THE HIGH COURT

[2013 No. 2721 P.]

BETWEEN

PETER CURRAN

PLAINTIFF

AND

GERRY BYRNE, MICHAEL SMURFIT AND THE K CLUB LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 14th day of December, 2018

Introduction

1. The central issue in this case concerns a very stark conflict of evidence between the plaintiff and the first defendant. It is the plaintiff's case that on the afternoon of 7th May, 2011, while attending a horse racing festival at Punchestown Racecourse, he was threatened in the gentlemen's toilet by the first defendant, who it is alleged was acting on the instructions or directions of the second defendant and was also acting in the course of his employment with the third defendant, when he issued the threat.

2. The precise nature of the threat and its communication to the plaintiff is pleaded in the following way in the plaintiff's personal injury summons:-

> *"11. On or about 7th day of May 2011, while the plaintiff was in attendance at Punchestown Races, he had cause to visit the toilets. As the plaintiff went to exit the toilets, he was approached by the first named defendant who blocked his way and by whom the plaintiff felt threatened and confined.*
>
> *The first named defendant then said that he was carrying a message to the plaintiff from the second named defendant and spoke the following words: 'Dr. Smurfit has not forgotten the statements about him and the call girls. Dr. Smurfit knows where to find you and this is not over'.*
>
> *12. The first named defendant was thereby deliberately referring and was understood by the plaintiff to be referring to the replies to particulars dated 9th December, 2004.*
>
> *13. The plaintiff told the first named defendant that there was an agreement in place, but the first named defendant responded that Dr. Smurfit did not care about the agreement. The plaintiff then managed to get past the first named defendant and exited the toilets."*

3. The plaintiff alleges that as a result of the issuing of this threat by the first defendant, psychiatric conditions which he had suffered from for many years, were greatly exacerbated. He alleges that as a result of the exacerbation of his mental illnesses, he has been unable to return to any form of gainful employment to date. It is pleaded that as a result of his injuries, the plaintiff is unlikely to be fit for anything other than very low grade employment.

4. As a result of the foregoing, the plaintiff claims damages, including aggravated and exemplary damages against the defendants.

5. The defence of the first defendant is very simple. He states that while he was at Punchestown Races on the day in question, in the company of his then eleven year old daughter, he did not visit the particular toilet identified by the plaintiff; he did not see or speak to the plaintiff in the course of that day; he did not have any conversation whatsoever with the plaintiff and, therefore, did not issue the alleged threat.

6. The second and third defendants, plead that they are strangers to the matters pleaded by the plaintiff in relation to the alleged incident at Punchestown Racecourse on 7th May, 2011, and they await proof by the plaintiff that the incident as alleged by him did, in fact, occur. Without prejudice to that plea, the second defendant denies that he ever instructed the first defendant to issue any threat on his behalf to the plaintiff. The third defendant pleads that if the court were to find that the first defendant did, in fact, threaten the plaintiff in the manner alleged, the third defendant denies that he did so while acting in the course of his employment as a Resort Superintendent in the K Club.

7. Thus, the central issue for determination by the court, is whether the first defendant threatened the plaintiff in the manner alleged in the toilets in Punchestown Racecourse on the afternoon in question.

8. Unfortunately, there has been a considerable background of animosity and litigation between the plaintiff and various individuals and companies connected to the second defendant, over a long number of years. In order to properly understand some of the issues that arose in this case, it is necessary to have a detailed knowledge of the history between the plaintiff and various K Club companies. It is also necessary to have an appreciation of the plaintiff's mental state prior to the alleged events, the subject matter of these proceedings.

Background

9. The plaintiff was born on 12th July, 1967. He completed his Leaving Certificate in 1985. He then did a three year course at Telford College, Edinburgh, where he obtained a qualification as a chef. During this time, he was a commis chef at the George Hotel in Edinburgh, rising to become first commis chef at the Sheraton Hotel in Edinburgh. From May to September 1988, he was the senior chef de parti at the Shelborne Hotel, Dublin. From September 1988 to May 1990, he was the head chef at Barberstown Castle, Co. Kildare. On leaving that job, he received a glowing reference from the proprietor, who noted that he had left the position in order to pursue a career in hotel management.

10. The plaintiff did an accelerated management training programme with the Castle Hotel in Windsor, UK. From June 1991 to January 1994, he was the restaurant manager in the Commons Restaurant, Newman House, Dublin, which had a Michelin Star. In 1994, he was the food and beverage manager at Kiltiernan Golf and Country Club, Dublin. From January 1995 to May 1996, he was the operations manager in the Holiday Inn, Tampa, Florida. From June 1996 to August 1997, he was the hotel services manager at BMI Healthcare, The Clementine Churchill Private Hospital in London. During these years, he had received a number of awards, particularly in his early years when training and working as a chef.

11. From 8th September, 1997 to 23rd October, 1998, the plaintiff was employed as the food and beverage manager at the Kildare

Hotel and Country Club. Unhappy differences arose between the plaintiff and his immediate supervisor, the general manager of the hotel, Mr. Ray Carroll. The plaintiff stated that as a result of certain financial irregularities that he witnessed in the kitchen, he sent a memo to Mr. Carroll on 22nd October, 1998. The plaintiff alleges that at a meeting which he had with Mr. Carroll on the following day, 23rd October, 1998, Mr. Carroll shouted at him and behaved in a generally aggressive manner. As a result, the plaintiff felt that he had no option but to resign as food and beverage manager. He did that by letter dated 23rd October, 1998, addressed to Mr. John O'Callaghan, the financial director of the K Club.

12. In his evidence at the trial, Mr. Ray Carroll stated that it had become clear to him during the year when the plaintiff was employed as the food and beverage manager at the hotel, that he was not up to the demands of the job. He had indicated to the plaintiff that it would be a good idea for him to look for a new position elsewhere prior to the following season. He stated that that is what prompted the plaintiff's resignation.

13. On 3rd November, 1998, a firm of solicitors wrote on behalf of the plaintiff to the secretary of Amisfield Limited, the owner of the K Club, indicating that the plaintiff would be claiming that he had been constructively dismissed as a result of the behaviour on the part of Mr. Carroll. It indicated that the plaintiff was going to institute a claim before the EAT for unfair dismissal. That claim was initiated by submission of a form T1-A on 19th November, 1998. Some five months later, on 3rd March, 1999, the plaintiff's claim before the EAT was settled. The plaintiff received a sum of money and also a glowing reference in respect of his service with the K Club. That reference was dated 9th March, 1999 and was signed by Mr. Ray Carroll, Chief Executive of the K Club. Mr. Carroll thought that the plaintiff had drafted the reference. This reference becomes highly significant in the context of a further set of proceedings which were issued by the plaintiff some years later.

14. When the plaintiff did not receive the monetary payment as agreed under the settlement agreement dated 3rd March, 1999, he issued a plenary summons on 21st April, 1999. However, it was not necessary for him to serve these proceedings, as the settlement cheque subsequently came to hand.

15. The plaintiff stated that in the years that followed, he found it impossible to find alternative employment. He stated that he was not able to understand why that was so, due to the fact that he had had an exemplary work record prior to his employment with the K Club and he had received a glowing reference from them pursuant to the settlement of the unfair dismissals proceedings. He stated that he applied for approximately 60 jobs, but was not able to secure a position. He was mystified by this, as he seemed to perform very well at interview, but when prospective employers would return to him, having checked his references, they merely indicated that the position was filled, or was otherwise unavailable to him.

16. In the years that followed, it dawned on the plaintiff that perhaps the K Club was not honouring the terms of the reference which he had obtained from them. He decided to test this theory by engaging in a stratagem which became known as the "*Liebermann Subterfuge*". On 10th June, 2002, the plaintiff wrote a letter to Mr. Ray Carroll under the name Johann Liebermann. In the letter, he stated that he and his colleagues were in the process of planning and building a development in Ireland and they were thinking of recruiting the plaintiff as their general manager/operations director. In order to help them with their recruitment process, he asked Mr. Carroll to fill in a blank form in relation to the plaintiff, which had been attached to the letter. Mr. Carroll duly filled out the form and signed it. It is fair to say that this was not a glowing reference. In it, the plaintiff's business acumen was rated as "*fair*". It stated that his staff did not respect him, nor was he a good leader of people. His management ability was rated as "*fair*". His professionalism was rated as "*poor*". Mr. Carroll returned the completed form in an official K Club envelope.

17. Armed with this information, the plaintiff issued a further set of proceedings claiming damages for breach of contract against Mr. Carroll and Amisfield Limited. The plaintiff claimed damages not only for financial loss as suffered by him due to the alleged breach of the settlement agreement by the defendants, but also pleaded that he had suffered severe personal injury in the form of psychiatric injuries, as a result of the wrongdoing on the part of the defendants. A statement of claim was delivered on behalf of the plaintiff on 21st October, 2003. A defence was filed on behalf of the defendants on 12th April, 2005.

18. During the course of these proceedings, a notice for particulars had been raised on behalf of the defendants on 9th March, 2004. The defendants had apparently not been satisfied with the first set of replies furnished thereto. By order of the court dated 15th October, 2004, the plaintiff was directed to furnish further replies to the notice for particulars raised by the defendants. In compliance with that order, the plaintiff furnished further replies on 9th December, 2004. At item 8 thereof, the plaintiff set out details of the financial and other irregularities, which he had alleged he had brought to the attention of Mr. Carroll back in October 1998 and which had led to him being constructively dismissed. At items 8(a)(iii) and (iv), the plaintiff had made allegations that call girls had been given free use of hotel facilities paid for by JSG Group and organised by a JSG director. Some of the girls were alleged to have been sourced in Monaco and Spain. The plaintiff also alleged that owners of apartments unknowingly received rental payments from the K Club as a result of call girls using their apartments, paid for by the JSG Group, with the approval of the first and second named defendants, meaning Mr. Ray Carroll and Amisfield Limited. It should be noted that these replies were delivered on 9th December, 2004.

19. Those proceedings were ultimately settled in February 2008. In a written settlement agreement dated 3rd February, 2008, which was executed by the plaintiff, Ray Carroll, Amisfield Limited and Smurfit Kappa Group plc, which latter company was not a party to the proceedings but was a party to the settlement agreement. There was a confidentiality clause in the settlement agreement. Neither the third defendant, nor Smurfit Kappa Group plc, waived this clause in the agreement. Accordingly, the terms of the agreement were not made public during the course of the hearing of this action. However, by agreement of the parties, I was furnished with a copy of the settlement agreement and was permitted to have regard to it when reaching my judgment in this case. While not breaching the confidentiality clause therein, it is permissible for me to note that this was a comprehensive agreement which took care of all outstanding issues between the parties.

20. It is necessary to give a brief outline of the plaintiff's mental health prior to 2011. While the court has not been provided with any medical evidence of the plaintiff's mental health prior to the time when he worked in the K Club in 1997/1998, it is fair to say that nothing is disclosed in any of the medical reports, or in any of the medical records, or in the plaintiff's prior social or work history, which would suggest that he had any mental health difficulties prior to that time.

21. There is also a lacuna of evidence in relation to the plaintiff's medical condition in the years 1998 – 2002. The earliest records which have been furnished to the court are those of the plaintiff's GP at the time, Dr. Bill Mangan. These records commence in July 2002. In his records for that month, it was noted that the plaintiff suffered from PTSD with secondary depression for which he was attending Dr. Martin Lucey, Consultant Psychiatrist. This is somewhat hard to reconcile with the medical records which have been made available by Dr. Lucey, which seemed to indicate that the plaintiff had been referred to him by his GP, Dr. Mangan, on 6th April 2004. The court notes that when the plaintiff was seen by his GP in July 2002, he was on a prescription of significant psychiatric medication including Efexor XL (150mg), Lamictal (50mg), Seroquel XR (50mg), Lyrica (50mg) as well as Seroquel XR (200mg modified

release tablets). These were all noted to be repeat prescriptions. Accordingly, it would appear that the plaintiff must have been under psychiatric supervision from some psychiatrist, if not from Dr. Lucey, prior to 2004.

22. I do not think that a lot turns on this, as the medical experts seem to be in agreement that the plaintiff did in fact suffer from psychiatric symptoms from approximately 1999 onwards. Dr. Lucey's diagnosis was that the plaintiff was suffering from Post Traumatic Stress Disorder, chronic depression and a persisting personality change, as a result of the circumstances surrounding his dismissal from the K Club in 1998 and the subsequent events, whereby he was unable to secure alternative employment in the years thereafter.

23. In a letter dated 29th September, 2004, Dr. Lucey wrote to the solicitor who was acting for the plaintiff in his third set of proceedings against the K Club. He informed him that in his opinion, the plaintiff, who was then 37 years of age, had been suffering from depression and Post Traumatic Stress following alleged trauma at his former employment. His symptoms were chronic and had persisted with time. The prognosis was poor.

24. It appears that with the exception of very short periods in 2000/2001, the plaintiff had not had any meaningful employment since he ceased working in the K Club. By 2002, he had relocated to live in Co. Kerry. In 2004, he did manage to obtain some work doing car valeting at Farranfore Airport. However, he was only able to manage that work for a number of weeks, due to the fact that he suffered a severe panic attack when a helicopter arrived at the airport. This reminded him of helicopters arriving at the K Club. He had to cease work immediately that day and subsequently he told his employer that he would not be able to return to work. The plaintiff has not worked since that time.

25. From the medical records, it would appear that the plaintiff had significant psychiatric difficulties in the following years. In June 2005, Dr. Lucey informed the plaintiff's solicitor that he remained unemployed with significant impairment in functioning. His diagnosis remained unchanged. The prognosis was poor. Dr. Lucey was of opinion that the plaintiff would never be capable of returning to similar employment. He thought that it was likely to be several years before the plaintiff would be capable of achieving any gainful employment. The plaintiff remained on a significant dose of psychiatric medication.

26. In January 2008, Dr. Lucey indicated that his opinion remained unchanged. He noted that the plaintiff had been suffering from a chronic depressive disorder, chronic Post Traumatic Stress Disorder and an enduring personality change since leaving his former employment in 1999. By that time, Dr. Lucey was of the opinion that the plaintiff had suffered permanent psychological damage. He would never be capable of returning to similar employment in the future. He thought that it was going to be several years before the plaintiff had the capacity to achieve gainful employment in an unskilled workplace.

27. It appears that in January 2009, the plaintiff made the decision to discontinue taking his medication. Dr. Lucey saw the plaintiff on 20th February, 2009. He noted that the plaintiff had decided to discontinue his medication a month prior to the review. The plaintiff's mood began to deteriorate with insomnia and irritability. Dr. Lucey recommended the plaintiff's medication. As the plaintiff had complained of heaviness in his head, secondary to Zispin, he had switched to Molipaxin (100mg) and the plaintiff continued taking Efexor XL (225mg). When reviewed on 26th May, 2009, Dr. Lucey noted that the plaintiff's mood had improved since his last review. He was doing an open university course in finance. He planned to take up golf. The doctor altered the medication slightly. By that time, the plaintiff had been engaging in share dealing on the internet on his own account. In her evidence, his former partner, Ms. Kelleher, stated that the plaintiff was not doing this by way of a business, but was simply managing his investment portfolio.

28. The plaintiff was reviewed by Dr. Lucey on 22nd January, 2010. At that time, he was noted to have persistent chronic depressive symptoms since he was last seen in June 2009. Dr. Lucey added Lamictal (50mg) and the plaintiff continued to take Efexor and Molipaxin. The plaintiff was seen again on 9th April, 2010. Dr. Lucey noted that the plaintiff's mood had improved since commencing Lamictal. His father had died suddenly five weeks previously. He was grieving normally. He occupied himself with share trading. Dr. Lucey advised that he should continue taking Lamictal (50mg), Efexor (225mg) and Molipaxin (50mg). He was due to see the plaintiff four months later in August 2010.

29. During 2010, the plaintiff attended with his GP practice to obtain prescriptions in relation to his psychiatric medication. He attended with them on 18th, 22nd and 23rd January, 2010, 4th March, 2010, 7th April, 2010, 10th May, 2010, 23rd June, 2010, 23rd July, 2010 and 8th September, 2010.

30. According to the plaintiff, he commenced weaning himself off his medication in January 2011, and was free of all psychotropic medication by the beginning of April 2011. The plaintiff stated that he had done this with the approval of his psychiatrist, Dr. Lucey. However, Dr. Lucey denied that. He stated that he had not told the plaintiff to wean himself off his medication at the beginning of 2011, for the simple reason that he had not seen the plaintiff since 9th April, 2010; at which time, he was prescribing three separate drugs for the plaintiff. Furthermore, he pointed out that there was no record in his handwritten notes of any such direction by him. Finally, he could not have given any such direction or approval to the plaintiff in the latter part of 2010, because due to health reasons, he was not in practice from September 2010, to the end of December 2010.

31. The court prefers the evidence of Dr. Lucey in this regard. I find as a fact that the plaintiff discontinued his medication in January 2011, without any direction or approval from his treating psychiatrist.

32. According to the GP notes, the plaintiff had one visit to his GP, Dr. Donal Coffey, (who had taken over from Dr. Mangan on his retirement) on 20th April, 2011. This was in respect of a cat bite to his left index finger, for which he required a tetanus vaccine.

33. There were a number of occasions over the years when the plaintiff had a very marked stress reaction to things that would seem quite ordinary to other people. In 2004, he had the severe stress reaction while working in Farranfore Airport as previously stated. On another occasion, when he was on holidays in Malta, he experienced a severe panic attack when a golf programme came on television. It reminded him of the K Club. He was so distressed that he had to return to Ireland. On another occasion, he told his doctor that he had experienced a panic attack when he had been in Wynn's Hotel in Dublin. He saw men arriving in suits and this again reminded him of being at the K Club, thereby inducing a stress reaction. In 2014, the plaintiff hired a bodyguard, when he was asked to attend a medical examination on behalf of the defendants. As this would entail travelling to consultation rooms in the centre of Dublin, he feared that the defendants would use it as an opportunity to attack him. However, he cancelled the bodyguard on the reassurance of his solicitor that nothing untoward would happen when attending that medical examination. Finally, in 2016, the plaintiff experienced a very frightening event, when the engine in his car spontaneously combusted. At first, he was not able to open the car doors due to some malfunction in the locks. He said that he thought that the second defendant had "got him" this time. After a few seconds, he was able to get out of the car uninjured. He remained suspicious for some time that that event had been caused by the actions of the defendants. However, his insurance company investigated the matter and paid out on foot of his comprehensive insurance policy. That concludes the brief summary of the general background to this case.

The Plaintiff's Evidence on the Main Issue
34. The plaintiff stated that he and his then partner, Ms. Lindsey Kelleher moved to live in Co. Kerry circa 2002. At first he lived in Killarney and subsequently moved to St. Brendan's Terrace in Cahirciveen. He had had mental health issues since 1999, for which he attended initially with his GP, Dr. Mangan. He was referred to Dr. Martin Lucey, consultant psychiatrist, in 2004. He was prescribed psychotropic medication by Dr. Lucey during the period 2004 – 2010.

35. By January, 2011, the plaintiff stated that he was feeling considerably better. He stated that in consultation with his psychiatrist, a decision was made that he could wean himself off his medication over the following months. As already noted, the court does not accept this part of the plaintiff's evidence.

36. The plaintiff stated by the end of March, 2011, he had weaned himself off all his medication. He stated that he was feeling much better. He was beginning to get out of the house a little more than he had done previously. Some weeks prior to 7th May, 2011, he received a telephone call from his friend, Mr. Raymond Mooney, who was the general manager at the Stephen's Green Hibernian Club in Dublin. Mr. Mooney told him that his employer had a marquee at the Punchestown Racing Festival, which was going to be held between 3rd – 7th May, 2011. He told the plaintiff that he had some spare tickets for the final day of the festival, which was Saturday 7th May, 2011. He invited the plaintiff to come to the races and enjoy some hospitality in the club's marquee.

37. The plaintiff stated that he was pleased to receive this invitation. His partner encouraged him to accept it, as she felt that it would be good for him. The plaintiff accepted the invitation and arranged to meet Mr. Mooney at the racecourse on the appointed day.

38. On 7th May, 2011, the plaintiff travelled by car to Punchestown Racecourse. He arrived there at approximately 10:30 hours. There is a slight divergence between the plaintiff's account and Mr. Mooney's account, as to when they first met on that occasion. The plaintiff thought that having gone through the ticket booth, he proceeded up to the marquee and met Mr. Mooney there. Mr. Mooney's recollection was that he met the plaintiff down at the ticket booth. Having given the plaintiff his ticket and lanyard containing a pass, which would admit him to the reserved area; he walked with the plaintiff from the ticket booth up to the marquee and arranged for the plaintiff to be given some tea or coffee. I do not see this discrepancy in recollection as being material.

39. The plaintiff stated that he mixed with some of the members and other guests in the marquee. He had lunch in the marquee at approximately 12:30/13:00 hours. When the meal had finished and when the other guests had started to move away from the marquee to watch the first race, Mr. Mooney became free. He and the plaintiff left the marquee for a stroll, to enable Mr. Mooney to smoke a cigarette or a cigar. They proceeded out of the marquee and made their way towards the parade ring. At that point, the plaintiff excused himself, so that he could use the gent's toilet, which was adjacent to the parade ring.

40. The plaintiff stated that when he had finished going to the toilet, he washed his hands and then moved to use the hand dryers, which were situated beside the entrance door. He stated that when he turned around, the first defendant was standing in front of him. The first defendant said to him "*I have a message from Dr. Smurfit. Dr. Smurfit has not forgotten about the statements you made about him and the call girls. He knows where to find you. It is not over.*" The plaintiff stated that the first defendant blocked him leaving the toilet. The plaintiff said to him "*We have an agreement in place*", to which the first defendant replied "*Dr. Smurfit does not care about any agreements*". At which time the plaintiff stated that he got by the first defendant and left the toilets.

41. The plaintiff stated that he was extremely shocked by this exchange. He described it as like receiving a blow to the head. He left the toilets and turned immediately to his left and walked some distance away to the retail area in the racecourse. There, he purchased a coffee and sat for a while to compose himself. He stated that he was in shock and tearful as a result of the incident. He stated that his mind began to shut down and he lost all focus. He felt sick. He had a headache and experienced flashbacks. He thought that his ordeal would never end. He recalled saying to his barrister in a previous case that these people, meaning the defendants, had the power and motive to destroy him.

