

THE HIGH COURT

[1999 No. 4465P]

BETWEEN

MICHAEL RICHARDSON AND WENDI FERRIS RICHARDSON

PLAINTIFFS

AND
GERARD MADDEN

DEFENDANT

AND
THE HIGH COURT

[1999 No. 2816P]

BETWEEN

MICHAEL RICHARDSON AND WENDI FERRIS RICHARDSON

PLAINTIFFS

AND
DERMOT O'DONOVAN, MICHAEL SHERRY, MICHAEL HOGAN
AIDAN FRAWLEY AND THOMAS DALTON

PRACTICING UNDER THE STYLE AND TITLE OF DERMOT G. O'DONOVAN AND PARTNERS SOLICITORS

DEFENDANTS

Judgment of Quirke J. delivered on the 27th day of May, 2005.

The plaintiffs, Michael Richardson and Wendi Ferris Richardson, claim damages from Gerard Madden for breach of contract. They claim damages also from their former solicitors Messrs Dermot G. O'Donovan and Partners for negligence and breach of duty arising out of the same set of facts and circumstances. They have instituted separate proceedings in the High Court in respect of each claim.

By order of the High Court (Johnson J.) dated 24th March, 2003, it was directed (a), that the two separate actions should be listed for hearing on the same date and tried by the same judge and (b), that the plaintiffs' claim against Gerard Madden should be tried first.

When the proceedings came before this court on 5th April, 2005, it was decided by the Court, without objection from the parties, that, since the evidence to be adduced in each case was common to both actions, the court should, for convenience, hear the evidence in full before deciding each case separately.

It has been agreed that the determinations in each case will be made in the order directed by Johnson J. i.e. that the plaintiffs claim against Mr. Madden (Record No. 1999 No. 4465P) will be determined first and the plaintiffs claim against Dermot G. O'Donovan and Partners (Record No. 1999 No. 2816P) will be determined immediately thereafter.

Since the factual background and the findings of fact are common to both sets of proceedings, I have, for convenience, included the determinations in both cases within the same document.

Factual Background

1. The plaintiffs are a married couple who live in Castleconnell in Co. Limerick.

The first named plaintiff Michael Richardson had worked in radio for a number of years and in particular had been the proprietor of a "pirate"

(i.e. unlicensed) radio station in Limerick known as "Big L" between 1978 and 1985.

Thereafter he had worked in other radio stations between 1985 and 1989.

Having worked abroad for some years he returned to Ireland with his wife Wendi Ferris Richardson in 1996 and settled in Limerick.

In November of 1996 Michael Richardson responded to an advertisement from the Independent Radio and Television Commission (hereinafter the IRTC) for "*expressions of interest*" in applying for a licence to provide a radio service for Limerick City and County.

The "*expression of interest*" was made on behalf of Michael Richardson, his wife Wendi Ferris Richardson and a mutual friend of theirs called John Franks who then lived, (and still lives), in London.

The proposed radio station was to be called "*Big L Radio Limerick*".

2. For some time prior to 1996 a company called Radio Limerick One Ltd. was the holder of a licence issued by the IRTC for the provision of radio services in Limerick city and county. Gerard Madden was the principal shareholder, the beneficial owner and the person having control of Radio Limerick One Ltd.

Some time in 1999 the radio licence held by Radio Limerick One Ltd. was terminated by the IRTC. A challenge by the licence holder to that termination undertaken in the High Court by way of judicial review failed in July of 1996. An appeal to the Supreme Court was unsuccessful. However Radio Limerick One Ltd. was permitted to continue broadcasting pending the appointment of a new licensee.

Radio Limerick One Ltd. (and its beneficial owner Mr. Madden) continued to benefit from the advertising and other revenue from the radio station during the interim period.

3. The IRTC received nine formal applications in response to an advertisement published in February, 1997, which sought formal applications for a licence to provide a radio service in Limerick.

The applicants included (a), the plaintiffs and Mr John Franks, who wished to provide a radio station known as "*Big L Radio Limerick*" (b), a company called Radio Limerick 1995 Ltd. which was partly owned by Gerard Madden (c), a company called Maigueside Communications Ltd. (hereafter Maigueside) in which a Mr Pat Fitzgerald had a beneficial interest and (d), a consortium headed by a Mr Tom Nolan.

4. On 21st March, 1997, the IRTC wrote to five of the nine applicants advising that their applications had been unsuccessful and that the IRTC intended to invite the remaining four applicants to make oral submissions to the IRTC in support of their applications. The plaintiffs, Maigueside and the companies controlled by Messrs Madden and Nolan were among the five unsuccessful applicants for a licence.

