THE HIGH COURT

APPROVED

[2021] IEHC 548

[2018 No.10665 P]

BETWEEN:

FINBAR TOLAN

PLAINTIFF

AND

JOHN BRADY AND JOHN DILLON-LEETCH BOTH TRADING UNDER THE STYLE AND TITLE OF DILLON-LEETCH AND COMERFORD SOLICITORS

DEFENDENTS

Judgement of Ms. Justice Mary Rose Gearty delivered on the 25th day of July, 2021

1. **Introduction**

1.1 The Plaintiff seeks judgement in default of defence and the Defendant seeks an order to dismiss the claim in its entirety as one that is frivolous and vexatious or an abuse of process. Both motions were heard together. The principles apparently in conflict in this case are those of finality in litigation and every litigant's right to justice and fair procedures.

1.2 The substantive claim arises out of an earlier set of proceedings. The Plaintiff has already sued a cooperative, Connaught Gold Cooperative Society Limited (Connaught Gold), claiming that this body breached the terms of a written contract with him. The High Court

dismissed that claim in 2015, former President of the High Court, Mr. Justice Kearns (the Trial Judge), having found that there was no written contract on which the Plaintiff could rely. The Court of Appeal heard an appeal against that finding and dismissed the appeal. The Plaintiff then discovered that the Trial Judge was related to a solicitor in the firm which acted for him in the case. The Plaintiff brought fresh proceedings before the High Court, again seeking to set aside the original decision, this time on various grounds, including that of reverse bias, i.e. that the Court was more likely to find for his opponents, lest they seek to overturn a decision in his favour by accusing the Judge of bias. The High Court dismissed that claim on the grounds that it had no jurisdiction to hear it but considered and rejected the logic of the Plaintiff's argument in respect of reverse bias. The Court of Appeal dismissed the Plaintiff's appeal against that decision, also having considered the reverse bias claim on its facts.

1.3 The Plaintiff now seeks damages against the solicitors whom he instructed in the 2015 proceedings for, amongst other things, professional negligence. He also sought declarations in respect of the original hearing but has abandoned this aspect of the claim in submissions to this Court and confirms that he no longer seeks to challenge the decision of the Trial Judge. The only claims presented to this Court in submissions were those against the Defendants, his then solicitors, and the claims revolve around two main arguments: that they should have called other witnesses and that they did not reveal to him the facts which would have disclosed the potential reverse bias of the Trial Judge. Other matters of fact are presented as claims and will be considered below.

1.4 The motions arise in circumstances where the Defendants have, to date, failed to file a defence and, as a response to the motion for judgment in default of defence, the Defendants filed their own motion claiming that the action itself should be dismissed as vexatious or

struck out as an abuse of process. The Court notes that a draft defence is now ready to be filed, should the Defendants' motion fail and if the Court permits a final extension of time.

1.5 The Plaintiff argues that the courts must administer justice and, he submits, the initial decision was wrong. Having failed to overturn that decision, firstly on appeal and secondly by way of challenging the then judge, he now seeks (amongst other reliefs, some of which are now abandoned) damages from his solicitors on the grounds that they were negligent and that, as a result, he lost the case. The consequences of losing the case were very serious, he submits, in that his business collapsed, as did his health. An assessment of the case requires a rehearsal of the main facts, the procedural history and various legal concepts including the purpose of pleadings, the meaning of the phrase "cause of action" and finality of litigation in the context of administering justice.

2. Outline Facts of the Connaught Gold Proceedings

2.1 In 2012, five men met to discuss the credit facilities being enjoyed by the Plaintiff at cattle marts run by Connaught Gold. The Plaintiff claimed, in the breach of contract case that followed these events, that this meeting, on the 16th of July 2012, led to a written agreement which the cooperative breached the following month. Connaught Gold took the view that there was no binding agreement and that it was entitled to refuse to extend credit facilities to the Plaintiff. After a meeting on the 9th of August of 2012, the Plaintiff was not afforded further credit by that company, having enjoyed three weeks of credit for many years until that date (albeit reduced to two weeks on the 16th of July). He was still entitled to buy at the marts but not on the same terms as he had enjoyed until that meeting in August. In May of 2015, after a 4-day hearing, the Trial Judge ruled against the Plaintiff in an *ex tempore* judgment.

2.2 This 2015 case revolved around a document which reads as follows:

"By the 10th Aug Finbar Tolan will have his overdraft in place to allow cheque to lodg [sic] on the Saturday for the previous Saturday week's purchase

During Galway race week cheques will be lodged in the current way with no gap in holding cheques

Ballinrobe cheques will continue to lodg [sic] in same way as in the past

Finbar agrees that the above is acceptable and has to be in place by the 10/8/2012 or all offers are off the table.

The only stock purchased will be dry cows and bulls and if any other stock purchased will be paid for on day.

Signed

Martin Walsh, Tom McGuire, Michael Murray, Tom Jordan, Finbar Tolan

16th – 7th – 2012."

2.3 The Trial Judge indicated on day two, after the Plaintiff's case closed, that he did not consider this document to constitute a contract. This decision was expressed to be on the basis of the document itself. At that time, the Plaintiff had given evidence that his interpretation of the document was that it was to be of a continuing nature, until at least December of 2012. Though he had served subpoenas on other witnesses, they were not called. One of these was the owner of the mart who seemed to be a reluctant witness, given the lengths to which he appeared to go to avoid service of the subpoena. The other two were signatories of the document. The Trial Judge noted that he could only construe the document in one way,

namely that there was to be continuing access to the marts but not unlimited as to time and that, even at a stage when he had only heard the Plaintiff's side of the case, the amount claimed by the Plaintiff could only be quite limited. In other words, at its height, the Plaintiff's case could only be for reparations in respect of breach of a credit agreement said (by him) to be in place until December 2012.

2.4 On day three, the defence called two of the signatories of the document, both mart managers, both of whom gave evidence that the document was not a contract but a memo, and that the Plaintiff would have been afforded continuing credit terms had he been more reasonable. The Plaintiff had said in evidence that the written document constituted what had been agreed by all parties in a general way, or at least until December 2012, including that two week's credit would be afforded to him. The witnesses for the defence disagreed and said there was no such agreement and that the document set out the discussion and made provision for the time between that meeting, in July 2012, and the next which was expected to be on the 10th of August but which in fact took place on the 9th of August.

2.5 In the document itself, as one can see from its terms, the only date nominated was the 10th of August. On day four the defence case closed, and the Trial Judge held for Connaught Gold saying that he was satisfied that the document was evidence of a holding arrangement, that he based this decision on the document itself but that its terms were supported by the defence evidence in that regard. The words of his ruling were: "*Certainly it is not to be taken as a contract, for the very simple reason [it is] non-specific as to time, non-specific as to limits, non-specific as to virtually everything*." He went on to point out that it only made provision for certain identified, pending events due to take place before the next meeting, expected to be on the 10th of August, but had no other specifics. At most, he found, the Plaintiff was entitled (as was

any other person) to enter into a series of individual transactions. Connaught Gold sought to curtail his credit (and probably the type of animal he could buy) and there was no contract as to future credit terms beyond the terms of the document of 16th July which governed events until the 10th of August when "*all offers would be off the table*".

