on Day 16 to the effect that of the original sum claimed, the only amount remaining due was €28,691. Mr. Keenan's evidence was also concerned with the detail of the counter claim which is not relevant for the purposes of this application.

66. At the end of the day therefore, the proof of the plaintiff's claim and its quantum rests upon the evidence of Mr. Loughnane and Mr. O'Kane. I have already referred to parts of Mr. Loughnane's evidence. I have found that he deliberately and repeatedly lied on oath in giving that evidence. He fraudulently altered invoices which were entirely unrelated to this claim to give them the appearance that they were so related. This included the Hubert Maxwell Haulage invoice on foot of which the plaintiff advanced a fraudulent claim for €17.025. Not content with that, in one case he changed the invoice from €700 to €7,000 and in another, from €641 to €5,175. By including these fraudulent invoices in his affidavit of discovery Mr. Loughnane swore on oath that these were relevant to the claim and supportive of it, a fact he knew to be untrue. The entire claim is tainted by the lies and dishonesty of Mr. Loughnane.

67. For his part, Mr. O'Kane in large measure relied on what he was told by Mr. Loughnane, in many cases without any independent verification or analysis of the claim. Indeed, although Mr. O'Kane's February 2015 report was put up to the defendants and to the court as an independent expert assessment of the value of the claim, it was in fact anything but, as Mr. O'Kane himself conceded in evidence that this report was in effect simply a statement of the claims that had been already formulated by Mr. Loughnane. Mr. O'Kane was instructed as an independent expert many years after the works the subject matter of the proceedings had been completed. As such independent expert, his primary duty was to give an impartial and balanced view of the claim rather than simply reciting what he had been told by Mr. Loughnane and adopting it as his evidence. As I have said, in many instances Mr. O'Kane accepted at face value what he was told by Mr. Loughnane when any reasonably careful analysis of the item claimed ought to have disclosed that it could not be sustained.

68. Another instance of Mr. O'Kane's approach to the claim was his production of a purported invoice for tiling towards the end of his evidence which had never previously been produced to the defendants or discovered by the plaintiff, as support for yet another new claim put forward for the first time. Indeed even after it had been shown in cross examination that many of the invoices relied upon by the plaintiff were either false or irrelevant, Mr. O'Kane persisted in including them in the claim.

69. Another cause for concern was Mr. O'Kane's approach to the Scott Schedule. As shown in the chronology above, on Day 2 of the trial I directed that such a schedule should be prepared in consultation between the respective quantity surveyors, Mr. O'Kane for the plaintiff and Mr. Wearen for the defendants. In fact this direction had been anticipated by the parties long since and the production of a Scott Schedule had been the subject of pre-trial correspondence. It clearly must have formed the basis for the discussions over at least a two day period before the opening of the case to which I have already referred. It seems to me that nobody could have been in any doubt as to what the Scott Schedule entailed.

70. Ultimately, the document that was produced by the parties was very detailed and comprehensive and indeed helpful to the court. The efficacy of a Scott Schedule is of course entirely dependent on the parties setting out their stalls in a frank and forthright manner in it. The schedule is intended to give a summary of what the plaintiff's claim is and the defendant's response to it. Importantly also, the schedule contains a list of items agreed between the parties. Obviously the identification of agreement on items is of great assistance to the court being an indication that no adjudication is required on that particular item. It seems to me that once an item is agreed on a Scott Schedule, that is an end of the matter save perhaps in exceptional circumstances such as for example manifest mistake or non est factum. It has however, to all intents and purposes the same characteristic as the compromise of an individual claim in relation to the item agreed.

