Neutral Citation: [2013] IEHC 523

THE HIGH COURT

[2004 No. 19859 P.]

BETWEEN

GERALDINE NOLAN

PLAINTIFF

AND

JOSEPH CARRICK

DEFENDANT

AND

[2004 No. 19860 P.]

JACQUELINE O'TOOLE

PLAINTIFF

AND

JOSEPH CARRICK

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered the 25th day of October 2013

The plaintiffs in these actions obtained damages against the defendant following trials before judge and jury on the 20th and 21st November, 2012 arising from the sexual abuse of the plaintiffs by the defendant. Following the judgments, the plaintiffs sought and obtained various orders to prevent the defendant from dissipating his assets. The two actions appeared in the jury list which commenced on the 13th November, 2012. An order was made on that day allowing the defendant's solicitors to come off record. That application was made in the absence of the defendant, but he had furnished a written consent to the application. It appears to be the case that an application was also made on behalf of the defendant to take the cases out of the list having regard to a letter from an orthopaedic surgeon stating that the defendant was booked for admission to Mount Carmel Hospital on the 20th November, 2012, for total hip replacement and which noted that the defendant was "presently housebound".

The two actions were left in the list and the former solicitors for the defendant advised the defendant by email that the cases remained in the list and that there was some possibility that the cases might go ahead "tomorrow or later in the week".

The defendant did not appear in court on any subsequent day and the actions proceeded. Ms. Nolan obtained a decree against the defendant in the sum of €700,000 and Ms. O'Toole obtained a decree in the sum of €4 million. Each obtained orders for costs.

The defendant is now represented by new solicitors. A series of motions have been brought on his behalf seeking various reliefs and seeking to lift injunctions relating to the dissipation of his assets and the reversal of an order appointing a receiver by way of execution. In addition, this motion was issued on the 11th April, 2013 seeking an order pursuant to O. 36, r. 33 of the Rules of the Superior Courts setting aside the judgment and verdict of the court; if necessary, an order extending the time within which to make such application and an order pursuant to the inherent jurisdiction of the court setting aside the verdict and judgment in each case.

The applications herein were grounded upon an affidavit of Joseph Burke of McCartan and Burke, solicitors who are now on record on behalf of the defendant herein. It is convenient to deal with both applications together as the hearing before the court dealt with both sets of proceedings at the same time and the arguments and issues are identical.

The defendant's present solicitors came on record on the 14th February, 2013. Prior to that date, the defendant himself swore an affidavit of discovery on the 23rd January, 2013. That affidavit was in connection with his financial circumstances. Further affidavits were sworn by the defendant on the 14th February, 2013, and on the 5th March, 2013, dealing with various ancillary issues herein.

Order 36, r. 33 of the Rules of the Superior Courts provides as follows:

> "Any verdict or judgement obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem fit, upon an application made within six days after trial."

The first point to note is that an application pursuant to O. 36, r. 33 should be made within six days after the trial at issue. The application in these cases is out of time. The Notice of Motion seeking this relief was not issued until the 11th April, 2013. Indeed, it was noted that the application was made in accordance with the directions of the court. By way of background, the matter had been listed before the court in relation to the injunctive relief granted by the court and it was intimated to the court that an application would be brought to set aside the judgments. It was made clear to the parties that one of the issues to be considered by the court on the hearing of any such application would be the extent of the jurisdiction of the court to make an order setting aside the verdict of the jury and the judgment of the court, whether pursuant to the application under O. 36, r. 33 of the Rules of the Superior Courts or pursuant to the inherent jurisdiction of the court.

There are no Irish authorities dealing with the scope of O. 36, r. 33 of the Rules of the Superior Courts. I was referred by counsel for the plaintiffs and the defendant to a number of English authorities dealing with the corresponding rule. The first of those is the decision in *Schafer v. Blyth* [1920] 3 K.B. 140. The defendant in that case did not appear at that trial date and judgment was given against him. Lush J. at p. 142 of the judgment stated:-

> "It cannot, I think, have been intended that the period of six days appointed by the rule should in every case be treated as a fixed period incapable of extension, in as much as a litigant might be absolutely prevented by illness or an accident, or other circumstances from making an application within the six days, and in that case a grave injustice might be worked

> if he was debarred from making the application at a later date."

In the later case of *Wise v. Swami Omkarananda*, a decision of the Queen's Bench Division, (21st February, 1985), Popplewell J. relied on the decision of Lush J. saying:

> "It is clear from the terms of the order and from the authorities which are cited in the notes, and in particular the decision of Mr. Justice Lush in the case of *Schafer v. Blyth* [1920] 3 K.B. 140, that this court has unfettered discretion as to how to deal with an application under this order, and the basic rule, as it seems to me, by which the court should be guided, is to seek to do justice between parties."

One of the difficulties in that case was that Mr. Swami was in prison at the time of the judgment in issue. In circumstances where the court was satisfied that as soon as he was notified of the proceedings he took proper steps to seek to set the judgment aside, he was given leave to make the application even though it was out of time. Ultimately, the defendant in that case was not allowed to defend the plaintiffs claim but was permitted to reopen a counterclaim.

Reference was also made to the judgment in the case of *Hayman v Rowlands* [1957] 1 All E.R. 321. In that case it was held, *inter alia*, that where a party failed to appear by mistake, a new trial should be ordered if it could be done with injustice, the other party being compensated in costs. Apparently the defendant in that case mistook the date of the case. He though it was listed in October, whereas it was heard in September. When he discovered the mistake, he went to a solicitor, paid an amount of rent outstanding into court (the case was an ejectment action) and applied for a new trial. Denning L.J. at p. 323, observed:-

> "What then is to be done? I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him, but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or weakness of it does not matter. I think it plain in this case that the tenant had a defence on the merits. He had a defence on the question whether it was reasonable to make on order for possession against him."

Thus, the defendant in that case was allowed to set aside the judgment. A particularly useful decision is that in the case of *Shocked and Another v. Goldschmidt and Another* [1994] Times (41h November, 1994) a decision of the Court of Appeal.

In that case the court (Leggatt L.J.) set out a list of propositions derived from the authorities as follows:-

> "1. Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he would normally be bound that decision.
>
> 2. Where judgment was given after a trial it was the explanation for the absence of the absent party that was most important: unless the absence was not deliberate but was due to accident or mistake, the court would be unlikely to allow a rehearing.
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> 3. Where the setting aside of judgment would entail a complete re-trial on matters of fact which had already been investigated by the court, the application would not be granted unless there were very strong reasons for doing so.
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> 4. The court would not consider setting aside a judgment regularly obtained unless the party applying enjoyed real prospects of success.
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> 5. Delay in applying to set aside was relevant, particularly if during the period of delay the successful party had acted on the judgment, or third parties had acquired rights by reference to it.
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> 6. In considering justice between parties, the conduct of the person applying to set aside the judgment had to be considered; where he had failed to comply with orders of the court, the court would be less ready to exercise its discretion in his favour.
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> 7. A material consideration was whether the successful party would be prejudiced by the judgment being set aside, especially if he could not be protected against the financial consequences.
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> 8. There was a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither was short."

Leggatt J went on to observe:-

> "When she had buried her head in the sand, Ms. Shocked had made an election by which she should be bound, in default of special circumstances. There were none. Her explanation for non attendance showed it was deliberate and even if she was in personal difficulties, she did not explain why no application could have been made for an adjournment."

The propositions outlined by the Court of Appeal in the Shocked case seem to me to provide a useful guide to the approach to be taken by this Court in considering an application pursuant to O. 36, r. 33 of the Rules of the Superior Courts. There are a number of facts to be borne in mind in considering this issue. First, the defendant had consented in writing to his then solicitors coming off record on the 13th November, 2012. An application appears to have been made by his former solicitors for an adjournment based on the letter of his orthopaedic surgeon, which noted that he was booked for a hip replacement on the 20th November, 2012. The case was not adjourned, but was left in the list and the defendant was notified of this by email by his former solicitors and advised that the case could go ahead "tomorrow or later in the week".

Thus, the defendant had been notified that the case had not been adjourned and remained in the list. In his affidavit, sworn on the 5th March, 2013, the defendant stated that he did not attend court the following day or later in the week, because he was not fit to do so. He also stated that he did not attempt to instruct new solicitors. It is relevant to note also that the reason his former solicitors gave for coming off record was "that his financial situation has deteriorated and that he is no longer in a position to fully instruct solicitors and counsel for the defence of the civil proceedings nor to fund the defence of a civil proceedings".

I should make one thing clear at this point: it is not part of the function of this Court on this application to revisit the decision of the court made on the 13th November, 2012, to leave the cases in the list. The cases were left in the list and no appeal was brought in

respect of that decision.

The defendant has complained that he was not informed that the cases remained in the list for the following week, but it seems to me that once a party who had been represented by solicitors consents to an application by those solicitors to come off record, the onus rests on them to keep themselves informed as to the status of the case, particularly where it is beyond dispute that the defendant in these proceedings had been informed that the cases had not been adjourned. Clearly, the defendant herein did not do this. He opted instead to undergo surgery on the 20th November, 2012.

As I have already said, following the refusal of the court to adjourn these cases, the defendant chose not to appeal that decision, attend court, or arrange for new solicitors or anyone else on his behalf to attend court. In other words, there appears to have been a deliberate decision on the part of the defendant not to attend court following the order allowing his solicitors to come off record. I acknowledge that the defendant had problems arising from his hip and the imminent operation for the replacement of his hip, but this is a case in which the letter from Dr. Dudeney of the 7th November, 2012, was available to the court when the case was left in the list. The defendant subsequently expressed the view that he was not fit to attend the court on the day after the 13th November, 2012, and did not instruct new solicitors to do so. It appears from his affidavit of the 5th March, 2013, that he knew the cases were listed for hearing, remained in the list and yet took no steps to deal with the circumstances which arose at that time. Accordingly, it would appear that one can safely say that there could have been no element of mistake or surprise about the cases being listed. Further, he stated in his affidavit that he did not give any consideration to the consequences of not attending at the trials.