5. In late March, 1997, Michael Richardson received a telephone call from Mr. Patrick Fitzgerald. Mr. Fitzgerald invited Michael Richardson to attend a meeting of the failed applicants to discuss the possibility of mounting a challenge by way of judicial review to the decision of the IRTC to refuse the applications of five of the applicants.

Mr. Richardson showed a guarded interest. He agreed to attend a meeting with some of the other failed applicants for the purpose of discussion. A meeting was arranged and was held in the Two Mile Inn Hotel in Limerick.

It is likely that it was held on 24th March, 1997. In addition to Gerard Madden and Michael Richardson it was attended by Mr. Patrick Fitzgerald, Messrs Bertie Wall and John Riordan (from Maigueside Communications Ltd), and by Mr. Tom Nolan.

In the course of discussion Michael Richardson stated clearly that he was not prepared to be responsible for any costs associated with any proposed proceedings. After further discussion those attending the meeting decided to consult Messrs. Dermot G. O'Donovan and Partners Solicitors for the purposes of obtaining legal advice as to the prospects of mounting a successful challenge to the decision of the IRTC.

6. After the meeting in the Two Mile Inn, Mr. Patrick Fitzgerald telephoned Messrs Dermot G. O'Donovan and Partners. He spoke to Mr. Michael Hogan. Subsequently Mr. Fitzgerald and Mr. John Riordan attended Mr. Hogan's office in Henry St. in Limerick.

Mr. Fitzgerald and Mr. Riordan advised Mr. Hogan that they were seeking advice as to the prospects of mounting a successful challenge to the decision of the IRTC. On the afternoon of the 24th March, 1997, Mr. Hogan met with Mr. Pat Fitzgerald, Mr. John Riordan and Mr. Bertie Wall.

7. On 25th March, 1997, Mr. Hogan spoke on the telephone with Mr. John Riordan and subsequently with Mr. James Gilhooley B.L. in relation to the proposed proceedings.

8. On the 25th March, 1997 a meeting was held in the offices of Messrs D.G. O'Donovan and Company. It was attended by Mr. Madden, Mr. Tom Nolan, Mr. Fitzgerald and Mr. Richardson. Mr. Hogan was present on behalf of D.G. O'Donovan and Company.

During the meeting the prospects of successfully challenging the decision of the IRTC was discussed. There was discussion also in relation to the costs associated with those proceedings. During the meeting Mr. Richardson made clear to all who were present that he was not prepared to make any contribution towards the costs of the proceedings or to bear any responsibility in respect of any costs arising out of any decision to proceed.

It was agreed to defer a decision on whether or not to mount a challenge in the High Court pending further discussion by the potential litigants amongst themselves. The meeting concluded.

9. After the meeting, there was a brief discussion between Mr. Madden, Mr. Nolan and Mr. Richardson outside the offices of D.G. O'Donovan and Partners. Although conflicting evidence was adduced by Mr. Richardson and by Mr. Madden as to what precisely was said in conversation on that occasion, I am satisfied on the evidence and on the balance of probabilities that Mr. Madden assured Mr. Richardson that he would be responsible for all of the costs associated with the potential legal challenge then under discussion.

I am satisfied also that Mr. Nolan further reassured Mr. Richardson, in the presence of Mr. Madden, that Mr. Madden would be responsible for all of the costs associated with the proposed legal challenge.

10. In the afternoon or in the evening of the 25th March, 1997, Mr. Hogan was notified that it was intended to proceed with the challenge of judicial review. Gerard Madden telephoned Mr. Hogan and discussed the question of the costs of the proceedings with Mr. Hogan.

Mr. Madden agreed to provide Mr. Hogan with a cheque in the amount of IRE4,000 on account in respect of the proceedings.

11. Proceedings were commenced by D.G. O'Donovan and Partners on behalf of six applicants. Relief was sought against the IRTC and the Minister for Transport Energy and Communications by way of judicial review.

The six applicants were Maigueside Communications Ltd., New Limerick FM Ltd., Limerick 95 FM Ltd., Michael Richardson, John Franks and Wendi Ferris-Richardson.

Mr. Richardson had agreed to participate in the proceedings on his own behalf, on behalf of his wife and on behalf of Mr. John Franks. It is improbable that either Wendi Ferris-Richardson or John Franks were ever advised that they had been named as applicants within the High Court proceedings. They were certainly never advised by anyone of the implications associated with that fact. They were never advised of anything at all by Mr. Hogan on behalf of D.G. O'Donovan and Partners.