71. Mr. O'Kane however, appeared to take quite a different approach to items agreed on the Scott Schedule. An example of this is to be found in the new claim produced by Mr. O'Kane for the first time on Day 19 of the trial, which had the effect of inflating the plaintiff's claim by over €100,000. By far the largest component of this new claim was an additional sum described as being for preliminaries in the amount of €60,000. The first Scott Schedule V. 1.1 of the 24th November, 2015, included at item 31 "preliminaries insurances etc." in the amount of €15,000. This amount was expressly agreed by both quantity surveyors and that agreement was recorded in the "Agreements" column in the Scott Schedule. In the Scott Schedule V. 1.2 updated on 11th May, 2016, the same item again appears as valued at €15,000 and again the parties' agreement on this is recorded. Less than a month later, Mr. O'Kane felt free to depart from this agreement and introduce a claim of €60,000 for preliminaries, not in lieu of the earlier amount of €15,000 that had been agreed, but in addition to it. Accordingly the plaintiff's claim for preliminaries now stood at €75,000.

72. In the course of his evidence, Mr. O'Kane repeatedly stated that the plaintiff was entitled to be paid extra for work not expressly shown on the architectural drawings, a not unreasonable proposition. However, when it was pointed out to him that in fact one of the claims for extra payment related to an item which was in fact shown on the drawings, Mr. O'Kane then claimed that if the item was not referred to in the narrative estimate provided by the plaintiff, then it ought to be regarded as an extra even if it was shown on the drawings, a proposition which I reject.

73. It is in my view very difficult to avoid the conclusion that during the course of his very lengthy evidence, Mr. O'Kane engaged in a process of constantly altering, amending and reinventing the plaintiff's claim, almost a decade after the event. This was starkly demonstrated on Day 25, the last day of Mr. O'Kane's evidence, when, as alluded to above, he was unable to say what the plaintiff's claim was without the benefit of an adjournment to calculate it.

74. In summary, I find Mr. O'Kane's evidence to be confused and utterly confusing and, for the many reasons I have identified, quite unreliable.

The Arguments
75. As I have said, the defendants rely on two alternative grounds in support of their application to dismiss the claim. The first is that, by virtue of the matters to which I have already referred, the plaintiff's claim is an abuse of process and the plaintiff is guilty of such a level of litigation misconduct that it ought to be dismissed. Alternatively, the defendants submit that even taking the plaintiff's claim at its highest, it has been established that the defendants have no case to answer. In support of the first ground, the defendants place particular reliance on the decision of the United Kingdom Supreme Court in *Fairclough Homes Limited v. Summers* [2012] UKSC 26. The defendants contend that this case is authority for the proposition that the court has an inherent jurisdiction to dismiss a claim on the ground of abuse of process, even where the court considers that a claim in damages has been established by the plaintiff. The defendants also relied in this regard on *Shelly-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232.

76. As to the second ground, the defendants accept that the appropriate test for the court to adopt at this stage of the proceedings is that set out by the Supreme Court in *O'Toole v. Heavey* [1993] 2 I.R. 554, namely whether at the conclusion of the plaintiff's evidence the plaintiff has made out a prima facie case. It was further accepted by the defendants that the court must take the plaintiff's case in an application of this nature at its highest – *Murphy v. Callanan* [2013] IESC 30. However, the defendants say that the evidence led by the plaintiff, even taken at its highest, falls short of establishing a prima facie case against the defendants.

77. Counsel for the plaintiff in reply argued that *Fairclough* does not represent the law in this jurisdiction and ought not be followed. Reliance in this regard was placed on the judgment of the Supreme Court in *Vesey v. Bus Éireann* [2001] 4 I.R. 192 and in particular on the judgment of Murray J. in the Supreme Court in *O'Connor v. Bus Atha Cliath* [2003] 4 I.R. 459.

78. The plaintiff contends that even ignoring the evidence of Mr. Loughnane and Mr. O'Kane, the evidence of Mr. Keenan alone establishes that there is at least some claim against the defendants. The plaintiff submits that it is not open to the court to dismiss the claim where any amount is, at the very least, on a prima facie basis owing to it. Counsel further contended that the proper course to adopt in this case, as recognised in *Hetherington v. Ultra Tyre Services Limited* [1993] 2 I.R. 535 by Finlay C.J. is to defer an decision on the defendants' application until all the evidence, including that of the defendants, has been heard.