One of the propositions set out in the *Shocked* case was to the effect that a court would not set aside a judgment regularly obtained unless there was a real prospect of success for the party applying to set aside. A striking features of the application before this court is that nothing has been put before the court dealing with the prospects of success or otherwise of the defendant in these actions if the judgments were to be set aside. The pleadings contain a traverse of the plaintiff's claims but there is nothing on affidavit as to the likely prospects of success of the defendant's case. Thus one cannot say that the defendant has any prospect of success in respect of the cases. Further, if the judgments were to be set aside, it is likely that the actions would be some time at hearing.

It seems to me that the purpose of O. 36, r. 33 of the Rules of the Superior Courts is not to deal with circumstances such as those which arose in this case. This is not a case of inadvertence, mistake or surprise. It is not the case that the defendant was unaware of the fact that the proceedings were in a list for hearing. As I have said, it appears that a deliberate decision was made by the defendant not to attend court. The defendant did not instruct a new solicitor to attend court, even for the purpose of renewing the application for an adjournment, nor did anyone else, such as a family member, attend court on behalf of the defendant. Therefore it seems to me O. 36, r. 33 of the Rules of the Superior Courts, is not applicable to the facts of this case. Order 36, r. 33 is there to avail those parties who by accident or mistake or for some similar reason were not aware of the trial date and consequently suffered a judgment being given in their absence. In the circumstances of these cases, I refuse the application pursuant to O. 36, r. 33 of the Rules of the Superior Courts.

For the sake of completeness, I would add that I do not think there is any doubt but that the court could enlarge the time for making an application pursuant to O. 36, r. 33 of the Rules of the Superior Courts in appropriate circumstances. Given that I am not satisfied that this is an appropriate case in which to grant an application pursuant to O. 36, r. 33, it is not necessary to consider whether or not it would have been appropriate to extend the time within which to bring the applications herein.

It is now necessary to consider the second element of the defendant's application in these cases, seeking an order pursuant to the inherent jurisdiction of the court setting aside the verdict given and judgment obtained and directing a new trial on the grounds that the defendant lacked the mental capacity to properly defend the actions.

I had the benefit of helpful oral and written submissions from both sides on the question of the inherent jurisdiction of the court.

The existence of such a jurisdiction is not in dispute. The jurisdiction was recognised in *In Re Greendale Developments Limited (No. 3)* [2000] 2 I.R. 514 which considered the finality of judgments of the Supreme Court having regard to the provisions of Article 34.4.6 of the Constitution. Denham J. in that case at p. 542 noted:-

> "The Supreme Court has jurisdiction and a duty to protect constitutional rights. This jurisdiction may arise even if there has been what appears to have been a final order. However, it will only arise in exceptional circumstances. The burden on the applicants to establish that exceptional circumstances exist is heavy."

She went on to say at p. 544:-

> "It would only be in most exceptional circumstances that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights."

In the course of the same judgment Barron J. at p. 546 commented:

> "Nevertheless where such circumstances exist, this court must be free to so declare and to indicate the procedures whereby such circumstances should be investigated. Not to be able to do so would conflict with the guarantee of fair procedures enshrined in the Constitution.
>
> The Constitution requires the decisions of this court to be final and conclusive for good reason. There must be certainty in the administration of justice. Uncertainty can lead to injustice. In my view, these provisions must prevail unless there has been a clear breach of the principles of natural justice to which the applicant has not acquiesced and such that a failure to take steps to remedy such breach would, in the eyes of right-minded citizens' damage the authority of this court. I believe that the jurisprudence of this court has always been to this effect."

Subsequently in the case of *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412, McGuinness J. at p. 478 of her judgment in that case considered the jurisdiction as described by Denham J. and Barron J. in *In Re. Greendale Developments Limited (No. 3)* cited above. She said:-

> "In summary, whilst very great weight must be given to the principle of finality and to the provisions of Article 34.4.6, this court has a jurisdiction to review and if necessary to set aside what appears to have been a final order in circumstances where the court's duty to protect constitutional rights or natural justice arises. Such circumstances can only be to a high degree exceptional, and a very heavy onus lies on the applicants to establish that such exceptional circumstances exist."

Reference was also made on behalf of the defendant in these proceedings to a decision of this Court in *Desmond v. Moriarty* [2012] IEHC 202 in which it was stated at p. 39 of the judgment:-

> "It seems to me that in invoking the jurisdiction to set aside a final order on the basis of correcting an injustice, what seems to be in contemplation is a want of fair procedures or breach of constitutional rights on the part of the court itself as in the *Pinochet* case where the issue related to the apparent bias of one member of the court.... In other words, it seems to me that in seeking to set aside a judgment on this exceptional ground, one is considering the conduct of the proceedings by the court or courts which heard the proceedings."

Having referred to those authorities, counsel on behalf of the defendant distilled the principles from the authorities as follows:-

> (i) The Supreme Court and the High Court have an inherent jurisdiction to amend or set aside final orders in exceptional circumstances where those circumstances clearly establish that there has been a fundamental denial of justice through no fault of the parties concerned.
>
> (ii) The burden on the applicant to establish that exceptional circumstances exist is heavy.
>
> (iii) The exceptional circumstances must constitute something extraneous going to the very root of the fair and constitutional administration of justice.
>
> (iv) The want of fair procedures or breach of constitutional rights required to invoke the jurisdiction must relate to the conduct of the proceedings by the court which heard the proceedings.
>
> (v) The jurisdiction of the High Court is limited to final and unappealable orders of the court.

Counsel on behalf the plaintiff takes issue with the argument that the High Court has an inherent jurisdiction to amend or set aside a final order of the High Court in circumstances where an appeal lies from the High Court to the Supreme Court. It is contended that so far as these proceedings are concerned, this Court is *functus officio* and cannot make a determination to the effect that there are exceptional circumstances herein which establish that there has been a fundamental denial of justice.

In the course of submissions on behalf of the plaintiffs on this point, reference was made to the decision of the Supreme Court in the case of *L.P. v. MP.* [2002] 1 I.R. 219. The matter before the Supreme Court related to a decision of the High Court on appeal from a decision of the Circuit Court. The provisions of s. 39 of the Courts of Justice Act 1936 were directly in point which provide that a decision of the High Court on appeal from the Circuit Court "shall be final and conclusive and not appealable". The question before the Supreme Court related to the status of the appeal brought by the respondent and whether he was entitled to appeal the matter of the Supreme Court on any ground.

In the course of the judgment, Murray J. considered the decision in *In Re. Greendale Developments Limited (No. 3)* referred to above and the decision in *Bula Limited v. Tara Mines Limited (No. 6)* also referred to above. He went on to say:-

> "It follows from the foregoing judgments that the courts have an inherent jurisdiction to amend or set aside a final order in exceptional circumstances where those circumstances clearly establish that there has been a fundamental denial of justice through no fault of the parties concerned and where no other remedy, such as an appeal, is available to those parties."

The decision in that case was also referred to by counsel on behalf of the defendants in the course of submissions.

In the judgment in *L.P. v. MP.*, Murray J. continued at p. 231 as follows:

> "While the judgments of this court in *In Re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R 514 specifically recognise, in the light of Article 34.4.6, the inherent jurisdiction of this court to afford a remedy in respect of its own orders to which the exceptional circumstances referred to apply, I think it must follow that there is an inherent jurisdiction in the High Court to provide a similar remedy at first instance in the same circumstances in respect of a final and unappealable order of the High Court. Of course these considerations do not apply to decisions of the High Court which are subject to appeal in the ordinary way. There, appeal is the remedy."

As I have said, both sides have cited the decision in L.P. v. M.P. at length.

Ms. Gayer S.C. on behalf of the plaintiffs has laid particular emphasis on the passage to which I have referred above from the judgment of Murray J. in which he commented:-

> "Of course these considerations do not apply to decisions of the High Court which are subject to appeal in the ordinary way. There, appeal is the remedy."

Relying on that passage, she contends that it is not appropriate for this court to adjudicate on the issue raised by the defendant herein, given that an appeal is available to the defendants.

The decision of the High Court of *M.D. v. Minister for Health* [2002] IEHC 128 (O'Neill J.) is of some assistance. Having reviewed the judgment of Denham J. (as she then was) in the *Greendale* case referred to above, he said:-

> "It would seem to me that the only circumstance in which the Supreme Court could interfere with the final order of that court is where a person can show that through no fault of his or hers, there has been a breach of natural justice in the conduct of the proceedings before the Supreme Court which would manifestly be irremediable unless the Supreme Court set aside the order impugned.
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> Thus, a clear distinction opens up between the jurisprudence of the Supreme Court in dealing with setting aside a final order of that court and the law relating to the setting aside of perfected orders of the High Court. In the High Court a breach of natural justice would not be irremediable unless the order was set aside. There could be an appeal to the Supreme Court where the breach complained of could be remedied. I am of opinion therefore, that so far as the High Court is concerned, when it is acting as a court of first instance, the only circumstances in which a perfected order could be set aside are the two circumstances described in the *Ainsworth* case and referred to by Finlay C.J. in the *Belville* case.

> The appellants are right in their submission to that extent."

I was referred to a number of other decisions such as that in the case of *People (DPP) v. McKevitt* [2009] IESC 29, in which Murray C.J. reiterated the jurisdiction of the Supreme Court in special and exceptional circumstances concerning an issue of constitutional justice as opposed to the merits of the decision. However, it was emphasised in the course of the judgment in that case (at p. 4) that an applicant to the Supreme Court to review an earlier decision must show cogent and substantive grounds which are objectively sufficient to enable the court to enter upon an exercise, by way of a hearing of an application on the merits of the wholly exceptional jurisdiction. Murray C.J. observed:-

> "For example, a mere assertion of subjective bias on the part of the Court by a dissatisfied litigant could not be a ground upon which the Court could have jurisdiction to hear and determine an application."

