

**Judgment Title:** Higgins & Anor -v- Bank of Ireland & Anor

**Neutral Citation:** 2013 IEHC 6

**High Court Record Number:** 2001 11002 P & 2004 1390 P

**Date of Delivery:** 21/01/2013

**Court:** High Court

**Composition of Court:**

**Judgment by:** O'Keefe J.

**Status of Judgment:** Approved

Neutral Citation 2013 [IEHC] 6

**THE HIGH COURT**

**[2001 No. 11002 P.]**

**BETWEEN**

**JOHN HIGGINS**

**PLAINTIFF**

**AND**

**GOVERNOR AND COMPANY OF THE BANK OF IRELAND**

**DEFENDANT**

**AND**

**THE HIGH COURT**

**[2004 No. 1390 P]**

**BETWEEN**

**JOHN HIGGINS**

**PLAINTIFF**

**AND**

**GOVERNOR AND COMPANY OF THE BANK OF IRELAND**

**DEFENDANT**

**(Joined by Order of Mr Justice Clarke dated 5 December 2005)**

**JUDGMENT of Mr. Justice O’Keeffe delivered on the 21<sup>st</sup> day of January, 2013**

1. These proceedings arise from the alleged suspension (20<sup>th</sup> April, 2001) and subsequent dismissal (8<sup>th</sup> October, 2003) of the plaintiff by the defendant in his position as manager of the newly merged branches of the defendant at Park Street and Clanbrassil Street, Dundalk. The first set of proceedings in the title hereof commenced on 4<sup>th</sup> July, 2001. These proceedings were for interlocutory relief restraining the defendant from proceeding with disciplinary procedures against the plaintiff and from continuing the alleged suspension of the plaintiff from his position as manager of the Clanbrassil Street branch. The second set of the proceedings were commenced on 3<sup>rd</sup> February, 2004, and sought damages for, *inter alia*, wrongful dismissal, conspiracy and libel.

2. These proceedings were at hearing for 51 days including legal submissions. A large amount of documentation was opened to the Court and there was extensive cross-examination of the witnesses on both sides. The Pleadings were also extensive as was the correspondence generated as a result of the Disciplinary Inquiry which was conducted over some 21 days resulting in extensive findings by the Inquiry.

3. In order to understand the range of issues, evidence and findings the Court considers it appropriate to set out in Schedule form some of the matters addressed. Accordingly:

Schedule 1 deals with the Disciplinary Inquiry correspondence

Schedule 2 deal with selected extracts from (i) the 41 page document of the 14<sup>th</sup> June, (ii) the Special Investigation Report (iii) the findings of the Disciplinary Inquiry in respect of selected transactions

Schedule 3 contains extracts from the Pleadings

Schedule 4 contains selected extracts from the findings of the Disciplinary Inquiry

**Evidence of Mr John Higgins**

4. The plaintiff was born in 1952 and joined the defendant in October 1971. He commenced his employment at the Park Street, Dundalk branch of the defendant. Park Street was a busy branch with many professional and farming customers. He worked in Park Street from October 1971 – March 1986. He was trained as a business development executive of the defendant. In 1986, he was promoted to assistant manager in Cootehill. In September 1987, he was transferred to Kells, where he was assistant manager from September 1987 to March 1989. Whilst in Cootehill and Kells he procured satisfactory ratings for each of the branches. In 1989 he was appointed a manager at Dunshaughlin.

5. In September 1990, he was moved to Clanbrassil Street, Dundalk, as manager.

The Clanbrassil Street branch was on the northern side of the town as was the customer base. In July 1993, he was appointed to a grade 2 manager which was a significant promotion for him. In November 2000 he was promoted on the recommendations of Mr pat Byrne, the newly appointed Regional manager North East, to the position of commercial manager in Dundalk at a time when there were only eight such positions in Ireland. He was appointed to oversee the merger of the Park Street and Clanbrassil Street branches in 2000 to be completed by 26<sup>th</sup> February, 2001. The merger of Park Street and Clanbrassil Street branches in Dundalk was part of the Group Transformation Programme which commenced during 2000. The Clanbrassil Street branch had a successful profit record. Each year he exceeded his annual targets and as a result was awarded performance ratings at the upper end of the scale.

6. In 2000 he lost the assistance of a deputy manager and an assistant manager which increased his workload.

7. A material change in the regulatory environment occurred when the Criminal Justice Act 1994, came into operation in April, 1995. A new cheque encashment procedure commenced in November 2000. This required cheques made account payee to be lodged directly to such account and not to be dealt with otherwise. This caused inconvenience for many of the larger customers of the branch. Whilst the new cheque encashment policy was being introduced, he said he was told by his superiors not to lose a good customer by not cashing a cheque. In some instances he said he would have done cashed a cheque whilst warning the customer that this was the last time that this would happen for him.

8. He accepted that the Code of Conduct dated 20<sup>th</sup> February, 1998, applied to all group employees and obliged compliance in full with the legal and regulatory requirements of the particular country it operated in and to observe best practice. He stated that each employee of the group had a personal responsibility for compliance with both the letter and spirit of such principles.

9. The Code also provided the employees should avoid situations where conflict could arise between their own interests and the interests of the defendant or of any customer.

10. The plaintiff accepted that various instructions were issued in writing in November, 2000 the effect of which was to introduce a new policy coming into operation on 13<sup>th</sup> November, 2000, in relation to the encashment of certain categories of cheques. It applied to no encashment of crossed cheques, no encashment of non-branch cheques, no partial lodgements. The plaintiff maintained that in November announcing the new cheque encashment policy that Mr. Byrne specifically said that managers were not to lose a good customer by not cashing a cheque. He denied that Mr. Byrne at a meeting asked the managers to have a discussion with the particular customer about it and to explain the bank's policies but not to cash the cheque unless authority was given from a superior. The documents in connection with the new encashment policy emanated from Paddy Murphy, Retail Banking Director, Dublin and the East. A document entitled "Encashment Policy Changes" emphasised that absolute compliance with the new policies was being demanded across the organisation and the creation of exceptions even in the case of the best customers would not be sanctioned under any circumstances.

11. In addition to promoting lending, the branch promoted lifetime products, pension products, life insurance cover and credit card sales.

12. Mr. Pat Byrne was appointed the regional manager north east in September 2000 and commenced his appointment officially on 1<sup>st</sup> October, 2000. The plaintiff met with him on 11<sup>th</sup> October to discuss the merger of the two branches. He had a second meeting on 26<sup>th</sup> October at which Mr. Byrne confirmed to him that he was to be the manager of the merged branches. He was given the title commercial manager. On 14<sup>th</sup> November, the plaintiff's appointment of the merged branches was announced.

13. The merger of the two branches was completed on 26<sup>th</sup> February, 2001 and in the intervening period from November onwards there was much activity both with staff and customers in order to effect the merger. As manager of the merged branch, his responsibilities included both branches to ensure that all the staff in the merged branch were compliant with all the bank's operating procedure. This included the encashment of cheques (whether endorsed or not) and bank drafts. The bank communicated with circulars to the staff in the branch and also to managers specifically in respect of certain matters. Shirley Clarke and Gavin Lyng, representatives of the Human Resources Department had one-to-one meetings with the staff of both branches on 28<sup>th</sup> and 29<sup>th</sup> November, 2000, at the instigation of Mr. Byrne, in the context of the proposed merger to identify any perceived concerns of staff. They reported back to him.

14. On 13<sup>th</sup> December, there was a manager's meeting at the computer centre in Killiney at which Mr. Byrne attended together with the plaintiff. Afterwards there was a social function at the Killiney Court Hotel and Mr. Byrne said to the plaintiff that he wished to discuss two items with him. The first matter discussed was the outcome of the one-to-one staff meetings and Mr. Byrne said that some staff were unhappy with his style and that he had too aggressive a style. The second matter discussed was his personal life. He stated he was having matrimonial difficulties at the time. Mr. Byrne said that rumours had come to his attention that the plaintiff was having an affair with a female staff member. The plaintiff asked to see the reports on which the comments in relation to his alleged aggressive style were based but they were not furnished to him. There were no complaints made about his aggressive style either by Mr. Kennedy or in the subsequent disciplinary process by Mr. Dunne. On 2<sup>nd</sup> January, Mr. Byrne asked him had he sorted out his personal situation to which he replied in the negative.

15. He said that according to his diaries he had four meetings with Mr. Byrne in January 2001 or wanted to discuss his marital situation and the others involved with staffing matters and the role of Colman Rush. On 9<sup>th</sup> February he had a meeting with Mr. Byrne in relation to moving Ms. Hamill to Drogheda.

16. The staff in Park Street moved to Clanbrassil Street on 27<sup>th</sup> February.

17. The next event of note was when the auditors of the defendant arrived at the branch on 26<sup>th</sup> March unannounced. The auditors were Brendan Hickey, Deirdre Freely, Freda McCague and Tim O'Leary (who stayed for a few days). Mr. Hickey had carried out two audits in Dundalk in November 1995 and in May 1998 and both audits were satisfactory. At the time the plaintiff had no view as to why an audit was taking place. Mr. Hickey, the auditor, was asked by Mr. Kennedy to investigate three matters when he commenced the audit on 26<sup>th</sup> March, namely, the credit cards of some Rank Xerox employees, the McKean account and the Reilly account.

18. Mr. Hickey approached him on 18<sup>th</sup> April, handed him five credit card application forms which became known as the Xerox Credit Card applications. They related to new employees of Xerox being recruited and who were applying through the bank for credit card. He was given photocopies of the five credit card applications. Mr.

Hickey drew his attention to amendments on the application forms. There were five alterations to the credit card forms and Mr. Hickey asked the plaintiff about them. The alterations related to the income levels that were stated. The plaintiff explained that the figures were amended to state higher salary figures namely what he believed was the correct salary of £1,100 per month. Mr. Hickey did not discuss with him who made the alterations but they discussed who had signed off on the alterations and it was the plaintiff. The plaintiff accepted that he had made two of the alterations himself and the other three were made by staff members. However, the plaintiff signed off on all five applications. As far as the plaintiff was concerned, Mr. Hickey was satisfied with the explanations given to him.

19. He said there was no indication that any work had been done on Reilly's accounts.

20. There was also a concern expressed by the auditor as to alterations in the mandate for Dundalk Urban District Council. It related to an amendment to the mandate for a deposit account (this issue was not the responsibility of the plaintiff).

21. The audit which Mr. Hickey commenced was taken over by Mr. Kennedy and his team as Mr. Hickey ceased working for health reasons around 25<sup>th</sup> April, 2001.

22. He was contacted by Mr. Byrne on 20<sup>th</sup> April, 2001 and a meeting was arranged. Present at the meeting was Mr. John Kennedy, an Audit Manager. Mr. Byrne, he said read from a set of notes and as he understood, he explained that he (the plaintiff) was suspended. He denied that what Mr. Byrne stated that he was being placed on special paid leave.

23. He contended that he had sought from Mr. Byrne and the defendant on many occasions details of the reasons for the suspension but none were given to him. It was put to him that the reason why he was being told by Mr. Byrne that he was being placed on special paid leave was for the purpose of an investigation of certain matters that would be subsequently be disclosed to him. He maintained that he was suspended without reasons and in accordance with the procedures of the 1985 agreement, he should have been given his rights. He was given no rights he contended. He was put outside the door on the 20<sup>th</sup> April, 2001.

24. Whilst he contended that he was told he was being suspended pending the completion of an audit investigation, as opposed to Mr. Byrne's note that he told him he was being placed on special paid leave, he agreed that the note prepared by Mr. Byrne of the meeting was otherwise correct.

25. Mr. Byrne note reads:-

*"I then told him that I was placing him on Special Paid Leave pending completion of the audit investigation."*

26. This note included the plaintiff's request to Mr. Byrne to explain why and what was the problem to which Mr. Byrne said he was not prepared to say. Notwithstanding repeated requests from to him Mr. Byrne, he got no answer as to why he was being suspended.

27. Mr. Byrne asked him for all the keys of doors and cabinets and the plaintiff said he would return them. As the plaintiff was taking his newspapers and passport with him as he left the office, Mr. Byrne said to him that he could not take the passport and Mr. Byrne held onto it. No reason was given for doing this. The plaintiff explained how he was very shocked and upset as what had happened. He could not

explain to his family why he was being suspended. What remaining keys he had he returned the following week.

28. Mr. Byrne made it clear to him that he was not to return to the bank or speak to any staff member, any contact would be through him. On no account was there to be any contact with customers.

29. At the time of his suspension, there were some 54 statements relating to Bank of Ireland Group Treasury relating to customers mainly from Northern Ireland who had sterling deposits with Bank of Ireland. He had those documents on his desk in order to contact those customers with a view to contacting them or sending them other products. He described these items as work in progress.

30. He also had in his briefcase, the sum of IR£8,800 and a sum of sterling. Some of that money represented the sale of greyhounds by accounts from betting transactions which he had on his own behalf or on behalf of others. There were also a number of bank drafts payable to customers and non-customers held in the filing cabinet.

31. The plaintiff made various different allegations during the hearing as to when the conspiracy to terminate his employment was initiated, what form it took and by whom.

32. He concluded that by 13<sup>th</sup> December, Mr. Byrne was unhappy with his style and relationships and he believed a decision was made to remove him. Mr. Byrne had gone up the line in late December or early January to Mr. Murphy, and most likely Mr Crowley, to inform him of the fact that the plaintiff was involved in criminal activity.

33. In the plaintiff's opinion by 20<sup>th</sup> April, Mr. Byrne had already hatched a conspiracy with Mr. Mitchell and Mr. Kennedy to get rid of him. This would have first started in January.

34. He claimed that Mr. Kennedy was first involved in the conspiracy with Mr. Byrne after meeting Hugh Muckian on 13<sup>th</sup> March.

35. He believed that Mr. Muckian was talking with Mr. Byrne as early as November 2000 as part of the conspiracy.

36. Mr. Higgins believes that the audit was set up for Mr. Hickey to leave after two weeks and for Mr. Kennedy to take over. The audit was used as a cloak to carry out the special investigation.

37. The plaintiff alleges that Mr. Byrne authorised Mr. Muckian to 'go official' (reveal his identity) in early March and this is seen in Mangan's notes of 27<sup>th</sup> February and 1<sup>st</sup> March.

38. As a result of his suspension he was shunned by the business community and had to resign from the Chamber of Commerce and other organisations as people did not wish to talk to him.

39. In the early days of the trial it was accepted on behalf of the plaintiff that he did not impugn Ms. O'Brien, Solicitor, in her professional capacity. She was a solicitor with the defendant. She was not party to any conspiracy. The same was true of

Arthur Cox Solicitors.

40. After the Dunne report was completed, the plaintiff and Mr. Smith had a meeting with Mr. Dunne and as they felt that the procedures being afforded to them were not fair. At that meeting, Mr. Smith protested that the sanction being imposed was unfair.

41. At the time of his suspension he was not told there was any informant or person making any allegations against him. Ultimately, when the Dunne inquiry started it was confirmed to him that the informant was Hugh Muckian who had been an assistant manager with him in Clanbrassil and had dealt with investments. He described himself as having a good relationship with Mr. Muckian. It was a working relationship. He was aware that Mr. Muckian was looking for promotion in 2000.

42. Subsequently, Mr. Muckian decided he would move to the defendant's private banking on a two year secondment as he believed he had a better opportunity moving to private banking. He joined private banking in July 2000. Subsequently, Mr. Muckian was out on sick leave from 16<sup>th</sup> November 2000. He never returned to the private bank. Around 5<sup>th</sup> December, 2000, the plaintiff was informed by an executive from private banking that Mr. Muckian was returning to the Dundalk region.

43. He had a theory that prior to any discussions between Mr. Muckian and Mr. Mangan that, Mr. Muckian was speaking directly to Mr. Byrne making his complaints about the plaintiff. This would have happened before the meeting in Killiney Castle on 13<sup>th</sup> December, 2000.

44. In mid September 2001, Mr. Byrne mentioned to him that Mr. Muckian was having a problem with the referral of business to Lifetime and not to private banking. The plaintiff had two meetings with the executive from private banking who informed him that business was to be done through private banking. Mr. Muckian was in attendance at two such meetings with Mr. John Kennedy, his superior in private banking. Private banking was marketing investment products over £100,000 whilst Lifetime, the insurance company business of the Bank of Ireland dealt with investments under that figure. Lifetime sold investment products as well as insurance products.

45. Martina Hamill formerly a branch employee, was a Lifetime counsellor and she would spend a couple of days a week in Park Street and Clanbrassil Street. The plaintiff said that whilst a level of £100,000 was introduced for dealing with Lifetime, he authorised Ms. Hamill to continue to deal with persons who had dealings over £100,000 as he did not want to introduce new persons into the transaction. He had given assurances to the officials from private banking whom he had met that all new business in excess of £100,000 would be given to Hugh Muckian and private banking.

46. A third meeting was between Mr. Kennedy (of private banking), Mr. Muckian and the plaintiff which dealt with similar issues. Mr. Muckian was very unhappy with the situation, according to the plaintiff.

47. In relation to notes taken by Michael Mangan, Manager Human Resources of a meeting he had with Mr. Muckian on 9<sup>th</sup> January, 2001, the plaintiff stated he had no knowledge that Mr. Muckian and Marie Strain went to visit Adrian Barry, a former Regional Manager around 1995 – 1996. The meeting was in relation to an account of one Terence McKean and the manner of its operation to the knowledge of the

plaintiff.

48. The issue raised by Mr. Muckian with Mr. Mangan was that an account was being operated in a false name and that Paul Begley was signing withdrawals on the account of Terence McKean and using the name of McKean. The plaintiff said that Mr. McKean was a customer who opened an account with him in August 1993 when Mr. McKean was living at an address in Newry. He was a cattle dealer. The name of Paul Begley in Mr. Mangan's note was incorrect and should be Peter Begley who was a cattle dealer in Dundalk who died in 1996. The suggestion in the note that Mr. Begley was operating the Terence McKean account was incorrect he said as the account was in the sole ownership of Mr. McKean. He had no knowledge that Mr. Begley was signing withdrawals in Mr. McKean's name. He said it was subsequently accepted and recorded in the Dunne report that it was not a false account and that Mr. McKean existed.

49. He did not agree with the reported remark of Mr. Muckian that he had an aggressive approach with the staff and said that he had good relations with most of his staff but that a couple of the staff would have had issues with him.

50. In dealing with the reference in Mr. Mangan's note of the meeting with Mr. Muckian on 9<sup>th</sup> January, 2001, he said, Rank Xerox came to Dundalk in the late 1990s. They were to have up to 2,500 staff employed. It was bank policy to recruit as many as possible of the employees as customers. Accounts were set up with them, cheque books issued and facilities given including setting up credit cards. Many of the people were on training courses travelling abroad and they would have had a need for a credit card. He said that he was informed by the HR people in Xerox that the lowest salary being paid was £1,100 per month which he understood was the minimum staff wage in the company. He amended the application forms of Una Duffy and Terence Barron to the correct figure of £1,100 as he believed that that was their salary. He believed that they had each stated it as £900. Kieran Dunne, Hugh Muckian and Clodagh Green each amended the salary level of three other employees in their application forms. An applicant for a credit card had to satisfy a credit scoring mechanism. A card was issued by the credit card unit and if there was default the loss would have to be borne by that unit. Where the branch authorised the issue of the credit card, it would have to bear any loss incurred as a result of the issue off the credit card. The alteration in the salary levels would have improved the prospects of a card being issued by the credit card unit and not the branch, and in those circumstances the credit card unit bore the risk. The plaintiff accepted that he had altered two applications himself and signed of in respect of all five applications.

51. The note also recorded Ms. Hamill, had been appointed the Lifetime counsellor in the branch and had replaced Mark O'Connor. It was stated that she had a relationship with the plaintiff.

52. Following the suspension of the plaintiff as contended by him (and not being placed on special paid leave as contended by the defendant), the audit under the direction of John Kennedy continued.

53. A meeting was subsequently arranged entitled by Mr. Byrne "*mini-summit*" which was held on 15<sup>th</sup> May, 2001 at which were present, Messrs. Byrne, Mitchell, Kennedy, Mangan, Condon, Holmes and Nicola O'Brien, solicitor. At this meeting it was agreed that Mr. Byrne should write to the plaintiff's solicitors, Smith Foy who had already written to the defendant on 11<sup>th</sup> May, 2001, requesting reasons for the plaintiff's suspension. Mr. Kennedy was requested to meet the



plaintiff and seek explanations as to matters of concern in the audit.

54. A "fact finding" meeting was held on 22<sup>nd</sup> – 23<sup>rd</sup> May, 2001, attended by the plaintiff and Mr. Kevin Smith, his solicitor, Mr. Kennedy and Ms. Deirdre Freeley. Mr. Smith stated that the purpose of the meeting was to be supplied with details of the alleged serious irregularities whilst Mr. Kennedy maintained that the purpose was to discuss issues. Mr. Smith maintained that the purpose of the meeting was to be informed of any serious irregularities that had led to the disciplinary procedures which had now been undertaken. Mr. Kennedy stated that they were not at the disciplinary stage yet and that the plaintiff was merely on paid leave. Mr. Kennedy stated that his role was to determine the facts and prepare a report to be sent to the regional manager and it was up to the Regional Manager to decide whether disciplinary procedures would be undertaken in due course.

55. He said that he repeatedly asked Mr. Smith at the meeting of 22<sup>nd</sup> – 23<sup>rd</sup> May what were the reasons for the plaintiff's suspension. Mr. Kennedy contacted Mr. Mitchell and said that it was not up to them to tell Mr. Smith and the plaintiff what was in Mr. Byrne's mind on the day he was suspended and that they were there to answer issues.

56. On 20<sup>th</sup> June a list of errata in relation to the letter of 14<sup>th</sup> June was sent. On 11<sup>th</sup> July, 2001, Ms. O'Brien wrote confirming that the plaintiff was placed on special paid leave and was not suspended and that being placed on special paid leave was in accordance with the disciplinary procedures in customs and practice over the last fifteen to twenty years. It was stated that the disciplinary procedures made clear that disciplinary action would only be taken after a thorough "investigation" whilst the purpose of placing the plaintiff on special paid leave was to facilitate the investigation.

57. Mr. Smith maintained that the procedures being adopted were flawed and in breach of the bank's own disciplinary procedures which had been unlawfully invoked and in breach of natural justice. Mr. Kennedy stated that he was purely in a fact finding role and Ms. Freeley's role was to take notes of the meeting and that it was not part of the disciplinary procedures. There followed a detail presentation by Mr. Kennedy of matters of concern that had come to Mr. Kennedy's attention. Ms. Freeley's detailed note of what was said over the two day meetings comprises some 27 pages. Mr. Smith indicated that the plaintiff was not saying anything until everything was on the table, that they wanted an opportunity to consider all the issues before responding. Details of the matters to be addressed subsequently were sent to Mr. Smith on 14<sup>th</sup> June, 2001. This document runs to 41 pages.

58. He accepted that at the meeting held on 22<sup>nd</sup> – 23<sup>rd</sup> May with Mr. Kennedy and Deirdre Freely that Mr. Kennedy raised a number of specific issues about specific customers in respect of which Mr. Kennedy was seeking explanations. The plaintiff said he was not providing any explanations on the basis that he was acting upon legal advice.

59. Mr. Smith had asked that the issues be segregated and categorised into different levels of seriousness.

60. By letter of 4<sup>th</sup> July, 2001, the plaintiff was informed that Mr. Byrne did not accept the allegation which had been made by the plaintiff that he was biased towards the plaintiff. It stated that Mr. Paddy Murphy (Mr. Byrne's superior) would consider the report which would be prepared at the conclusion of the investigation with a view to deciding whether the plaintiff had a disciplinary case to answer. The

letter also sought a reply to the letter of 14<sup>th</sup> June, 2001.

61. A report entitled "*Group Internal Audit, Bank of Ireland Report Re John Higgins 23<sup>rd</sup> August, 2001*" was issued and a copy of the report was sent to the plaintiff. Throughout the court proceedings, this report was referred to as the Special Investigation Report. As the formal title on the report is used extensively in subsequent documents both descriptions will be used interchangeably when referring to the report.

62. On 24<sup>th</sup> August, 2001, a further report issued on Dundalk branch and is entitled:-

*"Group Internal Audit Bank of Ireland Report on Dundalk."*

This report was not sent to the plaintiff.

63. Each of the reports was prepared by Mr. Kennedy and others and approved by Mr. Condon, the Group Chief Internal Auditor.

64. He claimed that the group internal audit should be an independent group within the defendant but in relation to the special investigation of the plaintiff their function was dictated by Mr. Byrne throughout commencing with breaking into his cabinets and office.

65. In relation to the concluding remarks by Mr. Kennedy in the Report that the audit investigation had disclosed transactions undertaken by the plaintiff which had all the hallmarks of money laundering and assisting customers with tax evasion and other illegal activities, the plaintiff strongly contested such characterisation. He interpreted this as being involved with criminals and their activities and getting rid of their criminal funds. There was not one customer in the report he said who could be termed a criminal or was involved in tax evasion or assisting customers with tax evasion.

66. Other than the three issues of the credit cards, the Reilly accounts and the McKean accounts which were referred to in the Special Investigation Report, the other issues emanated from the papers that were found in the plaintiff's office following the time when he was placed on special paid leave.

67. On 27<sup>th</sup> August, 2001, Mr. Murphy wrote addressing concern at the issues which had been set out in the Special Investigation Report. He stated that he was of the view that the bank's internal disciplinary procedures (copy of which had been furnished to the plaintiff) should be invoked and that he had nominated Mr. John Dunne, Regional Manager South Leinster to conduct the disciplinary process.

68. The first meeting set up by Mr. Dunne with the plaintiff was on 4<sup>th</sup> September, 2001, for a meeting with Mr. Kennedy to afford the plaintiff an opportunity to deal with issues in the Special Investigation Report with a view to Mr. Kennedy completing the bank's investigation. There followed a letter from the plaintiff's adviser that the plaintiff was undergoing medical treatment for stress and trauma and had been certified to take a break for one month. The back up documentation to the report of 23<sup>rd</sup> August was received on 11<sup>th</sup> September, 2001.

69. Whilst the Dunne inquiry went on for some 21 days, the plaintiff did not give any explanation to Mr. Dunne about the transactions in issue until the last four days of the hearing. The hearing in summary comprised the lengthy cross examination of a number of witnesses, particularly Mr. Kennedy (the author of the Special

Investigation Report) over ten days. Lengthy submissions by his solicitor were made on many topics including submissions about the distinction between special paid leave and suspension and the issue of a conspiracy. As a result of a letter on 2<sup>nd</sup> July 2002 written by Ms. O'Brien, Solicitor, to Mr. Dunne in which she complained about the progress of the inquiry, Mr. Dunne retained independent legal advice (Arthur Cox). Ultimately Mr. Dunne issued a ruling dated 4<sup>th</sup> December, 2002. It was during the Dunne inquiry, on the second or third day, that for the first time the Plaintiff learned about the role of Mr. Muckian. Whilst he previously had suspicions, Mr. Muckian's name came into the inquiry when Mr. Mangan gave evidence. Very extensive correspondence about the nature and extent of the issues involved, the procedures to be applied and witnesses to be called were set out in the correspondence. A summary of the issues arising in correspondence and at the inquiry is set out in Schedule 1. It is preferable to adopt this course having regard to the volume involved.

70. It emerged that Mr. Muckian had prior to the audit which was conducted by Mr. Kennedy provided information to the bank about a number of matters. In the plaintiff's opinion it was Mr. Muckian who was his accuser and he did not accept that it was Mr. Kennedy who was the accuser.

71. He was particularly concerned that the report described some as the transactions as facilitating money laundering and facilitating customers with tax evasion.

72. The plaintiff claimed that he had never heard of the word "converted" in the sense referred to by Mr. Dunne in his report. As far as he was concerned, converting cheques was changing cheques from Irish into sterling and visa versa.

73. At the time of the hearing his salary with Certus was €96,500 per annum. He said that at the time of his suspension his salary was in euro, €127,000 approximately. The disparity in income was approximately €30,000 per annum.

74. He accepted that in relation to a number of the matters set out by Mr. Kennedy in the Special Investigation Report that he ultimately admitted the transactions involved before Mr. Dunne in the last three to four days of the inquiry. He had, however, reservations about the transactions where the conclusions were that they had the hallmarks of money laundering and tax evasion in relation to four clients. He accepted that Mr. Kennedy did not accuse him of money laundering but the report pointed out that a number of the transactions had the hallmarks of money laundering.

75. He specifically adopted the pleas in the amended statement of claim in particular, the conspiracy alleged between Mr. Byrne, Mr. Kennedy, Mr. Mitchell and Mr. Dunne to conceal and cover up the malicious and unlawful position adopted by Mr. Byrne and to protect Mr Byrne's stance in the context of the plaintiff's suspension and the disciplinary proceedings. Moreover, the said persons he claimed aided and abetted by Mr. Dunne conspired throughout the course of the inquiry to attempt to bolster the false and malicious statements contained in the affidavits of Mr. Byrne and Mr. Kennedy (sworn in the first set of High Court proceedings). He also claimed that the inquiry was conducted in breach of the principles of natural and constitutional justice and fair procedures. His employment was terminated as a result of the conspiracy and there was malicious defamation as a result of the publication of the Dunne Inquiry Report.

76. He said that Mr. Dunne maliciously and deliberately falsified findings against him in his report. He said that Mr. Dunne and the other individuals engaged in charade

of a disciplinary process with the express purpose of getting rid of him.

77. He complained that Mr. Dunne had failed to put balance in his report about the plaintiff as he had promised to do so and also to recognise the plaintiff's contribution to the bank.

78. He said that in relation to Mr. Kennedy, he changed his evidence each day he came into the inquiry and there was a whole concealment of facts and the chairman allowed Mr. Kennedy to change his evidence unchallenged.

79. The plaintiff accepted that at the Dunne Inquiry he admitted breaches of procedure and that the findings made by Mr. Dunne were by and large in relation to factual matters that were based on admissions by him.

80. There were four matters that Mr. Muckian had referred to with Mr. Mangan which were not taken up by the investigation. These were a Buy & Sell advertisement in relation to bank counters, the account of McArdle, a local accountant and the Stanleys' portion of the Shannon Homes accounts.

81. He said that he was greatly damaged in reputation and standing by the publicity associated with the contents of the replying affidavits in relation to the interlocutory High Court application to restrain the disciplinary inquiry.

82. In relation to the conduct of the inquiry, he said that there were no witnesses called to give the earnings in relation to the Xerox employees.

83. He became aware that a meeting was held on 5<sup>th</sup> September, 2001 between three Gardaí and Gerry Gibson and Margaret Breadon, representatives of the Bank's Money Laundering Unit.

84. Subsequently he became aware that Suspicious Transaction Reports (STR) were sent by Mr. Gibson in the money laundering unit to the Gardaí.

85. The plaintiff accepted that Mr. Gibson, who was the head of the Money Laundering Section, was not involved in the conspiracy. However, the conspiracy by the defendant against the plaintiff extended to the reporting of and the dealings with the Fraud Squad.

86. Money Laundering legislation was put in place in 1995. The legislation provided that employees of a bank can make a report to the Money Laundering Section of a suspicious transaction known as a "*Suspicious Transaction Report*".

87. The Money Laundering Unit personnel then has to decide whether or not to make a report to An Garda Síochána or the Fraud Squad. Counsel for the plaintiff said that personnel in the Money Laundering Unit were not involved in the conspiracy but were an "instrument" in the conspiracy directed against the plaintiff.

88. A letter from Mr. Dunne dated 13<sup>th</sup> October, 2003, confirms his decision that the plaintiff should be dismissed from employment with the bank. It stated that a decision was made under the disciplinary procedures for the bank dated 1<sup>st</sup> July, 2002 and that the procedures provide for an appeal against a disciplinary sanction of dismissal imposed by the chairman's decision (*not a full appeal on the merits together with sanction*).

89. In response to Mr. Dunne's assertion that the appeal procedure was to be

conducted in accordance with the disciplinary procedures for the bank dated 1<sup>st</sup> July, 2002, Mr. Smith asserted that this was contrary to what Mr. Dunne had said at the hearing on 29<sup>th</sup> April, 2002, 3<sup>rd</sup> July, 2002, 27<sup>th</sup> November, 2002 and in his letters dated 28<sup>th</sup> August, 2001, 3<sup>rd</sup> December, 2002, namely that he was conducting the inquiry under the 1985 disciplinary procedures.

90. The plaintiff was in these proceedings examined and cross examined extensively over many days about the contents of (i) Special Investigation Report of 23<sup>rd</sup> August, 2001 and the findings of the Dunne disciplinary inquiry. The plaintiff acknowledged his role in respect of many of the allegations in the Special Investigation Report and also the findings in the disciplinary inquiry.