12. Each of the other applicants were corporate bodies limited by shares. Maigueside Ltd. was incorporated for the express purpose of seeking the radio licence. New Limerick FM Ltd. and Limerick 95 FM Ltd. were incorporated after, the licence applications had been made by their respective owners and rejected but before the commencement of the proceedings seeking to challenge the decisions of the IRTC.

13. On the 3rd April, 1997, (one day prior to the date fixed by the IRTC for the oral submissions on behalf of the four remaining

applicants for a licence) the six applicants were given leave by order of the High Court (Moriarty J.) to seek relief by way of judicial review including an order of certiorari quashing the decision of the IRTC.

The order of the High Court recited that an undertaking as to damages had been given on behalf of the applicants by their solicitors.

Thereafter the proceedings were dealt with expeditiously and the parties took a number of steps including compliance with an Order for Discovery.

14. Conflicting evidence was adduced by Mr. Michael Richardson and by Mr. Michael Hogan in relation to one aspect of discovery.

Mr. Richardson in evidence stated unequivocally that he attended the offices of D.G. O'Donovan and Partners on 28th April, 1997 and spoke to Mr. Hogan. He stated that Mr. Hogan asked for payment in the amount of IR£10,000 towards the costs of the proceedings.

He said that this request was made when he was in Mr Hogan's office swearing an affidavit of discovery in respect of the proceedings.

He said that having left the office of D.G. O'Donovan he was disturbed at the prospect that he, or his wife, or Mr. Franks should have to pay any sum by way of costs towards the proceedings.

He stated that on the following morning, (the 29th April, 1997), he wrote a letter to Mr. Hogan in the following terms:

"Dear Michael,

Thank you for your recent copy files sent to me on the 18th of this month. I am sorry that I was not able to return your telephone call regarding the hearings to be heard in Dublin on 25th.

Further to your request for funding the Court proceedings, I must reiterate my original position that I am unable to proceed as a partner in this venture, for reasons that have already been stated.

It was a pity that it was allowed to go this far before anything was done to correct the situation. May I take this opportunity to you to wish everyone success in whatever shape it comes!

Yours sincerely,

Michael Richardson.

Also on behalf of Wendi Ferris-Richardson

John Franks."

Michael Richardson said that at midday on 29th April, 1997, he drove to Limerick. He said that as he approached the premises of Messrs D.G. O'Donovan and Partners he saw Mr. Michael Hogan and Mr. Patrick Fitzgerald coming out of the building. He said that as he approached Mr. Hogan he gave him the letter saying *"the letter says it all"*. He said he then turned, left Mr Hogan and Mr Fitzgerald and drove away.

He said that he received a letter dated 15th May, 1997, which appeared to be a "circular" letter which had been sent to all of the participants in the proceedings outlining the steps which had been taken in the proceedings up to and including the date of the letter. He said that thereafter he heard nothing further from D.G. O'Donovan and Partners or any of the other participants in the proceedings.

15. Mr. Michael Hogan, in evidence, denied that he had ever received a letter from Mr. Richardson dated 29th April, 1997. He denied Ms. Richardson's account of having spoken with him in the presence of Mr. Fitzgerald outside his premises on 29th April, 1997.

Mr. Hogan stated that the affidavit of discovery to which Mr. Richardson referred was in fact sworn by Mr. Richardson on 23rd April, 1997. He pointed out that the affidavit of discovery which bore Mr. Richardson's signature was dated 23rd April, 1997.

16. Mr. Patrick Fitzgerald, in evidence denied Mr. Richardson's account of meeting Mr. Hogan and Mr. Fitzgerald outside the premises of D.G. O'Donovan and Partners on 29th April, 1997.

17. On 2nd May, 1997, an application was made on behalf of the Minister for Transport Energy and Communications to have the application for relief by way of judicial review dismissed against the Minister on the grounds that no cause of action was disclosed against the Minister. The application was successful and the applicants claim against the Minister was dismissed. The Minister was awarded his costs of the proceedings to date against the applicants.

18. A number of additional steps were taken in the proceedings during May of 1997 including an unsuccessful application to the High Court for an order for discovery. When the Supreme Court (Barron J.) on 10th June, 1997, dismissed an appeal against the Order of the High Court, the IRTC was awarded its costs against the applicants.

