**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 229

**Appeal Number 2017/186**

**Birmingham P.**
**Irvine J.**
**Whelan J.**

**BETWEEN**

**BISI ADIGUN**

**PLAINTIFF/**

**APPELLANT**

**- AND -**

**LINDA MCEVOY AND PATRICK MORAN**

**PRACTISING AS MORAN SOLICITORS**

**DEFENDANT/**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Máire Whelan delivered on the 6th day of July 2018**

1. This is an appeal against the judgment delivered in the High Court (MacEocaidh J.) on 6th April 2017 dismissing the appellant's claim for damages for negligence, breach of duty and other misconduct against the respondents and in particular the first named respondent.

**Background**
2. The appellant is a playwright, theatre director and producer. He is the founder and artistic director of Arambe Productions Company Limited (hereinafter "Arambe"), a company limited by guarantee. He is also a director of the said company.

3. The first named respondent, Linda McEvoy, is a solicitor (hereinafter "the solicitor"). A very detailed history of the course of dealings between the appellant and the solicitor is set out in the first 48 pages or so of the High Court judgment and will not be repeated hereafter save to the extent necessary.

4. The interaction between the parties was of relatively short duration. The appellant first met the solicitor on the evening of the 28th November 2007 and their dealings ended around 7th March 2008. Mr. Adigun claims that in addition to a retainer to act for Arambe he also personally retained the solicitor to represent his own private interests in respect of issues arising with the Abbey Theatre and Mr. Roddy Doyle, the world-renowned author.

**Some key aspects**
5. The background to this dispute had its genesis in an adaptation of the iconic play *The Playboy of the Western World* by John Millington Synge, first produced in 1907. Arambe wrote to Mr. Doyle in July 2005, inviting him to collaborate in an adaptation of the play.

6. Arambe, with Arts Council funding, by a contract dated 6th February 2006, commissioned the appellant and Mr. Doyle to co-write an adaptation of the play.

7. The contract provided, *inter alia*, that the co-authors would be the exclusive owners of the copyright to the adaptation and that Arambe would have an exclusive licence to produce and perform the play. It was stipulated in the contract that Arambe would not transfer the rights granted to it in whole or in part without the prior written consent of both authors.

8. The Abbey Theatre considered staging the play and negotiations commenced which led to a draft contract/licensing agreement with Arambe. On 9th May 2007 a draft contract was sent by the Abbey to Arambe. The appellant represented Arambe in all its key dealings with the Abbey Theatre. The prior written consent of Mr. Doyle was neither sought nor obtained for this agreement. The trial judge found that he was not informed by the appellant of the proposed staging of the play.

9. Mr. Doyle, acting through his agent, Mr. John Sutton, became aware of this development and disputed the legal entitlement of Arambe to enter into such a contract with the Abbey Theatre without his prior written agreement.

10. In a letter dated 17th May 2007 sent to Arambe his agent, Mr. Sutton, stated:

> "The contract… is a total and complete sub-licence by Arambe to the Abbey and therefore requires the written consent of Roddy Doyle."

11. On 18th May 2007 the Abbey sent a revised contract/licensing agreement to Arambe. The original draft had represented that Arambe was "the owner of the full copyright in the Play." The appellant had pointed out to the Abbey that both he and Mr. Doyle owned the copyright and not Arambe.

12. The Abbey responded on 21st May 2007 stating that they could only conclude a contract with Arambe if it could rightfully claim

to be the exclusive holder of the copyright.

13. The draft contract was amended to address this issue and the Abbey agreed to execute same on 22nd May 2007. Neither this contract, as revised, nor its terms were disclosed initially by the appellant to Mr. Doyle or his agent.

14. Subsequently the play was performed and ran at the Abbey in 2007. However, the dispute surrounding the failure of Arambe to obtain Mr. Doyle's prior consent to the Abbey contract remained unresolved.

15. A key grievance of Mr. Doyle's was the appellant's refusal to give him sight of a copy of the executed agreement between Arambe and the Abbey in a timely fashion.

16. On 27th September 2007 Arthur O'Hagan, solicitors for Mr. Doyle, wrote to Arambe seeking a copy of the agreement between Arambe and the Abbey. The request went unanswered. A follow-up reminder letter was sent on 17th October 2007.

17. On 1st November 2007 Mr. Doyle's solicitors wrote to Arambe's company secretary expressing concern that no response had been received to the earlier correspondence. This letter stated that Mr. Doyle had instructed them to repudiate the co-authors' agreement between their client and the appellant with immediate effect.

18. Meanwhile, the Abbey Theatre, on learning of this legal dispute, wrote noting that they would withhold royalty payments of approximately €20,860 pending a resolution of the impasse between the authors.

**Involvement and role of the solicitor**

19. The letters received by Arambe Productions, both from solicitors for Mr. Doyle and the Abbey, called for a response. This led to legal advice being sought from the solicitor.

20. The appellant first met the solicitor on the evening of the 28th November 2007. He contended at the hearing and at this appeal hearing that at this meeting he explained to her the issues in the dispute by reference to a number of documents.

21. After a hearing conducted over 16 days the trial judge reserved judgment. In his judgment he found as a fact that the appellant had failed to provide the solicitor with a copy of the (unsigned) authors' contract of 16th January 2006 at their initial meeting (para. 29 of judgment).

22. I am satisfied that the evidence at the trial demonstrated that this omission on the part of the appellant left the solicitor effectively in the dark regarding material facts. It impeded her in providing timely relevant advice to Arambe in response to the solicitors' letters it had received. A telephone conversation took place between the appellant and the solicitor on 7th December 2007 during the course of which she confirmed that she had not at that point written to the solicitors but had left messages for both firms.

23. On 18th December 2007 the solicitor issued a s. 68 letter (pursuant to s. 68 of the Solicitors (Amendment) Act 1994). The subject heading of this letter referred to Arambe alone. It set out the firm's terms of business including a request that a retainer fee of €1,200 plus VAT be paid. On the same day the solicitor sent a further e-mail to the appellant which stated that Arambe would have to formally accept the firm's terms of business in order to progress matters.

24. A further e-mail the following day stated:

> "The terms of business would need to be accepted by Arambe's board or by you on Arambe's behalf before we proceed further in terms of time …"

25. By e-mail dated 20th December 2007 the appellant replied, stating:

> "I had looked at the terms of business and I had informed my board about it and we are happy to let you handle the case for us."