91. In relation to his non-compliance with the bank's procedures for such matters as failure to comply with the bank's encashment policy for cheque and drafts without endorsement and the issue of bank drafts without appropriate signed requisition, his explanations included that he and the branch were busy at the time, that the person involved was a good customer and/or had good business prospects, that the use of sundry debits account was in widespread use by other branches (in addition to Clanbrassil St.), contending that it was the cashier who cashed a cheque without endorsement and yet accepting responsibility for such transactions where he had initiated such transactions with the cashiers involved.

92. He accepted that matters were happening at a point that if he had more time he would have done the transactions more correctly. He maintained he had a record of compliance and this was evident from the audits of the Clanbrassil St. branch in 1995 and 1998 which were deemed satisfactory. He maintained that clients of the ICS Building Society were in fact customers of the branch so as to enable him to cash such cheques. He maintained he had no intention to do damage to the defendant. He attributed his failure to answer questions put by Mr. Kennedy at the meeting of 22<sup>nd</sup> and 23<sup>rd</sup> May, 2001, with the fact that he was suspended and could not answer the questions as he was acting on legal advice. He also maintained that the assistant manager in administration should have identified some of the non-compliant transaction. He acknowledged that in some instances, cashiers would write his initials, name or bank number on cheques/drafts which were cashed without endorsement and such arose in cases where he brought the customer to the cashier or otherwise directed a person to go down to the cashier for encashment of the cheque/draft which would not have been endorsed. He explained the many cheques and drafts which were negotiated although unendorsed constituted a black spot in his administration and that he was very busy and under pressure but maintained there was full traceability of all the cheques.

93. An example of a transaction where the plaintiff accepts aspects of Mr. Dunne's findings and disputes others is the findings of Mr. Dunne in relation to Manley Investments Limited and Joe O'Toole. Details of this transaction are set out in Schedule 2. The findings were:-

*"(i) Mr. Higgins knowingly converted four cheques made payable to Manley Investment Limited totalling £696,498 which was used as cover for a draft in favour of BIAM for the benefit of Joe O'Toole.*

*(ii) Mr. Higgins knowingly breached bank procedures for issuing drafts.*

*(iii) Mr. Higgins knowingly breached the bank's money laundering procedures by signing the money laundering certificate on the BIAM application, even though the form was blank and facilitated the*

*falsification of the document.*

*(iv) Mr. Higgins breached the bank's code of conduct arising from the above."*

The plaintiff accepted findings (i) and (ii) but contended that (iii) and (iv) were not warranted.

94. Furthermore, in relation to transactions on behalf of Alfie McConnon extensive details are set out in the Special Investigation Report. Mr. Dunne's findings in relation to these transactions are set out in Schedule 2. There were five findings by Mr. Dunne, three of which accepted the explanations of the plaintiff. It was put to the plaintiff that these findings were entirely inconsistent with the plaintiff's conspiracy theory about Mr. Dunne but he would not accept such comment.

95. Furthermore, in relation to the account of Keith Prestige, an explanation was sought by Mr. Kennedy in his report in respect of what appeared to be a breach of discretion with the customer in relation to faculties afforded to him. Mr. Dunne noted that the plaintiff admitted that his lending discretion was inadvertently breached as a result of a failure to record one of the car loan's liability on the branch computer system and that this was a credible explanation. His conclusion was that he was making no finding regarding a breach of lending discretion in the case. Notwithstanding this finding, the plaintiff contended that the concerns over Mr. Prestige came as a result of Mr. Muckian's complaints and he contended that the finding was watered down by Mr Dunne intentionally.

96. He maintained that by 20<sup>th</sup> April there were no issues which had arisen in the course of the audit and he said that the audit had ended on 20<sup>th</sup> April and after that there was the special investigation. The statement that the purpose of the meeting of 22<sup>nd</sup> and 23<sup>rd</sup> May was to deal with issues which had arisen in the course of the audit was in his opinion a misrepresentation. At first he was concerned, there was an audit up until 20<sup>th</sup> April and after that there was a special investigation and the audit up to 20<sup>th</sup> April found nothing that would lead to his suspension. He claimed that the affidavits concealed the origin of the allegations. He claimed that line management interfered in the audit by virtue of the fact they broke into his cabinets and his office on 20<sup>th</sup> April, thereby damaging the independence of the audit.

#### **Evidence of Mr. Kevin Smith**

97. Mr. Smith is a partner in Smith Foy Solicitors, Dublin and has been in practice for upwards of 50 years. His first contact with the plaintiff was on 22<sup>nd</sup> April, 2001 who told him that he had been suspended from his position as senior of the Dundalk branch on 20<sup>th</sup> April, 2001.

98. He told him that Mr. Byrne accompanied by an auditor, Mr. John Kennedy had read out from a script telling him he was being suspended. The only reason he was given was that matters of concern had arisen in the course of the audit which had been taking place over the previous three weeks. He stated that the plaintiff got no reasons for his suspension though he asked Mr. Byrne for details. He retained counsel on foot of that conversation.

99. The first letter he wrote was on 11<sup>th</sup> May, 2001. A reply was sent from Mr. Byrne who informed him that the defendant was conducting an audit investigation into serious irregularities in the Dundalk branch and as part of that investigation Mr. Kennedy, the investigating auditor would meet with the plaintiff to discuss the

issues that arisen that obtain his input.

100. He got a telephone call from Mr. Kennedy who told him that the plaintiff had been put on special paid leave and not suspended as the plaintiff had informed him. He agreed to meet but he requested that a written agenda be forwarded first.

101. He received a copy of the 1985 disciplinary procedures from the defendant.

102. He said he went to the meeting to find out reasons for his client's suspension but that Mr. Kennedy was there to get some information in relation to audit queries. Both he and his client considered that they were in a disciplinary procedure.

103. They were allowed to look at documentation during the meeting at which Ms. Freeley took notes. The meeting was held on 22<sup>nd</sup> – 23<sup>rd</sup>. Mr. Kennedy maintained that there were no allegations but that his function was finding the facts. Mr Smith said that he advised the plaintiff that until he was told what the reasons for the suspension were and had an opportunity to cross examine the person who was responsible for those reasons that he should not get involved in the process.

104. He recalled the credit card applications issue being discussed and that Mr. Kennedy stated that that had been dealt with by Brendan Hickey with the plaintiff.

105. The issue of credit cards, the McKean account and the Reilly cases were discussed. In all, 58 items were identified. There was no distinction between each of the matters. He understood that the bank's position was that special paid leave would not be recorded on the employee's record but that suspension would be.

106. At the end of the meeting on 23<sup>rd</sup> May he asked Mr. Kennedy to highlight the degree of seriousness in relation to the matters discussed when also what were the reasons for the suspension.

107. The message he conveyed to John Kennedy was that they would not cooperate with the investigation until they got details of the suspension and details of the facts that warranted the suspension and also were supplied with details of the hierarchical gravity of the matters that were discussed at the meeting of 22<sup>nd</sup>-23<sup>rd</sup> May namely the 51 issues.

108. He said he did not consider the matters set out by Mr Kennedy in the 41 page document of 14<sup>th</sup> June 2001 of such gravity that they warrant the suspension. He said that most of the matters that were being put on the table for him to explain were, on the admission of Mr. Kennedy, items which had come to light after the suspension.

109. In further correspondence he maintained that none of the matters discussed at the meetings of the 22<sup>nd</sup> – 23<sup>rd</sup> May pertained to the reasons for the plaintiff's suspension. He also maintained that they would not participate in any investigative process until the reasons were furnished to him.

110. The correspondence from the defendant maintained that the plaintiff was placed on special paid leave in accordance with disciplinary procedures and customer practice over the previous fifteen to twenty years. Whilst the plaintiff received a copy of the 1985 procedures, they did not obtain a copy of the revised procedures that were brought in by the bank on 1<sup>st</sup> July, 2002.

111. He said that the plaintiff would not partake in an investigation that was

constituted outside the parameters of the prescribed disciplinary procedures and that the investigation was a sham unlawfully constituted. He threatened injunctive relief.

112. He said that most of the approximately 55 matters that were discussed at the fact finding meeting related to what was in the plaintiff's office. The plaintiff's suspension had taken place before anybody had gone into his office and as a result both he and the plaintiff surmised that at the point in time of his suspension that the reasons therefore had come from a different source other than the auditors.

113. He had not been told that the defendant had a serious concern about the credit cards or that the plaintiff's explanation was not accepted. The bank's perception of the credit card issue was not known.

114. He said that on the second day of the Dunne inquiry, he asked was there a complainant and what was his name. Mr. Smith said that he subsequently revealed the name of Mr. Muckian which caused some consternation at the hearing.

115. Their biggest complaint was that Mr. Muckian was not produced as a witness at the inquiry on the grounds that he was not an accuser.

116. The application was made to the High Court for interlocutory relief and the bank's affidavits were sworn in October 2001. The application for an injunction to restrain the disciplinary inquiry was rejected by Lavan J. in January 2002. The inquiry commenced on 29<sup>th</sup> April, 2002. He placed a lot of emphasis on what was stated both by Mr. Byrne and Mr. Mitchell in their affidavits namely that if the plaintiff participated in the inquiry that full unrestricted liberty would be given to the plaintiff to make his case.

117. He said that the Special Investigation Report from Mr. Kennedy was written into the minutes of the inquiry as were copies of the affidavits in relation to the High Court injunction application.

118. He concluded that the process was flawed because the bank's solicitor continuously stated that it was the matters in the Special Investigation Report that had to be answered.

119. He referred to the letter from Ms. O'Brien of 2<sup>nd</sup> July, urging the chairman not to require Ms. Siobhan Toal and Mr. Gavin Lyng to give evidence in relation to events which took place in preparation for the merger in February 2001 and also to reconsider whether Mr. Mangan should continue to give evidence. The plaintiff's rights she said were met by allowing him to confront his accuser namely Mr. Kennedy and to cross examine him as he was the author of the report. She stated that the plaintiff had been made aware of the substance of the allegation made against him by Mr Kennedy.

120. Mr. Smith recalled as best he could the evidence given by Mr. Hickey to the Dunne inquiry. He recalled him saying he would come to no conclusions until he had all the strands of the audit brought together. Mr. Hickey had no recollection of any particular matter he reported back to John Kennedy who was the manager of the audit. He also stated that Mr. Hickey said he did not find anything in Dundalk whereby the plaintiff was involved in any criminal or any such behaviour.

121. Mr. Smith gave extensive evidence as to the evidence given by various



witnesses at the Dunne inquiry.

122. Mr. Smith referred to the letter of 18<sup>th</sup> September, 2002 from Mr. Dunne to him which enclosed a copy of the proposed ruling and requesting written observations within fourteen days. On 31<sup>st</sup> October, 2002, Mr. Smith wrote to Mr. Dunne in response to his letter and draft ruling. It stated that Mr. Muckian was a major player in the subject matter of the inquiry and that the defendant appeared to be intent on depriving the plaintiff of his entitlement to have Mr. Muckian cross examined. The letter accused Mr. Dunne of blatantly seeking to ignore the evidence favourable to the plaintiff's case and that he was displaying bias against the plaintiff. The independent legal advice sought by Mr. Dunne was a cosmetic exercise on the part of the defendant.

123. In a letter to Mr. Smith dated 12<sup>th</sup> November, 2002, Mr. Dunne said that he would consider any submissions that might be made to him as to the relevance of Mr. Muckian to the matters complained of in the Special Investigation Report. He concluded by saying that other than the witness who were specified by him to be cross examined, he could be persuaded by Mr. Smith that any persons whom he requested the defendant to produce should be categorised as "*accusers*".

124. They attended the meeting suggested by Mr. Dunne for 8<sup>th</sup> October 2003 and found out that the appeal that they were being allowed was only an appeal against sanction. Mr. Dunne had ceased to operate under the 1985 procedures. He objected and wrote a letter setting out their objection.

125. He wrote a letter on 24<sup>th</sup> October, 2003, to the chief executive of the bank, Mr. Soden setting out his client's position.

126. In cross examination, Mr. Smith would not agree the matters referred to in Mr. Kennedy's report were largely admitted by the plaintiff. However, he acknowledged that the plaintiff had admitted breaches of procedures and he did not resile from that.

127. He referred to a meeting of 3<sup>rd</sup> September, 2001, when Mr. Dunne met with Mr. Mitchell and Mr. Mangan the same day as the report was being handed to Gerry Gibson of the bank's money laundering unit. He could not say what was discussed by Mr. Dunne but Mr. Mitchell was involved with the communication to the Gardaí.

128. He denied that the plaintiff had made a decision from an early stage not to engage in the process and that he was trying to destroy it. Mr. Smith was cross examined in relation to his allegations that Mr. Dunne was involved in a malicious conspiracy with Messrs. Kennedy and Byrne in advance of the commencement of the Dunne inquiry. He said that he subsequently learned that on 3<sup>rd</sup> September, 2001, prior to embarking on the inquiry Mr. Dunne had a meeting with Michael Mangan, Gerry Mitchell and Nicola O'Brien. That was the same day as the Money Laundering Department submitted a report to the Gardaí.

129. He did not think that the plaintiff was being suspended because of breaches of procedure. He was suspended by the bank because of a perception of criminality and illegality as recorded by Michael Mangan in his notes when he got the initial complaints from Mr. Muckian.

130. The reply from Mr. Smith dated 24<sup>th</sup> October said that the appeal should be under the 1985 procedures. He was asked why he did not write back to Mr. Dunne and in reply he said they had written to a Mr Soden who was in control of the bank

and who could deal with an appeal. He did not intend to write to Mr. Dunne as he was the one who was making the error. He said that he went to Mr. Dunne's ultimate boss, the chief executive of the bank. They also copied the letter they wrote to Mr. Soden to Ms. Nicola O'Brien, Mr. Dunne and the HR manager.

131. He referred to the letter of 14<sup>th</sup> November, 2003, from Mr. Soden which stated that it was noted that the plaintiff had chosen not to exercise his right of appeal under the disciplinary procedures against the decision to dismiss him. There was no point in appealing against a sanction. From the letter they wrote on 24<sup>th</sup> October he was clearly setting out that they were governed under the old rules.

132. The plaintiff would have appealed against his dismissal and would have appealed against the entire decision.

133. He said that if there was a mistake on the part of the bank in affording a full appeal, the bank could have come back and said that it was not a limited appeal that they would give the full appeal.

134. Mr. Smith said he had asked Mr. Kennedy for all the issues that were known on 20<sup>th</sup> April, 2001, which were regarded as "*serious irregularities*" and Mr. Kennedy replied that this was a matter that could be answered by Mr. Byrne.

#### **Evidence of Mr. Charlie Monaghan**

135. Mr. Monaghan was a former assistant manager of the Clanbrassil Street branch. He retired as manager of the Dunleer branch. He came to the branch in Clanbrassil Street in 1989 and the plaintiff came in 1990. He worked with the plaintiff for three and a half years. He described the plaintiff as being sales driven focused. His focus was on lending.

136. He recalled getting a telephone call from Mr. Kennedy whilst the audit was in progress. It had to do with the Terence McKean account. He was shown some documents and was asked did he recognise the writing or recognise signatures. He dealt with those inquiries. He had little contact with the plaintiffs since he left Clanbrassil Street. He recalled an incident in September/November 1993, when he was asked by a cashier to have a cheque approved on the account of McKean where there were not enough funds to meet payment of the cheque. He said that the person at the desk was Peter Begley whom he knew to see. He agreed that the cheque could be cashed and told the cashier to ensure that Mr. Begley signed the cheque. When he saw Peter Begley he wondered whether he was operating the account. He established that the plaintiff opened the account with Mr. McKean. He recalled asking the plaintiff was Peter Begley operating the account as a bogus account in which the plaintiff emphatically said no. The plaintiff assured him that the account was genuine. He said that the plaintiff was anti-bogus accounts and anti money laundering. He said the plaintiff took a strong line in relation to non-resident accounts. He was anti-false non-resident accounts.

137. He would not have thought there was anything sinister about failing to procure the customer's signature when issuing drafts. The plaintiff was the best business developer he ever worked with.

138. He said that if he knew there was tax evasion and there were accounts being used for the purpose of tax evasion he would have called in the customer and shut down the account and that the plaintiff would have the very same attitude.

139. He said it was the role of the assistant manager or the customer services

manager to ensure the cheques were endorsed and were properly lodged to accounts and that cheques and controls were working.

140. He said that the impact of the Dunne report on the reputation of the plaintiff destroyed his reputation. He never heard of a manager being dismissed for breaches of procedure. He read about the plaintiff and the injunction application and its outcome. He concluded that the plaintiff had no future in the bank.

141. He said that in a situation where a senior member of the staff cashed a foreign draft without having it endorsed and obtained Irish drafts for same which were not signed for and were subsequently cashed without endorsement, such a situation would not be acceptable.

#### **Evidence of Mr Seán Murray**

142. Mr. Murray was called to give expert testimony with respect to the standards applied in the compilation and preparation of the two reports namely the Special Investigation Report of 23<sup>rd</sup> August, 2001, and the Branch Audit Report of 24<sup>th</sup> August, 2001. He was requested to form an opinion as to whether the manner in which the reports were compiled and prepared was in line with relevant contemporary standards of best practice with respect to the operation of the Group Internal Audit Department of Bank of Ireland.

143. Mr. Murray, a Chartered Accountant, has extensive experience both in practice as an accountant and giving expert evidence in litigation support. He has held various positions within the Institute of Chartered Accountants in Ireland.

144. He was provided with the internal audit working papers of the internal audit relevant to these reports.

145. The Chartered Institute of Internal Auditors, he said, was the premier body in the UK and Ireland providing standards for internal auditors. It defines an internal auditor's as a role "*to provide independent assurance that an organisation's risk management governance and integral control processes are operating effectively . . . unlike external auditors, they look beyond financial risks and statements*". He said that in his review of the papers, there was no documentation on the working papers to show why a rating was not recorded whilst there was an earlier intention to advance a Control Rating. He took issue with the opinion as expressed in the audit report which stated that whilst no formal rating was being recorded in the report, the number of significant control issues identified would have resulted in a Deficient Rating if the review were to be rated.

146. He referred to the Half-Year Report to the Group Audit Committee in September 2001, which referred to matters from the Special Investigation Report and audit of the Dundalk branch. He was particularly concerned by the reference that:-

*"Some transactions have all the hallmarks of money laundering and assisting customers with tax evasion or other illegal activities."*

*"The widespread use of bank drafts could be construed as assisting customers to cloak their activities, for whatever reasons."*

147. He was of the opinion that there was a lack of sufficient relevant and reliable audit evidence to support such a conclusion.

148. He also referred to a mandate which had been altered to include as a signatory an individual who had given instructions for payments to be effected. As a result, payments effected on behalf of Dundalk UDC amounting to €20.2m over a two-month period in 2001, had not been properly mandated. There was not adequate attention in the audit review. He questioned whether internal audit personnel failed to appreciate the gravity of the bank's exposure.

149. In relation to the audit report, it was determined that a control rating was not appropriate but the reasons were not documented. The conclusion in the report indicated no formal rating was being recorded having regard to a number of significant control issues identified.

150. He took issue with some of the matters identified in summary of findings in the Special Investigation Report namely the description facilitating money laundering and customers with tax evasion. It was stated that the report does not demonstrate even to the remotest degree how this assessment was carried out.

151. In relation to what were the hallmarks of money laundering, he said that money laundering has three hallmarks known within the audit profession known as *placement, layering and integration*. The placement involved the transferring of the proceeds of criminal activity into the financial system. Layering involved distancing illicit funds from their source through a series of real or imagined transactions designed to hide the trail. Integration is bringing laundered funds back into the financial system.

152. He said that the working papers did not contain or refer to any perceived hallmarks of money laundering. In the absence of documented assessment it was unfair to proffer the conclusion offered.

153. He took issue with the manner in which another issue was referred to in the group internal report, namely the potential exposure of the Dundalk branch in respect of unauthorised payments made by the branch on behalf of a branch customer (Dundalk UDC in excess of IR£20m). The manner in which this was dealt with in the report failed to put the recipient of the report on notice of the extent of the bank's exposure in that regard. The review, he said made a scant reference to the issue which in his opinion was the major finding of the report.

154. He concluded by saying that any reliance on the Special Investigation Report was inappropriate, unsafe and inequitable as the entire internal audit process by which such review investigation was carried out and the conclusions reached do not measure up to any reasonable standards of:-

(i) integrity, independence and objectivity required of internal auditors; and

(ii) the audit evidence gathered and documented during the audit work as being sufficient or appropriate to support the conclusions reached.

155. In cross examination he said that he had done internal audits as part of the external auditor's work in which he was engaged.

156. He was not aware of Mr. Muckian who provided information to the HR manager in the bank in the context of him wanting to alter his employment arrangements or

that Mr. Brendan Hickey had been asked to conduct a branch audit and to look out for a number of specified items.

157. He agreed that internal controls of the case of a bank would include the endorsement of cheques or bank drafts and their encashment and the purchase of bank drafts and signing for such instruments as provided for in the bank's operating procedures. He agreed that if such bank procedures were complied with the less likely it was that money laundering can happen in respect of such transactions.

158. The failure to endorse a bank draft may disguise or conceal the transaction in so far as the identity of the person who negotiated the instrument is concerned and likewise where a bank draft is purchased but not signed for it may have the same effect.

159. He had read the Dunne report with which the findings of Mr. Kennedy were admitted by the plaintiff and he accepts perhaps the majority of them were admitted. He accepted that the plaintiff was in breach of the bank's operating procedures in a very substantial number of transactions.

160. He accepted that it would be highly imprudent for anybody to hold up to €20,000 in a briefcase in their office and if such sum were found that it would not be unreasonable to give an explanation for same to the auditor.

161. Mr. Murray was not aware of the fact that the reason the Special Investigation Report into the plaintiff ensued from the documentation that was found in his office in the immediate aftermath of him being put on special paid leave and he was not aware of this.

162. He agreed that it was up to the Group Audit Department to determine what kind of an audit would be done in any particular case and also if it would be rated. He said his issue was not the fact that the internal audit was not rated but his issue was having decided not to rate it, a throw away comment was then made which sought to rate it.

163. He suggested that the concluding paragraphs of a fax dated 13<sup>th</sup> August, 2001 from Mr. Byrne to Mr. Kennedy in relation to cheque encashment of a number of drafts outside standard bank procedures and how he, Mr. Byrne, might deal with same was something of concern to him (Mr Murray) and he saw it as Mr Byrne applying one set of rules to cheque encashment and another set of rules for the Plaintiff. Furthermore, he thought the concluding paragraphs of this fax might unduly influence the mind of the auditor, Mr Kennedy, in particular where there was a reference to the "culture" being fostered by the plaintiff amongst customers for cheque encashment.

164. He rejected the inference that the message conveyed was Mr. Byrne informing Mr. Kennedy about this event and how he dealt with it and his rationale for dealing with it.

165. He said it was appropriate to rely on the Special Investigation Report insofar as its findings relating to the overwhelming number of actual transactions that were being investigated.

166. I have considered in full, the report in evidence of Mr. Murray. I am satisfied that the internal audit function operated independently of line management in this case and that there was no contamination of the audit function by line management.

The court does not share the view of Mr. Murray that any reliance in the Special Investigation Report or the audit reviews or any subsequent decisions made on foot of either of such report were inappropriate, unsafe or inequitable as suggested by Mr. Murray.

167. A critical failure by Mr. Murray in his evidence was his inability to consider his reported opinion in the context of the substantial omissions by the plaintiff in failing to comply with the bank's operating procedures.

168. Furthermore, an email of 13<sup>th</sup> August, 2001, in relation to the encashment of cheques outside the bank's encashment procedures was not an example of one set of rules applicable to Mr. Byrne and another to the plaintiff. It was an effort to inform Mr. Kennedy the auditor of the problem and how Mr. Byrne proposed to address it. The message did not seek to unduly influence Mr. Kennedy's discharge of his functions.

**Mr. Don McDonagh**

169. Mr. McDonagh is a solicitor who presently works as a consultant in the firm McDonagh Breen.

170. He has had dealings with Mr. Higgins over a considerable number of years. He always thought he was a very decent person whom he could rely on.

171. When he first heard Mr. Higgins was suspended he had to assume that he did something very wrong because he was a very good manager and very charismatic so he obviously must have done something bad. The Bank didn't do what they did lightly, he thought. He presumed Mr. Higgins must have done something that was dreadfully incorrect.

172. He was not aware that Mr. Higgins' employment was terminated because of a finding of misconduct resulting from a disciplinary inquiry before Mr. Dunne.

**Mr. Jim Greene**

173. Mr. Greene is a former Detective Garda who retired from the Gardaí in 2005.

174. He is a personal friend of the plaintiff's and had a professional relationship with him. His work involved him discussing with Mr. Higgins his security in the Bank and at his home. There was a lot of subversive activity in Dundalk in the 1970's and Mr. Higgins would have been under Garda surveillance because there was a risk of him being kidnapped.

175. Mr. Higgins was a law abiding citizen and was friendly with the local guards.

176. He recalled that Mr. Higgins had cancelled several suspicious accounts in the Bank even before money laundering legislation was introduced in 1994. He said that Mr. Higgins would be in communication with the Chief Superintendent on a weekly basis.

177. He first heard Mr. Higgins was suspended because of money laundering allegations. Mr. Higgins told him that he was told to get out of the Bank and that his passport was taken.

178. He said that people in the town were shocked upon hearing this because Mr. Higgins was a highly respected person in the town.

179. He heard from Mr. Higgins within a matter of weeks who told him there were allegations of money laundering. He did not tell him there was an ongoing investigation in the Bank.

180. He was not aware that the plaintiff's contract was terminated by the bank but assumed it had been when Mr. Higgins was working for Bank of Scotland.

#### **Evidence of Mr. Pat Byrne**

181. He joined the defendant bank in 1971. Having worked in various branches and departments, he had appointments as manager before being appointed regional manager for the northeast in Dundalk in November 2000. The appointment of regional managers involved a restructuring of a system which previously involved district managers. It was part of his task to set up commercial branches in his regions. Whilst Park Street and Clanbrassil Street in their own right warranted becoming a commercial branch, there was also a need to address costs and hence the decision to merge the two branches in Dundalk.

182. The merger proposal was approved by his line manager, Paddy Murphy, Network Director East. Mr. Byrne decided that the plaintiff was the best man to be the manager of the merged branch. He first told the plaintiff of his new appointment in October. His appointment was announced to staff around the beginning of November.

183. He knew that Hugh Muckian who had previously been an employee of the Dundalk branch was on secondment to Private Banking in Dublin, covering the northeast. The first time he met Hugh Muckian was at a meeting requested by Private Banking to meet with the new Regional Management Team. He was one of those attending from Private Banking. The meeting took place in October.

184. He referred to the meeting he had with the plaintiff at a Christmas party in Killiney Castle Hotel in December 2000 where following feedbacks which he had received from the staff he raised with the plaintiff the issue of his aggressive management style and also referred to rumours about an extramarital affair.

185. On 9<sup>th</sup> January, 2001, Michael Mangan telephoned him to say he had spoken to somebody who had made allegations that the plaintiff was operating in a non-compliant way. Specifically, he said that the account of Terence McKean was operated as a false account, credit cards were being altered and that the plaintiff was a party to this. Mr. Byrne said that he subsequently made inquiries without talking to anybody and satisfied himself there was an account of Terence McKean with an address. Unless he got more information, he could not give credibility to what he was being told.

186. He was subsequently told by Michael Mangan about matters which had been communicated to him (Michael Mangan) in relation to the credit card issue, the Reilly/O'Reilly account and the opening of the credit grader's bag. He became concerned about the level of compliance being operated by the plaintiff. He was subsequently informed by Mr. Mangan in March 2001 that Hugh Muckian was the source of these complaints. He phoned Gerry Mitchell, head of Staff Relations who advised him to speak to Michael Condon, the Group Chief Internal Auditor. Mr. Condon engaged John Kennedy, one of the auditors to carry out an initial investigation and to speak to Hugh Muckian.

187. John Kennedy subsequently arranged to meet with Hugh Muckian to establish

his assertions and a meeting took place on 13<sup>th</sup> March, 2001.

188. Following this, Michael Condon said that a branch audit should be conducted. The audit started on 26<sup>th</sup> March. Initially Brendan Hickey of the audit department conducted the audit and he was communicating with John Kennedy who was the senior auditor in charge. Mr. Byrne was informed by Mr. Kennedy prior to 20<sup>th</sup> April that there were some question marks over the operation of the Reilly/O'Reilly accounts. In relation to the McKean account they were having difficulties finding debits to explain the transactions and to see whether the account was being operated by anybody else. He was also informed that it had been established that a number of the credit card applications had been altered and that the plaintiff had signed off on inappropriate alterations and had altered some of the application forms. He was also informed about the alteration of a mandate for Dundalk UDC and the plaintiff asked him to speak to Mr. Hickey with a view to him not interviewing the person involved in getting the signature on the mandate. He did not do this as he would be interfering with the audit.

189. He said that it was reaching a stage when the investigation would need to be done when the plaintiff was not on the premises. A disciplinary process was a possibility. He took advice from Gerry Mitchell. He also spoke with Paddy Murphy, his line manager, on a couple of occasions, initially as to why an audit was required and in course of the audit he discussed concerns which were unresolved and he concluded it was possible that he would have to place the plaintiff on special paid leave in order to facilitate an investigation.

190. He discussed with Paddy Murphy on 19<sup>th</sup> April and Des Crowley, his superior, on 20<sup>th</sup> April that he was proposing to put the plaintiff on special paid leave.

191. Special paid leave within the defendant's bank is a means by which an investigation can be conducted without the possibility of interference by the person who is being investigated either with staff, documentation or evidence. It was also a course taken to enable the bank and the bank official to engage in the investigation. Placing a person on special paid leave was in his experience a normal procedure to allow an investigation take place. The difference between a "suspension" and "special paid leave" is that the suspension is part of the official's record. Special paid leave is not on one's record. Suspension was a sanction as far as he was concerned.

192. He knew that his relationship with the plaintiff, regardless of what the outcome was, was going to be damaged as a result of putting the plaintiff on special paid leave.

193. When he met the plaintiff on 20<sup>th</sup> April, he was accompanied by John Kennedy. He had prepared his own notes for the meeting having consulted with Gerry Mitchell. It contained a summary of what he proposed to say.

194. He informed him that arising from the audit over the last few weeks that matters had been brought to his attention that were of concern and required further detailed investigation and may have implications for him and as a result he was obliged to place him on special paid leave, pending completion of the investigation. He asked him for his bank keys and computer password. He asked him not to have any contact with any member of the staff and if there was such a need it was to be routed through him. Mr Byrne asked Mr Higgins to keep himself available to meet with the auditor. He asked him not to remove anything from the office. He asked him to leave his passport which had other documents contained within it, with him. The plaintiff said he had not been planning to leave the country. He said that he would return the passport if it was required. The plaintiff told him that he would not



meet John Kennedy, the auditor without having legal representation. John Kennedy was to be part of the investigation process.

195. He was certain that he had used the terminology "*special paid leave*" when talking to the plaintiff on 20<sup>th</sup> April. He had written down what he would say and brought the note with him. He informed Mr. Rushe, Manager, Park Street, that pending completion of the audit, the plaintiff had been placed on special paid leave

196. After the plaintiff departed from the branch, John Kennedy, Mark O'Connor and himself noticed a number of drafts protruding from his diary and there was also a lot of documentation on his desk. There were many items on the desk that required explanation. He was aware from the audit team that there were items in the filing cabinet that they would like to see but it was locked. Mark O'Connor secured and opened the filing cabinet and found items of value including drafts, items that should not be in a bank manager's office. There was also the briefcase which was locked and which they opened and found a large amount of cash being a mixture of sterling and Irish pounds. It was the equivalent of €20,000. The lock was changed on the door. The presence of the cash in a briefcase was a very serious breach of banking procedure in Mr. Byrne's opinion.

197. He said that Mr. Hickey had spoken to the plaintiff about the credit card alterations and secured various explanations from Mr. Higgins which he described as "*implausible explanations*" which did not accord with the explanation given in court namely that the applicant's concerned were not aware of their correct income figures. Following 20<sup>th</sup> April, there were now a host of other issues that needed to be investigated and explained and any prospects that he had of having a "*normal working relationship with the plaintiff*" post the investigation were unlikely. The act of special paid leave in itself was damaging their relationship from the outset.