42. He stated that when the first defendant told him "*He knows where to find you*", that had been very frightening for him.

43. The plaintiff stated that after approximately one hour, he returned to the marquee. He was still in a bad state. He was not able to exchange pleasantries with the other guests. However, he did not want to appear rude and just leave without saying anything. He said that he did not confide in anyone that day about what had happened, because he had become very depressed and his mind had totally shut down. He just wanted to get home. While in the marquee, he met Mr. Mooney. He apologised for disappearing off during their stroll. Mr. Mooney was working at that time. The plaintiff did not say what had happened. He did not feel it was appropriate to do so, as there was a party going on and his friend, Mr. Mooney was busy attending to the guests. The plaintiff did not stay very long in the marquee. He returned home before the races had concluded.

44. The plaintiff stated that he did not have a good recollection of his journey home. He remembered stopping two or three times to have coffee. He recalled crying at various stages. He was very upset. He kept thinking "*Why has Dr. Smurfit done that to me today?*". They had had an agreement and he had been abiding by it. He had made a life for himself living with his partner in Co. Kerry.

45. The plaintiff said that when he arrived home, he told his partner that there had been a "*little altercation*". Approximately a week later, he told her what had happened. In her evidence to the court, Ms. Lindsey Kelleher, stated that when the plaintiff arrived home, she knew that something was annoying him or bugging him. She stated that it took a couple of days of her nagging him, asking what was up with him, for him to sit her down and tell her what had happened. He told her that he had gone to the bathroom and had bumped into the head of golf, whom she now knows to be the first defendant and that some form of threat was made by the first defendant to the plaintiff. The plaintiff never told her what wording had been used by the first defendant. She just knew that the plaintiff had been threatened by him in the bathroom.

46. It could be argued that this evidence was inadmissible as being evidence of a prior consistent statement, which offended the rule against self corroboration. However, as no objection was taken to the leading of this evidence at the trial, the court has had regard to it.

47. Ms. Kelleher stated that the plaintiff was very shaken by what had occurred at Punchestown Racecourse that day. She stated that it had had a profound effect on the mental health of her partner. She described it as being like an atomic bomb going off in their lives.

48. The plaintiff attended at his GP practice on 10th June, 2011. However, on that occasion, he only saw the administrator, Ms. Kay Carroll, for the purpose of obtaining a prescription for Elocon cream. Of more significance, is a visit that the plaintiff had to his GP, Dr. Donal Coffey on 24th June, 2011. In his evidence, Dr. Coffey stated that he had a recollection of a conversation with the plaintiff,

where the plaintiff told him that he had been threatened by some man in Punchestown. The plaintiff told him that that person was a friend of people in the K Club. Dr. Coffey told the plaintiff that he was not willing to get involved in that matter. He stated that he had had a number of conversations about different matters relating to the plaintiff's case against the K Club over the years. He felt that this was a new departure in relation to the complaints that the plaintiff had made. However, he told the plaintiff that he was not willing to get involved in that aspect, as his psychiatric treatment was being looked after by Dr. Lucey.

49. Dr. Coffey was somewhat unclear in his recollection as to when this conversation took place. At one stage, he thought that he was told of the threat at a consultation on 20th April, 2011, which had been in relation to the cat bite injury. When it was pointed out to him that that consultation predated the date of the alleged incident, he then thought that in all probability, the conversation had occurred at the visit on 24th June, 2011. He thought that that was probably the occasion, as he recalled prescribing the drug, Efexor on the occasion when he had been told of the threat. However, there are two difficulties with that proposition. Firstly, Dr. Coffey and the GP practice in general, kept detailed computerised notes of both attendances with doctors and attendances with the practice for the purpose of obtaining prescriptions. The notes for the visit on 24th June, 2011, simply noted that the plaintiff had attended at the practice and had seen Dr. Coffey. The reason for the visit was stated to have been dermatitis hands and recurrent herpes labialis. A drug prescription was given for Famvir tablets (750mg). Dr. Coffey accepted that there was no reference in those notes to the plaintiff telling him of any threat being made against him at Punchestown races. He stated that that was due to the fact that he was not dealing with the psychiatric aspect of the plaintiff's injuries. In addition, his notes were merely very brief in nature and were more of an aid memoir than anything else. It is also noteworthy that there is no evidence of a prescription for Efexor at that consultation.

50. On 18th June, 2013, the plaintiff wrote to Dr. Coffey in relation to his notes in respect of the consultation on 24th June, 2011. In that letter, he stated as follows:-

> *"I had to go over my medical diary notes last two years – could you kindly check you have for 24/6/2011 reason for visit: stress – immune system poor, oral/lip sores, hands with rash, spoke about chest pains (was down to muscular, as had two ECGs before nothing showed up), spoke about poor sleep, nightmares, over incident, recurring thoughts of suicide – medication prescribed Famvir 750mg (continued use of dermatitis cream) – I said I would be visiting Dr. Lucey again."*

51. Dr. Coffey stated that it was not unusual for patients to write in relation to concerns they had about the notes or records kept by the GP practice. However, he did not amend his notes in respect of that visit, because once the notes were entered onto the computer, they were locked in and could not be changed. It would appear that the plaintiff must have kept a fairly detailed medical diary, because he was able to write in June 2013, giving extensive details of what he maintained he had said to the doctor at his visit with the GP two years earlier on 24th June, 2011. That being the case, it is noteworthy that he had not recorded, nor did he allege that he had told the doctor that he had been threatened by anyone in the toilets in Punchestown. He merely alleged that he had spoken about poor sleep and nightmares over some unidentified incident with recurring thoughts of suicide.

52. On balance, the court is not satisfied that the plaintiff made any detailed complaint to his GP on 24th June, 2011, of having been threatened by the first defendant at Punchestown races on 7th May, 2011. The court reaches that opinion for three reasons. Firstly, if such a definite complaint had been made, the court thinks it likely that the doctor would, at least, have noted it. Secondly, while the GP did have a recollection of being told about a threat at Punchestown races, he was equivocal in his evidence as to when that occurred and finally settled on the date 24th June, 2011, due to the fact that he had prescribed Efexor at the time that he was told of the threat. However, from the records supplied it does not appear that he prescribed Efexor on that date. Thirdly, the plaintiff appears to have kept a meticulous medical diary, yet he only referred to an unidentified "*incident*", rather than asking the doctor to note that he had been told of the specific threat at that visit.

53. On 12th July, 2011, the plaintiff travelled up to the family home in Co. Meath to celebrate his birthday with his twin sister, Barbara Curran. She gave evidence that when she collected him from the train station, she was very distressed by his appearance. He had lost a very large amount of weight since she had last seen him at Christmas 2010. He looked very unwell. That evening, they went for a walk together. She asked him straight out whether he was alright. She said that he replied as follows:-

> *"Barbara, something happened at Punchestown Racecourse and I am basically in fear of my life with a threat that was made via Dr. Michael Smurfit."*

54. Ms. Curran stated that the plaintiff was crying when he told her that. His feelings of fear seemed very real to her. She did not ask any further questions about the matter and he did not volunteer any further details. He did say to her that he did not want her being upset by what was going on, because he had to live through it.

55. In cross examination, Ms. Curran stated that on average she would speak with her brother on the telephone three to four times a week. Thus, in the period 7th May, 2011 to 12th July, 2011, she probably had approximately 30 telephone conversations with him. She recalled that in one conversation he said "I *will see you in July, Barbara, for our birthday*". She noticed on the phone that something was wrong, but she could not put her finger on it. She was asked whether in any of the many telephone conversations that they had, had the plaintiff said to her that something awful had happened to him in Punchestown. She stated that he had not. When she met him on 12th July, 2011, he said "*I had to see you to tell you face to face*".

56. On 19th July, 2011, the plaintiff visited his psychiatrist, Dr. Lucey. He did not say anything at that consultation about any incident at Punchestown Racecourse on 7th May, 2011. On the following day, Dr. Lucey gave the plaintiff's GP an update by letter in the following terms:-

> *"I reviewed Peter on 19/7/2011. He last attended on 9/4/2010, tapered and discontinued his medication a few months ago.*
>
> *He informed me that he had recently attended yourself with oral ulcers which were stress induced.*
>
> *His mood was deteriorated with intermittent suicidal ideation, anxiety with chest pains and his past trauma has become more prominent again – with recurring nightmares, insomnia, intrusive memories, etc., poor concentration etc. He denied suicidal intent. He continues to live a reclusive lifestyle. He is considering returning to Killarney with his girlfriend.*
>
> *I advised him to recommence Efexor XL 225mg mane, Lamictal 50mg mane, Mollpaxin 50mg nocte. I advised him to attend on a more regular basis as he needs ongoing support and psychological intervention. I will see him in three weeks."*

57. The plaintiff returned to see Dr. Lucey on 9th August, 2011. In his notes for that visit, Dr. Lucey recorded as follows:-

> *"Reminder of the trauma at the race meeting in May. Went back to the trauma and reliving same. Challenge negative distorted cognitions. Continue medication."*

58. Dr. Lucey stated that he was aware on 9th August, 2011, that the plaintiff had been at a race meeting in Punchestown and that that had reminded him of his trauma. Dr. Lucey stated that at that visit, the plaintiff just told him that he had been reminded of the trauma when he had been at the race meeting in May, but he did not elaborate. He stated that that was common for people suffering from PTSD. There would be avoidance of going back to the trauma. He stated that the plaintiff elaborated more about what had happened when he came to see the doctor again ten days later. At that visit, on 19th August, 2011, Dr. Lucey recorded the following in his notes in relation to what the plaintiff told him:-

> *"Patient interviewed. ? 7.5.2011*
>
> *Incident at Punchestown races. In toilet, washing hands, gentleman stood over him and said 'Dr. Smurfit hasn't forgotten what you said about him and the girls. He knows where to find you'. 'I said we have an agreement'. At that stage I tried to get past him. He said 'It's not over, doesn't care about agreements'. Identified the person involved."*

59. Dr. Lucey explained the reference to "*identified person involved*", as meaning that the plaintiff told him that he could identify the person who had spoken to him in the toilets at Punchestown Racecourse, but did not identify him to Dr. Lucey. In cross examination, Dr. Lucey further clarified that the plaintiff had not told him that in delivering the threat, the person had said that he was bringing a message from Dr. Smurfit. He said that if the plaintiff had told him that, it would have been recorded in his notes.

60. Arising out of that consultation and in response to a request from the plaintiff's solicitor, which had been made by letter dated 11th August, 2011, to furnish a medical legal report, Dr. Lucey furnished a report dated 20th August, 2011. In that report, he recounted what the plaintiff had told him in the following terms:-

> *"He informed me of an incident when at a horse racing meeting on 7/5/2011 he was accosted by a gentleman in the bathroom. He stated that he was washing his hands when the gentleman stood over him and said 'He hasn't forgotten what you said about him and the girls and he knows where to find you'. He replied to the gentleman 'We have an agreement'. At that stage, he tried to get past him and the gentleman replied 'It is not over, he doesn't care about the agreement'."*

61. It appears that the plaintiff was not happy with the account which had been given by Dr. Lucey in his report, because by letter dated 6th September, 2011, his former solicitor wrote to Dr. Lucey thanking him for his report dated 20th August, 2011 and stating that having gone through the report in detail with his client, there were a few issues arising. His client had instructed that when the incident occurred on 7th May, 2011, that he had informed Dr. Lucey that he was at the dryer and had completed washing his hands. He was also very clear about what was said, in that the person was going to "*come and get you*". The letter went on to suggest that it would be helpful if the detail of what flashbacks the plaintiff was suffering, were mentioned in the report. His client had instructed him that he had informed the doctor of these flashbacks. His client felt victimised, bullied and abused. Finally, the solicitor suggested that Dr. Lucey might comment on the plaintiff's long term prognosis, if that was possible.

62. This prompted Dr. Lucey to issue a revised report dated 10th September, 2011, in which he described what he had been told by the plaintiff in the following terms:-

> *"He informed me of an incident at Punchestown horse racing meeting on 7/5/2011 when he was accosted by a gentleman in the toilet.*
>
> *He was at the dryer, having washed his hands when the gentleman stood over him and said 'He hasn't forgotten you, what you said about him and the girls and he knows where to find you'. He replied to the gentleman 'We have an agreement'. At that stage he tried to get past him and the gentleman replied 'It is not over, he doesn't care about the agreement'."*

63. The relevance of this exchange is that, while the plaintiff obviously went through the initial report from Dr. Lucey with great care and through his solicitor made suggestions as to how the report might be amended to give a true account of what he had said, he did not allege that he had told Dr. Lucey that the man who threatened him in the toilets had said that he was bringing a message from Dr. Smurfit. This is significant, because that precise allegation appears in the warning letter that was written by his solicitor to the defendants almost six months later.

64. The plaintiff stated that some nine months after the incident, he first consulted with his former solicitor, Mr. Tim O'Leary of O'Leary & Co. That cannot be correct because as seen earlier, Mr. O'Leary had written to Dr. Lucey seeking a medical report as far back as 11th August 2011. On 14th February, 2012, Mr. O'Leary wrote a warning letter to each of the defendants calling on them to admit liability for the incident and to make proposals to compensate his client by way of damages. In his letter to the first defendant, the incident was described in the following terms:-

> *"Mr. Curran attended the Punchestown Racing Festival on 6 and 7 May 2011. This was the third occasion on which he had ventured into the public domain since the case. On the afternoon of Saturday 7 May 2011 he was in the bathroom at Punchestown and had finished washing his hands. He turned around to find that there was someone blocking his exit whom he has identified as you. We are instructed that you are the course superintendent of the K Club.*
>
> *Our instruction is that you identified yourself as carrying a message from Dr. Michael Smurfit who said that he had not forgotten Mr. Curran's statement about him and the call girls. He knew where to find Peter Curran and said it was not over. Mr. Curran told you that they had an agreement and asked would you mind as he tried to get past you. You said that Dr. Smurfit did not care about any agreement. Mr. Curran managed to leave."*

65. The plaintiff having obtained an authorisation from PIAB, issued a personal injury summons on 14th March, 2013. It is not necessary to set out the account of the threat as contained therein, as that has been set out in the Introduction section of this judgment.

66. Finally, on 25th May, 2015, Dr. Matt Kinch, Consultant Psychiatrist, furnished a report to the plaintiff's solicitor based on his interviews with the plaintiff on 22nd April, 2015, and 22nd May, 2015. In that report, he said as follows:-

"He still to this day displays some evidence of chronic Post Traumatic Stress Disorder, having nightmares, feeling withdrawn socially and feeling under constant threat from would-be aggressors linked to his various ordeals culminating most recently in the physical and verbal attack on him by a named person in the K Club on 7/5/11."

67. In cross examination, Dr. Kinch was asked why he had stated that the plaintiff had been subjected to a "*physical and verbal attack*". He stated that he had made a note of what the plaintiff had told him and that he understood from the plaintiff that he had been pushed and shoved by the person who had threatened him. For that reason, he had put in his report that there had been both a physical and verbal attack. The reference to a physical attack was not to indicate that there had been an actual serious assault on the plaintiff, but that there had been some pushing and shoving. He accepted that there appeared to be a discrepancy between what the plaintiff told him in April and May 2015 and what the plaintiff had said on previous occasions. That concludes the evidence of the various accounts given by the plaintiff of his ordeal.

The Evidence of Mr. Raymond Mooney

68. At the trial, the first defendant was adamant that he had not been in the gentlemen's toilet on the ground floor at Punchestown Racecourse at any stage during the afternoon of 7th May, 2011. Accordingly, his case was that he could not and did not issue any threat to the plaintiff in that toilet as alleged by the plaintiff. In light of that very strong denial, the evidence given by Mr. Raymond Mooney was particularly relevant.

69. By way of background, Mr. Mooney stated that he was 52 years of age. He had been part of the original team in the K Club in 1991 when it opened. It was the first five star hotel and golf resort in Ireland. It was a very innovative project and it grew into a very successful operation. He said that he and the other members of staff had enormous pride in working there. He became friendly with the plaintiff when he came to work at the K Club in September 1997. The plaintiff was the food and beverage manager and Mr. Mooney was the bar manager. They both attended the Friday meetings, which were for the heads of departments. He stated that there would have been between sixteen/twenty people at such meetings. The first defendant also attended those meetings.

70. Mr. Mooney stated that he was quite friendly with the plaintiff during his time in the K Club. They had coffee together regularly to discuss various aspects of their joint operations in the hotel. They also socialised on occasion in a local pub. After the plaintiff left the K Club, Mr. Mooney kept in contact with the plaintiff. The plaintiff would ring him when he was coming to Dublin and if it was possible, they would meet up for a coffee. This was not a regular occurrence, but they would meet possibly three times a year.

71. Mr. Mooney stated that he had left the employment of the K Club on good terms in 1998 to become general manager of Sutton Castle Hotel. Subsequently, he became general manager of the Stephen's Green Hibernian Club in Dublin, a post which he has held for the last fifteen years.

72. In relation to the invitation to the Punchestown Racing Festival, Mr. Mooney stated that in his capacity as manager of the Stephen's Green Hibernian Club, he was in charge of operations in the club's marquee at the racecourse for the duration of the festival. On the last day of the festival, which was the family day, he had a discretion in relation to the allocation of a number of extra tickets, which he could allocate to prospective members of the club, business contacts and friends. In the weeks leading up to the festival, he telephoned the plaintiff and invited him to come to the marquee on Saturday, 7th May, 2011, as a guest of the club. The plaintiff accepted the invitation. Mr. Mooney thought that he may have posted an admission ticket to the plaintiff, which gave him general access to the racecourse.

73. On the day in question, Mr. Mooney stated that he actually met the plaintiff at the entrance ticket booth at approximately mid-morning. He gave the plaintiff a lanyard containing a pass, which would give him admittance to the reserved areas. He walked with the plaintiff from the ticket booth up to the marquee, during which time they chatted in general terms. He stated that the plaintiff appeared to him to be looking well and was in good form. He introduced the plaintiff to some people in the marquee and arranged for him to have tea or coffee. He then went about his business.

74. Mr. Mooney stated that he was busy attending to the requirements of the guests for the remainder of the morning and ensuring that lunch was served at the appointed time. When the lunch had finished, things quietened down in the marquee as the guests moved off to place bets in preparation for the first race. At some time in the early afternoon, he and the plaintiff went for a walk. He said that he left the marquee, so that he could have a smoke. They made their way from the marquee to the parade ring. There, the plaintiff left him to go to the gent's toilet, which was situated a very short distance from the parade ring. Mr. Mooney waited at the parade ring and kept an eye on the door of the gent's toilet for the return of his friend. He stated that after a short period, he saw the plaintiff coming out of the toilets. The plaintiff turned to his left and walked straight past Mr. Mooney. He did not speak to him. It was as if he was not there. He stated that the plaintiff looked very different coming out of the toilets. At the same time, he saw the first defendant come out of the toilets directly behind the plaintiff. The first defendant was less than an arm's length behind the plaintiff. He said that they were very close together, as if they were in a lift. He was able to see both of them at the same time. The first defendant turned to his right and walked off.

75. Mr. Mooney stated that when the plaintiff came out of the toilets, he was a different colour. He was walking very fast. He did not speak to Mr. Mooney. At that stage, Mr. Mooney returned to his work in the marquee.

76. Mr. Mooney stated that approximately 1/1.5hrs after he had seen the plaintiff exiting the toilets, he saw the plaintiff on the balcony or terrace, outside the marquee. The plaintiff had not spoken to him or anyone else. The plaintiff was not socialising at that stage. Mr. Mooney stated that he was quite busy at the time. However, he noted that the plaintiff's face was somewhat red or green in colour. He looked upset. He looked as if he was, or had been crying, or was about to cry. He was not socialising. He was definitely upset.

77. Sometime later, Mr. Mooney went over to the plaintiff and asked him if he was alright. He said that he did not really get any answer from the plaintiff. Mr. Mooney said that he did not push the matter, as he sensed that while the plaintiff was upset, he did not want to talk about it. Mr. Mooney stated that he was adept at reading people from his many years in the hospitality sector. He knew when to pursue a matter and when to back off. On this occasion, he sensed that the plaintiff did not want to talk about it, so he left it at that and returned to his work. He said that he kept away from the plaintiff, as he seemed upset. The plaintiff did not tell him what had happened.

78. Mr. Mooney elaborated on his evidence and said that when he had asked the plaintiff what was wrong, nothing had come out. The plaintiff seemed transfixed. He looked damaged. It seemed that he could not communicate due to his upset; he would not say what was wrong. He said that later in the afternoon when he looked for the plaintiff, he had gone. He had left without saying goodbye.

79. He had next spoken to the plaintiff approximately two months later, but the plaintiff had not said anything about the day at Punchestown races and they did not discuss it. It was just a general conversation. He could not recall the details of it.

80. However, the following year, in 2012, he again telephoned the plaintiff to invite him to the racing festival. When he invited the plaintiff by phone, the plaintiff declined saying that he would not go back there. When Mr. Mooney inquired why he would not go back, the plaintiff was at first evasive. He said that he was not going to go to the east coast again. The plaintiff said that something had happened the last time he was there. He said that he had been threatened. He did not say by whom. Mr. Mooney said that he was taken aback by this assertion.

81. Mr. Mooney told the plaintiff that he recalled him being upset. He asked was that connected to what had happened. He told the plaintiff that he did not have to go into it if he did not want to. The plaintiff got quite emotional. He said that he had bumped into someone and had been threatened. He did not go into details. Mr. Mooney asked him who had he been threatened by. The plaintiff would not answer, he just said "*Someone ex-K Club*". Mr. Mooney asked whether it was the first defendant. The plaintiff said yes. Mr. Mooney then told him that he had seen the plaintiff and the first defendant together. The call ended soon after that. Mr. Mooney stated that he was the first person to mention the first defendant in that conversation.

82. Approximately, six months later, he wrote a statement for the plaintiff's former solicitor in relation to what he had seen at Punchestown races on 7th May, 2011.