26. The appellant subsequently produced a cheque payable to the solicitor and dated the 12th February 2008 drawn on an account in the name of Arambe though apparently same was never presented to the solicitor.

27. In an e-mail dated 20th December 2007 the solicitor stated:

> "I have reviewed the documentation you furnished, however I have also forwarded same to a barrister in order to obtain her expert opinion on the points of law at issue… I will inform you when I have received her opinion which should be early in January."

28. The statement that papers had been forwarded to counsel was not true. Neither had she responded to the correspondence from solicitors for Mr. Doyle or the Abbey Theatre on behalf of Arambe.

29. Arambe is not a party to this litigation. The company brought no claim against the solicitor arising from these events or omissions.

30. The appellant asserts that she was also retained to act on his behalf. This action is brought in respect of personal losses he claims he suffered and which he attributes to her breaches of duty, failures and omissions.

31. The solicitor did meet with the legal representative for Mr. Doyle in January 2008. Mr. Edward Gleeson, solicitor for Mr. Doyle, gave evidence at the trial and was cross examined. He stated that his client wished to have a new Arambe/Abbey contract executed to replace the one for which Mr. Doyle had not given his prior consent. The trial judge found that the solicitor understood this to mean that Mr. Doyle was offering "an olive branch" to the appellant and Arambe.

32. He concluded that Mr. Doyle's stance was that the failure to obtain prior written consent would be forgiven and a new agreement between Arambe and the Abbey would be entered into with the prior assent of both Mr. Adigun and Mr. Doyle and same would govern any future productions of the play by the Abbey. This finding appears at, *inter alia*, paras. 51, 82, 87 and 105 of the judgment.

33. The solicitor apprised Mr. Adigun of the outcome of her meeting with Mr. Gleeson. The appellant strongly disagreed with the proposed solution. In maintaining that stance it is clear that he was acting as an agent for Arambe which was a party to the Abbey contract. The appellant, on behalf of Arambe, instructed her not to agree to the proposals advanced on behalf of Mr. Roddy Doyle.

34. The solicitor wrote on 29th February 2008 advising that in all likelihood any action taken by Mr. Doyle would not be successfully defended by Arambe. In this regard she stated:

> "… the terms of the Agreement between [the appellant], Roddy Doyle and Arambe dated 6th February 2006 somewhat conflict in that they grant to Arambe the dramatic rights in the play for three years should Arambe cause the play to be produced, yet simultaneously grant such rights to Arambe solely without any power of assignment, on balance I believe that Mr. Doyle's express consent to the terms of Arambe's granting of a licence to produce and present the Play to the Abbey Theatre was in fact required. I refer in particular to Mr. John Sutton's letter of May 17, 2007 in this regard and I feel that due regard should have been given to the contents of this letter at the time it was furnished to you."

35. Manifestly, this was not advice which the appellant wished to receive. He responded on 7th March 2008 seeking, *inter alia*, copies of all of the correspondence written by Ms. McEvoy to the solicitors acting on behalf of Mr. Doyle and the Abbey Theatre in relation to the issues therein referred to. It is to be inferred from the content and tone of that letter, the relationship between the solicitor and Mr. Adigun had, at that juncture, irretrievably broken down.

36. Following receipt of the letter of the 7th March 2008 aforesaid from the appellant, the respondent solicitors terminated their retainer with Arambe. The stated reasons included that they could not, as a firm of solicitors, act in any manner which breached or could be seen to breach a duty of care owed to Arambe as a corporate entity by acting on instructions that were contrary to its best interests and in which the firm's professional integrity could be compromised.

**The proceedings**

37. The appellant is a litigant in person.

38. The appellant instituted these proceedings by way of plenary summons on 30th November 2009 claiming that the respondents had acted as his solicitors and seeking damages under various heads. He asserted that the solicitor had been retained by him in his personal capacity as well as by Arambe.

39. A central claim advanced by the appellant in the High Court was that he had instructed the solicitor to write to the firms of solicitors retained for Mr. Doyle and the Abbey to assert that Arambe had acted lawfully in entering into a contract with the Abbey and further that Mr. Doyle had given verbal consent to the play being produced by the Abbey. He also contends that this letter ought to have asserted that there would be a "counterclaim" unless the outstanding royalties due by the Abbey were paid.

40. The appellant argued that the solicitors' failure to retain counsel had resulted in loss. In particular he contended that a properly-instructed counsel would have discovered the existence of the draft authors' agreement dated 16th January 2006 which he had failed to disclose to the solicitor, and that a counsel could have made use of the "legal consequences" of the said document.

41. He asserted that arising from the alleged omissions on the part of the solicitor to write the aforesaid letters a number of adverse consequences ensued for him personally which caused him loss:

> (a) his relationship with Mr. Doyle which could have been restored was not;
>
> (b) the play would have had greater success nationally and internationally than it had;
>
> (c) he was defamed in a newspaper article because of her inaction;
>
> (d) her inadequacies in the performance of her duties towards him required him to institute multiple sets of proceedings subsequently;
>
> (e) copyright on the play was breached during its second run;
>
> (f) he alleges that he endured years of stress in pursuing various parties.

42. A fundamental issue for determination at the trial was whether Mr. Adigun was ever a personal client of the solicitor. The trial judge in a written judgment, after detailed analysis of the facts, the documentation and the testimony of the witnesses, concluded that the first named respondent had agreed to act for Arambe but not for the appellant. The trial judge concluded that accordingly the action of the appellant must fail (para. 47 of judgment).

43. Since there are over 30 grounds of appeal raised by the appellant, it is necessary to consider the High Court judgment further in some detail.

**High Court judgment**

44. The judgment of the trial judge is very detailed and comprehensive. In reaching his determination regarding the key issue as to whether the solicitor was ever retained by the appellant to advise him personally he reviewed the evidence forensically.

45. The trial judge found on the evidence that the appellant had raised the prospect of separate representation for himself but concluded that this was only ever in relation to missing royalty payments that were due to him (para. 31 of judgment).

