THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 338

APPEAL NO.: 2014 1434

2014 1373

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

JOHN O'CONNELL

PLAINTIFF / RESPONDENT

- AND–

BUILDING AND ALLIED TRADES UNION, EDWARD MORRIS, PATRICK O'SHAUGHNESSY, MICHAEL MCNAMARA

FIRST DEFENDANTS / APPELLANTS

- AND BY ORDER -

CONSTRUCTION INDUSTRY FEDERATION

SECOND NAMED DEFENDANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 17TH DAY OF NOVEMBER 2016

1. There are two appeals before the Court. One by the first defendant ('BATU') and its named officers against a finding that they are liable in damages to the plaintiff (yet to be assessed) for breaches of constitutional rights, conspiracy and intimidation which he alleges they perpetrated against him; and one by the plaintiff against a dismissal of his claims against the second defendant ('CIF') on the basis firstly that they are statute-barred, and secondly on the merits. I will address the BATU appeal first. These findings are contained in the written judgment of Ryan J. (as he then was) delivered in the High Court on the 17th July 2014 following a six day hearing.

2. The plaintiff represented himself both in the High Court and in this Court, and did so competently as a non-lawyer, and courteously. He is an experienced block-layer by trade. Having qualified as such in the late 1970s he joined a trade union which later amalgamated with another union and became what is now BATU. He worked in the Limerick area throughout the 1980s either as a builder's direct employee where he was subject to PAYE income tax for the duration of any particular job, or as an independent subcontractor under the Revenue Commissioners' C2 scheme, as the occasion demanded.

3. Under BATU's rules, membership of the union was open only to "workers" , which it interprets as meaning only block layers in direct employment or unemployed. A registered subcontractor did not meet that criterion. However, it seems to be common case that during the 1980s while the late Jim Kemmy T.D was the union's local representative in Limerick, a somewhat indulgent attitude was taken to subcontractors. A blind eye was turned to the fact that some "workers" who were members of BATU worked sometimes as subcontractors on a C2 certificate when necessary in order to obtain work, which by all accounts was very scarce at the time.

4. During the 1990s the plaintiff, like many others, was forced by economic circumstances to seek work abroad, and did so in Germany and in the United Kingdom. He did not pay his union dues to BATU during his absence which caused his union membership to lapse. He returned to Ireland in 1997, and wished to resume working as a block-layer in the Limerick area, again either as a direct employee of a builder, or as a C2 subcontractor as previously.

5. However, he found that by then there was a less indulgent approach on the part of BATU to block-layers who worked as C2 subcontractors. Mr Kemmy had been replaced as the local union representative by Mr Morris, one of the personal defendants named in these proceedings, who considered that the rules for membership of BATU must be strictly adhered to so that there was no longer any question of block-layers who held a C2 certificate being admitted as members of BATU.

6. It would appear also that building employers in the Limerick area had agreed with BATU that they would employ as block layers only those who were members of BATU it being considered to be the appropriate union for block-layers at the time. This meant that the builder employers in Limerick and BATU each operated a policy which combined to ensure that block-laying work on building sites was available only to block-layers who worked as direct employees, and who were also members of BATU. Accordingly any block layer who held a C2 subcontractor's certifiacte from Revenue would not, if that was known, get employment on a building site in the Limerick area.

7. The plaintiff wanted to resume his membership of BATU so that he could again work as a block-layer in the Limerick area. He felt that his previous membership of BATU should have led to a simple resumption of his previous membership, but he was told that he had to re-apply, and that as part of that application he must furnish a letter from Revenue confirming that he did not hold a C2 subcontractor certificate. For over two years he objected to having to furnish such a letter on various bases such as that Revenue had told him that he did not have to give such a letter, that it was a breach of his right to privacy as he would have to provide his RSI number, or that the union failed to draw his attention to any particular BATU rule which required an applicant for membership to furnish such a letter. His objections to furnishing this letter from Revenue meant that the union would not grant his application for membership of BATU. The true reason for his objection to furnishing such a letter only emerged during his cross-examination in the High Court, namely that during the relevant time and until October 1999 he in fact held a C2 subcontractor certificate from Revenue, and could therefore never have provided the required letter from Revenue unless he gave it up. In October 1999 after his then current C2 certificate lapsed, he obtained the required letter confirming that he did not hold a C2 certificate, and again sought to re-join the union. He was granted membership but only on a probationary basis for a period of 8 weeks. Certain conditions had to be fulfilled

during that period including that all arrears of union dues would be paid, and that he would not in future make any contact directly with Mr Morris at his home, and that all his dealings with BATU would be conducted through its Limerick branch. The reason for the imposition of such conditions was because of certain incidents that had taken place between the plaintiff and Mr Morris in October 1999 which in fact had led to injunction proceedings by BATU against the plaintiff, as well as a personal injuries action by the plaintiff against Mr Morris. Those matters were the culmination of difficulties between the plaintiff and BATU during 1997/1999 over his membership application, and are dealt with in more detail in the judgment of Ryan J. In so far as it may be necessary to refer to them again I will do so, but for the purposes of the issues on this appeal they are perhaps peripheral and just part of the general background of difficulties which arose between the plaintiff and BATU.

8. At the heart of his claims in these proceedings is his belief that he was wrongfully excluded from membership of BATU by the imposition of unreasonable conditions for his membership, with the consequence for him that he either could not obtain employment in Limerick, or that any employment he managed to get was terminated as soon as his employer was informed by BATU that he was not a member of the union. His claims are based not only on his wrongful exclusion from membership of BATU, but also on an allegation that BATU intimidated and threatened his employers that unless he was let go other workers on the site would be directed to walk off. He has claimed damages against BATU and the named union officials for wrongful interference with his contractual relations, inducement of breach of contract, intimidation, and breach of his constitutional right to work and his right to earn a livelihood.

9. In his judgment the trial judge identified two principal issues for determination. Firstly, whether the plaintiff was wrongfully excluded from membership of BATU, and secondly, whether BATU and/or its officers wrongfully interfered with the plaintiff's employment. The first question has two parts. Firstly whether he was wrongfully denied membership up to 31st October 1999 when he finally provided the required letter from Revenue, and secondly whether he was wrongfully excluded from full membership after his 8 week period of probationary membership came to an end on the 31st December 1999.

10. The trial judge described the background of a developing antipathy on the part of the union, driven in the main by Mr Morris, in relation to block-laying work being done by subcontractors, once he became the local union representative in Limerick, his strong view that persons who worked as subcontractors could not be members of BATU, that only card-carrying members of BATU could be employed as block-layers on building sites in Limerick, and his determination that the rules of the union as to membership should be strictly enforced.

11. The trial judge referred also to some of the evidence which the plaintiff gave in relation to the refusal by the union to grant his application for membership of BATU, and the steps taken by the union to ensure that he could not obtain employment on sites in Limerick because he was not a member of BATU. He also addressed the denial by Mr Morris that he had wrongfully refused membership to the plaintiff, and his evidence that it was only because the plaintiff did not produce a letter from Revenue confirming that he did not hold a C2 certificate that his membership application was not granted. A summary of this evidence appears in the judgment of the trial judge, as does a summary of the fraught relationship between the plaintiff and, in particular, Mr Morris, which resulted in other legal proceedings between those parties to which I have just referred. He referred also to some of the evidence in relation to the plaintiff's 8 week probationary membership, the conditions attaching thereto, and the failure of the plaintiff to ever receive a full membership card.

12. The trial judge concluded that the plaintiff was wrongfully denied membership of the union, and that no "solid reason" had been given by the union for him not having been granted full membership at the end of the probationary period. Before stating that conclusion he stated at paras. 128 – 135:

> *"128. A person has a constitutional right to associate and dissociate. A trade union or other association has similar rights. BATU was not obliged to admit Mr O'Connell as a member. However, its power was not unfettered.*
>
> *129. The prescient comment made by Walsh J. in Murphy v. Stewart [1973] I.R. 97 at p. 117, which is quoted a little more fully above, is admittedly obiter but coming from such a source is deserving of the highest respect and bears repetition: –*
>
> > *'If the right to work was reserved exclusively to members of a trade union which held a monopoly in this field and the trade union was abusing the monopoly in such a way as to effectively prevent the exercise of a person's constitutional right to work, the question of compelling that union to accept the person concerned into membership (or, indeed, of breaking the monopoly) would fall to be considered for the purpose of the vindicating the right to work.'*
>
> *130. It is logical as well as just to condemn as unlawful the capricious abuse of power by an association when it achieves exclusivity for its members but excludes a qualified tradesman and then audaciously objects to his presence and prevents him from working or restricts his opportunities to provide for his amily.*
>
> *131. BATU was legally permitted to approach employers individually or collectively through the CIF to make it a condition of employment that block layers be members of the Union. The CIF was legally permitted to recommend to the members that they introduce such an employment term and builders were entitled to do that.*
>
> *132. BATU was not entitled to stigmatise the plaintiff, to have him removed from a site where he was employed on the ground that he was not a member. The Union could not legally instruct or encourage its members to walk off unless Mr O'Connell was dismissed. Such wrongful conduct was in breach of the plaintiff's constitutional rights and he can sue the Union and its officers if they were involved. He can also sue in tort for intimidation.*
>
> *133. It was and is wrongful under the Constitution as well as at common law for a union to operate a closed shop policy but refuse a qualified person membership, subject to some quite exceptional circumstances that do not arise in this case."*

13. The trial judge went on to state that the fact that a candidate for membership of the union might be an awkward, difficult person or even an unpleasant or troublesome person could not justify a policy of excluding that person not only from the union but from working at all.

14. The trial judge made certain findings of fact in order to reach his determination in favour of the plaintiff's claim against the BATU defendants, and I set these out as they appear in paragraphs 135 – 139 of his judgment as follows:

"135. This case is not about the entitlement of BATU to enforce a closed shop on building sites in Limerick at the material times. Neither is it concerned with a refusal by a worker to join a union in pursuance of a right not to associate. Mr O'Connell wanted to work as a block layer on building sites and was happy to be a member of the union. He had previously been a member and contended that he continued to be one. The problem was that BATU insisted that block layers had to be members of the union but would not admit him as a member. BATU was not entitled to insist on operating a closed shop restricted to their members and yet refuse Mr O'Connell membership and prevent him from working.

136. Mr O'Connell had a right to work while not a member of BATU. The union, its officials and members were not entitled to prevent this and it was an unlawful conspiracy for BATU to instruct its members to walk off a site because Mr O'Connell was employed there.

137. The plaintiff may have been troublesome, unpleasant, demanding and aggressive in his relations with BATU officials but that did not justify the union's conduct. BATU submitted that Mr O'Connell tried to bully his way into membership but my view is that just the reverse was the situation.

138. The plaintiff was wrongfully excluded from the union which then put him out of work because he was not a member. In the result BATU and its officers breached the plaintiff's constitutional rights and engaged in a campaign against the plaintiff that constituted the torts of intimidation and conspiracy by excluding him from membership and threatening builders who employed him.