198. Brendan Hickey had told him the explanations from the plaintiff in relation to the credit cards were the figures included overtime, shift allowance, a pay increase after six months or a probation period and, he was told this directly by Mr. Hickey.

199. He wrote a note the following Monday to John Kennedy setting out what he had said at the meeting with the plaintiff. This note confirmed that he said that he was placing him on special paid leave pending completion of the audit investigation.

200. He had spoken to Michael Mangan separately about Hugh Muckian making a return to the region from private banking. It was only at a later stage that the two were connected up in the sense of his return to the region and the complaint which was anonymous coming from the same person involved.

201. John Kennedy interviewed Marie Strain on 20<sup>th</sup> April and she confirmed that Mr. Muckian had gone to Adrian Barry with her concern in connection with the McKean account and the plaintiff some years earlier.

202. The first day Mr. Kennedy met Mr. Byrne was on 20<sup>th</sup> April.

203. He was of the view that as regional manager he would be the person required to do a disciplinary process and was also the view that he needed to be accompanied by somebody from Human Resources.

204. Mr. Byrne attended a meeting on 15<sup>th</sup> May, 2011 at which were Michael Mangan, Michael Condon, Billy Holmes (Chief Accountant), the legal adviser, Ms. Nicola O'Brien, Gerry Mitchell (Head of Staff Relations) and John Kennedy (Senior

Auditor). As a result of that meeting it was agreed that Mr. Kennedy would seek to meet the plaintiff.

205. The minutes of the mini-summit of 15<sup>th</sup> May, were the subject of a privilege claim which was upheld.

206. He wrote a letter on 15<sup>th</sup> May, 2001 to the plaintiff's solicitors informing them that Mr. Kennedy was conducting an investigation into serious irregularities that may result in disciplinary action and that they would be told about the matters, the subject matter of the investigation.

207. He could not say whether it was Mr. Condon or Mr. Kennedy who told him that there was going to be a branch audit. The audit started on 26<sup>th</sup> March with Mr. Hickey and his team excluding Deirdre Freeley who arrived the following day. Between 26<sup>th</sup> March and 20<sup>th</sup> April, when the plaintiff was put on special paid leave he did not have any communication with Mr. Condon nor did he have any communication with him about special paid leave.

208. The decision to send in the audit team was made by Michael Condon, preliminary investigations having been done through John Kennedy.

209. Apart from his discussions with Mr. Condon on 15<sup>th</sup> May, 2001 (at the mini-summit meeting) and subsequent communications with him in July 2002, seeking copies of emails, he did not have any discussions with Mr. Condon to discuss the question of terminating the plaintiff's employment nor did he engage with Mr. Condon in a conspiracy to undermine the plaintiff's position in the bank.

210. He contacted Mr. Mitchell to seek advice from him as to how he should deal with the information he had received from Mr. Mangan. As Mr. Mitchell was head of staff relations, he was the person to deal with disciplinary issues including staff under investigation for whatever reason. He is likely to have updated Gerry Mitchell as to John Kennedy interviewing Hugh Muckian and subsequently Michael Condon deciding that it could only be fully investigated by an audit. He had various discussions with Mr. Mitchell in the week prior to 20<sup>th</sup> April. At that stage, it became clear that the issues being investigated by John Kennedy had substance. He also discussed with Paddy Murphy the possibility of placing the plaintiff on special paid leave. He also spoke to Des Crowley on 20<sup>th</sup> April, informing him of what he intended to do. He never had a discussion with Mr. Mitchell, the object of which was to come up with a plan or conspiracy to get rid of the plaintiff.

211. In relation to Mr. Dunne who was a regional manager in South Leinster, whilst he did meet him at regional managers' meetings there was no discussion between them regarding the case.

212. He was questioned about the new encashment cheques policy, details of which were circulated to managers in September 2000. It provided that from 13<sup>th</sup> November, 2000, the bank would not cash cheques which were crossed or which were drawn on any branch or bank other than the particular branch. A memorandum was sent to all staff on 6<sup>th</sup> October, 2000 setting out the new encashment procedures for cheques. It was to come into operation on 13<sup>th</sup> November, 2000. It was emphasised that this new change had the potential to cause annoyance with customers and absolute compliance was required. Furthermore, staff had to sign a register confirming their understanding and acceptance of the new terms of encashment. The plaintiff, he said, signed the form

on 10<sup>th</sup> November, 2000.

213. In relation to his averments in the affidavit Mr Byrne swore in the interlocutory application brought by the plaintiff against the defendant, he denied that he had lied on oath or that the statements made in the affidavit presented a misleading picture to the courts. Some of the allegations referred to in the audit report originated from Mr. Muckian. However, the audit report reported on what the auditors had found which included some but not all of what Mr. Muckian had alleged. The defendant and its officers would rely on what was in the report rather than what was suggested by other people. He denied that the absence of reference to Mr. Muckian in his affidavit undermined the veracity of what he said and the bank's position.

214. He said that some of the items may have been initially identified by Mr. Muckian but that the greater majority of issues that were in the Report were as a result of what the special investigation found.

215. He denied that the effect of the new encashment policy was a policy over which the manager was told not to lose a customer or a client of the bank. He stated that his intentions were quite simple, namely, that the manager and not junior staff would take responsibility for the implementation of the policy. In his opinion, implementing the policy and not losing a customer were not inconsistent.

216. He defended the bank's stance in not including any of the documentation pertaining to Mr. Muckian prior to 20<sup>th</sup> April, 2001, and maintained that from the bank's perspective, the issues that needed to be addressed in the disciplinary inquiry were the issues that were presented to the plaintiff, as contained in the Special Investigation Report of John Kennedy. No other issues were in front of the inquiry.

217. He would have expected that irregularities highlighted in the Special Investigation Report would be addressed and explained by the plaintiff.

218. He would not accept that the tortuous process of the course of the hearing before Mr. Dunne was a result of the suppression of Mr. Muckian's role and the concealment of everything that had happened on the bank's side until the suspension of the plaintiff. If the plaintiff had addressed the issues that were put to him by the auditor, or if they had addressed the issues in the course of the disciplinary inquiry, the inquiries could have been dealt with more quickly. There also may have been a different outcome to the Dunne inquiry had the plaintiff accepted earlier the breaches of procedure in many cases.

219. The plaintiff was not on the distribution list of the audit review of the Dundalk branch completed on 24<sup>th</sup> August, 2001 (as against the Special Investigation Report of 23<sup>rd</sup> August, 2001) as it was a matter for those managing the branch to concentrate on dealing with the issues that had emerged, not for the plaintiff who was on special paid leave at the time.

220. He did not accept the suggestion that the reason why the audit review was not given to the plaintiff was because at that time, Mr. Condon, Mr. Kennedy and himself (Mr. Byrne) knew that the plaintiff was never resuming his position as manager in Clanbrassil Street.

221. In relation to the fact-finding meeting of 22<sup>nd</sup> and 23<sup>rd</sup> May, 2001, between the plaintiff and Mr. Kennedy, and following the mini-summit of the defendant's senior officials on 15<sup>th</sup> May, 2001, he denied that there was never any possibility of the

plaintiff returning to the role of manager of Clanbrassil Street branch. If the plaintiff had properly explained the issues put to him on 22<sup>nd</sup> and 23<sup>rd</sup> May, 2001, the outcome could have been different.

222. He had taken the advice of Michael Condon, the chief internal auditor, whose view was, initially, to investigate remotely and then to have a full branch audit.

223. As he saw it, the role of Mr. Muckian was in the past. The audit was then the present and the audit was going to be the evidence of what the standards of compliance were and what needed to be addressed to the plaintiff. Mr Muckian was not going to be relied on.

224. He said at the 22<sup>nd</sup>-23<sup>rd</sup> May meeting the plaintiff was not being asked to respond to something which Mr. Muckian was saying, but was asked to respond to what the auditor was finding in his investigation, and ultimately, what he put in his report.

225. Mr. Brendan Hickey was not told about the role of Mr. Muckian. Those officials of the defendant who were present at the mini-summit meeting on 15<sup>th</sup> May, 2001, were aware that the investigation into the plaintiff originated with the allegations of Mr. Muckian and that Mr. Muckian's role had not been disclosed to the plaintiff.

226. Mr. Mangan had a reputation for discretion and integrity and many people spoke to him in confidence.

227. The first conversation with Michael Mangan took place in late December or early January, 2001. His complaint about Mr. McKean's account was mentioned by Michael Mangan in the second call. In relation to the McKean matter, he searched the microfiche within a matter of days. This complaint related to the operation of accounts in false names. From the microfiche, he could see the debits and credits and other transactions going through the account, also the address of Mr. McKean, but he could not satisfy himself that a person other than Mr. McKean was operating the account.

228. In relation to the allegations that Mr. Muckian was making that the plaintiff was responsible for injuring his health and his career, Mr. Byrne was not aware of the allegations until March when Michael Mangan relayed the concerns he got from Mr. Muckian. He knew about it when the meeting took place between Michael Mangan, Mr. Muckian and his brother who is a solicitor, which was convened for the purpose of discussing Mr. Muckian's return to the region.

229. Whilst he was aware of Mr. Muckian's identity before 1<sup>st</sup> March, 2001, and knew that he was working in private banking, he did not know that Michael Mangan had been talking to Mr. Muckian specifically about the plaintiff. He has no reason to suspect that Mr. Muckian was the source of the allegations against Mr. Higgins that were conveyed by Mr. Mangan to him following the meeting of 9<sup>th</sup> January.

230. He was aware that Mr. Muckian had applied for a job as a manager in February 2001.

231. He recalled an issue over the referral of investment business to Mr. Muckian in Private Banking as opposed to such investments being directed via Ms. Hamill to Lifetime, a subsidiary of the defendant.

232. He heard a rumour about the relationship between the plaintiff and Ms. Hamill

in December. He told the plaintiff about this at the meeting on 13<sup>th</sup> December and informed him there were rumours which the plaintiff denied. The two persons he discussed it with were Mark O'Connor and Shirley Clarke both of whom referred to the relationship as "gossip".

233. In relation to the plaintiff's style of management at the meeting of 13<sup>th</sup> December, he emphasised to him the importance of completing the merger properly and that his style of management could be a barrier to getting the merger complete.

234. In relation to his style of management, one of his sources of information was from the IBOA. The concerns were communicated to him by Gerry Mitchell and this took place before the meeting in Killiney Castle.

235. On 2<sup>nd</sup> January, 2001, he had a meeting with the plaintiff and he spoke to him about moving Ms. Hamill. She was to be replaced by another official.

236. At the stage he met Mr. Muckian, accompanied by his brother, in March 2001 he had been unsuccessful in his application to secure one of the management jobs in the region. When asked to go to a meeting, Mr Byrne was aware of the allegations that Mr. Muckian was making against the plaintiff but he did not link them together.

237. Mr. Muckian phoned Mr. Mangan on 1<sup>st</sup> March, 2001, informing that he was "*going official*" with his allegations against the plaintiff. He then went away on holidays and returned on 13<sup>th</sup> March having a meeting with Mr. Kennedy at Dublin Airport on 13<sup>th</sup> March. Mr. Muckian was appointed assistant manager in Monaghan with effect from 1<sup>st</sup> April, 2001. His appointment was unrelated to the allegations that Mr. Muckian had made against the plaintiff.

238. The suspension of a manager was a rare occurrence in April 2001.

239. Prior to appointing the plaintiff as manager of the newly merged branches, he had concluded that the plaintiff was a person who delivered and got things done. He had a good profile in the area and he believed that he could grow the business.

240. It was put to the Mr. Byrne that he had significant areas of mistrust, had problems with the plaintiff's overaggressive style that needed to be addressed and rather than putting these concerns to the plaintiff he had decided by the time the auditors became involved that the plaintiff had to go and that he would do whatever he had to remove him. This was denied by Mr. Byrne. Mr Byrne said he had a view of the plaintiff's style as one that needed support and help. He accepted he did not do much work with the plaintiff in relation to his style post the Killiney meeting.

241. In Mr. Mangan's notes of the telephone conversation with Mr. Muckian on 1<sup>st</sup> March, 2001, three additional matters are raised, (i) concerning the credit rater's bag; and (ii) the spreading of the loan requirement across the group, that is the Keith Prestige case, and apparently that the plaintiff tipped off an accountant that the Criminal Assets Bureau were going to investigate him.

242. In the period between 13<sup>th</sup> March and 20<sup>th</sup> April, Mr. Byrne had 5-6 calls with Mr. Kennedy. In relation to the meeting he had with Mr. Muckian and his brother, he listened to what he had to say about coming back to the region but he did not give him any firm commitment that this would materialise.

243. As far as he was concerned, the accuser of the plaintiff was Mr. Kennedy not Mr. Muckian.

244. He accepted that Mr. Muckian had a personal agenda and had years of bitterness stored up against the plaintiff.

245. As he recollected it, Mr. Condon had informed him that there were to be two reports, one on the plaintiff and the other was to be an audit review. The branch audit was not being rated.

246. Mr. Byrne had learned about the alternations to the Xerox credit cards from Mr. Hickey after the latter had commenced audit work in the period between 26<sup>th</sup> March and the date of the suspension/special leave.

247. He denied that he had placed the plaintiff on special paid leave in the belief that the plaintiff was guilty of serious wrongdoing or that he was determined to get rid of him as the manager of Dundalk or both. Placing the plaintiff on special paid leave was not a sanction and was part of a process whereby the investigation would continue unhindered and the plaintiff should realise that the matter was serious.

248. He said prior to the plaintiff being placed on special paid leave on 20<sup>th</sup> April, he had more information than had been earlier elicited by Mr. Mangan. Mr. Kennedy had verbally reported to him, he had got additional information in respect of Terence McKean and in respect of the credit cards, Brendan Hickey had established that there were actually alterations which had been admitted and Mr Hickey considered that the explanations the plaintiff gave for this were implausible.

249. He said the reason why he placed the plaintiff on Special Paid Leave on 20<sup>th</sup> April rather than allowing completion of the audit was that there were admitted breaches of procedure from what the auditors were telling him. There was concern that the plaintiff might interfere with the audit process and that by allowing him to remain on the premises that the ability to conduct the investigation could be inhibited. In relation to the McKean situation they were unable to find debits, credits, *etc* that should have been on files.

250. He said that breach of procedure by a senior manager as in the commercial branch manager in Dundalk was very serious. Mr. Kennedy did not ask him to suspend the plaintiff.

251. He denied that Mr. Mitchell and Mr. Condon were a party to a conspiracy with him to deny the plaintiff his good name and that they were prepared to advise him how to proceed against the plaintiff while concealing at every turn the involvement of Mr. Muckian.

252. Learning from Mr. Kennedy that he had spoken to Marie Strain on 20<sup>th</sup> April who confirmed that she had gone with Mr. Muckian to Adrian Barry about the McKean Begley matter was important in his decision to place the plaintiff on Special Paid Leave. She confirmed that they had spoken to Mr. Barry about the Begley operation of the McKean account.

253. He accepted that Mr. Condon and Mr. Mitchell were aware that Mr. Muckian's role and identity was not going to be disclosed to the plaintiff.

254. If they had not taken that action on 20<sup>th</sup> April they may never have found all the drafts and documents and cash that were serious breaches of procedures which

he had never experienced in his career.

255. There were some items on the plaintiff's desk, within his diary and within envelopes that should not have been in his desk and should not have been in his office.

256. The plaintiff should not have had items of value or current drafts payable to an individual in a cabinet in his office. They should have been secure in a fire proof safe.

257. He had handwritten what he proposed to say to the plaintiff on 20<sup>th</sup> April and he wrote some notes on the Saturday evening as to what happened and went to work on the Monday.

258. He accepted that a person placed on special paid leave that the person would be disturbed, upset and angry following such a communication.

259. He denied that he had made a mistake in promoting the plaintiff as manger of the merged bank. He further denied that he availed of any opportunity that presented to get the plaintiff removed from his position which he denied.

260. When questioned about the affidavit he swore in the interlocutory High Court proceedings, in particular a statement that the plaintiff's suspension arose from an audit, he confirmed that when placing the plaintiff on special paid leave he was acting on the basis of what the audit findings were at that point rather than anything else. He was not dealing with Hugh Muckian's allegations *per se* but dealing with what the auditor, Mr. Kennedy, told him.

261. In relation to paragraph 11 of his affidavit, he had reason to believe that procedures relating to money laundering had been breached not that he was engaged in money laundering.

262. Placing the plaintiff on special paid leave on 20<sup>th</sup> April was justified by what he had known at that point and was subsequently reinforced significantly by what he discovered in his office and investigated by the auditors in the weeks thereafter.

263. Mr. Byrne was cross examined on affidavit he swore in connection with the interlocutory injunction in the High Court before Lavan J. It was put to him that the overriding purpose of his affidavit and that of Mr. Kennedy was to induce the High Court to believe that Mr. Higgins had been suspended as a result of the findings of an audit. He said that the purpose of the affidavit was to reply to the points that were made by the plaintiff with regard to him being placed on special paid leave.

264. He had accepted that he made no reference to Mr. Muckian in the High Court affidavit but that was not an issue because as far as he was concerned, he was dealing with the findings of the auditors.

265. In relation to the Terence McKean account, the Reilly account and the credit card applications he said that the details in the report came from the auditors and not from Muckian.

266. I find as a fact that whilst there were meetings during October between Mr. Byrne and officials of the private bank of the defendant at which Mr. Muckian was one in attendance and where the subject matter of discussion was obtaining increased business for private banking, that there was no meeting or communication

between Mr. Byrne and Mr. Muckian in November 2000 or prior to the end of 2000 in relation to Mr. Muckian making complaints against the plaintiff. The plaintiff had no factual evidence to support this theory of his. I do not accept the theory of the plaintiff that in December/January 2001, there were communications between Mr. Byrne, Mr. Murphy and Mr. Crowley whereby a plot or conspiracy was devised by the three of them to terminate the employment of the plaintiff because of money laundering and other illegal activities attributed to the plaintiff.

#### **Evidence of Mr. Michael Mangan**

267. Having joined the bank in 1968, he retired as HR Manager in 2003, a position which he held until 2001.

268. He was aware in 2000 that Mr. Muckian was on secondment to Private Banking.

269. He was the link to bring back Hugh Muckian to Branch Banking, as Mr Muckian was no longer reporting to his branch manager in Dundalk.

270. He confirmed that Muckian contacted him before Christmas 2000 and that they agreed to meet in early January. The note that he kept in relation to the various meetings was kept on his computer. It would be put on his file as an update from time to time. He said Mr Muckian had been on sick leave since November. He wanted to end secondment and return back to the Northeast Dundalk area. He could not go back to Dundalk because he had difficulty going back to the branch where the plaintiff was the manager.

271. Mr. Muckian said he was unhappy with the practices that were happening in the bank. He instanced that the plaintiff would have processed transactions which he, Mr. Muckian, would have refused because he felt the practice was wrong.

272. He gave evidence in accordance with the memorandum. In relation to the credit card alterations Mr. Muckian told him that by putting a higher salary than the real one, it meant that if there was any bad debt risk it would not affect the branch's grading and would be a loss to the credit card department.

#### **Evidence of Mr. Gerry Mitchell**

273. Mr. Mitchell joined the bank in 1972 and was appointed Head of Staff Relations in 1998. and was head of staff relations at all material times. His department deals with interaction with trade unions, collective negotiation and discussions and individual issues under agreed procedures, disciplinary, harassment *etc.*

274. In 2001, there was an ongoing reorganisation of the services delivered by the bank. Districts had been changed to regions and a number of districts merged to form one region. The programme started in Dublin in 2000. There was also a rationalisation of branches.

275. He recalled an issue being raised by the Irish Bank Official Association during the Dundalk merger in relation to the plaintiff's style of management. He did not regard it as a showstopper. He raised it with Pat Byrne because he did not want it to fester and then moved on.

276. The next time the Dundalk branch came to his attention was when he received a telephone call from Mr. Byrne in relation to some anonymous complaints that Michael Mangan brought to Mr. Byrne's attention. Mr. Byrne wanted to be advised as to what to do about it. Mr. Byrne contacted him because it was his role to advise



managers. He advised Mr Byrne to see if he could validate some aspects of the allegations.

277. Mr. Byrne got back to him some weeks later and there was more detail. As the matter related to compliance it was prudent that Mr. Byrne should engage the services of Group Internal Audit and he advised him to speak to Mr. Condon. His next involvement was when he spoke to Mr. Byrne in advance of the April 20<sup>th</sup> meeting.

278. In the week leading up to 20<sup>th</sup> April when the plaintiff was put on special paid leave, he had a number of discussions with Mr. Byrne in which Mr Byrne gave him updates he had received from Mr. Kennedy.

279. The possibility of further investigation arose as also did the prospect of placing the plaintiff on 'special paid leave'. Since 1998 onwards when he went to Group Industrial Relations he was used to the terminology 'special paid leave'. It was done to avoid interference with evidence that maybe obtained in the course of an investigation or to prevent further loss if there was theft, and also to give a person time to reflect and consider their position. He rejected the suggestion that special paid leave was only introduced in revised Bank of Ireland procedures after this case commenced. Special paid leave was custom and practice prior to assuming his role in 1998.

280. In his opinion the use of the word "suspension" had a disciplinary connotation. He denied that the special paid leave in this case was a disciplinary sanction on the plaintiff. He said that in the course of the audit issues emerged which were alarming and there were concerns that there were breaches of obligations imposed on the bank in relation to money laundering. Consideration was given to the manner in which these matters would be addressed including the reputational impact and damage to the bank. The meeting of 15<sup>th</sup> May was for that purpose. Mr. Condon, Mr. Holmes and the PR people were in attendance.

281. He had no involvement in the lead up to the publication of the reports on 23<sup>rd</sup> and 24<sup>th</sup> August as the investigations were ongoing and it would not be appropriate for him to interfere. He was on the circulation list for the Special Investigation Report which was published on 23<sup>rd</sup> August, 2001. He remembered discussing with Mr. Byrne his continued involvement in the disciplinary process. When the report was issued Mr. Paddy Murphy, the general manager for Area East, advised that Mr. Byrne should stand down from this role.

282. What was unusual arising from the Special Investigation Report was that the plaintiff had not provided any information about any of the transactions which could, in turn, have been reflected in the audit report.

283. Mr. Murphy made his decision on 27<sup>th</sup> August, that there was to be a disciplinary inquiry and he appointed Mr. Dunne to oversee the Inquiry.

284. In relation to the meeting on the 3<sup>rd</sup> September with Mr. Mangan and others, the purpose of that meeting he felt was to establish process for the Inquiry and it also related to the illness of Mr. Higgins. From a letter written by Mr. Smith on 30<sup>th</sup> August, the plaintiff was not available because of ill health.

285. He swore an affidavit in the High Court proceedings but was not one of those accused of perjury.

286. He said that once the disciplinary inquiry was completed by Mr. Dunne there was a right of appeal which was not exercised. He denied that there was any conspiracy or attempted conspiracy between himself, John Kennedy, Pat Byrne, John Dunne and Michael Condon. He recalled in some of the earlier discussions he had with Mr. Byrne that he, Mr. Byrne, was concerned about Mr. Higgins rights. He did not have any discussions with Mr. Kennedy or Mr. Dunne to engage in some kind of a charade of a disciplinary procedure so as to pretend that the plaintiff had fair procedures or that the ultimate outcome had been pre-determined. He did not have any discussions with Mr. Michael Condon as to how the plaintiff would be dealt with.

287. In relation to the concept of whistle blowers, they had in the bank a policy known as the 'Speak Up Policy' which nominates individuals to whom staff can refer matters. If an individual cannot raise an issue of concern with his/her line manager they can go to the HR Manager.

288. The 'Speak Up policy' was not there at the time. If a complaint was brought to their attention they would independently and objectively assess it.

289. When an individual took up employment with the bank he had to sign a confidentiality statement which included an undertaking to advise the bank of any issues of concern that may arise.

290. Where a complaint was made the facts would be established by the Internal Audit Department rather than relying on unsubstantiated statements as provided by Mr. Muckian. Up to 2001 there was nothing unique in a manager being placed on special paid leave. The question of dismissal of a manager might arise in some four to six occasions per annum. He considered that the transactions for which the plaintiff accepted responsibility were not simply administrative errors but the subject of regulation imposed on the bank by the authorities.

291. He rejected the suggestion he was involved in the amendment or correction of the Special Investigation Report. He is likely to have had an input in the decision not to disclose Mr. Muckian having regard to his health and fears of the plaintiff. Mr. Byrne and himself are likely to have been involved in the decision not to disclose Mr. Muckian.

292. He had discussions with Mr. Byrne before he placed the plaintiff on special paid leave. It was Mr. Byrne's decision to do so.

293. He denied he was a party to conspiracy directed at concealing the identity of Mr. Muckian as the primary accuser in relation to the allegations against the plaintiff. He also denied he was a party to an unlawful decision to put the plaintiff on Special Paid Leave. Any advice given by him was given in good faith in the circumstances in which they found themselves no different from any other situation where his advice was sought. He denied he was party to a conspiracy to conceal suspension.

294. He denied that he conspired with Messrs. Kennedy and Byrne to bolster statements in the two affidavits sworn by Messrs. Kennedy and Byrne. He had no input into the authorship of either the Special Investigation or Dunne reports.

#### **Evidence of Mr. Michael Condon**

295. He was the Group Internal Auditor having joined the Internal Audit Department in 1971. He was appointed head of internal auditor in 1987 and retired in 2003.

296. He said that the function of the Internal Audit Department was to examine all parts of the group to see that the risk was being properly identified and managed and the controls that were in place were being complied with by the staff. The role and functioning of internal audit is approved by the Group Audit Committee which is a committee of the Board of Directors of the bank. He prepared standards for adoption by the Audit Committee. It was one of the recommendations for the Institute of Internal Auditors that the scope and role of internal audit would be clear.

297. The role of the Internal Audit is decided by the Group Audit Committee. His department would carry out a range of audits every year. He would report to the Audit Committee on the important points that had emerged from the audits. The Audit Committee was comprised of non-executive directors. He reported twice a year to the Audit Committee.

298. The Money Laundering section reported to him.

299. He recalled getting a telephone call from Mr. Byrne saying there was a problem reported by a whistleblower who had come forward and there were issues of concern in relation to the branch. He said he would try and establish the substance of the allegations and he asked John Kennedy, the audit manager of the retail branches, to contact such person, Mr Muckian.

300. As a result of Mr. Kennedy discussing the matter with Mr Muckian, he, Mr Condon, decided that the best way to approach the matter was to carry out an audit. He had no previous knowledge of or acquaintance with Mr Muckian and he treated his allegations with caution and it was best to conduct an audit. Mr. Kennedy would have decided on what resources he required which was going to be a normal branch audit which would have been rated. He had no involvement in the carrying out of the audit once it got underway. That was the responsibility of the audit manager and his team. He had discussions with John Kennedy on an ongoing basis.

301. The special investigation commenced following the plaintiff being put on special paid leave.

302. He would have made the decision not to rate the audit having discussed the matter with Mr. Kennedy. They thought it was unfair to rate the audit when the manager was on special leave.

303. From an early part of his career in the audit department in 1998 he was familiar with special leave with pay, as it was then called.

304. Contrary to what Mr. Higgins stated, unrated audits were brought to the attention of the Audit Committee as was the findings of the Special Investigation Report.

305. Special Investigations were unrated. The Special Investigation Report was the subject of the next half yearly report.

306. He rejected the charge that he was involved in a conspiracy with Mr. Byrne, Mr. Mitchell and Mr. Kennedy.

307. He had only met the plaintiff once, many years earlier when he was locum for a regional manager in 1988.

308. He would have taken the decision in conjunction with Mr. Kennedy to have the

Special Investigation as well as a branch audit.

309. The Special Investigation was established to look at transactions and practices within the branch relating to the management of the branch by the manager. The fact that Mr. Muckian had made allegations initially had fallen by the wayside as the audit had turned up a sufficient number of things to warrant a Special Investigation.

310. He denied that he conspired as alleged in the pleadings with Messrs. Byrne, Kennedy and Mitchell to effect the plaintiffs' suspension or to have him removed permanently as an employee of the bank. The decision to suspend was for the line manager although his department would have agreed that it was an appropriate action. He did not have any discussions with Messrs. Kennedy, Byrne or Mitchell to get rid of the plaintiff from his employment.

311. He denied that he ever attempted to influence the Money Laundering Unit personnel in the work they were doing to get the Gardaí to prosecute Mr. Higgins.

312. In relation to Mr. Murray's expert report, Mr. Murray admitted that he was unaware of the reason for the decision to conduct the branch audit and was also unaware that there had been a whistleblower and that Mr. Hickey, when asked to do the audit, was asked to look at the McKean, Reilly accounts and credit cards.

313. He was referred to paragraph 30 of the Murray Report which said that the manner in which a conclusion was reached "demonstrates gross and inexplicable misjudgement on the part of the reporting person". He denied that he had ever been accused of not being competent to discharge of his function. This applied to Mr. Kennedy also.

314. He said there was always a degree of selectivity as to what matters were put into his half year Audit Committee Report, as to what was included and excluded but there was no selectivity based on malicious intent or design to achieve some nefarious end. He did not try to suppress or downplay any aspect of what was happening in Dundalk to the Audit Committee.

315. He was referred to that part of his report to the Audit Committee which stated that some transactions examined in this investigation had all the hallmarks of money laundering and assisting customers with tax evasion or other illegal activities. Whilst Mr. Murray took exception to the use of that phrase, he said he could not understand how any auditor, external or internal could take exception to those terms. The facts were that there were lots of transactions which did have the hallmark of money laundering in the absence of any explanation to the contrary: unsigned drafts; blank withdrawals dockets. He also relied on Mr. Kennedy's statement in his report "*in the absence of explanation*", as a consideration which qualified all conclusions.

316. He was referred to the conclusion of Mr. Murray's report which stated that in his opinion that any reliance on the Review Report and Special Investigation Report (or subsequent decisions made on foot of either such report) is inappropriate, unsafe and inequitable as the entire internal audit process by which such review investigation was carried out and the conclusions reached did not measure up to any reasonable standards of independence and objectivity required of the internal auditors and was not sufficient to support the conclusion. He denied that it was inappropriate to rely on the Special Investigation Report for the purposes of initiating the bank's disciplinary procedures.

317. He did not know in advance that the plaintiff was being put on Special Paid Leave.

318. He had approached Mr. Muckian's allegations with circumspection having regard to his history of illness and disagreement with management.

**Evidence of Mr. John Kennedy**

319. Mr. Kennedy joined the defendant in February 1961 and after different postings within the bank, he was appointed in 1987 to group internal audit where he remained until he retired in 2001.

320. He would direct the members of a team as to what to do and evaluate the reports, sign them off and passed them on to Michael Condon for finalisation. In addition to branch audits, they also got involved in special investigations.

321. He first became involved when Michael Condon called him and told him that he had a call from Mr. Byrne advising matters of concern that had been raised by Hugh Muckian. He believed that Mr. Byrne had previously been in touch with Gerry Mitchell who advised him to talk to Michael Condon. Michael Condon asked him to meet with Hugh Muckian to find out if there was anything of substance as to what he was saying. He never had met Mr. Byrne but knew of him.

322. He met Mr. Muckian on 13<sup>th</sup> March. Mr. Muckian had been on holidays until the previous Friday. He met Mr. Muckian at a hotel at Dublin Airport. He took notes and typed them up subsequently when he went back to the office. He met Mr. Muckian on 15<sup>th</sup> March to go through the notes which had kept of the meeting. He asked him to sign his initials on the bottom of each page.

323. The allegations in relation to McKean, the credit cards and Reilly were matters of concern if they were real.

324. He discussed the matter with Michael Condon and decided there was only one way to progress the matter namely to conduct a branch audit and ask the audit leader to concentrate on areas where they had concerns.

325. Mr. Kennedy said that Brendan Hickey and Deirdre Freeley were leading the audit on site. Mr. Hickey's retirement was imminent. Mr. Hickey was asked to look at three specific items: the McKean account, the credit card applications and the Reilly allegation. He did not tell Mr. Hickey that he had received information from an informant. He would have been in contact with Mr. Hickey on a daily basis.

326. He said that he got information about the McKean account from a lodgement docket that had been located and which indicated a lodgement to that account by Barry Begley.

327. In relation to the credit card applications for Xerox employees as of 20<sup>th</sup> April they had done a sample of credit card applications from Xerox employees. A sample of accounts was obtained from a printout of the Xerox employee applications. By 20<sup>th</sup> April they ended up with a sample of five where alterations had been made on some of them and the alterations had been signed off by the plaintiff. The plaintiff had altered two of the income figures on the applications. As far as he was concerned this was the granting of the credit facilities to an individual against incorrect information. In relation to the McKean matter, they had failed to find debits as of 20<sup>th</sup> on the McKean account and there was a lodgement by Barry Begley

who is a son of Peter Begley.