46. The primary determination of this trial judge on the key issue was that the solicitor had agreed to work for the company Arambe but not for the appellant:

> "My decision is that the defendant agreed to act for Arambe and not for the plaintiff. The plaintiff was not the defendant's client. Therefore, this action must fail. However, in view of the amount of evidence I have heard and the failure of the defendant to explain to the plaintiff in express terms that she was not acting for him personally, though he was under the opposite impression, and lest my decision on who her client was is wrong, I shall proceed to decide the plaintiff's case as though he were the defendant's client and, therefore, entitled to maintain these proceedings against her." (para. 47 of the judgment)

47. The trial judge found that the s. 68 letter was evidence of the solicitor's intention to act for Arambe alone. However, he observed that it was regrettable that the solicitor had not explained this clearly to the appellant. The trial judge analysed in detail the arguments advanced by the appellant to support his contention that he had in fact been a personal client of the solicitor. Such arguments included the appearance of the letters "ADI" in the reference section of correspondence and the fact that said

correspondence was sent to his home address. The trial judge did not find these facts to be persuasive:

> "They are neutral as to the question of the identity of the defendant's client." (para. 46 of the judgment).

The trial judge noted also that "the appellant's home address is also the address of Arambe." (para. 39)

48. Notwithstanding that the said determination might have been dispositive of the issues between the parties the trial judge proceeded to determine the claim as though the appellant were the solicitor's client for the reasons outlined in the extract of his judgment quoted above.

49. A second significant issue at trial concerned certain letters which the solicitor had represented she had sent on behalf of Arambe to solicitors for the Abbey Theatre and Mr. Doyle but which were never sent and the alleged repercussions of that omission.

50. The judgment notes that Mr. Doyle in his evidence stated that in 2007 he had received a personal letter directly from the appellant which he considered to be highly offensive. The trial judge concluded that it was clear from the evidence that the relationship between the two men had been irretrievably sundered as a result of the appellant sending this letter and its tenor and contents:

> "Mr. Doyle said that he received a letter during the course of these events from the plaintiff which he regarded as highly abusive. He said he had never received any such letter in his life. It is clear to me from observing Mr. Doyle and listening to his evidence that the relationship between these men had been permanently ruptured. Mr. Doyle was asked whether a letter from the defendant, as described earlier in this judgment, would have persuaded him to reverse his position. His clear answer was that such a letter would have made no difference." (para. 81 of the judgment)

51. The trial judge concluded that Mr. Doyle's evidence in particular was fatal to the appellant's claim against the solicitor since he was satisfied on the evidence that had she written the letters in question it would not have achieved the outcome Mr. Adigun contended for.

52. The trial judge was satisfied that evidence given by other independent professional individuals involved in the dispute, in particular by Mr. Cantwell and Mr. Corbett, solicitor for the Abbey, supported that conclusion. Mr. Gleeson, solicitor for Mr. Doyle, also stated in evidence that such letters would have made no difference to the instructions of his client.

53. Key amongst his conclusions in the context of this appeal were the following:

> (a) The unwillingness of the appellant for a protracted period to provide a copy of the draft contract/licensing agreement between Arambe and the Abbey Theatre to John Sutton, Mr. Doyle's agent, damaged the relationship between Mr. Doyle and the appellant irreparably.
>
> (b) A proposal to devise a compromise - characterised in the judgment as an "olive branch" – emanated from Mr. Doyle whose solicitor advocated a conciliatory approach to the impasse between the co-authors. This is to be found in particular at paras. 50 – 56 and 59 of the judgment.
>
> (c) A further central finding on the part of the trial judge was that had the letters which the appellant contended for been written by the solicitor they would have made no substantive difference to how events ultimately transpired.
>
> (d) The trial judge also considered that had the letter which had been sent personally by the appellant in March 2008 been written instead, at an earlier time, by the solicitor this too would not have made any material difference to the outcome of events.

54. The appellant's claim was dismissed and the trial judge further found that none of the claims, torts or unlawful conduct alleged against the solicitor had been made out.

**Notice of appeal**

55. By notice of appeal dated 28th April 2017 Mr. Adigun appealed the findings and determinations of the trial judge. Framed as 37 separate grounds in all, there is an overlap between some grounds of appeal. Certain grounds can be usefully considered in related groupings:

> (i) **Bias**
>
> In grounds 1, 2 and 37 of the notice of appeal the appellant contends that the trial judge ought to have recused himself during the proceedings by reason of actual bias and he also alleges subjective bias. The appellant bases his objective bias grounds of appeal primarily on the trial judge being a former class mate and personal friend of the former Director of the Abbey Theatre, Mr. Fiach Mac Conghail, who was a witness in the case. He argues that had the trial judge's perception of him not been tainted by alleged bias, further evidence helpful to the appellant would have been expressly referenced in the judgment it is argued.
>
> (ii) **Who was the client?**
>
> A separate series of grounds assert that the trial judge erred in determining that the appellant was not a client of the solicitors. These include grounds 4 and 11 of the notice of appeal.
>
> (iii) **Non-compliance with Rules of Superior Courts and evidential, procedural and other alleged deficiencies in the conduct of the trial**
>
> The third category of grounds encompass a whole range of alleged non-compliance by the trial judge with the Rules of the Superior Courts, the rules of evidence or rules of procedure and the incorrect inclusion or exclusion of evidence. These grounds include grounds 3, 4, 5, 6 and 7 as well as grounds 9, 10, 12, 13, 14, 15, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 32, 34 and 35.
>
> (iv) **Alleged consequences of failure to write letters as instructed**

The appellant contends that the trial judge erred in concluding that even if the solicitor had written the letter which was ultimately written by the appellant himself on 24th March 2008 to the Abbey Theatre it would not have made any material difference to the outcome of events – grounds 8 and 13.

(v) **Relevance of evidence adduced at a prior failed mediation**

The appellant contends that the trial judge ought to have taken into account evidence which emanated from a failed mediation. This form of argument is to be found in ground 16 of the appellant's submissions.

**The law – general principles**

56. It is important to recall the limited function of this Court on an appeal where oral evidence has been heard in the High Court. The law in this regard is governed by the Supreme Court's decision in *Hay v. O'Grady* [1992] 1 I.R. 210 where the judgment of the Court was given by McCarthy J. He emphasised the fact that an appellate court does not have the benefit of seeing and hearing witnesses or observing the manner in which evidence was given or the demeanour of those giving it. The decision is authority for the proposition that where findings of fact made by a trial judge are supported by credible evidence, the appellate court is bound by them, however voluminous and weighty any contrary evidence might seem. In particular it is no function of an appellate court to reweigh the balancing exercise which a trial judge is required to do for the purposes of reaching a determination at trial.

57. With regard to inferences of fact the following statement by McCarthy J. at p. 217 has been frequently cited:

> "Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in "Gairloch" The S.S., *Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

58. In the instant case the trial judge had the role of hearing and assessing the credibility of the witnesses over 16 days, witnesses which this Court has neither seen nor assessed. This Court has had no opportunity to observe the manner in which witnesses testified or their conduct or demeanour.