139. In the result the plaintiff's claim succeeds against BATU and its officials for breach of constitutional rights, conspiracy and intimidation. There will be a separate hearing to assess the plaintiff's damages taking into account the impact of the defendants' wrongs on the plaintiff's earning capacity and his rights. It does not follow from my findings that the plaintiff is entitled to be compensated for all the time from when the wrongs were first done to him. It will be for him to prove all the elements of loss actually sustained and properly recoverable, subject to any legally appropriate reductions. That hearing will also consider injunctive and ancillary reliefs." [emphasis added]

15. I have underlined a number of findings of fact which underpin the conclusions of the trial judge. The real issue for this appeal is whether in fact the evidence given at trial supports those findings. The appellants submit that it was not.

16. The role of the appellate court on an appeal is described by McCarthy J. in *Hay v. O'Grady* [1992] I.R. 210 at p. 217 in the following manner:-

> 1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
>
> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
>
> 3. inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact.... I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.
>
> 4. A further issue arises as to the conclusion of law to be drawn from the combination of primary fact and proper inference.... If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.

17. The same issue was dealt with by O'Higgins C.J. in the course of his judgment in *Northern Bank Finance v. Charlton* [1979] I.R. 149. At p. 180, he stated as follows:–

> *"A judge's findings of fact can and will be reviewed on appeal. Such findings will be subjected to the normal tests as to whether they are supported by the evidence given at the trial. If such findings are firmly based on the sworn testimony of witnesses seen and heard and accepted by the judge, then the court of appeal, recognising this to be an area of credibility, will not interfere."*

18. More recently in his judgment in *Doyle v. Banville* [2012] IESC 25, Clarke J. recalled the context in which *Hay v. O'Grady* was decided, namely the aftermath of the abolition of jury trials in most types of personal injury actions, where thereafter such cases have been heard before a judge sitting alone. At para. 2.3 of his judgment he stated:

> *"2.3 … it does need to be said that there are other consequences of the move to trial by judge alone. Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost. Where a jury decides facts, an appellate court will only have the submissions and evidence of the parties, the judge's direction and the answers given by the jury to the questions submitted to them, to go on. Where a judge decides the facts there will be a judgment or ruling whether orally given immediately after the trial, or in writing after a period. To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or the other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred. The obligation of the trial judge, as identified by McCarthy J. in Hay v. O'Grady, to set out conclusions of fact in clear terms, needs to be seen against that background."*

19. He went on to state at para 2.7 thereof:

> *"2.7 Finally, before moving on to the specific issues which arise in this appeal, it is also important to note that part of*

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

20. Having identified the principles which must guide this Court in deciding whether the findings and conclusions of the trial judge are supported by credible evidence or such reasonable inferences as can be drawn from such evidence, it will be necessary to see what particular evidence has been relied upon by the trial judge to support his conclusions, and where none has been identified by him as having been relied upon, to then see if in fact there was any evidence given which could support such findings, even though he may not have identified it in his judgment. In this case where the plaintiff is self-represented it is important that this Court should examine most thoroughly the evidence actually given, as recorded in the transcripts of that evidence which have been provided.

Was there evidence that BATU wrongfully excluded the plaintiff from joining the union?

21. In so far as the trial judge concluded that BATU was entitled to approach employers in an effort to get them to agree that it should be a condition of employment that block layers be members of BATU (para. 131 of the judgment) I would respectfully agree. I would also respectfully agree that it was permissible for employers to agree with BATU that they would employ only block layers who were members of a particular union, being in this case BATU. I agree also that the trial judge was correct to state that what was impermissible was for the union then to wrongfully refuse membership to a person who applied to join, and who met the criteria for membership, or otherwise to wrongfully prevent him from joining the union. The question at the core of this appeal is therefore whether there was any credible evidence given at the trial to support the trial judge's conclusions at paras. 137 – 138 of the judgment that BATU wrongfully refused membership to the plaintiff or otherwise prevented him from becoming a member. As I have stated, there are two periods to examine in this regard – firstly the period from December 1997 to October 1999, and then the period after the 8 week probationary period ended on 31st December 1999.

22. The trial judge's summary of the evidence which he heard commences at para. 22 of the judgment. At para. 27 he commences an account of what the plaintiff stated in relation to his efforts to join BATU. He noted that the plaintiff stated that Mr Morris had required tax information and also his (Mr Morris) approval before he could begin a job on a BATU site. That "tax information" is clearly a reference to a letter from Revenue stating that the plaintiff did not hold a C2 subcontractor's certificate. He records that the plaintiff stated that he had gone to the tax office "but did not give the required information". It is not entirely clear what that refers to, but he goes on to state the following at para. 28:

"28. Mr O'Connell did not want to give his tax details to Mr Morris; he said that the tax office told him he did not have to provide information because it was private. He offered to give payslips and a letter from a Commissioner for Oaths but his position was that the tax office informed him he should keep his revenue details private and that was what he was trying to do. He was also annoyed that he had to rejoin the Union – as a long serving member he did not see why that had to be the position and why he would need to provide private information to do so. Another issue, he said, was that Mr Morris wanted him to join in unofficial action and wanted members to go to sites where, if someone was not complying with his new conditions, they might be subject to pickets. Mr Morris was not renewing other bricklayers' cards as well and Mr O'Connell felt that he should instead be encouraging people to join the Union. Mr Morris refused him a union card and he was subsequently refused work, which continued until 1999 when he was on a site working for the builder Stephen Finn from Monaleen in Castletroy."

23. The trial judge then referred to some of the evidence given by Mr Morris. He stated that the plaintiff had contacted him (presumably in December 1997 when he was offered work) in relation to an offer of work, and had told him that he did not have a C2 certificate at that time, whereupon Mr Morris told the plaintiff that he would have to get a one-line letter from Revenue to that effect. The trial judge also notes Mr Morris's evidence that *"the position was that if Mr O'Connell had a C2 he would have been ineligible to join the Union but he could have given up his C2 and applied with no difficulty"*. Clearly it was because the plaintiff did not obtain that letter from Revenue at that stage which prevented him from becoming a member of the union.

24. The plaintiff was extremely unhappy about being required to produce this letter from Revenue. His evidence initially was that he was told by Revenue that he did not have to provide private information about his tax affairs. The plaintiff had a particular problem about giving out his PPS number, or so he stated. However, as will be shown later, he had put his PPS number on the application form which he completed when applying for membership. By the 8th December 1997 the plaintiff appears to have believed that his application for membership had been refused by Mr Morris. This is evident from a letter which he wrote to Mr Morris on that date and to which the trial judge refers at para. 31 of his judgment in which he requested that Mr Morris would send him a letter outlining why he had been refused membership as he needed such a letter for the purposes of social welfare. The trial judge then refers to the written response given by Mr Morris to this request in which he rejected any suggestion that the plaintiff's application for membership had been refused, and instead enclosed an application form for membership and gave information as to local union meetings and local points of contact. The trial judge then refers to evidence given by Mr O'Connell that on the previous day he had had a conversation with a Mr Flynn (of BATU) who had stated that the letter from Revenue was a new requirement for membership which was insisted upon by Mr Morris, and that membership would not be granted without it.

25. The trial judge then summarises some evidence given by the plaintiff in relation to correspondence written by the plaintiff to union officials between 1997 and 1999 in which he was making the point that he should not have to re-apply for membership given that he had been a member for 15 years previously before he went abroad, and that the demand for a letter from Revenue was not justified, and that he was being unfairly refused membership on this account. The trial judge briefly refers to the confrontation which the plaintiff had with Mr Morris at the latter's home on 13th October 1999 and which led to court action by both, but that incident is not directly relevant to the issue of being refused membership of the union.

26. At the moment I am addressing only the evidence recorded by the trial judge which relates to the period from December 1997 when the plaintiff first sought work upon his return to Limerick and became aware that he needed to re-join BATU, and 31st October 1999 when he eventually obtained the required letter from Revenue. When concluding that the plaintiff was *"wrongfully excluded from the Union which then put him out of work because he was not a member"* (para. 138), the trial judge made no distinction between the period up to 31st October 1999 and any later period. It can be presumed therefore that his conclusion that the plaintiff was wrongfully excluded from membership relates not only to the period from December 1997 to 31st October 1999, but also the period that followed the ending of the probationary membership period on 31st December 1999. But the question then arises as to whether the evidence adduced by the plaintiff, even if taken at its height, and preferred over the evidence adduced by the defendants where there is a conflict can support the conclusion that the plaintiff was wrongfully excluded from membership of BATU up to the end of October 1999. In my view it does not, as I will explain.

27. In his direct evidence to the court the plaintiff outlined the history of his qualification and employment as a block layer, and explained that in 1997 he was looking for work after he returned from abroad. He stated that he was asked if he was a member of the union and he said he was. However the prospective employer said that he would have to get approval from the "new person" who turned out to be Mr Morris who had taken over from Mr Jim Kemmy who by this time had become ill. He told the Court that Mr Morris required him to rejoin the union and to get a letter from Revenue confirming that he did not hold a C2 certificate. He stated: " *… I went to the tax office at the time – I think her name is Theresa Costigan – and I asked her. She said she couldn't get that information because it was under – I think it was some act secret – official secrets act, you know. I thought it was a bit bizarre myself and I said to him [Mr Morris] … more or less he refused me membership and I started corresponding back and forth."* [T.1, p. 9]. He went on to state that he was objecting to giving that information from the tax office *"because they told me not to give it to him …"* [T.1, p. 10]. He also stated that Mr Morris had told him that he might be required to join in unofficial action (i.e. action not officially sanctioned by the union). He went on to state that when he was refused a union card he was refused work. His direct evidence then moved forward to an incident with Mr Morris on the 13th October 1999 following which a meeting took place on 1st November 1999 with Mr McNamara and Mr Flynn after which an agreement was signed, which led to him being given an 8 week probationary membership ending on the 31st December 1999. He also gave evidence of problems that he still encountered on sites where he worked during and after that probationary period. I will come to that evidence in more detail in due course.

28. The plaintiff was closely cross-examined by counsel for BATU in relation to the evidence he had given in relation to the allegation that up to 31st October 1999 he had been wrongfully refused membership of the union. He was referred to his letter to Mr Morris dated 8th December 1997 which alleged, inter alia, that Mr Morris was refusing him membership of BATU. It was put to him that Mr Morris would say (as he did in due course) that he never refused him membership but simply required a letter from Revenue which would confirm that he was eligible to become a member under the rules of the union. He was then referred to Mr Morris's letter in reply dated 10th December 1997 where he refuted the allegation that he had refused membership, and in which he actually enclosed a membership application form, gave details of when union meetings took place in Limerick, and advised the name of the local Limerick union representative (Mr Flynn) whom the plaintiff should contact if he required further information. The plaintiff had to accept during this cross-examination that there was nothing in that letter which evinced any intention to block him from becoming a member. However, the plaintiff was adamant that it was the requirement that he produce a letter from Revenue that was blocking his membership and that this requirement was not mentioned at all on the application form, and that it was simply a new requirement insisted upon by Mr Morris. However, he was referred to the rules of the union and in particular rule 3(a) which states that *"the union shall consist of any number of persons <u>who are employed</u> in the building and furnishing trades or any allied trade or occupation ….."*, and to rule 3(e) which provided that " *… a person who is an employer of members of the union or who is a director or major shareholder with a company or firm or undertaking which employs or would normally employ members of the union or* who is self-employed may not be a member of the union ….". The copy of the rules that the plaintiff possessed did not contain this last reference to "self-employed". It appears that the plaintiff's copy of the rules may have not been an up to date copy reflecting all amendments made to the rules.

