Neutral Citation Number [2008] IEHC 18

THE HIGH COURT

[2002 No. 10061 P]

BETWEEN

JAMES BEHAN

PLAINTIFF

AND
EDWARD McGINLEY

DEFENDANT

THE HIGH COURT

[2005 No. 2424 P]

BETWEEN

JAMES BEHAN

PLAINTIFF

AND
THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND,
EDWARD McGINLEY OF ROYAL AND SUN ALLIANCE,
MICHAEL O'KENNEDY AND CHARLES CORCORAN

DEFENDANT

Judgment of Ms. Justice Irvine delivered the 24th day of January, 2008

1. The plaintiff in this action at the time of the events which give rise to these proceedings, had been a customer of the Bank of Ireland for many years at its Carlow branch where he dealt regularly with Mr. Vincent Power, the branch Manager. The plaintiff owned a valuable farm of approximately 240 acres at Athy, Co. Kildare and found himself, like many other farmers in 1980 in significant difficulties, principally due to rising interest rates and falling land values.

2. The business dealings between the plaintiff and his bank have resulted in the institution by the plaintiff of a number of sets of legal proceedings to which I will refer later in this judgment.

3. The first action in the title hereto was commenced by plenary summons dated 19th July, 2002 ("the 2002 proceedings"). The defendant to the action is the party nominated to defend the interests of the late Noel Clancy, S.C. who represented the plaintiff in the course of his first action against the Bank of Ireland, which was heard in the High Court in the summer of 1997 and dealt with an appeal on the Supreme Court the following year.

4. There are a number of motions which are the subject matter of this judgment the first of which is dated the 27th April, 2006. In that motion the defendant asks the court to strike out the plaintiff's pleadings pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the basis that the same that the same are vexatious, frivolous and/or disclose no reasonable cause of action as against the defendant.

5. The plaintiff has instituted further proceedings in the High Court under Record No. 2005/2424P ("the 2005 Proceedings") being the second action in the title hereto. The defendants in that action are the Governor and Company of the Bank of Ireland, Edward McGinley of Royal and Sun Alliance, Michael O'Kennedy and Charles Corcoran.

6. In the 2005 proceedings there are two motions before the Court. The first motion is that of the first named defendant, the Governor and Company of the Bank of Ireland, dated the 15th of January 2007 wherein the Court is asked to strike out the plaintiff's pleadings pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the basis that the pleadings disclose no reasonable cause of action. Alternatively, the Court is asked to direct that the proceedings be stayed or dismissed pursuant to O. 19, r. 28 on the grounds that the action is frivolous or vexatious. The court is further asked to exercise its inherent jurisdiction to stay or dismiss the action on the basis that the proceedings amount to an abuse of process. Finally, the court is requested to make an order prohibiting the plaintiff from issuing any further proceedings against the first named defendant without leave of the court.

7. The second notice of motion in the 2002 proceedings is one dated the 26th of January, 2007 and is brought on behalf of the second, third and fourth named defendants. In that notice of motion the court is asked to invoke its inherent jurisdiction and/or the provisions of O. 19, r. 28 of the Rules of the Superior Courts to strike out the plaintiff's proceedings as being an abuse of process and/or on the basis that the proceedings are frivolous or vexatious. Alternatively, the court is asked to strike out the proceedings on the grounds that the allegations of fraud and/or collusion and/or conspiracy and/or deception are made without any or any sufficient evidence. Finally, the court is asked to dismiss the plaintiff's claim for negligence on the basis that such a claim is statute barred.

8. The facts which underlie the within application, are set out in the pleadings and affidavits delivered in the actions to which the three motions relate. In essence, both actions relate to the dealings between the plaintiff and his bank over the period 1981 to 1985 and also his dealings with the lawyers who represented him in his litigation against his bank in the proceedings which are referred to below.

Background to earlier litigation

9. In proceedings bearing Record No. 1990/9665P ("The 1990 Proceedings") the plaintiff sued the Governor and Company of the Bank of Ireland with a view to establishing a breach by his bank of a concluded enforceable agreement allegedly made at a meeting with his bank Manager, Mr. Vincent Power on the 18th May, 1981. The plaintiff contended that, notwithstanding his increasingly substantial liabilities, his bank agreed that it would continue to fund his farming activities so as to permit him to trade out of his financial indebtedness.

10. In the 1990 proceedings the plaintiff further asserted that he was given negligent advice by Mr. Power. He alleged that Mr. Power convinced him not to sell certain lands which he wished to sell to reduce his indebtness. The plaintiff claimed that but for the bank's negligence in this respect he would have sold such lands, reduced his indebtness and ultimately avoided the losses occasioned to him when the bank called in all his outstanding liabilities in 1984. The plaintiff alleged that this negligence in addition to causing him financial loss caused him to sustain serious ill health. This claim for negligence and consequential personal injuries was held to be statute barred at a preliminary hearing in June 1997 at which time the court concluded that the plaintiff's claim for breach of contract was not statute barred.

11. Finally, incorporated within the 1990 proceedings was a claim which was made by the plaintiff late in the day as a result of the emergence of evidence in the course of the trial before Morris J. The court permitted the plaintiff to amend his pleadings to maintain a claim against his bank arising from the manner in which he was treated in relation to a scheme introduced by the Government in 1982 to assist farmers who were in difficulties having regard to increased interest rates at that time. For the purposes of this judgment it is sufficient to state that the "Reduced Interest Scheme for farmers in severe financial distress" ("the Scheme") was introduced by the Minister for Agriculture on the 1st April, 1982. The objective of the scheme was to provide relief from high interest rates for certain classes of farmers. The Scheme operated for three years from the 1st April, 1982 and provided for substantially reduced interest rates to those who qualified for admission into the Scheme. In turn the bank who provided the reduced interest rates received a corporation tax credit in respect of the reduced interest received by them from the farmers whom they admitted to the Scheme.

12. In the course of the evidence in the 1990 proceedings the court became appraised of the fact that after the bank had called in payment from the plaintiff of all sums outstanding and had reached a compromise with him regarding his indebtness, in the sum of £165,000 that it had thereafter credited his account with three sums totalling £18,455.18 so that it could offset such sums against its own corporation tax liabilities, something it was only entitled to do, if it had admitted the plaintiff to the Scheme. In this respect the judgment of Morris J. in the 1990 proceedings sets out all of the material facts referable to the banks management of the plaintiff's application for entry into the scheme.