328. Mr. Muckian had made the allegation that the McKean account was being operated by somebody other than the named account holder. He named the Begleys as being the operators of the account.

329. In relation to the Reilly matters, as of 20<sup>th</sup> April, there were a number of Reilly accounts which were in the ICS Building Society, a subsidiary of the defendant. The auditors had raised an issue relating to breach of procedure relating to the accounts documentation being completed in different names but in the same handwriting. This would suggest that they were not all opened by different people.

330. When he arrived in Dundalk on 20<sup>th</sup> April 2001 he met with Brendan Hickey and Deirdre Freeley and they went up to Mr. Byrne's office. They had a discussion about the McKean account, the Reilly account and the credit cards. There was a discussion about the UDC mandate also. He was with Mr. Byrne when he called the plaintiff to his office and told him he was proposing to put him on special paid leave.

331. Whilst Mr. Byrne had told him prior to the meeting that he was thinking of putting him on special paid leave, he had not told him that he had made a final decision. He said that Mr. Byrne read from the script which he had. The gist of what Mr. Byrne said was that as a result of items highlighted by the auditors that the plaintiff was being placed on special paid leave to allow investigations to continue. The plaintiff kept asking why he was being suspended and he was told that he was not being suspended but put on special paid leave.

332. He said that he intervened on a couple of occasions to say that Mr. Byrne did not say that the plaintiff was being suspended but that he was being placed on special paid leave.

333. There had been a number of occasions when officials of the bank were put on special paid leave pending an investigation, mostly by internal auditors. It was not regarded as a suspension. It was a period in which the official was out of the branch to allow investigation to continue. There was no written procedure he recalled. There was no disciplinary element in the investigation at that stage.

334. He said they went down to take possession of the plaintiff's office where Mark O'Connor had been. They opened the diaries to see what they were and there were a number of drafts and withdrawals forms within. There were a few letters lying around the desk and some 56 statements. They then decided to open the filing cabinet to see its contents. Mr. Byrne made the decision to open the cabinet which was done by Mark O'Connor. In the filing cabinet they found two briefcases with a number of envelopes and files. The items of value which they found such as drafts and the cash they found in the briefcase were put in an overnight security safe.

335. The manager's office was secured as best it could be. He took the audit papers home with him for the weekend. He phoned Michael Condon over the weekend and told him what happened. They decided that a special investigation had been triggered by the plaintiff being placed on special paid leave and secondly by the materials found in his office.

336. On the following Monday morning, Brendan Hickey counted the cash and put it into safe custody in the branch. He prepared listings of the documents which he found on the desk and in the filing cabinet.

337. Following the weekend of 20<sup>th</sup> April, the auditors looked at the personal accounts, the drafts outstanding, the Revenue expenditure accounts.

338. There were issues emerging over instruments such as drafts that did not pass through the accounts of customers. There were also issues about non-customers.

339. At the meeting of 15<sup>th</sup> May 2001 (the 'mini-summit' meeting) it was decided that he should contact the plaintiff to seek from him an explanation for the items which had been identified up to that stage. He phoned the plaintiff who told him to contact his solicitor Mr. Kevin Smith. They agreed to meet on 22<sup>nd</sup> May. He was expecting it to be in the form of an investigation. Mr. Smith said that was not the purpose but they were there to find out the allegations rather than being there to answer the queries that were being raised. The question of suspension versus special paid leave was discussed on many occasions at the meetings. He spoke with Gerry Mitchell by phone about the nature of special paid leave and conveyed the distinction between the two to Mr Smith and the plaintiff.

340. Mr Smith and the plaintiff asserted that being placed on special paid leave was a disciplinary sanction in its own right. It was agreed that the issues would be sent in writing to Mr. Smith and that there would be a response thereafter. This resulted in the 41 page document being sent to the plaintiff on 14<sup>th</sup> June 2001. Matters that were found in the filing cabinet were also dealt with, as was the cash which had been found in the briefcases and the document stated that the ownership of the cash needed to be explained and that the holding of cash in this manner was in breach of the bank's safe custody procedures and constituted a security risk.

341. He claims that all the documentation relevant to the issues were shown to Mr. Higgins and his solicitor who examined it at the meeting of 22<sup>nd</sup> – 23<sup>rd</sup> May. He offered inspection of facilities in his letter of 14<sup>th</sup> June.

342. In relation to the alteration of the credit card applications Mr Kennedy could not see any circumstances where it would be appropriate for a bank official to alter income figures on an application for a credit card. He said that most of the transactions in the Special Investigation Report were subsequently admitted in the closing days of the Dunne inquiry. He denied as it was suggested by Mr. Murray that his comments or observations were exaggerated.

343. Mr Kennedy was questioned in relation to the affidavits which he swore in connection with the High Court application.

344. At para. 16 of his affidavit sworn on 22<sup>nd</sup> October 2001 he said:-

*"In circumstances where the initial findings of an audit suggest as in the instant case, that matters such as money laundering, tax evasion and significant breaches of the bank's practices and procedures have occurred it is essential, in my view that all of the documents and records of the bank are preserved so that the investigation can be concluded. I believe that it would be wholly inappropriate that such an investigation would be conducted in the presence of a manager where the reasonable initial inference to be drawn from the findings is that the manager may well have been involved in misconduct of a most serious nature. I do not accept that the placing of a manager on special paid leave is a disciplinary sanction."*

345. Paragraph 21 of the affidavit stated as follows:-

*"From my investigations it is clear to me that many of the*

*transactions undertaken by the plaintiff in the course of his duties as Manager have all of the hallmarks of money laundering and assisting customers with tax evasion and other illegal activities. I believe that my investigation discloses very serious disregard by the plaintiff of policies and procedures issued by the bank, particularly those relating to the encashment of cheques, issuing of drafts, safe custody and money laundering."*

When questioned he said he stood over such averments in the affidavit.

346. When questioned about the allegations of perjury he was referred to para. 20 of the amended statement of claim in relation to the allegation that the special investigation of the plaintiff was in fact aimed at supporting the malicious allegations and was primarily conducted and/or directed by Mr. Byrne. He denied that the report was authored by him to conceal Mr. Muckian's malicious allegations as alleged.

347. Mr. Muckian's allegations of dishonesty and malpractice did not taint the entire report, it merely pointed him in the direction where he felt there were unacceptable management practices in the branch which he subsequently investigated. There were three matters which originally came from Mr. Muckian that were referred to in the Special Investigation Report namely the credit card issues, McKean account and Reilly accounts. These matters were eclipsed by all the other matters that were found. The material contained in the report in relation to those three matters was based on his findings and not on the basis of Mr. Muckian's allegations. The remaining 55 matters in the report had nothing to do with Mr. Muckian.

348. He denied that he had conspired or colluded with Mr. Byrne, Mr. Mitchell or Mr. Condon to deprive the plaintiff of fair procedures or to injure his good name.

349. He denied that he concealed Mr. Muckian as the plaintiff's accuser. He was not the accuser as far as they were concerned, it was Mr. Kennedy and his colleagues.

350. The meeting of 22<sup>nd</sup> and 23<sup>rd</sup> May was conducted as part of the Special Investigation Report carried out by him. He denied that the Special Investigation Report was biased against the plaintiff or that it was produced on foot of incomplete and/or improper investigations.

351. He rejected that he conducted his investigations in a grossly partial, biased and an improper manner. He denied that he put pressure on Mr. Monaghan to say that signatures on lodgement dockets were not that of Mr. McKean. He denied that he accepted Mr. Muckian's allegations at face value

352. The placing on special paid leave was done so as they could investigate the allegations made by Mr. Muckian and the matters identified by the auditors in their work up till 20<sup>th</sup> April.

353. He said that the disciplinary inquiry conducted by Mr Dunne had a different format than normal and that Mr. Smith tried to overturn the process rather than dealing with the issues. He was involved in the Inquiry for some ten days. No explanation was put forward during his cross examination as to why the various transactions covered by the report took place.

354. He denied that he made any allegation of money laundering against the plaintiff personally. What he said in his report and evidence was that the plaintiff may have facilitated customers in relation to money laundering. When asked did he



suppress relevant parts of his investigation which exonerated Mr. Higgins, he denied same. The issues that were relied on throughout were matters resulting from the audit work, not Mr. Muckian's allegations.

355. In relation to all the allegations made against him in paragraph 54 of the Amended Statement of Claim he refuted them all and said that they were incorrect and in fact insulting to him.

356. He did not regard the letter of 13<sup>th</sup> August 2001 that was written by Mr. Byrne and referred to by Mr. Murray in his report as an improper attempt by Mr Byrne to influence him in the course of his investigations. There was nothing in that letter that influenced him to go back and have another look at any transaction. He had retired by the time the Dunne inquiry started.

357. He denied that Mr. Condon, Mr. Byrne and Mr. Mitchell went to great lengths to conceal Mr. Muckian or that there was a conspiracy. It was suggested to him as part of the concealment, they went to the length of not telling Mr. Hickey, the audit leader appointed to the Clanbrassil Street branch on 26<sup>th</sup> March. He denied this.

358. He subsequently met Mr. Muckian on one occasion on 20<sup>th</sup> April when he was on route to Dundalk. He queried him about an account opened by Phil Reilly's wife in her maiden name.

359. It was he who asked Mr. Hickey to go into to do the audit and he directed to him to do the three matters. He did not give him a large amount of information as he did not have the same.

360. Mr. Hickey had been speaking to him about matters in relation to the Reilly accounts, his lack of progress on the McKean account and his discussions with the plaintiff regarding the credit card situation. Mr. Hickey told him that he had received explanations from the plaintiff that he was not happy about.

361. The plaintiff had no involvement in the alteration of the mandate in Clanbrassil Street which was a matter the auditors looked at.

362. It is likely that Mr Byrne decided to pace the plaintiff on special paid leave after he had spoken to Marie Strain who confirmed she had gone with Mr Muckian to Mr Barry in relation to the McKean account. Mr. Byrne had told him during the day the three issues he had in mind which were the Reilly account, McKean account, the credit cards and the UDC.

363. He agreed that it was a serious matter for the manager of a bank of a large provincial town who had a managerial position for ten years to be placed on administrative leave. It was very hard to go back from it.

364. He was questioned extensively in relation to what was contained in the summary of findings and in particular the statement:-

*"Some statements have all the hallmarks of money laundering and assisting customers with tax evasion or other illegal activities."*

365. It was put to him that he had no evidence in relation to this. He said there was evidence of persons not conducting their affairs in a straightforward manner by using the bank and the bank's internal account to cloak their activities. He denied that the evidence fell far short of what would be required to level such extremely serious allegation against the plaintiff. There was not adequate traceability in

relation to the transactions.

366. He denied that the defendant was deliberately ramping up the gravity of the allegations by reference to money laundering or assisting customers with tax evasion or other illegal activities. There was a suspicion that money laundering could have been involved in the transactions.

367. He said that their findings were that the actions that the plaintiff undertook facilitated money laundering. It was not up to the defendant to prove that money laundering took place.

368. In relation to the meetings of 3<sup>rd</sup> September, 2001, he said he remembered being at one rather than three meetings and present at that meeting was himself and Gerry Mitchell where they discussed the process of the Dunne Inquiry. Ms. Nicola O'Brien was also at that meeting. He could not recall being present at a meeting at which Mr. Dunne was present, or indeed being present at a meeting which was to deal with the correspondence from Mr. Smith.

369. He denied that the defendant was trying to press the Gardaí to investigate the plaintiff and to proceed against him.

370. He denied he had any malice against the plaintiff or overstepped any procedures or any of the operations of internal audit in connection with the plaintiff.

371. The branch audit report related to the activities of the branch, whilst the Special Investigation Report related to the plaintiff alone. The branch audit would have issued earlier were it not for the fact that the internal audit team was occupied with the Special Investigation Report into the plaintiff and also Ms. Hamill. He denied that the manner in which the various reports had been produced was unprofessional and were not logical and were unfair to the plaintiff. The Special Investigation Report commenced after the Audit Review.

372. He denied that his affidavit and that of others sworn in the interlocutory application reflected a decision on the part of the bank that on no account was the role of Mr. Muckian to be disclosed.

373. He denied that his affidavit of 22<sup>nd</sup> October intentionally misrepresented the origin and purpose of the investigation or disciplinary process against the plaintiff, or that he intentionally misled the High Court by representing that the process against the plaintiff had its origin in the audit of the branch as opposed to the complaints of Mr. Muckian, or that he intentionally concealed the role of Pat Byrne in directing an audit in order to procure the removal of the plaintiff, or that the suspension falsely and intentionally represented that the suspension arose from and was warranted by the *bona fide* belief of the defendant that plaintiff was guilty of facilitating money laundering, tax evasion and other alleged activities.

374. He said that by 20<sup>th</sup> April 2001 they had additional information in relation the McKean case insofar as they found a lodgement document which linked the account to the Begleys in some way, there were some transactions from the Reilly accounts that Mr. Hickey was not happy with and they had discussed the credit card applications with Mr. Higgins. In relation to the audit report, the issue addressed in relation to McKean was that the wrong address had been applied since the opening of the account. He could be using the account for the avoidance of tax or something similar. He denied that he used language in the Special Investigation Report to

"ramp up" the gravity of the findings in that report.

375. He stated he never at any stage asked anyone in the Money Laundering Department to take steps to have the plaintiff prosecuted. He was at one meeting with the Gardaí and it was at their request. They wished to talk through the issues that had been raised in the report.

**Evidence of Ms. Deirdre Freely**

376. Ms. Freely joined the defendant in 1978 and went to the audit department in 1986. At the time of the hearing she worked in Network Governance and Control. Where an audit was undertaking it would be normal to produce a report which would have a circulation list.

377. There were two types of audit, an audit review where there is no rating and an audit report where there is a rating. In reality there was little difference between them and the testing would be the same.

378. She said the audit section would become involved in special investigations from time to time. She was an auditor on the team in relation to the branch audit and also the special investigation. She did not join until the second day. At the commencement of the audit, it was intended to be a normal rated audit.

379. It came to her attention that shortly after the audit started that additional work was being undertaken and that they were looking at credit cards. Brendan Hickey and Freda McCague were involved.

380. They encountered problems with a mandate that had been altered during the course of the audit which relating to Dundalk UDC. Two copies of a UDC mandate were shown which were different and one had been altered during the course of the audit. She heard the plaintiff had been placed on special paid leave on 24<sup>th</sup> April and became aware from Brendan Hickey that various documents had been found in the plaintiff's office including a brief case of cash. She said that Brendan Hickey left the audit on 26<sup>th</sup> April. He had been unwell for some time leading up to that.

381. She did not hear there was a special investigation until after 20<sup>th</sup> April. On 24<sup>th</sup> April she knew they were working on a dual function.

382. She instanced various matters of concern to her in her audit work in discovering draft requisitions that were not signed by the client who wished to purchase the draft. They also discovered a large number of blank withdrawal forms on accounts which could be dangerous instruments to be held.

383. In relation to obtaining a bank draft or a sequence of bank drafts without the applicant signing for them from an audit point of view there would be no audit trail to be traced. She also came across instances of such transactions involving persons who were not customers of the bank.

384. She attended the meeting held on 22<sup>nd</sup> and 23<sup>rd</sup> May between John Kennedy, the plaintiff and his solicitor, Mr. Kevin Smith. She produced notes of the meeting. They went to the meeting seeking explanations for some of the items that they had discovered and were hoping to obtain answers from the plaintiff. From the outset she said there heated exchanges as to what the meeting was about as in special paid leave versus suspension. Mr. Kennedy stated that they were not at the disciplinary stage and that the plaintiff was on special paid leave. Mr. Kennedy repeatedly insisted that he was not at the disciplinary stage and that he was seeking

explanations for various transactions. He went through the various matters over the two days requesting information. Mr. Smith indicated that they wanted all the information and once they had it in its entirety a response would be made.

385. Issues also arose in respect of the Reilly transactions in trying to identify which accounts transactions applied to and who was operating the accounts. A cheque payable to one member of the family might go to the credit of another member.

386. At one stage when the issue of suspension versus special paid leave arose again, Mr. Kennedy left the room and took advice on the phone. He confirmed the disciplinary procedures were not in place at such a time. He said that having regard to the fact that the plaintiff was refusing to answer questions, the defendant had agreed to put in writing the issues that are of concern at this point of time. Mr. Smith and the plaintiff indicated that they wanted all the issues to be put in writing and also wished to get a hierarchy of issues so they would know the most important one.

387. It was her impression that they would get answers once all the issues had been put to the plaintiff in their entirety. She said that Mr. Smith asked if fraud was alleged to which Mr. Kennedy replied in the negative but stated there were a number of transactions which could be construed as fraud if not explained. She said that she subsequently became aware that the audit was not going to be rated.

388. On 20<sup>th</sup> April, 2001, she is likely to have been at the Park Street branch looking for documents and she did not know about the allegations against Mr. Higgins. She was looking for a docket in connection with the McKean account. Whilst the bank did not have a loss out of the matters investigated there was a vulnerability or a potential for loss.

389. She said that it was not normal procedure for a cashier to cash an instrument when the customer was not present particularly when the instrument was not endorsed.

390. She said that there were 85 instances of breach of draft issues in procedures which were detailed in either the Dunne report or the Special Investigation Report. She accepted that this included thirteen instances in respect of the McVeigh transaction.

391. She maintained that sundry credit suspense account should not be used for the benefit of a customer's account.

392. In her view there was a nothing else for the plaintiff to know that might be a cause for him being placed on special paid leave other than the matters that were raised by Mr. Kennedy over the two day meeting on 22<sup>nd</sup> – 23<sup>rd</sup> May.

#### **Evidence of Mr. Gerry Gibson**

393. Mr Gibson joined the Defendant in 1973. In 1997 he was appointed manager of Group Fraud Prevention Unit and in 2000 he was also appointed to the role of Group Money Laundering Reporting Officer.

394. He said that the Criminal Justice Act 1994 creates certain money laundering and related offences. Section 32.2.3 imposes certain obligations on designated bodies, including banks, and specifically in respect of the reporting of what is described in the Act as suspicious transactions.

395. If he felt a transaction was suspicious he would report it to the Garda authorities by way of a Suspicious Transaction Report.

396. Section 57 of the Criminal Justice Act 1994 imposes an obligation on individuals within a designated institution to report their concerns where they have a suspicion of money laundering. When they report the matter to a designated person they are deemed to have discharged their statutory obligation. At the time in question he was the designated Money Laundering Reporting Officer in BOI.

397. Section 58 deals with the "tipping-off" offence. Where a disclosure has been made to the authorities, or where there is an intention to make a disclosure to the authorities, the individual/organisation is precluded from advising the subject of the report that there is an intention to make a disclosure.

398. In 2001 his team at the Money Laundering Department consisted of himself and three others. They received reports from all of the Group businesses and had to assess them to decide if a disclosure was necessary or not.

399. He described a document from 27<sup>th</sup> April 1995 which introduced all BOI staff to the concept of money laundering and issued instructions in relation to their obligations.

400. His department was very independent of other departments. His line manager was Michael Condon but this did not in any way affect the independence of his department.

401. The author or recipients of the Special Investigation Report would have had to bring it to his attention as the transactions in question come within the definitions of suspicious transactions in the Act.

402. He looked into each of the transactions he felt he was obliged to make a STR to the authorities. As a result he wrote on 3<sup>rd</sup> September 2001 to Det. Supt. Willie McGee, Deputy Director in the Garda Bureau of Fraud Investigation. He did so in compliance with his obligations under the 1994 Act.

403. His opinion at the time was that plaintiff through his behaviour persistently and systematically breached the provisions of the Criminal Justice Act 1994. The letter to Supt. McGee stated that on an individual basis there may be insufficient evidence to reach a determination that a transaction or series of transactions is suspicious within the meaning of the Act. However, he wrote that because there were so many questionable transactions and because records had been falsified he had no option but to conclude that there was wrongdoing.

404. In relation to Mr Murray's evidence as an expert that the transactions could not be said to have the hallmarks of money laundering as they didn't contain the element of 'placement', he said all the elements of money laundering were present in number of the transactions in the Special Investigation Report.

405. He referred to the Kelly transactions by way of example which concerned a cheque for £43,000stg which was negotiated without endorsement and without being processed through a customer account. He was concerned by the lack of transparency and accountability, and the lack of response of the plaintiff.

406. In relation to the McVeigh transaction he said this was a high value transaction which was negotiated without endorsement. He said that the 13 drafts issued could

be described as 'layering'. He said that in the absence of explanation he had no option but to make a disclosure.

407. In the O'Toole case, four cheques were made payable to a limited company. They were negotiated without being processed through a customer account and against this a personal cheque was issued to Mr O'Toole. The funds were converted without being properly recorded.

408. His department sent an individual report to the Gardaí in relation to every transaction in the Special Investigation Report.

409. On 7<sup>th</sup> November 2002 Inspector Gerry Giblin suggested that he write a letter of complaint to the Gardaí under section 31(12). Mr Gibson said that the possibility of a prosecution under s.31(12) seemed to be something that was interesting the Guards at the time.

410. He was familiar with the information the Gardaí had given his department in relation to their investigation and also what information they provided about their inquiries and contact with police elsewhere. Margaret Breadon from the Money Laundering Department primarily dealt with the Gardaí on this matter.

411. He received an email from Ms Breadon on 10/10/02 informing him of what happened at a meeting she had attended with two members of An Garda Síochána, namely Pat D'Arcy and Maureen McGrath, in relation to Mr Higgins. She was told that in order to prosecute Mr Higgins under s.31(12) they would need to allege a specific crime such as tax evasion, forgery or fraud. The Gardaí recommended they get legal advice in relation to making a formal complaint. She was advised that the Garda Money Laundering Investigation Unit had found no criminality. The Gardaí were saying that they appeared to be at the end of the road.

412. On 14<sup>th</sup> November 2002 Ms Breadon and Sinead Mitchell, also from his department, again met with two Gardaí. Mr Kennedy was also in attendance at this meeting. The purpose of this meeting was to consider that since the money laundering route was not being pursued what, if anything, could be used in relation to a fraud charge. Garda McGrath explained that they had carried out background checks on all individuals named in the report and came up with nothing major. All the people did exist.

413. Neither himself nor any member of his staff was improperly influenced in any way as to how to do their work by John Kennedy, Michael Condon, Pat Byrne or John Dunne. He had no input whatsoever in relation to the Dunne Report.

414. He never discussed this matter with John Dunne. He was not put under undue influence in relation to the Kennedy Report by anybody at all and nobody in the Bank expressed a preference as to how they would like him to deal with it.

415. He does not agree with Mr Murray's criticisms of Mr. Kennedy's use of the term 'the hallmarks of money laundering'. He would largely concur with the findings and conclusions that the Special Investigation Report reached.

416. Michael Condon may have told him there was a special investigation ongoing before he received the report but he didn't know what exactly was being looked into.

417. He was not aware of the existence of Hugh Muckian or that Mr Muckian had

made serious allegations against Mr Higgins at the outset.

418. He was not aware of any of the meetings held on 3<sup>rd</sup> September, 2001.

419. He was dependent on the Special Investigation Report in trying to understand the various transactions.

420. Even if the plaintiff had made himself available the transactions in question still gave rise to serious concern and he would have made a report in any event.

421. Nobody told him to link Mr Higgins and Martina Hamill in his letter to the Gardaí.

422. He discussed a memo of a meeting of 5<sup>th</sup> September, 2001 which he attended with Margaret Breadon and three members of the Garda Síochána. The meeting was arranged after the Gardaí had the opportunity to read the reports he gave them on 3<sup>rd</sup> September. The purpose of the meeting was likely to have been clarifying the disclosure.

423. At the meeting they agreed to make a 'sanitised report' for the Gardaí which focused on money laundering. They told the Gardaí there was no evidence that John Higgins and Martina Hamill had defrauded the Bank.

424. He accepted that if any pecuniary benefit was accruing to the plaintiff he would have expected it to have turned up in one of the audits.

425. He agreed that a worksheet completed on 14<sup>th</sup> November 2002 by Mr Gibson's department contained very serious matters that were never put to Mr Higgins.

426. It was put to Mr Gibson that it was extraordinary that serious allegations were being canvassed against the plaintiff while the disciplinary process was ongoing and none of them were mentioned to Mr Higgins before Mr Dunne. Mr Gibson said it was up to the Gardaí to put these matters before Mr Higgins, should they so decide.

427. Mr Gibson said that he was not influenced or directed in any way by anybody external to him in his unit in relation to how he handled the case. He did what he was obliged to do. Mr Kennedy never tried to influence him or his level of contact with the Gardaí. Mr Kennedy never set the agenda for meetings with the Gardaí or press for a prosecution of Mr Higgins.

428. Mr Callanan SC accepted that there was no evidence to identify Mr. Gibson or the Money Laundering Department of the defendant as parties to the conspiracy. He added that Mr. Gibson and his Department may have been an "instrument" in the conspiracy against the plaintiff. No case was made that Mr. Gibson, or those in his Department, were involved in the conspiracy.

#### **Evidence Mr. John Dunne**

429. He started work with the National Bank of Ireland in 1969. He was promoted to Assistant Manager Administration in Drogheda in 1979. In 1985, he was promoted to Manager rank as Deputy Manager in Wicklow. In 1988, he was promoted to Manager of Wicklow branch, which was a commercial branch with 23 staff. From 1989, in addition to his branch managerial responsibilities, he also had other branches reporting to him. In October 2000, he took up the position as Regional Manager for South Leinster, covering counties Wexford, Wicklow, Carlow and Kildare. He had some 23 branches and about 400 staff. He retired in November

2010. As District and Regional Manager, he had involvement or knowledge of disciplinary procedures. He had been nominated by the bank to conduct inquiries.

430. At the time he commenced this inquiry, he was aware for 15-20 years that special paid leave was an action that the bank took when some serious matters in relation to some staff happened and it was necessary to place an employee on special paid leave. Special paid leave allowed the employee to be removed from the branch they were in and also allowed such person time to answer the questions that an auditor might wish to put to them. He would have placed staff on special paid leave himself. He said that from his own experience of placing somebody on special leave, he would speak to the staff members and say that matters had come to his attention that required further investigation which had concern about but they would not necessarily told what the matters were. He was aware of certain persons who had been placed on special paid leave reverting to their former positions. Before he embarked upon the inquiry, he had no knowledge of Mr. Muckian. He had limited knowledge of the plaintiff, knowing that he was a senior bank official in the Park Street branch. He would have met Mr. Byrne at the time he was appointed Regional Manager. He would have met Mr. Byrne in 2000 at a meeting of regional managers.

431. In relation to Mr. Condon, he could not recall ever contacting Mr. Condon in relation to a matter. He is likely to have met him at an executive conference or meeting. In relation to Mr. Kennedy, he cannot remember ever meeting him. He knew he was an auditor. In relation to Mr. Mitchell, if he needed advice in relation to staff matters, he would have had occasion to contact him. It would be on an irregular basis.

432. He got a telephone call from Mr. Paddy Murphy requesting him to conduct a disciplinary hearing. He gave him very little details of the reasons. He sent him the document that is called '*Group Internal Audit Report*' (which was the Special Investigation Report) as distinct from the branch audit report. It is dated 23<sup>rd</sup> August, 2001. He got a letter of appointment with that document. He wrote a letter to Mr. Smith on 28<sup>th</sup> August, 2001, setting out his appointment and proposed course of action. He was not involved in the application to the High Court to restrain the inquiry. Where the first hearing took place on 29<sup>th</sup> April, 2002, he recalled inviting the plaintiff to a meeting after the High Court hearing to respond to the Special Investigation Report which he had previously invited the plaintiff to comment on in his original letter. He regarded as important that the person being investigated (the plaintiff) should respond to the report prepared at that stage so that he could conduct a fair inquiry.

433. The first meeting of the inquiry took place on 29<sup>th</sup> April. It was evident that Mr. Smith and the plaintiff did not want a disciplinary hearing conducted by him and they were dissatisfied with the ruling of the High Court (on the interlocutory application). The plaintiff required the right to cross-examine witnesses before giving his evidence and Mr. Dunne accepted that as part of fair procedures. The early days were acrimonious and there were numerous disputes between Mr Smith and Ms. O'Brien. The inquiry was quite different to the disciplinary inquiries he had previously been involved in. The other matter that came to the fore which he had never before heard of was a plot or conspiracy to remove the plaintiff from his position as manager. Another issue that was raised was the question about the bank's right to place the plaintiff on special leave. From the outset, he indicated he was never going to make a judgment on the bank's right to place the plaintiff on special paid leave. As he saw it, the High Court had confirmed his right on behalf of the bank to conduct the disciplinary hearing. He was not going to make a finding in relation to the conspiracy theory. As far as he was concerned, the limits of his inquiry were set out in the Special Investigation Report and these were the matters



which he was going to put to the plaintiff. Mr. Smith continued to raise issues about the ambit of the inquiry at every opportunity he had. So far as the conspiracy was involved, it was that Mr. Byrne had his own personal agenda to remove the plaintiff from his position and that people such as Messrs. Mitchell, Condon and Kennedy had been used to achieve the same. As far as he was concerned, he was not going to compromise himself in this case. He was never contacted by Mr. Byrne urging a particular result.

434. On 2<sup>nd</sup> July, 2002, he received a letter from Ms. Nicola O'Brien in relation to the conduct of the inquiry. It stated that the audit in the Dundalk branch was prompted by a complaint made in confidence against the plaintiff by a fellow employee of the bank and that it was incumbent on the bank to carry out an investigation in response to the complaint. An audit of the branch was carried out, which in turn triggered a wider investigation and ultimately, the Special Investigation Report of 23<sup>rd</sup> August, 2001, was produced. The letter indicated that it was the report with which the disciplinary inquiry should be concerned and extraneous witnesses would simply prolong the disciplinary inquiry. It expressed concern that substance of the report had not been addressed and that other issues were being raised, namely, the bank's right to place the plaintiff on special paid leave. It suggested that for the purpose of the letter, that the issue of special paid leave was irrelevant to the disciplinary inquiry.

435. It stated less there should be any issue as to a potential conflict of interest that Mr. Dunne may wish to consider obtaining independent legal advice from solicitors at the bank. Following that letter, he decided to take outside legal advice from Mr. Seamus Given of Arthur Cox. Mr. Given attended one of the hearings and both Mr. Smith and Ms. O'Brien were invited to make submissions at that meeting. It was followed by a draft ruling being issued by Mr. Dunne which was circulated to both sides. He was not influenced by Mr. Byrne in relation to the ruling which he issued.

436. He denied that he was endeavouring to exclude material evidence including evidence against the defendant.

437. The reason he sought independent legal advice was that the hearing was going around in circles and getting nowhere, and he did not think that it would ever finish. He failed to stop the conspiracy issue being raised by Mr. Smith over the first ten days despite the fact that he was not going to make a ruling on it as he had not been asked to do so by the defendant.

438. He had no reason to bear bias or malice towards the plaintiff. The final ruling, following issuing of drafts, was dated 3<sup>rd</sup> December, 2002.

439. In his letter of 3<sup>rd</sup> December to Mr. Smith, Mr. Dunne said certain matters were not relevant to the issues to be considered by him and reiterated that he was dealing with the matter under para. 4(a) of the Disciplinary Procedures as set out in his letter of 28<sup>th</sup> August, 2001. He said that having considered the submissions made by Mr. Smith in relation to his draft ruling, he had finalised his ruling and enclosed a copy. He said that at the meeting on 27<sup>th</sup> November, Mr. Smith, for the first time, claimed that he was unaware of what charges were being made against the defendant under the Disciplinary Procedure and he said that he could not accept at such a late stage that the defendant was unaware of those charges. However, he confirmed that the charges were set out in the Special Investigation Report of 23<sup>rd</sup> August, 2011, which was referred to in his letter of 28<sup>th</sup> August, 2001. He said that the report and the documentation referred to therein were self-explanatory and required no further elaboration by him. The charges laid against the plaintiff were the 16 charges set out in para. A.3 together with the additional matters referred to

in para A.4 of the Special Investigation Report, in each case, as detailed in section B of the report and also the documentation referred to in the report, including the schedule of issues which was forwarded to him by Mr. Kennedy on 14<sup>th</sup> June, 2001, in respect of which *errata* were identified by Mr. Kennedy on 20<sup>th</sup> June, 2001. The letter stated that it was for the plaintiff and his representative to respond to the charges contained in the report and that he should be aware that the matters raised in the report are such as to call into question whether the bank can continue to have sufficient trust and confidence in the plaintiff so as to retain him in employment.