83. In the course of cross examination, the witness was asked whether he was uncomfortable giving his evidence. He stated that he was somewhat uncomfortable due to the fact that he was effectively giving evidence against the K Club, a place where he had worked in the past and with whom he continued to have very good relations. He stated that a number of ex-K Club employees, now worked under him in the Stephen's Green Hibernian Club. In addition, there were many members of the K Club, who were also members of the club in Dublin. It was difficult for him to give evidence against the defendants. However, he stated that he felt it was his duty to give evidence as to what he had seen on the day in question.

The Evidence of Mr. Timothy O'Leary

84. Mr. Timothy O'Leary was the plaintiff's former solicitor in these proceedings. He ceased acting for the plaintiff in November 2017. At that stage, he transferred his file to the plaintiff. Mr. O'Leary was called by the plaintiff primarily to give evidence in relation to a telephone conversation which he had with the first defendant on 15th February, 2012.

85. The warning letter in relation to these proceedings had been sent by Mr. O'Leary on the instructions of the plaintiff on 14th February, 2012. Mr. O'Leary stated that on the following day, Wednesday, 15th February, 2012, he received a message from his secretary, that the first defendant had telephoned the office earlier that day seeking to speak with him. Mr. O'Leary returned the call to the first defendant and managed to get through to him. This was a significant conversation. Mr. O'Leary prudently drew up a memo of the conversation which he had with the first defendant later that day. It was in the following terms:-

> *Memo of Telephone Call with Gerry Byrne*
>
> *Client: Peter Curran*
>
> *Case Reference: CU.060 Breach of High Court Settlement*
>
> *Date: 15th February, 2012*
>
> *I spoke briefly to Gerry Byrne on Wednesday, 15th February, 2012. I returned a phone call he made to this office earlier in the day. He said he had received my letter. He felt that it was a case of mistaken identity. He said he did not know Peter Curran and Peter Curran would probably not know him. He was prepared to email a photograph of himself. He was a greenkeeper on the golf side of things and he had no knowledge of anyone in the hotel.*
>
> *He confirmed that he was at Punchestown on the day in question. He was there with his daughter. It was a Saturday which is the family day. He has been working in the K Club since 1996. The only toilet he used on the day was on the far side of the course, up a stairs near the parade ring.*
>
> *I said that I was returning his phone call as a matter of courtesy. I would pass on what he said to Peter Curran but that Peter Curran had been very clear with me as to what had happened and he was able to identify Gerry Byrne. He questioned this as to how Peter Curran would know him and he said he would send a photograph by email. I said I would convey what he had said to Peter and he was in agreement with this."*

86. In evidence, Mr. O'Leary stated that it was the first defendant who raised the issue of which bathroom he had used on the day in question. The warning letter had made reference to an incident in a bathroom, but not whether it was situated upstairs or downstairs at the racecourse. For that reason, Mr. O'Leary stated that he noted carefully that the first defendant had mentioned that he had only used the upstairs bathroom.

87. In the course of cross examination by counsel on behalf of the first defendant, it was put to the witness that the first defendant had a recollection of the conversation and of having said that it was probably a case of mistaken identity and that he offered to furnish a photograph of himself. The first defendant recalled that the bathroom was discussed, but he had no recollection of any incident in any bathroom. It was put to the witness that the first defendant would say that he did not recall what bathroom he used that day. Mr. O'Leary stated that the first defendant had stated that he had used the upstairs toilet, as had been recorded by him in his memo. The question posed by senior counsel is of significance in light of the evidence subsequently given by the first defendant. It is to an account of that evidence, that I now turn.

Evidence of the First Defendant on the Main Issue

88. By way of background, the first defendant stated that he had been reared on Elm Park Golf Course, Dublin, where his father was the head greenkeeper. He moved to the Hermitage Golf Club, when his father transferred there. He worked at the Hermitage Golf Club from 1982 to 1988. He was appointed head greenkeeper at Westmanstown Golf Club from 1988 to 1992, where he developed the second nine holes on the course. In 1992, he moved to Luttrellstown Castle, where he worked with Mr. Nick Bielenberg, who had designed a course for that location.

89. In 1996, he saw an ad for a vacancy as head greenkeeper at the K Club. He applied for that job and was up against 35 greenkeepers from Ireland and Europe, who had also applied for the job. The plaintiff was successful in obtaining the post. Mr. Byrne

stated that when he took the job at the K Club, the course was not in first class condition. Professional golfers, who had played there as part of the tour were giving it a poor rating. The course had previously been closed in 1993 and 1994 for extensive remedial work to its drainage system. In 1996, the plaintiff's job was to restore the course to a five star international standard. At that time, he had eighteen greenkeepers, two machine operatives, four landscape workers, a secretary and an administrator, working under him.

90. The first defendant stated that his role as head greenkeeper was very much an outdoors role. He dressed in outdoor clothing. He spent most of his time out on the golf course supervising his staff and educating the greenkeepers in the art of maintaining first class greens. It had been suggested to the witness in the course of cross examination that he sometimes had occasion to interact with the plaintiff in his capacity as food and beverage manager, in particular, when there was a very large function going on in the tennis complex. Mr. Byrne denied that that was so. He stated that a request might have been made for some of his staff to assist with moving tables and chairs into the tennis centre for the event. However, such request would normally have come from the Facilities Manager. The request would have been made by phone to his secretary, who in turn would telephone him out on the golf course. He would delegate his head greenkeeper to select a number of men to go across to the tennis centre and assist with moving tables and chairs. He denied that such a request, would have involved any interaction between him and the plaintiff.

91. An issue had also arisen as to whether the first defendant was telling the truth, when he had asserted that he did not even know the plaintiff. It was put to him that both he and the plaintiff attended the weekly Friday meeting of the heads of departments and as such it was implausible for him to state that he did know the plaintiff and would not have recognised him if he had seen him at the races in May 2011. In response to this, the first defendant said a number of things about the Friday meetings. Firstly, he stated that he was not a regular attender at those meetings, as he preferred to remain outdoors on the golf course. However, he was at times directed to attend such meetings and did so. He stated that he attended the meetings once per month in the period October to March. During April, May and June, he would have attended three times per month. In July, he would not have attended the meetings at all, as he would have been busy preparing for the European Open, which was normally held at that time. In August and September, he would have attended approximately three times per month.

92. Mr. Byrne stated that he was somewhat uncomfortable at those meetings, due to the fact that he was dressed in outdoor clothes, whereas the other people attending all wore suits. He said that his direct supervisor, Mr. Paul Crowe, who was the Director of Golf, attended the weekly meetings. It was he who would have dealt in the main with any golf issues arising. The first defendant stated that as soon as the meetings ended, he did not stay around and socialise with the other managers, but returned immediately to the golf course. The meetings themselves were fairly brief, lasting some 45 minutes.

93. It was put to the first defendant that the plaintiff had said that he had had coffee with the first defendant on many occasions after the Friday meetings. The first defendant denied that he had ever done so. In relation to his assertion that he would not have recognised the plaintiff if he had seen him at the races in May 2011, the first defendant stated that he had not seen the plaintiff since he left the K Club in October 1998. There had been a very large number of second line managers employed at the hotel in the intervening years. He said that given his very limited level of interaction with them, he simply would not recognise most of the line managers who had come and gone in the interim.

94. In relation to 7th May, 2011, the first defendant stated that he had gone to the Punchestown Racing Festival that day with his daughter, who was then eleven years old. At the time he was in the process of becoming divorced from his wife. Saturday was his day for access to his daughter. They went to the races, because his daughter loved horses. He could not recall exactly from whom he obtained the tickets, but he presumed that he had obtained them from the HR department in the K Club, who would have had a number of tickets available. They were ordinary tickets and only permitted entry to the general areas in the racecourse. He had attended the racing festival each year from 1997 onwards.

95. On the day in question, he picked up his daughter between 13:30/14:00hrs. He let the traffic die down, so they arrived at the racecourse after the first race. They spent the day looking at horses in the parade ring and then going to place a small bet of approximately €2 on a horse and then going to watch the race itself. He said that they repeated this pattern for each of the races. In order to avoid heavy traffic, they left the races before the end of the last race. He could not remember anything in particular about that day. It had just been a fun day out for him and his daughter.

96. The first defendant denied absolutely that he had had any conversation with the plaintiff in the course of that day. He said he had not seen the plaintiff at all during the day. Insofar as the plaintiff had alleged that he made a threat to him in the gent's toilet adjacent to the parade ring, that was a lie.

97. The first defendant was adamant that he had never been in the gent's toilet on the ground floor at any stage during that day. He was able to be certain in that regard, because he had only been in that toilet on one occasion, when he had attended an athletics event in the racecourse. That ground floor toilet had been used as the gentlemen's changing area. He had changed in that toilet on that occasion. He stated that if he or his daughter needed to go to the toilet during the day, they would have used the upstairs toilet on the far side of the parade ring, as that was a much quieter toilet. It meant that if his daughter needed to use the facilities, she could do so there without having to join a long queue and he could wait outside for her.

98. In cross examination, the first defendant was asked how his account could sit with the evidence given by Mr. Ray Mooney. The first defendant stated that he knew Mr. Mooney from his time working at the K Club. He remembered him as an outgoing and genial person. He had not had any particular difficulty with him. He could think of no reason why Mr. Mooney would tell a lie. However, he was adamant that he had not used that particular toilet on that day and accordingly, he stated that Mr. Mooney must be wrong in his recollection.

99. The first defendant stated that the first he knew of any allegation being made against him was when he received the warning letter from the plaintiff's solicitor on 15th February, 2012. He stated that having attended a meeting with the finance director, Mr. John Mitchell and the CEO, Mr. Davern, in Mr. Mitchell's office, he collected the letter from the tray in the general office area. He opened the letter immediately and read it. He stated that he was very shocked by the assertions made against him in the letter. He had absolutely no knowledge of the incident to which the letter referred. He was very frightened by the assertion in the letter that he would be held liable for damages and costs in respect of the alleged incident.

100. The first defendant stated that he went straight back into Mr. Mitchell's office, where he showed the letter to Mr. Mitchell and Mr. Davern. He asked them whether they knew what it was all about. Mr. Davern told him that it was Peter Curran, who had sued the K Club on a number of previous occasions. He gave him a brief outline of the previous litigation. By this time, they could see that he was very upset and anxious. They said "*Let's think about it for a while and see what we do*". They said "*This is Peter Curran back again*". The first defendant said that he left the office at that stage.

101. He returned to his own office and read the letter again a number of times. Later in the afternoon, he telephoned the plaintiff's solicitor. He did not get through to him on that occasion. The plaintiff's solicitor subsequently phoned him back. They had a short conversation lasting two to three minutes, certainly less than four minutes in duration. He said that he told Mr. O'Leary that the incident had not happened. The first defendant thought that it was a case of mistaken identity, so he offered to send a photograph of himself. He thought that once the plaintiff saw the photograph, he would realise that whatever may have happened, he had picked the wrong person and that would be the end of the matter. He stated that he did mention the upstairs toilet on the far side of the parade ring, as that was toilet that he usually used with his daughter. He accepted that he had said that he did not know the plaintiff and that the plaintiff would probably not have known him. He accepted that Mr. O'Leary stated that he would convey what had been said to him to his client.

102. On the following day, the first defendant received a call from Mr. Mitchell, informing him that a similar letter had been received by the company.

103. On 23rd February, 2012, the first defendant sent an email to the finance director, Mr. John Mitchell outlining his response to the warning letter sent by the plaintiff's solicitor. While the same objection may have been taken to the admission of such evidence as could have been taken to the evidence given by Ms. Kelleher and Ms. Barbara Curran, no objection was taken. Accordingly, and in light of the fact that prior consistent statements were admitted through the evidence given on behalf of the plaintiff, it is only fair that the court should have regard to this statement made by the first defendant, notwithstanding that it is evidence of a prior consistent statement. In the course of re-examination, Mr. John Mitchell was asked why the first defendant would be sending him an unsolicited email, some eight days after he had received the warning letter from the plaintiff's solicitor. Mr. Mitchell stated that he had not asked the first defendant to send the email, but he had also received a warning letter addressed to the K Club Limited in his position as company secretary. He had informed the first defendant of the receipt of that letter. As he was now involved in the matter, he had asked the first defendant whether he knew Mr. Curran, or was he at the races. While he had not requested a response in writing, the first defendant had sent him the following email:-

> *"Subject: O'Leary & Co. Solicitors Re: Peter Curran [letter dated 14th February, 2012]*
>
> *Hi John,*
>
> *I refer to the letter I received from the above mentioned solicitors.*
>
> *I can confirm to you that I did attend the Punchestown Race Meeting with my daughter, Emer. We attend the races together as a treat for her and as she was eleven years old we concentrated on the parade ring looking at the horses which she loves. As I was driving, no alcohol was taken.*
>
> *I can also confirm I have only a knowledge of this man and have no recollection of him having any involvement with him here at the K Club and would not recognise him or know him if we were to meet. I have very little knowledge of any case taken against the K Club and certainly have no knowledge of specific details.*
>
> *My role during my early years here was strictly an outdoors one and my superior and direct line of contact at the K Club was the then Director of Golf, Paul Crowe. He sat on the senior management team table on behalf of the golf course and club.*
>
> *I attended a weekly heads of department meeting at 11.00am most Fridays whereby the function sheet was read out by a senior member of the sales team and comments were made about the needs of customers and golf. In the room was up to 25 people most of which I never knew, I concentrated on my own areas at all time which was the Palmer Golf Course.*
>
> *It was only when the current CEO Michael Davern was appointed, did I seek and was agreed to be allowed onto the senior management team, that I finally got to know the entire management team at the K Club.*
>
> *As you know I keep myself to myself here mainly and I have only ever attended three Christmas dinners in my time and only in the last six years did I attend any senior management functions other than leaving tea parties or dinners.*
>
> *I hope this helps to clarify my position in my knowing this man.*
>
> *I can categorically deny that I at any time stopped or spoke to this man in any way on the day in question or any other day for that matter. I cannot understand how he would know me as I certainly do not know him.*
>
> *Kind regards.*
>
> *Gerry Byrne, Resort Superintendent."*

104. The first defendant confirmed that he had sent that email to Mr. Mitchell on 23rd February, 2012, setting out his detailed response to the warning letter received from the plaintiff's solicitor.

105. In his evidence, the first defendant further stated that he had no knowledge of any statements or allegations that the plaintiff had made in relation to call girls, nor was he aware of any settlement agreement which had been reached between the plaintiff and the K Club in 2008. He denied absolutely that he had ever been given any message by the second defendant to give to the plaintiff. He denied that he had delivered any threat to the plaintiff on the day in question.

106. It was put to the witness that from the emails which he had sent in response to the bogus emails which had been sent to him in April 2015 (which will be examined later in the judgment), it was clear that he had enormous loyalty to the second defendant. It was put to him that he would be prepared to do literally anything that the second defendant requested of him. The first defendant stated that while he held the second defendant in very high regard and while he was very grateful for the fact that he had had many years of secure employment with the K Club, particularly during the recession years, he had simply not been asked by the second defendant to deliver any message or threat to the plaintiff. That concludes the summary of the evidence given by the first defendant on the main issue. It is necessary to break the narrative on the main issue, to look at two discreet issues that loomed large during the hearing.

The Discovery Issue

107. During the hearing, an issue arose as to whether the plaintiff had made proper discovery of his medical and other records, or had deliberately attempted to withhold certain information and records from the defendants, in particular, in relation to an accident which occurred on 18th July, 2015. On that date, the plaintiff had been walking along Old Road, Cahirciveen, Co. Kerry, when he was caused to stand on the cover of a hole or junction box, which was the property of Irish Water Limited. It was alleged by the plaintiff that the covering in question was not properly secured and/or had become dislodged or displaced and as a result thereof, he was caused to lose his balance and fall to the ground. As a result, he suffered a displaced fracture of the calcaneus bone in his right leg, together with abrasions to both hands and an injury to his right ring finger.

108. Arising out of that accident, the plaintiff issued proceedings against Irish Water Limited, J. Murphy and Sons Limited and Kerry County Council by a personal injury summons issued in the High Court on 26th May, 2016. The plaintiff's solicitors in that action were Patrick Mann & Co., in Tralee, Co. Kerry.

109. It is noteworthy that in his personal injury summons, the plaintiff did not allege that the injuries sustained in that accident, had had any effect on his psychiatric condition. The only injuries pleaded at that time, were the fracture to his heel, and the injuries to his hands. In a notice for particulars raised by the defendant's solicitor on 27th June, 2016, he was asked at item 25 thereof, whether he had ever suffered any injuries in any accident either prior to or subsequent to the alleged accident referred to in the endorsement of claim. At item 26, he was asked whether he had ever suffered from a medical condition in any way similar to the condition as pleaded and, if so, he was asked to furnish full details thereof.

110. In replies furnished on 29th July, 2016, the plaintiff stated at item 25 thereof, that he had suffered injuries during the course of his employment on 9th November, 1992, while working in a restaurant in Dublin. He had suffered an injury to his index and middle finger of his right hand, which were cut by glass and resulted in tendon damage. He gave details of the treatment he received for those injuries. He also indicated that a claim had been pursued and had been settled for the sum of £13,500 plus costs. In relation to the query raised at item 26, the plaintiff responded: "*The plaintiff says no*". Thus, in neither the personal injury summons, nor in the replies, did the plaintiff make any reference to the psychiatric injuries that he had suffered as a result of the various encounters that he had had with the K Club, or with the first named defendant on 7th May, 2011.

111. In the course of cross examination, it was put to the plaintiff that when making discovery of his medical records, he had deliberately asked his GP to furnish documents for a more restricted period, than that which had been requested by his solicitor.

112. In particular, it was put to the plaintiff that by letter dated 30th June, 2016, his former solicitor, Mr. Tim O'Leary of O'Leary & Co. had written to the Ross Medical Practice informing them that as part of the discovery process in this case, the plaintiff needed to furnish his medical records "*from 1998 to date*". The letter went on to inform them that the plaintiff would be contacting them directly in relation to production of the records.

113. It was put to the plaintiff that by email dated 12th July, 2016, he had requested the GP practice to furnish his medical files "*from 2002/3 whenever I first attended your practice to March 2013 only*". It was put to the plaintiff that he had deliberately phrased his request in that way, so as to avoid production of any records concerning his 2015 accident. It was further put to him that he had deliberately done that so as to conceal from the defendants in this case, the fact that he had had a subsequent accident in 2015 and had instituted proceedings in relation thereto.

114. The plaintiff denied that he had had any such motive in phrasing his request to his GP practice in that way. He stated that he had sought the records for that period for the simple reason that he was under the impression that he only had to make discovery of his medical records from the time when he first consulted the GP practice up to March 2013, which was when his personal injury summons in this case was issued. Furthermore, he pointed out that when he swore his affidavit of discovery for the third defendant on 22nd November, 2016, he had in fact furnished his GP records for the period 30th July, 2002 to 29th June, 2016, and the handwritten notes of his psychiatrist, Dr. Lucey, for the period 6th April, 2004 to 27th October, 2015. There were multiple references to the 2015 accident and the injuries arising therefrom in both sets of records. Accordingly, he denied that there had been any attempt by him to conceal the 2015 accident from the third defendant. Similarly, he had sworn an affidavit in response to a request from the second defendant that he should make discovery of his medical records "*from 1998 to date*". He pointed out that at items 63 and 82 thereof, he had furnished the same sets of GP notes and psychiatrist notes, which contained the references to the 2015 accident.

115. It should be noted for completeness that the plaintiff had furnished an affidavit of discovery to the first named defendant on 13th March, 2015, which was prior to the date of the 2015 accident.

116. The plaintiff did acknowledge that in relation to the request for discovery which had been made on behalf of the second defendant, he had not made complete discovery. In particular, he acknowledged that he had failed to provide medical reports from Mr. Rice, the Orthopaedic Surgeon who had treated him for his leg fracture, the medical notes of Dr. Din who had also treated him for the same injury and he had not furnished a copy of a medical report furnished by his current psychiatrist, Dr. Kinch, which had been furnished to the firm of solicitors looking after his proceedings concerning the 2015 accident, being a report dated 14th April, 2017. The plaintiff also acknowledged that he had failed to provide copies of certain scans from Kerry University Hospital in relation to his leg fracture.

117. In a supplemental affidavit sworn on 24th October, 2017, the plaintiff stated that some of the documents were incorrectly omitted by him through oversight and the balance were omitted on the basis of an incorrect assumption that they were not captured by the agreement to make voluntary discovery. Those documents primarily related to the accident in 2015 and to two incidents in 2016. The plaintiff went on to state in his affidavits that he did not inform his legal advisors in the present action of his legal proceedings in relation to the 2015 accident "*until the last few weeks*", nor did he furnish the reports and further information as set out in his affidavit, on the incorrect assumption that the matter was not captured by the agreement to make voluntary discovery, on the basis that it related to other proceedings.

118. The plaintiff swore a supplemental affidavit of discovery for the first defendant in identical terms, which was sworn on 31st October, 2017. There does not appear to be a supplemental affidavit of discovery furnished to the third defendant in the papers before me, however, it is highly likely that such a supplemental affidavit was produced to them.

Conclusions on the Discovery Issue

119. There are essentially two issues here. Firstly, whether the plaintiff deliberately tried to limit the scope of the records that would be produced by his GP, by sending the email on 12th July, 2016. Secondly, whether in swearing his initial affidavit of discovery for the third defendant on 22nd November, 2016, and for the second defendant on 20th July, 2017, the plaintiff had deliberately tried to conceal the medical records pertaining to the injuries suffered by him as a result of the accident in July 2015.

120. To deal with the first issue, I am not satisfied that in sending the email which he did on 12th July, 2016, asking his GP to furnish records from the date when he commenced attending at the practice "*to March 2013 only*", the plaintiff was attempting to conceal the records concerning the 2015 accident. While that was put to him by counsel acting on behalf of the second defendant in the course of his cross examination, it seems to me that that email was sent by the plaintiff in response to the request for voluntary discovery which had been made by the third defendant by letter dated 22nd May, 2015. It would appear that category B of the documents sought by the third defendant were all records relating to the plaintiff's health history subsequent to the termination of his employment with the third defendant in 1998 "*up to the date of these proceedings*". In these circumstances, it seems to me that the email which was sent by the plaintiff to his GP practice was in fact framed in the context of the request for discovery which had been made by the third defendant, which only sought discovery of records up to the date of the present proceedings, which commenced with the issuing of a personal injury summons on 14th March, 2013.