3. The Appeal in the Connaught Gold Proceedings

3.1 On appeal, the Plaintiff (by then representing himself) argued that the document was a binding contract, he had fulfilled the only condition, he was entitled to the credit terms set out and the Trial Judge was wrong to dismiss his case. Peart J. (giving the unanimous decision of the Court) in *Tolan v Connaught Gold Cooperative Society Limited* [2016] IECA 131 rejected the Plaintiff's appeal in May of 2016. While the Court of Appeal considered and dismissed various arguments raised by the Plaintiff in respect of contract law and the intentions of the parties, the crux of the decision is at paragraphs 53 and 54:

> "*[T]he document… is not enforceable as a stand-alone agreement because it lacks essential details such as, by way of example only, how long it was to endure, and how many cattle the plaintiff was allowed to buy, for example, during any one week or other period of time.*
>
> *It is therefore unenforceable because it is imprecise in its terms. It lacks the certainty necessary for it to have the consequences contended for by the plaintiff*."

3.2 As the Plaintiff sensibly now concedes, there is no prospect of revisiting that decision. His appeal was heard and dismissed, and there is no complaint made of Peart J. or any other member of that Court. The Plaintiff points to what he describes as numerous inaccuracies in the recital of facts by Peart J. but now submits that this is because all the facts were not before the original Trial Judge and that therefore the Court of Appeal was similarly limited in what

was before it. He lists these matters in his submissions. A fair summary, having considered this list, is to say that what he refers to as inaccuracies arise from the evidence of Mr. Jordan and of Mr. Walsh, which evidence was different to that given by the Plaintiff. He submits that had Mr. Forde, the C.E.O. of Connaught Gold (who was present on the 9th of August and on the Plaintiff's account to this Court chaired that meeting) and the other signatories of the document dated 16th July, been called to shed further light on the August meeting, these matters would have been clarified and the contract proven. At that time, however, the Plaintiff had not appealed on the basis that witnesses whose evidence would have changed the course of the case had not been called. His appeal was based, primarily, on the document dated 16th July 2012.

3.3 A further appeal to the Supreme Court was not permitted.

4. <u>Reverse Bias – Proceedings against Connaught Gold in 2017 and 2018</u>

4.1 In September 2016, the Plaintiff discovered that the Trial Judge was related by marriage to a solicitor in the Defendants' firm, his solicitors in the Connaught Gold proceedings. He commenced proceedings in the High Court to set aside the ruling in the 2015 case on the basis of alleged bias. In 2017, Mr. Justice Noonan held that he had no jurisdiction to hear a case in which the claimant sought a declaration that another judge of the High Court should not have heard the original claim and, *obiter dicta*, concluded that the argument in relation to reverse bias was not sustainable. The Plaintiff appealed and, in 2018, the Court of Appeal upheld the decision of Noonan J.

4.2 In that appeal, *Tolan v Connaught Gold Co-Operative Society Limited* [2018] IECA 267, Whelan J., delivering the unanimous judgment of the Court of Appeal, set out the factual and

procedural history in detail. It is important to note the issues raised therein, and some of the conclusions of that Court, as the same issues arise again in this case.

4.3 There, the Plaintiff argued that the Trial Judge had engaged in unconscionable behaviour, that he had discussed the case with these Defendants (his then solicitors) and then retained it, that he had failed to disclose his relationship with the Defendants and that the Plaintiff had not received a fair hearing before an impartial judge. The Court of Appeal considered each of the issues raised and ruled, on the main issue, that the fact that a judge is related to a lawyer in a case is not a sufficient ground to succeed in an argument that the judge was objectively biased.

4.4 That Court considered the allegations of pre-trial discussions, including the assertion that the Judge had promised a proper hearing, stating:

> *35. Far from there being any covert engagement between his solicitor and the then President of the High Court, the available evidence suggests that the application occurred in open court. Crucially the respondent's lawyers were present in court. It appears that the appellant's case was in no fit state to be tried as of November 2014 because the appellant himself was in default in two respects. Firstly, he had failed to reply to a notice for particulars and secondly he had failed to make discovery as he was obliged to do to support the claims he was advancing in his pleadings against the respondent.*
>
> *36. It appears that it was against a backdrop of him asserting that he had no documentation at all in his possession to support a claim, which at the hearing of this appeal was suggested to be for a sum in the region of €6m, that the President of the High Court, as was his entitlement,*

decided to retain seisin of the case and fixed a date for hearing for over five months later, namely the 12th May 2015.

37. Secondly, there is the contemporaneous letter from his own solicitor. Whilst the letter, dated 2nd December 2014, from Mr. Brady is couched in layman's terms, on any fair reading of same and when its terms are considered in light of the clear statement of facts sworn to by Eamonn M. Gallagher at para. 12 of his affidavit of 6th December 2016, the letter does not support a contention that the appellant's solicitor had any kind of covert engagement with the then President of the High Court of an improper nature or otherwise than in open court in the context of applications being defended in which it was sought to strike out the appellant's claim.

4.5 The Supreme Court refused leave for an appeal to that Court.

4.6 Three years later, therefore, the Plaintiff's challenge to the original Trial Judge's decision on the basis of reverse bias has been heard (in 2017), appealed and dismissed (in 2018) in turn. The Statement of Claim in these proceedings was delivered in July 2020 and is confined (as it must be) to the allegation that his solicitors effectively lost the 2015 case, through negligence on their part, when he, the Plaintiff, should have won it.

4.7 The main argument said to sustain a claim in negligence is that the Plaintiff lost the 2015 case due to the Defendants' failure to call three specific witnesses who would have given evidence about the meeting in August which would have confirmed that the document signed on the 16th of July 2012 was a contract, contrary to the findings of the Trial Judge.

4.8 Further, he argues that he would have had a better prospect of winning, had the Defendants not insisted that the case run in front of a judge who (as his solicitors must have known all along) may have been subject to the effects of reverse bias, due to having a

relationship through marriage with a partner in that very same solicitors' firm. This concept of reverse bias arises where a judge has a link to one side and, in order to obviate any claim of bias, she must decide in favour of the other side. Given that the challenge to the Trial Judge's decision has been abandoned, this can only be considered insofar as the same facts may form the basis for a potential claim against the current Defendants.

5. The Purpose of Pleadings and the Respective Motions

5.1 The Statement of Claim is intended to set out each claim that will be made by the plaintiff so that the defendant knows what case is being made. A cause of action must be revealed in a statement of claim. To use Lord Diplock's formulation, this is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. Lest there be any ambiguity or vagueness in the statement of claim, and to inform a decision as to whether or not she will contest the claims, the defendant is entitled to seek particulars of the claim before filing her defence. Failing that, she must file a defence within 21 days. The defence must set out the response to the claim so that the parties themselves, and the court, can identify the issues between the parties.

6. The Motion for Judgment in Default of Defence

6.1 Order 27 rule 1 of the Rules of the Superior Courts allows a litigant to bring a motion to the High Court for judgment in default of defence when she has written seeking a defence, there has been no adequate reply, and no defence has been filed within 21 days of that letter. The penalty for not filing a defence in time usually lies in costs rather than in the more draconian remedy of giving judgment to a plaintiff without hearing the defendant's side of

the case. The ultimate remedy of giving judgment in such a case must, however, remain an option or there would be no teeth to the relevant rule and it could be ignored with impunity.

6.2 The motion for judgment in default of defence is usually deployed, therefore, to prompt a response on the part of a defendant. O'Donnell J. deals with the purpose of such a motion in *Rooney v Minister for Agriculture and Food & Ors* [2016] IESC 1. Judgment will be granted if there has been no defence filed within the stated time and if the court considers the justice of the case requires it. Crucial to understanding the rule is that it is a procedural aid to spur parties into action in litigation. It is rare that judgment will issue on foot of such a motion and a court must consider whether or not justice requires a hearing in an individual case before making such an order.