Discussion
79. *Fairclough* was a personal injuries action. Liability was not in issue and there was no dispute about the fact that the plaintiff had suffered an injury. However, the defendants alleged that the plaintiff had fraudulently exaggerated the effect of his injuries to a very significant extent, a submission which was accepted by the trial judge. The issue which the U.K. Supreme Court had to decide was whether the court had jurisdiction to strike out a claim at the end of the trial as an abuse of process even where the court has held that the defendant is liable in damages to the plaintiff in some amount. The Supreme Court held that such a jurisdiction did indeed exist, both under the terms of the Civil Procedure Rules, which came into force in 1999, and the court's inherent jurisdiction. Lord Hope, Deputy President, delivering the judgment of the court said in his conclusion:

> "[65.] Although we have accepted the defendant's submission that the court has power under the CPR and under its inherent jurisdiction to strike out a statement of case at any stage of the proceedings, even when it has already determined that the claimant is in principle entitled to damages in an ascertained sum, we have concluded that that power should in principle only be exercised where it is just and proportionate to do so, which is likely to be only in very exceptional circumstances. We have further concluded that this not such a case."

80. Deliberate exaggeration in personal injury claims is unfortunately nothing new and is a virtual daily feature of personal injury litigation in our courts. The issues arising from it have been considered in a series of judgments of our Supreme Court, in particular *Vesey v. Bus Éireann* [2001] 4 I.R. 192, *Shelly-Morris v. Bus Atha Cliath* [2003] 1 I.R. 332 and *O'Connor v. Bus Atha Cliath* [2003] 4 I.R. 459.

81. In *Vesey*, a car being driven by the plaintiff was rear-ended by a bus. Liability was not in issue and the trial judge held that he had suffered some injury. He also held that the plaintiff had lied to both his own doctors and the defendant's doctors about the severity of his injury. The defendants sought to have the case dismissed arising from the plaintiff's dishonesty. In the course of delivering the court's judgment, Hardiman J. said (at page 198):

> "In argument in this court, counsel on behalf of the defendant made a further interesting submission. He referred to the well established principles whereby exemplary damages may be awarded to a plaintiff if the defendant's evidence or conduct of the case has been such that the court wishes to mark its disapproval of it. Counsel referred to a recent personal injuries case (*Crawford v. Keane*, (Unreported, High Court, Barr J., 7th April, 2000)) where this had been done. In effect, he argued, the same principle should apply in reverse against a plaintiff such as this, whose conduct of the case clearly merited the court's strong disapproval. Accordingly, any award to which the court might think the plaintiff was entitled should be reduced or extinguished on this basis. Counsel conceded, however, that he had found no Irish or English authority for the proposition that this could be done…
>
> I cannot agree, either, that it is the responsibility of a trial judge to 'disentangle' the plaintiff's case when it has become entangled as a result of lies and misrepresentations systematically made by the plaintiff himself. The procedure in our courts is an adversarial one and the defendant is entitled to have the plaintiff's case presented by him and accepted on its merits or otherwise, as these appear from the plaintiff's presentation and cross-examination. For the trial judge to make on behalf of the plaintiff the best case he can in such circumstances would risk the loss of the appearance of impartiality."

82. Hardiman J. continued (at page 201):

"Reduction or extinguishment of damages

> I have considered counsel for the defendant's submission to the effect that the damages to which the court considers the plaintiff is entitled should be reduced or extinguished as a mark of the court's disapproval of the sustained dishonesty which characterised the plaintiff's prosecution of his claim. I am not satisfied that there is a direct analogy with an award of exemplary damages to mark the court's disapproval of the conduct of a defendant. Such exemplary damages are a graft upon the plaintiff's entitlement to compensatory damages and an award of damages of the latter sort is a condition of the award of exemplary damages. Even if, contrary to the view I have expressed, there is an inherent power to reduce damages in circumstances such as the present, it would not be appropriate to exercise it without warning in the

circumstances of the present case.