19. On 19th June, 1997, the substantive proceedings were heard in the High Court.

On the 18th July, 1997, by order of the High Court (McGuinness J.) the relief sought on behalf of the applicant was refused and the IRTC was awarded the costs of the proceedings (including all reserved costs).

20. Michael Richardson was not advised by D.G. O'Donovan and Partners or by his fellow applicants about any aspect of the proceedings after the 15th May, 1997. He was not advised that the Supreme Court had awarded costs against him in favour for

the Minister for Transport Energy and Communication. He was not advised that the High Court had awarded the IRTC its costs of the substantive action against him.

21. Wendi Ferris-Richardson and John Franks were never advised by Dermot G. O'Donovan and Partners or by any of their corporate fellow applicants that any order for costs had been made which affected either of them.

22. Mr. Madden offered Mr. Richardson employment in August, 1997. Some weeks later Mr. Richardson asked Mr. Madden *"whatever happened to the case?"*.

Mr. Madden replied. He said *"we lost"*. He said nothing about any liability as to costs.

23. On 25th July, 1997, Mr. Hogan sent his file on the proceedings to a Costs Drawer for the purpose of preparing a Bill of Costs.

24. By letter dated 2nd October, 1997, Ivor Fitzpatrick and Company on behalf of IRTC wrote to D.G. O'Donovan and Partners enclosing the IRTC's Bill of Costs and Outlay in respect of the proceedings. It amounted to IR£84,658.17.

On 7th October, 1997, Mr. Hogan wrote to Gerard Madden enclosing a copy of the Bill of Costs and Outlay received from Ivor Fitzpatrick and Company. He advised that he had referred his own file to his costs accountants.

By further letters dated 22nd October, 1997, the 10th November, 1997, the 20th November, 1997 and 25th November, 1997, Mr. Hogan on behalf of Dermot G. O'Donovan wrote to Gerard Madden seeking an urgent meeting to discuss the costs claimed on behalf of the IRTC and to discuss his own Bill of Costs. He received no reply from Mr. Madden.

By letter dated 6th January, 1998, Mr. Hogan wrote again to Gerard Madden. He received no reply but a meeting was arranged between Michael Hogan and Gerard Madden at the end of February 1998 for the purpose of discussing the issue.

25. By letter dated the 14th July, 1998, Michael Richardson was advised by

Messrs Ivor Fitzpatrick and Company Solicitors on behalf of the IRTC that judgment had been registered against him in the amount of IR£66,078.43 and would be published in Stubbs Gazette. On the same date Wendi Ferris-Richardson received an identical letter. It contained advice that the same steps had been taken against her.

26. On 18th July, 1998, Michael Richardson had a conversation with Gerard Madden in the latter's studio in Patrick St. At that time Michael Richardson was employed by Gerard Madden. Michael Richardson was wearing a recording device.. At the commencement of the conversation Michael Richardson reminded Gerard Madden that they had agreed that *"...we'd go to court and we would see what we could do for you..."*.

Gerard Madden replied *"right yeah."*

Michael Richardson went on *"...there would be no costs, like you would handle the costs."*

Gerard Madden clearly and audibly replied *"OK"*.

On the 19th July, 1998, Michael Richardson arranged to see Michael Hogan at the office of D.G. O'Donovan and Partners. Again he was wearing a recording device. He recorded his conversation with Michael Hogan.

27. In February of 1999 Messrs Ivor Fitzpatrick and Company on behalf of the IRTC issued bankruptcy petitions against Michael Richardson and Wendi Ferris-Richardson. This followed returns of *"Nulla bona"* made by the County Registrar of Limerick endorsed on the *Fieri Facias* Order for Costs.

The bankruptcy petitions in respect of Michael Richardson and Wendi Ferris-Richardson have been adjourned generally pending the outcome of these proceedings This was achieved with some difficulty after certain undertakings were given on behalf of Michael Richardson and Wendi Ferris-Richardson in respect of these proceedings.

28. These proceedings were commenced on the 28th April, 1999, (against Gerard Madden) and on 11th March, 1999, (against D.G. O'Donovan and Partners).

The Plaintiffs Claim Against Gerard Madden

The plaintiffs claim that in consideration of their agreement to participate in the proposed proceedings against the IRTC, Gerard Madden agreed to be responsible for all costs of and incidental to those proceedings including any liability that the plaintiffs might have to the IRTC in respect of costs.

They claim that they duly participated in the proceedings as fellow applicants for the principal benefit of Gerard Madden. They claim that, in breach of the agreement, Gerard Madden has failed and refused to discharge the costs associated with the proceedings and in particular to discharge the plaintiffs liability to IRTC in respect of costs.