13. To qualify for entry into the Scheme the farmer was required to produce a report on the viability of their farm. In the instant case, the plaintiff produced a supportive report from ACOT on 28th July, 1983. On 17th January, 1984 the plaintiff's bank in Carlow was given authority to admit the plaintiff to the Scheme, he having completed the necessary forms for admission thereto on the 28th May, 1982. Notwithstanding the authorisation to admit the plaintiff to the Scheme, the benefit of the Scheme had not been passed on to him at the time the Scheme was being wound up by the Government. Further, the reduced interest rates had not been passed on to the plaintiff at the time when the bank ultimately called in all sums due by the plaintiff, which then amounted to £213,891.43.

14. The judgment of Morris J. dated 15th August, 1997 in the 1990 proceedings recites that he determined the plaintiff's claim, including his claim arising from any wrongdoing on the part of the bank in relation to the Scheme in the course of the hearing of the proceedings in July and August 1997. The plaintiff made the case at the trial that he had suffered consequential loss arising from the unreasonable and improper delay on the part of the bank in permitting him to benefit from the scheme.

15. The trial judge in his judgment expressed himself satisfied that the bank, whilst attempting to achieve benefits for itself deriving from the Scheme, had deprived the plaintiff of the benefit of the Scheme from January 1984 until the winding up of the Scheme and that the plaintiff had to be recompensed for such failure by reimbursement of the monies which would have been credited to his account had he been admitted to the Scheme.

16. In relation to the main issue in the proceedings, i.e. the breach of contract claim, Morris J. in his judgment dated the 19th of August 1997 held that:-

> "Even accepting Mr. Behan's evidence in its entirety I do not believe that anything that was said by Mr. Power on that occasion could constitute an enforceable contract by reason of the imprecise nature of the arrangement alleged. It is not suggested for how long the commitment was to have lasted, the rate of interest payable on any monies advanced on foot of the contract nor is it suggested that Mr. Behan ever indicated an acceptance of the alleged contract."

17. I do not believe it is necessary to set out all of the findings of the trial judge in relation to the 1990 proceedings. For the purposes of this judgment it is sufficient to state that the learned trial judge held that there was no enforceable contract to extend borrowings to Mr. Behan on an indefinite basis and that all claims arising from this alleged contract had to fail. Consequentially, Morris J. held that the bank was entitled to call in Mr. Behan's indebtness and dishonour cheques drawn by him on his account. In the course of his judgment, Morris J. noted that the plaintiff's liabilities to the bank as of 22nd July, 1985 were £213,891.43 and that the bank had agreed to accept in lieu thereof a sum of £165,000 in staged payments. The bank had thus agreed to write off a sum of £48,891.43.

18. Morris J. rejected assertions made in the course of those 1990 proceedings that the bank had deliberately dishonoured cheques to ruin the plaintiff's reputation and further concluded that the bank was entitled, in the absence of any concluded contract between the plaintiff and his bank, to refuse to honour cheques as there were simply no funds to meet them.

19. What is of significance to the present proceedings is the finding of the trial judge that no other losses accrued to the plaintiff by reason of the banks dealings with him referable to the Scheme, he having heard evidence regarding the extent of the plaintiff's liabilities at the relevant period and considered the benefits which he would have received in terms of a reduction of interest had he been admitted to the Scheme.

20. The judgment of Morris J. in the 1990 proceedings makes it clear that it was his intention to ensure, at the conclusion of the proceedings, that the plaintiff would be reinstated financially into the position which he would have been in had he been admitted to the Scheme at the relevant time. Hence, the plaintiff was compensated by the court to the extent of the amount of interest levied on his account at a time when he should have been admitted to the scheme and this the trial judge held compensated him in respect of all financial loss arising to him deriving him from the failure of the bank to formally admit him to the Scheme. At p. 13 of his judgment the trial judge stated that he was satisfied that the failure on the part of the bank to admit the plaintiff to the Scheme had no overall effect on his ultimate financial outcome having regard to the extent of his liabilities at the time.

21. Because of the nature of the motions presently before the court it is relevant to set out the conclusions of the trial judge in the 1990 proceedings and also briefly refer to the evidence which was available to him in relation to each conclusion. Hence, form the documentation submitted on these motions, which documentation includes the pleadings, various transcripts, orders of the court, written submissions and the judgment of the trial judge it appears that the court in the 1990 proceedings concluded that:-

> 1. The claim by the plaintiff contending for a breach by his bank of a binding contract of indefinite duration entitling him to continued funding was not sustained. For the purposes of determining this issue the court heard extensive evidence from the plaintiff and his experts regarding the dealings between the plaintiff and his bank, the nature and profitability of his farming enterprise and the consequential losses to him of the banks' failure to perform its obligations under the alleged contract. In particular the court heard evidence as to the cause of the plaintiff's financial difficulties in the 1980s and heard substantial expert testimony from Dr. Beilinberg, supporting the plaintiff's substantial claim for consequential loss.
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> 2. Having regard to the absence of any binding agreement requiring the bank to continue to fund the plaintiff's farming activities that the bank was entitled to dishonour cheques drawn by him and that in so doing it did not conspire with any

of his competitors to procure his downfall. The transcript reveals that the bank's entitlement to dishonour those cheques was challenged by the plaintiff's counsel. Further, counsel pursued the consequences to the plaintiff of the dishonour of those cheques by the bank.

3. The bank acted arbitrarily in failing to admit the plaintiff to the Scheme. Insofar as the bank had obtained the benefit of a reduction in its corporation tax liabilities by virtue of credits made to the plaintiff's account after its settlement with him, that the plaintiff was entitled to reimbursement of such monies together with interest as monies had and received to the plaintiff's benefit.

22. The learned trial judge did say in the course of his judgment that no evidence had been offered to support a claim for consequential loss arising from the failure of the bank to admit the plaintiff to the Scheme. However, he then went on to conclude, that the amount of the plaintiff's indebtedness at the relevant time was such that "the relief he would have obtained from immediate admission to the Scheme was of no overall consequence".

23. Because of the issues arising in the within motions it is important to note that in the course of the 1990 proceedings the court heard evidence from some fourteen witnesses whose names are set out in the schedule to the order of the court dated 15th August, 1997. One such witness was Mr. Duffy of ACOT, who had prepared a report as to the viability of the plaintiff's farming activities over the relevant period. The transcript exhibited in these motions demonstrates that counsel for the plaintiff used this report for the purposes of aggressively challenging the defendant's agricultural expert, Mr. Lawrence Power whose evidence was to the effect that the plaintiff's financial problems all stemmed from over expenditure. Further Mr. Power was cross-examined as to the financial consequences arising from the banks failure to admit the plaintiff to the Scheme.