It is interesting to note, however, that in the United States there is a well established jurisprudence on the inherent power of a court to dismiss an action for 'flagrant bad faith': see *National Hockey League v. Met. Hockey Club* (1976) 427 US 639. The power will be exercised in circumstances such as dishonest conduct by a litigant, obstruction of the discovery process, abuse of the judicial process or otherwise seeking to perpetrate a fraud on the court: see *Link v. Wabash Railroad Co*. (1962) 370 U.S. 626. The rationale is stated in *National Hockey League v. Met. Hockey Club* at p. 643 as follows:-

> '... [H]ere, as in other areas of the law, the most severe end of the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'

The American context is of course rather different from that prevailing here. In particular, the American courts usually lack the power to penalise conduct of the relevant sort by an appropriate order as to costs. But there is plainly a point where dishonesty in the prosecution of a claim can amount to an abuse of the judicial process as well as an attempt to impose upon the other party."

83. These views were affirmed and restated in *Shelly-Morris*. Denham J. (as she then was) agreed with the views previously expressed by Hardiman J. In his own judgment in *Shelly-Morris*, Hardiman J. having referred to *Vesey*, went on to say (at p. 257):

"In *Arrow Nominees v. Blackledge* [2000] 2 B.C.L.C. 167, the English Court of Appeal said at p. 194:-

> 'It is no part of the Court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the Court is to do justice between the parties; not to allow its process to be used as the means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke'.

I have no doubt that these principles are equally applicable in this jurisdiction. It must not be thought that a falsehood in respect of one aspect of a claim will, at worst, lead to that particular part of the claim being reduced or disallowed. The courts have a power and duty to protect their own processes from being made the vehicle of unjustified recovery. In a proper case, this will be done by staying or striking out the plaintiff's proceedings.

Quite properly, in the circumstance of the present case, the defendant has not sought this drastic relief. That is not to say that this relief would be inappropriate in a similar case in the future. But it appears to me that a plaintiff who is found to have engaged in deliberate falsehood must face the fact that a number of corollaries arise from such finding:

> (a) the plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree;
>
> (b) in a case, or an aspect of a case, heavily dependant on the plaintiff's own account, the combined effects of the falsehoods and the consequent diminution in credibility mean that the plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case;
>
> (c) if this occurs, it is not appropriate for a court to engage in speculation or benevolent guess work in an attempt to rescue the claim, or a particular aspect of it, from the unsatisfactory state in which the plaintiff's falsehoods have left it."

84. These issues were revisited yet again in similar circumstances in *O'Connor.* Here again liability was not in issue and the trial judge held that the plaintiff had suffered some injury, although he greatly exaggerated it. Among the grounds of appeal to the Supreme Court, the defendant contended that the plaintiff's claim was so exaggerated as to amount to an abuse of process and accordingly the claim should have been dismissed. Murray J. in his judgment referred to the submission of counsel for the defendant made in reliance of *Vesey* and *Shelly-Morris* that the plaintiff's claim ought to have been dismissed because of the false evidence given by him. In commenting upon that submission Murray J. said (at p. 479):

> "I have to say that I do not find either case an authority for the proposition advanced by the defendant, namely that a plaintiff who has established a claim for damages should nonetheless have his case dismissed because a portion or very substantial portion of his case was falsely and perhaps fraudulently advanced and constituted an abuse of the process of the court."

85. Murray J. went on to analyse the judgments in *Vesey* and *Shelly-Morris* to explain this conclusion. He expressed some general views on the issue of abuse of process (commencing at page 482):