They claim that as a result of Gerard Madden's breach of contract the plaintiffs have suffered serious loss, damage, inconvenience and distress and substantial damage to their respective reputations.

The Defence of Gerard Madden

Gerard Madden denies that he agreed to indemnify the plaintiff in respect of all of the costs of and incidental to the proceedings against IRTC.

He concedes that he agreed to discharge some of the costs of prosecuting the proceedings against the IRTC but he says that his agreement as to his liability to discharge those costs was restricted to the sum of IR£40,000. He says that he discharged that sum by making a series of payments by cheque, bank draft and cash, some of which were designed to give the impression that they were payments made by other parties to the proceedings.

In particular, he denies that he agreed to indemnify the plaintiffs in respect of any liability which the plaintiffs might have in respect of the costs of IRTC.

Conclusion

Whether or not Gerard Madden entered into an agreement with the plaintiffs to indemnify them in the manner claimed is a question of fact for determination by this court.

Having heard and considered all of the evidence adduced in this case and having carefully observed the demeanour of the various witnesses, I am satisfied on the evidence and on the balance of probabilities as follows:

1. The challenge by way of judicial review to the decision of the IRTC was commenced on the initiative of Gerard Madden. It was largely for his benefit. The only benefit to be derived from the proceedings by the other applicants was a possible opportunity to make a new application to the IRTC for a radio licence at a future time with a comparatively limited chance of success.

Mr. Madden stood to benefit significantly financially by delaying the decision of the IRTC on the award of a new licence. He was entitled to continue broadcasting until the award of a new licence and to enjoy the advertising and other revenues associated with that broadcasting.

He actively encouraged the other applicants (including the plaintiffs) to participate in the proceedings.

2. At all material times and in particular during the meeting held on 25th March, 1997, at the office of D.G. O'Donovan and Partners, Michael Richardson made it clear to Gerard Madden, to Mr. Michael Hogan, and to the other potential applicants that he did not have the resources to participate in the litigation and was not prepared to make any contribution towards the costs of or incidental to those proceedings.

3. Immediately after the meeting at the offices of D.G. O'Donovan and Partners on the 25th March, 1997, Michael Richardson repeated his assertion that he was not in a position to make any contribution towards the costs associated with the litigation. Gerard Madden, in the presence of Tom Nolan then assured Michael Richardson that he would "... pick up the bill...".

Mr. Nolan, in the presence of Gerard Madden also assured Michael Richardson that "... Gerard will take care of everything...".

4. On the evening of the 25th March, Gerard Madden telephoned Michael Hogan. He told Michael Hogan that he would be responsible for all costs associated with the proceedings. I accept the evidence of Michael Hogan that Gerard Madden confirmed on that occasion that he would be personally responsible for all of the costs associated with the proceedings and he made it clear that he was not referring merely to the costs incurred by Mr. Hogan in prosecuting the proceedings but would also be the responsible for any costs awarded against the applicants.

5. Gerard Madden sought to suggest that his recorded reply "OK" to Michael Richardson's observation "...there would be no costs, like you would handle the costs" was in the nature of a query. Having had the opportunity to hear the recording of the conversation I did not get that impression.

At no point during the conversation did Mr. Madden demur from suggestion that he had agreed to "handle the costs".

6. Between the 17th October, 1997, and the 3rd March, 1998, Michael Hogan wrote a number of letters to Gerard Madden advising him that the solicitors on behalf of the IRTC were now seeking to recover very substantial sums by way of costs due to their client. Notwithstanding the urgency of those letters Gerard Madden did not respond. Significantly he never suggested that the responsibility to discharge those costs lay with anyone other than himself.

His failure to do so was consistent with the evidence of Michael Hogan. It was consistent with the evidence of Michael Richardson. It was consistent with the existence of an extant agreement by Mr Madden to indemnify the plaintiffs in respect of all of the costs of and incidental to the proceedings.

I am satisfied on the evidence and on the balance of probabilities that Gerard Madden expressly agreed on or about the 25th March, 1997, that he would indemnify Michael Richardson and Wendi Ferris-Richardson in respect of all of the costs of and incidental to the proposed challenge by way of judicial review in the High Court seeking to quash the decision of the IRTC.