Appeal from the High Court decision in the 1990 proceedings
24. It is common case from the affidavits filed on behalf of the defendants in these motions that the plaintiff was advised by his counsel not to appeal the decision of the High Court. Notwithstanding, this fact and in the face of an offer from the bank to settle the proceedings, the plaintiff pursued an appeal which was heard by the Supreme Court in 1998.

25. The Supreme Court in its judgment unanimously upheld the trial judge's findings regarding his conclusion that there had been no concluded contract between the plaintiff and his bank which would have obliged the bank to allow him trade out of his financial difficulties. Further, Barron J. and O'Flaherty J. upheld the trial judge's finding that the plaintiff was entitled to be reimbursed the £18,455.18 together with interest which the bank had claimed as a corporation tax credit based on the plaintiff's entitlement to be admitted to the Scheme. The court also held that the plaintiff was entitled to know at the time he settled his liabilities with the bank, that the bank was intent on obtaining the fiscal advantage of these monies from the Revenue as a tax credit and that the bank in so doing was effectively acknowledging the right of the plaintiff to these monies and was consequently estopped from denying his entitlement to the benefit of the same.

26. The minority judgment of Keane J. on this issue concluded that there was nothing inappropriate with what he described as a "paper transaction" carried out by the bank after its settlement with the plaintiff. He held that, given the extent of the plaintiff's indebtedness and the banks acceptance of a significantly lesser sum than it had been entitled to by way of settlement, the plaintiff was estopped from claiming any entitlement deriving from the banks actions.

27. By order dated 20th July, 1998 the Supreme Court affirmed the decision of the High Court on the main issue. The costs order was varied with the plaintiff obtaining an order for three days High Court costs and the defendant being granted an order for ten days costs. The court further directed that the plaintiff's liability for costs be reduced by the sum he was entitled to receive from the defendant's referable to their failure to admit him to the Scheme. The court made no order as to the costs of the Supreme Court hearing.

28. The next critical event in the historical chronology of the plaintiff's litigation, is that by letter dated the 27th July, 1998 the plaintiff dismissed all counsel who acted for him in the 1990 proceedings namely Mr. Noel Clancy S.C., Mr. Michael O'Kennedy S.C. and Mr. Charles Corcoran B.L. Subsequently, the same counsel were asked once again to come back to act on the plaintiffs behalf in fresh proceedings by request made dated the 8th December, 2000. All counsel refused stating that their advice had been rejected in the course of the earlier proceedings and further referring to the fact that they had never received any payment for their earlier work. This work included representing the plaintiff in the course of the eighteen day High Court hearing, attending numerous consultations, the preparation of extensive pleadings and written submissions and the plaintiff's further representation at the time of his appeal to the Supreme Court.

The 2001 proceedings
29. Further proceedings were instituted by the plaintiff in 2001 against the Governor and Company of the Bank of Ireland bearing Record No. 2001 No. 4815 P. In those proceedings the plaintiff contended that he had been defrauded of the interest subsidy which he was entitled to under the Scheme referred to earlier in this judgment. The plaintiff alleged that he was defrauded of this subsidy due to the negligence of his bank and claimed that he had sustained significant losses as a result of the conversion by his bank of his monies to its own use.

30. The particulars of special damages claimed in the 2001 proceedings are set out at p. 11 of the statement of claim. The heads of loss are the same as those referred to in the plaintiff's 1990 proceedings.

31. The defendant to the 2001 proceedings brought a motion to the High Court to dismiss the proceedings on the basis that the issues were res judicata and further on the basis that the proceedings did not disclose any reasonable cause of action. The bank was unsuccessful in its application and the decision made in the High Court by Kinlen J. was appealed by the bank to the Supreme Court.

32. Denham J. at p. 4 of her judgment of 19th March, 2004, referred to the statement of claim which had been amended in the course of the 1990 proceedings to include the plaintiff's assertion of wrongdoing on the part of the bank referable to its failure to benefit him under the Scheme. The learned Supreme Court judge, at p. 5 of her judgment also referred to the portion of the judgment of Morris J. of 15th August, 1997 where he dealt with all of the issues arising from the banks wrongdoing and also to the decision of the Supreme Court upholding the trial judge's findings thereon.

33. At para. 13 of her judgment, Denham J. referred to the losses claimed in both sets of proceedings and concluded that the issues and losses the subject matter of the 2001 proceedings had already been litigated in the 1990 proceedings. The court concluded that the fact that the plaintiff wished to present further evidence which might not have been presented in the course of the first action did not mean that the matter could be re-opened and further determined in any event, that the consequences which flowed from any wrongdoing on the part of the bank in relation to those matters pleaded in the 2001 proceedings, had already been determined by

Morris J. She concluded that the consequential loss to the plaintiff of not having been afforded the benefit of the Scheme was the same irrespective of whether or not such losses were categorised as having flowed from negligence or alternatively fraud on the part of the bank.

The 2002 proceedings

34. The first action set out in the title to this judgement was commenced on the 19th July, 2002. In this action the plaintiff alleges negligence against his senior counsel, the late Noel Clancy S.C., in relation to the management by him of his 1990 proceedings which were the subject matter of the judgment of Morris J. of 15th August, 1997. The major criticisms made by the plaintiff against his counsel are not at all clearly stated in either his statement of claim or in his replies to the defendant notice for particulars. Further, the affidavits filed on the plaintiff's behalf in the present motions fail to set out the nature of the evidence which the plaintiff proposes to call in support of his latest claims. In addition, the affidavits filed in many instances inaccurately record the facts and the evidence referable to the earlier proceedings. These facts are more accurately captured by revisiting the earlier pleadings, judgments and transcripts.

35. Broadly speaking the plaintiff's complaint in this his third set of proceedings is that his counsel failed to secure for him adequate pecuniary compensation in his 1990 proceedings as a result of his negligent management of his High Court action and his appeal to the Supreme Court. He contends that he ought to have recovered compensation for the loss of his lands and livelihood. These losses are set out in the particulars of special damage in the statement of claim. Once again these losses mirror the same heads of claim advanced by the plaintiff in his earlier two actions. Written submissions had been delivered by the plaintiff in his 1990 proceedings and an examination of Chapter 4 of those submissions demonstrates that the losses which the plaintiff now seeks to recover in these 2002 proceedings are the same losses as were already dealt with by the court in his earlier proceedings.

36. By notice of motion dated 17th April, 2007, the defendant, who is the party nominated to represent the interests of the late Noel Clancy, S.C. seeks to dismiss the plaintiff's claim on the basis set out in the introduction to this judgement.