6.3 The Statement of Claim in this case is dated 10th July 2020 and, despite several requests, no defence has yet been filed. The Plaintiff had to motion the Defendant in order to persuade them to enter an appearance and his motions for judgement in default of defence have now been listed several times. This Court gave 21 days within which to file a defence, with liberty to the parties to re-enter. On the morning that the defence was due to be filed, a notice for particulars was served on the Plaintiff. The Court later gave 8 weeks for the defence to be filed with the Defendants undertaking to do so, provided that replies were received. It is now argued that these had to be adequate replies and that the replies filed were inadequate. A notice for further and better replies followed the first notice and the responses sent were in similar terms to the first replies sent by the Plaintiff.

6.4 The Plaintiff makes the point that, if they were not happy with these responses they could either make this clear to the Plaintiff or bring the matter to the Court's attention. They did neither. The Plaintiff claims that this delay in proceedings is having a devastating effect

on his health and, in an earlier motion he exhibited a doctor's letter to this effect. In those circumstances, he asks this Court to enter judgment in his favour, saying that the Court has already exercised its discretion in ease of the defendants twice. It is not correct to state that the Court, having allowed leeway to the defendants, so to speak, must now decide in the Plaintiff's favour, however. It is necessary for the Court to consider, in every such application, where the justice of the case lies.

6.5 The Plaintiff argues that, in respect of the particulars raised, they could only be answered as they were answered. The Defendants, he points out, were his solicitors and they had all the information and documentation. For example, he submits, when asked: What was your case about? These defendants knew the answer. The Plaintiff submitted: "*They were looking for things they had themselves.*" This misunderstands the purpose of pleadings, however, which are to make the issues between the parties plain to each other and to the Court. It is not sufficient to say, in replies to particulars, that the Defendant should know the answer. The burden of proof is on the Plaintiff and, save in very specific exceptional instances, he must prove every element of the case he has set out to make. If he is claiming that negligence arose in an earlier case, he cannot simply say: they know what they did, the Plaintiff must spell out exactly what he says was negligent and, if asked, must give particulars of his claim. While it is not necessary that he set out the evidence on which he will rely, the particulars in this context mean sufficient factual information such that a defendant can assess the claim and determine whether or not to dispute it.

6.6 The Defendants aver that they could not file a defence as the Plaintiff did not reply appropriately to the particulars raised. The Plaintiff, quite reasonably, points out that they could have told him this. In his words, they could have said to him or to the Court: – *until*

these questions are answered adequately we will not file our defence. They chose not to do that. In this case, the Defendants have delayed entering an appearance (doing so on the last possible day), they have delayed in entering a defence (bringing a draft defence to court only in response to this, an adjourned hearing date of the motion) and they have failed to acknowledge receipt of the replies to particulars of which they now complain, let alone notifying the plaintiff that they considered his replies inadequate. I am bound by the case of *Rooney* and the description therein of the motion for judgment in such cases as being a sensible procedural rule allowing a plaintiff to ensure progress in the action by using the mechanism of a motion. Nonetheless, even as the general rule is applied, it is appropriate to note that the Defendants conducted the litigation in such a way as to invite a serious consideration as to whether to use the ultimate penalty of refusing to permit them to make their case at all. The Defendants argue that they had always intended to defend the proceedings, they have a draft defence ready should they be permitted to file it and, as noted, they argue that the Plaintiff has not replied, adequately, to the notice for further and better particulars served on him. Thus, they say, it is not fair to order that judgment be entered against them.

6.7 Counsel reminds me that the Defendants are professional people whose reputation is at stake and who always intended to contest the substance of the claim in a robust way. Their draft defence makes this clear. However, it would have been of considerably more assistance to the Court had the defence been filed or had this motion been moved, or even flagged, earlier in the proceedings.

6.8 The status of the Defendants is also raised by the Plaintiff. He notes that, as solicitors, they must be held to a high standard: *they are officers of the court*. While it is of course the case that a solicitor who is a party to an action remains an officer of the court, here, the issue is one

of delay and the test is to determine what is in the interests of justice; the result must be fair to both parties. It does not appear fair, as a general principle, to find against a litigant solely because she is a professional and must be held to a higher standard than others.

6.9 When considering delay, the length of any delay is relevant. It may be unjust and disproportionate to prohibit a litigant from defending proceedings due to delay, unless the delay was egregious. It should also be recalled that, as set out in *Rooney*, the usual remedy in a case in which the defence is not filed in time, is one of awarding costs against that party. The delay in question here, while outside the 21 days permitted by the Rules of the Superior Court, is within the parameters seen in cases which regularly come before the High Court.

6.10 However, the Defendants were on notice that the Plaintiff urgently sought to get his case on for hearing and reassured the Court not once, but twice, that they would file a defence within a specific time period. They did not do so and did not alert the Court or the Plaintiff as to their reasons until this hearing. In order to decide whether or not the justice of the case requires that judgment now be entered against them, I must consider the substance of the claim as that decision must be based on what is fair to the parties in all of the circumstances. The substance of the claim is also the subject matter of the next motion, so it can be considered in that context and, if appropriate, the Plaintiff's motion can then be reconsidered.

7. The Motion to Dismiss or Strike Out the Plaintiff's claim

7.1 The Defendants submit that this action should be dismissed as being frivolous and vexatious. The purpose of this remedy is to ensure that there is a filtering mechanism in court cases. Simply put, if the case is bound to fail the court should dismiss it at an early stage rather than wasting the time and resources of all involved. There is a second submission which

involves a different test: whether or not the court has an inherent jurisdiction to strike out the claim as one which, while not bound to fail on the pleadings, is one which relies on asserted facts which have no credible basis and which should be struck out as an abuse of process.

i. <u>The Frivolous and Vexatious Claim</u>

7.2 This is a mechanism which must be used sparingly. Order 19 rule 28 of the Rules of the Superior Courts sets out the jurisdiction of the Court to dismiss an action where the pleadings fail to disclose a reasonable cause of action or are frivolous or vexatious.

The words of Mr. Justice Clarke in *Keohane v Hynes & anor* [2014] IESC 66, at para. 6.5, set out the test and the caution with which a court should approach such a motion:

> *If it is clear … that the case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However … whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis…it is for that reason that all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law.*

ii. <u>The Claim which is an Abuse of Process</u>

7.3 In *Lopes v Minister for Justice Equality and Law Reform* [2014] IESC 21 Clarke J. described the related jurisdiction to strike out a case as an abuse of process. The test is somewhat more elaborate than that involved in dismissing a case which must fail. Clarke J. confirmed a point

made by this Plaintiff (who cites Ms. Justice Macken to the same effect in his submissions) as to its being an exceptional remedy. He summarises the position at para. 2.3:

> "*If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits then it is appropriate for the court to dismiss the proceedings*."

At paragraph 6.8 in *Keohane v Hynes*, Clarke J. described the process thus:

> "*What the Court can analyse is whether a plaintiff's factual allegation amounts to no more than a mere assertion, for which no evidence or no credible basis for believing that there could be any evidence, is put forward. Likewise, the Court can go into documentary facts where the relevant documents govern the legal relations between the parties or form the only possible evidential basis for the plaintiff's claim*..."

8. <u>The Statement of Claim</u>

8.1 The Plaintiff's claim is for various declarations, including:

1. that the Defendants were in breach of their duty to the Plaintiff;
2. that they deliberately concealed the marital relationship of the then President of the High Court to a solicitor who worked with the Defendants;
3. that the President breached his oath of office in hearing the case;
4. that the Plaintiff was denied fair procedures and a fair and just hearing.