In reaching that conclusion I have taken into account the findings of fact which I have outlined above. However I have been principally influenced on this issue by the detailed oral evidence adduced during the trial by the witnesses as to fact. The testimony of Michael Richardson, Patrick Fitzgerald, Wendi Richardson and Michael Hogan on the contract of indemnity was coherent and relatively consistent. It was supported, in part, by documentary evidence.

The testimony of Gerard Madden was unsatisfactory and inconsistent. I found him to be an unreliable witness.

I am satisfied, therefore, that although there was an agreement between the plaintiffs and Gerard Madden (in the terms outlined above), Gerard Madden has failed and refused to discharge his obligations and on foot of that agreement. It follows that the plaintiffs are entitled to recover damages from Gerard Madden to compensate them for the loss, damage, distress, disruption, inconvenience or loss of reputation which they have sustained as a result of Gerard Madden's breach of contract.

The Plaintiffs Claim against Dermot G. O'Donovan and Partners

Mr. Simon McAleese, Solicitor, testified in relation to the steps which should, as a matter of practice, have been taken by a reasonably competent and prudent solicitor faced with the issues which faced Mr. Hogan in or around March of 1997.

He said that a reasonably competent and prudent solicitor should have:

- (a) expressly and individually advised all of the parties of all risks associated with litigation and in particular of the consequences of failure including

(b) the risks of an award of costs against an unsuccessful party. This should have been achieved by way of

(c) compliance with s. 68 of the Solicitors (Amendment) Act, 1994 which requires a solicitor who receives instructions from an aspiring litigant to furnish such a client "...with... particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties" and that

(d) this should have been done by way of written advice to both plaintiffs

pursuant to the Law Society of Ireland's "Guide to Professional Conduct".

Mr. McAleese stated that in the circumstances of the instant case Michael Hogan had a clear duty to ensure that an enforceable and coherent costs indemnity agreement was recorded in writing between the plaintiffs and Gerard Madden.

He said that prudent solicitors should also remind clients of their primary liability in respect of the clients' own costs of prosecuting litigation.

It was also the testimony of Mr. McAleese that if a reasonably competent and prudent solicitor is instructed by several parties to litigation and becomes aware that one party intends to indemnify another party in respect of costs of or incidental to the litigation the solicitor has a duty to reduce to writing the basis of the contractual relationship, (i), between the solicitor and the clients and (ii), between the clients *inter partes*.

He said that a competent and prudent solicitor instructed by several clients with apparently divergent commercial interests should advise those clients that it may be necessary for them to seek separate and independent legal advice to protect their respective interests.

Mr. McAleese said that solicitors should keep affected clients advised of the progress of litigation at each stage of the litigation. In particular, where clients do not enjoy corporate limited liability they should be kept advised as to any adverse costs consequences which have resulted from the litigation.

No evidence was led on behalf of Messrs D.G.O'Donovan and Partners which sought to challenge the evidence of Mr McAleese.

Conclusion

In *Roche v. Peilow* [1986] I.L.R.M. 189 the Supreme Court (Henchy J.) observed at p. 196 that:

"The general duty owed by a solicitor to his client is to show him the degree of care to be expected in the circumstances from a reasonably careful and skilful solicitor. Usually a solicitor will be held to have discharged that duty if he follows a practice common among the members of the profession...Conformity with the widely accepted practice of his colleagues will normally rebut an allegation of negligence against a professional man, for the degree of care which the law expects of him is no higher than that to be expected from an ordinary reasonable member of the profession or of the speciality in question."

Mr. Hogan, in evidence, fairly and candidly accepted that, by failing to offer any advice whatever to Wendi Ferris-Richardson at any stage about any aspect of the proceedings he had failed to adopt the appropriate practice expected of a reasonably competent and prudent solicitor in such circumstances.

I am satisfied on the evidence that had Wendi Ferris-Richardson been advised by Mr. Hogan of the risks attendant upon the proceedings (in which she was a named party) she would not have embarked upon those proceedings.

Mr. Hogan, in evidence, stated that at the meeting of the 25th March, 1997, he advised all of the proposed applicants of the risks associated with a failed legal challenge.

On the evidence it seems unlikely that he gave a warning in the terms contemplated by s. 68 of the Solicitors (Amendment) Act 1994. He certainly failed (by his own admission) to furnish Mr. Richardson "...with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties..."

Mr. Keane, on behalf of Dermot G. O'Donovan and Partners points out that the failure to furnish particulars in writing pursuant to s. 68 of the Act of 1994 does not *per se* amount to negligence. That is certainly correct.