37. In the grounding affidavit to the aforementioned motion Ms. Melanie Holmes, Solicitor on behalf of the defendant, at para. 8 of her affidavit asserts that:-

> "It is manifest that on the basis of the claim made by the plaintiff he has no cause of action against the defendant and in fact the plaintiff's claim against the defendant is no more than a further attempt to re-visit his proceedings against the Bank of Ireland."

38. The plaintiff's replies to particulars when read in conjunction with the statement of claim shows that the plaintiff still harbours the belief that he can maintain an action for damages as a result of the failure on the part of his bank to notify him of his acceptance into the Scheme and/or for the banks failure to give him the benefit of the interest reduction which he would have been entitled to under that Scheme. Further, notwithstanding the outcome of his first two actions the plaintiff in this his third action also seeks to maintain an entitlement to claim that the bank was obliged to honour his cheques during the currency of the Scheme and to claim damages consequent upon the banks dishonour of those cheques.

39. I now propose to deal with the several areas of complaint made by the plaintiff against the late Mr. Clancy S.C. in these proceedings which he contends amounts to negligence and which he asserts permits him to maintain once again a claim for damages for the loss of his entire farming enterprise in 1984. Because of the case law to which I will refer later it is necessary in the course of this part of the judgment to refer briefly to some of the facts and evidence relevant to the allegations of negligence made by the plaintiff.

> 1. The plaintiff asserts that counsel did not present what he describes as "relevant and appropriate documents" to the court which he contends would have had the effect of altering the courts judgment.
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> From the affidavits in these motions the documents which the plaintiff asserts were not produced on his behalf were firstly the ACOT Report and secondly a bundle of cheques which the plaintiff alleges he physically handed to his counsel. The plaintiff contends that his counsel's default in failing to produce these documents resulted in counsel failing to make appropriate submissions as to the damages which he was entitled to recover in those 1990 proceedings.
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> In this respect, insofar as the ACOT Report is concerned, that Report was clearly introduced into evidence as the author of such Report, Mr. Duffy, was called to give evidence on the plaintiff's behalf in relation to its contents. The order of the court dated the 15th August 1997 recites that the court heard evidence from some fourteen witnesses, the names of whom are set out in the schedule to the said order. Included amongst them is Mr. Duffy. It is common case that this Report, asserting that the plaintiff's farm would return to profitability in early course, was a condition precedent to the plaintiff's application for admission into the Scheme. The Report was relied upon strongly by Mr. O'Kennedy S.C. when cross examining Mr. Laurence Power, the bank's agricultural expert, regarding the profitability of the plaintiff's business, its future viability and the reasons behind the plaintiff's financial difficulties.
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> In relation to the cheques it is clear, contrary to what is contended for by the plaintiff, that counsel pursued the dishonour of the plaintiff's cheques with the bank's witnesses. However, even if he had not done so, it is difficult to see how these cheques could have formed the basis of any claim for damages unless the plaintiff was in a position to convince the court that there was an enforceable agreement that the bank would allow the plaintiff trade out of his difficulties and therefore would not have been entitled to dishonour the cheques. The transcript and submissions filed demonstrate that the making of such an agreement between the plaintiff and Mr. Power in May 1981 was aggressively pursued by counsel for Mr. Behan, but was rejected by the court and hence the dishonour of the cheques was the right of the bank, absent any such contract. Regarding such an agreement, Morris. J. stated that he could not possibly come to the conclusion that the bank had agreed to allow Mr. Behan trade through his financial difficulties. Hence, the entitlement of the bank to call in all outstanding liabilities and the ultimate loss by the plaintiff of his farm.
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> From the judgment of Morris J. it is apparent that not only did counsel produce the cheques handed to him by the plaintiff but the court went on to consider the banks actions in relation to the dishonour of the cheques against the backdrop of the failure on the part of the plaintiff to establish the concluded contract contended for. The court also considered the issue of the dishonour by the bank of the plaintiff's cheques during the period when the plaintiff, in its opinion, should have had the benefit of the Reduced Interest Scheme. Implicit in the Court's judgment was its conclusion that even had the plaintiff been afforded the benefit of the reduced interest rates under the Scheme prior to the bank seeking repayment of his liabilities that the benefit of the Scheme would have been so marginal in the overall context of the plaintiff's liabilities that the bank would in any event have been entitled to dishonour those cheques.

In addition to the aforegoing the transcript shows that Mr. O'Kennedy S.C. pursued the issue of the dishonour of the cheques and the consequences to the plaintiff's business and reputation flowing therefrom. This fact is borne out by the judgment of the court where it deals with the cheques in the context of the plaintiff's assertion that the bank sought to ruin the plaintiff's reputation and also sought to conspire with a fellow competitor so as to damage the plaintiff's business.

At other portions of the transcript and in particular through the questions posed by Mr. O'Kennedy, S.C. commencing with question 340, Mr. Power was challenged on the consequences of the bank bouncing cheques of the plaintiff in December, 1983 and January, 1984.

The learned Trial Judge at page 10 of his judgment stated as follows:-

> "Mr. Behan further complains that the bank improperly and indeed maliciously dishonoured cheques drawn by him. He suggested that the bank did so in order to ruin his reputation as a farmer and a businessman in the community and to denigrate him in the eyes of his workmen and business associates. No case has been made out to my satisfaction that any of these cheques were improperly dishonoured. At the time these cheques were drawn by Mr. Behan he neither had the authority of the bank to do so nor did he have funds or an accomplice to cover these cheques."

The finding of the learned Trial Judge referred to above has a significant impact on this motion insofar as the net effect of the judgment was that the bank was entitled at the relevant time to dishonour certain cheques presented for payment by the Plaintiff and about which dishonour the Plaintiff can have no legitimate complaint. It is clear that the trial judge had the benefit of sustained and in-depth cross-examination on the issue of bounced cheques, the credit-worthiness of the plaintiff, the potential viability of his business and the effect, if any, that the plaintiff's inclusion in the Scheme would have had upon him.

Prima facie therefore the plaintiff's claim against his counsel in respect of both the ACOT Report and the relevant cheques appears to be without foundation. Further, all issues arising in respect of the dishonour by the bank of the plaintiff's cheques during the relevant period are *res judicata*. In any event, in respect of the ACOT Report, the same was only of relevance to the plaintiff's admission into the scheme and he was compensated for the failure on the part of the bank to treat him as a member of that Scheme in the 1990 proceedings.

2. The second major complaint made against Mr. Clancy S.C. is that when it came to the courts attention in the course of the hearing that the bank had sought to reduce its corporation tax liabilities as if they had admitted the plaintiff to the Scheme that counsel refused to plead fraud contrary to the plaintiff's instructions. In addition, it is alleged that Mr. Clancy failed to argue for satisfactory damages arising from the bank's failure to admit him to the Scheme when invited to do so in the Supreme Court.