The Plaintiff claims compensation on the basis that his livelihood, reputation and his health have been destroyed by the Defendants and also compensation for alleged breach of contract, negligence, loss of opportunity, breach of duty and misrepresentation.

8.2 It is necessary to identify what is said to be a cause of action and to identify whether there is any cause of action which might succeed as pleaded and without looking at the facts which might support the claim. To use the formulation of Lord Pearson in the landmark case of *Drummond-Jackson v British Medical Association and others* [1970] 1 WLR 688, is there any cause of action with some chance of success on a consideration of the pleadings alone? In so doing it should be noted that the Plaintiff has listed a number of factual allegations as being causes of action. In this, he is mistaken. But there are some claims which can be considered under the headings of professional negligence.

8.3 Therefore, the first argument can be dealt with relatively swiftly: the pleadings disclose an identifiable cause of action, namely, professional negligence. Without assessing the factual basis for this claim, it cannot be struck out at this stage. To state this more plainly: if this rule of court was the only legal basis for the defendants' motion to strike out the case, it would be inappropriate to strike the case out at this stage as, leaving aside the assessment of the past and the potential evidence in the case, if some of the matters set out in the statement of claim were supported by credible evidence, there would be a *prima facie* case of professional negligence to be answered.

8.4 The reverse bias argument is an issue which has been raised in the High Court and in the Court of Appeal before. But for present purposes, I am prepared to consider the argument under the heading of professional negligence. The Plaintiff emphasised in written and in oral submissions that he is not attacking the decision of the Trial Judge, that his case in which the potential reverse bias of that Judge was raised did not involve these Defendants and therefore has not been considered before. This Court will consider the application on the basis that, as

the Defendant solicitors are the only defendants in the action, there can be no question of declarations which affect any other party and no question of rehearing the matter.

8.5 All of the factual matters relied upon by the Plaintiff in paragraph 12 of his submissions can be considered under the heading of professional negligence. He confirmed in legal submissions and in oral argument to the Court that he does not wish to re-litigate the contract case, does not intend to launch a collateral attack on the judgements in the previous cases and refers to the original proceedings only to illustrate the negligence of his then solicitors. It should be noted that the pleadings do not reflect the Plaintiff's current stance, as outlined in his legal submissions. In his pleadings, the Plaintiff seeks a declaration that the former President breached his oath of office in hearing the case, that he (the Plaintiff) was denied fair procedures and a fair and just hearing and that he is entitled to be fully compensated as his livelihood, reputation and his health have been destroyed. The Plaintiff is also seeking damages for loss of opportunity, breach of contract and/or breach of duty and misrepresentation. His claims can all be considered under the heading of professional negligence claims.

8.6 Insofar as there may be a claim of breach of contract, no details are offered as to what contract is relied upon or what provision of it was breached but again, the claim can be considered as one which relies on an alleged breach of the duties of professional advisors.

8.7 For the purposes of this motion to dismiss the action, the Court is prepared to take the Plaintiff's case at its height and consider these motions in that context of a professional negligence claim. This was the main claim on which the Plaintiff's submissions to this Court rested, both oral and written.

8.8 The inherent jurisdiction of the Court to strike out a case which is an abuse of process involves consideration of the factual basis on which this claim appears to rest. If there is a credible basis for the facts asserted, and if those facts are capable of constituting a cause of action, the case must go to a plenary hearing where the facts can be tested by cross-examination. If the assertions have no credible basis or are not capable of constituting a cause of action, the claim should be struck out as an abuse of process.

8.9 Assessing the basis for the factual claims made requires some consideration of the background facts of this case as set out in the pleadings and affidavits grounding this motion. Many of these facts are also contained in the three reserved judgements and one *ex tempore* judgement which have already been delivered in respect of the Plaintiff and Connaught Gold, in two sets of proceedings, which a brief description of has been set out above.

9. <u>The Current Claim</u>

9.1 To succeed in a claim for damages for professional negligence on the part of a legal representative in the context of a court hearing, a plaintiff must prove not just incompetence in representation but that the incompetence led to an identifiable loss.

9.2 In respect of the running of the case, the first argument relates to potential witnesses. In particular, two were mart managers who were signatories of the note, another was the CEO of Connaught Gold who was, by all accounts, present for the second of two meetings. The Plaintiff says he was advised by the Defendants to call the other men, but they were released and, despite his asking for an adjournment, they were never called. Had they been called, he is confident they would have supported his version of events and it was, he concludes, negligence on the part of the Defendants not to call them. There is no indication as to what

they might have said, or how the Plaintiff knows what they would have said, other than to assert that these Defendants were the ones who advised him to call them, they impressed upon the Plaintiff how crucial the evidence of the owner of the mart in particular would be and that they would, if telling the truth, have supported him. This is sufficient, according to the Plaintiff, to support his current claim. If even one of these witnesses was crucial, as he says he was told, he argues that it must have been negligence not to call him.

9.3 The Defendants point to the Supreme Court decision in *Director of Public Prosecutions v Shaughnessy* [2021] IESC 18 in which Charleton J. describes the development of the rules insofar as they apply to representation in a criminal trial, beginning with *Rondel v Worsley* [1961] 1 AC 191 and culminating in cases in which a claim of negligence is permitted but only where there is not only flagrant incompetence but a conviction which, as a result of the incompetence, is unsafe. Thus, the impact that the alleged incompetence had on the trial must be assessed, bearing in mind the warning from Charleton J. that there are countless ways to provide effective assistance in any given case. Tactical decisions, in other words, may not be easy to assess and will rarely form the basis for a conclusion that a lawyer has been incompetent.

9.4 The Plaintiff will recognise that this is a necessary protection for every litigant and lawyer. In every single case before the courts there is a losing party. If, in every such case, the courts entertained a challenge not only to that result (the right to appeal is enjoyed by every litigant) but also, if that failed, a challenge based on the argument that another lawyer would have run the case differently, then legal proceedings would never be at an end and the system would unduly favour those with unlimited funds to challenge decisions and those with no funds who chose to represent themselves yet put others to the expense of defending

such claims. These ill effects are in addition to the court time thus wasted, at the expense of other claims which might have been heard earlier but for the endless challenges to previous proceedings. All of this does not prevent damages being awarded in an appropriate case. But the principle of finality of litigation dictates that there be, at a minimum, a level of evidence establishing incompetence and damage which flows from that incompetence, before such a case may proceed. Otherwise, it may amount to no more than an attempt to challenge the previous proceedings yet again, but in another guise. And this is what the Defendants claim is attempted here.

10. <u>Alleged Negligence – The Witnesses Not Called</u>

10.1 In order to show an actionable cause, the Plaintiff must prove not only that it was incompetent for his solicitors not to call the witnesses, but that, had they been called, their evidence would have been such as to reverse the finding of the Trial Judge. There are two main obstacles to his successfully achieving this: the first is that he does not know what the witnesses would have said. The height of his claim is that his solicitor (on his account) appeared to think it important to call the witnesses. This is robustly denied but, for the sake of argument, let us assume that the solicitors did advise calling the witnesses.