29. It was put to the plaintiff that to provide a letter from Revenue was a simple task being asked of him in order to join the union. He agreed, but then stated that his concern was the information that would be contained in the letter, specifically his PPS number. He seemed to suggest in his responses that he did not trust Mr Morris with that sort of personal detail (T.1, p. 49-50)

30. It was put to him that when he completed his application form he had in fact inserted his PPS number as required on that form, and he was asked why, if he was not prepared to give the union a letter from Revenue that would contain this PPS number, he seemed not to have any problem providing it on the application form for membership. He responded on the basis that the lady he had spoken to in the Revenue office had told him he should not give out that information, and he mentioned that she had referred to the Official Secrets Act. He was pressed for a better explanation for his reluctance to provide the letter when he had in fact given his PPS number on the application form. His only response was to continue to maintain that the information ought not to be handed over, and he stated finally: *"I know I put the number down. I probably shouldn't have".* (T.1, p. 51).

31. The cross-examination proceeded to address the correspondence that passed between the plaintiff and Mr Morris in December 1997 and January 1998, during the course of which Mr Morris returned the plaintiff's application form stating that it was not properly completed and stating also that when properly completed it should be returned to the local Limerick branch who would deal with it. The plaintiff maintained his reluctance to obtain a letter from Revenue, and when pressed as to why, stated that it had never been a requirement in the past. The trial judge intervened at that point, and asked a number of questions of the plaintiff (T.1, p. 56). He asked the plaintiff to explain to him *"what was the big deal about getting a letter confirming that you didn't have a C2".* After a somewhat rambling response that did not address the straight question asked, the trial judge referred back to the fact that the plaintiff in his evidence had stated that prior to Mr Morris replacing Jim Kemmy, Mr Kemmy had *"turned a blind eye"* to the fact that some union members were working as sub-contractors because at the time work was hard to come by and he had sympathy for that situation. The trial judge suggested to the plaintiff that Mr Kemmy's turning of a blind eye suggested that it was a breach of a union rule which he was prepared to overlook. The plaintiff replied *"Well, there was no rule there at the time really …"*, to which the trial judge responded: *"But there was no need then for you to go and ask him is it all right if I do this. Do you follow me?"*. The plaintiff responded: *"Well, I was just asking about the situation because I didn't know anything about what a C2 was. Perhaps that's my own ign*orance. I didn't even know what a C45 was and I was asking him what are these things", whereupon the cross-examination moved to other matters.

32. The plaintiff maintained in his cross-examination that he considered the request to provide the Revenue letter as tantamount to refusing his application. It appears that even by 10th December 1997 he was considering bringing some action against Mr Morris for compensation on the basis that he was being refused membership, whereas the letters from Mr Morris to him in response all appear to advise him of what is required for his application for membership. It was put to him that far from evincing any refusal of his application, the letters from Mr Morris were actually telling him what was required. The plaintiff's response was *"No, as far as I'm concerned, as John [Flynn} said, they had their decision made and that was it"* [T.1, p. 60].

33. This cross-examination continued to address the reasons why the plaintiff was so steadfast in his refusal to comply with the requirement for membership, namely a letter from Revenue to establish that he was not the holder of a C2 certificate. The plaintiff stated that he had been told by Mr Flynn (since deceased) that as far as the union was concerned he was a subcontractor, and needed a letter from Revenue to establish that he was not. He went on to say that he had explained to Mr Flynn his "personal reasons" for not providing it, which I take to be the reasons already stated. At this point the trial judge, perhaps unsurprisingly given the length of time this issue was being explored with the plaintiff in cross-examination, intervened by asking: *"So, is this what this is all about?…… is that the whole thing? ….. that the union says we don't want somebody in who is either an employer or a C2 person, i.e. self-employed or an employer, and you believe they think that you are such a person?"*, to which the plaintiff responded: *"Yes – I was working PAYE, like"*. The judge then stated: *"and the way to disprove that is to get a letter from Revenue?* To which the plaintiff answered *"Yes"[*T.1, p. 62]

34. Shortly after that exchange, the trial judge intervened again after the plaintiff had said, in answer to a question from counsel, that he was at all times anxious to be working and was being held back from doing so by the union. He was asked by counsel why if he was so anxious to work he did not simply get the letter from Revenue. He replied that he considered it to be totally unnecessary. The trial judge then stated*: "Yes, but you say that it was totally unnecessary. They say the letter is totally necessary. Something has got to give. They have something you want? … They want a letter."* The plaintiff stated in reply that when he eventually gave them the letter in October 1999 it made no difference. However the judge stated: *"Yes, but do you see, the way to check out that would be to produce the letter and then to put it up to them".* [T.1, pp. 63-64]

35. Having explored some other matters not immediately relevant, counsel returned to the question of the plaintiff's refusal to provide a letter from Revenue, and his apparent refusal to engage with the union branch in Limerick in relation to his application as advised by Mr Morris in his letter dated 10th December 1997 and later letters from the union. He responded by saying that a new man had arrived in charge of the Limerick branch – Michael McNamara - and that he had had previous problems with Mr McNamara in 1996/*1997 "and there's no way he would let me in the union"* {T.1, pp. 66-67].

36. Counsel asked the plaintiff directly then whether at this point in time i.e. in 1997/1998, the plaintiff in fact held a C2 certificate. In my view the passage of cross-examination which follows that question is critical. I will set out some of it verbatim from the transcript starting at T.1, p. 68:

> "Q. At this point did you have a C2?
>
> A. I was working PAYE.
>
> Q. Did you have a C2?
>
> A. I don't think I had – I could have had one but I wasn't using it.
>
> Q. This is your case – you have prepared no doubt – this is going on since 2002 – I am sure you know the answer to this: Did you have a C2 at this time?
>
> A. 1999 – I might have had but I wasn't using it.
>
> Q. If you were in possession of a C2 isn't that blatantly what you're not meant to have in order to be a member of this union?
>
> A. It doesn't say that in any of the rules. Sometimes, like, sometimes you might work – you might get any work if you do [sic]. As I said earlier on, I was never in long term employment. So, when you had a C2 you had to make yourself available for work. It doesn't make a difference what tax system you were on. And it would give you really access to work if you had a C2, not that I wanted to use it.
>
> Q. Mr O'Connell, the purpose of joining this union is to avail of PAYE, PRSI-type employment, to be protected by the union, you have no use for a C2?
>
> A. Loads of members had C2s and they were working C2s and C4 … There's even a rule in the book that allows certain people that work C2s.
>
> Q. There will be evidence given addressing that issue directly but, with respect, in the absence of people giving evidence to corroborate what you're saying, it's not acceptable to say everyone this, everyone that, in a court. You can understand that Mr O'Connell?
>
> A. Okay, yes.
>
> **Judge**: Sorry, I'm confused. I'm lost here. The dispute was, as I understood it, the union, rightly or wrongly, the union was looking for confirmation from the Revenue that you did not have a C2. Am I right so far?
>
> A. I think so, yes.
>
> **Judge**: I'm not sure I understand why you would think so, why at this stage, so many years after the dispute, okay, but I thought they wanted confirmation that you didn't have a C2; is that correct?
>
> A. Yes, yes.
>
> **Judge:** For a variety of reasons you didn't feel that you should provide such a certificate for them or such a letter for them?
>
> A. Correct, yes.
>
> **Judge**: Okay. There the parties stood. The union say you have to have one; the late Mr Flynn says if you don't have this you've no chance of getting in?
>
> A. Yes.
>
> **Judge**: You believe that no matter what you produced, letter from the Revenue or not, you believe that there was no way the union was going to let you in. The only way to test that was to produce your letter saying that you didn't have a C2, okay.
>
> Next question: now I'm understanding from your answers to Mr Sweeney that you might, after all, have had a C2, which means that you would never have been in a position at this stage to get a letter from the Revenue saying you didn't have a C2. Now does that make any sense? Are you understanding?
>
> A. Yes.

Judge: Are you understanding what I'm saying first of all?

A. I do, yes.

Judge: Are you understanding why I am confused?

A. Yes.

Judge: Can you help me to be unconfused?

A. Well, you see, as I said if you – you could be working in a private job or something like that, you could work different tax systems. I would always try to work PAYE. You could even do works – you could even do something that is nothing to do with the union or anything – and you just might have a C2 to make yourself available. Now, it could have been left there, it could be dormant, whatever, or if it's there, if I wanted to, if things got bad in the buildings, if I needed to work a C2, I wanted to kind of have --

Judge: I'm not saying there's anything right or wrong with having a C2 or any other thing.

A. Yes.

Judge: Do you understand? I'm not saying anything right about it or anything wrong about it. But your position is, "Yes, I had a C2 but I didn't happen to be using it at the time".

A. Yes.

Judge: "I had it in reserve in case it might become necessary to use it. Meantime I wanted to be in the union as a PAYE, if that's the way things worked out".

A. Yes

Judge: I could understand somebody in the union having a bit of a problem with that, could you?

A. Well, not if I was following the rules, like, and working PAYE

Judge: No, I understand that, but if that was the case, if you had a C2 in reserve, just in case, how could you ever get a letter from the Revenue to state to say that you didn't have one?

A. Well, you wouldn't get a letter. I could have got a letter if I didn't have a C2. Judge: I'm not sure I'm making my confusion clear to you, but we'll carry on.

37. Following that exchange between the plaintiff and the trial judge, counsel resumed his cross-examination into the vexed question of whether or not in 1997/1998 the plaintiff had or had not a C2, something that in my view from the transcript the plaintiff seemed reluctant to make clear. He was asked whether he had a C2 in 1998. He replied *"I may have had it. I probably wasn't using it. Yes, I might have had it yet."* Counsel pressed the question and asked *"Did you have it or not?"* to which the plaintiff said *"I think I had a C2 then, yes"*. [T.1, p. 70].Counsel pressed for a straight answer once more and this time the plaintiff said *"I did, yes, in 1998, yes.",* but immediately followed that statement with *"I think so, yes".* When asked was it yes or no, the plaintiff finally said *"yes".* Not surprisingly counsel stated *"it took quite while for you to say that"*.[T.1, pp. 69-72]

38. Following that exchange, the trial judge asked the plaintiff: *"So, when the union is looking for this from you, you couldn't get them a letter because you had a C2, isn't that correct? That's the reality of it?"* to which the plaintiff said: *"yes, yes".*

39. Counsel then put it to the plaintiff that when in December 1997 he was in correspondence with Mr Morris or the union and was told that a letter from Revenue had to be provided, and when he was objecting to producing one on the basis that he did not think he should need to produce one, and that he objected to disclosing personal information, the reality was that he knew that he could not get such a letter because he in fact had a C2. Again, the plaintiff's answer was somewhat rambling and evasive, but after a number of follow-up questions he agreed that at the time he was in contact with Mr Morris about his application for membership (which was December 1997) he had a C2 certificate from Revenue, and he also agreed that he still had one in November 1998. [T.1, pp. 71-72]. The plaintiff said he thought that a C2 lasted for two years, but again was not sure about that. When he was asked by the trial judge when he ceased having a C2 certificate, he said that it was in November 1999 which coincides with the date on which he appears to have finally produced the required letter to the union and received an 8 week probationary union membership card. He thinks that in November 1999 he simply did not renew it. It was not that he actually de-registered as a subcontractor.