In relation to this issue it appears to this court that whatever the instructions given to counsel might have been the plaintiff in this motion has not produced any evidence to the court to show how fraud would have been established had such a plea been made in the 1990 proceedings. Neither does the plaintiff demonstrate in the affidavits filed on his behalf how any such claim, if established, would have entitled him to damages over and above those which he obtained as monies had and received by the bank to his benefit.

The High Court heard the evidence as to what occurred in relation to the plaintiff's treatment at the hands of the bank under the Scheme. The High Court categorised the bank's actions as wrongful and decided that such wrongdoing entitled the plaintiff to the benefit of the monies which the bank should have credited him with, had he been admitted to the Scheme. The Supreme Court categorised the plaintiff's rights to the same monies as arising by virtue by some type of estoppel. The minority judgment of the Supreme Court in relation to the 1990 proceedings determined that the bank did nothing wrong whatsoever in relation to how the plaintiff was treated under the Scheme. Finally, Denham J. in the second action instituted by the plaintiff stated that the damages would have been the same whether or not the claim was successful irrespective of whether it was categorised as fraud or negligence. Hence, even if the plaintiff could establish negligence against his counsel for not pleading fraud he has no claim for damages given that he has already been compensated for precisely the same loss in the course of his 1990 proceedings.

The plaintiff has produced no evidence to this court as to how the claim of fraud against the bank could have been supported by evidence had it been made in accordance with his alleged instructions in 1990. This being so, the court views the assertion made by Mr. Browne, a solicitor, who ought to be well familiar with the rules of evidence, as to Mr. Clancy's negligence in this respect as being one which is irresponsible and gravely offensive and is an assertion of professional impropriety against a fellow professional which he must know to be without any legitimate foundation. If the plaintiff's assertion is correct that Mr. Clancy, S.C. failed to plead fraud and he did so in the absence of any evidence to support such a plea, it is to his credit that he did not lend his name to such a plea and further was acting in accordance with his professional obligations.

From the affidavits filed, it seems that the plaintiff in these proceedings is trying to revisit his entitlement to be admitted to the Reduced Interest Scheme and the issue of losses arising therefrom through the guise of a negligence action against his counsel, when the court has already pronounced in his earlier proceedings that the issue of losses arising from not having been formally admitted to the Scheme are res judicata. Even if the plaintiff was correct that his counsel ought to have pleaded fraud and evidence was available to establish such a claim, it is difficult to see how the court could award damages to the plaintiff over and above those which were awarded to him in his first action. The effect of the bank's failure to admit the plaintiff to the Scheme on his business was considered and adjudicated upon in the 1990 proceedings at which time the court clearly accepted Mr. Powers evidence that in the context of the year by year losses and the marginal reduction it would have made to Mr. Behans's total liabilities that the overall outcome would have been much the same in any event. The fact that the court considered these issues in the earlier proceedings is demonstrated in Mr. Browne's affidavit of 12th June, 2006 where at para. 10 he refers to the evidence given by the bank's expert, Mr. Power which allegedly belittled the assertion of the plaintiff that the bank's failure to afford him reduced interest rates caused him substantial loss.

3. The third major complaint made by the plaintiff in the affidavits filed on his behalf is that Senior Counsel was negligent in failing to aggressively challenge the evidence given by the bank's agricultural expert Mr. Power. In particular it is asserted that counsel was negligent in failing to produce a report to rebut the evidence given by Mr. Power.

The court views the aforementioned assertion which is made by Mr. Browne, a solicitor, as one which lacks credibility. Any solicitor must know that, save in wholly exceptional circumstances, none of which are relevant to this case, the case ends after the conclusion of the defendant's evidence and that it is simply not possible for a plaintiff to produce reports to rebut the evidence of a defendant's expert witness after the conclusion of the defendant's evidence. Neither does the plaintiff demonstrate to the court that such evidence was available nor how it could have altered the outcome. Once again it seems in this action that the plaintiff seeks another opportunity to challenge the evidence given by Mr. Lawrence Power. The transcript shows that the plaintiff set out through his own experts, namely Dr. Beilinberg and Mr. Duffy, to establish how his losses arose and the extent of those losses. These were all put to Mr. Power whose evidence was fully challenged, but ultimately accepted by the court.

4. The plaintiff asserts that Senior Counsel was negligent in failing to contend that the award of damages made by the High Court in respect of the failure on the part of the bank to admit him to the Scheme was inadequate.

Once again the plaintiff in his affidavit does not establish how Senior Counsel could have contended for any additional losses having regard to the findings of the High Court on the core issue i.e. that there was no concluded contract precluding them from calling in the plaintiff's outstanding liabilities. The plaintiff does not put forward on affidavit the basis upon which he asserts that Mr. Clancy could have contended for damages over and above what were awarded without reversing the High Court's decision on the existence of an enforceable contract to permit him to trade out of his financial difficulties. Senior Counsel simply had no evidence to support an argument for damages to be made beyond that which was awarded in the High Court.

5. The plaintiff alleges that Mr. Clancy S.C. failed to adequately challenge the testimony of Mr. Laurence Power, the defendant's agricultural expert.

Not only does this assertion appear to be without foundation from the transcript of the evidence but the plaintiff has failed in his affidavits to point to the existence of any facts, which, if put to Mr. Power would have been likely to bring about an alternative outcome to that which occurred.

From the transcripts of the evidence produced on this motion it is clear that Mr. Laurence Power, in his direct evidence, advised the court that it was the management by the plaintiff of his farm, rather than interest rates, which was his major problem in the six years up to and including 1984. Mr. Power gave evidence that Mr. Behan's fixed and overhead costs were underestimated as were his living expenses. This witness gave evidence that in each year following 1979 that the plaintiff's liabilities were increasing. He gave evidence that any further monies that might have been advanced by the bank would simply have led to further losses.

A review of the transcript of the hearing identifies that a lengthy cross-examination of Mr. Power was carried out by Mr. O'Kennedy, S.C. and that cross-examination runs to some 30 pages of text. In the course of his cross examination Mr. O'Kennedy sought to challenge Mr. Power on many issues including the report from ACOT which set out a positive projection for Mr. Behan's farming business over the relevant period. Mr. Power constantly recalled to the court that Mr. Behan's track record was inconsistent with the projections being made for his farm in the ACOT plan and ultimately this evidence seems to have been accepted by the court. Further, when challenged about the bank's failure to give the plaintiff the benefit of the farm rescue scheme in circumstances where he had been approved for entry into that Scheme, Mr. Power pointed out:-

> "Now the farm rescue plan was actually a very limited plan, in that the most it could mean to a farmer in difficulty in any year was £8,750. That would be an awful lot of money to a very small farmer with a very small operation. To a very large farmer with very large indebtedness £8,750 was the maximum within the scheme. In Mr. Behan's case, his maximum was about £6,000, £6,200."