59. It is clear from post *Hay v. O'Grady* jurisprudence that where there is credible evidence which supports a trial judge's findings of fact then this Court on appeal is bound by those findings even where there was weighty testimony on the other side. As was stated by McCarthy J.: "The truth is not the monopoly of any majority".

60. This view has been reiterated by the Supreme Court and the Court of Appeal. Of note in this regard is the decision of MacMenamin J. (sitting as a judge of the Court of Appeal) in *Rosbeg Partners Ltd. v. L.K. Shields (A Firm)* [2016] IECA 161. He emphasised at para. 48 of that judgment that the Court of Appeal should be slow to substitute its own inferences of fact for determinations drawn from oral evidence adduced before the trial judge. This is so particularly where the trial judge had applied the correct principles. MacMenamin J. in the Court of Appeal in Rosbeg had stated that the question which was required to be asked is whether there was evidence upon which the inferences drawn by the trial judge could be drawn? It is noteworthy that as regards this principle the Supreme Court on appeal in *Rosbeg Partners v. L.K. Shields* [2018] IESC 23 agreed with that conclusion and, referring to the findings of fact on the part of the trial judge, stated:

> "It might also be said that these findings of the trial judge are difficult if not impossible to challenge in the light of the jurisprudence in *Hay v. O'Grady*." (para. 30, O'Donnell J.)

61. In applying the principles enunciated in *Hay v. O'Grady* subsequent decisions confirm that an appeal court must consider whether there was evidence upon which those inferences could be drawn.

62. It is not the function of an appeal court to "parse, sift or delve selectively through the evidence in order to ascertain whether there was some 'other evidence' …" as was stated by MacMenamin J. in Rosbeg. He was satisfied, in that case, that there was undoubtedly testimony which ran counter to the judge's conclusions but "…the truth of the matter is that the judge, for reasons which he set out, found the *Rosbeg* evidence credible, and that adduced on behalf of the appellants, not credible." (para. 42)

63. As was pointed out by Charleton J. in Hickey v. McGowan [2017] IESC 6:

> "There is a difference between a trial judge making an erroneous finding of fact and making a choice between competing evidence. In the latter instance it is not for an appellate court to 'second guess the trial judge's view'" (para.12).

64. In *Doyle v. Banville* [2012] IESC 25 at para. 2.7, Clarke J., as he then was, had stated:

> "… it is … important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this Court to seek to second guess the trial judge's view."

**Submissions and legal arguments of the parties**

65. Detailed submissions were filed in the High Court by the parties. Further submissions were filed in pursuance of this appeal. In addition, supplemental submissions were filed by both parties subsequent to the conclusion of the hearing of this appeal with leave of the Court. The submissions are most comprehensive and detailed. It is not realistic or practical to rehearse each and every point of the submissions exhaustively. They focus extensively on the issues that are articulated in the grounds of appeal. However, the key relevant points are considered hereinafter.

**Appellant's submissions**

**Bias**

66. The appellant acknowledges that the trial judge did disclose his friendship with Mr. Mac Conghail in advance of the hearing of the action commencing and that no objection was made by the appellant at that time or at any time thereafter during the 16-day hearing.

67. The appellant asserts that as the trial progressed and supplemental facts emerged regarding Mr. Mac Conghail's involvement in the original dispute the trial judge ought to have recused himself of his own motion without any request from either party. The appellant cites jurisprudence to substantiate his claim that the trial judge erred in failing to recuse himself from the case as a result of his connection to the witness.

68. He relied on the decision in *Kenny v. TCD* [2008] 2 I.R. 40 which he cited in detail.

69. Detailed reference was also made to, *inter alia*, *Official Assignee in Bankruptcy v. Dunne* and *Orange Limited v. Director of Telecoms (No. 2)* 4 I.R. 159 where Barron J. had considered *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd*. [2000] 2 W.L.R. 870.

70. The appellant in his supplemental submissions focuses, *inter alia*, on the judge's disclosure of the fact of his friendship with Mr. Mac Conghail, the witness, and when this disclosure occurred. The appellant attached emphasis to the fact that the said witness attended court on the first day of the hearing when the case had been assigned to the trial judge to enquire whether it would be possible that he might be facilitated in giving his evidence since he was due to be abroad on the date he was originally scheduled to be called as a witness. This would represent a fairly routine occurrence in High Court proceedings. The evidence shows that the trial judge disclosed the fact and history of his acquaintanceship with Mr. Mac Conghail and stated that if there was any problem with him proceeding to hear the case "now was the time to say it." The appellant contends the tone of that statement indicated that once the hearing commenced he would no longer have the opportunity to object to Mac Eochaidh J. hearing the case. He contends that in effect the parties had but one opportunity to object to the trial judge hearing the case and that was at the commencement of the trial alone.

71. The appellant asserts that although he refrained from requesting the trial judge to recuse himself either at the commencement or at any stage over the ensuing 16 days of hearing, this did not absolve the trial judge from subjective and objective bias.

72. He instances various comments made by the trial judge as evidencing judicial bias. At one point in the hearing it had been indicated that had the solicitor written the letters as she was instructed to do the worst case scenario which could have ensued would be that the parties to the dispute might ultimately have had to come to court. The judge commented "Hopefully it wouldn't have been me." The appellant contends that this remark demonstrates that Arambe would have had no chance in any action against other parties to the original dispute were the trial judge to have heard such an action. However, Arambe is not a party to this action. The remark is not contextualised. No objection was made to it at the hearing.

**Conduct of hearing**

73. The appellant argues that the trial judge erred in concluding that he was not a client of the solicitor and contends that in reaching his conclusions the trial judge disregarded evidence, particularly a letter of Mr. John Sutton dated 28th May 2007 and other correspondence which supported a contrary view. The appellant contends that there was evidence before the trial judge that once he received the said letter he was aware that he had a personal legal issue for which he required professional legal advice.

74. The appellant sets out detailed submissions regarding evidence which, he contends, ought to have been disregarded by the trial judge and also other evidence which, it is claimed, was not properly taken into account by the trial judge. With regard to the former he contends that the trial judge erred in considering certain affidavits filed in 2010 by him in an application to admit a copyright action into the Commercial Court. He contends that these affidavits were not relevant to the issues arising in the within proceedings.