40. I will perhaps return to the cross-examination in due course in relation to events subsequent to the issue of the probationary membership in November 1999. For the moment, however, I want to refer to some of the evidence given by Mr Morris (who was called by the plaintiff), and he did so in relation to the period December 1997 to October 1999. There is just a brief reference by the trial judge to Mr Morris's evidence at para. 29 of his judgment.

41. Mr Morris was appointed regional organiser for the Limerick region in 1997 when Mr Kemmy became ill. He was also the regional organiser for the south east of the country. He recalled meeting the plaintiff for the first time on a site in Limerick sometime around April 1997, but could not recall details of any conversation he may have had, other than that he invited the plaintiff to become a member of BATU. When pressed he accepted that he may have spoken about direct employment. He denied that he had asked the plaintiff to join in unofficial union picketing. Mr Morris recalled the plaintiff contacting him by telephone in November 1997. He recalled that when he got that call he did not know the plaintiff at all, but that it was not unusual for him to get such a call inquiring about membership. He would have asked the usual questions, he said, such as whether the person was previously a member, whether they had a C2, and so on. He said that the plaintiff had told him on that occasion that he had a C2 and that he had told the plaintiff that he would need to get a letter from Revenue confirming the position. He recalled that the plaintiff had said that he thought he had been a member in 1995 but was not specific about it. He went on to say that he never operated a system whereby he himself would make contact with Revenue in order to run a check on a person to see if they had a C2.

42. The trial judge asked Mr Morris what the situation would be if the plaintiff had a C2. Mr Morris stated that if he had a C2 he was a subcontractor, and would be ineligible for membership of the union. He went on to state that the policy of the union, with the backing

of the vast majority of members, was for direct employment only, and that they implemented that policy as best they could. He also stated that this was agreed with the majority of employers also. He stated that if a person wanted to give up a C2 certificate he could do so at any time without difficulty, and get a letter to that effect from Revenue, whereupon they would have no difficulty joining the union (T. 2, pp. 59-60. See also T.2, p. 81). He went on to state in answer to the plaintiff's questioning that he never had a problem with the plaintiff becoming a member of the union but he had to be a direct employee, and there was a procedure to be followed, which he had informed the plaintiff about. He denied ever trying to exclude the plaintiff from membership. The remainder of his direct evidence related to the incident in October 1999, the court proceedings that followed, and the agreement signed on 1st November 1999 which led to the probationary membership, and therefore does not relate to the period now under consideration.

43. The plaintiff also called Michael McNamara to give evidence. He was a member of BATU since 1981, and became an elected officer of the union from about March 1998. Very little of his evidence related to the period from December 1997 to the end of October 1999, nor to the requirement to provide a letter from Revenue before a person could become a member of the union. His evidence was principally directed towards events after 1st November 1999 which I will come to.

44. However there is one passage of his evidence which has relevance to the earlier period. The plaintiff asked Mr McNamara if there were any new conditions for membership of the union put in place by Mr Morris after Jim Kemmy had died. In answer to this question, Mr McNamara stated the following:

> *"No. I would imagine that there was more of an implementation of the conditions that were previously there but just probably not being adhered to as much. You see there were problems with subcontracting at the time. An awful lot of members were saying that they were forced to work for subcontracting and I believe you gave that evidence yourself. You said that at times employers would decide how you would work, whether you'd work PAYE or whether you would work as a subcontractor, but a lot of members, when we started to reorganise there first, were making allegations that they were working for subcontractors but they weren't getting their proper rate of pay and they weren't getting their pension stamps paid and more often than not the type of subcontractors were back of the van type of subcontractors. They weren't properly approved contractors for Revenue purposes, that they didn't have a building yard. They didn't have a proper office. So, I suppose technically on a point of law they weren't properly subcontractors. So, there was a lot of difficulties like." [T.2, p.88)*

45. Having examined all 6 days of transcript very thoroughly I can find no other evidence from any witness which bears upon the events relating to the plaintiff's unsuccessful efforts to achieve membership of BATU up to the end of October 1999.

46. In paras. 11 and 13 above I have set out what I consider to be the critical paragraphs from the judgment of the trial judge on this issue. At paragraph 132 he refers *to "the capricious abuse of power by [BATU] and the union [preventing] him from working".* At para.132 he states that BATU was "not entitled to stigmatise the plaintiff". At para.133 he refers to BATU operating a closed shop but refusing a qualified person membership. At para. 135 he states that BATU would not admit the plaintiff as a member and/or refusing him membership. At para. 137 he refers to BATU as having bullied the plaintiff. At para. 138 he finds that BATU wrongfully excluded the plaintiff from membership. These seem to me to constitute the findings of fact of the trial judge in relation to the membership issue up to the end of October 1999.

47. As I have said already, the trial judge has not in his judgment pointed to any particular evidence which he considered to support these findings. His conclusions are expressed in a general way. But I have examined the transcripts carefully and fully, and I can find no evidence which supports these findings in so far as they relate to events up to the end of October 1999.

48. The trial judge does not refer in his judgment to the critical evidence which was forced out of the plaintiff during his cross-examination by counsel for BATU in which he reluctantly was forced to concede that during this period he in fact held a current C2 certificate from Revenue. I have set out this passage of evidence at paras. 34-36 above. The concessions forced out of him at this point mean that far from being wrongfully excluded from membership, he was simply ineligible for membership at that time. This evidence undermines completely the fundamental case he seeks to make that the union and Mr Morris were deliberately and capriciously refusing his legitimate application for membership or imposing an unreasonable condition upon him for membership. There was nothing unlawful in BATU requiring a letter from Revenue stating that the plaintiff did not hold a C2 certificate as a condition of membership, given the criteria under the rules for membership. An association may legitimately set conditions for membership. Of course, it goes without saying that the plaintiff could not be picked upon in some discriminatory way by having some unreasonable condition imposed upon him which he could never be expected to fulfil in order to deliberately exclude him from membership, and at the same time operate a closed shop whereby only a member of the union may gain employment. But in my view there is no evidence that such was the case here. The rules of the union specified that membership was open to "workers". It is reasonable that this be construed by BATU as meaning those in direct employment since one of the functions of the union is to protect those in direct employment, and therefore that holders of a subcontractors C2 certificate should be seen as not coming within that definition.

49. In fact, the trial judge seems to have been of this view himself, considering some of his interaction with the plaintiff during the course of evidence – for example see the exchange appearing in T.1, pp. 69-70.

50. I consider that the evidence extracted from the plaintiff under cross-examination and the evidence of Mr Morris points only one way, namely that while up to his cross-examination he maintained strongly that there had been a concerted effort on the part of Mr Morris and the union to make sure that he did not become a member, and that this was achieved by imposing as a condition of membership that he produce a letter from Revenue- something which he was unwilling to do because it breached his rights to privacy and which he considered was not required under the rules of the union – the fact was that he could never have obtained such a letter because he in fact held a C2 certificate. He may have disagreed with the rule being strictly implemented that excluded those holding a C2 from membership. He may have found it an inconvenience. But he knew that by holding a C2 certificate he could not fulfil what was required of him, but was nevertheless intent on continuing to hold the C2 certificate rather than de-registering so as to remove that obstacle to his application for membership of the union.

51. As I have said, the evidence points only one way on that issue. I can find no other evidence to support the identified findings of the trial judge that the union bullied the plaintiff, that the union wrongfully excluded him from the union, that there was a capricious abuse of power, and that they effectively stigmatised the plaintiff. In my view the only conclusion open on the evidence is that the plaintiff excluded himself from eligibility for membership by continuing during this period to hold a C2 certificate from Revenue, and there was nothing unlawful about a condition of membership that the person be a "worker" in the sense of being direct employee, and to require evidence to establish that in the form of the letter from Revenue confirming that position.

52. In these circumstances, I am not satisfied that the findings and conclusions of the trial judge in relation to the period December 1997 – 31st October 1999 can stand, and I reach that conclusion consistent, in my view, with the principles in Hay v. O'Grady and

the other authorities to which I have referred.

Probationary period: 1st November 1999 – 31st December 1999:
53. During the period of probation, the plaintiff was undoubtedly a member of BATU, albeit on probation. He had a probationary membership card which was valid until the 31st December 1999.

54. For some time prior to the 11th October 1999 the plaintiff was employed by Stephen Finn Construction, even though he still held a C2. It is likely that Stephen Finn was not aware that he was not a BATU member until Mr McNamara called to the site and made it known, whereupon he was let go. Mr Finn died prior to the hearing in the High Court, so his evidence was not available. However, the trial judge found that the plaintiff's evidence in this regard was corroborated by a memo on the plaintiff's file with the Department of Social Welfare which is dated 26th October 1999. This memorandum referred to a visit to the site by a union member on the 11th October 1999 and noted: *"… and as he was not a union member the employers had let him go" and that "the applicant stated that he has tried to join the union on two/three occasions but was not allowed"*.

55. It was in the immediate aftermath of his being let go by Stephen Finn Construction that the plaintiff either gave up his C2 card or did not renew it. This had the effect of enabling him to obtain the letter which BATU had insisted upon before it would allow him to re-join the union. That letter issued to him on the 26th October 1999 whereupon, following the meeting on the 1st November 1999, he was given an 8 week probationary membership of BATU in accordance with the union's rules. Once in possession of that probationary membership card, he was then re-employed by Stephen Finn Construction at the beginning of November 1999. One could have expected that thereafter the plaintiff's problems with the union and on any other site where he might work would have ended. Sadly that was not to be the case, at least according to the plaintiff.

56. Before setting out subsequent events, I will give some brief detail of what led to the plaintiff achieving this 8 week probationary membership of BATU. During and prior to October 1999 there had been a good deal of trouble between the plaintiff and certain union officials, but particularly with Mr Morris, both before and in the aftermath of his having been let go by Stephen Finn Construction. In fact these difficulties culminated in Mr Morris obtaining an injunction to restrain certain behaviour on the part of the plaintiff. It resulted in the plaintiff issuing proceedings against Mr Morris in which he claimed damages for personal injuries. It is unnecessary to dwell upon the details of these incidents, but it provides some flavour of the atmosphere prevailing between the plaintiff and the union, perhaps in particular with Mr Morris, at the time. Those events however resulted in a meeting in Limerick on the 1st November 1999 between the plaintiff, and John Flynn and Michael McNamara, both of BATU. It appears that John Flynn had telephoned the plaintiff and suggested that the parties meet to try and resolve matters.