40. The details set out in relation to the five categories of complaint above are is not an effort on the part of this court to prejudge the outcome of these proceedings if they were to be permitted to run to trial. However, because of the law which is pertinent to an application to have an action dismissed as being vexatious and an abuse of process, is necessary for the court to seek to evaluate the viability of the claims made in the within proceedings when viewed in the context of the plaintiff earlier litigation.

The 2005 proceedings

41. The second of the actions referred to in the title to this judgment were instituted by the plaintiff in 2005 under Record No. 2005/2424P. In this action the Bank of Ireland is the first named defendant, the second named defendant is the representative of the late Mr. Noel Clancy, S.C., the third and fourth named defendant respectively are Senior and Junior Counsel who acted on his behalf in the 1990 action.

42. In this his fourth action the plaintiff claims that counsel deliberately mislead the court in the 1990 proceedings in order to deny him his legal entitlements. In addition the plaintiff asserts that his counsel deliberately mislead him and further alleges that his counsel colluded with the bank to deny him his legal rights.

43. I have carefully considered all of the affidavits filed by the parties in these motions and in particular the affidavits of Mr. Lavelle, solicitor for the Bank of Ireland, the affidavits of Mr. Corcoran Junior Counsel, Mr. O'Kennedy Senior Counsel, and Mr. McGinley on behalf of the late Mr. Noel Clancy, S.C. The court has also carefully considered the affidavit of Mr. Behan sworn on his own behalf on 26th January, 2007.

44. Once again the plaintiff in this action wishes to impugn the evidence given to the court by Mr. Lawrence Power, the agricultural expert called on behalf of the bank in the 1990 proceedings. In the earlier proceedings the plaintiff had complained that the court had accepted Mr. Power's evidence due to incompetence on the part of his own counsel to adequately cross examine Mr. Power or adduce appropriate rebuttal evidence. In this action it is alleged that the bank conspired with its own expert witness to mislead the court and in addition that his own counsel conspired and colluded so as to allow the bank's evidence go unchallenged.

45. Notwithstanding these most serious allegations there is simply no evidence produced by the plaintiff in support of these assertions of collusion and conspiracy. The court is asked to assume corruption and collusion. The assertions made are abusive, not supported by the evidence and indeed appear to be in the teeth of the challenges made to the evidence on the plaintiff's behalf by his counsel and other expert witnesses. Once again the court has serious concerns that these allegations of the gravest type of deliberate professional misconduct have been made by Mr. Behan at a time when he is being advised by Mr. Browne, a practising solicitor, who

has not only sworn affidavits himself in relation to the defendants motions but has written correspondence and overseen all of Mr. Behan's submissions in the course of the three day hearing before this court. The fact that these serious allegations of professional misconduct are deposed to on oath without a scintilla of evidence against three members of the Bar is, to say the least, regrettable.

46. Once again, whilst new allegations of collusion and conspiracy are at the core of this action, the proceedings appear to be yet another effort on the part of the plaintiff to re-open the consequences to him of the bank's failure to admit him to the Scheme for which he was fully compensated in the 1990 proceedings.

The Law

47. Order 19, r. 28 provides as follows:-

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

48. Order 19, r. 5(2):-

> "In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings."

49. Whilst the court has the specific power referred to at O. 19, r. 28 above to order and action to be stayed or dismissed where the pleadings are defective within the manner specified in that Order, the court also has an inherent jurisdiction to strike out a claim so as to ensure that there is no abuse of the right of access to the courts.

50. The circumstances in which the courts inherent jurisdiction may be invoked was briefly stated by Costello J. in *D.K. v. A.K.* (High Court, 1990 No. 5306P, 2nd October, 1992) were he stated:-

> "The principles on which the court will exercise its inherent jurisdiction to strike out a plaintiff's action can be shortly stated. Basically the jurisdiction exists to ensure that an abuse of the courts process does not take place. If it is established by satisfactory evidence that the proceedings are frivolous or vexatious or if it is clear that the plaintiff's claim must fail, then the court may stay the action. But it will only exercise this jurisdiction sparingly and in clear cases (*Barry v. Buckley* [1981] I.R. 306: *Sun Fat Chan v. Osseous Limited* [1992] 1 I.R. 425)."

51. The courts have further determined in *Sun Fat Chan v. Osseous Limited* that if a claim is capable of being rectified by amended pleadings then the court should not strike out proceedings exercising its inherent jurisdiction. Further, the decision of Costello J. in *Barry v. Buckley* makes it clear that for the purposes of an application where the court is asked to exercise its inherent jurisdiction to stay proceedings that the court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case. In this regard the court has had regard to the extensive affidavits, exhibits, and transcripts produced to the court by the parties for the purposes of determining the outcome of the within motions.

52. For the purposes of the courts adjudication as to whether or not proceedings are vexatious within the meaning of O. 19, r. 28 or indeed for the purposes of the courts consideration as to whether it will exercise its inherent jurisdiction to stay or dismiss proceedings the court must consider whether the proceedings have been brought without any reasonable grounds. Ó Caoimh J. in *Riordan v. Ireland* [2001] I.R. Vol. 4, p 463, has referred to a helpful decision of the Ontario High Court in *Re. Lang Michener v Fabian* [1987] 37 D.L.R. (4th) 685 at p. 691, where the following matters were held to be indicators of proceedings which were potentially vexatious namely:-

> "(a) the bringing of on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
>
> (c) when the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
>
> (f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

53. It is clear that the court must be very cautious when deciding to exercise its jurisdiciton under O. 19, r. 28 or its inherent jurisdiction to stay or dismiss proceedings having regard to the fact that the Constitution expressly recognises the right of every citizen to have access to the courts to determine the existance or breach of a legal obligation owed to him by any potential defendants. However, as Murphy J. stated in E. *O'K. v. D. K.* (Witness: immunity) at p. 573:-

> "On the other hand, the Constitution expressly recognises the need for finality in the judicial process. Moreover, it is recognised that justice is more likely to be achieved where persons participating in litigation whether as parties, witnesses, judges, jurors or lawyers can discharge their funciton without the fear of being held to account, at the suit of, perhaps, a disgruntled litigant for the manner in which he performs his role."