75. The appellant contends that strict compliance with the Rules of the Superior Courts was not observed by the trial judge including O. 24, r. 2 insofar as the respondents were permitted to depart from their pleaded defence. It was contended at length in his submissions that the trial judge disregarded evidence which supported the appellant's contention as to what might have transpired had the letters been written by the solicitor which she had failed to write.

76. He sets out in his submissions details regarding findings of the trial judge he contends are inconsistent with the oral testimony of various witnesses, including in particular Mr. Roddy Doyle.

77. The appellant contends that the judge interrupted his cross examination of the solicitor and that the solicitor is guilty of falsehood and litigation misconduct. He argues that the trial judge adopted an unduly benign interpretation of the conduct of Mr. Doyle. He objected to the characterisation by the trial judge of Mr. Doyle's behaviour as an attempt to "offer an olive branch". He contended that there was no credible evidence to support this conclusion on the part of the trial judge.

78. It was argued that the refusal of the trial judge to admit evidence which emanated from a failed mediation was erroneous and he raises the issue that the trial judge failed to make express reference to all of his various submissions written and oral in his judgment including arguments, closing submissions, oral evidence, pertinent authorities and alleged applicable legal principles.

79. The appellant contends that an opinion of counsel obtained by Arambe in September 2008 ought to have been received in evidence by the trial judge without the judge requiring that the counsel who authored the opinion be made available to testify. The appellant contends - relying on the decision of the Supreme Court in *O'Neill v. Dunnes Stores* [2010] IESC 53 - that such an approach on the part of the trial judge was impermissible.

80. Otherwise, the submissions contend that the judge's interventions, particularly during the appellant's cross examination of the solicitor, were extensive, lengthy and too frequent and this hampered the cross examination and the propriety of the trial.

81. The appellant cited authorities including *Jones v. National Coal Board* [1957] 2 Q.B. 55, *The People v. McGuinness* [1978] 1 I.R. 189, *Power v. Doyle* 2 I.R. 69 and *London Borough v. Kofi-Adu* [2006] ECWA Civ. 281. The appellant's contention as set out in detail in his submissions is that by interjecting and intervening in the questioning of certain witnesses the trial judge used the bench "to intimidate those individuals into giving answers which the trial judge wished to hear through the utilisation of leading questions." Further, it is alleged that the trial judge deprived the appellant of the right to re-examine witnesses. Relying on these authorities, the appellant contends that the trial judge's findings and decision ought to be set aside.

**Litigation misconduct**

82. The appellant asserts that the solicitor was guilty of litigation misconduct. This claim is further elaborated on in his supplemental submissions. In particular he relies on an affidavit sworn by her before the solicitor's tribunal and he relies on the authority of *The Law Society of Ireland v. Walker* [2007] 3 I.R. 581 in that regard. In the High Court proceedings the appellant contended that the solicitor and one Jenny Haughton were involved in "secret liaisons" with each other to the detriment of the appellant's interests and further that they had "spread false rumours" about him. The trial judge had considered that aspect of the appellant's pleading to be scandalous. The issue is raised in ground 34 of the notice of appeal. The appellant contends that it was "grossly unfair" on the part of the trial judge to find that this pleading amounted to litigation misconduct on the part of the appellant and further he argues that the trial judge was wrong in striking out this pleading insofar as it pertained to Ms. Jenny Haughton who was not a party to the litigation.

83. The appellant relies on the decision and test set out in *Ryanair v. Bravofly* and *Travelfusion Ltd.* [2009] IEHC 41 regarding whether a pleading ought to be categorised as scandalous and further contends that the respondents had never sought to rely on O. 29, r. 27 to ground an application to have the plea struck out. He contends that that the trial judge exhibited partiality in seeking to delete that specific plea.

84. The grounds of appeal are further amplified in supplemental submissions filed where, *inter alia*, the appellant contends that it is standard practice for a solicitor to instruct counsel. He relies on the decision of MacMenamin J. in *McMullen v. Kennedy* [2013] IESC 29 and contends that the solicitor was grossly negligent in failing to expeditiously discharge her duties with due care and in accordance with standard practice.

85. Expounding on a number of the grounds of appeal raised, the appellant contends that but for the failure of the solicitor to write the letters which she had represented to him she had already written the Abbey Theatre would not have later adopted a stance favourable towards Mr. Roddy Doyle.

86. Arising from these contentions he relies on authorities as supporting his claim in damages against the respondent including *Balamoan v. Holden and Co* (1999) N.L.J. 898, *Johnson v. Gore-Wood* [2004] C.P. Rep. 27, *Baker v. Willoughby* [1970] A.C. 467, *McGill v. Sports and Entertainment Media Group* [2017] 1 W.L.R. 989.

**Fraud**

87. The appellant also makes submissions asserting fraud on the part of the solicitor. He asserted that the untrue statements made by the solicitor regarding having written letters and having briefed counsel were made fraudulently rather than negligently and that the Court should dispense with the need for the "but for" test to establish her liability towards him.

**Respondent's submissions**

88. The respondents likewise made detailed submissions. In summary these contend as follows:

(a) That there was no duty of care owed to the appellant as opposed to Arambe.

(b) That the appellant was never a client of the solicitor.

(c) That the solicitor's conduct, notwithstanding its imperfections, did not fall below the standard of care of the ordinary reasonable solicitor.

(d) The appellant has not suffered any loss as a result of the allegedly negligent actions of the solicitor.

(e) There is a lack of causation between any conduct alleged against the solicitor and any loss which the appellant claims to have suffered.

(f) That there is no basis for a contention of bias, subjective or objective, as against the trial judge since he disclosed the position to the parties immediately prior to the commencement of the trial and the appellant effectively waived any right to object.

(g) The conduct of the trial itself was not objectionable.

**Determinations**

89. As outlined above, the post *Hay v. O'Grady* jurisprudence emanating from the Supreme Court continues to emphasise the importance of an appellate court not interfering with findings of fact reached by a trial judge who has heard and seen the witnesses. In *M.C. (A Ward of Court) v. F.C.* [2013] IESC 36 MacMenamin J. engaged in a detailed exposition of the functions of an appellate court, stating at para. 3:

> "This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts."

Referencing *Hay v. O'Grady*, he emphasised that:

> "… if the findings of fact made by a trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court will only interfere with findings of the High Court where findings of primary fact are not supported by evidence, or cannot in all reason be supported by the evidence …"

MacMenamin J. further stated:

> "… in *Hay v. O'Grady*, McCarthy J. pointed out that an appellate court will be slow to substitute its own inference of fact for that of the trial judge, where such inference depends upon oral evidence or recollection of fact. In drawing of inferences from circumstantial evidence, an appellate tribunal is, of course, in as good a position as the trial judge …"

**Subjective bias**

90. In grounds 1, 2 and 37 of his notice of appeal the appellant advances allegations of bias – both subjective and objective – against the trial judge. Subjective bias is a matter of fact to be established by cogent evidence.