57. At this meeting the plaintiff was told that he would be given a probationary membership provided that he signed an agreement to abide by certain terms. He did so, though in his evidence he stated that he did so under duress. The agreement which he signed was in the following terms:

> *"I, the undersigned, do hereby agree to abide by the rules and regulations of the above named Trade Union if granted membership, and furthermore I agree to accept the conditions for membership as set out here.*
>
> > *1. That all business that I will conduct with the said Trade Union shall be carried out with the Limerick branch, and all payments and correspondence will be directed to Mechanics Institute Limerick.*
> >
> > *2. That I will refrain from making contact with BATU regional officer Mr Eddie Morris or his family home at Kilkenny in any manner or make contact by way of phone call by myself, or any persons acting on my behalf.*
> >
> > *3. I accept and acknowledge the rules governing re-entry to membership of the above Trade Union. I also accept that I will pay the sum of £200 re-join fee, £156 subscription fee for the year 1999 and the sum of £400 arrears due by me since 1996 to date."*

58. It can be noted at this point that rule 23(b) of the union rules provides for the re-admission to membership of a person whose membership has ceased under rule 23(a). Rule 23(b) provides:

> *"23 (b): A person who ceases to be a member of the union under the provisions of this rule may be re-admitted to membership by a branch of the Union, the National Executive Council, or an official authorised for the purpose <u>on such terms and conditions as may be decided in each case"</u> [emphasis added]*

59. It was open to BATU to decide that the terms and conditions of readmission should include a period of probation under rule 3(g) which provides as follows:

> *"3(g): Before being admitted to full membership of the Union an applicant for membership whom it is proposed to <u>admit shall first be accepted as a probation member for a period of eight weeks</u> during which time the applicant shall pay the entry fee which shall from time to time be prescribed by the National Executive Council and <u>the applicant's suitability for membership of the Union shall be assessed. The acceptance of a person as a probation member shall not prejudice the making of a final decision on the application at the end of or at any time during the probation period.</u> If the entry fee is not paid during the probationary period the application shall not be considered further and all monies previously paid by the applicant shall be forfeited to the Union. A probation member shall not be entitled to vote in any election or on any question coming before the members of the Union but in every other respect (other than in that provided by this paragraph) shall have the same rights and obligations as full members."* [emphasis added]

60. Clearly, by signing the agreement dated 1st November 1999 the plaintiff agreed to abide by the rules of BATU as well as conditions at 1, 2 and 3 contained in the agreement which the union considered necessary given the history of difficulties between the plaintiff and union officials. Those conditions are straightforward. He was to conduct all his dealings with the union through their Limerick Branch, and therefore not through the Dublin Branch or with any official directly, such as Mr Morris or Mr O'Shaughnessy, as he had previously attempted to do. Neither was he to make any direct or indirect contact with Mr Morris or attend at his family home. Lastly he was required to pay £400 arrears of membership fees, the re-joining fee of £200 as well as £156 for his 1999 subscription.

61. In his evidence the plaintiff stated that he signed the agreement under duress. He stated that it was not usual for an applicant for re-admission to be put on probation. He felt picked out for special treatment. However, while nothing turns on it in particular, the union's rules are clear that re-admission under rule 23(b) may *be "on such terms and conditions as may be decided in each case".* The plaintiff also stated in evidence that he thought the reason for putting him on probation only was because his solicitor had written to Mr Morris relating to the incident at Mr Morris's home arising out of which the plaintiff sought damages for personal injuries.

That incident had occurred on the 13th October 1999, and the plaintiff had consulted his solicitor about it before the meeting on the 1st November 1999. But he did not know by that date if his solicitor had actually written the letter. In fact the letter was not written until the 4th November 1999, so its receipt could not have been the reason he was put on probation. The plaintiff also stated that immediately after signing the agreement he had told John Flynn that he was expecting that his solicitor was about to or had written to Mr Morris and that he was worried that the receipt of that letter by Mr Morris might be interpreted by him as a breach of condition 2 of the agreement he had just signed. However, it is quite clear that none of these concerns were relevant to why he was put on probation. He was put on probation in accordance with rule 3(g).

62. As for the payment of arrears, and the other payments referred to in the agreement, the position appears to be that the plaintiff gave Mr Flynn cash in the sum of £400 to cover arrears of subscription, as well as a cheque in respect of one of the other items. According to his evidence he had just one cheque with him at the meeting, and a few days later handed over another cheque. It seems from the evidence that there was some problem with these cheques in as much as they were overwritten in handwriting to some extent. The plaintiff's name and the account number at the bottom of the cheques were handwritten for some reason, which meant that they could not be electronically processed by a bank on presentation, and would therefore not go through. It appears that these cheques were not in fact presented by the union for encashment, but neither were they returned to the plaintiff. They appear to have been simply held on the union's file. While it was put to the plaintiff in cross-examination by counsel that he had told John Flynn not to present them as they were worthless, (which was denied by the plaintiff), there was in fact no evidence adduced by the union that this had been said, because unfortunately Mr Flynn was deceased by the time this case came to trial. However when the plaintiff was examining Mr McNamara when he was giving his evidence, Mr McNamara stated, when asked about the cheques:

> *"Mr Flynn said that he contacted you about the cheques to say that there was a handwritten name instead of a printed name, and handwritten numbers, and it was my understanding that you were supposed to have said to Mr Flynn 'don't try to cash those cheques. You'll find yourself in a lot of bother'. [T.3, p.2].*

63. I mention these cheques only as part of the narrative, and because, strictly speaking, it might be seen as a breach of the agreement if cheques were handed over in the knowledge that they would not be met or could not be presented due to the over-writing. However, the trial judge made no finding that the plaintiff was in breach of the agreement for this reason. The question whether the plaintiff breached the union's rules or indeed the terms of this agreement becomes of some relevance later in relation to whether there was any reason why this probationary period did not evolve into full membership after the 31st December 1999.

64. I have mentioned that upon receipt of his probationary membership card the plaintiff was able to resume his employment with Stephen Finn Construction. It appears that Stephen Finn was anxious that the plaintiff resume immediately as otherwise he would have to employ somebody else. In that regard the plaintiff stated in his own evidence that *"it was six weeks to Christmas and really – the builder was phoning me up and asking me, John, if you don't come back we're going to have to get somebody else and he was a nice builder"*. [T.1, p. 20].

65. The plaintiff's evidence was that even after October 1999 Mr McNamara continued to call to the Finn site, and kept telling the plaintiff he was breaking the union's rules. He stated also that he kept asking Mr McNamara what rules he was breaking but that he was not told, and that he also sought a copy of the union's rule book but was not provided with one. He stated that his probationary membership card did not in fact improve his situation, and that he left his job with Stephen Finn Construction because he did not want to be causing trouble for Stephen Finn.

66. It is unclear from the evidence at trial exactly how long his employment continued with Stephen Finn Construction after his resumption there in November 1999. However, replies to particulars state that he left after "approximately two weeks". The trial judge made no finding in that regard. Neither did the plaintiff in his evidence state exactly when he commenced with his next employer, Michael Cusack & Sons. Neither did Mr Kieran Cusack, when called by the plaintiff, state the date of commencement of the plaintiff's employment. However, replies to particulars state simply that he started with Mr Cusack "in December 1999". There is, however, an internal union memorandum among the documents produced by the plaintiff which is dated 9th December 1999 which states:

> *"Mike McNamara telephoned. Site visits today. Mike advised that he spoke to John O'Connell on site today. He said Mr O'Connell was working on this site for several weeks. He said he had to tell Mr O'Connell not to [be] working out in the rain."*

67. This memo states that the plaintiff had been working with Michael Cusack & Son for several weeks by the 9th December 1999. It seems probable therefore that the plaintiff left the Finn site after resuming his employment there in early November 1999 Perhaps the reference to working in the rain at the Cusack site is a reference to a breach of the union's rules, but it cannot relate to the short time he was working on the Finn site in early November 1999. There was no evidence that this is the particular rule that Mr McNamara was referring to when, according to the plaintiff's evidence, he stated that the plaintiff was in breach of the union's rules while on the Finn site. There is no finding in that regard by the trial judge.

68. Mr McNamara gave evidence. He was asked by the plaintiff if the union's attitude towards him had changed after Mr Morris received the solicitor's letter dated 4th November 1999, and that thereafter he was never going to be allowed to achieve full membership of the union. Mr McNamara denied this. The judge intervened in order to clarify the question and the following exchange took place:

> ***"Judge:*** *Now let me ask the question the way a lawyer would, if I may … did the union's position change, by which I mean the Limerick branch, …… when they got news of the [solicitor's] letter that went to … Mr Morris?*
>
> *A. No, your honour, it didn't. The position was at that time that with a probation card being taken out, the applicant would come back in within – at his eight week stage, … when the probation would be up and apply to take out the full card at that stage. Mr O'Connell never came back at the end of the eight week period. As a matter of fact, within that period he went off and joined another union, is my understanding.*
>
> ***Judge:*** *and just while we're on … that, what would happen during the eight-week period? Would it be sort of automatic that he'd get a full card or what could stop [that]? What was the probationary part of it, if you know what I mean? What would stop him getting it?*
>
> *A. The probationary part was to make sure that he complied with the rules of the union and that he demonstrated that to the union, to the branch committee."*

69. This theme was returned to by Mr McNamara when he was questioned again by the plaintiff about what rule of the union he was supposed to have breached which led to him being refused full membership at the end of the probationary period. In that regard, Mr McNamara stated:

> *"The position with your probation period, Mr O'Connell, was, for the end of the probation period was up, and you never came back, and you went and you joined another union and apparently Mr O'Shaughnessy's correspondence will be able to deal with everything in between." [T.3,p.16]*

70. The plaintiff persisted in his contention that he did not get his full membership because of a view in the union that he was breaking the rules, but he did not know what rule he was supposed to have broken and nobody would tell him. At one point of his evidence Mr McNamara stated that he had breached the rules in relation to the probationary period by not returning to the union to get his full membership card, and went on to say that there would have been no problem whatsoever about giving it to him, but he never returned. He drew attention again to the fact that the probationary card itself states on its face that it is not valid beyond 31st December 1999. [T.3, pp. 17-18]

71. The plaintiff was asked by the trial judge who had alleged that he was in breach of the rules. At first he stated that it was Mr McNamara, possibly within days of the agreement being signed when he realised that Mr Morris had received a solicitor's letter. Immediately thereafter he said that it was also Mr Flynn. Indeed, in his Replies to Particulars the plaintiff stated that it was Mr Flynn who called to the Finn site in mid-November 1999 and told him that he was breaching union rules. Mr McNamara denied that he had ever spoken to the plaintiff after the agreement. That would seem to be contradicted by the contents of the internal memorandum to which I have just referred which notes that on the 9th December 1999 Mr McNamara spoke to the plaintiff about working in the rain.

72. The plaintiff also said that Mr McNamara had been on the Stephen Finn site with John Flynn. The judge asked what they had done there, to which the plaintiff replied that *"they just said that you know that you broke the rules of the union and, you know, our agreement et cetera"*. The judge was able to get a clarification of that - the plaintiff explaining that what he was saying was that he was being accused of having broken the union's rules by having the solicitor's letter sent to Mr Morris. The trial judge asked Mr McNamara to respond to that, and he did so by saying that he could not recall any of that - "none whatsoever" – and that this was the first time he had heard it. It is true to say that the plaintiff had not stated this in his evidence over the previous days. [T.3, pp. 20-21]

73. The plaintiff stated that he could see that there was going to be further trouble with the union, and Stephen Finn didn't want any more trouble, and that this was why he left that site and went to work for Cusacks.