121. That email could not have related to the wider request for discovery of documents made by the second defendant, which sought all the plaintiff's medical records and reports "*from 1998 to date*", for the simple reason that that request was not made until 27th June, 2017. Therefore, while the plaintiff's email was in more restrictive terms than the letter which had been previously sent by his solicitor to the GP practice on 30th June, 2016, the plaintiff's request was consistent with the terms of the request that had been made of him by the third defendant. Accordingly, I do not draw any adverse inference against the plaintiff in relation to the wording of his email dated 12th July, 2016.

122. The second issue concerns whether or not the plaintiff made full discovery when swearing his affidavit of discovery on 20th July, 2017, in response to the request from the second defendant that he should furnish all medical records "*from 1998 to date*", which meant up to the request for discovery, made in the letter from the solicitor acting for the second defendant dated 27th June, 2017. As already noted, in the affidavit of discovery sworn on 20th July, 2017, the plaintiff did not disclose any details of his other set of proceedings, which had issued on 26th May, 2016, concerning the 2015 accident, nor did he provide any medical records from Dr. Rice, Dr. Din, Kerry University Hospital or from Dr. Kinch in relation to the 2015 accident. It was asserted on behalf of the second defendant, that the plaintiff had deliberately withheld these documents and in particular the report from Dr. Kinch to Ms. Fiona Lally of Patrick Mann and Co. dated 14th April, 2017, because in that report, the psychiatrist had stated that the 2015 accident had had a significant adverse effect on the plaintiff's pre-existing mental illnesses.

123. In order to appreciate the significance of this omission, one has to understand Dr. Kinch's role in both sets of proceedings as of 2017. He had taken over the treatment of the plaintiff's psychiatric injuries upon the retirement of Dr. Lucey in 2015. He had provided a medical report to the plaintiff's former solicitors in these proceedings on 25th May, 2015. On 27th April, 2017, he furnished an updated medical report to Mr. Tim O'Leary. Somewhat curiously, he did not mention the 2015 accident, or any effect that it may have had on the plaintiff's mental health in that report. He merely outlined how the plaintiff had progressed since his previous review and furnished a prognosis for the future. That was based on a review of the plaintiff on 26th April, 2017.

124. On 14th April, 2017, Dr. Kinch had sent a report to Ms. Fiona Lally of Patrick Mann & Co., who was the solicitor looking after the proceedings in relation to the 2015 accident. In that report, he noted that the plaintiff had been attending him prior to the accident in relation to post traumatic stress disorder, reactive depression and major anxiety "*following a separate situation which had happened a number of years previously*". He gave the opinion that the accident on 18th July, 2015, had certainly aggravated the plaintiff's pre-existing psychological condition. In addition, the physical imposition of the injuries, made his psychological progress more difficult. He concluded that while the plaintiff had had an ongoing psychiatric condition of PTSD, major anxiety and reactive depression of at least moderate degree, he had deteriorated psychologically because of the accident in July 2015. His medication had been increased and the plaintiff would need to see him more regularly than before going into the future. His psychological progress overall would partially depend on how he was doing as regards his recovery from the physical aspects of his injury.

125. That was a significant medical report. It stated clearly that it was the opinion of his treating psychiatrist, that his psychiatric condition had been aggravated as a result of the accident which he suffered in July 2015. Dr. Kinch had made no mention of any such aggravation in his report to Mr. Tim O'Leary dated 27th April, 2017, which was dealing with the psychiatric sequelae that were said to flow from the events in May 2011.

126. In his evidence, the plaintiff stated that his solicitor was well aware of the injuries which he had suffered and indeed had advised him to seek the advice of a solicitor in relation to seeking compensation for those injuries.

127. In the course of cross examination of Mr. O'Leary, it was put to him that the plaintiff had stated in his evidence that when Mr. O'Leary had seen the plaintiff on crutches in the summer of 2015, he had advised the plaintiff that he needed to look at taking an action in relation to that, as he might be severely injured. Mr. O'Leary stated that he did not recall those words. It was further put to Mr. O'Leary that the plaintiff had stated that Mr. O'Leary had been aware of his accident and had suggested to him that he should take legal action. Mr. O'Leary stated that he did not recall having any such conversation with the plaintiff. Mr. O'Leary was asked whether he knew about the report from Dr. Kinch to Ms. Lally. He stated that he was not aware that the plaintiff had instituted a separate set of proceedings in relation to that accident, nor was he aware of any report from Dr. Kinch to Ms. Lally. He was not aware of the other action, or of the documents which were subsequently produced by the plaintiff in his supplemental affidavit of discovery, until just prior to the time when the supplemental affidavit was sworn by the plaintiff.

128. Having considered all the available evidence, I am satisfied that Mr. O'Leary was probably aware that the plaintiff had had an injury in the summer of 2015. This is due to the fact that he had suffered an undisplaced fracture of the calcaneus bone in his right leg in the accident on 18th July, 2015. According to the medical report furnished by Mr. Rice, the plaintiff was in a cast and on crutches until the early days of September 2015. Given that this period coincides with the time when the emails issue had come to the fore, I feel that it is likely that the plaintiff had some meetings with his solicitor during the summer months. If that was the case, he would have seen that the plaintiff was in a cast and on crutches at that time.

129. However, I accept Mr. O'Leary's evidence that he was unaware that the plaintiff had instituted separate proceedings through a separate firm of solicitors in relation to the injuries sustained in that accident. More importantly, I find as a fact that Mr. O'Leary was unaware of the existence of Dr. Kinch's report to Ms. Lally until in or about October 2017. In these circumstances, I find that the plaintiff when swearing his initial affidavit of discovery for the second defendant on 20th July, 2017, deliberately withheld from his solicitor and from his affidavit of discovery, the fact that he had issued separate proceedings arising out of the 2015 accident. More importantly, he concealed the medical records concerning that accident which were in the possession of Mr. Rice, Dr. Din, Kerry University Hospital and Dr. Kinch. I am satisfied that he did that, so that the defendants in the present proceedings would not be aware that Dr. Kinch was of the view that the 2015 accident had aggravated his pre-existing psychiatric condition. The fact that there were references in the GP notes and in Dr. Lucey's notes to the physical injury suffered in July 2015, does not excuse the failure to produce these records. I am further satisfied that the plaintiff only made full disclosure to both his former solicitor and to the defendants and swore his supplemental affidavits of discovery, due to persistence on the part of the solicitor acting for the

second defendant in relation to the adequacy of the discovery previously made by him. In short, the plaintiff only made full discovery, when he became aware that his attempt to conceal the report of Dr. Kinch dated 14th April, 2017, had failed.

The Emails Issue
130. Between Friday 24th April, 2015, and Monday 27th April, 2015, an extraordinary series of emails passed between an email address purporting to be one owned by the second defendant and the email address belonging to the first defendant at the K Club. The first defendant accepted that the two emails which were sent from his work email address were sent by him in response to the various emails that had been received by him from a person called Natasha, who held herself out in the emails as being a personal assistant to the second defendant.

131. The purpose of the emails from Natasha, was to persuade the first defendant to make a statement admitting that he had threatened the plaintiff in the toilets at Punchestown Racecourse on 7th May, 2011. The statement would also incriminate the second defendant, because the first defendant would state in his statement that he had carried out the threat at the request of the second defendant.

132. In the events which transpired, the first defendant never sent the requested statement. Instead, he found out that the email address which purported to be one belonging to the second defendant, was in fact a bogus email address. The first defendant sought an order from the High Court on 8th May, 2015, known as a *Norwich Pharmacal* Order, directing the internet service provider, Eircom Ltd, to provide details from their records of the customer who was assigned the IP address as appearing in the various email metadata. Subsequently, Mr. Michael Finnerty, the Chief Investigations Officer in the Fraud and Security Unit of Eircom Ltd swore an affidavit deposing to the fact that at the relevant times the IP address appearing in the emails was assigned to the plaintiff.

133. At the trial, the plaintiff bitterly contested the assertion that he had been responsible for sending the bogus emails to the first defendant. He alleged that the other defendants had been responsible for sending the questioned emails to the first defendant, so as to make him and his lawyers look bad in the eyes of the court. A very substantial amount of evidence, including a large amount of technical evidence, was called on this issue. In these circumstances it is necessary for the court to look at the issue in some detail.

The Emails
134. On Friday 24th April, 2015, the first defendant received the following email at his work email address, gerry.byrne@kclub.ie:

> *"From: Michael smurfit [mailto:michaelwjsmurfitoffices@mail.com]*
>
> *Sent: 24 April 2015 12:02*
>
> *To: Gerry Byrne*
>
> *Subject: Report*
>
> *Dear Gerry, Strictly Private & Confidential*
>
> *This communication must remain between Dr Smurfit and you only.*
>
> *Dr Smurfit needs you to kindly forward information in point 1 back to him by 5.00pm Mon, use the services of a secretary there etc for gathering/ scanning etc if needs be, but don't state who it is for, then carry out sending the email yourself back to this private email address. Make no calls or speak to anyone on the contents. Dr Smurfit will not be discussing this matter again. Do the best you can, he appreciates you're busy there too.*
>
> > *1. Scan and/or write down and email any memo's, letters, meeting dates, telephone calls between Dr Smurfit and yourself from April 1st 2011 to April 2015, include GSMC company stuff etc.*
>
> *Best Regards*
>
> *Natasha*
>
> *Dr Michael W J Smurfitt*
>
> *Monaco*
>
> *PP. Natasha*
>
> *Dr. Michael Smurfitt*
>
> *Irish Consultate*
>
> *Le Sardanpale"*

135. At 06:50 hours on Saturday 25th April, 2015, the first defendant replied to that email in the following terms:

> *"Dear Natasha,*
>
> *Thank you for your email and my reply is as follows:*
>
> > *1. Memorandum's sent from Dr Smurfit to Gerry Byrne between April 1st 2011 to April 2015 – None*
> >
> > *2. Letters sent from Dr Smurfit to Gerry Byrne between April 1st 2011 to April 2015 – None*
> >
> > *3. Meeting/meeting dates held between Dr Smurfit and Gerry Byrne between April 1st 2011 to April 2015 – None*
> >
> > *4. Telephone calls between Dr Smurfit and Gerry Byrne between April 1st 2011 to April 2015 – None*

5. Any correspondence between Dr Smurfit and Gerry Byrne involving the company Golf Course Maintenance Services [GCMS] between April 1st 2011 to April 2015 – None

For your information, the last correspondence I received from Dr Smurfit is a congratulatory letter in delivering the conditioning of the Palmer Course for the Ryder Cup matches in 2016.

I hope this is of help to both yourself and Dr Smurfit.

Kind regards

Gerry."

136. At 16:56 hours on 25th April, 2015, the first defendant received the following email from Natasha from the same email address purporting to belong to the second defendant:

"Strictly Private & Confidential

Without Prejudice

Dear Gerry,

That's excellent feedback, we just wanted to cross check our records so we've not missed anything. Dr. Smurfit was not too sure given the length of time.

Dr. Smurfit wants to clear the air and do the following for the company's legal issue Re Mr Curran.

This is an insurance issue as the company has recently advised Insurers Solicitors on the situation. The costs are massive, the company can not afford it, we need to bring this issue to a close to save costs, so you and the Dr can move on with your roles without this headache.

Dr Smurfit is aware Mr Paul Crowe was at Punchestown that Saturday in April 2011, you meeting Mr Crowe is considered company business, which means you're insured by the company.

Point A: Dr Smurfit said we need to come clean on this issue and is kindly asking you to confirm by return email in Strict Confidence, that both Dr Smurfit and you had words about Mr Curran prior to Punchestown and Mr Curran was spoken to by you on Dr Smurfit's instructions at Punchestown. To be clear here Gerry, it is Dr Smurfit who will be taking the blame and will be taking this issue on the chin.

Dr Smurfit will confirm to his Legal team on Monday his role in Point A, but will not be stating he spoke to you about our emails, these emails must remain private.

Dr Smurfit asks you to email the following Solicitors on Monday morning latest and then call your own Solicitor directly after to confirm your Email to your Solicitor, Ciaran, make no comment that Dr. Smurfit and you spoke re our emails. This is your own decision etc. The matter will then go away.

Copy the email below.

Email to: sma@simonmcaleese.com Att: Ciaran Maguire,

solicitors@gmgb.ie Att: Emma O'Neill,

Info@olearysolicitors.ie Att: Tim O'Leary

Ref: Curran -v- G. Byrne, Dr M. Smurfit & K Club Limited

I Gerry Byrne, Resort Superintendent at The K Club, confirm I delivered a message to Mr Peter Curran at Punchestown Races public toilets in April 2011, on the strict instructions of Dr Michael Smurfit, (my employer) as per words described by the Plaintiff in these proceedings of what was spoken to the Plaintiff by me, with my knowledge of an High Court confidential legal agreement involving Mr Curran, I request this matter be settled. I'm now exiting from this situation and want no more legal proceedings, except to finalise matters. I was only following instructions and was not aware the affect it would have on the Plaintiff, it is Dr. Smurfit who will have to answer for the reasons why.

Yours sincerely

Gerry Byrne

End

Keep your conversation with your Solicitor brief, just state the email is confirmed by you and that is all you have to say, a minute conversation max. That will be the end of the matter.

Kindly, confirm by return email you'll proceed with the above.

Thank you

Kind regards

Natasha

Dr Michael WJ Smurfit

Monaco

P.P. Natasha

Dr. Michael Smurfit

Irish Consulate

Le Sardanbale

2 Avenue Princess Grace

NC98000 Monaco."

137. At 17:47 hours on the same day, 25th April, 2015, the first defendant received a further email from Natasha in the following terms:

"Without Prejudice

Gerry,

forgot to add, this issue can not go to court, the last email to you is the only way to finish this legal issue.

Court date is due shortly.

Best regards

Natasha."

138. At 09:18 hours on 26th April, 2015, the first defendant replied to the previous emails in the following terms:

"Dear Natasha,

I am deeply uncomfortable with the comment in Point A 'we need to come clean on this' suggesting that there is any wrongdoing on myself or Dr Smurfit's part.

It is essential for me to point out;

- *I only have a vague recollection of Mr. Curran working at the K Club.*
- *I would not recognise this person in any way if he approached me.*
- *My only knowledge of any dismissal issue was through FD John Mitchell who mentioned the stress he was under due to the unfair dismissal case.*
- *The comments I am alleged to have said is a lie, I would never make references to my employers in such a way.*
- *I attended Punchestown on the day in question with my young daughter and we simply minded our own business watching horses in the parade ring which she dearly loves.*
- *This incident simply did not happen.*

Dr Smurfit has provided me with 18 years of employment here at the K Club and supported my role during very difficult times, particularly over the last number of years. It would be devastating to me if he felt I would in any way betray him by making such comments to a former employee. I have always kept a very low profile and simply do my job as best I can. I do hope that there is no reflection of this matter on me by Dr Smurfit or the Smurfit family.

The instructions which is requested is very difficult for me as it is an admission of an incident that did not happen, however as it is felt in the best interest to all I will carry out the instructions exactly as written.

Could I kindly request that it be clarified that I will be legally exonerated from this case and no further action can be taken against me from this person and if so, will I be indemnified.

This is a very upsetting incident for me and my family.

The email and phone call will be carried out tomorrow morning as requested.

Kind regards

Gerry."

139. Later that morning, at 10:18 hours on 26th April, 2015, the first defendant received a further email from Natasha:

"Without Prejudice

Strictly Private & Confidential

Dear Gerry,

We Appreciate your email and contents, Dr Smurfit is very aware of your excellent work record and severe loyalty which is most important to him, you are highly respected by him and his family, this is just a business decision, one of many he has to make each week on worst issues, that sometimes involves family and close friends.

The case costs alone with three sets of Solicitors will run over €1.5m, we need to stop it down ASAP, we need to take you out of financial harm, insurance will take care of this and leave the company in tact, but we cannot fight it in Court, we need to admit liability so it stops down, Dr Smurfit has no problem having his name stated he directed this incident per the email draft sent to you, you only acted as a messenger that's what you stick too.

Dr Smurfit will personally indemnify you financially from any costs or further costs re legal issues in this case or with the plaintiff, you are 100% covered in any loss.

Kindly, Dr Smurfit asks you follow through tomorrow morning before 9.am and send the three emails c.c. each Law firm at the same time. Make one call to your Solicitor after the emails and just state you confirm the email as facts that happen and say to him you have no more comment and want the issue settled, again give the call max 1min to delivery the message to him, if he questions you just say this is Dr Smurfit's issue and say you have to get back to work.

Take no more calls from any Solicitors except your own man, it may take a short while to complete the process, you may have to sign off on papers, just stick to the email you are sending and say no more.

N.B. when you have copied the draft email, it is important for you to delete our emails to you and delete the trash box too, we can't have a paper trail of our discussions.

Dr Smurfit says, keep your head up and he will see you soon, this issue will pass and its work as usually.

Thank you.

Kind regards.

Natasha.

For. Dr. Michael W.J. Smurfit

p.p. Natasha

Le Sardanpale

2 Avenue Princess Grace

MC98000 Monaco."

140. On Monday 27th April, 2015, the first defendant received the following email:

"Without Prejudice

Strictly Private & Confidential

Hi Gerry,

Sorry for extra work, will you print off one of you email letter to the Law Firms, copy it three times, they will need a signed hard copy.

Mail them tis morning at Straffan.

Dr Smurfit will meet up with you in 2 weeks, we very much appreciate you carrying out this instruction.

names and addresses:

1. *Simon McAleese Solicitors, 3 Fitzwilliam Court, Upper Pembroke Street, Dublin 2*
2. *Gleeson McGrath Baldwin Solicitors, 29 Anglesea Street, Dublin 2 Insurers.*
3. *Timothy O'Leary Solicitors, Countess Road, Killarney, Co. Kerry.*

Take care to delete all our emails, Inc outbox, trash, draft boxes too.

Thank you

Take care

Kind regards

Dr. Michael Smurfit

p.p. Natasha

Le Sardanpale

2 Avenue Princess Grace

MC98000 Monaco."

The First Defendant's Evidence on the Emails Issue

141. The first defendant stated that he was somewhat surprised to receive the first email from the second defendant, as he had never received such an email from him before. He had had some dealings with the second defendant in his capacity as Head Greenkeeper and, in particular, when he was involved in the construction of the Palmer Course at the K Club. However, as the information sought in the first email from Natasha was fairly non-descript, he did not think very much about it. Having checked through the files in his office, he drafted his reply that evening and sent it the following morning.

142. The first defendant stated that he was deeply hurt when he received the two further emails from Natasha at 16:56 hours and 17:47 hours on Saturday, 25th April, 2015. He was very upset that he was being asked to provide a confession to something that he had not done. He did not think that the second defendant would ask him to do such a thing. He could not believe that he was being asked to make such a statement. He stated that he had no recollection of meeting the plaintiff in the toilets that day. He did not carry any message from the second defendant to the plaintiff. He had no knowledge at all of the plaintiff's relationship with the second defendant in relation to their previous litigation. He was very disappointed that he had been asked to make a confession to something that had never happened, and to a man that he did not know. He was very upset by this.

143. At that time, he believed that the emails had come from the second defendant. However, in the email sent at 16:56 hours he was struck by the statement that the second defendant was aware that the first defendant had met Mr. Paul Crowe at the races and would, therefore, be seen as being on company business. He thought that that was odd, as the second defendant would have known that Mr. Crowe had left the employment of the K Club long before that date. He thought that that did not sound right. It made him a little suspicious. He was also very disappointed, as he did not think that it was something that the second defendant would ask him to do.

144. He stated that in his email sent at 09:18 hours on the 26th April, 2015, he made it clear that the incident simply had not happened, but said that he would make the requested statement if it was felt that that would be in the best interests of all concerned. He asked for confirmation that he would be exonerated. At 10:18 hours that morning, he received a further email purporting to come from the second defendant, confirming that the second defendant would provide an indemnity to him. That email also asked him to send the requested statement by email to a number of solicitors.

145. The first defendant stated that he had been deeply uncomfortable agreeing to make the statement, which he had done in his email sent at 09:18 hours. He was very upset with what the second defendant had asked him to do, but he did not state that in the email. He did state that the incident had not happened. However, he was aware that the second defendant had given him eighteen years of employment through some very difficult times. He did not want to upset the second defendant, or the Smurfit family, if they wanted a statement from him, he would provide it. He stated that he was very concerned about the cost implications of doing so, especially for his family, so he asked for an indemnity.

146. A short time after sending his email that morning, the first defendant contacted the CEO, Mr. Michael Davern. This was at 09:23 hours. He simply asked Mr. Davern to confirm that the email address given was an email address for the second defendant. He did not give any further details. At 09:42 hours, Mr. Davern replied by email sent form his iPhone, that the particular email address was not one that he had for the second defendant. He stated that he had the second defendant's office email address and a private email address, plus an email address for the second defendant's secretary. He told the first defendant that, if he were to telephone him, he could read these addresses off his computer later.

147. The first defendant stated that it was then that he realised that the emails were fraudulent. He said that he was relieved to learn that they were fraudulent and had not, in fact, come from the second defendant. He said that his primary emotion was one of relief.

148. When he received Mr. Davern's email, he telephoned Mr. Davern and said that he needed to see him straightaway. He went to Mr. Davern's office and told him what had happened. He was actually in Mr. Davern's office when he received the email sent from Natasha at 10:18 hours. Mr. Davern advised him to bring the emails to the attention of his solicitor. The first defendant telephoned his solicitor that afternoon and forwarded the emails to him.

149. On the following day, his solicitor talked him through the process of retrieving the metadata from the header of the emails. Metadata is simply data that is embedded in the header of the email showing the path which the email took from the original sender to the recipient. The first defendant managed to access the metadata. He furnished this to his solicitor on 27th April, 2015. He also forwarded the final email which he had received at 08:13 hours that day.