54. For the purposes of dealing with the defendants motions in the present proceedings bearing Record No. 2002/10061P which is the negligence action against Edward McGinley as the nominated representative of the late Noel Clancy S.C. it is relevant briefly to look at whether or not in this jurisdiction a barrister, such as Mr. Clancy S.C., enjoys any immunity from suit which issue is clearly relevant as to whether or not the proceedings are vexatious or an abuse of process. The same issue is also relevant to the courts decision as to whether or not the proceedings instituted are bound to fail.

55. In relation to this particular issue the court is guided by the decision of the House of Lords in *Arthur J.S. Hall and Company v.*

Simons [2000] Vol. 3 All E.R. p. 673. That decision relates to three separate cases wherein clients brought claims for negligence against their former solicitors. Having initially successfully relied upon the immunity of advocates from suits for negligence the Court of Appeal ultimately held that the claims fell outside the scope of the immunity. The House of Lords determined that it was no longer appropriate that barristers or solicitors should enjoy immunity from proceedings for negligence against them in respect of the manner in which they conducted proceedings in court. Lawyers will not be immune from suit if it is established that they acted negligently on behalf of their client, either in the preparation or in the conduct of legal proceedings. The court did nonetheless refer to the evidential difficulties which arise in trying to establish in the course of the negligence action what conclusion would have come about in the earlier proceedings if those proceedings had been conducted differently. Nonetheless, the court determined that the existence of such evidential difficulties for a plaintiff who has to prove that the lawyers negligence caused him loss is not a reason for continuing the immunity but might well become a reason for the court striking out such negligence proceedings on the basis that the potential action for negligence had become so weak due to the passage of time. Hoffman L.J. at p. 699 considered the difficulties for a court in such circumstances in the following manner:-

> *"(b) Invidious Judgments*
>
> Then it is said that while it is difficult enough to decide what would have happened at a trial which did not in fact take place, it may become positively invidious to decide how a judge who actually heard the case would have reacted if the advocate had advanced a different argument or called different evidence. Some judges are more receptive to certain kinds of points than others. I think this is an imaginary problem. Whatever may have been the foibles of the judge who heard the case, it cannot be assumed that he would have behaved irrationally. If he did, it would have been corrected on appeal. Obviously one has to take into account the findings that the judge made on the case as it was actually presented. For example, if he did not believe anything which the plaintiff said, it may be difficult to show that the different line of argument would have persuaded him to find in his favour. But I do not see how it is relevant for the purposes of the hypothetical exercise to have regard to the judge's idiosyncrasies. It must be assumed that he would have behaved judicially."

56. The court also in *Arthur J.S. Hall v. Simons* considered the problems of relitigating an action in the following manner:-

> "The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: *autrefois acquit*, *res judicata* and *issue estoppel*. The second policy is wider: it is concerned with the interests of the State. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules."

57. For the purposes of the within applications, notwithstanding the fact that there is no definitive approval of the decision of the House of Lord in *Arthur J.S. Hall and Company v. Simons* in this jurisdiction, the court for the purposes of this application will assume that barristers such as those implicated in the within proceedings do not enjoy a blanket immunity from suit and can be sued for negligence in relation to their management of litigation on behalf of their clients either in respect of their preparatory work or indeed in respect of their management of the trial itself.

58. There is one final matter which causes the court some concern in the context of the action for negligence against Edward McGinley as representative of the late Noel Clancy S.C. Many of the assertions made in these negligence proceedings pertain to the manner in which Mr. Lawrence Power, the bank's expert agricultural witness was dealt with in the course of the trial. In particular there is a complaint that he was not examined sufficiently fulsomely by counsel on behalf of the plaintiff and it is alleged that this cross examination constituted negligence.

59. It is clear from the transcript that this cross examination was conducted by Mr. Michael O'Kennedy S.C. and this court doubts whether under any circumstances a fellow Senior Counsel could, on the basis of some type of collective responsibility, be held to be negligent in respect of any default on the part of his colleague in the conduct of a cross examination which it is alleged was not sufficiently aggressive. However, having regard to the conclusions that the court has reached in any event on the other issues this issue is not one which is troublesome in the context of the within application.

Conclusions

60. Having regard to the aforementioned legal position and the circumstances surrounding each of the Plaintiff's actions which have been dealt with earlier in this judgment, the court concludes that the 2002 proceedings against Edward McGinley should be struck out as being vexatious and as proceedings which disclose no reasonable cause of action against the defendant.

61. Principally, the 2002 action is a claim for negligence and this court concludes that the action is one which is destined to fail. The facts relied upon by the plaintiff in support of his assertions of negligence are not borne out by the transcripts, pleadings and judgments of the court in the earlier proceedings. The assertion that the cross examination of Mr. Power was not aggressive in the sense required to establish negligence is highly unlikely to be sustained having regard to the transcript of the same which is available to this court. The issue regarding the dishonour of the plaintiff's cheques was fully canvassed in the course of the 1990 proceedings and adjudicated upon by the court both in terms of the bank's entitlement to dishonour the cheques and whether or not the same would have been dishonoured had the plaintiff been admitted to the Scheme. Insofar as the ACOT Report is concerned the same was clearly introduced into evidence by Mr. Behan's legal team through the evidence of Mr. Duffy and the same became the plinth upon which Mr. O'Kennedy S.C. cross examined the defendant's agricultural expert. The assertion that no rebuttal evidence was produced by the plaintiff's Senior Counsel to counter the evidence of Mr. Lawrence Power is to misunderstand the procedural rights of the parties in relation to the production of evidence.

62. Even if the court is in error in terms of the plaintiff's ability to prove the facts before mentioned, the plaintiff has indicated to the court that he will have no professional evidence to place before the court, should the matter be permitted to go to trial, to suggest that his counsel departed from an acceptable standard of practice in terms of his conduct of the action. The only evidence available, according to Mr. Behan will be his own evidence and that of Mr. Browne who was the solicitor who handled his 1990 action. Mr. Browne's evidence is hardly likely to withstand significant cross examination regarding the negligence of counsel having regard to the fact that whilst he initially dismissed the plaintiff's counsel following the decision of the Supreme Court given in 1998, he then sought to re-engage the very same counsel in December 2000 for the purposes of representing Mr. Behan in yet further proceedings.