A number of other decisions were opened to the court such as the decision in the case of *Talbot v. McCann Fitzgerald* [2009] IESC 25, *Bank of Scotland (Ireland) Limited v. Mannion* [2010] IEHC 419 and *Desmond v. Moriarty* [2012] IEHC 202, which reiterate the relevant principles but do not advance the principles identified in the authorities to which reference has been made.

In the course of the submissions on behalf of the defendant, it was argued that appeals from the final orders made in respect of each plaintiff against the defendant would be limited by virtue of the fact that there was not a full hearing on the merits, given that there was no participation by the defendant in either of the two actions before the court. Thus, it was submitted, that having regard to the jurisprudence of the Supreme Court on the scope of an appeal as described in such cases as *Hay v. O'Grady* [1992] 1 I.R. 210 and *O'Connor v. Dublin Bus* [2003] 4 I.R. 459, that the defendant would be severely limited in any appeal that might be brought on the merits of the decision save as to the question of damages. In that context reference was made to O. 58, r. 7(2) of the Rules of the Superior Courts which provides:-

> "A new trial shall not be granted on the ground of mis-direction or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Supreme Court some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Supreme Court may give final judgement as to part thereof, or as to some or one only of the parties, and may direct a new trial as to the other party only, or as to the other party or parties."

Reference was also made to the decision of the Supreme Court in the case of *Cooper Flynn v. R.T.E.* (Unreported, Supreme Court, 28th April, 2004) in which Keane C.J. stated:-

> "It was pointed out by Henchy J. in *Kelly v. Board of Governors of St. Laurence's Hospital* that the rule applies where there has been a wrong or miscarriage 'in the trial', as distinct from the result of the trial. It would follow that the verdict of the jury should not be allowed to stand where the direction or ruling found to be erroneous was of such a character as to render the trial itself unfair or to give it the appearance of lack of fairness.
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> In this context, the fact, if it be the fact, that the ground on which it is sought at the appeal to argue that the direction or ruling was erroneous was not advanced at the trial, although not necessarily a conclusive factor, can undoubtedly be of considerable importance in determining whether the trial was either essentially unfair or lacking in the appearance of fairness."

Relying on that authority it was submitted that an appeal in the ordinary way would not provide a remedy because a full appeal on all the issues could be restricted by the jurisprudence applicable to such appeals within the Supreme Court and therefore although, strictly speaking there is an appeal , the defendant would be limited in the scope of such an appeal and for example, would have difficulty in satisfying the Supreme Court that it was an appropriate case in which to permit new evidence to be adduced before the Supreme Court in relation to the matter.

There is no doubt whatsoever that the circumstances in which a final order of a court can be set aside is limited. Provision is made in the Rules of the Superior Courts for the correction of mistakes. Further, the court itself can amend a final order where it finds that the judgment as drawn up does not correctly state what the court actually decided and intended. In addition, as was mentioned previously, the Rules provide a jurisdiction to set aside a judgment pursuant to the provisions of O. 36, r. 33 of the Rules of the Superior Courts. Further, it has been established that there is an inherent jurisdiction to set aside a final order in exceptional circumstances such as on the basis of bias or fraud or where there has been a breach of constitutional rights. That jurisdiction, as described above, has been set out in a number of cases, such as in *Re Greendale Developments Limited (No. 3) and Bula Limited v. Tara Mines Limited (No. 6).* It is also necessary to bear in mind the decision in the case of *L.P. v. M.P.*

It is clear that the onus on an applicant seeking to set aside a final order is, to quote from Denham J. in *Re. Greendale Developments Limited (No. 3),* "a very heavy onus". Further, it is clear that a case will not be re-opened save in the most exceptional circumstances and that a case will only be re-opened where through no fault of the party, he or she has been subject to a breach of constitutional rights. Finally, it is apparent from the decision of the Supreme Court in *L.P. v. M.P.* that this exceptional jurisdiction is not to be exercised in circumstances where there is another remedy available such as an appeal, a point re-emphasised in the case of *M.D. v. Minister for Health* by O'Neill J. in the passage from his judgment referred to above where he described the clear distinction between the jurisprudence of the High Court and the Supreme Court relating to the setting aside of final orders.

The inherent jurisdiction of courts to set aside a final order is limited in its scope and is not generally available in circumstances where there is another remedy available to the aggrieved party. In this case, there is undoubtedly an appeal available to the defendant in respect of these actions. The fact that there may be some procedural difficulties in pursuing aspects of the appeals does not alter the underlying principle identified in the authorities to which I have referred from which it is apparent that where there is another remedy, namely an appeal, then the jurisdiction to set aside a final order does not arise. Accordingly, I have come to the conclusion that it is not appropriate to exercise the jurisdiction invoked by the defendant herein.

In the event that I am wrong in coming to the conclusion that the defendant is not entitled to set aside the judgments obtained against him in these proceedings for the reasons outlined above, I feel that it would be appropriate to consider the evidence before me in relation to the mental capacity of the defendant in these proceedings. The argument before the court has been predicated on the basis that the breach of constitutional rights alleged to have occurred was the hearing of the actions in circumstances where the defendant lacked the necessary mental capacity to conduct the litigation herein on his own behalf or make appropriate decisions regarding the litigation.

In the course of the hearing before me, reliance was placed on a number of affidavits to which I will refer later on in the course of this judgment. I also had the benefit of oral evidence from a number of witnesses and in the first instance I propose to refer to the evidence of medical witnesses called on behalf of the defendant in these proceedings. The first of those to give evidence was Prof. David Cotter, a Consultant Psychiatrist and Neuro Psychiatrist. He furnished a report based on an assessment of the defendant on the 15th April, 2013, followed by an addendum based on a conversation with the defendant's wife on the 24th June, 2013. Prof. Cotter had the benefit of a preliminary psychiatric report provided by Dr. Paul O'Connell, Forensic Psychiatrist on the 14th February, 2013. That report contained a full psychiatric history and overview of the defendant's background. More recent medical and psychiatric history was also set out in that report. In the course of that report, Dr. O'Connell set out an account of the defendant's description of the alleged sexual offences and legal matters. Prof. Cotter had the benefit of Dr. O'Connell's views and the results of an assessment of cognitive function carried out by Dr. O'Connell using Addenbrooke's Cognitive examination. Prof. Cotter had a booklet of medical records from Dr. O'Toole, the GP. He also had sight of two MRI reports dated the 21st March, 2013 and one on the 1ih January, 2012. In addition he had a letter of the 28th September, 2012, from Mr. Sean Dudeney, Consultant Orthopaedic Surgeon in relation to a proposed admission of the defendant for a total hip replacement. Other correspondence relating to other health problems suffered by the defendant was described in the course of the report by Prof. Cotter.

It would be useful to set out the conclusions expressed by Prof. Cotter in the course of his report. He noted:-

> "Cognitive examinations of Mr. Carrick have now repeatedly shown deficits (Dr. O'Connell, ACE-R 64, and Dr. Cooney Mini Mental State Examination (MMSE) 26/30). These scores are in keeping with a dementia or mild cognitive impairment, respectively. On assessment with me today, Mr. Carrick scored 24/30 MMSE, in keeping with an early dementia. His score on the ACE-R was 74 and whilst they were supportive of dementia, this result showed variability WRT [with regard to] Dr. O'Connell's similar examination two to three months previously which scored 65/100. The timing (including the onset and progression) and the other clinical symptoms associated with possible dementia (including functional difficulties) are difficult to clarify from the history of Mr. Carrick alone and therefore it will be important in my view to obtain a collateral history from his wife or another family member. The presentation is not suggestive of a cognitive decline associated with a delirium.
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> These cognitive difficulties could certainly have impacted on Mr. Carrick's ability to judge and weigh information and could also have impacted on any decisions he made last year during the period when he chose to have surgical procedure rather than attend court. I understand there were medical indications with this surgery and the balance of his medical needs and the requirements of the court needed to be considered and judged in relation to this by Mr. Carrick. I am not clear if Mr. Carrick was given any advice during this period which he chose not to consider or which he may have considered unwisely or with poor judgment. In addition, it is clear that Mr. Carrick has numerous medical conditions, including prostate cancer and arthritis which have caused him significant pain. Also in relation to the court cases, there was significant anxiety and depressive symptoms which together will have impacted on him and on his judgment and in the context of a potential dementia illness, would have affected him particularly strongly.
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> I note that Mr. Carrick is reported to have experienced a significant head injury during the road traffic accident of June 2012, which led, in part, to his admission to St. Vincent's hospital for a ten day period. He describes confusion following the accident, some disturbance of anterograde memory (the ability to make new memories) although no loss of consciousness, or retrograde amnesia is described. I am not aware if neuro imaging was undertaken at this time. Cognitive difficulties can occur in the context of head injury and in the case of an elderly person, these can be more pronounced. I therefore consider that it is reasonable that if there was a head injury, that this can be viewed as a contributing factor to any cognitive difficulties which occurred subsequently during the 12 to 24 months which followed the accident. It is also well known that acquired brain injury is associated with the development of anxiety and depression, occurring typically in 30% to 40% of people in the year following a head injury."

Prof. Cotter went on to indicate that it was necessary to obtain further information including a collateral history from his wife. In his subsequent addendum report, Prof. Cotter concluded:-

> "Overall, the collateral history and sight to Dr. Pender's report indicate to me major depressive disorder and mild cognitive impairment significantly impact on Mr. Carrick's day to day living and his level of functioning, and that they are likely to have done so last year at the time that he failed to attend court and be adequately represented at that court."

Prof. Cotter in the course of his evidence referred to a note in the defendant's GP's records in which the defendant's family raised an issue as to his memory. A mini mental state examination at that time was noted as "deficient". Nevertheless, the defendant was then orientated as to time, place and person. Prof. Cotter said that this note was indicative of some functional difficulty.