440. In relation to his ruling, he said he was the author of the ruling but his legal advisor would have an input into it. The ruling was not part of a conspiracy or as a result of being "turned" by the bank to alter his position.

441. On 24<sup>th</sup> January, 2003, Mr. Smith wrote to Mr. Dunne claiming that the plaintiff had not been furnished with the specifics relating to each allegation of wrongdoing, together with the clear indication as to the context in which the bank makes each charge, the evidence which supports same, and the potential sanction. The letter complained about the inadequacy of the charges based upon the Special Investigation Report.

442. On 13<sup>th</sup> February, 2003, Mr. Smith wrote a nine-page letter disagreeing with the manner in which the process was being conducted and restricted to the Special Investigation Report. He claimed that Mr. Dunne was entrenched in the bank's blinkered and unfair view of the scope of the process and that the report is the product of a maliciously motivated attack on the good name, integrity and professional standing of the plaintiff. The letter complained that the defendant's so-called accusers had not conducted themselves in an impartial or unbiased way as is required of auditors in preparing a Special Investigation Report.

443. As far as Mr. Dunne was concerned, it was the defendant's obligation to prove to him that the matters that were in the Special Investigation Report were correct and he said he gave every opportunity to the plaintiff to dispute what was in the report or to bring to him information that would suggest that such matters were not correct or true.

444. Following this correspondence, he said that one day there was a change in the approach being taken by the plaintiff and the plaintiff himself began participating in dealing with the matters that were set out in the Special Investigation Report.

445. He said the plaintiff was not accused of failure to complete for suspicious transaction reports and if such were in the Special Investigation Report, he would have pursued them. He was referred to an email from Margaret Breadon to Gerry Gibson dated 10<sup>th</sup> October, 2002 which stated MLIU have looked at everyone involved and have found no evidence of criminality. Also reference was made to a note of a meeting of 14<sup>th</sup> November, 2002 which stated that:-

*"Detective Sergeant Maureen McGrath explained they had carried out background checks on all the individuals named in the report and came up with nothing major. She also explained that if it was money laundering, as suspected there had to be a crime."*

446. He denied that he knew or that it could be inferred he knew of the reference to the Gardaí of the suspicious transaction reports sent by Mr. Gibson. It was suggested to him that in relation to his conclusion at para. 2 of this report that the bank was exposed to an unacceptable risk that money laundering might take place and to that extent he may have facilitated money laundering that he did so to shore up Mr. Kennedy's reference in his report and in his affidavit to "*all the hallmarks of*

*money laundering and assisting customers with tax evasion or other illegal activities”* which he rejected.

447. When he was asked why he did not exonerate the plaintiff of money laundering and facilitating tax evasion he said that he had found evidence that the plaintiff had not been in compliance with the bank’s operating procedures and there were multiple transactions that he had so admitted and in such circumstances how could he exonerate him.

448. He said that the plaintiff did not accept in front of him that there were numerous breaches of procedures. The plaintiff accepted that those transactions happened but there was ambivalence in terms that there were serious breaches of procedure. Mr. Dunne satisfied himself that there had been numerous breaches of procedure. He said he got the impression that the plaintiff did not appear to be aware of the gravity of his failure to observe the defendant’s procedures.

449. He said there was a significant amount of agreement between Mr. Kennedy and the plaintiff in respect of certain transactions and where they could not agree he had to take a view on such transactions. He then moved to the bank’s procedures and assessed the transaction against the procedure to see if the rules were broken. It was only when he had gone through all the breaches that he considered whether there should be a sanction and what that sanction should be.

450. When considering the appropriate disciplinary measure and having regard to his conclusions what he took into consideration was the plaintiff’s failure to comply with bank procedures that were designed as anti-money laundering procedures and anti-tax evasion. He did not say that there might be tax evasion or money laundering. The plaintiff failed to comply with the procedures which the defendant had put in place to stop customers or to stop helping customers with tax evasion or money laundering.

451. He said that from the outset there was an attempt to defeat the process that he Mr. Dunne was engaged in. Mr. Smith wanted Mr. Dunne to make a determination on whether the bank was entitled to place the plaintiff on special paid leave and Mr. Dunne informed him that that was not his function. Notwithstanding this, Mr. Smith spent a lot of time pursuing it.

452. He rejected the suggestion that the inquiry had proceeded in a reasonably efficient manner up until the point at which Mr. Dunne at the bank’s prompting changed direction and when Ms. O’Brien wrote to him the letter of 2<sup>nd</sup> July, 2002.

453. The whistleblower suggestion disclosing Mr. Muckian’s identity came on second or third day of the Dunne inquiry as a result of a question from Mr. Smith to Mr. Kennedy. That was the first time Mr. Dunne knew that there was a whistleblower and had no knowledge of the person. Mr Muckian was not an accuser of the plaintiff in the Special Investigation Report.

454. He could not accept neither Mr. Higgins nor Mr. Smith did not know what the charges were. The plaintiff would be aware of the gravity of the accusations that were in the report. In the *McVeigh* case there was the placing of money, the layering of money and the reintegration of money all of which had the attributes of money laundering. The plaintiff would be aware of that as he was.

455. He said he had no knowledge of the money laundering section’s communications with the Gardaí until 2-3 weeks before he gave evidence in these

proceedings.

456. The plaintiff said at the outset to Mr. Dunne that he was fully familiar with all the bank's procedures.

457. Mr. Dunne is referred to a memoranda prepared by Nicola O'Brien of a number of meetings held on 3<sup>rd</sup> September, 2001. The note recites that the first meeting was held with Mr. Dunne, Mr. Mitchell, Mr. Mangan and Mr. Kennedy and initially was confined to dealing with matters relating to the plaintiff's non-availability to attend a scheduled meeting due to ill health. He stated that he had no recollection of the meeting. He would not accept that if there was to be a meeting before the hearing that Mr. Smith should have been there. In the normal course of events if a hearing was scheduled, he would often have a meeting the day before preparatory to a hearing.

458. He was certain that a whistleblower was not mentioned at the meeting of 3<sup>rd</sup> September, 2001.

459. Whilst the solicitors for the plaintiff and the defendant had agreed on a list of witnesses when they wanted, he came to the conclusion that some of those witnesses had no relevance to the case. It is against that background that the letter of 2<sup>nd</sup> July, 2002 was received from Ms. O'Brien and in respect of which he delivered his ruling on 3<sup>rd</sup> December, 2002.

460. He denied that his ruling of 3<sup>rd</sup> December, 2002, was a complete volt-face, reversing of the entire direction of the hearing up to that point. If they had continued in the manner in which the inquiry had been going, it would have continued on for three to four years more.

461. In relation to the documents found on the plaintiff's desk, Mr. Dunne said it was simply not believable that this was work in progress although he had found that there were instances where the documents could reasonably be accepted that they were work in progress.

462. In the hierarchy of responsibilities which a manager has, adherence to compliance standards lies at the top of the apex.

463. The fact that no loss is suffered by the bank is not an excuse for deviation from compliance.

464. In relation to the preparation of his Report as there was not template for a report of this kind, he sought the assistance of Ms. Nicola O'Brien in relation to the format of the report. The report was substantially completed, he would have emailed the entire report to Mr. Given and he would have two or three teleconferences with Mr. Given. Neither Mr. O'Brien nor Mr. Given made any of the decisions on his behalf.

465. In deciding the appropriate disciplinary measure, he took into consideration the failure of the plaintiff to comply with bank procedures which were designed as anti-money laundering procedures and anti-tax evasion. They did not say that there might be tax evasion or there might be money laundering.

466. In relation to the McVeigh, O'Toole and Conway transactions where the breaches of procedures were accepted by the plaintiff, it was his opinion that for

each of the transactions alone dismissal would be the appropriate sanction.

### **Findings of the Dunne Inquiry**

467. Like his colleagues, Mr. Condon, Mr. Mitchell and Mr. Kennedy, Mr. Dunne was an experienced and professional banker of many years standing when he was appointed by Mr. Murphy to take charge of the disciplinary process. He was totally independent of the plaintiff and the alleged conspirators.

468. I find that from the outset he sought to be fair and impartial and afford the plaintiff every opportunity to answer or rebut the various matters raised in the Special Investigation Report, as he was mandated to do pursuant to the letter of Mr. Murphy of 27<sup>th</sup> August 2001. I accept the evidence that at the inquiry there was lengthy interventions and questioning by Mr. Smith on behalf of the plaintiff in relation to the reasons for the suspension of the plaintiff on 20<sup>th</sup> April, 2001, the conspiracy which was being alleged by the plaintiff against Mr. Byrne and others in relation to procuring the termination of the plaintiff's employment and the predetermination of the disciplinary inquiry by Mr. Dunne, the involvement of Mr. Muckian and the request that he should be required to give evidence. In addition to these issues there were constant requests by Mr. Smith to furnish the particular charges or accusations which the plaintiff faced, details of the evidence pertaining to each such charge and a characterisation of the seriousness of such charges and the range of potential disciplinary sanctions attending to such charge. Indeed these latter matters continued to be raised in the closing days of the Dunne inquiry notwithstanding that at that stage the plaintiff had for the first time in the last three – four days of the inquiry accepted the truth of many of the transactions in the Special Investigation Report whilst not accepting some of the consequences.

469. In addition to these matters there was the allegation that as a result of the intervention of Ms. Nicola O'Brien, Solicitor, by her letter to him of 2<sup>nd</sup> July 2002 and his agreement to obtain independent legal advice, that Ms. O'Brien through Mr. Dunne was effectively dictating the manner in which the inquiry was to be run.

470. I find that Mr. Dunne acted in good faith throughout the inquiry and sought to be as fair as possible to the plaintiff. He was entitled to say that his mandate was to inquire into the issues raised in the Special Investigation Report. Furthermore, in my opinion he was correct to assert that the charges/accusations were sufficiently set out in the Special Investigation Report and were capable of being understood. Whilst it was not necessary for Mr. Dunne to produce a hierarchy of the charges he spent some considerable time at the inquiry giving his opinion of the potential gravity of some of the accusations and the range of appropriate sanctions that might be attendant thereto. I further find that Mr. Dunne did not conduct the inquiry at the behest or instigation of the defendant and in particular at the request of Ms. Nicola O'Brien on behalf of the defendant in her letter of 2<sup>nd</sup> July.

471. Mr. Dunne stated that following his ruling in December 2002, he confined the witnesses to such witnesses as he saw relevant and this is set out in his ruling but that he allowed to stand the agreement that had previously been made between the legal representatives of the parties in relation to the persons who were to be called as witnesses.

472. Furthermore, he correctly stated that he placed the onus of proof in respect of the accusations against the plaintiff on the defendant at his inquiry and pointed to the number of instances where he gave the plaintiff the benefit and in others found that the defendant had not made out its case under a particular heading.

473. In my opinion, the bank was entitled to set the parameters to the inquiry and

the matters to be investigated. There was no necessity to have Mr. Muckian and others as a witness if they were not identified as part of the Special Investigation Report. The defendant chose to prove its case by reliance on the issues in the Special Investigation Report to be proved by witnesses including Mr. Kennedy and others.

474. In the course of his submissions the plaintiff referred to a term now implied by the Courts, namely, the implied duty to maintain trust and confidence. He submitted that the mere non-disclosure of Mr. Muckian was a breach of such implied duty. He said this non-disclosure could be challenged as a breach of a contractual term or of constitutional rights including his right to a good name. Mr. Callanan SC accepted that an employer can pick and choose the allegations that he makes against an employee without disclosing everything he knew.

475. The extent of this implied duty has not been fully defined by the Courts. I am not satisfied that it extends to an obligation to disclose Mr. Muckian and his role as an "accuser" whose evidence can be cross-examined.

476. The defendant was entitled to rely on its accusers as it saw fit pursuant to what was stated in the *Abbeylara* case.

477. Mr. Dunne robustly denied that he was party to any conspiracy that Mr. Byrne and/or others in relation to the plaintiff's dismissal and/or that he was involved in any charade of a disciplinary inquiry which had a predetermined outcome from the outset. From the evidence given he was fully justified in such stance.

478. From the evidence the court has heard, I am satisfied that during the greater part of the Dunne inquiry which lasted some 21 days that Mr. Smith on behalf of the plaintiff repeatedly requested Mr. Dunne to entertain the issue of the conspiracy by Mr. Byrne and his associates to terminate the employment of the plaintiff, the issue as to the suspension and the reasons therefore together with requests to have Mr. Muckian made available for cross examination. Mr. Dunne correctly stated that these were not issues to be addressed by him pursuant to the mandate from Mr. Murphy. The following passage is apt in the case having regard to the attitude taken by the plaintiff and his adviser throughout the disciplinary hearing namely as was stated by Morris J. in *Gallagher v. Revenue Commissioners* [1995] I I.R. 55 :-

*"I have come to the conclusion, and I have never heard an argument to the contrary, that a citizen's constitutional rights to fair procedures cannot be altered or diminished merely by his attitude or reasons for ensuring that these rights are afforded to him. The rights cannot be taken away from him merely because his conduct is alleged to be unmeritorious."*

479. I am satisfied that notwithstanding the repeated protest from Mr. Smith and the prolongation of the inquiry that the plaintiff's right to fair procedures during the Dunne inquiry were afforded to him.

480. I am further satisfied that the test has been satisfied by the plaintiff which was set out by Keane C.J. in *Maguire v. Ardagh* [2001] 1 I.R. 385 where he stated:-

*"no citizen whose good name may be affected by the proceedings of a committee of this nature... can be constitutionally denied in advance the right to cross-examine those whose evidence might so affect his rights."*

481. The Court is satisfied that Mr. Dunne in discharging his role acted in a fair,

truthful and measured manner both in the way he carried out the Inquiry and the manner in which he gave his evidence in this Court. He afforded the plaintiff fair procedures throughout. I accept I have found that the Defendant denied the Plaintiff a right of appeal. In my opinion, having regard to the manner in which Mr. Dunne expressly carried out the Inquiry under the 1985 procedures, this decision must be regarded as the erroneous decision of persons other than Mr. Dunne made after the findings of the Inquiry were made known.

### **The Special Investigation Report**

482. The Special Investigation Report was produced by Mr. Kennedy on 23<sup>rd</sup> August, 2001 and the branch audit report was produced on the following day, 24<sup>th</sup> August, 2001. The special investigation report at para. A.3 summarised issues that had emerged from Mr. Kennedy's inquiries which he said *could indicate*:

- "(i) Breaches of the banks code of conduct.*
- (ii) Facilitating money laundering.*
- (iii) Facilitating customers with tax evasion.*
- (iv) Assisting customers with the conversion of cheques made payable both to personal and non-personal entities.*
- (v) Assisting customers with the operation of accounts with false names and addresses.*
- (vi) Non-adherence to the bank's policies/procedures on issuance of drafts to customers/non-customers.*
- (vii) Non-adherence to the bank's encashment policies.*
- (viii) Failure to ensure that items cashed were endorsed and/or date branded.*
- (ix) Misuse of impersonal accounts at Clanbrassil Street branch for customer transactions.*
- (x) Abuses relating to revenue and expenditure accounts at Clanbrassil Street branch including personal expenses claimed.*
- (xi) Serious breaches of the bank's safe custody and hold mail procedures.*
- (xii) Unauthorized withdrawals on customer accounts.*
- (xiii) Breaches of lending discretion.*
- (xiv) Alteration of financial information on application forms with a view to having facilities made available by way of credit cards to customers.*
- (xv) Financial transactions incorporating unauthorized withdrawals and conversion of funds involving a customer of both Clanbrassil*

*Street and Kildare branches.*

*(xvi) A number of PINs and signed withdrawals were held by JH. This practice is unacceptable as it could facilitate/indicate improper use."*

### **The Allegation of Perjury**

483. In the plaintiff's submission the perjury relates to the clear statement in the evidence on affidavit of Mr. Byrne and Mr. Kennedy to the effect that the suspension/placing on special paid leave was the result of the audit process. The plaintiff contended it was not the result of the normal audit process but the result of what Mr. Muckian told Mr. Mangan, Mr. Kennedy and Mr. Byrne.

484. In relation to the allegations of perjury against Mr. Byrne and Mr. Kennedy arising from statements in their affidavits in the interlocutory proceedings, it was submitted by the defendant that there was not any credible evidence asserted to substantiate the perjury claim.

485. I have considered the evidence identified by the plaintiff in this regard. Contrary to what the plaintiff asserts, I find that the audit did not cease on 20<sup>th</sup> April and give way to the special investigation. The work associated with the audit continued after 20<sup>th</sup> April. It is correct to say that separately after 20<sup>th</sup> April the special investigation into the plaintiff began but the audit continued. In considering the plaintiff's claim in relation to matters stated by Mr. Kennedy in his affidavit it has to be remembered that the plaintiff had repeatedly been requested to cooperate in the investigation and respond to the matters raised but he failed to do so. The comments made by Mr. Kennedy and the consequences and potential conclusions he referred to were made by an auditor in the context of an investigation without the input of the plaintiff. Furthermore, Mr. Kennedy's affidavit and that of Mr. Byrne were made in response to the affidavit of the plaintiff who exhibited the Special Investigation Report.

486. The court rejects the allegations of perjury against Mr. Byrne and Mr. Kennedy. The Court acknowledges the necessity for care and exactitude to be adhered to in swearing affidavits to be relied on by the court.

### **The Conspiracy- Legal**

487. The defendants submitted that the tort of conspiracy consisted of the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. If such an agreement damages another person then it is actionable at the suit of that person for the damage so inflicted. However, it is not enough merely to show the damage was caused by the agreement; it has to be shown that the infliction of that damage was the objective of the agreement. Reliance was placed on the Supreme Court in *McGowan v. Murphy* (Unreported, 10<sup>th</sup> April, 1967) where the plaintiff who had been expelled from his trade union sought damages for conspiracy by the members of the executive committee of the union who prevented it from earning his living.

488. The plaintiff criticises the reliance by the defendant in its submissions in relation to the ingredients of the claim of conspiracy when compared with the decision in *Meskell v. CIE* [1973] IR 121 and *Taylor v. Smith* [1991] 1 IR 142. The plaintiff relies on the decision in *Meskell*. In my opinion, the principles in these cases are not relevant to the plaintiff's claim. There is no agreement as between persons calculated to injure the plaintiff nor did the defendant or its officers pursuant of an agreement employ unlawful means as alleged by the plaintiff. There was no



infringement of the plaintiff's constitutional rights. Contrary to what is alleged, there is no actionable conspiracy as between Mr. Muckian and the persons named in the plaintiff's submission. The allegation in the submissions that the various parties named together with the defendant had combined in "*various permutations*" is indicative of the wide trawl being alleged by the plaintiff without any precise details as to the individual agreements.

### **The Conspiracy Allegations**

489. The plaintiff has made extensive and wide ranging allegations of conspiracy and a denial of fair procedures to him by various senior officials of the defendant, all of whom it is alleged were part of a plan or scheme to procure unlawfully the termination of the plaintiff's employment. The evidence of the plaintiff relies on inference to a high degree and is largely speculative. He has accused Mr. Dunne, Mr. Condon, Mr. Kennedy and Mr. Mitchell (and also Mr. Crowley and Mr. Murphy to a lesser degree of involvement) as being part of a conspiracy with Mr. Byrne to procure termination of his employment. Each of the witnesses was subject to extensive cross examination and was required to address fully the allegations of conspiracy against each of them. It was urged on behalf of the plaintiff that there was conspiracy including an agreement by such witnesses (including Mr. Byrne) to deny the plaintiff fair procedures thereby ensuring the termination of his employment. His evidence I found was unsatisfactory and on issues of materiality was largely inventive. By way of example I refer to his theory that Mr. Muckian met with Mr. Byrne around November 2000 setting up the case against the plaintiff which was relayed to Mr. Murphy and Mr. Crowley. I find no such meeting did take place and that the first material contact was with Mr. Mangan on 9<sup>th</sup> January, 2001. He also had theories as to why the audit was unrated so as to prevent it from being reported to the special audit committee of the board of directors. The outcome of the Special Investigation Report was communicated to the committee.

490. Furthermore, he persistently minimised the consequences of his failure to comply with the defendant's procedures attributing such conduct to isolated administrative black spots. His accusations of perjury against Mr. Byrne and Mr. Kennedy are also unfounded and emanate at a time when he himself had not participated in the investigation process and as a result the Special Investigation Report was completed without any input from him. Another example of the unreliability of his evidence is in the four different explanations given by him as reasons for altering the credit card applications of Rank Xerox's employees. Such explanations were given to Brendan Hickey, in the grounding affidavit of the plaintiff for the interlocutory injunction and in the evidence given to this Court.

491. For such an experienced and high ranking manager, he purported to display serious but innocent lack of knowledge of the concepts or consequences of the "*conversion*" of a cheque in banking terms. I do not accept his evidence that he was innocently unaware of such term or similar terms such as "*convert*" or "*converted*".

492. In assessing the plaintiff's claim, the court has to ask what motive existed that prompted the alleged conspirators to be involved in such conspiracy. I find no motive or explanation as being credibly put forward by the plaintiff or can be detected from the evidence that was given by him in court. The court finds that Mr. Dunne, Mr. Mitchell, Mr. Condon and Mr. Kennedy were professional bankers who gave their evidence honestly and independently and were not part of any agenda, plot or conspiracy (whether individually or collectively with Mr. Byrne). Each of them had nothing to gain from their role in the entire process. Notwithstanding this they were subject to sustained cross examination that they had acted with malice and prejudice that they were determined to deny (and did deny) the plaintiff of fair

procedures and that two of them gave evidence perjurally. I accept the evidence of such witnesses and I reject the plaintiff's evidence as unfounded and invented in relation to such allegations. The evidence of Ms. Freeley which I accept supports the evidence of Mr. Kennedy and Mr. Condon.

493. The evidence of Mr Gibson also supports the gravity of the issues arising from the Special Investigation Report.

494. I reject the submission that Mr. Dunne, Mr. Condon, Mr. Mitchell or Mr. Kennedy were part of a conspiracy with Mr. Byrne.

495. There is no credible evidence to prove Mr. Murphy or Mr. Crowley were part of a conspiracy with Mr. Byrne from the outset. I also conclude that Mr. Byrne did not initiate a conspiracy of the kind alleged against him. The decision taken to appoint Mr. Dunne to conduct the inquiry following the completion of the Special Investigation Report was a proper one.

### **The Right of Appeal**

496. At the time of the appointment of Mr. Dunne to conduct the disciplinary inquiry into the plaintiff, the procedure was regulated by the Disciplinary Procedure for Staff who are not Members of the Union which was effective from 1985. It stated:-

*"The object of these procedures is to ensure a fair, effective and speedy arrangement exists for dealing with disciplinary matters in the interest of good staff relations. Disciplinary action will be taken only after thorough investigation and the staff member will be given every opportunity to present his/her case before him.*

3.

*For the purpose of this agreement, 'disciplinary actions' shall mean:*

*(a) dismissal*

*(b) action short of dismissal including the following:-*

*(iii) suspension with or without pay.*

4.

*The following procedurals shall be followed in any case where it is decided to take disciplinary action against a Staff Member.*

*(a) The Staff Member will be told of the offence and the disciplinary action proposed. The Staff Member may at this stage make such oral or written representation as he/she sees fit, and may if he/she wishes nominate somebody to represent him/her and be accompanied by this representative at any interview held for the purpose of making oral representations. After such had been made, the bank shall then review the nature of the intended disciplinary action and give notice in writing to the Staff Member of his decision. The bank should give its decision where possible within ten working days after the making of such representations*

*(b) If the Staff Member wishes to appeal against such decision, he/she can give notice of appeal in writing to the manager or to the personnel department of the bank setting out the reasons for the appeal within ten working days after receipt of the said decision.*

*(c) Appeals will be heard by the Chief Executive or other Senior Executive or other Senior Executive nominated by the Chief Executive, and should take place as soon as possible. Disciplinary action will not be taken pending the outcome of the hearing of the appeal. At the appeal, the staff member may be accompanied by his/her representative. The bank shall give notice in writing to the staff member of the decision on the appeal. The decision shall where possible be given within ten working days from the hearing.*

*(d) If the staff member is dissatisfied with the decision given on such appeal, the staff member shall be entitled to appeal further by notice in writing given to the personnel department of the bank within ten working days of the decision being given. The further appeal shall be heard by an independent person agreed between the bank and the individual whose decision shall, subject as hereinafter provided a final and binding on both parties."*

497. Revised Disciplinary Procedures became effective from 1<sup>st</sup> July, 2002.

498. The revised procedures provided for:-

*"Special Paid Leave*

*Employee may be placed on Special Paid Leave in order to facilitate the proper conduct of the Disciplinary Procedures. An employee on Special Paid Leave will receive full pay pending investigation and/or the holding of the disciplinary meeting and any appeal. An employee who is placed on Special Paid Leave will not be required to work but will be required to be available to the group for the purpose of the investigation and/or the Disciplinary Procedures. The placing of an employee on Special Paid Leave is not disciplinary sanction. Employees will only be kept on Special Paid Leave for as long as shall be reasonably necessary to conduct and complete a full and proper investigation and/or the Disciplinary Meeting and any appeal.*

*Disciplinary Sanction*

*Disciplinary Sanction means:*

*(i) Dismissal*

*(ii) Action short for dismissal including the following:*

*Demotion*

*Suspension with or without pay."*

499. In procedures where the imposition of a Disciplinary Sanction is being considered, it was provided in relation to an appeal as follows:

*"If the employee wishes to appeal against a disciplinary sanction*

*imposed by the decision, he/she will give Notice of Appeal in writing to his or her Human Resources Department setting out the reasons for the appeal within ten working days of the date of the notice of the decision.*

*Appeals will be heard by the Chief Executive or other Senior Executive nominated by him and will take place as soon as possible after receipt of the Notice of Appeal. The disciplinary sanction, subject of the decision under appeal, will be suspended pending the outcome of the hearing of the appeal.*

*If the employee wishes to appeal against a disciplinary sanction imposed by the decision given on the appeal, he/she will be entitled to appeal further by notice in writing given to his/her Human Resources Department within ten working days of the date of the notice of the decision on the appeal.*

*The disciplinary sanction, the subject of the decision given on the appeal, will not be suspended pending the outcome of the hearing of the further appeal.*

*The further appeal will be heard by an independent person agreed between the Group and the employee and/or the employee's representative.*

*If agreement cannot be reached between the Group and the employer in relation to the appointment of the independent person, the independent person shall be a person nominated (a) in the Republic of Ireland by the*

*Labour Relations Commission..."*

500. By letter dated 6<sup>th</sup> October, 2003, the plaintiff's solicitors wrote to Mr. Soden, Chief Executive of the Bank of Ireland. They stated the purpose of the letter was to advise the bank of the plaintiff's position in relation to the proceedings before Mr. Dunne. This letter reiterated the history of the proceedings before Mr. Dunne and other associated matters.

501. By letter dated 6<sup>th</sup> October, 2003, the plaintiff's solicitors wrote to Mr. Dunne indicating that his findings against the plaintiff were rejected and informing him of their intention to write to Mr. Soden.

502. On 7<sup>th</sup> October, 2003, Mr. Dunne referred to an impending meeting with the plaintiff to consider such representations as he might make. Having considered the same he would review the nature of the disciplinary action he had proposed and give notice of such decision to him. It was stated that if he was not satisfied with his decision, the disciplinary procedures provide for an appeal which will be heard by the Chief Executive or other executives nominated by him.

503. On 13<sup>th</sup> October, 2003, Mr. Dunne wrote to the plaintiff's solicitors and stated:-

*"The bank's disciplinary procedures had been revised since I commenced hearing the matter in April 2002 under the 1985 disciplinary procedures. This letter should be regarded as the notice of my decision under the revised disciplinary procedures for Bank of*

*Ireland Group dated 1<sup>st</sup> July, 2002 ('the procedures') a copy of which I enclose herewith. The procedures provide for an appeal against the disciplinary section of dismissal imposed by my decision. If your client wishes to bring such an appeal your client should give notice of appeal in writing to the Human Resources Department...setting out the reasons for the appeal within ten working days of the date of this letter (i.e. on or before close of business on 28<sup>th</sup> October, 2003).*

*If your client chooses to appeal my decision, the disciplinary sanction will be suspended pending the outcome of the hearing of the appeal."*

504. On 24<sup>th</sup> October, 2003, Mr. Smith again writes to Mr. Soden and copies such letter to Mr. Dunne and Ms. Nicola O'Brien. This letter, *inter alia*, states:-

*"Mr. Dunne is fully aware, and it is disingenuous to imply otherwise, that in earlier correspondence conveying his decision to dismiss Mr. Higgins and at the meeting of 8<sup>th</sup> October last, contrary to the provisions of the bank's disciplinary procedure (1985) he refused to allow Mr. Higgins to challenge his 'findings' as set out in his report. Mr. Dunne unlawfully limited Mr. Higgins' appeal to the issue of 'sanction' only as opposed to permitting him to make such oral or written representations as he see fit. As regards his findings, which are perverse, unfounded and defamatory of Mr. Higgins."*

*"It is indicative of the bank's disregard of every legal principle that in spite of Mr. Dunne's repeated confirmation, both at the hearings on 29<sup>th</sup> April, 2002, 3<sup>rd</sup> July, 2002 and 27<sup>th</sup> November, 2002, and in his letters dated 28<sup>th</sup> August, 2001 and 3<sup>rd</sup> December, 2002, that he was conducting his inquiry pursuant to the bank's 1985 Disciplinary Procedure, the bank has now subsisted those procedures with 'Revised' Disciplinary Procedures dated 1<sup>st</sup> July, 2002.*

*The bank now purports to invite Mr. Higgins to appeal Mr. Dunne's decision under the July, 2002 procedures. They are not the procedures on foot of which the bank purported to conduct the disciplinary inquiry (and which it subsequently resiled from) and on foot of which Mr. Dunne purported to make his findings and decision. The procedures introduced in July, 2002 were patently introduced by the bank specifically as a result of Mr. Higgins case and arose out of an attempt by the bank to ensure that it could not find itself open to legal challenge regarding its treatment of employees. The bank is now attempting retrospectively to impose restrictive rights on Mr. Higgins...*

*In view of all the above matters, Mr. Higgins will not be exercising the limited right of appeal now offered by the bank."*

505. The effect of the rule change was that there was now no unrestricted appeal but there was an appeal against the sanction imposed namely dismissal. The nature of special paid leave was also set out in the revised procedures of July 2002.

506. Both Mr. Soden and Mr. Dunne in correspondence refused to acknowledge that the plaintiff was entitled to an appeal under the 1985 procedures. It is claimed that he should have been more vocal and insisted on his right of appeal and that in any event he had no real intention of appealing. Whilst Mr. Dunne cannot say why he changed his stance and referred to the revised 2002 rules having throughout the inquiry indicated that the inquiry was being conducted under 1985 rules, it is likely that he may have got advice to that effect as initially following his decision the right

of appeal under the 1985 procedures appears to have been acknowledged..

507. The representations on behalf of the plaintiff made it quite clear that the inquiry had been conducted under the 1985 procedures and the defendant could at any time following receipt of the representations from the plaintiff have acknowledged its error and offered the appeal under the 1985 procedures. It would then be a matter for another forum to determine the nature and extent of such appeal in the light of proceedings before the Tribunal, the acknowledgements made by and on behalf of the plaintiff and all other matters that were in issue. It was not sufficient to assert that the plaintiff should have insisted on the 1985 Procedures.

508. In my opinion, the plaintiff was wrongfully deprived of his right of appeal as the stance of the defendant had made clear.

### **Special Paid Leave versus Suspension**

509. It is the plaintiff's case that he was suspended from duties by Mr. Byrne on 20<sup>th</sup> April, 2001. It is the defendant's case that Mr. Byrne told the plaintiff that he was being placed on special paid leave.

510. The concept of placing an official on special paid leave pending investigation was not provided for in the 1985 procedures. It was, however, provided for in the 2002 procedures where it provides:-

*"An Employee may be placed on special paid leave in order to facilitate the proper conduct of the disciplinary procedures. An Employee on special paid leave will receive full pay pending investigation and/or the holding of the disciplinary meeting at any appeal. An Employee who is placed on special paid leave will not be required to work but will be required to be available to the group for the purposes of the investigation and/or the disciplinary procedures. The placing of an employee on special paid leave is not a disciplinary sanction. Employees will only be kept on special paid leave for as long as shall be reasonably necessary to conduct and complete a full and proper investigation and/or the disciplinary meeting and any appeal."*

511. It is claimed that a suspension is disciplinary in nature where as placing a person on special paid leave is not a disciplinary measure as its purpose is investigative.