91. As was observed by Geoghegan J. in *Orange v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159, for subjective bias to be established it would be necessary to prove that the judge had deliberately set out to hold against a particular party. No cogent evidence has been adduced by the appellant in support of this contention other than his clear dissatisfaction with the outcome of the litigation.

92. No basis is advanced by the appellant in support of the contention that the trial judge had any animus whatsoever against him. Apart from the bare assertion of subjective bias I am satisfied that it is not supported by any probative evidence. The instances identified by the appellant in his arguments before this Court or his various written submissions do not support such a claim. It is clear from the transcripts and the judgment that in reaching his conclusions there was no element of prejudgment from a subjective bias point of view. His conclusions on the facts cannot be considered wrong since he had ample evidence before him upon which to reach his findings.

**Objective bias**

93. In my view it is significant that apart from an allegation of bias which centred on the judge having attended school and maintained a friendship with the witness in question, the extensive grounds of appeal and submissions fail to identify any aspect of the witness's evidence which was improperly or selectively treated by the judge in a manner prejudicial to the appellant's claim. I am satisfied that the quotes selectively extrapolated from the transcripts are at best ambiguous. They cannot be characterised as constituting evidence of extreme or unbalanced comments capable of casting doubt upon the ability of the trial judge to determine the issues with a fair and objective judicial mind.

**The Test**

94. In *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, at p. 441, Denham J. stated:

> "… it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."

95. In *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 IR 149, Keane C.J. stated at p. 186:

> "While the test for determining whether a decision must be set aside on the ground of objective bias has been stated in different ways from time to time by the courts in the United Kingdom, there is … no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."

96. The trial judge fully disclosed to the parties before he embarked upon the hearing the fact of his friendship with the witness and clearly invited the parties to make whatever arguments or submissions they saw fit arising from this disclosure.

97. The appellant refrained from raising any objection at all at that point or at any time thereafter during the course of a 16-day hearing.

98. The witness in question, Mr. Fiach Mac Conghail, was called by the appellant. The appellant makes reference to a passing comment made by the trial judge as supporting actual bias.

99. The selective extrapolation of ambiguous phrases, sentences or comments in the manner adopted by the appellant is not probative of bias on the part of the trial judge. At best I am satisfied that it is a self-serving exercise in retrospective rationalisation on the part of the appellant. I am satisfied that the statements attributed to the trial judge, considered in context, do not establish that there was any element of bias on his part in relation to the conduct of the hearing. Neither has the appellant identified any relevant new fact or information of which he was not fully aware prior to the commencement of the hearing which would justify the allegations of bias he now raises. The case law he relies on is distinguishable insofar as a common characteristic in those cases was that litigants were not adequately informed of a nexus or a particular material fact in a timely manner – an element which does not arise here.

100. Further it is highly significant that whilst raising the issue of bias against the trial judge in this appeal the appellant represented by his contemporaneous conduct and active acquiescence that he did not have any objection to the trial judge hearing the case. He did not raise any objection at the time to the comments of the trial judge now advanced as exhibiting bias. Thus the judge was not afforded any opportunity to contextualise the comment. All the indications are that the appellant has simply rummaged through the 16 days of hearing transcripts to selectively extrapolate any tangential fragment, excerpt or statement that might support his claim in regard to the allegation of subjective bias.

101. The contention now advanced by the appellant that he was under the impression that once he refrained from objecting initially he was precluded thereafter from objecting at any time throughout the hearing is wholly implausible.

102. The question arises whether a reasonable, fair minded and informed person in the position of the appellant might have apprehended that the trial judge might be biased because of the particular proven circumstance, namely the nexus between the trial judge and the witness Mr. Mac Conghail. The fact of the matter is that there was no inhibition upon the appellant raising this point at any stage in the hearing and he elected not to do so. Notwithstanding that omission on a due consideration of the evidence and documentation as furnished including elements of the transcripts of the hearing and the judgment itself there is no evidence tendered by the appellant which supports this contention.

103. I am satisfied that the trial judge was entitled, in the exercise of his judicial discretion, to accept or reject the evidence of one or other of the parties and their witnesses. The appellant has failed to establish bias on the part of the trial judge.

104. Accordingly grounds 1, 2 and 37 of the notice of appeal are not made out.

**Was the appellant a client of the solicitor?**

105. This appears to be a pivotal ground of appeal articulated, inter alia, in grounds 4 and 11 of the notice of appeal. The evidence preferred by the trial judge was that the appellant was not a client of the respondent solicitor. The appellant had important functions within the company and was a director. He acted throughout as agent on its behalf. He received and accepted a s. 68 letter addressed to the terms upon which the solicitor was willing to act for the company. He ultimately, after due consideration and informing the board of the company, accepted those terms on its behalf and conveyed that acceptance to the solicitor. He had a cheque drawn in respect of fees which were payable on account to the solicitor. The cheque was drawn on the account of the company and not his personal account.

106. Whilst the appellant managed to draw up a number of factors supporting his contention that he was her client, it is clear that an overwhelming body of probative evidence before the trial judge supported a conclusion that the solicitor was retained to act on behalf of Arambe rather than the appellant and the fact that the primary function of the appellant in dealing with the solicitor was as agent and director of the said company.

107. The trial judge found that the preponderance of the evidence was consistent with the solicitor being retained to act on behalf of the company alone. There is no basis for impeaching or interfering with the trial judge's conclusions in that regard.

108. The trial judge pointed out that it would have been preferable had the solicitor expressly conveyed to the appellant that she was not acting on his behalf personally (para. 47 of the judgment).

109. In his direct evidence the appellant contended that he was aware since late May 2007 that he would personally require legal advice. However, there was substantial evidence before the trial judge on which he was entitled to rely pointing to the fact that as of late November 2007 the key legal issues arising were between the Abbey Theatre and Mr. Doyle on the one part and Arambe the company on the other. The correspondence that precipitated the retainer of the solicitor dated from the weeks prior to the initial meeting rather than the letter received by the appellant from Mr. Doyle's agent, John Sutton, received over half a year prior. Accordingly, the trial judge was entitled to prefer the evidence, of which there was a significant amount, which supported the contention that the appellant was never a client of the solicitor.