150. On the 5th May, 2015, the first defendant swore an extensive grounding affidavit for the purpose of obtaining an order against Eircom Limited, directing it to identify which of their customers had been allocated the IP address which appeared in the email metadata. On Friday, 8th May, 2015, Gilligan J. made an order directing Eircom to furnish an affidavit within 7 days setting forth the name and address and/or any other contact details of the party using and/or the registered owner of the Internet Protocol address (IP address) 86.45.158.140 on various stipulated dates and times between 11:45 hours on 24th April, 2015, and 08:45 hours on 27th April, 2015.

151. On 12th May, 2015, Mr. Michael Finnerty, the Senior Investigations Officer in the Fraud & Security Unit of Eircom, swore an affidavit in which he deposed as follows, at para. 3 thereof:

> *"I make this affidavit to comply with the said order and I have carried out searches and investigations of Eircom's records, as was necessary to so comply. The result of those searches and investigations confirm to me that on each of the dates and times listed above, the Caller Line ID (CLID) associated with the IP address 86.45.158.140 was telephone number 066-9481538. The registered account holder of telephone number 066-9481538 is Mr. Peter Curran of 1 St. Brendan's Terrace, Cahersiveen, County Kerry."*

152. The first defendant stated that he was very relieved at this outcome. He felt that they had caught the plaintiff out, and that that would be the end of the matter for him. He felt that the plaintiff had made scurrilous accusations against him and had sent fraudulent emails. He felt that this discovery would represent the end of a horrible time for him.

153. In cross-examination, the first defendant was asked why he had not brought the emails to the attention of the K Club's IT Manager. The first defendant stated that he had gone straight to the CEO, Mr. Davern, who was his senior manager. Mr. Davern had advised him to inform his solicitor, which he had done. He thought that that was the appropriate procedure. Thereafter, he left further investigation of the matter in the hands of his solicitor.

154. The first defendant was asked about a letter which had been exhibited in his grounding affidavit from the second defendant, in which he had confirmed that the emails had not been issued under his instructions or on his behalf. The second defendant stated that the email address given was not held by him, nor was it held by any of his employees, or those acting on his behalf. He stated that the author of the emails had used his identity for the purpose of engaging in such correspondence without his knowledge or consent. He said that the content of the emails was extremely serious. The author had purported to elicit false evidence through the use of subterfuge from a co-defendant of ongoing High Court proceedings to which he was a party. The first defendant stated that he had not received that letter, which had been exhibited in his affidavit.

155. The first defendant was asked why in subsequent emails the purported email address for the second defendant which appeared in the first email, was not repeated; there was merely the name of the second defendant. The first defendant stated that he could not explain those differences. He was not an IT person. He had simply pressed the reply icon in order to respond to the emails which he had received. It was further put to the witness that he and Mr. Davern should have got all necessary information before seeking the court order. The first defendant stated that he had followed correct procedure in taking the emails to his CEO and his solicitor. He felt that that had been the correct thing to do. Thereafter, he had left it in the hands of his solicitor.

The Plaintiff's Evidence on the Emails Issue

156. The plaintiff stated that, in or about March, 2015, he had switched his internet and phone provider from Sky to Eircom. They had installed cabling and a router in his house at St. Brendan's Terrace in Cahirciveen. The new system had not operated satisfactorily. He said that in the following months he had made a large number of complaints, possibly up to 14 in total, in relation to difficulties that he was experiencing both in relation to his broadband and his television reception.

157. At some time prior to 21st May, 2015, he and his former solicitor became aware that an order had been made in the High Court directing Eircom to furnish details of the owner of a particular IP address during the period 24th/27th April, 2015. By letter dated 21st May, 2015, the plaintiff's former solicitor wrote to the first defendant's solicitor indicating that they had very recently become aware of the fact that they had made a third party disclosure application to the High Court and had obtained an order from the High Court against Eircom on 8th May, 2015. The letter complained about the fact that the plaintiff had not been put on notice of that application. It is clear that the plaintiff and his former solicitor had access to the grounding affidavit, because the letter complained that the first defendant's affidavit was clearly intended to have the court infer that the plaintiff was the author of spurious communications to the first defendant from the second defendant, which had been sent for the purpose of compromising the first defendant in the proceedings and to induce a false confession of responsibility. The plaintiff's former solicitor maintained that that was a preposterous proposition. They were asked to state the basis on which they had purported to deprive the plaintiff of the opportunity to deal with the matters averred to in the first defendant's affidavit.

158. The plaintiff stated that on 24th April, 2015, a curious thing had happened. He had gone into Cahirciveen, where he had had coffee in a number of cafes, and had then gone to the local hotel. He had a number of files with him and his iPad. On the following morning, Saturday, 25th April, 2015, he had discovered that his iPad was missing. He retraced his steps and made enquiry at the various locations he had visited the previous morning. There was no sign of his iPad. He then reported his iPad as missing at the local garda station. He did not have his iPad during that weekend.

159. On Monday, 27th April, 2015, when he went out the front door of his house in Cahirciveen, he saw a white A4 piece of paper fluttering on top of the front driver's wheel on his car. On top of that was his iPad. He returned to the garda station that day and reported that the iPad had been returned to him. He told the garda that it had been left on the front wheel of his car.

160. The plaintiff stated that he continued to have difficulty with his broadband and television reception. He made complaints to Eircom by phone over the following months. On a date in July, of which he was not certain, an Eircom representative came out to his house and replaced all the cabling and the router. He said that the man who came out to his property was driving a white van, which did not have any logo or markings on it. He did not produce any ID. However, the plaintiff was satisfied that he was an Eircom representative, due to the fact that, in a prior telephone call with Eircom, they had agreed that a service technician would be sent out at that particular day and time. Also, when he looked in the van, he saw a large amount of electronic equipment in it. The plaintiff said that there was just one man on this visit. He told the plaintiff that he might like to sit outside in the sun, as he was going to be some time on the property. He spent approximately 1.5 hours in the house. He replaced all the cabling and the router. The plaintiff did not have to pay for the new equipment.

161. The plaintiff retained Mr. Martin Hogan, who was a retired garda. He had been a member of An Garda Síochána for 31 years. From 2001 to 2012 he had served in the Garda Bureau of Fraud Investigation. His area of expertise was in computer forensics and cybercrime. He had investigated hundreds of cases involving cybercrime, including examination of emails. He was retained to prepare a report in the matter. To that end he visited the plaintiff in his home in late 2015. He stated that he was not made aware that the router and cabling had been replaced in July of that year. He said that he did not carry out a forensic examination of the plaintiff's iPad or router, because the plaintiff had told him that he had reset the router on a number of occasions because it was not working properly. He had also told him that he had reset his iPad. Mr. Hogan stated that in these circumstances, it was not possible to do a forensic examination of them, because they had been reset to the default factory settings. If there had been any possibility of obtaining relevant data, he would have done a forensic examination of these items, but he had not done any examination, other than a cursory look at them.

162. In order to compile a report, he had requested the plaintiff's former solicitor to request of the first defendant's solicitor production of soft copies of the emails, either by email or on a USB stick. When he had not received either of these things, he issued his report in December, 2015. This aspect will be dealt with further when dealing with the technical evidence.

163. The plaintiff stated that he continued to use the iPad in the years after 2015. However, on an occasion in or about June 2017, he had the iPad in his hand when he used it to swat a fly. The iPad slipped out of his hand and fell onto the wooden floor in his house. The screen was badly cracked. He could not use it. In the repair shop he was told that it would cost almost as much to replace the screen, as to buy a new iPad. He then put the iPad in a cupboard. It was subsequently put into a black plastic bag and stored in a shed on the property. When the plaintiff split from his partner, Ms. Kelleher, in July, 2017, she decided to carry out renovation works to the property. In the course of clearing the property in preparation of those works, she removed all the black bags, including the one containing the iPad, to the recycling dump. Accordingly, it was no longer available.

164. In cross examination, the plaintiff accepted that on 10th April, 2015, his psychiatrist, Dr. Lucey had written to his GP stating that the ongoing legal process was an ongoing stress for the plaintiff. In a further letter dated 5th May, 2015, Dr. Lucey stated that in response to a letter which he had received from the plaintiff, he was writing to inform the plaintiff's solicitor that the plaintiff's chronic psychiatric illness was being adversely affected by the ongoing legal process. He advised that an early date should be set by the court to deal with the case. The plaintiff accepted that he had written to Dr. Lucey asking him to provide such a letter. He said that the case was reminding him of the incident.

165. It was put to the plaintiff that the clear motive of whoever sent those emails to the first defendant, was to get the first defendant to make a statement accepting that the allegations made by the plaintiff concerning the incident were correct and further, incriminating the second defendant in relation to the making of the threats. The plaintiff stated that that was not the purpose of the emails. Whoever sent those emails was trying to undermine him and his legal team.

166. It was put to the plaintiff that whoever wrote the emails wanted the case ended quickly, which was precisely what he wanted. It was put to the plaintiff that the only person who would benefit if the steps taken in the emails had been carried out, was the plaintiff himself. The plaintiff denied that he had had any part in sending the emails. He thought that they would not have benefited anybody, because the truth would eventually have come out.

167. It was put to the witness that Eircom had found out that the emails had come from his IP address. The plaintiff stated that he was knowledgeable in relation to IT. He would not have sent emails from his own IP address. That would be like sending his home address on a letter or envelope. It was put to the plaintiff that the offending emails had come from a "mail.com" platform, but had originated with his IP address. The plaintiff stated that the emails were not sent from his home.

168. It was put to the plaintiff that on 5th June, 2015, he had told Dr. Lucey that he had had his iPad forensically analysed. He told the doctor that he believed that his data had been accessed. He told him that he was seeking a court order to obtain the source of intrusion. This was recorded in a letter sent by Dr. Lucey to the GP on the following day, 6th June, 2015. It noted that the plaintiff had become anxious and hyper vigilant and had been misusing alcohol. The plaintiff stated that Mr. Hogan had come to his house. He was not sure when. He attended on his own, without his solicitor being present. Mr. Hogan examined the wiring and the router and had analysed the iPad. He was not sure if he had taken a forensic image of the iPad. He had instruments and other equipment with him. It should be noted that the plaintiff gave evidence before Mr. Hogan, so what Mr. Hogan said about the impossibility of doing a forensic examination of the router and iPad, was not put to the plaintiff.

169. The plaintiff was asked why he had not asked for a report on Mr. Hogan's examination of the iPad if he had in fact examined it. The plaintiff stated that he was on tablets and was very unwell at that time. He was asked why his solicitor had not asked for such a report. He said that Mr. Hogan had told his solicitor that he had examined the iPad. However, he accepted that there was no report on his iPad or on the router in his house.

170. The plaintiff was asked whether his solicitor had told him to preserve his computer. He said that he had done so. His solicitor had said "*Keep everything there safe until the defendants, they are going to request it shortly*".

171. It was put to the plaintiff that in the correspondence which passed after they had learned of the making of the *Norwich Pharmacal* Order on 8th May, 2015, there was no reference to any examination having been carried out of the iPad. The plaintiff was asked whether the examination had taken place by 27th May, 2015, to which he replied "I believe so, yes". It was further put to the plaintiff that notwithstanding the advice of his solicitor to retain the equipment in his house, he had done the opposite by facilitating the removal of the equipment from the house in July 2015. The plaintiff denied that. He stated that he had reported numerous faults to Eircom and they had sent out a man, who had removed all the cabling and the router and had replaced it with new equipment. He stated that he had told his former solicitor about the removal of the equipment.

172. It was put to the plaintiff that it was extraordinary that when he knew that the equipment was important, he had allowed it to be removed. The plaintiff stated that he was on a lot of medication at the time and was unwell. He assumed that they were just going to do some electronic adjustments. After an hour and a half, the technician left with a box full of equipment and put it into his van. He told him as he was going out the door, that he had replaced everything. The plaintiff stated that he had not asked for the equipment to be removed. He had simply made complaints because his Wi-Fi and television were not working correctly. He had asked for technical support to come out. He could not believe it when they took out brand new equipment.

173. He was asked whether he had written to Eircom to make any complaint in relation to the removal of the equipment. He said no, because at that stage it did not dawn on him that that could be possible, meaning that he could be in trouble for having removed equipment that he had been told to keep by his solicitor. The plaintiff was asked whether his assertion that his solicitor had been told that the equipment had been removed from his house in July 2015, could be true, having regard to the fact that on 19th January, 2016, his former solicitor wrote to the solicitors for the second defendant stating, *inter alia*, that their expert had "*also examined the devices under the control of Mr. Curran, as identified to him by Mr. Curran*". The plaintiff stated that that letter was seeking soft copies of the emails, as had been requested by his expert, Mr. Hogan. He accepted that there was no mention in that letter that any representative of Eircom had taken away any of this equipment. When asked again as to whether he had told his solicitor that all the cabling and router had been removed from the house, the plaintiff said no because he was unwell at that time. It was put to him that he knew that he should have preserved the equipment. He replied that he was on a lot of medication at that time.

174. It was put to him that he was saying that he did not tell his solicitor about removal of the equipment, because he was unwell. The plaintiff agreed with that proposition. It was put to him that every time he was in difficulty, he claimed that he was unwell; however, the evidence suggested that he was fully functioning at that time. The plaintiff denied that that was true. He said that he was unwell at that time. It was put to him that he had allowed removal of the equipment and had not told his former solicitor, because he was very much "*Peter the manager*" at that time. The plaintiff denied that that was true. He repeated that he was on medication and was unwell. It was put to him that he could not have been unaware of the importance of the equipment. He said that they were focusing on obtaining soft copies of the emails.

175. It was put to the plaintiff that in letters from Dr. Lucey dated 6th June, 2015, and 29th June, 2015, it was noted that he was "*misusing alcohol*" and "*drinking to excess*". The plaintiff accepted that he had been drinking at that time. He said it was in connection with suicidal ideation which he had. Counsel suggested that the plaintiff's agitation at that time, his alcohol consumption and his temperamental outbursts, had arisen because he knew that he was going to be caught out in relation to the emails. The plaintiff said that his condition at that time had nothing to do with the email investigation. He was drinking because he had suicidal ideation.

176. It was put to the plaintiff that in a letter written by his former solicitor on 10th November, 2015, in relation to the email issue, it

had given his version of his iPad going missing on the weekend of 24th/27th April, 2015. In that letter, it had stated that the plaintiff had been in various places on the morning of 24th April, 2015, including "*The Park Hotel in Cahirciveen, the Interpretive Centre, Café Siveen, Supervalu and the public park*". Counsel suggested that he was simply planting a cover story to show that the iPad was out of his control at the relevant time. The plaintiff denied that that was correct. He stated that he would not have used his own IP address, as that would be like sending an address on a letter. Counsel suggested that he was creating a smoke screen by reporting the iPad missing during that period. The plaintiff denied that that was true. The plaintiff accepted that the letter from his former solicitor made no mention of the removal of the equipment from his house, or that his iPad had become damaged. The plaintiff stated that the iPad had become damaged in or about June 2017.

177. The plaintiff explained the loss of the iPad by stating that after he had let it slip out of his hand when swatting the fly, it had been put into a black plastic bag with some other electronic items. At the time that his relationship with his partner was breaking up in July 2017, it was mistakenly sent to the recycling dump. That had been an oversight. He had been on a lot of medication at that time and his long term relationship was breaking up. He stated that he had kept the iPad for years after 2015. It had simply become lost by mistake, when he had left the property. Ms. Kelleher in her evidence, had stated that when renovating the property she had brought a number of black bags to the recycling dump. It was put to him that in effect he was responsible for removal of both the router and the iPad. He said that it had been Eircom who had removed the router from the property. It was put to the plaintiff that the second defendant's expert would not suggest that he had sent the emails from his own email address, but that he had gone onto a web based platform from his IP address and had then sent the emails from the mail.com server to the first defendant. The plaintiff stated that that was a matter which would have to be dealt with by the experts. He said that his iPad had been stolen from him and it could have been used by a third party, who could have parked on the roads near his house, thereby giving him access to his router and had sent the emails from his iPad via his router. He said that his domestic Wi-Fi could have had a range of approximately 25m from his house.

178. The plaintiff accepted that the person who had sent the emails, had had a detailed knowledge of the case. That person had wanted the first defendant to make an incriminating statement. However, he said that the entire matter was a sting operation by the defendants against him and his legal team, to make them look bad. He did not accept the second defendant's expert's view that, as some of the emails were quite long, the person would have had to have been in the vicinity of the plaintiff's house for a considerable period, thereby, increasing the risk of being seen. He said that there were a number of roads near his house. The person could have parked there and sent the emails without observation.

179. Counsel put it to the plaintiff that at the relevant time, he wanted the case closed, he had the iPad and therefore had the opportunity to send the bogus emails. After the *ex parte* application to the High Court, he had become very agitated and had arranged for removal of all the equipment from his house. The plaintiff denied that that was true. He said that he had nothing to do with the sending of the emails. He was very unwell at that time. He already had sufficient information to prove his case against the defendants. He stated that it would have been crazy for him to use his own IP address from his own house. If he had wanted to do such a thing, he would have gone to a nearby hotel. Counsel suggested to him that alternatively, he could have used a web based email address from which to send the emails. The plaintiff stated that he had nothing to do with those emails.

Other Witnesses of Fact in Relation to the Emails Issue

180. The plaintiff called evidence from Garda James Cronin, who was the garda to whom he had reported the iPad missing in Cahirciveen Garda Station. Garda Cronin stated that on 24th April, 2015, the plaintiff had attended at the Garda Station. He had reported that his iPad was missing. He had not reported it as having been stolen. Garda Cronin made a note of the iPad being missing, in case it was handed in at the station later.

181. On 27th April, 2015, the plaintiff returned to the Garda Station and informed Garda Cronin that his iPad had been located. He had found it on the front wheel of his car. Garda Cronin made the following entry in the Pulse system:-

> *"Male to station reporting on 24/4/15 he lost his iPad in Cahirciveen Town. Found iPad on 27/4/15 placed on front wheel of his jeep. Wanted matter noted as iPad not in his possession between these dates."*

182. Garda Cronin produced a print out of what had been entered by him on the Pulse system. He confirmed that the last sentence in the narrative had been inserted at the request of the plaintiff.

183. Garda Cronin stated that on or before 22nd May, 2015, he was asked to provide a statement, which he did on that date. In his statement, he had given the incorrect date on which the plaintiff had reported the iPad missing, as 25th April, 2015. He stated that that had been an error on his part. The report of the missing iPad had, in fact, been made on the previous day, 24th April, 2015.

184. Ms. Lindsey Kelleher, the plaintiff's ex-partner, stated that as the plaintiff was quite knowledgeable on computer matters, he dealt with everything concerning Wi-Fi, computers and their television. She said that in the months and years following the incident on 7th May, 2011, the plaintiff became hypervigilant and very security conscious. He would insist that all the doors and windows were closed and locked, even in warm weather. She described the house as being "*like Mountjoy*". He was also very nervous when people would call to the front door. If the postman arrived, he would be anxious. She described one occasion when a representative of Airtricity called to the house. The plaintiff "*freaked out*", and ran to his bedroom, where she later found him shaking on the bed. He was also extremely concerned about his safety. He kept a knife in their bedroom.

185. Ms. Kelleher stated that after they had moved from Sky to Eircom, they had a lot of trouble with the new system. The plaintiff looked after that aspect with the company. She thought that it had taken a couple of months to get it sorted. She had a recollection that at some time in the summer of 2015, the entire system had been replaced. She recalled returning home and the plaintiff was tidying up boxes and sheets of bubble wrap. The television and Wi-Fi worked satisfactorily after that.

186. In cross examination, the witness was asked whether, having regard to the incidents such as had happened at Farranfore Airport and on other occasions, the plaintiff tended to imagine and exaggerate things. She stated that at times, the plaintiff would see danger, or a threat, where there was none actually present; for example, on the arrival of the Airtricity representative and in relation to the helicopter arriving at Farranfore Airport.

187. Ms. Kelleher was asked about the plaintiff's difficulties with alcohol, as recorded in the medical records. She stated that due to the medication that he was taking, if he drank even a small amount of alcohol, that could have a significant effect on him. She accepted that he had been drinking to excess at various stages as recorded in the notes. In particular, he had drunk a large quantity of alcohol after the incident involving the fire in his car in 2016. She accepted that she was concerned at that time that he may have been drinking without her knowledge. She did not think that he was telling the truth at that time about his consumption of alcohol. She had told the self-harm nurse that the plaintiff had been very abusive in the past when he had taken alcohol. If he consumed

alcohol, he would not be in control of his emotions. He became very angry and stressed.

188. Ms. Kelleher confirmed that after the breakup of their relationship, she had been tidying the property in July 2017. There were five or six black rubbish bags in the shed. The plaintiff subsequently rang her looking for his iPad which was in one of the bags. She had already disposed of the black bags from the shed. Ms. Kelleher was asked whether the plaintiff would have been likely to have opened the door to a man in an unmarked white van, who did not have any ID, she did not think that he would have opened the door in such circumstances.

189. The plaintiff also called Mr. Keith Mulvey, the director of internal audit at Eir. He was primarily called to deal with the records of any complaints or repairs carried out to the plaintiff's system. He stated that there was a record made on 11th March, 2015, which indicated that the plaintiff was a new customer set up. This supported the proposition that the plaintiff had changed over to Eir at that time. It would have involved the installation of equipment. A credit note was issued on 18th March, 2015. There was a note of a complaint from the plaintiff on 6th May, 2015. The next recorded complaint that he had was a note of 14th July, 2015, where it was noted that the reason for the complaint was that the recording on the plaintiff's television was ending too early. In the box related to the problem, a period of ten days was indicated for repair. There was a note that it had been fixed "*two days ago*". The note stated "*broadband and phone ok, e-vision faulty. Customer wants reduction in bill. Complained of loss of service 30th June, 2015, to 11th July, 2015*." The matter was passed to the technical support section. The customer satisfaction check was recorded as "*satisfied*".