512. Mr. Mangan gave evidence that when he left the bank in 2003, special paid leave would have been standard but he could not put a date on it. It was leave with pay pending an investigation.

513. According to Mr. Byrne, special paid leave was to allow the investigation to be conducted without the possibility of interference from the person who is being investigated by their interference with their documentation or evidence. The second aspect he said was making a clear statement to the individual that this was a serious matter and that they had to engage with the investigation. It served a purpose to protect the bank and the individual. He had previous experience of persons being placed on special paid leave pending the completion of an investigation for some time. Suspension was something one had on one's record if there was subsequent misbehaviour. Special paid leave was to allow the investigation.

514. Mr. Gerry Mitchell also gave evidence in relation to special paid leave being in operation. Special paid leave had the benefit in addition to the other matters to give

the individual in question time to reflect and prepare for the issues that might arise in the course of a disciplinary procedure. Mr. Mitchell described it as used as custom and practice that had been established two years prior to his arrival in his position.

515. It is surprising that an employer such as the defendant permitted such an important procedural aspect of its employment provisions to be governed by "*custom and practice*" and was dependant upon each executive's individual understanding as to how it operated in practice. It has to be remembered that the 2002 procedures in relation to special paid leave were not operative at the time.

516. I am satisfied that the practice of putting persons on special paid leave pending investigation of matters of concern to the bank was established and operational in 2001. In practice, it is likely to have operated along the lines as that contained in the 2002 procedures, but it would have been preferable if it were formally set out and became part of the written procedures of the defendant.

517. Mr. Byrne is adamant that he used the words "*special paid leave*" rather than "*suspend*" or any derivative thereof. He was supported in this by Mr. Kennedy who was present and also by his own notes which record the fact that he was placing the plaintiff on special paid leave.

518. I therefore conclude that Mr. Byrne did say he was placing the plaintiff on special paid leave.

519. An early example of the distinction between a suspension as a disciplinary sanction and a suspension for the purpose of an investigation is *Rochford v. Storey* [1983] WJSC-HC 1022 in which the plaintiffs had been suspended from membership of a trade union sporting club following a dispute over the plaintiffs' eligibility for membership. The suspensions had been imposed when the plaintiffs' had failed to attend a meeting at which they had been requested to produce evidence of their entitlement to become full members of the club. Even though O'Hanlon J., concluded that natural justice was complied with when the plaintiffs had been put on notice by letter that the validity of their membership was in dispute, he was also of the opinion that the decision to suspend did not attract the rules of natural justice. The reason was that this was not a suspension inflicted by way of punishment; but rather a suspension made as a holding operation pending inquiries.

520. A similar distinction was made in *Quirke v. Board Luthchleas na hEireann* [1988] IR 83 where Barr J., stated:-

"...the suspension of a member by a body such as BLE or a trade union or professional association may take two different forms. On the other hand it may be imposed as a holding operation pending the investigation of a complaint. Such suspension does not imply that there has been a finding of any misbehaviour or breach of rules by the suspended person, but merely that an allegation of some such impropriety or misconduct has been made against the member in question. On the other hand a suspension may be imposed not as a holding operation pending the outcome of an enquiry, but as a penalty by way of punishment of a member who has been found guilty of misconduct or breach of rules. The importance of the distinction is that where a suspension is imposed by way of punishment, it follows that the body in question has found its member guilty of significant misconduct or breach of rules."

521. This passage from the judgment of Barr J. in *Quirke v. Board Luthchleas na*

hÉireann was cited with approval by Kearns J. in *Morgan v. The Provost and Fellows of Trinity College Dublin, Cyril Smith and John Gerard Buchanan* [2003] 3 I.R. 157. The plaintiff in those proceedings was a senior lecturer in TCD. On 7<sup>th</sup> October 2002 he was suspended with pay with immediate effect on foot of a complaint made by a colleague alleging physical intimidation and harassment. This particular event occurred in the aftermath of an ongoing investigation into other complaints previously made by another colleague. The report into that earlier matter which had been made available to the plaintiff two days earlier had recommended that he be suspended for a period of three months without pay and that he receive a formal warning. Referring to the distinction between the two suspensions in the course of the proceedings Kearns J. noted the consequences and implications as follows:-

*"A suspension may have different consequences and implications by reference to the particular occupation of the person affected. For example, a professional footballer might not regard a suspension, even a lengthy one, as being particularly detrimental or damaging to career or reputation. On the other hand, an allegation of misconduct against a senior medical consultant, or, as in the instant case, a senior academic and lecturer, may well be a more serious matter. It is a simple fact of life that suspension for a person in one of the latter categories may be seen as altogether more damaging. At the opposite end of the spectrum, the Supreme Court found in *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482 that the three day suspension of a pupil either by the principal or by the board of management of a school did not amount to an adjudication on or determination of any rights, or the imposition of any liability."*

522. The Trial Judge then went on to deal with the different types of suspension when he said:-

*"Equally, the court will have to consider the manner and nature of the suspension. If the suspension is without pay and open-ended, it obviously has far more detrimental effects from the point of view of the person suspended and may more readily be seen as a punishment. Disciplinary procedures may also be found wanting if the person who is about to be suspended has not been fully informed as to the complaint against him and given an opportunity to respond to any proposed suspension. In the case of a second suspension, which is the situation contended for on behalf of the plaintiff in the instant case, the detrimental effects can only be seen as more marked, because such a suspension is more often than not likely to lead inexorably to the possibility of termination of employment, a factor I deemed to be of some importance in *McNamara v. South Western Area Health Board* [2001] E.L.R. 317."*

523. Kearns J. then went on to quote at length from the judgment of Barr J. in *Quirke v. Bord Luthchleas na hÉireann* (including the passage quoted above) and then stated:-

*"It follows, obviously, that where suspension constitutes a disciplinary sanction, the person affected should be afforded natural justice and fair procedures before the decision to suspend him or her is taken. However, where a person is suspended so that an inquiry can be undertaken as to whether disciplinary action should be taken against the person concerned, the rules of natural justice may not apply. These were the findings of the Supreme Court in *Deegan v. The Minister for Finance* [2000] E.L.R. 190, in which Keane C.J. stated as follows at pp. 198 to 199:-*

*"It is clear that the suspension of a person from their employment for a specified period because of irregularities or*



*misconduct on his or her part can constitute a form of disciplinary action which would entitle the person affected to be afforded natural justice or fair procedures before the decision to suspend him or her is taken. The consequences of such suspension can be extremely serious for the person concerned, involving not merely their right to earn a livelihood but also their right to have their good name protected. In John v. Rees [1969] 2 All E.R. 274 at p. 305, McGarry J., in a passage cited by the learned High Court judge, said:-*

*'... in essence suspension is merely expulsion pro tanto. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment the rules of natural justice prima facie apply to any process of suspension in the same way that they apply to expulsion.'*

524. Kearns J. continued:-

*"However, that was not a case in which the suspension was being imposed so that an inquiry could be undertaken as to whether disciplinary action should be taken against the person concerned and, if so, the nature of such a sanction. That distinction was emphasised by Lord Denning M.R. in Lewis v. Heffer [1978] 3 All E.R. 354 a decision to which the attention of the learned High Court Judge does not appear to have been drawn. Having cited the passage from the judgment of Megarry J., Lord Denning went on at p. 364:-*

*"These words apply, no doubt, to suspensions which are inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries."*

*"Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply: see Furnell v. Whangarei High Schools Board [1973] 1 All E.R. 400."*

525. The plaintiff relied on dicta from the Supreme Court decision in *Rajpal v Robinson* [2005] 3 IR 385. It was a case of suspension not special paid leave. Further, there was no consideration of whether or not the suspension was necessary. In this case Mr. Byrne did consider the action he took as necessary and this was endorsed by Messrs. Crowley and Murphy.

526. The defendant is best equipped to consider whether investigative action should be taken. It must also be remembered that the Defendant is a commercial bank having responsibilities to shareholders, employees, depositors and customers and in

particular statutory and regulatory obligations.

527. I hold that the action of placing the plaintiff on special paid leave was not a “knee-jerk” reaction as described by Lady Justice Hale in *Gogay v. Hertfordshire County Council* [2000] IRLR 703

528. Mr. Horan SC for the plaintiff submitted that Laffoy J. in *Cronin v Eircom Ltd.* [2007] 3 IR 104 had adopted the implied term of mutual trust and confidence as recognised by the House of Lords in *Malik and Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20.

529. He also submitted that an employer is under a duty to investigate all allegations/grievances articulated against the plaintiff, namely, the extensive allegations by Mr Muckian and for example the assault charges made by another member of staff against the plaintiff.

530. Mr Horan accepted that there had not yet been a case in this jurisdiction where general damages have been awarded under the implied term of mutual trust and confidence. No case was referred to which defined the limits of this implied term. He sought damages under this implied term arising from the suspension and accepted he was not entitled to damages for his dismissal under this heading.

531. I do not accept that the placing of the plaintiff on special paid leave amounted to circumstances where the implied term arose. Nor do I accept that under this term or any other principle that there is an obligation to disclose to an employee all complaints of every character of which the employer might have been made aware. The employer is entitled to decide the issues on which it proposes to take action against an employee as it did in this case.

532. I accept the principles set out by Keane C.J. in *Deegan v. The Minister for Finance* [2000] ELR 190 and also those of Kearns J. in *Morgan v. The Provost and Fellows of Trinity College Dublin, Cyril Smith and John Gerard Buchanan* [2003] 3 I.R. 157, which are above referred to. The cases draw a distinction between suspension where a disciplinary action is being taken and suspension which is made as a holding operation pending inquiries and to investigate a matter. In these latter circumstances, the rules of natural justice do not apply.

533. What was proposed by Mr. Byrne on 20<sup>th</sup> April was an investigation to be carried out into areas of concern that had been highlighted by Mr. Kennedy. The correspondence subsequently sent by Mr. Byrne and Mr. Kennedy to the plaintiff sought explanations from the plaintiff in respect of such issues. When the plaintiff was placed on special paid leave the likely period of the special paid leave was unknown and was to be in part determined by the response of the plaintiff to the matters being investigated. On 20<sup>th</sup> April, it could not be foreseen that the duration would be so long and that responses to the matters under investigation would only emerge in the last three - four days of the Dunne inquiry. The court is conscious (as Mr. Byrne acknowledged) that actions such as placing a person on special paid leave have a capacity to interfere with or damage the future working relationship with the parties involved. This is not in itself a valid reason for saying that a person cannot be placed on special paid leave, in order to facilitate further investigation.

534. I hold that the placing of the plaintiff on special paid leave was for investigative purposes and was lawful and that the rules of natural justice did not apply. Where a court cannot find any improper motive in placing the plaintiff on special paid leave, the court should be slow to condemn such management action from persons within

the Defendant who are best equipped to know whether such action is reasonable and necessary in the circumstances and at the time prevailing. Mr. Byrne, having consulted with Mr Murphy and Mr Crowley concluded it was necessary having regard to the manner in which the audit was progressing.

### **Dismissal**

535. The plaintiff's case, insofar as the termination of his employment is concerned, appears to be:-

1. that his dismissal resulted from a flawed disciplinary process that was part of an unlawful malicious conspiracy to which the person who conducted the inquiry was a party
2. That consequently, by definition, his dismissal was in breach of fair procedures.
3. That, even if there was no conspiracy, there was a breach of fair procedures such as to render his dismissal unlawful

536. The plaintiff's written submission appear to rely upon a concept of wrongful dismissal that is much wider than the action for wrongful dismissal that is recognized in law. At common law the action for wrongful dismissal lies where a contract of employment is terminated without reasonable notice. Quite separately from the action for wrongful dismissal, in the case of a dismissal for misconduct, the Court has a jurisdiction to intervene if there has been a breach of fair procedures. The plaintiff's claim in these proceedings is not a wrongful dismissal action for failure to give reasonable notice.

537. It is the defendant's case that, as a matter of law, the Court does not have any jurisdiction to intervene in relation to the termination of the plaintiff's employment unless it reaches a finding of a breach of the rules of natural justice, either on the basis of the existence of a conspiracy or otherwise.

538. The law in relation to wrongful dismissal is that, absent express provisions to the contrary, employment contracts can be terminated by notice for good reason, bad reason or no reason. In *Sheehy v. Ryan and Moriarity* [2008] 4 IR 258, Geoghegan J. stated as follows:-

*"The judge in fact went on to point out that the plaintiff had chosen a common law remedy. She could have initiated proceedings under the Unfair Dismissals Act 1967 or under the Redundancy Payments Act. The trial judge then said that the position at common law is that an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice. I would slightly qualify that by saying that it does depend on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal, that clearly is the position."*

539. A similar view was expressed in England in *R v. Hull University* [1999] 4 All ER 747 where Donaldson L.J. put it in the following terms:-

*"In the ordinary course of events the legal relationship of employer and employee, which is the relationship with which we are concerned, can be determined by either party with or without notice and with or without "good" or any cause. It is a personal relationship and cannot survive its repudiation by either party whether or not the repudiation is accepted by the other. The relationship having ended, all that*

*remains is to determine whether it was wrongful dismissal, which turns on the terms of the contract, or was an unfair dismissal, which turns on the provisions of the relevant English statute."*

540. The Courts are unwilling to extend the common law remedies available in wrongful dismissal in circumstances where the Oireachtas has created an entirely stand alone regime of unfair dismissal. The leading case in this area in England *Johnson v. Unysis* [2001] ICR 480 sets out the principles. In that case the employee claimed common law damages for breach of the implied term of trust and confidence in an employment relationship. He alleged that, because of the manner in which he had been dismissed, he had suffered a mental breakdown and was unable to work. His claim was struck out as disclosing no reasonable cause of action. The principle announced in *Johnson* is that the implied term of trust and confidence cannot be extended to allow an employee to seek to recover damages for loss arising from the manner of his dismissal. In that case the English Court was unwilling to in effect create a new common law right governing the same ground as that provided under the English statutory scheme similar to that applying in this jurisdiction under the Unfair Dismissals Act. Nicholls LJ. stated that it:-

*"...would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims."*

541. What has become known as the *Johnson* exclusion area has developed from the decision in *Johnson v. Unysis*. In essence the Courts recognise that a dismissed employee may be compensated for damage caused to him (including personal injury) where the wrong occurred prior to the dismissal. The extent of that exclusion area was considered in *Eastwood v. Magnox Electric Plc* [2004] IRLR 733 where Nicholls LJ. made the following observations:-

*"27. Identifying the boundary of the 'Johnson exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.*

*28. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the Johnson exclusion area."*

542. In the instant case the plaintiff determined, as did the plaintiff in *Sheey v. Ryan*, to launch his action at common law rather than taking a claim pursuant to the statutory provisions. By doing so he limited his remedies and in particular he cannot ask this Court to act as some type of employment appeals tribunal to determine the fairness of the substantive grounds justifying his dismissal.

543. In *Maha Lingam v. HSE* [2006] ELR 137, Fennelly J. giving the Judgment for the Court stated as follows:-

*"the employer was entitled to give that notice so long as he complied with the contractual obligation of reasonable notice whether he had good reason or bad for doing it. That is the common law position and*

*it is an entirely different matter as to whether a person has been unfairly dismissed and a different scheme of statutory remedy is available to any person dismissed whether with or without notice under the Unfair Dismissals Act, but this is not such an application. This is an action brought at common law for wrongful dismissal in the context of which an injunction was sought."*

544. In *McGrath v. Trintech Technologies Ltd and Trintech Group Plc* [2005] 16 ELR 49, Laffoy J, at p.391 stated as follows:-

*"The first point to be made in relation to that submission is that the plaintiff has not invoked any statutory provision in support of his claim. Although decisions of the Employment Appeals Tribunal were cited, I did not understand the plaintiff to argue that the principles applicable under the statutory scheme should be imported into common law. On the authority of the judgment of Carroll J. in *Orr v. Zomax Ltd.* [2004] IEHC 131, [2004] 1 I.R. 486, it would not have been open to them to do so. His claim is grounded entirely in the common law - in contract and tort. In particular his claims for declaratory relief are based on the express or implied terms which he contends for, not on any statutory protection. On the authority of the decision of the Supreme Court in *Parsons v. Iarnród Éireann* [1997] 2 I.R. 523, however, the plaintiff is not entitled to any declaration which extends beyond the ambit of the contractual rights which he establishes and the breach of those rights. On the same authority, the only other remedy to which he is entitled, if he establishes his claim in contract, is damages."*

545. Prior to her making that observation Laffoy J. expressly referred to *Sheehy v. Ryan, Hickey v. The Eastern Health Board, Johnson v. Unysis Ltd and Malik v. BCCI*. This matter was also referred to in some detail by Clarke J. in *Carroll v. Bus Atha Cliath* [2005] 4 IR 184. At page 208 of the Judgment he stated as follows:-

*"It is, of course, the case that *Parsons v. Iarnród Éireann* [1997] 2 I.R. 523 was concerned with dismissal rather than with breaches of terms of an employee's contract of employment. However, it does appear to be a recent reiteration of the general principle of law to the effect that a court will not grant orders which have, in substance, the effect of ordering specific performance of a contract of employment. In *Cassidy v. Shannon Castle Banquets* [2000] E.L.R. 248 Budd J. granted a declaration that a purported dismissal was in breach of natural and constitutional justice and that, as a consequence, the dismissal was without efficacy and invalid. However it is made clear that the above declarations did not coerce a reinstatement. In that respect *Parsons v. Iarnród Éireann* [1997] 2 I.R. 523 was distinguished. It is also clear from a consideration of the judgment of Budd J. in *Cassidy v. Shannon Castle Banquets* [2000] E.L.R. 248 that a factor taken into account in that case was the entitlement of the plaintiff to clear his name. In that respect it is of some importance to note that there have been significant developments in the typical terms of employment of many employees in recent years. Such changes have a material effect upon the circumstances in which, as a matter of contract, many employees can be dismissed.*

*The traditional position at common law was that a contract of employment could be terminated on reasonable notice without giving any reason. In those circumstances it was obvious that the only remedy for a breach of contract by way of dismissal was for the payment of the amount that would have been earned had appropriate notice been given. However, it is now frequently the case that*

*employees cannot be dismissed, as a matter of contract, save for good reason such as incapacity, stated misbehaviour, redundancy or the like. It would appear that the development of the law in relation to affording employees a certain compliance with the rules of natural justice in respect of possible dismissal derives, at least in material part, from this development. If the stated reason for seeking to dismiss an employee is an allegation of misconduct then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such a dismissal. That does not alter the fact that an employer may still, if he is contractually free so to do, dismiss an employee for no reason. It simply means that where an employer is obliged to rely upon stated misconduct for a dismissal or, where not so obliged chooses to rely upon stated misconduct, the employer concerned is obliged to conduct the process leading to a determination as to whether there was such misconduct in accordance with many of the principles of natural justice.*

*In those circumstances it seems to me that it is open to the court to grant declarations concerning most alleged breaches by an employer of his contractual obligations. Parsons v. Iarnród Éireann [1997] 2 I.R. 523 imposes a limit in cases where the declaration could not avail the plaintiff in any practical way.*

*Where, as here, the consequence of a declaration as to a breach in respect of the plaintiff's entitlement to date simply gives rise to a claim in damages then no difficulty, therefore, arises."*

546. In *Nolan v. Emo Oil Services Ltd* [2009] IEHC 15 Laffoy J. dealt expressly with an attempt by a plaintiff to litigate what was in truth an unfair dismissal claim that is an allegation that he was either unfairly selected for redundancy or alternatively the grounds for his dismissal was not in truth redundancy. She described the plaintiff's claim in the following terms:-

*"Although not articulated in this way by counsel for the plaintiff, the plaintiff's case, as I understand it, is that it is an implied term of his contract of employment that, notwithstanding the express right to terminate his contract on notice, the plaintiff is entitled to litigate the fairness or otherwise of the termination of his contract on the grounds of redundancy by reference to the statutory code in plenary proceedings in this Court. I base that understanding on the submission of counsel for the plaintiff that the defendant, as his employer, owed a duty of good faith to the plaintiff, in consequence of which it was an implied term of the plaintiff's contract of employment that, if he was to be let go on the grounds of redundancy, there would have to be a valid redundancy."*

547. Laffoy J. then went on to make reference to the Supreme Court decision in *Maha Lingam* and noted that in that case the Supreme Court had made reference to *Eastwood*, a case in which the House of Lords had considered its earlier decision in *Johnson v. Unysis Ltd*. She then quoted from Lord Nichols and his views on the "*Johnson exclusion area*" and she then dealt with the case at issue in the following terms:-

*"In this case, the plaintiff's employment with the defendant came to an end on 30<sup>th</sup> November, 2008 and his last day at work was the 28<sup>th</sup> November, 2008. In essence, what he is trying to achieve by these proceedings is to get his job back. He got the required notice under his contract of employment and his contract of employment*

*was lawfully terminated. If, as he contends, his dismissal was unfair, then the remedy available to him is the remedy provided by statute. As a matter of fact, that is the only remedy he could pursue because, in my view, he had not acquired a cause of action for breach of contract or otherwise prior to his dismissal. In the circumstances, there is no remedy which he can pursue in this Court.*

*That conclusion is supported by the decisions of the Supreme Court in the Maha Lingham case and in the Sheehy case.*

*In my view, it is also correct in principle. There may be situations in which, on the reasoning of Lord Nicholls in the Eastwood case, a dismissed employee is entitled to maintain an action at common law, for example, where he has suffered financial loss from psychiatric or other illness as a result of pre-dismissal unfair treatment which would give rise to an action for damages. That scenario was signposted by Lord Steyn in the Johnson case and recognised in the Eastwood case. The plaintiff's situation here is entirely different. In effect, he is inviting the Court to develop its common law jurisdiction by reference to the statutory concepts of redundancy and unfair dismissal. Specifically, the Court was invited by counsel for the plaintiff to have regard to the statutory definition of "redundancy" in s. 7 of the Redundancy Payments Act 1967, as amended. The Oireachtas in enacting the Unfair Dismissal Acts 1977 to 2008 and introducing the concept of unfair dismissal provided for specific remedies for unfair dismissal and specific procedures for obtaining such remedies in specific forums, before a Rights Commissioner or the Employment Appeals Tribunal. For the Courts to expand its common law jurisdiction in parallel to the statutory code in relation to unfair dismissal and redundancy would, to adopt Lord Nicholls's terminology, end up supplanting part of the code."*

548. The above cases from this jurisdiction recite what are the applicable principles to be considered and applied. In the instant case much of what the plaintiff claims relates to the unfairness of the decision to dismiss as distinct from wrongful dismissal and, as such, this Court has no jurisdiction in same.

### **Conduct or Performance**

549. The plaintiff claims there was no misconduct on his part. The case the plaintiff makes is one which went to performance and not conduct. I am satisfied that the plaintiff was employed by the defendant to conduct its banking business in Clanbrassil Street. The matters outlined in the Special Investigation Report were an examination of the manner in which he conducted himself and the affairs of the bank whilst in the defendant's employment. It was not a case exclusively of performance. Mr. Dunne properly considered the actions and failings of the plaintiff and his disregard for the bank's procedure as misconduct and the ultimate conclusion as gross misconduct.

### **Bias**

550. There were three meetings on 3<sup>rd</sup> September, 2001, held by various senior members of the defendant. One such meeting was between Mr. Dunne, Mr. Kennedy, Mr. Mitchell and Ms. O'Brien. Mr. Dunne's recollection of the meeting is set out earlier. It is likely that the meeting came in the wake of the request by Mr. Smith to have the initial hearing for 4<sup>th</sup> September postponed in light of the medical condition.

551. In supplemental submissions it was claimed by counsel for the plaintiff that such meeting was wholly improper and of itself disqualified Mr Dunne as an adjudicator in the disciplinary process. He relied on the case of *The State (Hegarty) v. Winters* [1956] I.R. In that case the applicant sought a claim to arbitration seeking compensation for disturbance to his lands. Mr. Winters was the arbitrator and had walked the lands with the County Council surveyor after the hearing. The Supreme Court decided that the fundamental rule that not alone should justice be done, but that it must be seen to be done, was broken.

552. In response to these submissions, Mr. Hanratty on 27<sup>th</sup> July, 2012 (day 50) objected to the introduction at the eleventh hour of a new case of objective bias. He said that objective bias had never been part of the plaintiff's case. He submitted that it was not pleaded in the statement of claim. He further submitted that there were occasions in the course of the hearing where there were discussions as between the court and counsel on both sides as to what the issues in the case were and on none of those occasions was the question of objective bias introduced or mentioned.

553. On 3<sup>rd</sup> October, 2012, (day 51) Mr. Hanratty continued his submissions and subsequently Mr. Callanan SC made his closing submissions in response. As far as the court could determine there had been no specific response on behalf of the plaintiff to the submission that objective bias was not specifically pleaded. Having regard to the importance of this matter the Court convened a further sitting of the case as a matter of urgency on 15<sup>th</sup> January, 2013.

554. In the course of his submissions, Mr. Callanan SC accepted that the term objective bias is not used or pleaded although bias is comprehensively pleaded. He submitted that this was not a judicial review case and was a technical point. He submitted that there was adequate reference in the amended statement of claim to the plea of bias and also to the failure to afford natural and constitutional justice. He referred to the following paragraphs from the Amended Statement of Claim:

Paragraph 58 page 23; para. 22 page 26; para. 59 page 28; para. 78; para. 79; para. 80; para. 81(b).

555 He submitted this was not a new case and had been made during the proceedings. He referred to the mini summit meeting of 15<sup>th</sup> May, 2001 which was held by the court to have been a privileged occasion and submitted that the defendant must have been aware that such meetings were under scrutiny.

556. He referred to a passage from *Administrative Law in Ireland* by Hogan J. and Morgan P. where the author stated:-

*"In the past decade or so, there has been a good deal of characterisation and jargonisation in this area which is noted at this point. But once you observed that while this may be useful from a descriptive point of view, in most cases, nothing turns on these distinctions. And it should be emphasised that we have used the term 'bias' to embrace all members of the family."*

557. The authors continued to their commentary and refer to what Geoghegan J. stated in *Orange v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159, where he stated:-

*"(1) The rare case of proved actual bias. For such bias to be established it would be necessary actually to prove that the judge or the tribunal or the adjudicator... was deliberately setting out to mark or hold against a particular party irrespective of the evidence...."*



*(2) A situation of apparent bias where the adjudicator has a proprietary or some other definite personal interest in the outcome of the proceeding competition or other matter on which he is adjudicating. In that case there is a presumption of bias without further proof.*

*(3) Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken..."*

558. The authors continue by saying that category 1 "actual bias" is sometimes known as "conscious bias".

559. On 18<sup>th</sup> January 2013 Mr. Hanratty submitted in reply to Mr Callanan SC that: (i) the objective bias plea was a new one, and (ii) without prejudice to that submission, the test of objective bias is not passed having regard to recent authorities on the subject.

560. He referred to the Amended Statement of Claim and the various contexts in which bias was pleaded. These are recorded in the transcript of evidence as are the various contexts in which the word bias appears in the lengthy submissions of the plaintiff.

561. I accept Mr Hanratty's submission that the case is pleaded as one of subjective bias, and that the case as heard in Court for over 50 days was one of deliberate prejudgment by persons including Mr. Dunne in a conspiracy in which subjective bias was a major part.

562. In the various exchanges between Counsel and the Court during the hearing to identify the substantial issues in the case objective bias was not raised. Whilst there was reference to the three meetings of 3<sup>rd</sup> September 2001, including the meeting which Mr. Dunne attended, no complaint was made in the context of objective bias until the supplemental submissions were delivered.

563. Having considered all the pleadings opened to the Court and submissions made on behalf of the plaintiff and defendant I conclude objective bias is a new plea and is also of such a character as it should have been specifically pleaded to enable the parties to litigate the issue in Court. It is not a technical pleading point.

564. The issue of amending the Statement of Claim cannot arise at this late stage and would set in train many consequential matters. The issue of objective bias cannot be pleaded.

565. I reject the Plaintiff's submission that in the context of this case actual bias encompasses objective bias.

### **The Alleged Defamation**

566. The plaintiff accepted that the claim for defamation must show malice to defeat qualified privilege. The claim related to the Dunne report and the defendant's communication to the Money Laundering Investigation Unit of the Garda Bureau of

Fraud investigation. The plaintiff accepted that the onus was on him to establish malice. He accepted that ordinarily a claim for defamation would not arise out of findings of a disciplinary hearing as the plaintiff employee would be unable to establish that a statement that was on its face defamatory was uttered with malice. The plaintiff relied on the definition of malice in *Kirkwood Hackett v. Teirney* [1952] IR 185 and *Hennessey v. K-Tel* [1998] WJSC-SC 8033 which defined malice as:-

*"The use of the occasion of qualified privilege for an indirect or improper motive or purpose."*

567. I am not satisfied that the plaintiff has established malice on the part of the defendant either in relation to the Dunne report or the communications with the money laundering section. The plaintiff claimed that whilst no malice was being imputed to Mr. Gibson and his colleagues, they were acting on the instructions of Mr. Kennedy and Mr. Condon who were seeking to precipitate the prosecution of the plaintiff. I have already rejected the conspiracy theory. The publications complained of were made on occasions of qualified privilege. Furthermore, the reporting of parts of the Special Investigation Report and the making of Suspicious Transaction Reports were done pursuant to statutory obligations and were made bona fide.

### **The Plaintiff's Claim to Monies**

568. Following the plaintiff being placed on special paid leave on 20<sup>th</sup> April, 2001, the defendant took possession of monies in his briefcase along with the passport which was subsequently returned. The money comprised of Ir£8,000 and STG£8,800. The defendant has not advanced any case for a superior claim to the monies than that advanced by the plaintiff. The plaintiff is entitled to the return of the value of the monies. I will hear the parties in relation to how the sum should be calculated together with the claim, if any, in relation to interest.

### **Claim for Legal Costs**

569. The supplemental submissions of the plaintiff also included a claim for legal costs of representation before the Dunne inquiry. Reliance was placed on the judgment of Barrington J. in *Condon v. Córás Iompair Éireann* (Unreported, 16<sup>th</sup> November, 1984) in which the plaintiff as the train driver in the Buttivant train disaster was allowed the cost of his representations for the inquiry in which he was exonerated.

570. Reliance was also placed on a decision of O'Neill J. in *Courtney v. Our Lady's Hospital & Ors* (Unreported, 27<sup>th</sup> May, 2011) in which the plaintiff was successful in a claim for costs of legal representation at the inquest into her daughter's death. Reliance had been placed on the *Condon* case.

571. In the present case, the disciplinary procedures are part of the legal relationship between the plaintiff and the defendant. There is no provision in those procedures for costs to be awarded either to the plaintiff or to the defendant following a disciplinary inquiry hearing. The fact that the hearing took so long is not in itself a valid ground for the claim. No case has been put forward in which costs have been allowed to an employee who appears before a disciplinary inquiry.

572. The concluding remarks of Barrington J. relied on the fact that the plaintiff was placed in the position of needing representation as a consequence of the negligence of CIE and this was a reasonably foreseeable consequence. In the instant case, the inquiry did not arise as a consequence of the negligence of the defendant. The disciplinary inquiry arose following the completion of the Special Investigation Report. The matters contained within such report were of sufficient gravity to warrant a disciplinary inquiry. Indeed, the plaintiff during the inquiry acknowledged his failure to comply with many of the defendant's procedures in relation to the

transactions. Furthermore, the requirement of the plaintiff to have legal representation in the circumstances arising was unlike the *Condon* case, not a reasonably foreseeable consequence.

573. The Courts finding is that Mr. Dunne did not act in any malicious or conspiratorial manner.

574. In the circumstances, the court will disallow the claim.

### **Money Laundering**

575. The court has previously permitted the defendant to make further and better discovery in particular in relation to documents relating to the money laundering section of the bank and its dealings with the Gardaí. The officer of the defendant in charge of this section had statutory obligations to notify the Gardaí and to file where necessary a suspicious transaction report to the Gardaí. Mr. Gibson gave evidence as to his involvement. Relevant details were supplied to the Gardaí. I accept the evidence of Mr. Gibson which is set out in detail in this judgment. Mr. Callanan SC accepted that there was no impropriety associated with Mr. Gibson's communications with the Garda Money Laundering Investigation Unit. There was no evidence of Mr. Gibson's involvement in the conspiracy alleged by the plaintiff but that he and his section would have been used as instruments of the bank's conspiracy. It is evident that the statutory obligations to deal with the Gardaí in connection with the money laundering legislation and the responses of the Gardaí to such notifications are confidential and separate from the other activities of the bank including the disciplinary inquiry. I am satisfied that Mr. Dunne had no knowledge of the dealings between Mr. Gibson and his colleagues with the Gardaí. Mr. Gibson's evidence is of value to the court since there is no allegation of conspiracy made against him. It is apparent that Mr. Gibson took a serious view in relation to the matters set out in the Special Investigation Report. I am satisfied that Mr. Gibson acted independently and was not improperly influenced by Mr. Kennedy or Mr. Condon.