> "In concluding this point I think it appropriate to make some general observations.
>
> The courts have an inherent jurisdiction to stay or dismiss proceedings on the grounds of an abuse of process. That is a power which has existed for upwards of 150 years (see, for example *Grainger v. Hill* (1838) 4 Bing. N.C. 212) and some American authorities have traced it back to Blackstone's Commentaries. The notion also received statutory recognition in s. 27 (5) of the Judicature Act (Ireland) 1877 and it is reflected in the Rules of the Superior Courts 1986, O. 19 r. 28:-
>
> > 'Abusing the process of the court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious, or oppressive, the ordinary remedy in such a case being to apply to strike out the pleadings or stay the proceedings, or to prevent further proceedings being taken without leave. Beyond this the court has jurisdiction to punish abuse of process by committal or attachment as a contempt. Where the court, by exercising its statutory powers, its powers under rules of court, or its inherent jurisdiction to stay frivolous or vexatious

> proceedings, can give an adequate remedy, it will not order a committal. On the other hand, where the irregularity amounts to an offence against justice, extending its influence beyond the parties to the action, it is contempt of court and punishable accordingly' (Halsbury, 3rd ed., vol. 8 at p. 16).
>
> The term has also been applied to cases where the proceedings are in proper form but in substance have been brought for a purpose which is ulterior and extraneous to them and to circumstances where a party has blatantly and persistently refused to comply with an order of the court (e.g. to answer interrogatories).
>
> While I do not consider it necessary for present purposes (where these observations are necessarily obiter) to review the extensive caselaw on the application of the term abuse of process, the Irish, English and United States authorities which have been referred to in the cases I have cited would appear to conform to the manner of its application as indicated in Halsbury and outlined above. It appears to be a notion applied where the whole of an action ought to come to an end and is preventive of an abuse of process rather than punitive. That is the present state of the law if I understand it.
>
> So far as I can ascertain, it is a term which is applied to stay or dismiss proceedings before trial to prevent an action proceeding any further and has not been applied at the conclusion of a trial, apart from the exceptional case where an alleged abuse of process is the cause of action itself. A party which suffers harm caused by the abuse of process may have a cause of action against the other party for damages for that harm (see *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327 which also refers to the American Second Restatement of the Law of Tort of 1977 to that effect, and the observations of Lord Denning M.R. in *Goldsmith v. Sperrings* [1977] 1 W.L.R. 478 at p. 489 in an application to stay proceedings before trial). That arises where harm is proved to have been done by a tortious wrongdoer, the person who has abused the process of the court, and he or she is liable to pay damages measured by reference to the harm done to the injured party. That is quite different from denying damages to a plaintiff without reference to any harm or loss, if any, sustained by a defendant (thus relieving the latter of his or her legal liability) in a case where part of the plaintiff's claim is rejected because of deliberate exaggeration while part is found to have been proved. In the present case there has been no claim (or counterclaim) for such harm or loss.
>
> So far as I am aware there has been no case in this jurisdiction, England or the United States where proceedings have been stayed or dismissed for an abuse of the process of the court or imposing on another party where the abuse is alleged to be comprised of deliberate exaggerations or falsehoods by the plaintiff in the course of his or her evidence at a trial where the plaintiff has otherwise been held to have established that at least part of his or her claim was valid and entitled to some award of damages. In such circumstances it is the judgment of the court which has governed the issues and the plaintiff loses any claim based on such evidence. Of course where there is cogent or tangible evidence of fraud the court may in circumstances where it considers it proper to do so direct that the relevant papers in the case be referred to the Director of Public Prosecutions. A plaintiff may also be penalised in costs since the court enjoys a wide discretion having regard to wanton and substantial waste of the court's time."

86. Although the views of Murray J. were expressed obiter, they do point to some divergence from the law in England and Wales as clarified in *Faircoulgh*. It thus appears that the position at common law in this jurisdiction, in personal injuries litigation at any rate, is that a plaintiff who has established that he has suffered some injury is not to be deprived of damages solely on the basis of fraudulent exaggeration. Of course the position at common law has since been substantially modified by the provisions of the Civil Liability and Courts Act 2004 and in particular s. 26 thereof.