110. Merely because the trial judge does not in his judgment specifically make reference to each and every document, statement, contention, argument or point raised, made or taken by an appellant throughout a lengthy 16-day hearing, is not probative of a proposition that the trial judge must be deemed to have "completely disregarded" such material. It is clear from the decision of the Supreme Court in *Doyle v. Banville* cited above that the absence of such a reference in a judgment does not support such an inference. Clarke J. at para. 2.3 stated:

> "… it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident in question occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred. The obligation of the trial judge, as identified by McCarthy J. in *Hay v. O'Grady*, to set out conclusions of fact in clear terms needs to be seen against that background."

111. I am satisfied that there was ample evidence before him upon which the trial judge was entitled to rely in arriving at his conclusion that the appellant had never been a client of the firm. This ground of appeal is not made out.

The trial judge should have disregarded affidavits

112. The appellant contends that affidavits filed in a copyright action which were considered by the trial judge ought not to have been considered by him. Even were it the case that the contents of the said affidavits undermined the appellant's claims it is clear from the judgment that to the extent that the trial judge may have perused any one or more of the said affidavits, they were not pivotal to his determination of any key issue in this case. The appellant was the deponent. This ground of appeal is not made out.

**Complaints regarding conduct of trial, application of rules of evidence and rules of superior courts and omissions in the judgment to matters raised by appellant**

113. In *Doyle v. Banville* the trial judge stated:

> "In saying that, however, it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of *jurisprudence* it is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in a rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation of the court is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides."

114. I am satisfied that the judgment embodies a comprehensive précis of the evidence which the trial judge considered to be crucial to the issues which fell for determination by him at the conclusion of the hearing. Furthermore, the judgment contains a thorough and reasoned conclusion for the determinations he arrived at in his judgment. Were he to be required at the conclusion of a 16-day hearing to enter into an analysis of each and every document, comment, submission and argument made by both sides and their witnesses, such a judgment would not serve the ends of justice. Accordingly, the grounds of appeal advanced on this basis are not upheld.

115. A trial judge has significant discretion in regard to the conduct of proceedings to enlarge or abridge time for any purpose under the rules. The arguments and grounds of appeal based on alleged failure to strictly comply with the Rules of the Superior Courts and rules of evidence are not maintainable.

**Interventions during the hearing**

116. Insofar as excessive interventions are alleged it is important to bear in mind that as a matter of law in this jurisdiction the trial judge was entitled to ask questions. As was stated by McCarthy J. in *Donnelly v. Timber Factors* [1991] 1 I.R. 553 at p. 556:

> "The role of the judge of trial in maintaining an even balance will require that on occasion he must intervene in the questioning of witnesses with questions of his own - the purpose being to clarify the unclear, to complete the incomplete,

to elaborate the inadequate and to truncate the long-winded. It is not to embellish, to emphasise or, save rarely, to criticise."

117. There is nothing in the extracts of transcript relied on by the appellant to support his contention that the trial judge' s questioning of certain witnesses resulted in him effectively using the bench to intimidate individuals or procure specific answers.

**"Olive branch"**

118. Great weight is attached by the appellant to the characterisation of the trial judge of the conduct of Mr. Roddy Doyle as wishing to compromise or offering an "olive branch". However, careful examination of the evidence, including the testimony of Mr. Edward Gleeson, solicitor for Mr. Doyle, is wholly consistent with such a conclusion. The evidence of Mr. Doyle himself and also of the solicitor supported such a contention. There was no evidence going the other way – save the bare assertions of the appellant - with regard to the motivation and intention of Mr. Doyle as of the month of January 2008 in seeking to devise a resolution of the issue between the parties.

119. Further, the trial judge was entitled to stress-test the appellant's contention whether the clear language contained in the draft agreement between the appellant and Mr. Roddy Doyle contemplated the prior written consent of Mr. Doyle to any performance of the play. No inference of an adverse nature can be drawn from that aspect of the hearing in the High Court. The furthest the trial judge goes in his judgment is a statement of a clear fact which is that Mr. Edward Gleeson, solicitor for Mr. Roddy Doyle, testified that he had obtained the opinion of counsel and was advised to the effect that Mr. Doyle's prior consent ought to have been sought and obtained before Arambe could proceed to license the Abbey to produce the play (para. 86 of the judgment).

**Consequences alleged to flow from the failure of the respondent to write the letters she represented she had written to the solicitors for Mr. Doyle and the Abbey**

120. The appellant challenges the inferences drawn by the trial judge from the testimony of various witnesses especially the evidence of Mr. Roddy Doyle. He particularly takes issue with the conclusions of the trial judge at para. 82 of the judgment. However, I am satisfied that the trial judge was entitled to rely on the evidence of Mr. Doyle that had he received such a letter from the solicitor it would have made no difference to the position he adopted. Indeed that part of the judgment is reasoned, thorough and forensic. The trial judge notes that the evidence of Mr. Doyle is consistent with the solicitor's account of her meeting with Mr. Doyle's solicitor. He found it was also consistent with the evidence of Mr. Edward Gleeson. Selectively digging out a fragment of words from Day 7, p. 220 of the transcript does not in any way undermine the conclusions of the trial judge in that regard which were logical, reasoned and based on a significant body of clear and corroborated evidence.

**Preferring the evidence of respondents**

121. In circumstances where there was significant conflict of evidence between the appellant on the one part and certain other witnesses on the other, it was perfectly open to the trial judge, who had an opportunity for many days to consider and evaluate the stance, demeanour, attitude and disposition of the witnesses, to prefer the clear evidence of a number of witnesses on a series of issues over the contentions being advanced by the appellant. For instance, where there was a consideration of what might have transpired had the letters been written by the solicitor which she failed to send it is clear that the trial judge preferred the evidence of the first named respondent and a whole series of witnesses who contended that it would have made no difference particularly to the broken harvest of the relationship between the appellant and Mr. Roddy Doyle.

**Refusing to admit the opinion of counsel**

122. The trial judge was entitled to make the adjudications he did with regard to speculation as to what might have transpired had the solicitor retained counsel. Further, the trial judge was entitled to refuse to permit the appellant to rely on an opinion of counsel, Mr. McKeown BL, and dispense with any need to prove the opinion in accordance with the rules of evidence. In that regard grounds 23, 24 and 25 are unsound. The case was heard on oral evidence and all witnesses called by the respective parties were available for cross examination. No justification was identified nor any rule of the Superior Courts relied on in support of a proposition that the appellant was entitled to rely on an opinion he procured from counsel long after the solicitors had ceased to act for Arambe. The trial judge acted wholly appropriately in excluding attempts by the appellant to introduce the said opinion in unproven form. It was perfectly open to the appellant to subpoena the counsel in question as a witness had he elected to do so.