576. The Court has considered the pleas in the Amended Statement of Claim following the supplemental discovery of documents in relation to the defendant's reporting of the plaintiff to the Fraud Squad. The Court has already concluded there was no conspiracy in relation to Mr. Kennedy and Mr. Condon, and there was no impropriety on the part of Mr. Gibson. These additional claims are rejected.

### **Ms. Nicola O'Brien**

577. In the third day of the closing submissions of the plaintiff the plaintiff's counsel asserted that Ms. Nicola O'Brien, solicitor, should not have been doing what she was doing. She was acting as a protagonist and acting in a dual function, it was stated. She was representing the defendant and providing advice to the Dunne Inquiry it was asserted.

578. Repeatedly the Court asked counsel on behalf of the plaintiff during the hearing was Ms. O'Brien involved in the conspiracy or was any allegation being made against her. The Court was told no such matters were being alleged.

579. The Court will not entertain such allegations against Ms. O'Brien. Furthermore, her involvement was known to the plaintiff without protest at the outset of the Inquiry including her letter of 2<sup>nd</sup> July 2002 to Mr. Dunne as a result of which he took advice from Mr. Given.

### **Conclusion**

580. The primary allegation in this case is a malicious conspiracy by the Defendant's servants or agents. It is argued that the conspiracy is characterised by an agreement to deny fair procedures to the plaintiff. Surprisingly it is then alleged that if there was no conspiracy the allegations of breaches of fair procedures remain as a separate cause of action.

581. It is arguable that the plaintiff's case stands or falls on the ability to prove there was a conspiracy to deprive the plaintiff of fair procedures. However, the Court has considered the issues separately. As already found, the Defendant, having confined its allegations to the Special Investigation Report

(i) was not required to produce Mr Muckian for cross examination to, as Mr Horan said, determine "what was his whole process about"

(ii) did not dictate to Mr Dunne the witnesses to be called or documents to be produced relevant to the issues under consideration

582. There were no breaches of procedure by Mr Dunne and the finding of Mr. Dunne of gross misconduct on the part of the plaintiff was a conclusion lawfully arrived at by Mr Dunne.

583. The defendant has argued that the court should not re-open the merits of the disciplinary findings, whilst the plaintiff has invited the Court to do so arguing the dismissal was procedurally unfair in some substantial way or that the finding was substantively wrong or disproportionate or could have justified a lesser sanction as it was in the nature of a first offence. In the Court's finding many if not all of these issues are appropriate to be determined under Unfair Dismissals legislation.

## **Schedules**

### **Schedule 1 - Disciplinary Correspondence**

1. There has been extensive correspondence between the plaintiff's solicitors (Mr. Smith) and Ms. Nicola O'Brien, solicitor of the defendant. This correspondence extends to some 200 pages from 27<sup>th</sup> August, 2001. The witnesses were examined and cross examined extensively over the course of the proceedings on this correspondence. It is not practical to set out extensively contents of such correspondence but it is necessary to allude to some of it in shortened form in order to indicate the issues raised and the attitude of the parties to such matters.

2. On 27<sup>th</sup> August, 2001, Mr. Paddy Murphy wrote to Mr. Smith invoking the bank's internal disciplinary procedures arising from the issues in the Special Investigation Report of 23<sup>rd</sup> August, 2001. Mr. John Dunne, Regional Manager South Leinster was appointed to conduct the disciplinary inquiry. On 28<sup>th</sup> August, 2001, Mr. Dunne wrote offering an opportunity to the plaintiff to respond to the matter set out in the report suggesting a meeting between himself, the plaintiff (and his legal representative) and Mr. Kennedy in accordance with practice.

3. On 30<sup>th</sup> August, 2001, Mr. Smith wrote stating that the plaintiff was undergoing medical treatment for severe stress and trauma and holding the defendant responsible for his condition. It sought specified documentation from the defendant and required fair procedures to be observed. On 5<sup>th</sup> December, the defendant

responded stating that the matters at issues were set out in the report and that the report cannot be said to be final until the plaintiff had an opportunity to respond to the matters raised therein. He stated that the documentation sought had already been shown to the plaintiff on 22<sup>nd</sup>/23<sup>rd</sup> May followed by an opportunity to inspect documentation on 11<sup>th</sup> July, 2001 and that it would be supplied once the voluminous copying was completed.

4. On 28<sup>th</sup> September, Mr. Smith sought details in the matters which triggered the suspension of the plaintiff stating that such matters had been repeatedly requested. On 1<sup>st</sup> October, Mr. Smith claims that the procedures initiated against the plaintiff have from the outset been irredeemably tainted by bias and prejudice and that there is no possibility of his being afforded fair procedures if the bank has seen fit to disregard the High Court proceedings which were in being. It threatened to restrain the disciplinary proceedings until the High Court proceedings instituted had been determined by the court.

5. Following the order of Lavan J. on 23<sup>rd</sup> January, 2002, refusing the plaintiff's application for interlocutory relief to restrain the disciplinary proceedings, the defendant sought a meeting between Mr. Dunne and Mr. Kennedy.

6. On 28<sup>th</sup> February, 2002, Mr. Smith claims that contrary to what was stated by Mr. Mitchell in the High Court proceedings that the plaintiff could cross examine persons relevant to the inquiry and adduce evidence, it appeared that the defendant was relying on the investigation and report dispensing with any obligation to prove its case against the plaintiff.

7. On 3<sup>rd</sup> April, 2002, the defendant stated that the plaintiff was entitled to all documentation which had been provided and would be entitled to be represented at the disciplinary hearing and to cross examine any person relevant to the inquiry and to adduce evidence or call witnesses on his behalf. The letter stated that Mr. Dunne would question Mr. Kennedy and the other authors of the report as he thought fit.

8. On 18<sup>th</sup> April, the plaintiff stated that he would attend the proposed disciplinary meeting of 29<sup>th</sup> April without prejudice to his position. The attendance of Ms. Freeley and Mr. Hickey was sought to the extent that the defendant was alleging that the plaintiff colluded in or was facilitating money laundering and/or tax evasion by customers of the bank, the attendance of all necessary persons at the inquiry was sought. On 25<sup>th</sup> April, 2002, the attendance of a garda superintendent and a garda detective sergeant together with some ten other persons was sought. In relation to some of the witnesses, his attendance was sought by the plaintiff, it was indicated that the defendant could not compel the attendance of its customers.

9. By letter dated 10<sup>th</sup> May, 2002, the plaintiff suggested an official stenographer should be engaged to record the proceedings and also requested the defendant make available the bank's employee who made the initial complaints against the plaintiff which prompted Mr. Byrne to call for the audit investigation and for such person to be a witness for cross examination.

10. By letter dated 15<sup>th</sup> May, 2002, the defendant indicated it would not be making available the bank's employee who made the initial complaint against the plaintiff. Such complaint obliged the bank to carry out an inquiry which prompted a wider investigation culminating in the Special Investigation Report. Such report dealt with all the issues of substance for which the bank as employer was seeking an explanation/response. It was submitted that the plaintiff's right in constitutional justice to confront his accusers was satisfied by the entitlement to cross examine

the relevant auditors and authors of the Special Investigation Report.

11. By letter dated 15<sup>th</sup> May, 2002, the bank's refusal to make available the employee who made the initial complaints for cross examination was not accepted. It was contended that the plaintiff did not accept that Mr. Kennedy was the plaintiff's accuser and that cross examination in that regard should be directed solely to him. It was contended that the complaint employee and Mr. Byrne were the original accusers. Reference was made to the affidavits Mr. Byrne and Mr. Mitchell in the High Court interlocutory proceedings where it was stated that the plaintiff would have an entitlement to cross examine any person at the disciplinary inquiry and that the bank would make available such employees.

12. On 19<sup>th</sup> June, 2002, the plaintiff sought in addition to Mr. Mangan from the bank's human resources department, being one of the witnesses have in addition Mr. Siobhan Toal, Head of the Human Resources Department and Mr. Gavin Lyng, HR Manager for north east region be made available as witnesses.

13. By letter dated 22<sup>nd</sup> July, 2002, the defendant's solicitor stating that the original complainant brought certain matters to the attention of the defendant who carried out the investigation resulting in an audit in the branch being carried out which triggered a wider investigation capsulated in the Special Investigation Report of 23<sup>rd</sup> August, 2001. Consideration of that report resulted in Mr. Murphy's decision to nominate Mr. Dunne to conduct the defendant's disciplinary procedures in relation to the plaintiff.

14. It was submitted that it was a report with which the disciplinary inquiry should be concerned and extraneous witnesses would prolong the inquiry. It was contended that from the defendant's prospective, the purpose of the disciplinary inquiry was to hear explanations for the issues in the report. It was contended that further evidence by Michael Mangan in relation to his discussion with the complainant prior to the audit and the report were largely irrelevant as was the production for cross examination and Ms. Toal and Mr. Lyng. It was stated that Mr. Kennedy, the author of the report had been subject to extensive cross examination (*in fact he was subject to cross examination for some ten days at the inquiry*). It was noted that whilst Mr. Kennedy had been subject to lengthy cross examination it had not been put to Mr. Kennedy what the plaintiff should say by way of explanation in relation to the matters dealt with in the report. It was also stated that the bank's right to place the plaintiff on special paid leave was not one for the disciplinary inquiry.

15. On 2<sup>nd</sup> September, the plaintiff sought the attendance of Mr. Muckian as a witness and others.

16. By letter dated 18<sup>th</sup> September, 2002, Mr. Dunne stated that following the adjournment of the hearing in July, he had taken independent legal advice on the conduct of the proceedings and proposed to make a ruling on the conduct of the disciplinary proceedings going forward. A draft of the proposed ruling was enclosed and submissions were invited from Mr. Smith from the defendant's solicitor.

17. On 31<sup>st</sup> October, Mr. Smith wrote requesting that the plaintiff was apprised of precisely what was being alleged against him and that the defendant was not entitled to adduce a report which allegations are made against the plaintiff in general terms without the bank clearly identifying in each case what the alleged wrongdoing consisted of and how the bank perceived the alleged wrongdoing.

18. On 31<sup>st</sup> October, Mr. Smith wrote a seven page letter in response to the draft

ruling of Mr. Dunne dated 18<sup>th</sup> September, 2002. It contended that the defendant had contrary to what was represented in the High Court interlocutory proceedings failed to call whatever witnesses the plaintiff wished to be produced and further resisted Mr. Mangan being called to give evidence. It was contended that the evidence proposed to be excluded by Mr. Dunne was relevant to the entire context of the subject matter of the inquiry and the absence of credibility on the part of Mr. Kennedy and Mr. Byrne. It was contended that the Special Investigation Report was not an audit report but a partial and biased investigation of the plaintiff commissioned and directed by Mr. Byrne as a result of maliciously motivated allegations made by Mr. Muckian against the plaintiff.

19. The plaintiff was intent on depriving the plaintiff of his entitlement to have Mr. Muckian cross examined. By ignoring the evidence available to the plaintiff, the defendant was in breach of the principle of procedural fairness set out in the *Abbeylara* decision when Mr. Dunne was displaying bias against the plaintiff. The device of proffering what Mr. Dunne described as "*independent legal advice*" was part of the process of the bank not being prepared to accept Mr. Dunne's earlier rulings but was sought that one do the effects of those rulings. The letter confirmed that it was the plaintiff's contention to give evidence in due course to the allegations made against him but that he was not prepared to acquiesce in the relentless and utterly self serving endeavour of the bank to delimit in an arbitrary fashion the ambit of the inquiry before.

20. A further draft ruling was submitted to the parties in November 2002. By letter dated 12<sup>th</sup> November, 2002, Mr. Dunne replied to the letter of 31<sup>st</sup> October from Mr. Smith. He said his role was to deal with the matters contained in the Special Investigation Report and to consider whether disciplinary sanction should be imposed on the plaintiff arising out of the matters contained in the report. He stated that he would ensure that the defendant would produce at the disciplinary hearing that any of its employees which can be shown to be relevant to the complaints made against the plaintiff contained in the Special Investigation Report. He did not believe that the defendant should be obliged to produce any persons who cannot be shown to be thus relevant and that the defendant would be given the opportunity to question all relevant persons without limitation. In relation to Mr. Muckian, he had not been persuaded that he was relevant to the matters at issue and would consider any submissions that might be made on behalf of the plaintiff to the relevance of Mr. Muckian as to the matters complained of in the Special Investigation Report. He believed that after thirteen days of hearings, some of which was devoted to hearing evidence whose relevance was questionable, it was appropriate to remind both sides of the matters which he considered to be in issue and therefore required addressing.

21. Having regard to the decisions in *Haughey* and *Abbeylara*, he decided in August 2001 that the disciplinary procedures related to the Special Investigation Report and the plaintiff's entitlement was to cross examine any persons who might be said to be "*accusers*" with respect to such report.

22. By letter dated 20<sup>th</sup> November, 2002, Mr. Smith insisted that Mr. Muckian should be made available for cross examination as he was heavily involved in the issues raised in the Special Investigation Report.

23. The ruling of Mr. Dunne is set out in Schedule . In an accompanying letter dated 3<sup>rd</sup> December, 2002, Mr. Dunne stated that he was dealing with the matter under para. 4(a) of the disciplinary procedure. He stated that in retrospect, the cross examination of Messrs. Mitchell, Barry, Byrne and Mangan were of questionable relevance to the matters contained in the Special Investigation Report and he gave his reasons therefore. He confirmed that the charges to be addressed by the plaintiff

in the Special Investigation Report that that report and the documentation referred to therein was self-explanatory and required no further elaboration. The charges against the plaintiff were sixteen charges set out in para. A3 together with the additional matters referred to para. A4 of the report in each case as detailed in s. B of the report. He also referred to the documentation in the report together with the schedule of issues which was forwarded to the plaintiff by Mr. Kennedy on 14<sup>th</sup> June, 2001.

24. In the course of his ruling, he referred to issues which had been raised which he considered to be outside the scope of his functions in the disciplinary proceedings. This included a dispute as to whether on 20<sup>th</sup> April, 2001, the plaintiff was suspended by the defendant or placed on special paid leave which was related to the earlier High Court proceedings. He also concluded that matters leading up to 20<sup>th</sup> April were beyond the scope of his functions. Notwithstanding his ruling any evidence already heard by him was not excluded from his consideration in order to preclude the plaintiff from calling witnesses in which own defence.

25. On 14<sup>th</sup> January, 2003, Mr. Dunne in response to a letter from Mr. Smith of 9<sup>th</sup> January, 2003, repeated that he did not consider Mr. Mangan or Mr. Muckian to be the plaintiff's "accusers" within the terminology used by the Supreme Court.

26. On 20<sup>th</sup> January, 2003, he gave his ruling as to why specific persons should be called as witnesses for cross examination and asked the relevance of certain of the persons.

27. By letter dated 24<sup>th</sup> January, 2003, he asserted that it was fair procedure to frame the report in such a way as to seek information on issues which arise in the particular section as opposed to setting out the specific charges. He asserted that he did not fulfil the requirement of para. 4(a) of the bank's disciplinary procedures. He asserted that the refusal of the defendant to identify charges and the particulars thereof and to give the context in which the defendant considered them to be serious was totally unfair to the plaintiff. It made it impossible for him to prepare the defence when the bank was refusing to identify the central issues in order of gravity (including the potential sanctions) and to disclose the context in which the bank considers the particular issues to be serious. In relation to the term "conversion" which was referred to in the report did not know what exactly the defendant was alleging under such heading against the plaintiff.

28. Mr. Smith's letter of 13<sup>th</sup> February, 2003, asserted that Mr. Dunne was entrenched in the bank's blinkered and unfair view of the scope of the process and the plaintiff required him to give reasons why he states that the initiation and genesis of the disciplinary process was not as relevant as the report itself. He claimed that the entire investigation was relevant to the matters contained in the report and that the Special Investigation Report was the product of a maliciously motivated attack on the plaintiff's good name, integrity and professional standing. It was claimed that he intended to exclude any witness who might assist the plaintiff in exposing *themala fides*. By excluding witnesses such as Messrs. Mangan and Early, is illustrating both bias and partiality against the plaintiff. He would be in a position to give evidence which would go to the credit of the defendant. The letter also set out details of why six other persons should not be called who were in the defendant's employment together with some four other witnesses including members of An Garda Síochána.

29. On 25<sup>th</sup> February, 2003, Mr. Dunne replied to earlier correspondence and stated that he was satisfied that the Special Investigation Report was sufficiently clear setting out the accusations or charges against the plaintiff. He noted that the



plaintiff had at the time begun the process of addressing the matters that were raised in the Special Investigation Report. He also gave particulars as to how he understood the meaning of the term "*conversion*" in relation to a cheque or draft. He further gave details as to why some seventeen persons were not called as witnesses. He stated that he had agreed to each and every one of the witnesses whom the plaintiff goes to call.

30. On 7<sup>th</sup> March, 2003, Mr. Dunne wrote to Mr. Smith asserting that he and his client were endeavouring to prolong the hearing for an indefinite period.

31. On 12<sup>th</sup> March, 2003, Mr. Smith wrote in relation to the relevance of witnesses which he proposed to call namely Mrs. Higgins and members of the gardaí and others and stated the question of their relevance would become clearer when Mr. Dunne set out the charges which the plaintiff had to meet. He further maintained that a deprivation of the plaintiff's right to cross examine Mr. Muckian was to make a mockery of the inquiry and to establish beyond any doubt that the inquiry was a charade.

32. By letter dated 26<sup>th</sup> March, 2003, Mr. Dunne repeated that he did not consider Mr. Muckian to be an accuser of the plaintiff nor did he feature in the Special Investigation Report and was not an accuser in respect of any of the accusations made against the plaintiff in the said report. Likewise any additional information from Mr. Mangan was not relevant and he was not one of the plaintiff's "*accusers*".

33. On 14<sup>th</sup> April, 2003, Mr. Smith wrote to Mr. Dunne stating that acting upon the advice of counsel, the plaintiff should not be forced into position where he was required to produce witnesses prior to being furnished with details of the specific accusations or charges which the defendant was making against him.

34. On 9<sup>th</sup> May, 2003, Mr. Smith stated that his actions and those of the plaintiff had always been motivated by the desire to obtain fair play by the plaintiff and to challenge the dishonest way in which the defendant had instigated and presented the case against the plaintiff which Mr. Dunne was endorsing. He stated that under the guise of following independent legal advice, Mr. Dunne subsequently succumbed to the bidding of the defendant and resiled from earlier undertakings. It claimed that the unreasonable position adopted by Mr. Dunne was compounded by his failure to identify the wrongdoing of which the plaintiff stand charged despite of the earlier undertakings to do so. It claimed that the stance of Mr. Dunne to the effect that something is not expressly mentioned in the Special Investigation Report, it is not relevant, confirms that Mr. Dunne was intent on sanctioning the lie that the bank had set up from the beginning as to the origin and nature of the investigation to the plaintiff. The letter asserted that no specific "*charges*" were contained in the report with the report being framed by way of general inquisition of with certain questions of "*potential*" wrongdoing being imposed. It stated that the plaintiff was dealt with each issue in the report which were raised in the form of general questions as matters of "*potential*" wrongdoing.

35. On 21<sup>st</sup> May, 2003, Mr. Dunne wrote to Mr. Smith in relation to the witnesses which the plaintiff wished to call and concluded that since they had not been called, they concluded that the plaintiff did not wish to call such evidence and he ruled that the hearing of evidence was complete after 21 days.

36. On 13<sup>th</sup> May, 2003, Mr. Smith wrote in response and stated that he was not in a position to know what additional witnesses the plaintiff needed to call until Mr. Dunne identified the specific complaints that the bank had in view of the evidence that the plaintiff had given at what Mr. Dunne had originally called the investigative

stage of the process.

37. In a letter dated 22<sup>nd</sup> August, 2003, Mr. Smith contended that the delay in reverting to him after the hearings were terminated was due to the fact that Mr. Dunne presumably found it necessary to carry out his own investigation into alleged serious issues (e.g. money laundering, forgery, fraud and deception) which had been highlighted by Mr. John Kennedy in his affidavit in the High Court. Details of any such investigation were required. It also complained that the letter pre-empted the inquiry in that a decision had been made to remove the plaintiff as manager of the Dundalk branch by the appointment of another person as branch manager.

38. On 8<sup>th</sup> September, 2003, Mr. Dunne sent his findings and decision arising from the disciplinary procedure and as set out in his letters of 26<sup>th</sup> March and 21<sup>st</sup> May, 2003, he proposed a meeting to enable the plaintiff make further representations in the context of the disciplinary action proposed and that he did not intend to reopen the disciplinary hearing at the meeting.

39. On 8<sup>th</sup> September, 2003, Mr. Dunne replied to Mr. Smith's letter of 22<sup>nd</sup> August and for the record stated that he had not carried out any form of separate investigation as referred to in the letter of 22<sup>nd</sup> August.

40. On 23<sup>rd</sup> September, 2003, Mr. Smith wrote objecting the findings of Mr. Dunne contending the proceedings by the bank and by Mr. Dunne were contrary to the principles of natural justice, in violation of the bank's own procedures and the representations made in the High Court. The contents of the "*Finding and Decision*" were defamatory of the plaintiff it was contended.

41. On 6<sup>th</sup> October, 2003, Mr. Smith wrote to the chief executive of the defendant protesting at the manner in which the proceedings before Mr. Dunne were conducted and alleging as a result of the conspiracy on the part of the bank and its officials to effect the plaintiff's removal and to conceal that conspiracy which encompassed the misleading of the High Court involving grave misrepresentations of the facts in the bank's affidavits extending to prudery and claiming that the plaintiff had suffered damage to his good name, professional standing, physical health and material wellbeing.

42. On 7<sup>th</sup> October, 2003, Mr. Dunne wrote indicating that following representations that may be made by or on behalf of the plaintiff that he would review the nature of the disciplinary action he had proposed and if the plaintiff was not satisfied with his decision the disciplinary procedures provided for an appeal.

43. On 13<sup>th</sup> October, 2003, Mr. Dunne wrote stating that the bank's disciplinary procedures had been revised since he commenced hearing the matter in April 2002 under the 1985 Disciplinary Procedures. This letter should be regarded as the notice of his decision under the revised disciplinary procedures for Bank of Ireland Group dated 1<sup>st</sup> July, 2002, a copy of which was enclosed. The procedures provided for an appeal against the disciplinary sanction of dismissal imposed by his decision. If the plaintiff wished to bring such an appeal he should give notice of the appeal to the human resources manager setting out the reasons for the appeal. If the plaintiff chooses to appeal against his decision, the disciplinary sanction will be suspended pending the outcome of the hearing of the appeal.

44. A further letter was sent to Mr. Soden on 24<sup>th</sup> October, 2003 protesting that the bank had now substituted disciplinary procedures dated 1<sup>st</sup> July, 2002, contrary to the repeated confirmation that the plaintiff was conducting his inquiry pursuant to

the bank's 1985 Disciplinary Procedure. He asserted that the defendant was now attempting to retrospectively impose restricted rights on the plaintiff and that in the circumstances, the plaintiff would not be exercising the limited right of appeal then offered by the defendant.

45. On 14<sup>th</sup> November, 2003, Mr. Soden wrote to Mr. Smith noting that the plaintiff had chosen not to exercise his right of appeal under the disciplinary procedures against the decision to appeal him.

46. On 18<sup>th</sup> November, 2003, Mr. Dunne wrote noting that the plaintiff had chosen not to exercise his right of appeal under the disciplinary procedures and that the plaintiff would be dismissed from his employment with immediate effect from 13<sup>th</sup> October, 2003.

## **Schedule 2**

### **Selected extracts from transactions dealt with in:**

- (i) 14<sup>th</sup> June document sent by Mr Kennedy to Mr Smith
- (ii) The Special Investigation Report
- (iii) The Dunne report

## **2.1 Terence McKean**

### **(i) Terence McKean**

An account in the name of Terence McKean had a balance of £31,313 overdrawn on 8.1.2001. (This has reduced since). A number of staff have expressed doubts that this account was not being operated by a person called Terence McKean. This account was opened by John Higgins on 27.8.1993. The opening documentation refers to Mr McKean with an address 6 Templehill Road, Newry as a farmer and cattle dealer, self-employed.

There are suggestions that this account was operated by an individual called Peter Begley and after his death, by his son Barry Begley. We found that a lodgement of £9,393 to the account on 11.9.1996 (branded 9.9.1996) is signed as having been made by Barry Begley. This signature appears to conform to the specimen signature for Barry Begley who has an account in the branch.

The account of Terence McKean is subject to a bad debt provision although there are some payments coming through.

Investigations conducted on behalf of the Bank found that this individual had never lived at the above Newry address. The parties living at that address seemed to know Terence McKean and stated that he had used the address for mailing purposes. The neighbours were found to be unaware of Terence McKean. Further enquiries located one Terence McKean who lived in Summerhill, Co Louth, and judgement was obtained against him, but there was no property against which it could be registered.

Clarification is needed as the identity of the owner of the account, and as to the degree of investigation by John Higgins as to the actual address of the party concerned at the time the account was opened, and subsequently during its

operation and decline..

**(ii) B20. Terence McKean**

An account in the name of Terence McKean is currently overdrawn £30,117.64. A number of Bank staff have expressed doubts that this account was being operated by a person called Terence McKean. This account was opened by John Higgins on 27.8.1993. The opening documentation refers to Mr. McKean with an address 6 Templehill Road, Newry as a farmer and cattle dealer, self-employed.

There are suggestions that this account was operated by an individual called Peter Begley and after his death, by his son Barry Begley. We found that a lodgement of £9,393 to the account on 11.9.1996 (branded 9.9.1996) is signed as having been made by Barry Begley. This signature appears to conform to the specimen signature for Barry Begley who has an account in the branch.

The account of Terence McKean is subject to a bad debt provision although there are some payments coming through.

Investigations conducted on behalf of the Bank found that this individual had never lived at the above Newry address. The parties living at that address seemed to know Terence McKean and stated that he had used the address for mailing purposes. The neighbours were found to be unaware of Terence McKean. Further enquiries located one Terence McKean, who lived in Summerhill, Cc Louth, and judgement was obtained against him, but there was no property against which it could be registered.

Clarification is needed as to the identity of the owner of the account, and as to the degree of investigation by JH as to the actual address of the party concerned at the time the account was opened, and subsequently during its operation and decline.

**(iii) B20. Terence McKean**

Mr Higgins admitted that he opened this account in 1993 for Terence McKean with an address at 6 Templehill Road, Newry. With regard to the identity of the ownership of the account I am satisfied Terence McKean was the owner of this account. With regard to the level of investigation carried out as to the actual address of the party concerned at the time the account was opened, and subsequently during its operation and decline the following is the explanation: "*When the account was opened there wasn't any major test to be carried out*". This statement is not correct. Branch procedures for opening new non-resident accounts have always required that steps be taken to verify identity and address.

One lodgement was made to this account on 9 September 1996 which was signed by Barry Begley who was alleged to have been operating the account. Mr Higgins established that the Bank sought and obtained judgement against Mr McKean for the full amount of the debt outstanding. On the evidence available to me it would be unreasonable to deduce that this account was owned and/or was being operated by anyone other than Terence McKean.

However the Northern Ireland address on the account is not the address at which Mr McKean normally resided and as such is a false address. Mr McKean was operating a Non-Resident current account even though he was a resident of the Republic of Ireland.

My findings in this case are:

Mr Higgins has clarified the ownership of this account.

Mr Higgins did not conduct any investigation as to the actual address at which Mr McKean resided at the time the account was opened.

Mr Higgins stated that he did carry out some investigation as to the actual address of Mr McKean when the account went in to decline.

## **2.2 Rank Xerox Credit Card Applications**

### **(i) 22. Credit Cards for Xerox employees**

A sample of Credit card applications for employees of Xerox found that the information, such as salary level and length of time with bank on which a decision would be made to approve the application, had been altered in a significant proportion of cases. Alterations had largely been effected in handwriting apparently that of John Higgins.

*Without a clear explanation for this activity, it could be regarded as tantamount to falsifying information with a view to the granting of credit facilities. This would be clearly in breach of the Bank's Code of Conduct and the principles on which applications for credit are made.*

### **(ii) B25. Credit Cards for Xerox Employees**

A sample of Credit card applications for employees of Xerox found that the information, such as salary level and length of time with bank on which a decision would be made to approve the application, had been altered in a significant proportion of cases. Alterations had largely been effected in handwriting apparently that of John Higgins.

*Without a clear explanation for this activity, it could be regarded as tantamount to falsifying information with a view to the granting of credit facilities. This would be clearly in breach of the Bank's Code of Conduct and the principles on which applications for credit are made.*

### **(iii) B25 Credit Cards for Xerox Employees.**

Ref: Transcript dated 28 March 2003. Page 9

In this case a sample of 30 Credit Card applications were examined and five were found to have been altered but alterations were not authorised by the applicants. The general explanation offered by Mr Higgins was that Xerox which is a large multinational Company had to be facilitated with Credit Cards for its workforce in Dundalk at short notice.

The Credit Cards were being used as a means of providing free Banking and credit facilities to these employees. All new employees did some initial training in the USA and required Credit Card facilities to take care of out of pocket expenses.

I examined copies of the five credit card applications in question. I will comment separately on each copy Credit Card application that I examined.

### **1. Kieran Boyd**

It would appear that Kieran Boyd completed the customer sections of the application for i.e. Please tell us about yourself, Please tell us about your employment, Please tell us about your financial details. Mr Higgins states that Kieran Dunne, a Bank Official at Dundalk Branch, changed the salary figure on the application form from IR£900 to IR£1,000. *"yes what we are saying is that it was altered to what we believed was the correct salary figure."* This change is not authorised by the customer.

Mr Higgins certified that the information on the application was correct.

### **2. Anthony Todd**

It would appear that Anthony Todd completed two of the customer sections of the form i.e. Please tell us about yourself, Please tell us about your employment. Mr Higgins states that Hugh Muckian changed the salary figure from IR£900 to IR£1,000 and added *"the spouses net income of IR£800 is written by Hugh Muckian"*. Mr Higgins stated that the next section i.e. Please tell us about your financial details was completed by Hugh Muckian. These changes were not authorised by the customer.

Mr Higgins certified that the information on the application was correct.

### **3. Steven Hilton**

It would appear that Steven Hilton completed two of the customer sections of the form i.e. Please tell us about yourself, Please tell us about your employment. Mr Higgins claims that the salary figure was in fact changed downwards from IR£1,600 to IR£1,400 by a branch official named Clodagh Greene. From examining a copy of the application my considered view is that this application was altered upwards from IR£600 to IR£1,100. Mr Higgins also claimed that Clodagh Greene completed the Please tell us about your financial details section. These changes were not authorised by the customer.

Mr Higgins certified that the information on the application was correct.

### **4. Terry Barron**

It would appear that Terry Barron completed the customer sections of the application for i.e. Please tell us about yourself, Please tell us about your employment, Please tell us about your financial details. There is a change to net monthly income which Mr Higgins admits he made. *"There is a change of net monthly income and I think or believe that it looks like my writing"*. The income figure was changed from IR£800 or IR£900 to IR£1,100 by Mr Higgins. This change was not authorised by the customer.

Mr Higgins certified that the information on the application was correct.

### **5. Una Duffy**

It would appear that Una Duffy completed the customer sections of the application

for i.e. Please tell us about yourself, Please tell us about your employment, Please tell us about your financial details. Mr Higgins admitted that he changed the net income on the form: "Your net income has been changed, I would say it has been tippexed and figures put in by me of IR£1,100 but there are two zeros at the side of it which I believe are the zeros in the handwriting of Hugh Muckian". The two extra zeros have little significance. This change was not authorised by the customer.

Mr Higgins certified that the information on the application was correct.

Four Credit card applications had the net monthly income altered to IR£1,100 and one was altered to IR1,000 plus the addition of income from spouse. Mr Higgins has admitted that he altered those in respect of Barron and Duffy. In the other three cases he certified the altered information was correct.

Having considered the evidence and explanations given I can only conclude that on the balance of probabilities the alterations were made to help the Credit Card Applications obtain a positive credit score.

My findings in this case are:

I find that in three cases Mr Higgins knowingly signed off on unauthorised altered financial information and in two cases he altered the applications with a view to granting credit facilities. I find that Mr Higgins knowingly falsified the documentation in question and submitted it for credit assessment and card issue and approval and in doing so clearly breached the bank's Code of Conduct in relation to Integrity and Honesty.