As against that, it must also be said that the judgments of Hardiman J. above cited recognise that dishonesty by a plaintiff may reach a point where the abuse of process is such as to require the ultimate sanction of striking the claim out. He expressly approved the dicta of Lord Denning in *Arrow Nominees* as equally applicable in this jurisdiction. This is consistent also with the views of the Supreme Court recently expressed in *Tracey T/A Engineering Design & Management v Burton & Ors* [2016] IESC 16. The court's judgment was delivered by McMenamin J. who said:

> "[45.] … In all legal proceedings, whether a litigant is legally represented or not, a point may be reached where the conduct of such litigation is so dilatory, or so vexatious, or proceeds in a manner which either breaks or ignores rules of procedure, or where there is such egregious misconduct either before court, or in court itself, as to raise questions as to whether the right of access to the court should be limited, or, in extreme cases, whether a case should actually be struck out. Put simply, the questions are whether there is abuse of process to such a degree that a claim simply should not be allowed to proceed, or whether such a claim should be allowed to proceed only under identified procedural conditions, or in a manner proportionate to the circumstances, while seeking, as far as is practicable, to vindicate that constitutional right to litigate proceedings…
>
> Time allotted to the parties may be apportioned by a judge fairly, prior to, or during a hearing. But, such time must be predicated on a realistic appraisal of the time a case, or matter, should, ordinarily and properly, take. As Denham J. pointed out in *O'Reilly McCabe v. Minister for Justice, & Patrick Cusack Smith & Co (Agents of Thomas McCabe Ward of Court & Minor)* [2009] IESC 52 at para. 33, the constitutional right of access to the courts, while an important right, is not an absolute one….
>
> [47.] In addition to the factors outlined in those decisions, however, a court is entitled to generally have regard to the manner in which proceedings are conducted. While the jurisdiction to strike out proceedings for abuse of process, in one form or another, is to be exercised sparingly, it is a sanction which cannot be ignored. Similarly, while parties have a right to defend proceedings, it may be necessary to identify the manner in which defendants' rights are best vindicated. A court may, under the Constitution, take whatever proportionate steps are necessary to protect the integrity of its own processes and procedures, and the inherent right of courts, themselves, to manage their own procedures in a manner which balances the rights of litigants with the rights of the public, and other litigants."

87. The authorities to which I have referred establish that the court has not only a power but a duty to protect its own process from abuse of the kind that has occurred in this case. It will be in rare and exceptional cases that this will require the ultimate step of striking out or dismissing the claim but it cannot be doubted that this step can and should be taken when the case warrants it. I have come to the conclusion that this is such a case.

88. I now turn to consider the discrete issue of whether the plaintiff has met the threshold of establishing a prima facie case and if not, whether I should nonetheless hear the defendants' evidence before coming to a final conclusion on this application. In *Hetherington*, Finlay C.J. in the course of his judgment made the following remarks in connection with non-suit applications (at page 541):

> "If a defendant to an action being tried by a judge sitting without a jury applies for a direction on the basis that the evidence adduced by the plaintiff is not sufficient to establish a case against him, I think it is reasonable for a judge, if he sees fit, on a trial to inquire from that person as to whether he intends to stand on that application. If he indicates that he intends to give evidence in the event of the application failing, the judge may well properly defer the decision on the issue as to whether a case is being made out by the plaintiff until he has heard all the evidence.
>
> Secondly, and more importantly, in the light of this case, I am quite satisfied that if two defendants are sued and if one of them makes an application for non-suit at the conclusion of the plaintiffs case, that it is open to a judge and, in my view, probably very desirable in the interests of justice, that he should enquire from the other defendants involved in the case as to whether it would be their intention, if they are left in the action, to present a case against the party seeking a non-suit at that time. If they are going to present a case by evidence or submission against their co-defendant, seeking to blame him, all the requirements of justice are that all that evidence should be heard before a final determination of the case."