However Mr. Hogan, on his own evidence, was conscious that Michael Richardson was unwilling to participate in any proceedings which would leave him exposed to the risk of any expense. In such circumstances there was a clear obligation upon Mr. Hogan either

(a) to take appropriate measures to protect Mr. Richardson from exposure to the risk of a liability as to costs or

(b) to comply with the provisions of s. 68 in respect of both Michael Richardson and Wendi Ferris-Richardson (and, indeed, John Franks), so that they would be fully and adequately advised in the manner contemplated by s. 68 of the Act of 1994.

I accept the evidence of Mr. McAleese that, in the circumstances, Mr. Hogan should have kept Michael Richardson and Wendi Ferris-Richardson (and John Franks) advised as to the progress of the litigation on a continuous basis.

In particular he had a duty to advise the plaintiffs (and Mr. Franks) that orders for costs had been made against them in favour of the Minister for Transport Energy and Communications by the High Court on 2nd May, 1997, and in favour of the IRTC by the Supreme Court on 10th June, 1997.

It has been established on the evidence that the order of the Supreme Court on 10th June, 1997, affirming the order of the High Court (which had refused discovery of certain documents) comprised a severe setback to the prospects of mounting a successful challenge by way of judicial review.

Mr. Hogan and the plaintiff co-applicants were so advised by Counsel.

Inexplicably Mr. Hogan failed to advise the plaintiffs (or Mr. Franks) that the prospects of successfully prosecuting the claim were now severely reduced and there was now a real and serious likelihood of an award of costs in favour of the IRTC and against the plaintiffs.

It follows from what I have found earlier that Michael Hogan, on behalf of Dermot G. O'Donovan and Partners, was negligent and in breach of his duty to Wendi Ferris-Richardson by failing to offer her any advice at any stage of any aspect of the proceedings which he was conducting on her behalf.

As I have earlier indicated I am satisfied that if Wendi Ferris-Richardson had been advised of the risks attendant upon the proceedings she would never have embarked upon the proceedings in the first instance.

Accordingly Wendi Ferris-Richardson is entitled to recover damages from the defendants to compensate her for any loss, damage, inconvenience, distress or disruption which he has sustained by reason of the defendants negligence, breach of duty and breach of contract.

I am also satisfied on the evidence that Michael Hogan, on behalf of the defendants was negligent, in breach of his duty to and in breach of his contract with Michael Richardson by failing to take any or any adequate steps to properly advise Michael Richardson (i), of the risks attendant upon the litigation upon which Michael Richardson was about to embark, (ii), that the claim might fail and, (iii), that Michael Richardson would then be primarily and personally liable to discharge the IRTC's very substantial costs.

I am satisfied on the evidence that Michael Hogan, on behalf of the defendants, owed a particular duty to Michael Richardson to so advise Michael Richardson because he knew that Michael Richardson was unwilling (and probably unable) to pay any costs associated with the litigation.

I am satisfied also that Michael Hogan, on behalf of the defendants, was negligent, in breach of his duty to and of his contract with Michael Richardson in failing to take any or any appropriate measures to protect Michael Richardson from exposure to the risk of liability as to costs.

He had a further duty to take such steps on behalf of Michael Richardson because he knew that Michael Richardson did not enjoy the corporate protection enjoyed by his fellow applicants and was personally exposed to liability for costs.

Michael Hogan, on behalf of the defendant, was further negligent, in breach of his duty to and his contract with Michael Richardson because he failed to keep Michael Richardson advised as to the progress of the proceedings after the 15th May, 1997, and in particular failed to advise him:

(a) that an order had been made awarding costs to the IRTC against him on 10th June, 1997, and

(b) that the prospects of a successful outcome to the proceedings had been severely reduced by the 10th June, 1997.

It follows that Michael Richardson is entitled to damages to compensate him for the loss, damage, inconvenience, distress and damage to his reputation which has resulted from the negligence, breach of duty and breach of contract on the part of the defendants.

Having regard to the evidence adduced by Michael Richardson, Wendi Ferris-Richardson and John Franks, I am satisfied on the balance of probabilities that Michael Richardson wrote a letter dated 29th April, 1997, in the terms which have been outlined earlier herein. It is probable that he handed the letter to Michael Hogan in the manner which he described in evidence.

Gerard Madden said that when he was present in Michael Hogan's office he saw that letter. He said that he remarked to himself as to its print, colour and font style. I did not find Gerard Madden's evidence on that issue to be credible.

Accordingly I do not find that it has been established on the balance of probabilities that the letter was in Michael Hogan's office on the date described in evidence by Gerard Madden.