74. Whatever is the period of time after 1st November 1999 during which the plaintiff worked for Stephen Finn Construction until he again ceased that employment, a couple of weeks at most, his evidence was that Mr McNamara continued to call to the site and accuse him of breaching the union's rules but without telling him which particular rule, and that he left that job because he did not want to cause trouble there for Mr Finn. Mr McNamara denied this. The trial judge at para. 124 of his judgment concluded that *"in the wake of his probationary period I prefer the evidence of the plaintiff and the employers to that of Mr McNamara".* It is not exactly clear to what period of time that comment relates. Does the phrase "in the wake of" mean that it relates to the period after the probationary period ended? Or does it include the probation period itself? The reference to the employers' evidence could suggest the former given that the employers who were called by the plaintiff all gave evidence relating to employment after the probation period had ended, with the possible exception of Kieran Cusack since the plaintiff seems to have started with him in the second half of November 1999. However, I consider it reasonable to conclude that the trial judge's preference for the evidence of the plaintiff over that of Mr McNamara can be taken as being a general preference, and therefore that he was preferring the plaintiff's evidence in relation to what occurred during the period of probation, as well as thereafter. He was clearly entitled to make that preference.

75. While the trial judge did not address the three periods individually, his overall conclusion that the plaintiff was intimidated, bullied and harassed must be taken to include the probationary period, which I am presently addressing. The first question then is whether the trial judge was correct to conclude that the evidence given by the plaintiff (which he preferred to that of Mr McNamara) as to what happened during the period of probation constituted intimidation. There was certainly no evidence that Stephen Finn felt intimidated in any way. He had died and was unavailable to give evidence in any event. The only intimidation, if there is any to be found, can be intimidation of the plaintiff. In my view the evidence does not go that far. There is no evidence that the union or any official did anything unlawful during this period. The plaintiff said that Mr McNamara and/or Mr Flynn continued to call to the site and told the plaintiff that he was breaching union rules but did not specify which rule, even when asked, and that the plaintiff left the Finn job because he did not want to cause Mr Finn any trouble. That is the extent of the plaintiff's evidence in relation to this period. There was nothing unlawful about the union officials visiting the sites in question. Mr McNamara confirmed that when visiting any site he would have the foreman's permission to be there. There is no evidence of any threat as such made to the plaintiff, nor to other employees on the site, nor indeed to the employer that if he did not terminate the plaintiff's employment further trouble would ensue. The plaintiff's own evidence was simply that Mr McNamara and/or Mr Flynn had continued to visit the site and tell him that he was breaching union rules. The plaintiff's evidence did not go as far as saying that Mr Finn had come to him and stated that because of threats by the union he had to let the plaintiff go.

76. The tort of intimidation is summarised in *Salmond & Heuston* on the Law of Torts [21st ed] at p. 360 as follows:

> *"The role of intimidation includes all those cases in which harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with. This wrong is of two distinct kinds, for the liberty of action so interfered with may be either that of the plaintiff himself or that of other persons with resulting damage to the plaintiff. In other words, the defendant may either intimidate the plaintiff himself, and so compel him to act to his own hurt, or he may intimidate other persons, and so compel them to act to the hurt of the plaintiff."*

77. On p. 361 the authors go on to state that *"it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him. The threats must be made seriously and taken seriously"*.

78. The tort of intimidation is described in Clerk & Lindsell on Torts [18th ed.] at para. 24-65 as follows:

> *"The tort of intimidation – A commits a tort if he delivers a threat to B that he will commit an act, or use means, unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C …… The tort, like the tort of procuring a breach of contract, is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure."*

79. The authors went on at paras. 24-66 to state that *"a threat, for our purposes, is something which puts pressure on the person*

to whom it is addressed to take a particular course, something by means of which that person is 'improperly coerced".

80. The tort of intimidation is described in similar terms in *McMahon and Binchy: Law of Torts* [4th ed.] at para. 32.83 as follows:

> *"The tort of intimidation consists of a threat delivered by the defendant to a person, where the defendant intentionally causes that person to act or refrain from acting in a manner in which he or she is entitled to act, either to that person's own detriment or to the detriment of another."*

81. As for the nature of the threat itself, the authors state the following at para. 32.85:

> *"A threat is an 'intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like'. The threat must be 'of a coercive nature', of the 'or else' kind. There is, thus, a distinction between a threat (which is tortious) and a mere warning or advice (which is not). The courts should be guided, not by the question whether the communication was made in a menacing manner but rather, regardless of how politely it was made, whether it conveyed the intimation that unless the other party complied with a particular course of action, something illegal that he or she would not wish to occur, would take place."*

82. There is no evidence from the plaintiff or from anybody on his behalf to support a conclusion that during the probationary period anything of an illegal nature was threatened in the sense described above which coerced the plaintiff to leave his employment with Finn Construction, or which coerced the employer to terminate his employment during the probationary period. Conclusions must be reached based only on the evidence given to the trial judge, or by inferences which may be reasonably drawn from that evidence. If, for example, the fact is that the union applied some pressure upon Mr Finn or upon the plaintiff that if his employment was not terminated the union would instruct its members to walk off the site, the problem for the plaintiff is that there was no evidence given to that effect, even by the plaintiff himself. The plaintiff's evidence in relation to the Finn site was simply that Mr McNamara called to the site and told him that he was in breach of the union's rules. In my view that evidence does not disclose the sort of threat and coercion necessary to support the tort of intimidation.

83. I should advert to the fact that the plaintiff did state to the trial judge at an early stage of the case (T.1, p. 12) that Mr McNamara *"came onto the site and he told the rest of the masons to stop working immediately until I was evicted off the site"*. If that evidence had related to the couple of weeks in November 1999 when the plaintiff was working on the Finn site it could be considered to constitute evidence of a threat so as to bring it within the tort of intimidation. But it is clear from what appears immediately following that passage of the transcript that it relates to a time in early October 1999 while the plaintiff still held his C2 certificate, and when he was first let go by Stephen Finn on the 11th October 1999, and does not relate to any date during the period of probation after 1st November 1999. This is made clear in the transcript by what immediately follows when the plaintiff goes on to describe what happened after Mr McNamara had called and issued that threat. He stated he was upset, that he called Mr Morris several times at his business number, and that having received no response he called to his home in Kilkenny. That was the occasion in mid-October 1999 when there was trouble between them to which I have already referred, and after which an agreement was signed on the 1st November 1999 which in turn led to the issuing of a probationary membership card.

84. So, it is clear that the threat implicit in that particular piece of evidence cannot form the basis for a finding of intimidation during the probationary period. There is no evidence that the same threat or similar was uttered by either Mr McNamara or Mr Flynn on the Finn Construction site after the 1st November 1999. I would therefore allow the appeal against any finding of intimidation during the period of probation

85. I would also allow the appeal in so far as the trial judge concluded that there was a breach of the plaintiff's constitutional right to work and earn a livelihood during the period of probation. In my view there is no evidence to support that conclusion. The plaintiff had membership of the union. He had a probationary card valid until the end of December 1999. He was not therefore prevented from obtaining employment by reason of being wrongfully excluded from membership during that period, and there is no evidence that the union or any individual union official interfered with those rights while he was so employed.

The Post-Probationary Period:
86. The plaintiff's probationary membership card expired on the 31st December 1999. He never thereafter received a full membership card.

87. The union maintains that the plaintiff should himself have contacted the union to get his full membership card when the period of probation ended, and that since he never did so it was his own fault that he never became a full member. It also maintains that the plaintiff was in breach of the agreement that he signed on the 1st November 1999 because as early as 4th January 2000 he started to write again to Mr O'Shaughnessy at his home address, whereas he had agreed that all his dealings would be conducted through the Limerick branch only.

88. The plaintiff maintains, on the other hand, that the union continued wrongfully to refuse him full membership, and that they never wanted him to become a full member because they regarded him as being troublesome.

89. The plaintiff's case is that in the aftermath of the expiry of the probation card he was wrongfully excluded from full membership and at the same time was being prevented from either gaining or keeping employment on sites around Limerick because he was not a member of BATU. His evidence was that Mr McNamara called to any site he might have been working on after 1st January 2000, and informed the employer that the plaintiff was not a BATU member, and that as soon as this information was imparted the employer let him go. It will be recalled that these employers had each agreed with the union, as they were entitled to do, that their block layers would all be persons who were members of "the appropriate union" which was taken by all to be BATU. These employers were perfectly entitled to agree that matter with the union, and therefore to let a block layer go if it transpired that contrary to what they understood the position to be the person in question was not in fact a BATU member. Neither was there anything unlawful about a union official informing the employer of the correct factual situation that any particular block layer was not a BATU member. What is not permissible however was for BATU to insist on that agreement being complied with and at the same time to exclude the plaintiff, who was a qualified block layer from membership without good reason.

90. There was clearly a conflict between the plaintiff's evidence that Mr McNamara called to sites after the 1st January 2000 and caused him to lose his employment, and Mr McNamara's evidence in denial of this. I have already referred to the fact that the trial judge stated that where there was conflict "in the wake of his probationary period" he preferred the evidence of the plaintiff and the employers whom he called to give evidence. His conclusions in this regard are contained at paras. 122–125 of his judgment as follows:

> *"122. The evidence is clear and consistent that BATU sought to enforce [a] closed shop for block layers so that only*

their members were employed on building sites and, at the same time, excluded the plaintiff from membership. There is independent evidence that one builder was warned about employing Mr O'Connell after the particular job ended. It is a matter of inference from the evidence as a whole that the Union policy would have prevented him from getting work or of retaining it when the officials became aware that he was on a building site. The plaintiff's own testimony coheres with the known or admitted facts and his behaviour over the years since these events happened is consistent with his account.

123. First, there is the plaintiff's experience with Mr Stephen Finn. Second, his evidence is that he would have been re-employed by Cusack Builders if he had been in the Union. Third, the evidence as to McGrath Construction confirms the policy, power and attitude of the Union. Fourth, the evidence of Mr Paddy Gallagher illustrates the capacity of the Union officials to dictate whether and when a tradesman might be permitted to work.

124. In regard to the plaintiff's experience on building sites in the wake of his probationary period, I prefer the evidence of the plaintiff and the employers to that of Mr McNamara where there is a conflict. The social welfare document is also, as far as it goes, some corroboration of Mr O'Connell's evidence of removal from site. It is too much of a coincidence that Mr McNamara came to be visiting the plaintiff's sites on other separate business and yet had nothing to do with what happened to the plaintiff. Besides, his recalled reticence is quite inconsistent with the policy that he and his colleagues had announced and were not just implementing but enforcing.

125. Mr O'Connell was entitled to a full Union card but he was treated as a pariah from early in the year 2000 and was prevented from working. In desperation, he joined UCATT so as to be a member of a union, some union, and thus not be open to the objection that he was a non-union block layer. However, UCATT backed off when BATU made a complaint to Congress that it had given membership to a block layer, but that is merely a side issue and is not really relevant." [emphasis added]

91. At an earlier part of his judgment the trial judge expressed some conclusions on the failure of the plaintiff to achieve full membership after the period of probation ended. In this regard he stated at paras. 117 – 118 of his judgment:

"117. The plaintiff did not become a full member of the Union <u>but the Union witnesses did not provide any solid reason for that</u>. Mr O'Connell never got his full union card during, or at the end, of the probationary period. The Union officials gave evidence that he did not come back to get his full union card, but that makes no sense. It is frankly absurd in a situation so fraught with serious consequences for the plaintiff to propose that explanation as a reason for depriving an otherwise qualified applicant. Neither is it suggested that anybody informed the plaintiff of this simple step that would give him the membership he sought.