10.2 The Trial Judge's ruling, as is made plain by the detailed judgment of Peart J. in the Court of Appeal, rested on an interpretation of the document signed in July. The President had heard three witnesses as to the facts of what happened at the meeting in July. While he referred to the evidence of two of them, and to the evidence of the Plaintiff, it is clear that the primary basis for his decision was an objective interpretation of the hand-written document. Peart J., on appeal, sets out the law of contract clearly in support of the same construction and reaches the same conclusion without reference to the witnesses' intentions other than in

respect of other issues, such as the fact that there was a new regulation and that there was concern over the potential exposure of Connaught Gold. The discussion by Peart J. of events in August 2012 had minimal relevance to these findings. The evidence of the owner of the mart could only have been confined to the events of the 9th of August and no document emanated from that meeting.

10.3 The Plaintiff is concerned that there have been inaccuracies as to the events at that meeting and the sequence of events. This is partly a misconception: The Trial Judge and Peart J. considered the evidence in the case. Just because the Plaintiff does not agree with it does not render it inaccurate. But while he now seeks to undermine those witnesses, the witnesses he proposes include one who was not present on the 16th of July 2012. More fundamentally, as two courts have now held, the decision rested primarily on the terms of the document itself and not the intention of the parties.

10.4 While the Trial Judge and Peart J. in turn concluded that the witnesses' evidence supported this construction, the definitive finding is this: the document could not and did not form a binding contract beyond an arrangement as to credit which was to continue over the period between one meeting and the next, during which various events such as the Galway races would take place. Its very terms make this clear in that the only date referred to was the 10th of August 2012, by which time all offers would be off the table if there was no overdraft in place. Nothing in the document itself suggests that the agreement would last beyond that date, whether the overdraft was in place or not. The agreement, such as it was, could not achieve business efficacy without significantly more detail.

10.5 Insofar as the Plaintiff's claim in this case rests on an allegation of professional negligence in the calling of witnesses, the height of that claim is that the owner of the mart or

one of those present at the meeting of the 9th of August might have said something wholly different from what was said by the other defence witnesses, or indeed by the Plaintiff himself, such as to lead to a different interpretation of the written document. But as Peart J. makes clear, the law provides that a contract depends on various conditions one of which is business efficacy. More importantly, the intention of the parties is not the relevant issue but the intention of the document.

10.6 That being the case, it is difficult to conceive of evidence that the owner of Connaught Gold could give that could disturb that finding of fact. Even if he had intended to create a wholly different contract to that negotiated by the mart managers on the 16th of July, the document itself shows no evidence of this and could not be construed in any way other than that set out in the Trial Judge's ruling and in the Court of Appeal. More fundamentally still, the Plaintiff cannot identify what this, or any witness not called, might say.

10.7 The test as to what the Plaintiff must show in an allegation of professional negligence against his former legal advisors in respect of their conduct of litigation does not appear to have been considered in Ireland in the civil context or, if it has, neither side referred to an authority specifically directed at the issue. However, the parties both referred to the previous decisions of the courts in this Plaintiff's actions in which excerpts from the case of *Talbot v Hermitage Golf Club & ors* [2009] IESC 26 are quoted and which, in turn contains a discussion of the case of *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 IR 412. Both cases are considered below.

10.8 The Supreme Court has considered the duty of counsel in a criminal trial in *Director of Public Prosecutions v Shaughnessy* [2021] IESC 18, referred to above. In that situation, according to Charleton J., the court must evaluate an advocate's conduct without the benefit of hindsight and, to achieve this, must operate a strong presumption in the advocate's favour

acknowledging that it would be all too easy for the disappointed litigant to challenge the result by attacking his advisors. Seen in this context, and following American authorities to this effect, the Supreme Court adopted the test that there was a presumption in favour of the advocate if his conduct could be considered as coming within the wide range of reasonable professional assistance. In the judgement, Charleton J. quotes from O'Connor J. of the American Supreme Court in *Strickland v Washington* 466 US 668 (1984), who concluded that: "*the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'*" It should be noted that *Shaughnessy* applies only to criminal trials and suggests a test for the standard to be applied in deciding if a defendant can appeal a conviction or sentence based on the allegedly incompetent representation.

10.9 It is not clear that the same high standard must be reached before a civil litigant would be permitted to sue for negligence in the conduct of litigation. In other words, it may not be the case that there will be a strong presumption in favour of competence. However, some such presumption must exist otherwise there would never be an end to civil litigation and every decision could potentially be challenged on the basis that the solicitor or barrister involved was at fault. In the case of the impecunious or wealthy litigant, this is a powerful tool of manipulation or even harassment; one has nothing to lose, the other has the means to re-litigate every issue, both can raise the same arguments repeatedly against different parties.

10.10 Given the policy imperative of finality in court decisions and the existing remedies of *res judicata* and abuse of process protections, the appropriate test is one that achieves this policy objective but provides a remedy in a case of injustice. Where a party has suffered demonstrable loss due to the negligence of her legal advisors, she ought not to be prevented from recovering damages in that regard even if it means reviewing the facts of a previously

litigated case. The test in a case of bias was considered by the Supreme Court in its decision in *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 IR 412, where the inherent jurisdiction of that Court to protect constitutional rights and justice was discussed. McGuinness J. held at p 478:

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

10.11 It is highly speculative to suggest that the witnesses might have given evidence which would affect the result of the case. The Plaintiff claims that he has witnesses as to his being advised by one of the Defendants to call the three witnesses (none of these witnesses are named) but more significantly, he never identifies what it is that the three witnesses who are named would have said that could conceivably change the outcome of the case. It is not sufficient to prove that the Defendants advised him to call the three witnesses (again, assuming for the sake of argument that the Plaintiff could do this as a matter of fact, which is far from clear). It was submitted in oral argument that the three witnesses would have told the truth and agreed with his version of events. This remains a hope of the Plaintiff's but there is no evidence to support it; he seeks to persuade the court in 2021 that three witnesses would have supported him in 2015 had they been called, even though they were, respectively, the owner of and mart managers in the company the interests of which party were directly opposed to his. Further, this argument is made in circumstances where the written evidence

in the case (the document itself, dated 16th July 2012) did not support the Plaintiff's testimony that this purported to be a contract as to ongoing credit between the then parties.

10.13 If this argument was successful in this case, it would amount to a finding that a losing party is entitled to identify a list of potential witnesses and argue that, had they been called, she would have won. At a minimum, such a claimant must identify what will be said by the witness which is the basis for the claim that the evidence would have changed the course of the case. The Defendants argue for a stronger presumption in favour of the legal representative but in circumstances where the Plaintiff has not identified any evidence, merely three named witnesses, the test to be applied does not arise.

10.14 There is always a losing party and, to prevent never-ending litigation arising from court decisions (appeal, review, suit against the legal team, further suit against the team who lost the second challenge, and so on) the Court requires a reason to revisit any such decision. The mere assertion of negligence is insufficient: having been challenged by the Defendants who say there is no cause of action, or none that can succeed, the Plaintiff must show duty, breach of that duty, *and* a loss that was caused by that breach if he is to succeed in his claim.

10.15 If a plaintiff relies on a failure to call evidence, the missing evidence must constitute material capable of creating a realistic prospect that the Trial Judge would have changed his view. On the basis of the policy considerations set out above, it is more likely that the missing evidence must create a substantial likelihood that the outcome of the case would have been different had the evidence been available, thus constituting the kind of exceptional circumstances envisaged by McGuinness J. in *Bula v Tara Mines*. At the very least, the evidence must be available so that its weight can be assessed and either of these tests applied.