The MRI scans of January 2012 and subsequently March 2013 indicate some age related changes, but there was no overt abnormality present. He was of the view that the changes on the MRI scans were indicative of vascular ischaemia but these were not abnormal findings. Prof. Cotter went on to point out that a significant part of the defendant's presentation related to depression and he stated that it was hard sometimes to distinguish between mood disorder and cognitive impairment. His overall view of the defendant was confirmed by his conversation with Mrs. Carrick as described in the addendum report. He concluded that the combination of problems with which the defendant presented such as pain, stress and the head injury suffered by the defendant in the road traffic accident in June 2012, diminished his ability to plan and organise.

Prof. Cotter was cross examined extensively and reiterated that the defendant had mild cognitive impairment. People with mild cognitive impairment may go on to develop dementia. Relying on the MRI scans and the GP notes, he expressed the view that the features identified by him were present in November 2012.

Prof. Cotter accepted that the defendant had good understanding at times, but he expressed the opinion that the defendant did not have the ability to represent himself or defend himself in legal proceedings due to a combination of factors. He noted that the defendant participated in the last of the criminal trials in July 2012. He accepted that this had some relevance to the issue presently before the court, but he was not fully aware of the details of the involvement of the defendant in that trial, which resulted in a disagreement by the jury.

Prof. Cotter was not aware of the fact that the defendant had sworn a number of affidavits since November 2012, in connection with these proceedings. He commented that the Defendant may have had the capacity to do so when he swore the affidavits, but he questioned whether or not he, in fact, understood the affidavits he was swearing. He acknowledged that to create those affidavits would require understanding. He reiterated that the defendant could perform well on a day to day basis but that he suffered from a mild cognitive impairment. Bearing in mind the swearing of the affidavits, he said that he could not say definitively how the defendant

was in November 2012, but he added that there was some evidence of cognitive impairment. He concluded that the defendant suffered from major depressive disorder and a mild cognitive impairment which would affect his ability to give instructions and to make decisions.

Dr. Paul O'Connell then gave evidence on behalf of the defendant. He is a Consultant Forensic Psychiatrist attached to the Central Mental Hospital. He furnished a detailed report on the 14th February, 2013. It was on his recommendation that the defendant was examined by Prof. Cotter. Before dealing with the views of Dr. O'Connell as expressed in the course of his evidence, I note that his report was a very comprehensive document, in which he set out in great detail the background, family circumstances, education and work history of the defendant; his medical and psychiatric history, his account of the criminal proceedings and the civil proceedings. He also reviewed the defendant's medical history and records. He then set out his findings on examination of the defendant's mental state. He noted that depression can lead to cognitive impairment. In the course of his observations, he opined that the defendant was developing a dementia.

Dr. O'Connell also considered the defendant's fitness to plead using the test known as the McArthur Competence Assessment Tool-Fitness to Plead (MacCat FP). He noted:-

> "In my opinion, in the light of the letter from Mr. Dudeney, it would be reasonable to conclude retrospectively that at the time of the trial in November 2012, Mr. Carrick would have been experiencing substantial pain from the "bone on bone" arthritis in his hip. In addition to being medically unfit from a surgical perspective, with the history of depression and clinical evidence of current cognitive impairment, in all probability the pain present at the time of trial would have exacerbated his depression and by extension further compromised his cognitive capacity and ability to reason in his defence."

He went on to add that if there was to be a future trial that he recommended that the defendant would be fully evaluated with respect to the nature and degree of his cognitive impairment and that fitness to stand trial should be examined proximate to any trial.

In the course of his evidence, Dr. O'Connell explained the nature of the tests he used in his examination of the defendant. He noted that the defendant had some difficulties with reasoning and verbal fluency. There were also some short term memory problems. He said that the defendant had been able to give a fluent biographical history and medical history. He was able to provide details of the criminal proceedings. However, people with dementia retain long term memories. Overall he concluded that the defendant had mild cognitive impairment, such that he had some difficulty with short term memory. The defendant in discussing matters tended to wander of the point, but once directed, he was logical and coherent. He pointed out that someone's level of education can give an indication as to their level of intellectual functioning. Someone who left school early may give a misleading result in relation to the tests which are standardised tests. It was important to look at factors such as business success. It was the view of Dr. O'Connell that an individual with less education, but with business success should have a high base line in relation to the tests being carried out. In other words the defendant should have performed better in the tests.

Dr. O'Connell examined the medical records and in particular the results of the MRI scan. The results of the scan were indicative of vascular ischaemia. This is not an unusual finding for someone of that age. It is something that happens to most people. The fact that it is not unusual does not meant that it does not have any effect. The scan results support the view that he has some level of vascular disease and that it may be evolving. Dr. O'Connell went on to discuss the road traffic accident in June 2012. He outlined the unusual experiences described by the defendant which occurred in hospital. There was a period of confusion and the defendant complained of tinnitus. He appeared to have suffered from an auditory hallucination. There were episodes of collapsing or fainting. It was noted that this could be caused by his blood pressure dropping, by seizure activity or heart problems. The description of the auditory hallucinations was described by Dr. O'Connell as an unusual symptom. Usually one complains of hearing voices and not music as described by the defendant. This occurred after the accident and in the view of Dr. O'Connell was something that fitted with a diagnosis of dementia.

Having referred to the performance of the defendant in the Addenbrookes Test, in which the defendant obtained quite a low score, it was noted by Dr. O'Connell that this prompted further investigation. In the McArthur Competence Test Tool/Fitness to Plead, the overall performance of the defendant was that he did well in some parts but not in others. The reasoning domain was poor and this prompted Dr. O'Connell to recommend further investigation.

The report furnished by Dr. O'Connell was described by him as a preliminary report and was written in the absence of GP notes and in the absence of a book of evidence. He had no collateral history. The overall situation was one that merited further investigation. The view of Dr. O'Connell was that there was an evolving pattern of dementia. In the months preceding the assessment by Dr. O'Connell, the defendant was already on a trajectory. This view of Dr. O'Connell was supported by the concerns of the GP. In addition, it was noted that the defendant had severe depression. Of itself, this often manifests with dementia and may impair cognitive function. He noted further that pain can lead to depression and that sleep disturbance can follow. It was reasonable to conclude that the defendant was experiencing severe pain. This would have been worse in November given that Dr. O'Connell saw the defendant when he was post operative having had a hip replacement. He concluded that the information obtained from Dr. Pender was valuable and supported his findings. Consequently, he was satisfied that the defendant was in the early stages of dementia.

In the course of cross examination, Dr. O'Connell was asked about the fact that the MRI scans showed no further changes in the period of time that elapsed between the first of those scans and the subsequent scan in March 2013. He noted that there had been no such changes and the speed of change could be relevant to the question of evolving dementia. An ischemic event could cause an increase in impairment, but as it repairs the position in relation to cognitive impairment may improve. Dr. O'Connell expressed the view that dementia in the case of the defendant was due to vascular problems but he was not in a position to explain the significance of the fact that there was no change in the period to time that elapsed between scans.

He was asked about the Addenbrookes test to which reference has been made previously and he contrasted the results he found with those found by Dr. Pender. He accepted that it was possible that external factors could have affected the defendant. Dr. O'Connell saw the defendant in February 2013. There were some differences between the test results obtained by Dr. O'Connell and Dr. Pender. Dr. O'Connell pointed out that the tests were a snapshot of the position at any given time, but he also expressed the view that there was a longitudinal history of disimprovement and that the condition of the defendant was progressive. In this regard he referred to the GP's notes. He agreed with the view of Prof. Cotter that there was a mild evolving dementia.

Dr. O'Connell was then asked about the MacCat-FP test and accepted that it is something used in the course of criminal proceedings, but there was a difference between criminal and civil proceedings. Acknowledging that, Dr. O'Connell pointed out that there was no structured way of testing in relation to civil proceedings. The tests carried out showed a possible problem on the part of the defendant with practical reasoning and Dr. O'Connell indicated that that was the value of administering the MacCat-FP test. He took

the view that the defendant was impaired in all domains. To that extent, having regard to the tests administered and the clinical history of the defendant, he concluded that there was evidence of a mild cognitive impairment.

There was some discussion in the course of the cross examination as to the level of depression being experienced by the defendant. Dr. O'Connell was of the view that the defendant was not obviously depressed in February. This contrasted with the view expressed by Dr. Freyne in a letter of the 11th February, 2013, addressed to Dr. O'Toole, the GP. In that letter the assessment in relation to the defendant's depression made it clear that he was very depressed. Dr. O'Connell said that it was unusual that the defendant's mood fluctuated so much. He made the point that cognitive impairment made it more difficult to assess depression and vice versa.

Dr. O'Connell was then asked about the reference in Dr. O'Toole's notes in 2011 in which reference was made to a concern about the defendant's memory problems. He commented that there may have been a particular event in December 2011, leading to a period of confusion, for example, a vascular event.

Dr. O'Connell went through parts of his report and described some level of inconsistency about relationships as described by the defendant. He was of the view that the defendant was being evasive. In overall terms he took the view that the defendant was someone who was likely to be above average intelligence. The defendant was able to give a great deal of detail in relation to the road traffic accident that occurred in June 2012.

Dr. O'Connell was asked about the fact that nobody raised the issue as to fitness for trial at the time of the last of the series of criminal proceedings in July 2012, which took place after the road traffic accident. He accepted that that was the position. Dr. 0'Connell was not aware of the fact that a number of steps were taken by Mr. Carrick in the civil proceedings following the trial before the jury. An affidavit of discovery was sworn by the defendant at a time when he did not have legal representation. Further, on the day that he was seen by Dr. O'Connell, the defendant swore an affidavit in these proceedings. A further affidavit was sworn on the 5th March by the defendant and the position is that the latter two affidavits were prepared on his behalf by solicitor and counsel. It was sworn by the defendant after his attendance with Dr. O'Connell. He noted the fact that the defendant signed a consent on the 13th November, 2012, agreeing to his then solicitors coming off record.