89. Of course in this case, there is in reality a single defendant so that the latter remarks of the Chief Justice are inapplicable. A similar issue arose for consideration by the Supreme Court some months later in *O'Toole* where Finlay C.J. elaborated upon the views he had previously expressed in *Hetherington* as follows (p. 546):

> "[1.] If an action is brought either in tort or contract against one defendant only, and if at the conclusion of the evidence for the plaintiff the defendant applies for a dismiss, then it seems appropriate that the trial judge should inquire from the defendant as to whether in the event of a refusal of that application the defendant would intend to go into evidence.
>
> [2.] If, as occurred in the present case, the indication given by counsel in making the application is that, if refused, his client intends to go into evidence, then, it seems to me that the issue which has been raised as a matter of law before the trial judge is to reach a decision as to whether the plaintiff has made out a prima facie case. This would be consistent with the procedure which would be appropriate in a case where such an application was made and the case was being tried with a jury. In that instance the judge would be required to consider whether on the evidence the plaintiff had submitted, it would be open to a jury, if no other evidence was given, or if they accepted that evidence, even though contradicted in its material facts, to enter a verdict for the plaintiff.
>
> [3.] If upon applying for a non-suit at the conclusion of the plaintiff's case, in a case where one defendant only has been sued, it is indicated that the defendant does not intend, if the application is refused, to go into evidence, then, in effect, the learned trial judge is being asked to determine the following question, which is: having regard to his view of the evidence of the plaintiff, whether the plaintiff has (that being the only evidence before him) established as a matter of probability the facts necessary to support a verdict in his favour. Unless he is so satisfied, he must dismiss the action; if he is so satisfied it appears to me that he must give judgment for the plaintiff."

90. The issue again arose for consideration more recently in *Murphy v. Callanan* [2013] IESC 30. The appeal to the Supreme Court was concerned with the manner in which the trial judge had dealt with an application for a direction. In delivering the courts' judgment Denham C. J. referred to and followed the earlier judgments in *Hetherington* and *O'Toole* saying (p. 16):

> "The procedure for the learned High Court judge to follow was then to assess whether the plaintiff had made out a prima facie case against [the defendant] i.e. whether there was any evidence from which negligence may be inferred against [the defendant] or was there evidence, whatever its relative cogency or strength, upon which a court could conclude that [the defendant] was liable."

The Chief Justice made clear that the trial Court in an application for a non-suit was obliged to take the plaintiff's case at its highest, saying (p. 23):

> "[31.] It is clear that the learned High Court judge erred by failing to assess the appellant's case at its highest but rather he balanced the appellant's case against that as asserted by [the defendant], and found for [the defendant].

Credibility

> [32.] The learned High Court judge referred extensively to the appellant's oral evidence and its credibility. While it is a factor to which a trial judge may refer and have as part of a reason for a decision, in all the circumstances of this case it could not be effectively the reason to dismiss the appeal, where the Court is required to take the appellant's case at its highest.

Conclusion on appeal

> [33.] The learned High Court judge erred in failing to have due regard to evidence, including that of Dr. Dunne, to the joint cheque issued by [the defendant], and to the expert evidence of Ms. Hynes on the assessment of the appellant's credibility. The learned trial judge did not apply the correct test by failing to take the appellant's case at its highest. Of course a judge when applying the correct test, even though he or she is bound to take a plaintiff's case at the highest mark, would be entitled to dismiss if a plaintiff had not established a prima facie case, or if a plaintiff's case manifestly lacked credibility and no sufficient weight could be attached to it. However, that was not the situation in this case."

Conclusions

91. This case stands or falls on the evidence of Mr. Loughnane and Mr. O'Kane. Leaving to one side the separate issue of abuse of process for a moment, I accept, as I must, that I am obliged to take their evidence at its height in order to assess whether the plaintiff has established a prima facie case against the defendants. However, taking the evidence at its highest is not to be equated with accepting that evidence without question. The court is entitled to assess the credibility of the plaintiff's evidence and the weight to be attached to it even at this stage of the trial. In my view, the evidence of both Mr. Loughnane and Mr. O'Kane has been completely undermined by virtue of the matters to which I have referred in detail above. Mr. Loughnane's evidence is entirely lacking in credibility and for somewhat different reasons, so is that of Mr. O'Kane. Mr. Loughnane's evidence was grossly dishonest in a number of respects I have identified. It is of course possible that some of his evidence was truthful but in reality, it is all but impossible to separate truth from fiction. As the authorities to which I have referred make clear, it is not the function or duty of the

court to disentangle a case that has become entangled by lies.