190. A further complaint was recorded on 15th July, 2015, at 12:51hrs when the issue was recorded as "*e-vision fault*". He was transferred to the e-vision section. The customer was recorded as being "*very happy*" with the outcome. On the same day at 13:00hrs, there was a record of the plaintiff making a query in relation to a credit or rebate. It was noted "*advised customer credit issue resolved. Customer very happy*". There was a further record at 13:10hrs on the same day which was recorded as "*ongoing issue with TV – resolved – disputed bill due to loss of service*".

191. There was a note dated 16th July, 2015, at 14:10hrs that the customer had been looking to change the password on his Wi-Fi. He was transferred to the technical support section. There was a note dated 29th July, 2015, recording that a credit of €73 had been issued to the customer.

192. Mr. Mulvey stated that there was also a note of a telephone call from the customer on 18th May, 2015, wherein the reason for the call was recorded as being a technical issue, as "*customer looking for his IP address*". He was recorded as having been transferred to the technical support section. The customer satisfaction box had been ticked which suggested that he was satisfied.

193. Mr. Mulvey stated that there was no record of any technician being sent out to the plaintiff's property in July 2015, nor was there any record of any equipment being replaced by the company at that time. He stated that the absence of any record of the dispatch of a repair team to the property, or any documentation concerning removal of the equipment, would suggest that nothing was taken from the property by the company in July 2015. He stated that if the plaintiff's router had been replaced, that would have appeared on the customer's account. He would have a different router number. There was no record of any replacement router or modem. If the customer had requested replacement of his router, that would have been recorded, both the request from the customer and the replacement of the router.

194. Mr. Mulvey stated that all service calls would be logged and recorded and charged to the customer. However, he was only asked in the subpoena to supply all failure and repair records for the plaintiff's address. He was not asked for any accounts information. There was one record dated 11th May, 2015, at 09:51hrs where a driver was dispatched to the plaintiff's property in relation to storm damage. He thought that that would probably have related to a fallen cable. The fault had not been reported by the customer. It may have been reported by someone in the area, who had seen the fallen cable. The letters "DS" in the record indicated storm damage. A particular repair crew with identification number 50807, had been dispatched to deal with the matter.

195. It was put to the witness that the level of complaints recorded, was not consistent with the plaintiff's evidence that he had made many complaints to the company in relation to the fibre optic cables and the operation of his broadband and television. The witness stated that these were the only records available for that period. However, this evidence has to be seen in the light of the evidence subsequently given by Mr. Michael Finnerty, to the effect that there may have been other complaints recorded on a different system known as the unified gateway system, which would only have been retained for a period of six months. Thus, they would not have been available to Mr. Mulvey when he searched the records in compliance with the subpoena that had issued to him.

196. Mr. Tim O'Leary, the plaintiff's former solicitor stated that he had some recollection of being told that the iPad was not available. He could not say when he was told that. He could not recall the plaintiff telling him that he had used the iPad to swat a fly. He was not sure whether he had first learnt of that fact when he became aware of the plaintiff's evidence to the court in 2018. He recalled engaging Mr. Hogan to carry out a forensic examination in 2015. He did not know whether Mr. Hogan got a forensic copy of the iPad. He was asked whether he had been told by the plaintiff in July 2015, that the equipment had been removed from his house. He could not recall whether he was told that by his former client.

197. Finally, Mr. Michael Finnerty was called to give evidence on behalf of the second defendant. He had sworn the affidavit in response to the direction of the High Court in its order dated 8th May, 2015. At that time, he was senior investigator in the fraud and security unit in Eir. He had worked with the company for 38 years. He retired in October 2017.

198. Mr. Finnerty stated that in the affidavit which he had sworn on 12th May, 2015, he had stated that the Caller Line ID (CLID) for the IP address requested, was telephone number 066-9481538. The registered account holder for that telephone number was Peter Curran of 1 St. Brendan's Terrace, Cahirciveen, Co. Kerry. In order to make that averment, he had had to request a colleague to access the radius system in Eir. He could not do so personally, as there were only four people within Eir authorised to access that system. His colleague furnished him with the radius logs for the given IP address for a period commencing on Friday, 24th April, 2015, at 00:14hrs. He also produced a subsequent snapshot from the radius logs for the same IP address for Monday 27th April, 2015, at 23:47hrs. Mr. Finnerty produced a printout of those extracts from the radius logs.

199. From the log for 24th April, 2015, at 00:14hrs, the relevant IP address was identified in the sixth line. The relevant telephone number was given in the ninth line and the customer account number was given directly after that. The letters "*CVN1*" referred to the local exchange in Cahirciveen. In the eleventh and thirteenth lines, the session ID number and the multisession ID number were given. When one compared that extract from the radius log with the extract for Monday, 27th April, 2015, at 23:47hrs, one could see that the same IP address, the same telephone number, the same account number and the same local exchange were all given. More importantly, the session ID number and the multisession ID number, were identical to the numbers given in the earlier log. This meant that the session had been continuous from the start time, which had been prior to the times directed in the court order, until the subsequent extract from the log, which was after the period stipulated by the court. Mr. Finnerty explained that this meant that all

traffic during the intervening period, which had the same IP address, came from the same Caller Line ID, which was that registered to the plaintiff. Accordingly, he was in a position to say that on each of the dates and times listed in the court order, the Caller Line ID (CLID) associated with the IP address 86.45.158.140 was telephone number 066-9481538. The registered account holder of that number was the plaintiff. It was on this basis that he was able to make the averments that he did at para. 3 of his affidavit sworn on 12th May, 2015.

200. Mr. Finnerty stated that the telephone number as recorded on the radius system was recorded automatically. It had been recorded in lines 9, 18 and 19 in the record for 24th April, 2015, at 00:14hrs and at the same lines in the log for 27th April, 2015, at 23:47hrs. He confirmed that the identification number and letters given at line 22, was probably the MAC address for the router in the plaintiff's house. He was satisfied that as the session and multisession ID numbers were the same in both extracts from the radius log, the router or modem had not been switched off in the intervening period. It is only if the router is switched off, that a new internal IP address would be allocated to the customer, when they turned the router back on. However, that had not happened in this case.

201. In relation to security systems within Eir. He stated that only four members of staff had access to the radius system. Each person would have a password and would have to log on each time they entered the system. If a person was authorised to enter one system, they would not necessarily be able to enter other systems, unless they had been authorised to do so. The passwords of the people who were authorised to enter the system would be changed every 60 days. He said that Eir takes security of their systems very seriously. They had their own designated IT security unit, made up of four people, whose job it was to guard against hacking from around the world. The security unit would update security features on a constant basis. An operative would need a password to log onto the company network and then would have to enter a separate log on and password to gain access to a particular system within the network. The company also had an Intrusion Detection System, which was in place in 2015. It identified any peculiar types of attempted access or hacking.

202. Mr. Finnerty confirmed that Eir always acted in compliance with the data retention requirements of the Communications (Retention of Data) Act, 2011. This provided that internet data must be retained for 13 months. The company would not retain data such as an IP address after that period. It would be deleted automatically. The same would apply to email data. He had retained the data from the radius logs, because that data had been obtained pursuant to court order. Under the Act, phone and mobile phone data must be retained for 25 months. He confirmed that Eir would not have any evidence in relation to emails sent from a mail.com address. They would only have metadata for emails from or to an Eircom.net account. They would only hold the metadata itself, not the content of the email for a period of thirteen months.

203. The witness was asked whether there was any evidence of interference with the radius logs. He said that he did not specifically check for tampering of the logs, but he believed that it would be impossible to tamper with them. He could say that the system had not been hacked into during that period. In relation to the router password, he confirmed that that would not have been in the possession of Eircom. It would only be known to the customer and whoever he may have told. The password is generally on the back of the modem. It is 26 characters in length. Eir would not have known the modem password, nor did they store it.

204. In cross examination, Mr. Finnerty was asked why he had not recovered the logs for the intervening periods, which would specifically show the periods which had been requested by the court. He stated that he had recovered the log before the first date and time given in the court order and the log after that date and time and because it was clear therefrom that it was the same session, it meant that the data recorded therein covered the entire period from the first log taken early on 24th April, 2015, and the second log taken late on 27th April, 2015. If the router had been switched off, then there would have been a different session ID number and he would then have sought the intervening logs. He stated that once the modem is in use, the IP address is assigned to the particular telephone number. It would only get reassigned to a different phone number, when the modem had been switched off.

205. The radius logs were updated at various intervals of either 6 hours, 59 minutes or 3 hours, 30 minutes. He had not needed those logs because the logs provided, which had the same session ID number, had covered the time periods stipulated by the court. The crucial point was that the session ID stamp was the same throughout.

206. Mr. Finnerty was asked about some aspects of Mr. Mulvey's evidence. He stated that it was not surprising that there were not more records in relation to the installation of the new system in March 2015. That information would probably only have been held for either 13 or 25 months, it would not have been available to Mr. Mulvey when collecting documents in compliance with the subpoena. Indeed, it was possible that such records would only have been retained for three/six months. There would have been no need to retain them beyond that period.

207. He agreed that the record in relation to the callout on 11th May, 2015, probably related to storm damage as designated by the letters "*DS*". The reference to the repair crew number 50807, probably referred to a repair crew rather than to an individual staff member. There would have been two/four on the repair crew for storm damage. He was not surprised that there was no specific note of a call in relation to that incident, because if the matter had been reported on the 1901 phone number, it would not have been recorded. If the plaintiff himself had called in the fault, that would have been recorded. However, the fact that it had been recorded on his account log, caused him to suspect that the call emanated as a result of a call by the plaintiff, or someone on his behalf. He accepted that the fact that the records showed that the plaintiff had been given a credit rebate, indicated that there had been some problem with the services provided by the company either in relation to his internet, his mobile phone or his television.

208. Mr. Finnerty accepted that the fact that there was no evidence of any further rebate after July 2015, nor any complaints, indicated that something had changed. He said that was a fair assessment of the records. A technician would sometimes put in new equipment into a property if they could not actually find the cause of an ongoing problem. In relation to the number of complaints which Mr. Mulvey found on the system in 2018, the witness stated that it was possible that some complaints may have been recorded on the unified gateway system, which records would only have been retained for six months. He accepted that there appeared to have been a record of some problem in July 2015, because an Eir agent had recorded, "*fixed two days ago*". There was also reference to a credit being issued around that time.

209. Mr. Finnerty was asked about the request which had been made by the plaintiff on 18th May, 2015, for his IP address. He stated that he could not say what the plaintiff was looking for. It could have been the IP address for his iPad or his computer. One could ascertain an IP address from a received email by simply opening the header and getting the metadata attaching to that email. The IP address is in that metadata. It was probably from such metadata that the first defendant had obtained the information necessary to ground his application for the *Norwich Pharmacal* Order. In relation to the plaintiff's request on 16th September, 2015, seeking to change the Wi-Fi password, Mr. Finnerty stated that it was very rare for a customer to do that. Mr. Mulvey had also noted that the plaintiff had requested a reduction in the output power of the Wi-Fi. Mr. Finnerty stated that he had never heard of that being requested before. However, he did not work in the customer care section.

210. Mr. Finnerty was asked to comment on the fact that the K Club's IT manager had only been able to retrieve two emails from the K Club's server in 2016, he stated that that may have been due to auto deletion, but that was only a theory. It would be necessary to ask a witness from the K Club about that. It was put to him that Mr. Harbison had suggested that someone may have marked two specific emails for preservation and that the others had been auto deleted. Mr. Finnerty accepted that that was possible.

211. Mr. Finnerty was asked about the use of a virtual private network. He stated that this was an additional security feature. It could be used by an administrator. They would be given a key to access the VPN, they would then log on and enter a password onto that system and through that system they would be able to log onto the Eir system.

212. In re-examination, the witness stated that he had never been requested by the plaintiff for retention of any of his data in the possession of Eir in 2015, 2016 or 2017. Nor had the plaintiff made any data access requests to him. The plaintiff as the customer, could have sought access to a wide range of data in 2015 or 2016, if it was within the thirteen month retention period. He was not aware of the plaintiff having made any application to court for retention of data by Eir, nor had the plaintiff sought discovery from the company.

213. In relation to the customer's internal IP address, Mr. Finnerty thought that that could be accessed through the internet on certain Google packages.

214. Mr. Finnerty was asked about the effect of resetting an iPad and a router. He stated that his understanding was that in relation to an iPad, resetting would delete everything. However, he would still have done a test to see if there was any information on the iPad. He was surprised that Mr. Hogan had not done that. In relation to the effect of resetting a router, he had never carried out a test on a router, so he could not say what the effect of resetting it would be. He thought that the router would probably hold some information, but he did not know what information it might retain.

Technical Evidence on the Emails Issue

215. At the trial, there was a considerable amount of expert evidence given in relation to technical issues concerning the acquisition and analysis of the emails and the email metadata. In light of the subsequent evidence given by Mr. Finnerty and in particular the production by him of the extracts from the radius logs, it is not necessary to rehearse all the technical evidence in extenso. A brief synopsis of the main points made by each of the experts will suffice.

216. While Mr. Andrew Harbison was called as a witness by the second defendant, it makes sense to commence with his evidence, because the experts retained on behalf of the plaintiff, although they gave evidence in advance of Mr. Harbison, had in fact been retained to comment on the assertions contained in his initial report. Accordingly, I will commence with a summary of his evidence.

217. Mr. Harbison is the head of Litigation Technology at Grant Thornton. He has a degree of Bachelor of Engineering and Electronic Engineering. He also has a master's degree in Business Administration and a master's degree in Computer Management. He stated that he had worked with computers for 30 years. He was one of the founding members of the cyber-security group in Ernest and Young. He founded their IT forensics group. He then moved to Deloitte, where he founded their IT forensics group. He was seconded to Bank of Ireland, where he performed the same function for them. After that, he moved to Grant Thornton, where he set up their IT forensics group.

218. He stated that he was an experienced IT security specialist. He was an ethical hacker with Ernest and Young. He founded Grant Thornton's Instant Response function, which was set up to respond to instances of hacking. That had been set up five years ago and had grown to become a very large international group within the Grant Thornton structure. He handles dozens of incidents per month.

219. Mr. Harbison stated that he is an adjunct lecturer in Digital Investigation in UCD. He has been teaching there for the last ten years. He stated that there are two master's degrees in digital investigation in UCD. One is for police officers, the other for civilians. He had assisted in the preparation of the investigation degree for civilians. He teaches IT forensics, specialising in questions involving imaging servers and data tampering. He has also published extensively in that area. He has written the professional practise guides for the Law Society of Ireland in cloud computing and cybercrime. He lectures in both the Law Society and in Kings Inns on the higher-diploma programmes in relation to white-collar crime. In the last seventeen years, he had been involved in over 500 forensic IT investigations. He has given evidence in court on a handful of occasions. As he normally works in the Commercial Court, his evidence is usually given on affidavit. He estimated that perhaps he had given hundreds of affidavits, or reports, for use in court.

220. Mr. Harbison stated that he had been retained by the solicitors acting for the second defendant in or about September, 2017. He was asked to provide an expert opinion and in particular to answer five specific questions which had been put to him by the solicitors for the second defendant. The first of these was whether the emails in question contained any identifying data other than the IP address, which would make it possible to identify who sent the emails. Mr. Harbison answered this question in the negative. The bogus emails had been sent from a web-based email service called mail.com, which was run by a company in Germany. It was relatively easy for people to set up an email account with mail.com in any name they wanted. They would be allowed to use the email address, as long as it was not already in use by someone else. Mr. Harbison stated that the information which one had to provide in order to create such an email account, was very limited. The only useful piece of information in the email metadata, which had been retrieved by the first defendant from the emails sent to him, was the IP address: 86.45.158.140. All that could be said was that this was an Eir IP address. To determine to whom that address belonged, it was necessary for the first defendant to get an Order from the Court directing Eir to ascertain from their internal logs, which of their customers had been assigned that IP address at the relevant time.

221. In cross examination, it was put to Mr. Harbison that if the defendants had genuinely wanted to know who sent the bogus emails from the mail.com address, they could have sought that information from the company in Germany. Mr. Harbison stated that having lived and worked in Germany, he was aware that German internet companies were extremely slow to divulge any such information. It would require an order from the courts in Germany directing them to divulge the information. However, given that whoever set up these emails was setting up a bogus email account, it was extremely unlikely that they would have used their genuine name and address in the data submitted when creating the account. For these reasons he did not think that that was a feasible option to pursue.

222. Mr. Harbison stated that there were two relevant IP addresses. The first was known as a gateway IP address, which indicated that the internet connection had come via a designated internet service provider, in this case Eircom. The second relevant IP address was known as the internal IP address, which indicated which specific customer of Eircom held a particular IP address at a particular time. He stated that the internal IP address was something only known to Eir and could only be ascertained from an examination of their internal logs. The defendants' experts disputed this assertion. Mr. Harbison's assertion was also contradicted by the evidence of Mr. Finnerty in re-examination, who said that the plaintiffs internal IP address could be ascertained on the internet by using certain

Google packages.

223. Mr. Harbison stated from the information available to him, which was the metadata from the emails and the soft copy versions of the two emails which had been retained on the K club server, which had been provided to him on a USB stick, he could say the following:

firstly, the emails from the bogus Michael Smurfit email address, looked entirely genuine. There was nothing in their format, which would have caused the recipient to question their veracity. Secondly, he could find no evidence of tampering in the metadata, so as to make it appear that the emails had originated from the plaintiff via the mail.com platform, if that was not in fact the case. It was a simple proposition, the metadata in the emails contained an IP address which belonged to Eircom. Their representative, Mr. Finnerty, had stated that from an examination of their internal logs, that IP address had been assigned to the plaintiff at the relevant dates and times.

224. The second question posed, asked whether it would have been possible at this remove to determine if the plaintiff's iPad had been used to send the emails. Mr. Harbison stated that once an iPad was reset, then everything was deleted, even the flash memory. Once the iPad has been reset to its factory settings, that kills it as a source of evidence. The same applies if one resets the router, it is then gone as a source of forensic evidence. The third question asked whether it would be possible to identify the IP address of the plaintiff through receipt of an email sent by the plaintiff from that IP address. Mr. Harbison stated that that information could not be obtained from the email itself. It would be necessary to have access to the Eir internal logs. Eir would assign each user on their network an internal IP address, which is used to keep track of each account internally on the network. The internal IP address would only be converted into the external IP address when the user's web traffic reaches the edge of the Eir network to be sent outside. The process of changing the IP address is called Network Address Translation (NAT). The practical effect of this was that only an Eir representative could identify the actual customer, by reference to their internal logs.

225. The fourth question asked whether if an individual knew the IP address of Mr. Curran, would it be possible for that individual to fake the IP address contained in the emails to represent an IP address associated with Mr. Curran, without his knowledge or consent. Mr. Harbison was of the view that that would be extremely difficult without access to the internal logs held by Eir, because it would be necessary to ensure that the faked email contained the correct internal IP address associated with the particular customer. Unless one had the assistance of an Eir employee, who had access to such logs, he did not think it was a realistic proposition. The only other way of sending a fake email would be to obtain access to the router in the plaintiff's house. However, in 2015 the router itself would have had a security system known as WPA, which made it very difficult to hack into from the outside.

226. The fifth question asked whether it would be possible to determine whether the email address "michaelwjsmurfitoffices@mail.com" was a valid email address, and if so, who owned that address. Mr. Harbison stated that at this remove, it would be unlikely that that email address would still exist. Email addresses on mail.com are deleted if they are not used for a set period. Even if the account did exist, it would entail getting an order from the courts in Germany directing mail.com to release the information concerning the person who had set up the account. It was unlikely that a person engaging in such a fraudulent exercise, would use their true name when setting up the bogus account. Accordingly, it was very unlikely that they could ascertain who had actually created that email account.

227. In relation to the emails themselves, Mr. Harbison stated that there was nothing in the format of the emails which would have aroused suspicion. While mail.com was commonly used by persons engaged in distributing spam emails, he did not think that this email was spam for the following reasons: firstly, spam is usually a generic type of email sent to many people, whereas these emails were sent to one specific person, the first defendant. Also, they were written by someone who had a very detailed knowledge of the case. Accordingly, he was of the view that these emails could not be classified as spam in the usual sense of the term.

228. The other type of scam which is commonly used, is known as "spearfishing". This involves a person hacking into a network and monitoring email communications thereon. When they see that a particular payment is due to be made as part of a transaction, the fraudster will send what looks like a genuine email from the entity that is going to receive the money, informing the paying party that their bank account details have changed and furnishing new bank details. The hope is that the paying party will enter the new bank details and make the payment in good faith, before they realise that they have actually paid the money into a fraudulent account. These are often known as "Friday afternoon scams", because they tend to be sent late on a Friday afternoon, which is a time when many company operatives may not be at their most alert. Once the fraudsters receive the money into their account, they will transfer it on as soon as possible. Mr. Harbison did not think that these emails could be classed as such a scam, because while they were directed at just one person, there was no attempt to extract money from him.

229. The remainder of Mr. Harbison's evidence was given in response to the evidence given by the plaintiff's experts. It will be dealt with in the summary of the plaintiff's experts' evidence.

230. The evidence given by Mr. Martin Hogan, has been dealt with earlier in the judgement. The plaintiff also called evidence from Prof. Tahar Kechadi. He is a professor of computer science at UCD. He has worked there for nine years. Having completed his PhD in France, he applied for a number of post-doctorate research positions and ended up coming to Ireland for two years. He was appointed a permanent lecturer in UCD in 1998. He progressed thereafter to become Professor in Computer Science. In 2004 he helped set up the Centre for Forensic Investigation and Cyber-crime Investigation which was based in UCD. Since that time he has been involved in giving courses on digital forensic investigation. He has lectured to a number of police forces, both Irish and foreign. He has also published extensively in relation to digital forensic and cybercrime investigations.