Dr. O'Connell concluded that the defendant was suffering from cognitive impairment at the time of the two trials which was exacerbated by pain and depression. Dr. O'Connell expressed the view that the defendant would have been appreciably worse in November than when he saw the defendant.

At that point, a number of affidavits were opened to the court. They included an affidavit of Mr. Hayes of Gore and Grimes Solicitors in which the application for the firm to come off record was made. It was explained that since the criminal proceedings had come to an end, Mr. Hayes had sought instructions from the defendant as to the defence of the civil proceedings and was informed by the defendant that his financial situation had deteriorated and that he was no longer in a position to instruct solicitors and counsel for the defence of the proceedings nor to fund the defence in relation to those proceedings.

Mr. Hayes also gave evidence before the court. In that regard he explained that he had acted for the defendant's family and the defendant from the time he had joined the firm of Gore and Grimes in 1973. An enduring power of attorney was executed in 2006 and that Mr. Hayes was satisfied that he was capable of managing his affairs at that time. Subsequently in February 2007, he was involved in the transfer of the defendant's family home to his wife.

He explained that since 2005, he has acted in a number of other proceedings on behalf of the defendant and his companies. He remains on record in relation to some of those proceedings. Indeed, in the very recent past, he came on record on behalf of the defendant in revenue proceedings. He explained that the firm of Gore and Grimes does not deal with criminal matters and accordingly, was not involved in the criminal trials. He was not aware that the *nolle prosequi* in relation to the further prosecution of the criminal matters had been entered into on the 24th July, 2012. He found out about that on the 1st October. He was sure that he had informed the defendant of that. The correspondence between his firm and the plaintiffs' solicitors reflects the fact that the concern of Mr. Hayes for a period of time related to the fact that the civil proceedings were about to be listed for trial at a time when Mr. Hayes was not aware that the *nolle prosequi* had been entered in relation to the criminal proceedings. Immediately prior to the hearing date, the concern of Mr. Hayes related to the serious health issues facing the defendant, but he was not aware of any concern in relation to the mental capacity of Mr. Carrick.

The cases were listed for hearing on the 13th November, 2012, and on that occasion liberty was given to Gore and Grimes to come off record on behalf of the defendant. The affidavit seeking to come off record exhibited a consent signed by the defendant a few days earlier. Mr. Hayes pointed out that he would not have asked Mr. Carrick to sign that consent if he did not think that the defendant had the capacity to sign it.

The letter of Mr. Dudeney, the defendant's surgeon was in court. It was not handed in to the court, but it was available in court and counsel appearing in the matter stated orally that the defendant was housebound and unable to attend.

Notwithstanding, the case was left in the list. Nothing was said at that stage about the defendant's mental capacity because as Mr. Hayes explained he did not have those concerns. On his return to the office he sent an email to the defendant informing him of what transpired. It also advised the defendant that the cases remained in the list.

Mr. Hayes set out the fact that he had a number of conversations leading up to the trial date with the defendant and that he had wanted to obtain a letter or certificate from his surgeon to explain his non attendance on the date when the cases were listed for hearing. He informed the defendant in June 2012, of the trial date in November, 2012.

Subsequently, Mr. Hayes gave further assistance to the defendant after the judgment was given. So far as he could ascertain the position from the family of the defendant, the defendant was recovering from surgery and no issue was raised as to his capacity. It was explained by Mr. Hayes in the course of cross examination that it had been agreed that the civil proceedings would have to wait until the criminal proceedings had concluded. The trial of the criminal proceedings commenced in November 2011. Mr. Hayes last saw the defendant in May 2012, and also briefly in the course of the criminal proceedings. He had a passing chat with the defendant in July 2012, in the course of the criminal trial that ended in July 2012. There was no concern expressed about the mental well being of the defendant. He did not see any of the correspondence prior to the 13th November, 2012 of medical reports or doctors notes.

Mr. Hayes went to explain the fact that it was anticipated that the civil trials could last two weeks or longer. They were called on originally for two weeks. It was explained to Mr. Carrick that it simply was not possible for Gore and Grimes to continue to act in the proceedings given the commitment involved in the absence of funding.

Mr. Hayes was aware of the physical ailments of the defendant and indeed observed those and he was also aware of the fact that the defendant suffered from anxiety and depression. Insofar as Mr. Dudeney's note was concerned in which it was said that the defendant was "presently housebound", Mr. Hayes was aware of this as he had been told that this was so by the defendant.

He confirmed that counsel appeared in court on the application to come off record on the 13th November. His recollection was that the court was informed that the defendant was having an operation the following week and that he was then housebound. The court directed that the defendant be advised that the actions had been left in the list. There was nothing to suggest that the case might go ahead the following week.

Mr. Hayes explained that he undertook to prepare an affidavit of discovery on behalf of the defendant which was subsequently sworn by the defendant. He put the information together with the assistance of some of the defendant's children. He had most of the information in any event. Again, he may have advised on a letter of the 12th December, 2012. He explained that the letter came into existence after discussions with him and was not drafted by him. The letter was prepared by Graham Carrick with the assistance of his mother after discussions with Mr. Hayes.

Evidence was also given by Mr. Burke, the current solicitor of the defendant.

Mr. Burke was first contacted by the defendant's family on the 23rd January, 2013. The defendant and his son Graham attended the following day. Mr. Burke had received information from Mr. Hayes together with a draft affidavit. Much of the information on that day came from Graham Carrick. The defendant seemed to be inhibited in giving instructions. Mr. Burke sought a letter from the defendant's GP.

He was aware at that stage that there were matters being dealt with in court. He required instructions, but felt that the defendant tended to off the point and had to be redirected.

The defendant's GP had mentioned the possibility of a psychiatric evaluation as the defendant was seeing Dr. Freyne in St. Vincent's Hospital. Following a consultation, Mr. Burke decided to arrange for a psychiatric evaluation of the defendant. Dr. O'Connell then saw the defendant on the 14th February, 2013. On that day, the defendant swore an affidavit in these proceedings. That affidavit was drafted by Mr. Hogan and contained information elicited mainly from the family and also from Mr. Hayes. Subsequently, Mr. Burke felt it was appropriate to discuss the matter with senior counsel

Dr. O'Connell furnished a preliminary opinion. He felt other investigations were needed. He swore (Dr. O'Connell) an affidavit on the 21st March, 2013, in which he expressed concern as to the defendant's capacity to defend himself.

Mr. Burke went on to explain that he received the defendant's medical notes on the 13th February, 2013. He noted that concerns had been raised by Dr. Colm Cooney, Consultant in Old Age Psychiatry in St. Vincent's Hospital in March, 2011, when, in a letter to the GP, Dr. Cooney stated:-

> "You will need to keep his mood and cognitive function under review and I would recommend that given the finding of an MMSE score of 26/30 and informant history of memory impairment that you carry out a full cognitive impairment screening on him, including chest x-ray, ECG, full blood count, ESR, full biochemical profile including serum calcium thyroid function test, B12 and folate, random blood sugar and in addition I would recommend that you arrange a CT brain scan for him."

Mr. Burke noted that Dr. O'Connell was anxious that further tests should be carried out on the defendant. As the matter was due back before the court, a further affidavit was sworn by the defendant. That affidavit was put together with information from the defendant, his family and Mr. Hayes. Mr. Burke took the view that at that stage there was insufficient information not to have the affidavit sworn by the defendant.

Mr. Burke was in court in connection with this matter on the 8th March, 2013. He had a discussion with Mrs. Carrick before this and subsequently he instructed counsel to inform the court that there was a real issue as to whether or not the defendant was suffering from dementia. Mr. Burke was concerned about this as a result of his interaction with the defendant. Ultimately, it was considered that the appropriate course to take was to issue the motion of the 11th April, 2013. Mr. Burke set in train further reports as suggested by the doctors. As set out previously, the defendant had been assessed by Dr. O'Connell on the 14th February, 2013, and thereafter by Prof. Cotter on the 15th April, 2013, and by Mr. Pender on the 23rd May, 2013. He was also examined by Prof. Kennedy on behalf of the plaintiffs. On receipt of the third report, Mr. Burke commenced the process of registering an enduring power of attorney.

In cross examination, Mr. Burke said that he never consulted with the defendant on his own. He was originally retained by the defendant and his family. Subsequently Mrs. Carrick was appointed as guardian ad litem and thereafter he has taken instructions from her. At the initial consultation with the defendant and his son, Mr. Burke requested a letter from the defendant's GP. That letter did not mention dementia. The defendant had been referred by his GP to the Department of Old Age Psychiatry in St. Vincent's Hospital and reference was made to a letter of the 11th February, 2013, from Dr. Freyne. The defendant was seen by her in connection with depression and stress, but not in the context of cognitive impairment.

Mr. Burke stated that when the defendant came to see him, he was under enormous stress and had been so since November 2012. Mr. Burke could not comment on how the defendant had been in November 2012. During a consultation, the defendant was unable to give a clear account of the situation. He would go off the point. He gave incorrect information concerning certain things, for example, the wrong date as to when he commenced treatment for cancer. He was able to discuss the date of criminal trials with Mr. Burke who also accepted that the defendant had been able to give a full account of those trials to Dr. O'Connell.

Mr. Burke explained how various affidavits came to be sworn by the defendant. As he said, Dr. O'Connell had formed a preliminary view, but felt that further tests were required. Mr. Burke did not tell Dr. O'Connell that affidavits were sworn or to be sworn by the defendant. When the affidavit of the 5th March, 2013, was sworn by the defendant, Mr. Burke was in possession of the preliminary opinion of Dr. O'Connell. However, at that stage further tests were to be carried out. The court was advised as to the position in relation to the defendant on the 8th March, 2013. Mr. Burke's position at that time was that he had serious concerns about the defendant's capacity but did not have as yet definitive medical reports on the situation.