92. By my reckoning, the plaintiff has presented the defendants with some 14 different versions of its claim ranging in value from €28,691 to €370,892.82, the majority of these after the institution of proceedings. Although I do not suggest that Mr. O'Kane deliberately lied in his evidence, much of it was predicated upon the uncorroborated evidence of Mr. Loughnane and it was ultimately so hopelessly confused and contradictory due to its constantly changing and shifting nature that it was at the end of the day incapable of being relied upon by the court.

93. The manner in which the plaintiff has put forward its claim has had a dramatic effect on the length of time this case has so far taken. The case was originally estimated by the parties to take six days and was listed for hearing on that basis. It appears to me that the fact that the case has taken such an inordinate length of time is due in large measure to the way in which the plaintiff's ground has constantly shifted and changed and also to Mr. Loughnane's dishonesty and its exposure.

94. It has been impossible for the defendants to know at any given time what case they have come to court to meet with new claims being constantly presented for the first time right up to Day 25 of the trial. This to my mind constitutes the clearest abuse of the court's process. That must have some bearing on the plaintiff's right to further prosecute the case. As has been frequently noted in recent times, the court's resources are not unlimited and the court has a duty to ensure that such resources are utilised fairly. The constitutional right of access to the court is not absolute and the resource of access must be protected for the benefit of all litigants – see in that regard *Talbot v Hermitage Golf Club* [2014] IESC 57 and *Tracey*.

95. The conduct of the plaintiff to which I have already referred in the presentation of its case has been such as to virtually subvert the trial process. It is not merely a case where there has been deliberate dishonesty by the plaintiff in the prosecution of an otherwise valid claim as in the series of cases beginning with *Vesey*. Rather, that dishonesty coupled with the constant advancement of new claims and abandonment of old ones has led directly to the prolongation of the trial in a manner and to an extent that can only be regarded as an abuse of process in itself.

96. Having regard to my findings concerning the plaintiff's evidence and its effect on the progress of the case, it seems to me that this is a case of the rare kind contemplated by the authorities where the court would be justified in striking it out to prevent further abuse of process and oppression of the defendants.

However, even apart from that, I am driven to the conclusion that the plaintiff has not made out a prima facie case against the defendants that there is any sum due to it. Having reached that conclusion, and were it necessary to do so, I propose to consider whether the defendants should nonetheless be required to go into evidence before making a final ruling on the matter.

97. I have come to the view that the justice of the case requires that the defendants should not have to proceed further with this trial. In an affidavit sworn by the defendants' solicitor, Mr. Neal Boland in support of the application to dismiss for want of prosecution, on 21st July, 2014, Mr. Boland averred at para. 22 that the plaintiff company appears to be insolvent and exhibited the plaintiff's most recent accounts in that respect. This averment was repeated in submissions by counsel for the defendants and has not been contradicted. The costs incurred to date in these proceedings are by any standards enormous. If the defendants are ultimately awarded costs against the plaintiff, it seems unlikely that they will ever be recovered. It has already taken 28 days at hearing to get to the end of the plaintiff's evidence and it would not be unreasonable to suppose that the defendants' evidence might well take a similar length of time. This would impose a very significant additional costs burden on the defendants in addition to the costs they have already incurred. I think it would be unjust and oppressive to the defendants to require them to incur such a level of costs in circumstances where they have no prospect of recovering them irrespective of the outcome. Of course the conclusions I have reached in relation to the plaintiff's evidence do not in any way depend upon, or anticipate, any evidence that might be given by the defendants and thus such evidence from the defendants is unlikely to bear upon those conclusions.

98. In those circumstances and for all of the foregoing reasons, I propose to accede to the defendants' application and dismiss the plaintiff's claim.