231. Prof. Kechadi stated that when doing a full digital forensic examination, it was divided into three stages. The first stage was the acquisition stage, which concerns the acquisition and retention of the data, which is the subject matter of the investigation. The second stage is the analysis of that data. The third stage is reporting on the data having carried out a thorough analysis thereof. He stated that the acquisition phase was critical, because the validity of the subsequent analysis and reporting, depended entirely on whether proper procedures had been followed at the acquisition stage. In this case, the accepted protocols in relation to the acquisition of data had not been followed. He was very critical of the data which had been presented to Mr. Harbison, in the form of the hard copy of the email metadata and the soft copies of the two emails that survived on the K Club server, which had been put on a USB stick. In relation to the former, he stated that this was merely a page with material typed onto it. There was no way to validate the accuracy or authenticity of any of that data. Put at its simplest, it was just a page on which anyone could have typed literally anything.

232. In relation to the soft copies of the two emails contained on the USB stick, he stated that these had apparently been taken from the K Club server by Mr. Brian Byrne, the K Club IT manager. He had furnished the USB stick to the solicitor acting for the K Club, who had in turn transferred it to the solicitor acting for the second defendant, who in turn transferred it to the solicitor acting for the first

defendant, who had passed it to the solicitor acting for the plaintiff. Thus, when he was handed the USB stick in July, 2018, he refused to take it, as there was no point in carrying out an analysis on material which could have been altered or tampered with along the way. There was no point in analysing data which could not be certified as being authentic data. In this case the chain of evidence in respect of these two emails was so weak and as the possibility of alteration or tampering with material could not be excluded, analysis of the content of the USB stick was pointless.

233. Prof. Kechadi stated that the accepted procedure internationally and which should have been followed by the defendants in this case, was that immediately upon the receipt of the emails at the K Club server, the defendants should have notified the plaintiff's solicitor and in the presence of both parties, the relevant emails should have been extracted from the K Club server by an independent third party. That would represent the "original copy" of the data. The next step would be to make certified cloned copies of the original copy. These would be copies of the original data, which would be certified as being identical to the original copy. These cloned copies could then be given to each of the parties to carry out whatever analysis or testing they wished in relation to the cloned copy. If in carrying out those tests they happened to alter or modify the data, they could simply go back and get another cloned copy of the original copy. The original copy would remain quarantined. It would never be worked on by any of the parties.

234. The advantage of making cloned copies, also meant that if a party subsequently wanted to engage a new expert, who wanted to carry out his own analysis, he would not be at any disadvantage, as he could be furnished with a cloned copy even though it was later in time. The essential point was that the data should have been taken from the server by a fully qualified independent party in the presence of all the parties to the dispute. This would ensure that the acquisition procedure had been carried out properly. Thereafter, the "original copy" of the data would be quarantined to ensure that it was not altered or tampered with. Prof. Kechadi stated that as that had not been done in this case, it was not possible to draw the conclusions which Mr. Harbison had done over 2.5 years after the event, on the basis of the materials which had been presented to him.

235. In cross-examination, Prof. Kechadi accepted that this was the first time he had given evidence in court. He was not on any directory of expert witnesses. He had been contacted by the plaintiffs' solicitor in May or June, 2018. He had been asked to furnish an expert opinion in the matter. He had been furnished with the reports issued by Mr. Hogan and Mr. Harbison and had been asked to comment on those reports. In relation to his experience of digital forensic examinations, he said that over 50% of his writing concerned digital forensics. He had been writing and teaching in the area for more than ten years. He had provided over a 100 research papers and lab work in digital forensics. He had been involved in four or five investigations concerning the authenticity of the sender of certain emails. He had worked for the Gardaí on one occasion in relation to emails. That had been for the digital investigation section of An Garda Síochána. That was 7/8 years ago. He had also assisted in two investigations carried out by the Oslo University Police and one investigation by the French Police. He did not have to give evidence in those cases.

236. It was put to Prof. Kechadi that he was adopting a somewhat theoretical approach to the issue of the data available in refusing to analyse the metadata and the two emails on the USB stick, because the acquisition thereof could not be validated to the very high standard that he had indicated. It was put to him that that standard may be applicable to a criminal trial, where a person may be convicted on the basis of that evidence alone, but that did not accord with the realities of civil litigation, where one often had to work with whatever evidence one had. Indeed, Mr. Harbison had stated, that while police and other investigators might wish for better evidence, they often had to do the best they could with whatever evidence was available to them. Prof. Kechadi did not accept that his approach to the acquisition phase, which view was shared by the plaintiffs' other expert Mr. O'Sullivan, was entirely theoretical. He stated that because of the deficiencies in the evidence available, being the hard copy of the email metadata and the two emails on the USB stick, one could simply not draw the conclusions which Mr. Harbison had done, given the total lack of validation of the authenticity of the material on which he had based that opinion. In fairness to Prof. Kechadi, it should be noted that he gave his evidence prior to the time that Mr. Finnerty had produced the radius logs.

237. Both Prof. Kechadi and Mr. O'Sullivan, stated that as the plaintiff maintained that his iPad had been stolen during the period 24th April, 2015 to 27th April, 2015, one could not exclude the possibility that the third party who had taken the iPad, had sent the emails from the plaintiff's iPad, via his router, by simply driving near the house and sending them via the plaintiff's Wi-Fi. Mr. O'Sullivan stated that in America, people often drove into the car park of a Starbucks café and parked, so that they could send their emails using the café's Wi-Fi. He said that there was nothing to prevent a third party doing the same by driving near to the plaintiff's house, within range of his Wi-Fi. If that was done, it would set up a path which would make it look as if the offending emails had been sent by the plaintiff using his own iPad and router.

238. Mr. Harbison doubted the plausibility of that theory, due to the fact that as the plaintiff lived in a small rural town, and as the emails were sent at various times in response to emails that had been sent by the first defendant, it would have entailed the person driving close to the plaintiff's house on a number of occasions over the same weekend. This would have heightened their risk of being observed either by the plaintiff, or by his partner, or by a neighbour. It was implausible to suggest that the person could have driven by the location on five separate occasions over that four day period, without arousing suspicion.

239. Furthermore, Mr. Harbison stated that the range of a domestic router was circa 15m. That range could be further attenuated by the presence of walls in a given direction, weather conditions e.g. rain and could be attenuated even by the presence of a person in a room between the router and the person attempting to connect to it. Mr. Harbison submitted pictures of the plaintiff's house, which he had obtained from the internet. He stated that in order for a person to drive to the rear of the property as shown in the photograph submitted, he would have been at the very edge of the router range. In addition, some of the emails were quite lengthy and therefore would have taken some time to compose. In response to that, Mr. O'Sullivan stated that the emails could have been drafted elsewhere and the third party would simply have driven to the sweet spot within range of the plaintiff's router and simply connected to it and pressed the "*send*" icon. That would have taken a very short time.

240. An alternative posited by the plaintiff's experts, was that third parties had simply hacked into the Eir network and made it appear as if the bogus emails had been sent by the plaintiff. Mr. Harbison stated that in order to do that, they would have had to have implanted both the gateway IP address and the internal IP address relating to the plaintiff, which would have been impossible to do without the assistance of someone within Eir, who had access to their internal logs. The plaintiff's experts disagreed. While it would have been a difficult task requiring some considerable expertise, it would have been possible for a hacker to create the impression that the offending emails had come from the plaintiff's iPad and router. Mr. Harbison doubted that theory, due to the great difficulty in obtaining the plaintiff's internal IP address within Eir. However, given the evidence of Mr. Finnerty, to the effect that the plaintiff's internal IP address could be ascertained from the internet, the strength of Mr. Harbison's criticism of this theory is somewhat diluted.

241. Mr. Daniel O'Sullivan was called to give evidence on behalf of the plaintiff. He stated that he had had a very long career in the computer industry. He had a degree in electrical engineering from the Dublin Institute of Technology and a Masters in Computer Science from New York University. He had owned and sold two companies and now had a third company. He was the Chair and Director of the MIT Enterprise Forum at NYC. In cross examination, he stated that he had been first contacted in this case on 28th

September, 2018. He had been friends for some time with the plaintiff's solicitor, as they both shared an interest in computer technology. He also knew the plaintiff's senior counsel, Mr. Fogarty S.C., as he had been at school with him. Mr. Fogarty S.C., was named as legal counsel in the documentation submitted to the Companies Office in respect of his company in Ireland. He accepted that he had never given evidence in court as an expert witness before. He was not named on any directory of expert witnesses. While he had carried out investigations in relation to emails in the context of litigation in which he was a party, he had not been part of any independent forensic investigation.

242. It was put to the witness that the letter from Dr. Lucey dated 6th September, 2015, wherein the plaintiff had told the doctor that he had had his iPad forensically analysed, indicated that the plaintiff was aware of the importance of forensic analysis of that equipment. It was put to the witness that the plaintiff had by his own actions put the iPad and the router beyond forensic examination. Mr. O'Sullivan accepted that the loss of the information from the iPad and the router was important. If that had been knowingly done by the plaintiff, that would be consistent with guilt on his part. He accepted that to investigate the iPad and the router, one would have to have them available and not previously reset.

243. He accepted that there was nothing in the header of the email, which would have aroused suspicion in the recipient. He was critical of the email metadata which had been examined by Mr. Harbison, due to the shortcomings in relation to the acquisition stage thereof. However, he accepted that he had no evidence that the header metadata was fabricated, or altered in any way. He agreed that the questioned emails had none of the characteristics of spam. While he did not know the exact geography of the locus of the plaintiff's house, he did not see any great difficulty in a third party simply driving by the property and sending the emails.

244. He agreed with Prof. Kechadi that there was no point in analysing the emails contained on the USB stick when the acquisition phase was not reliable. It was put to him that the plaintiff's expert, Mr. Hogan, who had been an experienced member of An Garda Síochána, had indicated to the plaintiff's solicitor that he would be happy to analyse soft copies of the emails if they were furnished on a USB stick. The plaintiff's solicitor had written a request to the solicitors acting for the third defendant in such terms. Mr. O'Sullivan stated that he would not be happy with the material presented on the USB stick. However, he accepted that Mr. Hogan appeared to be content to analyse such material.

245. He did not agree with Mr. Harbison that it was unlikely at this remove that there would be any back up of the material on the plaintiff's iPad, on the iCloud or elsewhere. Mr. Harbison had stated that usually such backups roll over after a period. Mr. O'Sullivan did not agree with that, but he had not asked the plaintiff had he backed up the material on his iPad. He could not comment on the backup options that were available to the plaintiff in 2015. All he could say was that a backup of the iPad material may exist.

Conclusions on the Emails Issue

246. Having considered all of the evidence carefully, I am satisfied that the emails in question were sent by the plaintiff to the first defendant. I have reached that conclusion for the following reasons. While the bogus emails were sent from a web based mail.com address, which is frequently used by persons sending spam, I am satisfied that these emails do not fall into that category. This is due to the fact that the writer of the emails had an intimate knowledge of the details of the case. They also knew that Mr. Paul Crowe had been at the Punchestown racing festival in May 2011, although the writer incorrectly thought that he still worked for the K Club at that time. These emails do not fit the profile of mass generated emails which are sent to hundreds of thousands of recipients. I note that both Mr. Harbison and Mr. O'Sullivan were in agreement on this point. Nor do I think that these emails can be seen as being an example of "spearfishing", as the purpose of such emails is to carry out a complex fraud on the recipient, which is normally designed to get them to part with large sums of money. This did not apply in this case. The sender of the emails had considerable knowledge of this case. The plaintiff was a person who had the requisite knowledge of the case to draft the details given in these emails.

247. A second aspect of knowledge, is that the plaintiff is skilled in IT matters. He accepted in evidence that he was proficient in the use of computers. While he does not have any formal qualification, he freely admitted to the vocational assessor, Ms. McFeely, that he had considerable expertise in computers. The extent of that expertise is set out at p. 3 of her report. The plaintiff's former partner, Ms. Kelleher also stated in her evidence that he was proficient in the use of computers. The court is satisfied that the plaintiff had the necessary knowledge and skill to create a bogus email address on the mail.com platform and possessed the skill to send emails via that address.

248. When one looks at the dominant purpose of the emails, their sole aim was to entice the first defendant into making an inculpatory statement supportive of the plaintiff's version of events, while at the same time incriminating the second defendant in those events. This was something which would have inured greatly to the benefit of the plaintiff in the ongoing litigation. Indeed, it is arguable that if the first defendant had made the statement requested of him, that may have brought about the end of the liability aspects of the case. Thus, the plaintiff had a great deal to gain if the scheme proposed in the emails had been carried out by the first defendant.

249. The timing of the emails is also relevant. On 10th April, 2015, Dr. Lucey had written to the plaintiff's GP indicating that the plaintiff was finding the ongoing litigation stressful. When seen by Dr. Kinch on 22nd April, 2015, two days before the first email was sent, he was noted to have had serious suicidal ideation. He was displaying evidence of chronic Post Traumatic Stress Disorder, was having nightmares, was feeling withdrawn socially and was feeling under constant threat from would-be aggressors linked to his various ordeals. He was recorded as constantly reliving his former employment experiences through intrusive day time thoughts. He remained hypervigilant. He had a constant severe fear for his own safety. He felt very angry towards his former employer. According to Dr. Kinch, he remained very anxious, agitated, insecure and felt very vulnerable. He admitted that his way of thinking and reasoning had been completely adversely affected by what had happened to him. Dr. Kinch noted that his very fragile and vulnerable mental state, indicated that he continued to suffer from enduring and chronic psychiatric illness. He agreed with Dr. Lucey that the plaintiff was at a high risk of suicide and certainly of unpredictable behaviour. Thus, it would appear that two days prior to the sending of the first email, the plaintiff was in quite an agitated condition.

250. It is also noteworthy that on 5th May, 2015, at the request of the plaintiff, Dr. Lucey wrote to his former solicitor recommending that an early hearing date should be sought.

251. In the weeks and months following April 2015, the plaintiff's condition seems to have worsened. He was described by Dr. Lucey as being in somewhat of a "*crisis*" and was misusing alcohol. Thus, it appears that the plaintiff was in quite an agitated condition both generally and in relation to the litigation in the weeks preceding 24th April, 2015. He became more agitated and distressed in the weeks thereafter. It is clear that he wanted the litigation ended quickly. That goal would have been achieved, or certainly advanced, if the first defendant had carried out the request made of him in the emails.

252. When one looks at what the plaintiff said had happened to his iPad during the critical period, one is given a somewhat implausible

story. The plaintiff said that he had reported his iPad missing to the gardaí on Saturday, 25th April, 2015. This may have been based on the statement furnished by Garda Cronin on 22nd May, 2015, where that date was given. However, in evidence, Garda Cronin stated that he had made an error in his statement and that the iPad had, in fact, been reported missing by the plaintiff on 24th April, 2015. I accept Garda Cronin's evidence in this regard. Thus, it appears that the plaintiff reported his iPad missing on the day when the first email was sent. It may have been reported before the time when the first email was sent at 12:02hrs. This is significant.

253. Of even more significance, is the fact that when the plaintiff found his iPad sitting on top of the A4 sheet of white paper on the front wheel of his car, he went back to the Garda Station to report its return to Garda Cronin. He specifically asked Garda Cronin to note in the Pulse system, the following "*Wanted matter noted as iPad not in his possession between these dates*". That was a very telling request, because on the plaintiff's account, at that time he had no idea that any emails had been sent to anyone. All he knew was that his iPad had gone missing when he visited a number of locations in Cahirciveen and had been returned to him on Monday, 27th April, 2015, when he found it on the wheel of his car. If he was truly innocent, there would have been no reason for him to request the garda to note that his iPad had not been in his possession between 24th April, 2015, and 27th April, 2015. This critical insertion into the Pulse record, which only came to light when Garda Cronin produced the record while under cross examination, is highly indicative of the plaintiff's guilt. It appears to the court that what the plaintiff was doing was trying to establish on record that he had something akin to an alibi in relation to the period when the emails were sent, by establishing that he had not had possession of his iPad during that period.

254. The manner of the return of the iPad to the plaintiff is also implausible. It is quite possible that a person might leave their iPad behind in a café by mistake. If that was spotted by someone who did not know the owner of the iPad, they would probably hand it in to the owner of the café. If the person who spotted what had happed did know the plaintiff, and brought it to the plaintiff's house when he was not at home, I think it most unlikely that they would have left it on the front wheel of the plaintiff's car for three reasons: a passer-by might have seen it and stolen it, or it might have become damaged by rain, or the plaintiff might have left his house in a hurry and driven off thereby crushing or damaging the iPad. If the person who had found the iPad and had brought it to the plaintiff's house had found he was not there, I think they would have placed a note in the letter box informing the plaintiff that they had it and that he could collect it from them. Accordingly, I can discount the theory that a good Samaritan brought the iPad from the café and simply left it on his car wheel.

255. The plaintiff's actions after 27th April, 2015, are not consistent with him being innocent. It is not clear exactly when the plaintiff and his former solicitor learned of the making of the *Norwich Pharmacal* Order on 8th May, 2015. However, on 18th May, 2015, he was recorded as having contacted Eir seeking his IP address. On 21st May, 2015, his solicitor wrote a letter to the solicitor for the first defendant complaining bitterly about the fact that the application had been made on 8th May, 2015, without notice to them. He also stated that it was based on groundless assertions in the grounding affidavit. The plaintiff accepted that he was told by his former solicitor to retain his iPad and other computer equipment. On 5th June, 2015, he told Dr. Lucey that he had had his iPad forensically examined, yet that was not the case. The plaintiff did the direct opposite. He took steps to ensure that neither his iPad or router could be forensically examined by resetting them. Mr. Hogan and the other experts agreed that resetting the iPad and the router rendered a forensic examination of them almost useless. Even in his evidence, the plaintiff tried to maintain the fiction that his iPad had been forensically analysed by an independent specialist, Mr. Hogan. When asked by counsel for the first defendant whether that analysis had disclosed any information, he replied "*The specialist who checked the iPad said he could find no trace of the iPad being used for those emails*". Even at that late stage, the plaintiff was sticking to the lie that his iPad had been forensically examined.

256. In July 2015, the plaintiff states that he allowed a man, who arrived in an unmarked white van and without ID, into his property, where he spent 1.5hrs removing all the cabling and the router. The plaintiff said that he allowed the man into the house, because he had made complaints in relation to his internet and television to Eir and they had agreed a time when they would send out a repair technician to look into the matter. He said that the man in the white van turned up at the appointed time. Also when he looked into the van, he was reassured when he saw electrical equipment in it. That account is inconsistent with the evidence given by Ms. Kelleher, which I accept, which was to the effect that after May 2011, the plaintiff had become hypervigilant and security conscious. He kept the windows and doors locked at all times, even in summer. She described the house as being like Mountjoy jail. She stated that the plaintiff would become very anxious whenever anyone came to the door. She described him fleeing to the bedroom when an Airtricity representative called to the door. He also became anxious by the arrival of the postman. He kept a knife in his bedroom. She candidly stated that if a man in a white van turned up without identification, she did not think that the plaintiff would allow him into the property. She did have a recollection of returning to the house during the summer of 2015 and finding boxes and bubble wrap in the house following the carrying out of works there.

257. I am satisfied that the router in the plaintiff's house was removed in July 2015. However, I do not accept his story that it was taken away by a man in a white van and that this had been done by Eir. I accept Mr. Mulvey's evidence that there is no record of any repair crew being dispatched to his property in July 2015, nor of there being any replacement of equipment in the house. It is also noteworthy that the plaintiff never complained to Eir about the removal of any equipment from his home in July 2015. He did not tell his expert, Mr. Hogan in late 2015, that the router had been removed some months earlier. I find that it was the plaintiff who had his router removed in July 2015. I find that he did that to prevent any possible forensic examination of his old router.

258. Furthermore, as well as resetting his iPad, the plaintiff was the person ultimately responsible for the removal of his iPad, when on his account, he used it to swat a fly, lost it from his grip, causing the screen to become cracked when it hit the floor. Thereafter it was placed in a black plastic sack, which was brought to the recycling dump by Ms. Kelleher when she was cleaning out the property. The court finds this account hard to believe.

259. Turning to the technical evidence, I think that the approach of Prof. Kichadi is somewhat theoretical. It may well be the best approach to take in relation to the acquisition phase, if one is in a position to do so and if one is trying to obtain evidence that will be used in a criminal prosecution. However, I prefer the evidence of Mr. Harbison, who is a vastly experienced forensic investigator, to the effect that just because one does not have the best possible evidence, does not mean that one should not analyse and work with the evidence that is actually at hand. It seems to me that Prof. Kichadi's approach is based on his experience of teaching the police in relation to the best method of collecting evidence for use in a criminal trial. One has to remember that there are significant differences between a criminal trial and a civil action. In a criminal trial, the onus rests on the prosecution at all times to prove the guilt of the accused beyond a reasonable doubt. The accused is entitled to the presumption of innocence at all times, until he either enters a guilty plea, or is found guilty by verdict of the jury. In practice, in a criminal trial, one will normally only have the evidence that can be assembled by the police. The accused will usually not make any admissions while in custody and is not obliged to give evidence at the trial. He is entitled to test the prosecution evidence in whatever way he can.

260. In a civil action, there is no presumption of any sort either for or against either of the parties. The burden of proof is lower, being proof on the balance of probabilities. Thirdly, as in this case, one is not usually confined to the evidence that may be led by one

side, but will usually have the benefit of evidence given in response from the other party. Thus, one is not looking only at the technical forensic evidence against the plaintiff, but the court has the benefit of the evidence given by the plaintiff and given by other witnesses on a range of matters concerning the emails. In these circumstances, I do not see that any shortcomings that there were in relation to the acquisition phase of the evidence upon which Mr. Harbison based his report, is fatal to the opinions given by him in his evidence.

261. When one boils down the technical evidence given by Mr. Harbison to its bare minimum, all he was saying was that in the email metadata, which had been retrieved by the first defendant on the afternoon of 26th April, 2015, on the instructions of his solicitor, one found the relevant IP address, which was an Eircom IP address. At that time, the defendants did not know for certain that the emails had come from the plaintiff. However, using the IP address that had been revealed, they obtained the *Norwich Pharmacal* Order directing Eircom to examine their internal logs to ascertain which of their customers had that IP address during the relevant period. I accept Mr. Finnerty's evidence that from the investigations carried out by him, that IP address was associated with the caller line ID connected to the telephone number which was registered to the plaintiff at his home address in Cahirciveen, Co. Kerry. I have already summarised in extenso the evidence given by Mr. Finnerty in this regard. It is not necessary to repeat same here. His evidence is strongly indicative that the plaintiff was responsible for sending all of the emails during the relevant period. I accept his evidence in this regard.