63. In addition to the foregoing matters I believe that even if the plaintiff had a stateable case in negligence against his Senior Counsel in respect of the management of the 1990 proceedings he has failed to show that his losses arising from such wrongdoing are any different from the losses which were awarded to him by the High Court in the 1990 proceedings. The plaintiff has failed to demonstrate in his pleadings or affidavits how the management of the 1990 case could ever have led the court to conclude that he had a binding contract with the bank such as would have entitled him to recover the very significant claim for special damages which he contended for in that action. Any alleged negligence on the part of counsel has not been shown to have had any bearing whatsoever on the outcome of the only issue which would have entitled him to damages beyond those already awarded to him in that action. Applying the same reasoning as that of Denham J. in her judgment in relation to the 2001 proceedings, I conclude the issues which are the subject matter of the negligence action are in effect *res judicata*.

64. The court also is of the opinion that these proceedings are an abuse of process. In the 1990 proceedings, Mr. Behan claimed that he lost his business and the vast preponderance of his wealth because the bank were in breach of a contract made with him in May 1981 whereby he alleged the bank agreed to provide him with funding to trade out of his financial difficulties. The plaintiff failed to establish the existence of such a contract and all of the losses he claimed in those proceedings were therefore irrecoverable. In the course of those proceedings, both in the High Court and the Supreme Court, the courts considered whether or not the failure on the part of the Bank of Ireland to admit him to the Scheme in any way altered the plaintiff's financial outcome. On both occasions the court held that the failure to admit the plaintiff to that Scheme merely meant that he had not been afforded credits amounting to a total sum of approximately £18,455.18 over the relevant period and that had such credits been afforded to him that the same would not have in any way materially altered the viability of his business. Notwithstanding the Court's adjudication on those issues the plaintiff sought to revisit all of the losses which initially had been based on the breach of contract claim in his 2001 proceedings where he sought to attribute the same losses to fraud on the part of the bank in failing to admit him to the Scheme. The Supreme Court determined that those losses had already been the subject matter of his 1990 proceedings and determined that all of the issues therein raised were *res judicata.*

65. The within negligence action is a further effort to revisit the extensive losses claimed by the plaintiff in the 1990 proceedings as damages for breach of contract. All of the facts which form the foundation for the allegations of negligence in this claim have already been litigated in the 1990 proceedings and the proceedings are merely a further effort on the Plainitff's part to use an alternative cause of action to revisit his initial claim. Further, the plaintiff's affidavits fail to demonstrate how the alleged mismanagement by his counsel of his 1990 case resulted in his failure to establish a concluded contract with the bank whereby they were committed to permitting him to trade out of his financial difficulties. Only proof of such a contract would have entitled him to claim the significant special damages which were at the heart of his 1990 proceedings and indeed all subsequent actions. The within proceedings bear all of the hallmarks which Ó Caoimh J. in *O'Riordan .v. Ireland* warned were likely to be present in an action which was potentially vexatious and an abuse of process.

66. It seems to the Court that the Plaintiff continues to reject, either deliberately or otherwise, the findings of the High Court and Supreme Court in his 1990 proceedings to the effect that he lost the monies claimed in that action firstly, as a result of his own non profitable farming activities and secondly by reason of his failure to convince the court that the bank was not entitled to call in his indebtedness which action by the bank ultimately led to the end of his farming business. Ever since the plaintiff has sought to ascribe these losses to the fraud, negligence, collusion or conspiracy of those parties referred to earlier in this judgment.

67. The court has considered carefully the replying affidavits delivered by the plaintiff's then counsel and by Mr. McGinley on behalf of Mr. Noel Clancy deceased. It could not be clearer to this court that the plaintiff was provided with what appears to have been competent and dedicated advice, none of which was ever paid for by the plaintiff.

68. For the reasons set out above the court concludes that the plaintiff's continued right of access to the courts is being abused and this abuse is perhaps most clearly seen in the proceedings instituted by him in 2005 where he has sought to implicate the defendants in a conspiracy to cause him harm.

69. In relation to the motions brought by each of the defendants in the 2005 proceedings to dismiss the plaintiff's claim the court firstly concludes that the plaintiff has not complied with the O. 19, r. 5(2) of the Rules of the Superior Courts insofar as he has failed to adequately particularise his claims in respect of conspiracy and/or collusion as is required when contending for fraud on the part of a defendant.

70. Secondly, the court has considered all of the affidavits that have been sworn on plaintiff's behalf and concludes that the plaintiff has failed to demonstrate to the court that he has any evidence to offer to establish that there was any collusion between his counsel and the Bank of Ireland so as to cause him any loss or damage. The best that the plaintiff can do is ask the court to infer the existence of such collusion.

71. In the absence of any particulars of collusion or any evidence in the supporting affidavits filed on behalf of the plaintiff this court believes that the assertions by the plaintiff in these proceedings must be destined to fail. The court concludes that the pleadings offend O. 19, r. 28 and also O. 19, r. 5(2). Further given that the proceedings are destined to fail the court also concludes that it is entitled to exercise its inherent jurisdiction even if the pleadings themselves were not defective as found.

72. The final relief sought by the second, third and fourth named defendant in the 2005 proceedings is an order that the plaintiff's proceedings for negligence against them is stature barred by reason of the provisions of the Statute of Limitations 1957, as amended. Section 11 which refers to actions of contract and tort and certain other actions provides a six year period of limitation for the institution of any such proceedings. In the instant case the plaintiff dismissed his counsel following the Supreme Court hearing in the 1990 proceedings by letter dated 27th July, 1998. This being so I conclude that at best the plaintiff had six years from 27th July, 1998 to issue a writ claiming negligence on the part of his counsel. Given that the 2005 proceedings were commenced by plenary summons dated 12th July, 2006 the court concludes that the negligence aspect of such proceedings are statute barred.

73. Finally the relief sought by the Governor and the Company of the Bank of Ireland in its notice of motion must for all of the reasons set out above also be granted.

74. For the aforementioned reasons the court will in the case of *James Behan v. Edward McGinley* bearing Record No. 2002/10061P make an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the plaintiff's proceedings on the basis that the same are vexatious, frivolous and disclose no reasonable cause of action.

75. In relation to the bank's notice of motion in proceedings bearing Record No. 2424P/2005 which is a notice of motion dated 15th January, 2007 the court will grant to the first named defendant, the Governor and Company of the Bank of Ireland the reliefs set forth at paras 1 to 4 of their notice of motion. Further, in relation to the motion brought on behalf of the second, third and fourth named

defendants in the action bearing Record No. 2424P/2005 being the notice of motion dated 26th January, 2007 the court will grant the reliefs set forth at paras. 1 to 4 of the said notice of motion.

76. As a consequence of the aforementioned reliefs the court does not have to consider the plaintiff's motion for judgment in default of defence in the proceedings bearing Record No. 2424P/2005 and accordingly that motion will be struck out as the proceedings are now at an end.