Subsequently, Mr. Burke got the report from Mr. Pender. He also received the addendum report from Prof. Cotter of the 24th June, 2013. Mr. Burke had previously noted that Dr. Cooney who saw the defendant in 2011 also raised issues as to cognitive impairment. Nevertheless, he accepted that the defendant stood trial on four occasions between November 2011 and July 2012. Mr. Burke could not say what the defendant's situation was between July 2012 and November 2012, when the hearing of these actions took place. He

accepted that he could not say what the defendant's capacity was in November 2012.

Finally Mr. Burke confirmed that notices of appeal were drafted in respect of the judgments obtained herein, but ultimately, it was felt that it was more appropriate to make an application to have the judgment set aside than to appeal the judgments obtained herein.

The final witness to give evidence on behalf of the defendant was Dr. Niall Patrick Pender, who is a Clinical Neuro Psychologist and a Clinical Psychologist who is the Head of the Department of Psychology, Beaumont Hospital.

Dr. Pender furnished a report dated the 5th June, 2013. In the course of his report, Dr. Pender indicated that he had been furnished with the report prepared by Prof. Cotter. In addition he was provided with the report of Dr. O'Connell. He noted in Dr. O'Connell's report that an assessment using the McArthur Competent Assessment Scale - Fitness to Plead Test disclosed that the defendant was "in the competent range and understood and appreciated that he was impaired on reasoning". He also noted Dr. O'Connell's opinion that the defendant was developing a dementia.

Dr. Pender also had access to the medical records of the defendant including those of Dr. O'Toole, the GP, records from St. Vincent's Hospital and the MRI scans. In addition to examining the medical records described above, Dr. Pender took a collateral history from Mrs. Carrick.

Dr. Pender then described the interview and examination that took place in the course of which the defendant told Dr. Pender about the criminal proceedings and the civil proceedings. He told Dr. Pender that he had seen Prof. Cotter and Dr. O'Connell and Prof. Harry Kennedy. He also said to Dr. Pender that he had a diagnosis of dementia. He described the nature of the allegations against him. He also described his work history and his medical problems. He outlined the circumstances of the road traffic accident in June 2012. Dr. Pender noted that when he met the defendant he was very agitated, quite distressed and complained that his blood pressure was quite high.

Dr. Pender then carried out a neuro psychological examination. In his conclusions, Dr. Pender made a number of observations. He expressed the view:

> "Overall, in my opinion, he has a patchy presentation of his cognitive functioning, but many of his cognitive skills were remarkably intact. However, he does appear to have difficulties with aspects of his fluency and language, aspects of reasoning and some aspects of more challenging memory. However, his delayed memory and retention for both verbal and visual information does appear to be intact. His difficulties do appear to be more at the encoding, registration and concentration stages of memory.
>
> Overall, his difficulties would be consistent with a mild cognitive impairment, most likely of vascular type, given his medical history. Mild cognitive impairment refers to patients who have difficulties which are evident on testing, but which have not converted into a clear dementia....
>
> In my opinion, it would have been very difficult for him to actively participate in the court proceedings in 2012 given his mild cognitive impairment, his significantly compromised mood, and the physical consequences of the accident.
>
> In terms of his current mental capacity, he does appear to have a good understanding of the trial and the individuals associated with the court. He understands the allegations made against him and denies them vehemently. His intellectual ability is intact and he does have good ability to understand and interpret information. It does seem that there has been a slow and gradual decline in cognitive functioning since 2011, which probably reflects his micro vascular illness but this appears to vary, perhaps according to fluctuations in his underlying mood.
>
> One would be concerned that at more challenging and distressing times, the impact of external pressure and his mood will exacerbate his underlying cognitive difficulties. Nevertheless, Mr. Carrick does retain cognitive functioning when the conditions are favourable."

In the course of his evidence, Dr. Pender commented on the material he had examined prior to seeing the defendant. In taking the collateral history from Mrs. Carrick, he spoke to her by telephone. When he saw the defendant he was able to give Dr. Pender a history in surprising detail. Nevertheless, the defendant was quite agitated and anxious at the time. Dr. Pender went through the results of the neuro psychological examination in relation to such areas as, *inter alia*, general intellectual ability, executive functions, memory, language and perception. He outlined his opinion as described in his report and commented that there was a mild cognitive impairment. He pointed out that external pressures can make cognitive functioning poorer. When there was pressure on the defendant his ability to function would deteriorate. The concern of Dr. Pender was that a number of events had occurred around November. He was suffering from pain, he had depression and he was on medication for a variety of problems. Dr. Pender expressed the view that this would have made it difficult for the defendant to function in a legal context. Finally, he observed that the results of the examinations by Dr. O'Connell, Prof. Cotter were consistent and that effectively all three were saying the same thing.

In the course of cross examination, Dr. Pender explained his role as a Neuro Psychologist as being part of a data gathering exercise. A number of people see the patient and a pattern of tests will occur which create a picture. He was not personally familiar with the MacCat - FP test.

In essence, his role is to seek a consensus with the views expressed by Prof. Cotter. He noted in the course of his evidence that there was no mention of dementia until after the defendant had been to visit Dr. O'Connell. The first problem that had been raised was the issue as to the defendant's memory in 2011. He was then referred for an MRI scan. Throughout 2012 there were a series of serious health problems including prostate cancer, hip pain and depression. They were the most pressing concerns throughout that year together with the court proceedings. In 2012, there was no reference to memory problems. Bearing in mind the fact that there were ischemic changes in the brain as depicted in the MRI scans, it was the view of Dr. Pender that the cognitive changes were probably due to the vascular issues. Those cognitive changes were exacerbated by changes in mood, although Dr. Pender acknowledged that there was little change between 2012 and 2013 shown in the MRI scans. Dr. Pender commented that the road traffic accident in June 2012 could have had an effect on the defendant's cognitive functioning, that is, his day to day functioning. He had read the reports from St. Vincent's Hospital in relation to the road traffic accident. Dr. Pender commented that it was impressive that the defendant was able to stand trial for four weeks in July 2012. He accepted that the defendant may have been sufficiently well in July to stand trial, but that the position could have changed in November. He did accept that to some extent he was speculating as to the position in November. He added that it was necessary to look at the cumulative effect of a series of events and also to bear in mind that the defendant was in pain. He accepted that the position in relation to the defendant's depression was far more significant following the conclusion of the civil cases. Dr. O'Toole had noted that the defendant was very depressed and

suffering from acute depression in January 2013. Again further medical notes from February 2013, as described by Dr. Freyne, demonstrated that the defendant was under a great deal of strain at that stage. Dr. Pender accepted that the severe depression that the defendant was suffering from at that stage would have an effect on cognitive function.

One of the other observations made by Dr. Pender was that people function well in a routine environment, but this may worsen in circumstances when somebody is not in their normal situation, for example, if they have to go to hospital or to a nursing home. The defendant had an operation in November and then went to a nursing home and was out of his normal routine. Those sorts of changes can affect people.

Dr. Pender noted that there were some variations between the test results obtained by Dr. O'Connell and himself. He explained that the testing done by him was more detailed. He commented on the fact that the defendant was poor at learning information but did not have a difficulty in storing memory. He was of the view that those results fitted with a form of vascular ischemia. He further commented that people who are impaired may go on to develop dementia.

Dr. Pender was asked about the collateral history taken from Mrs. Carrick. He made the comment that he wanted to see whether what she was seeing was converging with what Dr. Pender was seeing on the test results. He asked her for her view of changes she noted in the defendant. Nevertheless, he commented that he placed more emphasis on the clinical evaluation and the results of the tests than on the information obtained by way of collateral history. Nevertheless, it was helpful to have her views.

That concluded the evidence from Dr. Pender.

Having considered the evidence provided to the court, I accept as a fact that the defendant is now suffering from mild cognitive impairment. I also accept that the extent of his difficulties can vary from time to time and may be affected by other factors such as depression and pain. It is also clearly the case that following the conclusion of the civil trials in November 2012, the defendant suffered from acute depression and anxiety as a result of the outcome of the civil proceedings.

One of the points made at the conclusion of the evidence on behalf of the defendant was that the court should draw an adverse inference from the failure on the part of the plaintiffs to call Prof. Harry Kennedy to give evidence, a Forensic Psychiatrist who examined the defendant on the 13th May, 2013, for the purpose of assessing the defendant's mental capacity in November 2012. Prior to the hearing, it was indicated to the defendant's solicitors that the plaintiffs did not propose to call Prof. Kennedy. It was said on behalf of the Plaintiffs that the decision not to call Pro. Kennedy was on the basis that the court did not have jurisdiction to set aside the judgments and that the question of jurisdiction would be raised as a preliminary issue. When the matter came before the court, a ruling on jurisdiction was deferred by the court on the basis that it would be more appropriate to hear the evidence. Nevertheless, the report of Prof. Kennedy was not furnished to the defendant nor was he called to give evidence. Accordingly, it was submitted on behalf of the defendant that it is reasonable to infer that had Prof. Kennedy come to a contrary view to the views expressed by the defendant's experts that he would have been called to give such evidence. Reliance was placed on the decision of the Court of Appeal in *Wiszniewsky v. Central Manchester Health Authority* [1998] P.I.Q.R. 324 in which Brooke L.J. stated:-

> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

That case has been followed in this jurisdiction in a number of decisions.

In *Fyffes Plc v. D.C. C. plc* [2009] 2 I.R. 417 Laffoy J. noted at p. 508:-

> "While, as I have already stated, the plaintiff did not point to any Irish authority in which the basis on which adverse inferences may be drawn from the absence or silence of a witness whose evidence might be expected to be critical to an issue arose, I have no doubt that in practice, in the course of fact finding, judges do draw adverse inferences in such circumstances. The type of situation I have in mind arose in one of the earlier authorities considered in Wisniewski: *Herrington v. British Railways Board* [1972] A.C. 877. Where an issue arises as to whether an adverse inference should be drawn, I consider that the principles outlined in *Wisniewski* are helpful guidelines for the court."