Nonetheless it has been established in evidence and on the balance of probabilities that a letter dated 29th April, 1997, was delivered to Mr. Michael Hogan on or around that date. Inexplicably he failed to act upon it. He may have mislaid it. It is difficult to believe that, had he opened it and read its contents, he would not have acted upon it.

However his failure to deal appropriately with the letter comprises further negligence, breach of duty and breach of contract on the part of Michael Hogan and of D.G.O'Donovan and Partners.

Damages

Mr. Keane S.C. on behalf of the defendants contends that the plaintiffs are entitled to be indemnified by Gerard Madden in respect of any loss or damage which they have sustained. He says that no evidence has been adduced indicating that they cannot recover damages from Gerard Madden to compensate them for their losses. He has relied upon the decision of the Supreme Court (Finlay C.J) in *Hegarty v. O'Loughran* [1990] 1 I.R. 148 as authority for the proposition that a tort has not been completed until damage has been caused by the wrong complained of.

He also says that damages may not be awarded if the court is satisfied on the balance of probabilities that no loss has flowed directly from the tort complained of. He relied upon the decision of the Supreme Court (Kearns J.) in the case of *O'Carroll v. Diamond* (Unreported, Supreme Court, 12th April, 2005) in support of that contention.

The principles identified in those cases are not in dispute. However the facts of the instant case can be clearly distinguished from the facts of both cases relied upon by Mr. Keane S.C.

In the instant case judgment has been registered against both plaintiffs in the sum of €88,902.30 (with costs and interest at the rate of 8.7% per annum from 18th July, 1997). Further orders for costs have been made against them. Efforts have been made to execute the orders for judgment and costs. Bankruptcy proceedings against the plaintiffs have been commenced and temporarily suspended. They have suffered and continue to suffer distress, convenience, disruption and damage to their reputations. Their loss and damage has been sustained over a period in excess of six years.

If Gerard Madden had discharged his contractual obligations to the plaintiffs then they would not have sustained the loss and damage which they have sustained.

If Michael Hogan had discharged the contractual and other obligations owed by D.G.O'Donovan and Partners to the plaintiff then they would not have sustained that loss and damage.

The civil wrongs complained of in both sets of proceedings have been completed. Loss and damage has flowed directly from each.

The fact that Gerard Madden is a concurrent wrongdoer with D.G.O'Donovan and Partners and that both have caused the same loss and damage to the plaintiffs is not relevant to these proceedings. The court has not been required to determine any issue as to indemnity or contribution as between the concurrent wrongdoers in either of the two sets of proceedings.

The plaintiffs have established on the evidence and on the balance of probabilities that the loss and damage which they have sustained would not have occurred in the absence of breach of contract on the part of Gerard Madden.

They have also established on the evidence and on the balance of probabilities that the loss and damage which they have sustained would not have occurred in the absence of negligence breach of duty and breach of contract on the part of D.G.O'Donovan and Partners.

It follows that the application of the principle identified *inter alia* by the Supreme Court (Kearns J.) in *O'Carroll v. Diamond* (Unreported, Supreme Court, 12th April, 2005) requires that the plaintiff should be awarded damages against the defendants in both sets of proceedings.

Since the plaintiffs have sustained loss and damage by reason of civil wrongs committed by concurrent wrongdoers they are entitled to joint and several judgment against those wrongdoers.

The plaintiffs claim damages arising out of the negligence, breach of duty and breach of contract.

They have proved that as a result of the civil wrongs of the defendants they are now liable, jointly and severally, to discharge costs in the amount of €88,902.30 together with interest thereon at the rate of 8% per annum from 18th July, 1997.

They are, accordingly entitled to recover from the defendants in both proceedings, jointly and severally, a sum by way of damages which will enable them to discharge that liability.

They are also entitled to recover from the same defendants a sum by way of damages sufficient to enable them to discharge (a), their liability to pay the additional costs incurred by the IRTC in connection with the latter's bankruptcy proceedings against the plaintiffs (b), their liability to pay the costs incurred by the IRTC and the Minister for Transport Communications and Energy arising out of the High Court proceedings, and, (c), the costs which they have incurred in defending the bankruptcy proceedings commenced against them by the IRTC.

Finally they are entitled to recover damages sufficient to compensate them for the very substantial distress, inconvenience, disruption and the damage to their reputations which has resulted directly from the wrongs complained of.

I intend to hear Counsel for the parties upon the issue of damages before making a final order in these proceedings.