118. In my view the probationary period should have led to full membership <u>unless something happened</u> during the period that would have disentitled the probationer from progressing. Mr O'Connell did not progress, but there is no evidence that he did anything to disqualify himself from doing so. He was therefore entitled on his case and on this assumption to full membership but the Union did not grant him that status and did not furnish any reason for that decision.[Emphasis added]

92. In my view the conclusion by the trial judge that there was no "solid reason" given by the union for the plaintiff not gaining full membership after his period of probation ended is one that he was entitled to reach on the evidence. While not specifically addressed by the trial judge, I would also add that the obligation to conclude the assessment of the plaintiff's suitability rested at all times under the union's rules upon the union, and that as a matter of law it was not incumbent upon the plaintiff to follow up his application after the probation period ended, no matter how logical and sensible it might be for him to do so. For convenience I will again set forth the provisions of rule 3(g) of the BATU rules. It provides:

"3(g): Before being admitted to full membership of the Union an applicant for membership whom it is proposed to admit shall first be accepted as a probation member for a period of eight weeks during which time the applicant shall pay the entry fee which shall from time to time be prescribed by the National Executive Council <u>and the applicant's suitability for membership of the Union shall be assessed</u>. The acceptance of a person as a probation member shall not prejudice the making of a final decision on the application at the end of or at any time during the probation period. If the entry fee is not paid during the probationary period the application shall not be considered further and all monies previously paid by the applicant shall be forfeited to the Union. A probation member shall not be entitled to vote in any election or on any question coming before the members of the Union but in every other respect (other than in that provided by this paragraph) shall have the same rights and obligations as full members." [Emphasis added]

93. The plaintiff was certainly an applicant for membership who had been given probationary membership. This rule clearly indicates that during the probationary period the applicant's suitability for full membership "shall be assessed". In the case of the plaintiff there is no evidence that this was ever done. It would appear that even if there was a decision made that he was not suitable he was never so informed either formally or at all, and was certainly not given any reasons as to why he was assessed as unsuitable if that was the case. The union was obliged under its rules to complete the application process by making that assessment and reaching a decision one way or the other, which would then have to be communicated to the plaintiff. They failed to do this, and, in my view, it is incorrect for the union to place the onus upon the plaintiff to follow up his own application at the end of the probationary period. I would therefore uphold the trial judge's finding that the plaintiff was wrongfully excluded from membership of the union after his probationary period ended by reason of the fact that the union did not complete the application process as it was obliged to do in accordance with rule 3(g).

94. However, the question of what if any harm to the plaintiff actually flowed from his wrongful exclusion from the union is a separate matter. I will address the evidence given by the employers in relation to their employment of the plaintiff during the year 2000, and the reasons for those employments coming to an end. The plaintiff called these employers in order to establish that he had been let go by the employers as soon as they were informed by the union officials that he was not a BATU member. The trial judge concluded that the evidence of the employers was to be preferred to that of Mr McNamara where there was a conflict. He did not, however, set out that evidence, or analyse it in any detail. One must look closely at the evidence given by these employers when they were called by the plaintiff, to see if that evidence, taken at its height, in fact supports what the plaintiff contends in respect of the post-probation period, and specifically the year 2000. In my view it does not. I would also add that in so far as the trial judge placed reliance upon the memorandum from the Department of Social Welfare file as corroboration of the plaintiff's evidence in respect of this period, he erred in doing so since that memo clearly related to his being let go by Stephen Finn on the 11th October 1999 and not to any period post- probation.

Michael Cusack & Son:
95. The plaintiff's evidence establishes in my view that he left the employment of Mr Finn around the middle of November 1999. His next employment was with Michael Cusack & Son, and he was certainly working on that site by early December 1999 if one considers the union internal memorandum which refers to Mr McNamara visiting that site on the 9th December 1999 and advising the plaintiff not to work in the rain. It is confirmed also in the plaintiff's affidavit which he swore on the 28th November 2005 to ground his application for discovery in these proceedings. That same affidavit avers that he was forced to leave the Cusack site in August 2000 when Mr McNamara and Mr Flynn let it be known that he was not a BATU member. The plaintiff gave that same evidence to the trial judge.

96. The evidence of Kieran Cusack was that it was his father who actually took on the plaintiff as a block layer at the relevant time between November 1999 and September 2000, and that he himself did not know the plaintiff at that time. The plaintiff asked him if he could recall visits to the site by Mr McNamara. Mr Cusack said he could not, and *stated "I probably had so many jobs on I wouldn't have been taking any notice"* (T.4, p. 5). He went on to state that *"I have always had a good working relationship with BATU, you know, they've always been fair with me, you know, I have worked with them in accordance with their rules"*.(T.4, p. 6). He was very clear that he had had no trouble from BATU. The trial judge asked him specifically if he knew anything about the plaintiff's assertion that BATU caused him to be *"drummed out of work"* and that *"employers gave in"* against their will. In answer Mr Cusack at first stated that the plaintiff did work for them, but that he was let go when the work was finished on that site. The trial judge then sought some clarification from Mr Cusack by saying: *"… correct me if I'm wrong – I'm understanding from that that you are not saying that union people visited the site and warned you off Mr O'Connell and/or Mr Fogarty"*, to which Mr Cusack replied: *"Union people do visit sites to make sure that everything's in order, <u>but I never had any pressure from them</u>"* [emphasis added] - [T.4, p.9] When cross-examined by counsel for BATU, Mr Cusack said he could not remember Mr McNamara coming to him specifically about the plaintiff. He said also that the plaintiff <u>was not forced to leave</u> that employment, and that he had left to go to work for Davins only <u>when the block laying work on that job had been completed.</u> He said that neither BATU nor Mr McNamara had any influence on the plaintiff's employment on that site coming to an end. [T.4, p. 13]. This evidence does not in my view support the trial judge's finding that post-January 2000 the union coerced the plaintiff's employers to let him go because he was not a BATU member. It seems to say the opposite in fact. I am satisfied that under *Hay & O'Grady* principles this is a finding of fact which this Court is entitled to overturn.

Davins:
97. The plaintiff's employment with Mr Cusack ended in August or perhaps early September 2000 when the block laying work on that site was completed. One way or another there was little or no gap in employment because the evidence is clear that the plaintiff started on another job on the 15th September 2000 with another firm building firm named Davins. Mr Paddy Gallagher of that firm was called by the plaintiff to give evidence on his behalf. I should add that by this time the plaintiff had in fact joined another union, namely UCATT. According to the same affidavit to which I have referred earlier, the plaintiff joined UCATT in January 2000. However, the correct date would seem to be April 2000. Nothing turns on that discrepancy. While he was therefore a member of a union, it was not, for present purposes "the appropriate union", namely, BATU. Mr Gallagher stated in his evidence that Davins was one of the firms who had signed an agreement with BATU that only BATU members would be employed on their site.

98. Mr Gallagher stated in answer to the plaintiff that he recalled receiving a complaint from Mr McNamara of BATU shortly after the plaintiff had commenced employment there in September 2000. The complaint was that the plaintiff was not a BATU member, and that he could not be employed on the job. Mr Gallagher stated that he had understood that the plaintiff was in fact a member of BATU. In his answer to the plaintiff he stated *"I understood that you were in the union as all people had to be"* (T. 5, p. 2). The plaintiff asked Mr Gallagher were *there "ultimatums and threats up to you about it [sic]?"* to which Mr Gallagher replied: *"… I talked to Mr McNamara … and in fairness to him he allowed you to finish the job … but that is it"* (T.5, p. 2).

99. Mr Gallagher went on to say that he had dealt with Mr McNamara for a long time *and "I never had any problem with the man"*. Following an intervention by the trial judge Mr Gallagher stated again what had occurred, and in that regard stated: *"He [Mr McNamara] just said that this man isn't in our union and there's an agreement that only their members work in Limerick, and I said I didn't know that. And I said that's okay. I'll talk to him. In the meantime I had asked him for his union card when I heard this first and he produced a union card of the other union"* (T. 5, p. 3).

100. At a later point in his evidence in response to the trial judge's request that Mr Gallagher state what he knew of the plaintiff, he explained that Mr McNamara had approached him and had told him that the plaintiff was not a BATU member and could not work on the site, but went on to say *"I then spoke to Mr McNamara about him and in fairness Mr McNamara says 'Yes, we'll let him finish' because it was the good days and it was hard enough to get block layers or bricklayers and he said: 'let him finish the job but you can't employ him after that'. That's the whole and all of it I think that I know of'."*(T.5, p. 5). The block laying work at Davins finished in mid- November 2000 and at that point the plaintiff was let go.

101. Under cross-examination by BATU Mr Gallagher confirmed that there was an agreement in place between Davins and BATU that only BATU members would be employed on the site. He also confirmed that it was not a question of the plaintiff being singled out by BATU in this regard, and that the same would have happened to any other person who was not a BATU member and who might have been working on the site, and that it was the enforcement of a BATU policy, which was not directed at any particular person. (T.5, pp.6-7).

102. So again, I must conclude that there is nothing in Mr Gallagher's evidence which supports a finding that the plaintiff's employment at Davins came to an end as a result of threats and intimidation from Mr McNamara or BATU generally. It is true that it came to an end because he was not a BATU member, but the evidence also is that he was allowed to remain on that job until it was completed, even though he was not a BATU member. I should add, of course, that the plaintiff gave evidence that if he was a member of BATU he would also have been able to get further work from Davins immediately after that particular job finished, as he is aware that there were about 15 block layers taken on for another Davin job soon after that. That may be so, but it does not speak to the torts of intimidation and harassment.

Frank McGrath Construction:
103. The plaintiff next called Mr Frank McGrath to give evidence. His employment with that company started on the 5th July <u>2002</u>. This employment was very short-lived and ended on the 8th July 2002 after the foreman was informed by Mr McNamara that the plaintiff was not a BATU member. The foreman told the plaintiff he could not continue to work on the site. It appears that the plaintiff at first did not leave the site until he received some assurance that he would be paid for the work he had done. This caused problems with other block layers. However, the plaintiff was paid, and the plaintiff left the site.