10.16 Here, we do not know what the evidence would be as we do not know what the missing witnesses would have said. Ironically, given his argument that the Judge may have been biased, the Plaintiff ignores the inherent conflict of interest which would have been presented to the three potential witnesses in his prediction that the witnesses would have supported his case. Even ignoring the hand-written document, if one predicted that a person was unlikely to give evidence opposed to the interests of the company that provides their financial support, this would be a sensible conclusion. That view is certainly one that a legal advisor would be entitled to take, and that view justifies the decision not to call such a person, in light of their financial interests alone. This is not to cast any aspersions on any witness, nor to predict what they might have said but merely to state a sensible position which a lawyer would be fully justified in taking in any case.

10.17 Taking the Plaintiff's case at its height, ignoring for the moment the averments of the Defendants, if it was the case that they had considered these three witnesses to be appropriate and important witnesses for the Plaintiff's case, such that they had to be called, this view is hard to justify. It is difficult to give evidence in favour of a party when you have a keen financial interest in the success of that party's opponent. This is self-evident: such a witness, arguably, has a direct financial interest in the outcome of the case. The Plaintiff is ignoring this interest and seeks to persuade the Court that, instead, speculation as to what the witnesses might have said is grounds for a professional negligence claim against his lawyers.

10.18 The Defendants deny that they advised calling Mr. Forde and aver that the Plaintiff was advised that calling the witness would be detrimental to his case. This accords with common sense in terms of trial tactics: the proposed witness was the owner of the defendant company in those proceedings. In any event, given the discussion above, there is no need to

assess the weight of the Plaintiff's averments to the contrary: the facts remain that there is no indication as to what they might have said, if called and the decision of the Trial Judge and that of the Court of Appeal did not depend on the evidence of those who were present at the meeting of the 9th of August. Their evidence, even if we knew what it was, was unlikely to shed light on the interpretation of a document dated the 16th of July.

10.19 The Plaintiff emphasised the fact that the CEO appears to have been reluctant to give evidence. The Plaintiff himself knows how stressful litigation can be. It is very likely that a business owner would not want to give evidence in court generally. Few people do. If a witness is forced by the plaintiff, by *sub poena*, to give evidence in a case in which her company is the defendant, most people would understand that the witness would be a reluctant one and most lawyers would advise that such a course should not be adopted. Unless a litigant is very sure that the witness will testify in her favour, it would be a brave or a desperate lawyer who would take a chance on calling such a witness, particularly if she is the owner or manager of the opposing corporate party.

10.20 The argument set out at 13 (b) of his submissions, that the importance of Mr. Forde as a witness is a matter for evidence, is not correct. As set out above, to sustain a cause of action the Plaintiff must show, not only the conduct relied upon but how it is said to have caused him a loss. This means that, even if one accepts that (contrary to the Defendants' averments) his solicitors decided not to call him and opposed the Plaintiff's specific instructions, he must still identify the evidence the witness or witnesses would have given so that this Court can assess why it would have led to the case being decided differently. This Plaintiff cannot do that. His insistence that if others had told the truth he would have won, remains a mere

assertion, no matter how strongly he believes it, that is not supported by any facts or by common sense regarding how witnesses, or indeed human beings, usually behave.

11. <u>Credibility of the Current Claims</u>

11.1 The assessment of the credibility of the Plaintiff's assertions generally arises from the test outlined by Clarke J. in *Lopes v Minister for Justice Equality and Law Reform* [2014] IESC 21. Here, the Court must assess, insofar as this is possible, the potential weight of the evidence of three parties all of whom provided evidence on affidavit, none of whom has been cross-examined. In order to do this, the Court can look at established facts and thereby assess which version of events is supported, if any, by those facts. This is considered as the claim in respect of reverse bias has yet to be considered in any detail.

11.2 Here, there are a number of contradictions in the affidavits in respect of which there is independent evidence to help assess the credibility of the deponents. In the Plaintiff's affidavit, he begins by stating that he had a credit contract with Connaught Gold. This was the very issue in the 2015 case, which issue was decided against him. The document on which he relied was held to be insufficiently detailed to constitute a binding contract. Thus, while he may believe this to have been the case, it is not a fact on which he can rely but one he is trying, yet again, to prove.

11.3 Later, at paragraph 5(g) the Plaintiff avers that the main reason the Trial Judge held against him was that he believed that the Plaintiff had walked away, annoyed, from meetings and that this impression was created by the two witnesses called by the defence. It should be noted here that, while this evidence was referred to by the Trial Judge and in the Court of Appeal, and it is clear that the Plaintiff strongly disagrees with it, not only were both judges

entitled to rely on that evidence, it was not the main reason the decision went against this Plaintiff. The terms of the July document itself were crucial in this case and, without substantial evidence to explain and, essentially, amend the July document (which referred only to the 10th of August and made no provision for what was to happen thereafter), the Plaintiff was never likely to win this case. The Plaintiff may believe that the evidence of the witnesses was crucial, but the plain words of both courts make it clear that the document was the key to the success of Connaught Gold, on an objective interpretation of its terms.

11.4 In a related averment, at 5(i), the Plaintiff states that the crux of the case was the meeting on the 9th of August, which he says the CEO chaired. This is not so. The crux of the case was the document dated 16th of July, which may have been discussed at length on the 9th of August, or, as the two defence witnesses said, was not discussed at length but either way, the Plaintiff has not specified how events at this meeting created a contract when there was none apparent in the July document.

11.5 The Plaintiff avers at paragraph 5(i)(vii) that he was advised that the case had settled and that his other witnesses could now be withdrawn. This was the advice he says he received at the end of day two of the hearing. All that remained to be decided was the quantum or the amount of money that would be awarded to him. In those circumstances, he says he was told that the witnesses would be released. Contrary to what he swears on affidavit, the transcript of the case itself reveals that the Plaintiff's case closed at the end of day two. So, by the time of any phone call at the end of that day, there was no prospect of him calling any further witnesses. No matter what his recollection, and how genuine his belief that the reason they were not called was due to a proposed settlement, the clear words of the Trial Judge, as recorded on the transcript, were that at the close of the Plaintiff's evidence (and he had heard

no defence evidence at that point) he did not consider the handwritten document to constitute a contract. The Defendants argue that, in those circumstances, they did not and could not have advised the Plaintiff that he had won his case. More importantly, there is no support for the assertion that witnesses were released because of settlement talks; his case had already closed so there was no reason for them to be retained.

11.6 It is possible that a legal team might endeavour to settle on certain terms at that stage and it is clear from the Defendants' second affidavit in support of this motion that talks had taken place. However, what the Plaintiff does not address in his affidavit is the fact that his case closed before this Trial Judge's comments came and before these talks bore any fruit. It is true that the case did not settle, which the Plaintiff sees as another example of Connaught Gold reneging on an offer but in this context, what is more important is that there was no prospect of the Plaintiff calling any further witnesses at that point. So, his averment that the witnesses were called off after the settlement talks that evening is unlikely to be correct as a matter of objective fact.

11.7 The relevant Defendant avers that there were no complaints about the witnesses not being called. This is supported by the Court of Appeal decision of Peart J. in which no such complaint was made.

11.8 When asked for particulars, the Plaintiff has replied and submitted that what the witnesses may say is a matter for evidence at the trial of this action. That is not so. This is one of the main bases on which he seeks to persuade this Court that these Defendants were negligent. There is no evidence to support his hope as to what they might say, still less evidence on which to decide that there are substantial grounds to find that the judgment of the Trial Judge would have been different, had he heard from the three proposed witnesses.

11.9 The Plaintiff has made claims made about his solicitors having discussions with the Trial Judge and this issue dealt with under the next heading.