I accept that the principles set out in *Wisniewski* are of assistance in determining when a court can draw adverse inferences from a failure to call a witness whose evidence could be relevant or material to an issue to be determined by a court. On the facts of this case, I have already indicated that I accept that the defendant now suffers from a mild cognitive impairment. It may well be the case that Prof. Kennedy would not demur from that position had he given evidence. Given the position, I do not see that drawing an adverse inference from the fact that Prof. Kennedy was not called makes any significant difference to the strength of the evidence put before the court on behalf of the defendant.

The critical question in this case, it seems to me, is whether or not the defendant had the necessary capacity to litigate in November 2012. I now want to consider some of the arguments made in that context in the light of the evidence. The leading decision on this issue is the case of *Masterman-Lister v. Brutton and Company (Nos. 1 and 2)* [2003] 1 W.L.R. 1511. The plaintiff in that case had been involved in a serious road crash in September 1980. He suffered serious head injuries, causing brain damage and reducing his mental and physical capacities. Legal proceedings were commenced and ultimately the proceedings were settled for £76,000 plus costs. He was unhappy with the settlement and some years later commenced proceedings against the solicitors who represented him. The issue arose as to whether he was a "patient" within the meaning of s. 94 of the Mental Health Act 1983 (that is, someone who by reason of mental disorder is incapable by reason of mental disorder of managing and administering his property and affairs) and/or within the rules of court. If so, that meant the settlement could be reopened, because it is did not receive the approval of the court

as was required in the case of patients. It was held that he had capacity to manage his affairs and was not a patient on the trial of a preliminary issue. Permission to appeal was granted to the plaintiff. The Court of Appeal held, in refusing the appeal, *inter alia*, that:-

> "Capacity requires an ability to make and communicate, and where appropriate give effect to, all decisions required in the context: this in turn requires the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; to weigh the information (including that derived from advice) in the balance in reaching a decision, and communicating that decision. In short, it requires an ability to understand the transaction when it is explained by advisers. Although the court should have regard to the complexity of decisions under consideration it should not have regard to its own valuation of the gravity of those decisions because it is not for the court to decide in a non medical treatment case, what is or is not serious in the light of the person before it.
>
> All adults are presumed to be competent to manage their property and affairs. The contrary has to be proved by those alleging incapacity; the fact that an individual was at some stage incompetent does not displace this requirement by way of the presumption of continuance, though clear evidence of incapacity for a considerable period of time may mean that the burden of proof is more easily discharged. Medical evidence will almost certainly be required.
>
> In determining capacity under the rules of court, it is necessary to have regard to time and context, namely the particular litigation: in contrast, the court of protection has to look to the totality of the property and affairs of the alleged patient and has to have regard to the complexity and importance of that person property and affairs. The issue of the specific nature of the test means that it is possible to have capacity to make all decisions related to litigation, but not to decide how to administer and award made. Consequently, a decision as to capacity in one context, does not bind a court which has to consider the same issue in a different context. A person may be a patient for purpose of RSC O. 80, r. 1, or CPR 21.1 (a need litigation friend), but not for the purposes of s. 94(2) Mental Health Act 1983 (Court Protection), and visa versa; any medical witness asked to assist in relation to capacity needs to know the area of the alleged patient's activities in relation to which his advice is sought."
>
> In the course of the judgments in that case, Kennedy L.J. at p. 1520 noted: "It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity."
>
> Kennedy L.J. went on to comment:-
>
> "What, however, does seem to me to be of some importance is the issue specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage plaintiffs in personal injury actions with capacity to deal with all matters and take all 'lay client' decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the claimant is to be regarded as a patient from the commencement of proceedings. Of course, as Boreham J said in White's case 1ih November, 1987, capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere."
>
> Chadwick L.J. in the same case commented at p. 1533:-
>
> "English law requires that a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself....
>
> The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained."

Reference was also made to the decision in the case of *Fitzpatrick v. K.F.* [2009] 2 I.R. 7. In that case the High Court Laffoy J. had to consider the capacity of a patient to refuse medical treatment. In the course of her judgment in that case, and bearing in mind that that case concerned the ability of a patient to refuse medical treatment, Laffoy J., having considered a number of authorities and Law Reform Commission recommendations, set out the following test for assessing capacity at p. 40 of the judgment,:-

> "On the basis of the foregoing analysis of the authorities from other jurisdictions and having regard to the constitutional framework within which the capacity question must be determined in this jurisdiction, it seems to me that the relevant principles applicable to the determination of the capacity question are as follows:-
>
> (1) There is a presumption that an adult patient has the capacity, that is to say, the cognitive ability, to make a decision to refuse medical treatment, but that presumption can be rebutted.
>
> (2) In determining whether a patient is deprived of capacity to make a decision to refuse medical treatment whether -
>
> (a) by reason of permanent cognitive impairment, or
>
> (b) temporary factors, for example, factors of the type referred to by Lord Donaldson in *In Re T . (Adult: refusal of medical treatment)* [1993] Fam. 95,
>
> The test is whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and the consequences of accepting or rejecting it in the context of the choices available (including any alternative treatment) at the time the decision is made.
>
> (3) The three stage approach to the patient's decision making process adopted in *In Re C. (Adult: refusal of medical treatment)* [1994] 1 W.L.R. 290 is a helpful tool in applying that test. The patient's cognitive ability will have been impaired to the extent that he or she is incapable of making the decision to refuse the proffered treatment if the patient-

(a) has not comprehended and retained the treatment information and, in particular, has not assimilated the information as to the consequences likely to ensue from not accepting the treatment,

(b) has not believed the treatment information and, in particular, if it is the case that not accepting the treatment is likely to result in the patient's death, has not believed that outcome is likely, and

(c) has not weighed the treatment information, in particular, the alternative choices and the likely outcomes, in the balance in arriving at the decision.

(4) The treatment information by reference to which the patient's capacity is to be assessed is the information which the clinician is under a duty to impart - information as to what is the appropriate treatment, that is to say, what treatment is medically indicated, at the time of the decision and the risks and consequences likely to flow from the choices available to the patient in making the decision.

(5) In assessing capacity it is necessary to distinguish between misunderstanding or misperception of the treatment information in the decision making process (which may sometimes be referred to colloquially as irrationality), on the one hand, and an irrational decision or a decision made for irrational reasons, on the other. The former may be evidence of lack of capacity. The latter is irrelevant to the assessment.

(6) In assessing capacity, whether at the bedside in a high dependency unit or in court, the assessment must have regard to the gravity of the decision, in terms of the consequences which are likely to ensue from the acceptance or rejection of the proffered treatment. In the private law context this means that, in applying the civil law standard of proof, the weight to be attached to the evidence should have regard to the gravity of the decision, whether that is characterised as the necessity for 'clear and convincing proof or an enjoinder that the court 'should not draw its conclusions lightly'."

Reference was also made in the course of submissions to the decision in the case of *Dunhill v. Burgen (No. 2)* [2012] 1 W.L.R. 3739, in which the case of *Masterman-Lister v. Brutton* was considered. That was a case in which the claimant in an action for damages against the defendant for injuries sustained in a road traffic accident. A negotiated settlement was reached at the door of the court. Both parties were legally represented at the time and the claimant was accompanied by a mental advocate. The judge in the County Court was asked to order by consent that judgment be entered for the claimant in the agreed sum but was not asked to approve the settlement. The claimant was later held to have lacked capacity at the time of the settlement. She made an application subsequently for the consent order to be set aside and a preliminary issue was considered as to whether CPR or r. 21.10 applied so as to invalidate the settlement, where (i) the court had declared that the claimant had lacked capacity to enter into a settlement, (ii) the defendant declined to ask the court to approve the settlement retrospectively and (iii) the claimant had not, at the time of the settlement, been acting by a litigation friend, as was required by CPR r. 21.2(1) in the case of a "protected party". It was held that in accordance with the rules which applied to claims made by as well as on behalf of a party who lacks capacity to conduct proceedings, a party who in fact lacked capacity was protected even if he had not been officially declared to be such and had not been acting by a litigation friend at the time when a settlement agreement had been made and whether or not she had been legally represented. Therefore, even where lack of capacity was unknown to the parties at the time of the settlement, a consent order giving effect to a settlement reached without the approval of the court was invalid. Accordingly, the consent order was set aside. In the course of his judgment Behan J. at p. 3751 having commented that CPR PT 21 applies to invalidate a consent judgment involving a protected party reached without the appointment of litigation friend and with the approval of the court even where the individual's lack of capacity was unknown to anyone acting for either party at the time of the compromise went on to say:-

"I have reached this conclusion as a matter of statutory interpretation, but I should add my view that if one reaches the stage of policy considerations the balance strongly favours the same result. It is true to say that there is a public interest in certainty and finality in litigation; and that the setting aside of the compromise many years later is hard on defendant's insurers, who reasonably thought in January 2003 that the case was over. But there is also a public interest in the protection of vulnerable people who lack the mental capacity to conduct litigation. As it happens, the claimant was represented in the original proceedings, and might have an alternative remedy against the solicitors and counsel who were then advising her. But, as Mr Rowley frankly accepted in the course of his powerful submissions, if Chadwick LJ's Imperial Loan point is right it must apply equally to unrepresented parties, of whom there are likely to be more in the future. It is not difficult to imagine the case of a claimant who is capable of signing and posting an acceptance form sent by a loss adjuster, but who (unknown to the defendant or the loss adjuster) is incapable of managing his affairs. It would be disturbing if the 'compromise' reached by such a person could not be reopened."