104. When giving his evidence to the trial judge, Mr McGrath could not recall the plaintiff actually starting on the site, but he was able to give evidence of some of the difficulty that ensued, culminating in the dismissal of the plaintiff from the job, albeit that he heard about it from others since he himself had not been directly involved. His evidence therefore is largely hearsay in this regard. But he stated the following by way of narrative during his direct evidence (T. 5, pp. 9-10):

> *"Now, unfortunately it's all kind of second-hand because I wasn't directly involved with the matter at the time but my recollection of it is that Mr O'Connell approached the site foreman looking for a job in Castleconnell. We were building houses there at the time and he was asked at the time if he had a union membership. He told the foreman that he had but that he didn't have the card with him and that he would present it when – in due course. Apparently towards the end of that week Mr McNamara visited the site to speak to some of the other block layers and I think he became aware at that point that Mr O'Connell was on the site and he spoke to the foreman about it and the foreman told him that Mr O'Connell had a union card and the foreman was then informed by Michael McNamara that he didn't in fact have a BATU card. At that point the foreman approached Mr O'Connell and told him that he couldn't continue to work on the site because it had been a tradition in Limerick that only BATU members worked as block layers and that was a kind of custom and practice that had been observed for many years and was always observed by our company. At that point, and I do have recollection in this because this is the only bit that I had direct involvement in, I got a phone call from a Garda in Castleconnell because at that point I think Mr O'Connell had effectively staged a sit-in on the site and the guard asked me how, you know, could I guarantee that Mr O'Connell would be paid, and that if he was guaranteed that he would be paid he would discontinue his sit-in. I replied that of course he would be paid for whatever he had done and that was effectively the end of the matter at that point.* "

105. Mr McGrath was cross-examined by counsel for BATU, in the course of which he was asked about a particular Clause 14 of the contract of employment signed by the plaintiff and the company when the plaintiff commenced there on 5th July 2002, and he confirmed that it is the same as would be signed by any tradesman taken on by the company. Clause 14 specified that all tradesmen must be *"members of an appropriate trade union"*. He stated that in relation to block layers this would be BATU, and in relation to carpenters for example that would mean UCATT. He stated also, in so far as the plaintiff had stated at the outset that he was a union member, *"he certainly had a union card but he didn't seem to have the relevant union card"* (T. 5, p. 16).

106. Mr McGrath was asked also if the result for the plaintiff would have been the same regardless of who had informed him that the plaintiff did not have BATU membership, and he confirmed that this was so, and that it was not just because it was Mr McNamara who had drawn it to his attention. He said that it was the policy on the site, and that it was specifically written into the contract of employment, and it applied to anybody.

107. There is nothing in Mr McGrath's evidence that establishes the tort of intimidation. There is no doubt from that evidence, and which confirms the plaintiff's own evidence, that the absence of a BATU union card was the reason why the plaintiff was let go. But it falls short of what is necessary to establish intimidation. The employer was not threatened or intimidated. His foreman was simply informed of the fact that the plaintiff was not a BATU member, having believed previously that he was. The agreement whereby he would employ only BATU members was in place, and once he was informed that the plaintiff was not a BATU member, he let the plaintiff go in accordance with the agreement. There was no coercion involved. Clearly if he had not done so, BATU would in all likelihood have taken steps that might ensure that the plaintiff was let go. But that scenario does not arise here.

108. There was no evidence adduced as to what occurred between the time the plaintiff ceased to be employed by Davins in November 2000 and the 5th July 2002 when his employment with McGrath Construction commenced, or whether indeed the plaintiff was able to get employment during those dates.

109. Having considered all the evidence adduced by the plaintiff, and having considered his submissions on this appeal, and indeed the submissions of John Rogers S.C. for BATU on this appeal, I consider that there was not a proper basis for the finding of the trial judge that the defendants *"engaged in a campaign against the plaintiff that constituted the torts of intimidation and conspiracy by excluding him from membership and threatening builders who employed him"*. In that respect I would allow the defendants' appeal.

Breach of Constitutional Rights:

110. The trial judge also concluded that the defendants had wrongfully excluded the plaintiff from membership of BATU, and had prevented him from working as a block layer because he was not a member of that union, and that this constituted a breach of his constitutional rights, entitling him to be compensated in damages, those damages to be assessed in due course in the light of losses actually sustained as a result of the breach.

111. .That is a conclusion that the trial judge was entitled to reach in the light of the evidence which he heard though, in my view, not as against the second, third and fourth named defendants. The evidence falls short of establishing that Mr Morris played any part in the breach of the plaintiff's constitutional rights after January 2000, and it is clear also that any actions taken by Mr O'Shaughnessy and/or Mr O'Shaughnessy were taken in their capacity as officers of the union. I have already expressed my respectful agreement with the trial judge's conclusion that the plaintiff was wrongfully excluded from membership of BATU for the reasons I have stated. A plaintiff's entitlement to claim damages for a breach of his constitutional rights was stated in the following terms by Walsh J. in *Meskill v. C.I.E.* [1973] I.R. 121 at pp. 132-133:

> *"It has been said on a number of occasions in this Court, and most notably in the decision in Byrne v. Ireland, that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries with it its own right to a remedy or for the enforcement of it. Therefore if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right. As was pointed out by Mr Justice Budd in Educational Company of Ireland v. Fitzpatrick (No.2), it follows that 'if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens not to interfere with it'. He went on to say that the Courts would act so as not to permit a person to be deprived of his constitutional rights and would see to it that those rights were protected."*

112. In this context, the critical considerations so far as the present case are concerned are, first, that the plaintiff's ability to pursue a chosen livelihood were prejudiced from January 2000 onwards by the fact that he was not admitted by the defendant Union to membership. Second, the union has advanced no sufficient reason or "solid reason", to use the words of the trial judge, for why the plaintiff was not given full membership of the union at the end of the probationary period. Third, the Union enjoyed an effective monopoly in the Limerick region where the plaintiff lived and worked. The trial judge's findings to this effect are clearly supported by the evidence.

113. In *Murphy v. Stewart* [1973] I.R. 97, 117 Walsh J. stated:

> "The question of whether the right is being infringed or not must depend upon the particular circumstances of any given case; if the right to work was reserved exclusively to members of a trade union which held a monopoly in this field and

the trade union was abusing the monopoly in such a way as to effectively prevent the exercise of a person's constitutional right to work, the question of compelling that union to accept the person into membership (or, indeed, breaking the monopoly) would fall to be considered for the purposes of vindicating the right to work."

114. This passage is rather apposite as far as the present case is concerned. As I have already pointed out, the Union did indeed enjoy a monopoly in the relevant field in the Limerick region and its failure to permit the plaintiff to become a member certainly interfered with his constitutional right to earn a livelihood. The right in question can best be described as "the right of every citizen to earn his or her living from any lawful vocation, trade, business or profession": *see Casey v. Minister for Arts* [2004] 1 I.R. 402, 419, *per* Murray J. Although this right to earn a livelihood is sometimes described as an unenumerated personal right for the purposes of Article 40.3.1 (see, *e.g.*, the judgment of Kenny J. in *Murtagh Properties Ltd. v. Cleary* [1972] I.R. 330), there is also clear authority for the proposition that the right to earn a livelihood is a dimension of the protection of individual property rights protected by Article 40.3.2 (see, *e.g. Hand v. Dublin Corporation* [1991] 1 I.R. 409, *Cox v. Ireland* [1992] 2 I.R. 503 and *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321). The precise constitutional provenance of the plaintiff's constitutional right to earn a livelihood probably does not greatly matter, at least so far as the present case is concerned. What does matter is that once the right has been identified (as it clearly has been), it then becomes the duty of the courts to defend and vindicate that right.

115. A plaintiff can normally only sue for breach of constitutional rights where the ordinary law (and perhaps especially the ordinary law of torts) is inadequate or ineffective for the purpose of vindicating the constitutional rights in question: see *Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.L.R.M. 623, 636 *per* Henchy J. So far as the present case is concerned, it is implicit from the reasoning of the Supreme Court in *Murphy v. Stewart* that the torts of intimidation and conspiracy would be inadequate for this purpose, precisely because these causes of action do not address the specific problem presented in a case such as this one, namely, the failure by a union exercising monopoly control of entry to the relevant labour market by reason of closed shop agreements made with employers to admit an otherwise qualified applicant for membership, with consequent implications for that person's right to earn a livelihood.

116. It is also clear from the case-law that the action for breach of constitutional rights can be invoked against purely private parties. Thus, for example, in *Lovett v. Grogan* [1995] 3 I.R. 132 the Supreme Court granted the plaintiff an injunction restraining the defendant (a road transport operator) from operating an illegal transport service as this interfered with the former's constitutional right to earn a livelihood by lawful means. Of course, if the courts could not grant appropriate relief (whether by way of damages or, as the case may be, an injunction) against a private party such as a trade union, the substance of the constitutional right to earn a livelihood might not be appropriately vindicated, precisely because (as here) in many cases the party interfering with that constitutional right will itself be a private party.

117. It follows, therefore, that where the union wrongfully excluded the plaintiff from membership of BATU after 31st December 1999 by failing to determine his application for membership by not deciding upon it as it was required to do under its own rule-book and in circumstances where he was prima facie qualified for membership, its actions, in informing employers that he was not a member, leading them to dismiss him or not to employ him further because he was not a member of BATU are sufficient to constitute a breach of his constitutional right to earn a livelihood. In so far as the plaintiff suffered losses which are properly attributable to such breach, he is entitled to claim damages. This is a matter which will now have to be determined by the High Court. The plaintiff will obviously have to establish that he suffered an actual loss by reason of this infringement and the ordinary rules governing the assessment of damages for civil wrongs (including the duty to mitigate) will naturally apply in respect of any such assessment.

118. I would add, however, that in so far as any individual union official defendant is concerned each was at all times acting in his capacity as an official of BATU and carrying out BATU policy, and while the trial judge held them to be personally liable, I would allow their appeal against that finding, particularly so where any finding of conspiracy and intimidation is not upheld.

119. I would therefore allow the appeal by BATU against the findings of conspiracy and intimidation, and remit the case to the High Court for the assessment of any damages found to properly from the breach of constitutional rights as found above.

Dismissal of case against the Construction Federation of Ireland

120. As for the plaintiff's appeal against the dismissal of the claim against the second named defendant, Construction Federation of Ireland, I would dismiss that appeal for the reasons given by the trial judge and since the evidence is clear that by the time the proceedings were commenced against that defendant, the period under the statute had long expired. In truth, the plaintiff did not press that appeal.

Conclusions

121. In summary, therefore, my principal conclusions are as follows:

First, the evidence clearly establishes that as the plaintiff did not surrender the relevant C2 form prior to October 1999 so that he was only entitled to membership of the Union qua "worker" from that point onwards, the trial judge's findings against the defendants in respect of the period up to the end of October 1999 cannot stand.

Second, during the period from November to December 1999 the plaintiff had been admitted as a probationary member of the union, holding a union card. The trial judge's finding that there had been intimidation on the part of the Union (or the second, third and fourth defendants) or a breach of the plaintiff's constitutional right to earn a livelihood during this period is not borne out by the evidence and, accordingly, cannot stand.

Third, the plaintiff never received a union card after the probationary period. The trial judge was entitled to conclude on the available evidence that no valid justification for the failure to admit an otherwise prima facie qualified person from membership had been advanced by the Union.

Fourth, the trial judge's conclusions that the defendants had engaged in the torts of intimidation or conspiracy from January 2000 onwards by threatening or intimidating employers who had employed the plaintiff on the ground that he did not have a union card are not borne out by the evidence and accordingly cannot be sustained.

Fifth, the trial judge was entitled to find that the Union (but not its individual officials) had infringed the plaintiff's right to earn a livelihood by excluding him from membership in circumstances where it enjoyed an effective monopoly control of access to the relevant market and by then informing employers that he was not a member, leading them to dismiss him or not to employ him further because he was not a member of BATU. The assessment of damages in respect of this breach of constitutional rights will have to be remitted to the High Court for determination.

Sixth, the trial judge's finding that the action against the Construction Industry Federation was statute-barred and out of time is clearly established on the evidence and the plaintiff's appeal in respect of this discrete claim must accordingly be dismissed.