11.8 These matters are set out due to the test proposed in *Lopes*, that this Court must assess the credibility of any alleged facts in deciding if there is a cause of action. To a large extent, this is not necessary as the only cause of action arising on these pleadings, against these Defendants, is one of professional negligence and in respect of this claim the Plaintiff cannot establish that the Defendants' actions in failing to call witnesses, caused him a loss. Nonetheless, some serious allegations are made about the Defendants and (although now abandoned) about the Trial Judge and therefore it is appropriate to comment on these factual matters which do not support the Plaintiff's assertions.

12. <u>Alleged Negligence – Failure to reveal a Marital Relationship with a Lawyer</u>

12.1 The facts on which the Plaintiff bases the second limb of his case in negligence all relate to events revealed to him in 2016, namely that there was a marital link between the trial judge and one of his solicitors which, he says, ought to have been revealed to him. The Plaintiff also asserts that there were pre-trial discussions between the Trial Judge and his solicitors to effectively ensure that he, the Trial Judge, heard the case.

12.2 The Plaintiff further claims that he was told by the Defendants that, due to their discussions with the President, he would get a full and proper hearing. The inference he now presses upon this Court is that, having learned of the relationship, this substantiates an allegation of improper conduct. But this Plaintiff has made that case against the Trial Judge and lost, he now makes it again, based on identical facts, against his lawyers. These are the relevant passages from the judgment of Whelan J. in the Court of Appeal:

"38. The statement in the letter to the effect that "the President of the High Court is going to hear your case and make sure it gets a good and proper hearing" considered in its context, does not suggest that the former President of the High Court would make improper determinations favourable to the appellant irrespective of the evidence and irrespective of the law. Rather, it was offering assurances to a highly exercised and agitated litigant whose proofs were not in order and who at that time was experiencing illness and undergoing medical treatment for cardiac issues according to his own affidavit that the case was proceeding to trial.

39. Both solicitors Mr. Gallagher and Mr. Brady were present in court on 20th November 2014. The appellant was not. It is noteworthy that with regard to the conduct of the former President of the High Court, Mr. Justice Nicholas Kearns, in relation to the hearing of the application to dismiss the appellant's case on 20th November 2014, he found in favour of the appellant and refused the application on terms. The affidavit of Mr. Gallagher, solicitor for the respondent, and the letter from his own solicitor do not support the very serious allegations of impropriety made against the former President of the High Court.

40. It is significant that the appellant, who claims to have been aware of improper contact by the firm with the President of the High Court since November 2014 and who had possession of the letter in question for over five months prior to the trial, raised no issue whatsoever regarding it either at the substantive hearing in May 2015 or before the Court of Appeal in 2015 or 2016. This substantially undermines the insidious gloss which the appellant seeks to project onto events including the correspondence he received from his solicitor."

As Whelan J. noted in this context:

"the reasonable person is neither complacent nor unduly sensitive or suspicious. There should not be attributed to the "objective reasonable person" so cynical and negative a view of humanity as to make him or her assume that a trial judge whose relative by marriage practices law cannot or may not, by reason of that fact alone, make an honest decision based on the evidence when faced with a rational basis for doing so."

12.3 This Plaintiff seeks to undermine these previous decisions and avoids the argument of *res judicata* by selecting different respondents for this claim. He nonetheless anticipates that witnesses from the first claim will be brought before the High Court, again, to prove that his then solicitors should have run the case in a different way. He makes this claim, in part, because he considers that it was wrong of them not to reveal a relationship by marriage with the Trial Judge in his case.

12.4 The claim of reverse bias fails to address the fact that the lawyers are independent of their clients and are often known to one another and to the court. Other than a very close relationship such as parent, a spouse or a sibling, a connection with a lawyer, alone, would not usually provide grounds for an argument that a judge is objectively biased still less that he was "reverse biased". More is necessary than an assertion based on a connection between a judge and a lawyer and this too was discussed in detail in his 2017 and 2018 proceedings by Noonan J. and Whelan J. There is no reason to diverge from their view of the facts of this case. As a matter of fact, there is no evidence to support the assertion that the Defendants were at fault by not revealing this connection.

12.5 Yet again, however, and bearing in mind that the Plaintiff has suffered great financial loss and has a genuine sense that he has been wronged, this Court will briefly examine the

law on bias and the effects of a successful claim of bias against the Trial Judge, and whether his solicitors should have warned him.

12.6 In *Talbot v Hermitage Golf Club & ors* [2009] IESC 26, Denham J. referred to the test for bias, citing *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 IR 412. There, at para. 20, the court set out the test for perceived bias as follows: "*whether an ordinary reasonable member of the public would have a reasonable apprehension that an Appellant would not have a fair hearing from an impartial judge*." There, it was pointed out that barristers were independent and did not become espoused to a litigant's ambitions in providing the litigant with legal services. A reasonable person would know this. As Denham J. stated, a prior relationship of legal advisor and client does not disqualify the former advisor on becoming a member of court sitting in proceedings to which the former client is a party. *There must be additional factors establishing a cogent and rational link between the previous association and its capacity to influence the decision to be made in the particular case*.

12.7 To conclude, the Plaintiff, on whom the burden rests when alleging negligence, must show a cause of action. This is not the same as a complaint, as set out above, it constitutes not only a claim that is stateable in law but one that resulted in a loss which can be identified. Here, the Plaintiff must show, in other words, that had he been informed that there was a marital relationship between the President and a partner in his then solicitors' firm, he would have taken his business elsewhere or would have successfully insisted on another trial judge, due to the danger of reverse bias. Neither of these events, had they occurred, come close to showing that he would have won his case had it not been for the relationship in question.

12.8 In some cases, the disputes of fact should be the subject of evidence such that conflicting claims of fact could be assessed by a trier of fact. But here, the allegations in this

regard are not of negligence but of collusion to keep the case in the President's court, a highly inappropriate conversation is specifically alleged by this Plaintiff to have been the reason why he did not achieve a trial date in Cork.

12.9 The problems with this argument are threefold: Firstly, no reasonable woman would anticipate that a judge would decide a case based on a marital link to one of the lawyers, still less if that lawyer was no longer involved in the case. The link is such a tenuous one that it could not be said to be the subject of a perceived bias. And it must be recalled that bias is not what is claimed, but reverse bias. This has been discussed and rejected as a ground of appeal or review by Noonan J. in the first challenge on these grounds and by Whelan J. in her judgment when that decision was unsuccessfully appealed.

12.10 Even if this did not dispose of the argument and, in this Court's view, it does, the logic of the Plaintiff's position is undermined by the alleged conversation. His solicitors, on his account, knew but hid their relationship with the President then tried to keep his case in that court. On the Plaintiff's case, they told him that the Trial Judge had retained the case to give it a proper hearing. Not only is this refuted by the Defendants, but Whelan J. has shown, in the excerpt quoted above, how this is most unlikely to be the case given what happened in open court at a time when the Plaintiff was not present.

12.11 Taking the argument at its height, however, and ignoring the strong evidence that there was no such discussion, hypothetically, a solicitor who tried to get a judge to retain a case must have expected more favourable treatment from the President. Having repeatedly exonerated the President from any allegation of a collateral attack in this case, it remains an argument only to be deployed against the Defendants that they, having expected a bias in their favour, did not receive any special treatment. Further, there is no evidence on which one

could possibly have expected a different outcome from a different judge. There is no basis for a claim in professional negligence on these grounds as there was no conceivable loss caused. Nor, for the reasons set out in the judgements of Noonan and Whelan JJ. is there any reason to perceive a risk of reverse bias in this case such that the decision must be revisited on the ground of fairness.