262. In giving their critique of the initial report furnished by Mr. Harbison, the plaintiff's experts put forward a number of theories as to how the questioned emails might have been created by some other party so as to look as if they had been created by the plaintiff. It was suggested that hackers could have set up the mail.com account and made it look as if the questioned emails had, in fact, been sent by the plaintiff, by forging his IP address and putting it into the metadata in the questioned emails. Mr. Harbison did not think that that was a realistic possibility, due to the fact that not only would the hacker have had to insert into the metadata, an IP address that had been assigned to the plaintiff, but he would also have had to have ensured that the internal logs within Eir were consistent with that IP address. That would have required either that the third party had the assistance of someone within Eir who had access to the logs and was prepared to alter them, or that the third party was able to hack into the internal Eir logs and alter them himself. Mr. Harbison stated that such an act would require the resources of a nation State. On that account, he did not think that this independent hacker theory was credible.

263. I prefer the evidence of Mr. Harbison to the evidence given by the plaintiff's experts on this issue. It seems to me unrealistic to expect that a hacker would have been able to insert the plaintiff's IP address into the metadata in the emails and also gain access either via a person within Eir, or through his own devices, to the internal Eir logs and alter them, so as to make it appear that the emails had been created from the plaintiff's iPad and/or router. Having regard to the evidence of Mr. Finnerty, which I accept, that there were only four people within Eir who had authority to access the radius logs, I do not see it as a realistic possibility that the hacker would have been able to persuade one of these people to assist him in the enterprise.

264. The only other method of gaining access to the internal logs, would be for the hacker to break into the internal logs himself. Again, I accept the evidence of Mr. Finnerty that Eir had a sophisticated security system which monitored its network to detect any unauthorised access to it. I also accept the evidence of Mr. Harbison that to actually break into the internal logs within Eir would require enormous resources. I also accept the evidence given by Mr. Finnerty, that there were no actual instances of hacking into the internal Eir logs during the relevant period. Accordingly, I find that the plaintiff's experts' theory that some third party hacker may have created the emails, inserted the plaintiff's IP address into the metadata and gone on to ensure that the internal radius logs in Eir were consistent with that, is not a realistic theory in this case.

265. The plaintiff also proposed the alternative theory that someone on behalf of the defendants had stolen his iPad during the period 24th April, 2015, to 27th April, 2015, and had sent the emails by simply driving close to his property, so that the emails could be sent within range of his domestic Wi-Fi. I prefer the evidence of Mr. Harbison that such a scenario, while just about possible, is unlikely due to the fact that the third party would have had to have driven within 15m of the property on five separate occasions during those four days. Given that the plaintiff lived in a terrace of houses in a rural area, it is likely that such activity would have aroused suspicion, either from the plaintiff, who on his own account was hyper vigilant and very security conscious, or from his neighbours who lived nearby on the same terrace. In addition, in order to send the emails on five separate occasions the third party would have had to have been within 15m of the plaintiff's router. I find that theory highly improbable.

266. The plaintiff's contention that the defendants went to the bother of stealing his iPad, driving close to his property on a number of occasions so as to send the bogus emails to the first defendant and then returning his iPad, for the purpose of making the plaintiff and his legal team look bad in the eyes of the Court, is simply not credible.

267. Finally, one must note that the plaintiff had engaged in a previous similar stratagem with considerable success, when he carried out the Lieberman subterfuge referred to earlier in this judgement.

268. For all these reasons I am satisfied that the plaintiff sent the five bogus emails to the first defendant in a desperate attempt to entice him into making an inculpatory statement, which would also incriminate the second defendant, thereby ending the litigation and resulting in a windfall of damages to him. As part of that stratagem, the plaintiff planted a story with the Gardaí about his iPad being taken from him during that period. After the *Norwich Pharmacal* Order was made, he put his iPad and router beyond forensic examination; such actions were inconsistent with innocence. They were entirely consistent with him being guilty in the matter. The technical evidence, while not perfect, is strongly suggestive of the plaintiff having sent the emails. In particular, the error made in the email sent at 16:56hrs on 25th April, 2015, wherein it was stated that as Mr. Paul Crowe was at the races that day, the first defendant's meeting him there would be considered company business, with the additional statement that the first defendant would be insured by the company, is strongly suggestive that the author knew that the first defendant's immediate superior had been Mr. Crowe, but the writer was not aware that Mr. Crowe had left the K Club's employment prior to 2011. Having regard to the fact that the plaintiff had left the K Club in 1998, it is easy to understand how the plaintiff would have made this error. Taking all of these matters into account, I am satisfied that it was the plaintiff who sent the five emails to the first defendant.

269. I find that the plaintiff has lied continually in relation to what he told various third parties such as Dr. Lucey and his former solicitor about having had the iPad forensically examined. He also lied in is evidence to the Court in his denial that he sent the emails and his story that it was Eir who had removed his cabling and router in July, 2015. I find that his evidence to the Court on this issue has been a tissue of lies.

Conclusions on the Main Issue

270. In reaching its conclusions on the main issue, the court has been greatly assisted by the evidence of Mr. Raymond Mooney. This witness gave his evidence to the court in a clear and straightforward manner. He did not attempt to dodge any difficult questions, nor did he attempt to put a spin on any of his evidence. The court is satisfied that in giving his evidence, Mr. Raymond Mooney was not

influenced by his friendship with the plaintiff, nor by any animus towards the defendants. This court is satisfied that he has given a truthful and accurate account of what he saw on the day in question. The court accepts his evidence without reservation.

271. Accordingly, based on Mr. Mooney's evidence, I find as a fact that the first named defendant was in the gentlemen's toilet on the ground floor of Punchestown Racecourse at the same time as the plaintiff on the afternoon of 7th May, 2011. I accept the evidence of Mr. Mooney that the first defendant exited the toilet directly behind the plaintiff. I also accept Mr. Mooney's evidence that the plaintiff appeared to be in a distressed state on exiting the toilet and remained so during his encounters with the plaintiff later that day.

272. In looking at the evidence given by the plaintiff as to what occurred inside the toilets, the court has to have regard to the findings that it has already made on the discovery issue and on the emails issue. The court has to have regard to the fact that the plaintiff is capable of engaging in deceptive and manipulative conduct to achieve his desired goals. He is also prepared to lie to cover his tracks. He lied to the court repeatedly in his evidence on the emails issue.

273. The court is also satisfied that the plaintiff has lied on a number of other occasions. Firstly, the plaintiff stated in evidence that he had been advised by Dr. Lucey that he could wean off his medication in 2011. For the reasons set out earlier in the judgment, I prefer the evidence of Dr. Lucey that no such advice was given by him to the plaintiff. Secondly, he told Dr. Lucey that he had seen his GP on 16th May, 2011. In view of the fact that there is no note of any such visit and having regard to the fact that the GP practice kept comprehensive records on their computer of all visits to both doctors and allied personnel at the practice, I am satisfied that the plaintiff did not see his GP on that date. Thirdly, he told Dr. Lucey that he had had his iPad forensically examined. That was not the truth. Mr. Hogan was not able to do any forensic examination because the iPad and router had been reset by the plaintiff. Fourthly, he told Dr. Kinch in 2015, that he had been physically and verbally attacked by the first defendant in the toilets at Punchestown Racecourse. Insofar as there was an allegation of a physical assault, that was a lie. There is no allegation in the pleadings or in the evidence, that the plaintiff had been physically assaulted by the first defendant. In these circumstances, the court must find that the plaintiff will lie when it suits his case. Accordingly, it must approach the plaintiff's evidence with great caution.

274. In relation to the conflict as to whether the first defendant was lying when he said in 2011, that he did not know the plaintiff and would not recognise him, I prefer the evidence of the first defendant in this regard. I accept his evidence that he was a man who worked primarily outdoors and had very little interaction with management staff at the hotel. I accept his evidence that he was an infrequent attender at the Friday meetings. I accept his evidence that he did not socialise with the plaintiff, or with other managers, after the Friday meetings. Accordingly, I do not accept the plaintiff's evidence that he and the first named defendant had coffee on numerous occasions after these meetings.

275. I accept the evidence of the first defendant that given the large turnover of second line managers in the years since 1998, when the plaintiff left the K Club, he would not have recognised the plaintiff if he saw him at the races in 2011. The first defendant's evidence in relation to the large turnover of managers, is supported by the evidence given by Ms. McFeely, who when commenting on the plaintiff's employment record prior to taking up employment with the K Club, stated that it was not unusual in the hospitality sector for people of management grade to change jobs frequently.

276. When one has regard to the fact that by 2011, the first defendant would not have seen the plaintiff for over twelve years, it is not unreasonable that the first defendant would say in 2011, that he did not know the plaintiff and would not have recognised him. I prefer the evidence of the first defendant in this regard.

277. Turning to the core issue, which is the evidence in relation to the alleged threat itself, when one looks at the various accounts given of the incident, the plaintiff's accounts have lacked consistency. He said nothing to Mr. Mooney on the day of the alleged incident. A few days later he told his partner, that he had gone to the bathroom and had bumped into the head of golf and that some form of threat was made by the first defendant. He did not elaborate. The plaintiff never told his partner what exact words had been spoken by the first defendant. The plaintiff saw his GP on 24th June, 2011. The GP records do not indicate that he said anything about the alleged incident on that occasion. While Dr. Coffey gave evidence that he thought that there may have been mention of the incident during that visit, for the reasons already stated earlier in the judgment, I do not accept that the plaintiff did in fact mention the threat to his GP at that time.

278. As previously noted, on 12th July, 2011, the plaintiff made a limited disclosure to his twin sister, when he told her "*Barbara something happened at Punchestown Racecourse and I am basically in fear of my life with a threat that was made via Dr. Michael Smurfit*". One week later, the plaintiff visited his psychiatrist, Dr. Lucey, on 19th July, 2011. He said nothing about any incident at the races at that consultation. The court finds that significant, because Dr. Lucey had been his treating psychiatrist since 2004. He clearly had a good rapport with him. It is somewhat curious, that if the plaintiff had been subjected to a frightening verbal assault some two months previously, he did not tell his psychiatrist about it on that occasion.

279. The plaintiff returned to see his psychiatrist on Tuesday, 9th August, 2011. At that time, he told Dr. Lucey that he had had a reminder of his previous trauma at the race meeting in May. He did not mention any threat being made against him by the first defendant. Curiously, the plaintiff had attended with his former solicitor earlier on the same day. It would appear that he was able to tell the solicitor sufficient details to warrant the solicitor writing to Dr. Lucey some days later on 11th August, 2011, in which he stated that he had had a consultation with his client on 9th August, 2011. The solicitor understood that the plaintiff had seen his psychiatrist after his consultation with him. He requested Dr. Lucey to furnish a report to him in relation to the plaintiff's recent difficulties arising out of an incident on 6th May, 2011 [sic]. Thus, it would appear that the first occasion on which the plaintiff gave full details of the incident was to his solicitor on 9th August, 2011. Notwithstanding that, he did not give full details to his psychiatrist when he saw him later that day.

280. The letter from the plaintiff's solicitor obviously prompted the further visit by the plaintiff to his psychiatrist on 19th August, 2011, at which time he gave an account of the incident to his psychiatrist. It is noteworthy that there is no reference therein to the first defendant saying that he was bringing any message from the second defendant.

281. Arising out of that consultation, Dr. Lucey issued his first report. In a letter dated 6th September, 2011, the plaintiff's former solicitor wrote back to Dr. Lucey indicating that the plaintiff had gone through his medical report and had pointed out a number of things missing from the doctor's account of what he had been told by the plaintiff in relation to the incident. In particular, the plaintiff had pointed out that he had referred to the incident occurring at the hand dryer after he had washed his hands. He also mentioned that he had told the doctor that the first defendant had said that the person was going to "*come and get you*". Dr. Lucey was asked to amend his first report. Thus, it is clear that the plaintiff had looked carefully at how his account of the incident had been recorded in Dr. Lucey's first report. It is noteworthy that after such careful scrutiny, there was still no reference to the first defendant saying that he was bringing a message on behalf of the second defendant.

282. By letter dated 10th September, 2011, Dr. Lucey stated that the plaintiff was clear that the gentleman did not say that the person was "*going to come and get you*" and this concurred with his records. Accordingly, he did not include that portion in his amended report, but he did include the reference to the incident occurring at the hand dryer. He issued his amended report on 10th September, 2011.

283. The plaintiff was not asked why it had taken until 14th February, 2012, for the initial warning letter to be sent by his former solicitor. This was probably due to the fact that the plaintiff had stated in evidence that he first consulted with his solicitor some nine months after the incident. Having regard to the correspondence referred to, that cannot be true. Section 8 of the Civil Liability and Courts Act 2004, places an obligation on a plaintiff in a personal injuries action to notify the proposed defendant of his intention to make a claim within two months of the accrual of the cause of action, or as soon as practicable thereafter. Where a person fails without reasonable cause to serve such a notice, the court can draw such inferences from the failure to serve such a notice, as appear proper. In this case, no explanation has been put forward for the delay in issuing the warning letter, between the time when the incident occurred, or from when he first consulted with his solicitor, which was certainly on or prior to 9th August, 2011, or at the very least from receipt of the amended report from Dr. Lucey dated 10th September, 2011, and the date when the initial letter was ultimately sent on 14th February, 2012. The court is entitled to have regard to the unexplained nature of that delay.

284. Of more significance, is the fact that by the time the warning letter was sent on 14th February, 2012, the plaintiff's allegation had changed, to include an assertion that the first defendant had said that he was bringing a message from the second defendant. This was a very significant change in his account, as it is arguable that on his previous account as given to Dr. Lucey, there was no cause of action against the second defendant. Thus, by adding this small but significant detail, the plaintiff had put himself in a position to mount a claim for damages against the second defendant.

285. That assertion also has to be viewed in light of the plaintiff's evidence where he repeatedly said that he did not think that the first defendant was a bad man, who had a vendetta against him. He stated that the first defendant was merely a messenger, bringing a message from the second defendant, who was intent on destroying him because of what he had said about call girls in the replies delivered in his previous proceedings in December 2004.

286. The plaintiff has not furnished any convincing evidence why that significant detail was only included after September 2011, and before February 2012. Its late insertion into the narrative is consistent with it being something deliberately added to the story between those dates, so as to give the plaintiff a right of action against the second defendant.

287. The court has also had regard to the fact that the plaintiff gave a different account to Dr. Kinch in 2015, when for the first time, the plaintiff told the doctor that there had been a physical element to the encounter between him and the first defendant, in the form of pushing and shoving. That had not been mentioned earlier, nor was it repeated in the plaintiff's evidence. This would imply that it was a gratuitous lie placed on the record in 2015, but subsequently not used by the plaintiff.

288. The reason for that may have been due to the fact that, while a small man could deliver a vicious verbal threat, it is unlikely that such a man could engage in pushing and shoving of a bigger man. In this case, the plaintiff is a tall man. I would estimate that he is circa 6ft in height. He is also reasonably well built. I would estimate that he weighs circa 87/90kg. The first defendant is of much slighter build. He is 53 years of age. He is a long distance runner. He said that he weighed 72kg. I would estimate that he is 5ft 10 in height. Accordingly, it is unlikely that he would have been able to push and shove the plaintiff, even if he had wanted to.

289. Taking all of these matters into account, the court notes that the plaintiff was very non-specific in relation to his initial accounts of the incident to his partner and his sister. He did not mention the threat when he first saw his psychiatrist on 19th July, 2011. Somewhat surprisingly, having consulted with his solicitor and apparently having told him what had happened on 9th August, 2011, he only made a very vague comment to his psychiatrist when he saw him later that day. He did not state that any threat had been made against him by the first defendant. It was not until 19th August, 2011, that he informed his psychiatrist of the threat. However he did not identify the first defendant at that consultation. It was subsequent to that, that the assertion that the first defendant stated that he was carrying a message from the second defendant, was inserted into the narrative. His subsequent account to Dr. Kinch in 2015, added a further new element to the narrative. Finally, his evidence to the court mirrored the narrative which had been set out in the warning letter from his former solicitor dated 14th February, 2012.

290. Thus, the plaintiff was somewhat non-specific in relation to his allegation, until it was formulated in the letter from his former solicitor of 14th February, 2012. The court is of the view that this history of the evolution of the plaintiff's narrative, is not consistent with his telling the full truth in relation to the matter from the outset.

291. The court also had regard to the fact that the plaintiff's narrative is somewhat implausible. The plaintiff's assertion is that the second defendant was so incensed by the replies that he had given in the previous proceedings in December 2004, that he gave a direction either to his staff in general, or to the first defendant in particular, that if and when they, or the first defendant should come across the plaintiff, they or the first defendant, should threaten him if the opportunity arose. The court is of the view that that was a somewhat unlikely scenario for two reasons. Firstly, the allegations that had been made by the plaintiff concerning call girls, were buried in pleadings, which had been delivered as far back as December 2004. The allegations had not been repeated since that time. All the evidence is that the plaintiff lived a reclusive lifestyle in Co. Kerry and did not travel to the east coast of Ireland frequently. There is no evidence that he ever repeated the allegations, or even threatened to do so. In such circumstances, one has to wonder whether the second defendant would have had the motivation to issue any such direction, which was to be carried out almost six and a half years after the time when the allegations had first been made.

292. Secondly, none of the defendants knew that the plaintiff was going to be at Punchestown races on 7th May, 2011. Thus, for the plaintiff's theory to be correct, the second defendant would have had to have given a general instruction at some earlier time, which the first defendant carried into effect, when by chance, he came across the plaintiff at the races. The court does not think that this is a likely scenario. If the second defendant had actually wanted to threaten or intimidate the plaintiff, it would have been far easier and more effective for him to have sent someone to Kerry to deliver a threat to the plaintiff directly, either verbally or visually. Thus, the court is of the view that while the plaintiff's hypothesis is just about possible, in reality, it is somewhat implausible.

293. Turning to look at the accounts given by the first defendant, the court has already found his evidence that he did not know the plaintiff and would probably not have recognised him in 2011, credible for the reasons already set out.

294. The court is of the view that the first defendant's action in immediately telephoning the plaintiff's solicitor on receipt of the warning letter on 15th February, 2012, and offering to send a photograph of himself, is consistent with his evidence that he genuinely believed that this was a case of mistaken identity. The making of that phone call is also consistent with him being innocent of the matters alleged in the warning letter.

295. At the hearing, much was made of the fact that the first defendant stated in that telephone call, that he had only used the upstairs toilet at the far side of the parade ring that day. It was suggested that this showed that he, in fact, knew that the incident had taken place in the ground floor toilet and was trying to set up something of an alibi in that regard. It was pointed out that it was curious that the first defendant should specifically have stated that he used the upstairs toilet, when no specific toilet had been mentioned in the warning letter. While that is a possible interpretation of his comment, the comment is also consistent with the fact that the first defendant did not know to which toilet the plaintiff was referring and he merely volunteered the information that when at the races with his daughter, he would normally use the upstairs toilet. Accordingly, I do not think that the assertion made by the first defendant in the telephone call was indicative of any guilty knowledge on his part as to the precise toilet where the incident was alleged to have occurred.

296. The court is satisfied that in sending the email to Mr. Mitchell on 23rd February, 2012, the first defendant was not deliberately attempting to set out a trail of false, yet consistent statements in relation to his version of events, but was setting out in a private email to his finance director, his genuine recollection of events that day. That email is entirely consistent with the version of events given in his solicitor's letter of 9th March, 2012, which was in response to the plaintiff's solicitor's warning letter. It is also consistent with the first defendant's evidence at the hearing.

297. The court has also had regard to the emails which the first defendant sent in response to the bogus emails sent to him in April 2015. There was no suggestion at the trial that the first defendant was part of any conspiracy in relation to the sequence of emails sent and received at that time. It was accepted that his responses were genuine responses on his part to the requests that had been made of him by the fictitious Natasha. In his email responses, the first defendant stated very clearly that he was entirely innocent of the allegations made against him by the plaintiff. In short, the first defendant has been consistent from day one in relation to his denial of the allegations made against him.

298. Finally, the court has had the opportunity to view the first defendant giving evidence over a number of days. He was subjected to a rigorous cross examination by senior counsel on behalf of the plaintiff. He answered all questions put to him in a straightforward manner. Having watched and listened carefully to the first defendant, the court is satisfied that he has told the truth in relation to the core issue in this case.

299. The fact that the court has not accepted the first defendant's evidence that he was not in the downstairs gentleman's toilet at the same time as the plaintiff that day, does not mean that it has to find that the allegations of what allegedly occurred in the toilet, as made by the plaintiff, are true. Having regard to the inconsistencies in the plaintiff's accounts and having regard to the consistent nature of the first defendant's denials over a period of years and having watched both the plaintiff and the first defendant give evidence and taking all of the evidence outlined above into consideration, the court is satisfied that the first defendant did not have any interaction or conversation with the plaintiff on 7th May, 2011. In short, the court accepts the evidence of the first defendant that he did not threaten the plaintiff in the manner alleged or at all on the day in question.

300. Whether the plaintiff's distressed condition in the hours and days after 7th May, 2011, was simply due to the fact that he saw the first defendant in the toilet and, as he was not on his medication at that time, he had a psychological reaction to that sighting, which was similar to the reactions which he had had in Malta, in Wynn's Hotel and at Farranfore Airport and he subsequently decided to blame the first and second defendants for that adverse psychological reaction by inventing the making of a threat by the first defendant against him at the behest of the second defendant, is not a question that I have to determine. It is equally possible that the plaintiff simply saw the first defendant in the toilet and saw that as an opportunity for him to mount a fraudulent claim, which he did by inventing the story of the threat and pretending to have an exacerbation of his pre-existing psychiatric condition. This Court does not have to decide which of these fraudulent possibilities is the more likely. On the central issue, the court is satisfied that no threat was made by the first defendant to the plaintiff. Accordingly, I dismiss the plaintiff's action against all the defendants.