**Mediation**

123. As regards the mediation process and the trial judge's considerations of same at para. 73 of the judgment there was ample evidence before the trial judge particularly from Mr. Doyle and parties connected with him, including his solicitor, which entitled him to conclude that the reason the mediation process failed was the reason given by the appellant to his own board at Arambe, namely that Mr. Doyle was not for turning in regard to the central issue between them. Accordingly ground 16 is not made out.

**Trial judge preferred evidence of respondents**

124. In light of the judgment in *Doyle v. Banville* (cited above) grounds 21, 28, 35 and ground 8 are not established. In this regard there was evidence before the trial judge which he was entitled to rely upon and to prefer over the contentions advanced by the appellant in regard to each of these matters. The fact that the trial judge preferred the said evidence including certain witnesses called by the appellant himself is not a ground on the facts disclosed in the instant case for impugning the determination of the trial judge on any of the bases advanced.

**Alleged Partiality of trial judge**

125. I am satisfied from the excerpts from the transcripts provided by the appellant that whilst at times the trial judge engaged in proactive management of the case for the purposes of ensuring compliance with the rules of evidence and so forth, at no time could he be said to have dropped the mantle of a judge and assumed the robe of an advocate in support of any party to the litigation to use the language of Lord Denning in *Jones v. National Coal Board*. One of the grounds alleged by the appellant was that had the trial judge afforded him greater latitude in cross examining the solicitor, she would, he contends, have ultimately admitted that she had been provided with approximately 50 documents. This is pure conjecture. Furthermore, it is clear that that appellant was afforded significant latitude in his examination and certainly more than might have been forthcoming had he been legally represented. This ground of appeal is not made out.

**Litigation misconduct**

126. With regard to the allegations pleaded against Ms. Jenny Haughton by the appellant to the effect that she conducted a "secret liaison" with the solicitor, it will be recalled that Ms. Haughton was not a party to the litigation. It is clear that O. 19, r. 27 confers a broad discretion on a court to strike out any part of a pleading which is, inter alia, scandalous or prejudicial. As was acknowledged by

Clarke J. in *Ryanair v. Bravofly and Travelfusion Ltd*. [2009] IEHC 41:

> "In *Morony v. Guest* (1878) 1 LR I.R. 564 Chatterton V.C., at page 571, described one of the predecessors to this rule in the following way:-
>
> > "A party is not to be called upon to answer statements which are irrelevant to the case, or which are pleaded in an unfair, ambiguous, or prolix manner; but the Court should confine the rule to cases which come within it."
> >
> > (para. 4.4).

127. Clarke expressed the view at para. 4.5:

> "The primary test used in judging whether a pleading contains unnecessary or scandalous matters is the relevancy of the matter pleaded to the proceedings between the parties; whether the pleadings concerned seek to introduce extraneous matters for purposes and motives unconnected with the subject matter of the dispute between the parties. Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the reliefs claimed. This test was formulated in *Christie v Christie* (1873) L.R. 8 Ch App 499, and approved in *Riordan v Hamilton* (Unreported, High Court, 26 June 2000, Smyth J) where Smyth J., at p. 5 of his judgment, stressed that:-
>
> > "The purpose of pleadings is to convey what the nature of the action is. Pleadings should not be used as an opportunity of placing unnecessary or scandalous matters on the record of the court, or as an opportunity of disseminating such matters when they have nothing to do with any dispute between the parties"."

128. Having carefully considered the pleadings and the reliefs being sought by the appellant in his statement of claim and plenary summons I am satisfied that the allegations being levelled against Ms. Haughton were not admissible to show the truth of any allegation in the pleadings and were not material to any reliefs being claimed by him against the solicitor. Accordingly, the trial judge was well within his rights to exercise his discretion pursuant to O. 19, r. 27 in the manner that he did and this ground of appeal also fails.

129. All other grounds of appeal and points raised are not made out save with regard to the issues addressed hereinafter arising pursuant to para. 95 of the judgment.

**Civil Liability Act**

130. At para. 95 of the judgment the trial judge states:

> "The issues in respect of which the defendant was engaged were comprehensively settled by the plaintiff who agreed to the compensation offered. The plaintiff is not entitled to seek damages for losses in proceedings where these losses have been litigated to conclusion by way of settlement in earlier proceedings. The fact that the defendant was not a party to those earlier proceedings is irrelevant. Equally, the fact that the plaintiff was dissatisfied with the settlement achieved is irrelevant. I accept that the defendant is entitled to rely on ss. 16 and 17 of the Civil Liability Act 1961 in this regard."

I am unable to agree with this determination as to the law. Were the claims of the appellant to be maintainable, and for the reasons stated above I am satisfied that they are not, it does not appear that the pleas of either discharge or estoppel by satisfaction could have been available to the respondents pursuant to s. 16 of the Civil Liability Act 1961. Neither could the respondents have asserted release, accord or satisfaction with a concurrent wrongdoer or any ground pursuant to s. 17 of the said Act. However, this finding does not avail the appellant in the circumstances of this case.

**Henderson v. Henderson**

131. The trial judge states:

> "The defendant has correctly referred to the rule in Henderson v Henderson (1843) 3 Hare 100 as preventing the plaintiff from litigating the issues raised in these proceedings, having regard to the matters pursued in the earlier proceedings." (para. 95 of the judgment)

I am of the view, however, that the so called rule in Henderson v. Henderson was not applicable in these proceedings.

132. The principle in *Henderson v. Henderson* derives from a passage in the judgment of Sir James Wigram V.C.:-

> "…I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (67 E.R. 313 at p. 115)

In *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345, Pallas C.B., at p. 372, without reference to Henderson held that a party to previous litigation, as against the other party in that action, was bound "not only (by) any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein."

133. By contrast, there has not been any previous proceedings between these parties. The other litigation referenced by the trial judge pertains to defendants other than the respondents and accordingly the rule in *Henderson v. Henderson* is not applicable in the instant case. However, this determination does not avail the appellant in the circumstances in light of the key findings above.

134. Accordingly I am satisfied that no ground of appeal advanced by the appellant succeeds and I would dismiss this appeal.