13. <u>The Plaintiff argues that a fair Appeal does not cure an unfair trial</u>.

13.1 To paraphrase the *Talbot* judgment of Denham C. J. [at para. 33] The legal system gives a right to a hearing and a right to an appeal. In this case the initial hearings were in the High Court in relation to a breach of contract claim and again in the High Court in relation to an argument of reverse bias. Appeals were heard by the Court of Appeal in respect of both claims. These appeals involved a full consideration of the Plaintiff's arguments in each case, despite the finding that the High Court, on the second case, had no jurisdiction to hear the case at all.

13.2 There is a right of access to the courts, and a right of appeal. The Appellant has exercised both rights, twice. But there has to be finality to litigation. That finality is achieved on the conclusion of an appeal, in this case in the Court of Appeal. He now attempts a third challenge to the proceedings. While he insists in submissions that he no longer challenges the initial trial, he cannot re-characterise his case so completely as that – in order to prove loss, he would have to run the original trial again, call all the witnesses, insist on a judge who was not related to the lawyers and win before his losses could begin to be assessed.

13.3 This is his ultimate aim and his written submissions confirm that, although he now abandons overt criticism of the Trial Judge, he expects that these negligence proceedings will

involve a hearing at which he calls witnesses to prove the 2012 contract. The essence of the case, in other words, is to challenge a decision which went against him in 2015, to involve the same witnesses in proving this claim and to claim damages from the solicitors who, he now says, should have won that case. The problem is that no matter how sincere his beliefs in that regard, the witnesses have never provided any statement to him on which he could actually base such a claim. Nor has he established how these Defendants were negligent, therefore. The facts tend to show that the document on which he relied was deficient in terms of a claim in contract.

13.4 Finally, even if the facts as asserted included the allegation that the Defendants knew, for instance, that the President had a reverse bias, by day two, the President had already determined, on legal principles upheld by the Court of Appeal, that there was no contract. This is sufficient to dispose of the reverse bias argument as Peart J. had no connection with any party or lawyer in the case. The Plaintiff argues that a fair appeal does not cure an unfair trial but here, he has been unable to demonstrate that he was not given a fair trial. The Court of Appeal refused his appeal. He launched a second set of proceedings on the basis of the reverse bias argument which has been rejected in the High Court and the Court of Appeal.

13.5 The claims that the Plaintiff was denied fair procedures are, clearly, attempts to reopen matters which have been decided by the courts. His original claim has been heard, appealed, challenged in respect of the Trial Judge's role and that unsuccessful challenge has been unsuccessfully appealed in turn.

13.6 This Plaintiff is very familiar with concept of finality in litigation as it has arisen in the last two cases in which judgments were delivered against him. In *Talbot v. McCann FitzGerald* [2009] IESC 25 an application to set aside a final judgment on the grounds of reasonable

apprehension of objective bias was refused. Denham J. noted that such an application could only be exercised in extremely rare and exceptional cases. In this Plaintiff's High Court claim that the judgment of Kearns P. should be set aside, Mr. Justice Noonan noted, and Ms. Justice Whelan repeated the same quotation from *Talbot*, both judges confirming the fundamental principle that "*the finality of litigation is an important concept in the administration of justice*."

13.7 Whelan J. her judgment in *Tolan v Connaught Gold Co-Operative Society Limited* states*:*

61. Parties are entitled to legal certainty and to have a final determination of issues.

62. In the instant case the respondent has successfully defended this claim in the High Court, it has successfully defended an appeal in the Court of Appeal, and has successfully resisted an application to have the matter reopened by way of further appeal in the Supreme Court. Furthermore, in the instant case it has successfully contested the claims of the appellant to have the proceedings reentered and the orders previously made set aside and the matter re-tried. There is clear jurisprudence emanating from the European Court of Human Rights in Strasbourg for the proposition that where courts have finally determined an issue it should not generally be called into question.

63. Under the objective test, it must be determined whether, quite apart from the personal conduct of the judge, there are ascertainable facts which may raise doubts as to his impartiality. What is at stake is the confidence which the courts in a democratic society must inspire in the public. No evidence of any probative kind was advanced to support the allegation of bias. No legitimate reason was identified by the appellant to support a claim that the former President of the High Court lacked of impartiality towards him in the conduct of any aspect of the case.

64. The appellant has failed to identify any objective justification for his complaints that the former President of the High Court lacked impartiality or conducted the case otherwise than in accordance with his constitutional rights.

13.8 If the Plaintiff succeeds, one of the reliefs claimed is a full rehearing. This clearly cannot occur. And we return to a major obstacle for this litigant: what can this Plaintiff obtain from these Defendants? What loss has occurred? He lost his case but cannot show that this was due to their negligence. Even if they disobeyed his instructions, even if the Trial Judge was married to a sister of a partner in the firm, none of these factors has been shown to have had any bearing on the final decision which has been challenged now 3 times. While these Defendants are different, identical issues have been raised despite these issues having been determined by courts in previous cases. This Court has, nonetheless, considered the facts of the case, and the arguments raised, anew. There is no reason to depart from the reasoning of the courts in the original trial and appeal, or in the later challenge and the related appeal.

13.9 At para. 37 of *Talbot* Denham J. made a comment which could be applied to this case:

"37. At the root of the application is the appellant's misunderstanding of court proceedings and his disappointment with decisions in family law matters in Circuit and High Courts. His assertions of objective bias are only that, assertions. His belief in the strength of his case does not establish any bias by the Court. He has no right under the Constitution or the law to have the previous final decision of the Supreme Court reviewed. The litigation must conclude."

This case also displays some of the features described by O'Donnell J. in *Rooney*, cited above:

"3. This case illustrates a number of truths which will be familiar to any person with experience of the law: the system of administration of justice is human; it is unavoidably imperfect;

resources are limited; court time is expensive and scarce; errors can be made by even the most capable and well intentioned people; short cuts, to paraphrase Lord Scarman, can often be treacherous, exacting a heavy price in delay anxiety and expense; and once a case goes awry it is disproportionately difficult to right it and it often becomes prey to misunderstandings, misconceptions and misfortunes. It is often the case that a person who litigates on their own behalf has some sense of grievance about an issue which is neither fanciful nor necessarily completely ill founded; that rejection of a complaint, even if the correct and just outcome, can often generate obduracy and suspicion that the decision was made for reasons of prejudice; that litigants will often respond with misconceived applications and more intemperate allegations; that the inevitable rejection of such applications feeds an easily triggered sense of conspiracy, which often leads the litigant into conflict with the courts, and individual judges. Some litigants, and not just those who represent themselves, prefer the comfort of focusing exclusively on the debatable ruling or judicial comment reinforcing a sense of grievance rather than recognise the forest of problems in the overall case. The cycle continues and becomes almost a form of litigious perpetual motion."

14. Conclusion

14.1 The motion to strike the case out as an abuse of process must succeed. While the case might have survived a motion to dismiss it on the pleadings, once the claims are examined, there are no credible facts which sustain a cause of action and the inherent jurisdiction of the Court to prevent an abuse of process appears to be the appropriate remedy.

14.2 In the circumstances, the motion for judgment in default of defence is not an appropriate order. The same considerations, that the speculative claims of the Plaintiff cannot succeed and that the allegation of reverse bias is not well-founded, make it unjust to enter

judgment against the Defendants, despite their delay in filing their defence. The importance of finality in litigation and the overall justice of the case, having examined the facts and history in detail, require that this case be struck out.