The final case which may be of some assistance in considering this issue is the decision in the case of *Presho v. Doohan* [2009] IEHC 631. That was a case in which the defendants in an action founded on tort relating to an allegation made by the plaintiff that the first named defendant arranged unnamed persons to set the defendant's house alight could not be brought after the expiration of six years from the date on which the cause of action accrued. Reliance was placed by the plaintiff on an exception to the six year rule provided for by s. 49 of the Statute of Limitations 1957, which relates to a person being under a disability including being of unsound mind. It was noted in the course of the judgment that there is no definition contained in the Statute of Limitations of unsound mind. Murphy J. at p. 16 of the judgment commented:-

"On the question of unsound mind, Lord Denning M.R. in *Kirby v. Leather* [1965] 2 Q.B. 367 held:

'It seems to me that the words 'unsound mind' in a statute must be construed in relation to the subject matter with which the statute is dealing. In *Whysall v. Whysall* [1959] 3 WLR 592, Phillimore J. held that the phrase 'unsound mind' in a statute relating to the dissolution of marriage must be taken to describe a mental state which would justify a dissolution of the marriage tie, that is, mental incapacity such as to make it impossible for a couple to live a normal married life together. So here it seems to me in this statute a person is of 'unsound mind' when he is, by reason of mental illness, incapable of managing his affairs in relation to the accident as a reasonable man would do. It is similar to the test where a guardian ad litem or next friend is appointed under the new R.S.C. Ord. 80, r.l. That states that a person under a disability means 'a person who by reason of mental disorder is incapable of managing and administering his property and affairs.' So here it seems to me that David Kirby was of unsound mind if he was, by reason of mental illness, incapable of managing his affairs in relation to this accident.'

> In determining if mental disorder or illness amounts to a disability for the purpose of the Statute of Limitations, the test is whether or not the plaintiff was capable of managing his affairs in relation to the alleged wrong. Managing his affairs includes the protection of his legal rights."

Conclusion
The principles outlined by Laffoy J. in *Fitzpatrick v. F.K.* which I set out above are of some assistance to the court in this case although they deal specifically with the capacity of a patient to refuse medical treatment. Thus, there is a presumption as to the capacity of an adult patient to make a decision as to medical treatment, but that presumption can be rebutted. The test in that case was stated to be whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and the consequences of accepting or rejecting in the context ofthe choices available at the time the decision is made.

It seems to me that with suitable modification that test could be used to meet the situation in this case, bearing in mind the helpful decision in *Masterman-Lister* referred to above. It is important that the question of capacity be considered in the context of the particular transaction to be done or in this case, in relation to the conduct of the litigation in November 2012. Thus, in determining capacity in the context of litigation, it seems to me that the appropriate test is as follows:

> Was the defendant's cognitive ability impaired to the extent that he did not sufficiently understand with the assistance of such proper explanation from legal advisers and such experts as the nature of the case may have required, the issues on which his decision was likely to be necessary, the nature and effect of the decisions made in the course of the litigation, and the consequences of the decisions made by him for the litigation at that time? Applying that test, it is necessary to look at the decisions made in November 2012, the critical time in the context of this case, by the defendant. He consented to his solicitors corning off record in the proceedings on the day when the cases were first listed for hearing. He did not arrange for alternative representation nor did he arrange for anyone on his behalf to attend court in circumstances where he was apparently housebound. He had been informed that the actions had not been adjourned but did not seek to instruct any one to renew the application to adjourn the cases given that he was facing surgery in a number of days. He made the decision to undergo surgery rather than turn up in court or have anyone else do so on his behalf. He did not appeal the decision not to adjourn the cases.

I have described in detail the psychiatric and psychological evidence given to the court in this case. That evidence is uncontroverted. I have already indicated that I accept that the defendant now has mild cognitive impairment. It is clear from the evidence that other factors affect the ability to function on a day to day basis, such as depression and pain. I accept that the defendant was in all probability suffering from pain in November 2012, but it is difficult to be precise about the extent of the pain suffered by the defendant at that stage, given that the defendant has not given any evidence before the court nor have any members of his family.

The evidence from Dr. O'Connell, Prof. Cotter and Dr. Pender necessarily focused on the defendant as they found him in February, April and May 2013 respectively. None of them had seen the defendant in November 2012. In the course of evidence, the cognitive impairment of the defendant was described as an evolving situation.

It is impossible to ignore the background and history not just of the civil proceedings, but also of the criminal proceedings. The defendant faced four criminal trial commencing in November 2011 and concluding in July 2012 after the last lengthy trial finished without the jury being able to reach a verdict. That trial, it should be remembered, took place after the defendant's road traffic accident in June 2012. Throughout the criminal proceedings, the defendant was represented by Michael J. Staines and Company. There was never any suggestion in the course of the criminal proceedings that any issue as to fitness to plead arose. I need hardly say that facing criminal proceedings of that kind would be very serious for any person accused of such offences. It seems to me to be inconceivable that, if there was any doubt about the defendant's capacity to deal with those proceedings, the defendant's solicitors would have failed to deal with that situation. I note from the documents supplied to the court under the heading of GP notes that the defendant's solicitors in the criminal proceedings expressed concern before the commencement of the first of the trials in November 2011, as to the defendant's ability to cope with the strains of a trial if he was then receiving treatment for prostate cancer. I am aware of the evidence that there were some concerns as to the defendant's memory going back to 2011 but there is no evidence to suggest that the defendant was cognitively impaired in the course of the criminal proceedings up to July 2012, such as to prevent him from having the necessary capacity to deal with those proceedings.

I also note the affidavit sworn by the defendant himself on the 5th March, 2013, in which he set out the circumstances surrounding the events on the 13th November, 2012, when the matter was listed before the court. He commented:-

> "I am advised and so believe that Mr. Justice de Valera was informed of my condition on the 13th November 2012, and in this regard a medical report of Mr. Sean Dudeney dated the 13th November, 2012, was tendered to the court confirming the foregoing....
>
> I did not attend court on the following day or any day that week. I was simply not fit to do so. Nor did I attempt to instruct new solicitors. It was explained to the court I was housebound and due to be admitted to hospital to have a total hip replacement the following week on the 20th November, 2012.
>
> Unbeknownst to me it would appear that the case was kept in the list until the following week (commencing the 20th November, [2012]).
>
> I was not aware that the case was kept in the list. I was not notified by the solicitors for the plaintiff or anyone else that the case had been kept in the list or held over to the following week. I think that it is important to say that I had never absented myself form any previous hearing. On the contrary I had vigorously and successfully defended four separate criminal trials arising out of the same complaints made by the plaintiff in these proceedings."

He went on to add that he was in extremely poor health at that time and that the he believed that this hindered his ability and capacity to instruct new solicitors.

I note the fact that Mr. Burke in the course of his evidence explained the circumstances in which that affidavit came to be sworn and his concerns as to the capacity of the defendant at that stage. It is also worth noting and bearing in mind that throughout the visits of the defendant to the various medical experts who have given evidence in this case, the defendant has been able to provide a full and detailed account of all of the circumstances surrounding the criminal proceedings and his background. I do accept nevertheless that there have been comments as to the fact that the defendant from time to time wondered off the point and had be brought back

to the point.

I have carefully considered all of the evidence given in this case bearing in mind that the onus of proof rests on the party asserting a lack of capacity. I accept that the defendant suffers from a mild cognitive impairment, a problem linked to vascular ischemia. I accept that this is an evolving situation. I also accept that by November 2012, the defendant was likely to be in pain given the state of his hip as described by Mr. Dudeney.

Even though the defendant suffers from mild cognitive impairment, can I say that the defendant's cognitive ability was impaired in November 2012 to the extent that he could not sufficiently understand, with the assistance of such proper explanation from legal advisers and such experts as the nature of the case may have required, the issues on which his decision was likely to be necessary, the nature and effect of the decisions made in the course of the litigation, and the consequences of the decisions made by him for the litigation at that time?

The evidence before the court, in my view, does not go that far. What is striking about the facts of this case is that the defendant was able to give clear and detailed accounts of the facts and background to this litigation to the various experts who examined him. Dr. Pender, in his report noted that the defendant "understands the allegations made against him and denies these vehemently. His intellectual ability is intact and he does have good ability to understand and interpret information." His level of functioning has varied to some extent in the course of the examinations. Factors such as depression can affect the level of cognitive impairment. The experts who have given evidence have attempted to describe the defendant's likely position in November 2012 based on their examinations earlier this year but this evidence is somewhat difficult to reconcile with the fact that the defendant was able to deal with the criminal proceedings over a long period concluding in July 2012. Crucially, the evidence does not appear to me to go so far as to establish that the defendant's cognitive ability was impaired to the extent that he could not sufficiently understand with the assistance of such proper explanation from legal advisers and such experts as the nature of the case may have required, the issues on which his decision was likely to be necessary, the nature and effect of the decisions made in the course of the litigation, and the consequences of the decisions made by him for the litigation at that time.

It is unfortunate that a series of events occurred in November 2012 which left the defendant unrepresented at the trial of these actions. His then Solicitors came off record on the day the trials were first listed. The trials were not adjourned in circumstances where the defendant was scheduled to have hip replacement surgery on the 20th November 2012. That decision was not appealed nor was an application to adjourn renewed by the defendant or anyone on his behalf. Undoubtedly, his personal circumstances were difficult given the health problems he had. The fact that the defendant did not deal adequately or appropriately with the events which occurred at that time is something which is a sign of poor judgment. It does not necessarily demonstrate a lack of capacity on the part of the defendant.

Having regard to all of the evidence, I am not satisfied on the balance of probabilities that the defendant lacked the capacity to make the necessary decisions in relation to the litigation in November 2012. Accordingly, on that basis I refuse to set aside the judgments herein.

For completeness, I propose to refer very briefly to an issue raised on affidavit before the court. It was suggested that the defendant had been seen in the Four Courts on the 21st November 2012, the day after the first of these trials. I accept that the defendant underwent hip replacement surgery and was in Mount Carmel Hospital from the 201h November 2012, as borne out by the Hospital Admission Record exhibited by Mr. Burke in an Affidavit of the gth July 2013. No further comment on this issue is necessary.