I find no evidence to suggest that the length of time with the Bank was altered in any of the five cases examined.

## **2.3 Michael McVeigh**

### **(i) 7. Michael McVeigh**

During our investigations we noted transactions involving the above named, who does not appear to be a customer of the branch. The transactions were:

1. Cheque no. 496561 drawn by First Active plc, Dundalk dated 22/12/00 in favour of Michael McVeigh, which was sent for collection to Bank of Ireland, Westland Row (bankers, to First Active) on the same date.
2. The proceeds of the collection of the cheque were lodged to Sundry Credits Suspense on 29<sup>th</sup> December 2000.
3. Twelve drafts for £10,000, and one draft for £7,046.30 in favour of Michael McVeigh were written on 4<sup>th</sup> January 2001.
4. All thirteen drafts were cashed on 9<sup>th</sup> January 2001, although crossed "Account Payee".

*Issues concerning these transactions, which need explanation are:*

- 1. First Active crossed cheque effectively cashed for a person who does not appear to be a customer.*
- 2. No identification details or results of enquiries seen re the transactions for a non-customer.*
- 3. The cheque was endorsed M McVeigh, but this appears to be in handwriting apparently that of John Higgins.*
- 4. The applications for the drafts, all apparently in handwriting apparently that of John Higgins, were not signed by the applicant. The address written on the applications is Bessbrook, Co. Armagh.*
- 5. None of the cashed drafts was endorsed b), the payee.*
- 6. The Cash Paid listing shows the drafts cashed in three tranches - two of £40, 000 and one of £47,046. The name – John – is written in the details column opposite each of these tranches on the Cash Paid listing.*
- 7. Details of the cheque sent for collection were not entered in the register maintained in the branch for that purpose.*

*These transactions could be regarded as unusual, and carried out in breach of a number of Bank policies and procedures which include:-*

- a) Payment Policies in relation to both the First Active cheque and the drafts subsequently issued.*
- b) Money Laundering*
- c) Issuance of Drafts*
- d) Maintenance of internal bank records,*

These transactions need to be fully explained, and without an adequate explanation, a question could be raised of money; laundering or other illegal activities.

## **(ii) 8. Michael McVeigh**

We noted transactions involving the above named, who does not appear to be a customer of the branch. The transactions were:

1. Cheque no. 496561 for £127,064.30 drawn by First Active plc, Dundalk dated 22/12/00 in favour of Michael McVeigh, was sent for collection by JH to Bank of Ireland, Westland Row (bankers to First Active) on the same date. This fact was not recorded in the register of cheques sent for special collection maintained at Clanbrassil St. branch.
2. The proceeds of the collection of the cheque were lodged to Sundry Credits Suspense on 29<sup>th</sup> December 2000.
3. Twelve drafts for £10,000, and one draft for £7,064.30 in favour of



Michael McVeigh were written on 4<sup>th</sup> January 2001.

4. The cover for these drafts was the amount credited to Sundry Credits Suspense on 29<sup>th</sup> December.

5. All thirteen drafts were cashed without endorsement on 9<sup>th</sup> January 2001, although crossed "Account Payee".

The applications for the drafts, all in handwriting apparently that of JH, were not signed by the applicant. The address written on the applications is Bessbrook, Co. Armagh. The drafts are all in handwriting apparently that of JH, who signed them as authorised signatory.

*Issues which need explanation concerning these transactions are:*

1. First Active crossed cheque effectively cashed for a person who does not appear to be a customer.
2. No identification details or results of enquiries seen re the above transactions for a non-customer.
3. The First Active cheque was endorsed M McVeigh, but this is in handwriting similar to that of John Higgins.
4. None of the cashed drafts was endorsed by the payee.
5. The Cash Paid listing shows the drafts cashed in three tranches - two of £40, 000 and one of £47,046. The name - John - is written by the cashier in the details column opposite each of these tranches on the Cash Paid listing.
6. The breaches of encashment policies and procedures for the issuing of drafts inherent in the above transactions

*Unless satisfactorily explained, transactions in this instance have all the hallmarks of money laundering or other illegal activities.*

### **(iii) B8 Michael McVeigh**

A series of transactions were undertaken by Mr. Higgins for Michael McVeigh who was not a branch customer. Mr Higgins claimed that because he possibly was an ICS customer that would make him a Bank of Ireland customer. This is not correct. Mr. Higgins accepts these transactions took place. The explanation offered in this case was that Mr. McVeigh's brother, mother and uncles were substantial branch customers.

In relation to non compliance with Money Laundering Procedures, Mr Higgins stated that he had sight of a Northern Ireland driving licence but no details of this or any other acceptable form of identification are recorded anywhere as required under the Bank's Money Laundering Procedures.

The explanations offered do not obviate Mr Higgins responsibility to ensure that these transactions were dealt with in a compliant manner

My findings in this case are:

Mr Higgins knowingly breached the Bank's Cheque Encashment Policy by effectively cashing a cheque for a non customer.

Mr. Higgins knowingly failed to comply with Bank Procedures in relation to Money Laundering identification requirements.

Mr Higgins has disputed that he endorsed the First Active cheque. In, the absence of sight of the actual item I cannot make a finding in this regard.

Mr. Higgins knowingly used Sundry Credits Suspense Account inappropriately for a large (IR£127,084.30) non-branch customer transaction.

Mr. Higgins knowingly breached Bank procedures for issuing drafts including encashment of 13 drafts contrary to the crossing instruction of "Account Payee".

Mr. Higgins knowingly failed to obtain endorsement on 13 Drafts totalling (IR£127,084.30)

## **2.4 Joseph O'Toole**

### **(ii) B.12 Joseph O'Toole**

A draft no. 122746 in favour of B.I.A.M. for IEP£696,498.78 was issued on 29<sup>th</sup> August 2000. The draft application was in the name of Joe O'Toole, Taylors Hill, Galway. The draft, and application were in handwriting apparently that of JH, who also signed the draft as authorised signatory. Mr. O'Toole did not sign the application as required. There is no account in Clanbrassil St. in the name of Mr. O'Toole, and it is not known if he is a customer of any other branch of the Bank.

The cover for the draft was four cheques (issued in euros) drawn by Bloxham Stockbrokers in favour of Manly Investments Limited. There is no account in the name of Manly Investments Ltd. in Clanbrassil St. branch, and we have found that there is no Irish registered company in this name. The cheques were not endorsed, and in any event they should only have been lodged to an account in the company's name.

The proposal dated 29/8/2000 for a Bank of lifetime portfolio policy in the name of Joseph O'Toole showed information, for compliance with money laundering procedures, that he was a customer of Clanbrassil St. branch at 2/5/95. This information was completed in handwriting apparently that of Martina Hamill, the then Insurance and Investments Manager at Clanbrassil St. The information was certified as correct by JH using his Bank signature number 29/8/00. The account number used as part of this certification is one allocated for a now closed personal current account in the name of Frank Hamill (husband of Martina Hamill). It should be noted that Ms. Hamill, previously an official attached to the branch, was seconded in November 1999 to Lifetime Assurance Co. Ltd. As Insurance and Investment Manager, based in Clanbrassil St. It was therefore incorrect and inappropriate for her to have been involved in the certification process in this instance.

*Clarification is needed as to the identity of this party. Explanation is required for:*

conversion of cheques in favour of a limited company

failure to comply with Bank's encashment policies and procedures re the issuing of drafts.

The certification by JH of details required to comply with money laundering procedures, which were patently false.

**(iii) B12 Joseph O'Toole**

*REF: Transcript dated 28 January 2003. Page 163:15 to Page 239:24*

*Transcript dated 5 March 2003. Page 72 Q 101 to Q112*

Mr Higgins admitted that he processed the transactions set out in the Group Internal Audit Report.

In this case four cheques payable to Manly Investments Ltd totalling IR£696,498.78 were used to provide cover for a draft for the same amount in favour of BIAM for the benefit of Joe O'Toole. Mr Higgins' explanation was that Joe O'Toole who is claimed to be a customer of Tuam Branch was introduced to him by an accountant in Dublin. Mr Higgins also claimed in evidence that Joe O'Toole is the sole beneficial owner of Manly Investments Ltd which is a nominee company. While this may well be the case it is a breach of Bank Procedures to accept cheques payable to a limited company and to convert same for the benefit of an individual. These cheques should have been lodged to the Bank Account of that Limited Company as required under Branch Operating Procedures. The explanation given for not complying with Bank Procedures for issuing Drafts was: *"I didn't happen to have a requisition with me when I was there"*

The explanation given for the certification of false information in relation to Money Laundering was; *"When I came back to the office at about 4.30 I signed that document in blank. The I&I Manager was away at a meeting and I had phoned her on the road coming down from Dublin to inform her that this documentation would be left on her desk at 4.30. She was gone to a meeting, I signed it in blank. She filled in the documentation and she subsequently sent that documentation away on that evening"*. An account number for a closed account in Clanbrassil Street was input on the form as proof that Joe O'Toole was an existing Bank of Ireland customer to meet Money Laundering requirements. By completing this form in blank Mr Higgins abdicated his responsibility as a Manager to ensure that Money Laundering Procedures were adhered and facilitated the falsification of this form which was a serious breach of the Bank's Money Laundering Procedures. In doing so he failed to act with Integrity and Honesty as required under the Bank's Code of Conduct.

The explanation given in this case is not satisfactory and did not obviate Mr Higgins' responsibility to ensure the transaction is carried out in a compliant manner.

My findings in this case are:

Mr. Higgins knowingly converted four cheques made payable to Manly Investments Ltd totalling IR£696,498.78 which were used as cover for a draft in favour of BIAM for the benefit of

Joe O'Toole.

Mr. Higgins knowingly breached Bank Procedures for issuing drafts.

Mr. Higgins knowingly breached the Bank's Money Laundering Procedures by signing the Money Laundering Certification on the BIAM application even though the form was blank and facilitated the falsification of this document.

Mr Higgins breached of the Bank's Code of Conduct arising from the above.

## **2.5 Reilly transactions**

### **(i) 14. Phil Reilly**

As outlined above, an envelope was found with the name Phil Reilly on the outside, and this contained four ICS Deposit books in different names.

Mr. Oliver Reilly, c/o Bank of Ireland Clanbrassil St., Dundalk, Co. Louth, a/c no. SHH35838532REI showing a balance as at 28/1/00 of £32,662.83. Many of the entries in this book, and all of the recent ones, are in handwriting apparently that of John Higgins.

In the front of this book is an ICS withdrawal record for £100 dated 7 Jun 1996 for this account.

Mr. Oliver Reilly & Mrs. Patricia Reilly, Gibbstown, Navan, Co. Meath, a/c no. B1442645309REI showing a balance as at 28/1/00 of £98,840.27. All of the handwritten entries in this book are in handwriting apparently that of John Higgins.

In the front of this book are (all in handwriting apparently that of John Higgins)

- ICS withdrawal record in the name of Matthew Reilly Esq., a/c no. 36266994 for £3,650.40 dated 11 Dec 2000

- ICS lodgement record in the name of O. Reilly Esq. & Mr. P Reilly, a/c no. 42645309 for £42,500 dated 28 Jan 2000

- ICS lodgement record in the name of Oliver Reilly Esq. A/c no. 35838532 for £26,050.28 dated 28 Jan 2000.

Mr. Matthew Reilly, Blackhills, Bailieboro, Co. Cavan a/c no SHH36266994REI showing a balance as at 6/4/01 of £73,619.93. Many of the entries in this book, and all of the recent ones, are in handwriting apparently that of John Higgins. Within this book are (all in handwriting apparently that of John Higgins):

- ICS lodgement record (no name quoted) a/c no 36266994 for £17,850 dated 1 Feb 2001

- ICS lodgement record in the name of Matthew Reilly Esq. A/c no 36266994 for £10,000 dated 11 Dec 2000.

- ICS lodgement record in the name of Matthew Reilly Esq. A/c no

36266994 for £22,735.33 dated 16 Oct 2000.

- ICS lodgement record in the name of Matthew Reilly A/c no 36266994 for £25,000 dated 28 Jan 2000.

- ICS withdrawal record in the name of Matthew Reilly A/c no 36266994 for £20,000 dated 11 Dec 2000.

Mr. Sean Reilly, Blackhills, Bailieboro, Co. Cavan, a/c no. SHH3626703ORF-I showing a balance as at 9/11/00 of £69,486.04. Many of the entries in this book, and all of the recent ones, are the handwriting apparently that of John Higgins.

Within this book are (all in handwriting apparently that of John Higgins):

- ICS lodgement record in the name of Sean Reilly A/c no. 36267030 for 125,000 dated 28 Jan 2000.

- Bank of Ireland compliments slip with the figures 4052.35 written on the reverse.

We examined a number of recent transactions on these accounts, which resulted in the following facts coming to light:

#### Account Oliver Reilly

With one exception, transactions on this account since August 1996 have been interest credits. There was a lodgement of £26,050.28 on 28/01/2000. The ICS Deposit Lodgement form for this transaction was entirely in handwriting apparently that of John Higgins. This lodgement arose from negotiation of an Irish Nationwide Building Society Account cheque for £76,050.28 in favour of Sean Reilly. This cheque was not endorsed. The proceeds of this cheque were also split between the accounts Matthew Reilly and Sean Reilly (see details under those headings below).

#### Account Oliver & Patricia Reilly

Since a cash withdrawal of £50,000 in July 1996, transactions on this account, with one exception have been interest credits. There was a lodgement of £42,500 on 28/01/2000. This comprised of an Irish Nationwide Building Society cheque for £42,500 in favour of Matt Reilly. The cheque was not endorsed. The ICS Deposit Lodgement form was entirely in handwriting apparently that of John Higgins.

#### Account Matthew Reilly

Following a number of transactions in 1996, the only transactions in the meantime were interest credits until £25,000 from the cheque referred to under the heading Oliver Reilly was lodged to this account on 28/01/2000. The ICS Deposit Lodgement form for this transaction was also entirely in handwriting apparently that of John Higgins. Further transactions on this account were:

(1) On 16/10/2000 a lodgement of £22,735.33 arose from a cheque for £21,735.33 on the account J & M Sloyan at Bank of Ireland Maynooth in favour of Sean Reilly, and cheque for £1,500 in favour of Shannon Homes on account JG & G O'Reilly at Bank of Ireland, Bailieboro, less cash paid £500.

(2) On 09/11/2000 a lodgement of £24,000 arose from cash received. The ICS Deposit Lodgement form for this transaction was in

handwriting apparently that of John Higgins.

(3) On the same date (09/11/2000) there was a withdrawal of £35,613.48 on the account. We were unable to locate the voucher for this. However we noted a lodgement for the same amount on that day to the ICS account in the name of Sean Reilly (see below).

(4) Lodgement of £10,000 on 12/12/2000. This related to an Irish Nationwide cheque for the same amount in favour of Sean Reilly. This cheque was not endorsed. The ICS Deposit Lodgement form for this transaction was in handwriting apparently that of John Higgins. This indicated that the amount was paid in by "Self".

(5) Withdrawal of £3,965.40 on 12/12/2000. This is shown as a cash paid item via the Foreign Exchange Cash. The ICS withdrawal form, apart from the signature, is in handwriting apparently that of John Higgins.

(6) Further withdrawal of £20,000 On 12/12/2000. This is shown as a cash paid via the Secure Cash.

(7) Lodgement of £17,850 on 01/02/2001. This formed part of a series of transactions on that day:

*a. Cash Received £23,850*

*b. Debit on savings account Philip &*

*Patricia O'Reilly (73471575) £15,484*

*Total £39.334*

*Lodged as follows:*

*c. Philip O'Reilly BTL 7347214 £2,000*

*d. Philip O'Reilly TL 66693444 £7,000*

*e. Philip O'Reilly TL 73473001 £12,484*

*f. ICS a/c 36266994 Matthew Reilly £17,850*

*Total £39.334*

(8) Lodgement of £28,000 cash on 30/03/2001.

(9) Withdrawal of £5,000 by way of cash on 06/04/2001. We noted that there was also a withdrawal of £40,400 from the account Philip O'Reilly & - Patricia O'Reilly at Clanbrassil St (73471575) on the same date. Both vouchers were filled in, apart from the signatures, in writing apparently that of John Higgins. The account number 46868348 was in writing apparently that of John Higgins (it is unclear

what account this number relates to), but it was altered to 73471575. Both vouchers were actually signed "P. Reilly". We could not locate any authority for P. Reilly to operate the account of Matthew Reilly.

#### Account Sean Reilly

Following a cash withdrawal of £6,953.90 in June 1999 there have been only two transactions on this account other than interest credits:

(1) A lodgement of £25,000 on 28/01/2000 arising from the Irish Nationwide cheque as referred to under Oliver Reilly and Matthew Reilly. The ICS Deposit Lodgement form for this transaction was also entirely in handwriting apparently that of John Higgins.

(2) The lodgement of £35,613.48 on 09/11/2000 referred to under Matthew Reilly. The ICS Deposit Lodgement form for this transaction was in handwriting apparently that of John Higgins (the name Matthew Reilly was written in for the name of the account, but changed to Sean Reilly. What appears to be M Reilly is written on the form as paying in the lodgement. It is not clear whose writing this aspect is.

#### Additional comments:

- We obtained the opening documentation for the various accounts in ICS and found that the "Reilly" portion of the signatures of Sean, Matthew and Oliver Reilly compared to the "Reilly" portion of the signature of Philip Reilly (O'Reilly) for his own personal accounts and in relation to the accounts of Shannon Homes at Clanbrassil St.

- There was an A4 pad on John Higgins' desk with entries which appeared to be a "to-do" list. One of these was an item "Phil Reilly re Malaga". This could have significance in that it appears from Bank files that Phil Reilly has an apartment in Marbella (adjacent to Malaga). We also found an envelope containing two air tickets for a return journey from Dublin to Malaga on 25<sup>th</sup> May. These tickets are in the name of John Higgins and another party.

#### Issues that need clarification /explanation in relation to the above:

- *Clarification re the ownership of the four ICS accounts, and the transactions on these generated by another party without mandates.*

- *Conversion of cheques in favour of Shannon Homes, Sean Reilly and Matthew Reilly lodged without endorsement.*

- *Transaction on account Matthew Reilly, signed P. Reilly, when there was no authority for this.*

- *Significance of entry on A4 pad referred to.*

#### **(ii) B.14 Phil Reilly**

As outlined in Appendix 2, an envelope was found with the name Phil Reilly on the outside, and this contained four ICS Building Society Deposit books in different names:

1. Mr. Oliver Reilly, c/o Bank of Ireland, Clanbrassil St., Dundalk, Co. Louth.
2. Mr. Oliver Reilly & Mrs. Patricia Reilly, Gibbstown, Navan, Co. Meath,
3. Mr. Matthew Reilly, Blackhills, Bailieboro, Co. Cavan,
4. Mr. 'Sean Reilly, Blackhills, Bailieboro, Co. Cavan.

In these deposit books were various records of lodgement and Withdrawal relating to these ICS accounts. These, and entries in the various deposit books were mostly in handwriting apparently that of JH.

We examined a number of recent transactions on these accounts, which resulted in the following facts coming to light:

#### Account Oliver Reilly

There was a lodgement of £26,050.28 on 28/01/2000. The ICS Deposit Lodgement form for this transaction was entirely in handwriting apparently that of JH. This lodgement arose from negotiation of an Irish Nationwide Building Society Account cheque for £76,050.28 in favour of Sean Reilly. This cheque was not endorsed. The proceeds of this cheque were also split between the accounts Matthew Reilly and Sean Reilly (see details under those headings below).

#### Account Oliver & Patricia Reilly

There was a lodgement of £42,500 on 28/01/2000. This comprised of an Irish Nationwide, Building Society cheque for £42,500 in favour of Matt Reilly. The cheque was not endorsed. The ICS Deposit Lodgement form was entirely in handwriting apparently that of JH.

#### Account Matthew Reilly

£25,000 from the cheque referred to under the heading Oliver Reilly was lodged to this account on 28/01/2000. The ICS Deposit Lodgement form for this transaction was also entirely in handwriting apparently that of JH. Further transactions on this account were:

- (1) On 16/10/2000 a lodgement of £22,735.33 arose from a cheque for £21,735.33 on the account J & M Sloyan at Bank of Ireland Maynooth in favour of Sean Reilly, and cheque for £1,500 in favour of Shannon Homes on account JG & G O'Reilly at Bank of Ireland, Bailieboro, less cash paid £500.
- (2) On 09/11/2000 a lodgement of £24,000 arose from cash received. The ICS Deposit Lodgement form for this transaction was in handwriting apparently that of JH.
- (3) On the same date (09/11/2000) there was a withdrawal of £35,613.48 on the account. We were unable to locate the voucher for this. However we noted a lodgement for the same amount on that day



to the ICS account in the name of Sean Reilly (see below).

(4) Lodgement of £10,000 on 12/12/2000. This related to an Irish Nationwide cheque for the same amount in favour of Sean Reilly. This cheque was not endorsed. The ICS Deposit Lodgement form for this transaction w n handwriting apparently that of JH. This indicated that the amount was paid in by "Self"

(5) Withdrawal of £3,965.40 on 12/12/2000. This is shown as a cash paid item via the Foreign Exchange Cash. The ICS withdrawal form, apart from the signature, is in handwriting apparently that of JH.

(6) Further withdrawal of £20,000 On 12/12/2000. This is shown as a cash paid via the Secure Cash.

(7) Lodgement of £17,850 on 01/02/2001. This formed part of a series of transactions on that day:

*a. Cash Received £23,850*

*b. Debit on savings account Philip &*

*Patricia O'Reilly (73471575) £15,484*

*Total £39.334*

*Lodged as follows:*

*c. Philip O'Reilly BTL 7347214 £2,000*

*d. Philip O'Reilly TL 66693444 £7,000*

*e. Philip O'Reilly TL 73473001 £12,484*

*f. ICS a/c 36266994 Matthew Reilly £17,850*

*Total £39,334*

(9) Withdrawal of £5,000 by way of cash on 06/04/2001. We-noted that there was also a withdrawal of £40,400 from the account Philip O'Reilly & Patricia O'Reilly at Clanbrassil St (73471575) on the same date. Both vouchers were filled in, apart from the signatures, in writing apparently that of JH. The account number 46868348 written on the withdrawal form was in writing apparently that of JH (it is unclear what account this number relates to), but it was altered to 73471575. Both vouchers were actually signed "P. Reilly". We could not locate any authority for P. Reilly to operate the account of Matthew Reilly.

#### Account Sean Reilly

Following a cash withdrawal of £6,953.90 in June 1999 there have been only two

transactions on this account other than interest credits:

(1) A lodgement of £25,000 on 28/01/2000 arising from the Irish Nationwide cheque as referred to under Oliver Reilly and Matthew Reilly. The ICS Deposit Lodgement form for this transaction was also entirely in handwriting apparently that of JH.

(2) The lodgement of £35,613.48 on 09/11/2000 referred to under Matthew Reilly. The ICS Deposit Lodgement form for this transaction was in handwriting apparently that of JH (the name Matthew Reilly was written in for the name of the account, but changed to Sean Reilly. What appears to be M Reilly is written on the form as paying in the lodgement. It is not clear whose writing this aspect is.

We obtained the opening documentation for the various accounts in ICS and found that the "Reilly" portion of the signatures of Sean, Matthew and Oliver Reilly compared to the "Reilly" portion of the signature of Philip Reilly (O'Reilly) for his own personal accounts and in relation to the accounts of Shannon Homes at Clanbrassil St.

Issues that need clarification /explanation in relation to the above:

*- Clarification re the ownership of the four ICS accounts, and the transactions on these generated by another party without mandates.*

*- Conversion of cheques in favour of Shannon Homes, Sean Reilly and Matthew Reilly lodged without endorsement.*

*- Transaction on account Matthew Reilly, signed P. Reilly, when there was no authority for this.*

**(iii) B14 Phil Reilly**

*Ref: Transcript dated 5 March 2003 Page 155:20 to 183:23*

In this case there are four accounts with ICS Building Society:

1. Oliver Reilly, C/o Bank of Ireland, Clanbrassil Street, Dundalk.
2. Oliver and Patricia Reilly, Gibbstown, Navan, Co. Meath
3. Matthew Reilly, Blackhills, Bailieboro, Co. Cavan
4. Sean Reilly, Blackhills, Bailieboro, Co. Cavan

The Internal Audit Report set out issues that need clarification/explanation in this case:

A. Clarification re the ownership of four ICS accounts.

Mr. Higgins explained the following in relation to the ownership of these accounts:

Oliver Reilly is, in fact, Phil Reilly (Phillip Oliver Reilly).

Patricia Reilly is Phil Reilly's wife, formerly Carolan.

Matthew Reilly is a brother of Phil Reilly.

Dean Reilly is a brother of Phil Reilly.

Matthew and Sean are described as farmers who dealt in cattle and the four accounts are claimed by Mr. Higgins to relate to farming activities.

Conversion of Cheques in favour of Shannon Homes, Sean Reilly and Matthew Reilly without endorsement.

Mr. Higgins confirms these transactions took place. Mr. Higgins commented as follows; *"There are only five cheques"*.

*"There is IR£ 76,050 of a cheque payable to Sean Reilly. That cheque was broken up into three accounts; IR£25,000 to Sean Reilly, IR£25,000 to Matthew Reilly and IR£26,050.28 to Oliver Reilly."*

*"Cheque no. 2 is credited to the account of Oliver and Patricia Reilly and it is a cheque for IR£42,500 and it is payable to Matthew Reilly",  
"Cheque no. 3 is a cheque for IR£10,000 payable to Matthew Reilly, sorry credited to Matthew Reilly account, IR£10,000",*

*"The final two cheques were to be lodged to Matthew's account IR£21,735.33 plus IR£1,500 and there was IR£500 in cash given back which made the lodgement IR£22,735.33. The IR£21,735 was payable to Sean Reilly and the IR£1,500 was payable to Shannon Homes"*

The total amount of money involved in the transactions involving the five cheques was IR£151,785.33 which is a substantial amount of money. None of the five cheques were endorsed. I find that in each case that conversion by Mr. Higgins of cheques payable to individuals and a non personal legal entity to the value of IR£126,785.33 took place.

Of the cheque for IR£76,050 payable to Sean Reilly only IR£25,000 went to the credit of Sean Reilly's account.

Transactions of four ICS accounts generated by another party without mandate.

It is clear from the evidence that Phil Reilly initiated numerous transactions on the four accounts as detailed on pages 18 and 19 of the Group Internal Audit Report.

I have concluded that Phil Reilly was entitled to lodge funds to the four ICS accounts and in the normal course of events would not require a specific mandate from the account holders to allow him to do so. There are four withdrawals on the account of Matthew Reilly mentioned in the report where the existence of a written mandate is at issue.

In relation to a withdrawal of IR£35,613.48 the voucher would not be located. I am, therefore, unable to make a finding in relation to who signed this withdrawal.

In relation to the two withdrawals of IR£3,965.40 on 12 December 2000 and IR£20,000 on 12 December 2000, it is not clear who signed the forms.

Mr. Higgins evidence is that: *"To my recollection, Mr. Reilly would have produced these debits to me signed"*

In relation to the withdrawal of IR£5,000 on 6 April 2001, the evidence is that this item was signed by P Reilly. This transaction was generated by another party on the account of Matthew Reilly without mandate.

My findings in relation to this case are:

The ownership of the four ICS accounts was clarified by Mr. Higgins to my satisfaction.

One transaction was knowingly produced by Mr. Higgins on the account of Matthew Reilly without the required written mandate in breach of Branch Operating Procedures.

Cheques to the value of IR£126,785.33 in favour of Shannon Homes, Sean Reilly and Matthew Reilly were knowingly converted by Mr. Higgins for the benefit of other parties without endorsement.

### **Schedule 3**

#### **The Pleadings**

1. The plaintiff commenced employment with the defendant on 23<sup>rd</sup> September, 1971 and was manager of the defendant's branch at Clanbrassil Street, Dundalk from October 1990 until 13<sup>th</sup> October, 2003, when it was claimed his employment was unlawfully terminated by the defendant. The plaintiff asserts that he had an exemplary work record since his appointment as manager and he attained top grades in all reviews of the branches he managed. It was claimed that it was an implied or express term of his contract of employment that the defendant would provide the plaintiff with a fair and reasonable working environment and that the defendant would conduct any disciplinary inquiry or proceedings in a fair and proper manner.
2. Amongst the expressed or implied terms of the plaintiff's contract of employment, it is alleged that the defendant would act in good faith towards the plaintiff, would not conspire against him and would not undermine the trust and confidence of the employment relationship. The defendant would observe a duty of care in relation to the plaintiff and that any action against the plaintiff by the defendant would not be actuated by bias or malice.
3. It is claimed that in December 2000 and January 2001, following the plaintiff's promotion to the position of commercial manager of the merged Dundalk branches at Clanbrassil Street, an employee of the defendant, Hugh Muckian made malicious and false allegations of and concerning the plaintiff and made accusations of a serious nature against the plaintiff, that he was guilty of dishonesty, lack of integrity and fraudulent and unlawful practices and was unfit to be manager with the defendant. These allegations were made to Pat Byrne, Regional Manager, North East and subsequently to Michael Mangan, Human Resources Manager.
4. It is claimed that the defendant failed to furnish the plaintiff with written

documentation pertaining to the allegations. Such allegations were maliciously and false and included allegations:-

- (a) That the plaintiff had facilitated the operation of an account in a false name, namely an account known as "T. MCK." and facilitated another person to operate an account in the name of T. MCK.
- (b) The plaintiff allowed third parties to sign withdrawals on other customer accounts.
- (c) The plaintiff falsified customer information relating to salaries, a length of time as customers to mislead that the credit card department had wrongfully procured the issue of credit cards.
- (d) That Mr. Muckian was put under pressure by the plaintiff to falsify information relating to credit card applications.
- (e) That the plaintiff had an over-bearing style of management.
- (f) That the plaintiff wrongly entered the branch over a weekend and opened a credit grader's bag and looked at the list of accounts and misled the credit grader regarding the plaintiff's maintenance of the accounts.
- (g) That the plaintiff opened and facilitated the operation of accounts in false or incorrect names to enable a customer to engage in tax evasion and/or money laundering.
- (h) That the plaintiff had referred investment customers to the Lifetime Counsellor on the basis of his personal relationship with such to the detriment of Mr. Muckian whilst he was an investment manager with the private banking section of the bank.

5. It is claimed that Mr. Byrne requested the audit department to put in place an audit of the branch and ensured that the audit leader was unaware of and did not investigate the allegations made by Mr. Muckian.

6. It is claimed on foot of the conspiracy and in order to effect the plaintiff's summary removal and how Mr. Byrne falsely alleged that the auditors had made findings against the plaintiff and purported to summarily suspend him on foot of those alleged findings on 20<sup>th</sup> April, 2001 without giving any particulars of such findings.

7. It is claimed that the defendant that the allegations against the plaintiff originated from Mr. Muckian and that the defendant falsely represented the sole source of complaint was the auditors and the only acquisitions which the plaintiff had to meet where the allegations in the Special Investigation Report. The Special Investigation Report was to support the malicious allegations of Mr. Muckian and was primarily conducted by Mr. Byrne for that purpose.

8. It is claimed that in furtherance of the unlawful conspiracy in March 2001 with the knowledge and inclusion of other senior managers and executives of the defendant namely, Gerry Mitchell, Head of Staff Relations and Michael Condon, Chief Group Internal Auditor and John Kennedy, an Audit Manager all conspired to deprive the plaintiff of fair procedures to injure his good name and effect his suspension and

permanent removal as an employee of the defendant.

9. Such conspiracy involved the plaintiff being suspended on foot of Mr. Muckian's allegations on 20<sup>th</sup> April, 2001 and no proper investigation was carried out and no investigation of Mr. Muckian's complaints were carried out by Brendan Hickey, Audit Leader. Furthermore, the defendants maliciously used the audit findings as a pre-text for imposing a summary suspension on the plaintiff and there was failure to comply with the defendant's disciplinary procedure.

10. It is claimed that Mr. Byrne compromised senior bank personnel by falsely claiming the auditors had substantiated the complaints of Mr. Muckian prior to the suspension. It is claimed that the plaintiff's passport, personal belongings and monies were unlawfully seized.

11. It is claimed that the suspension was maliciously procured in breach of the principles of constitutional and natural justice and in breach of the defendant's own disciplinary procedures.

12. It is claimed that Mr. Byrne intended to conduct all disciplinary proceedings in order to have his objective of dismissing the plaintiff effected as soon as the merger was completed.

13. It is claimed that in pursuance of the conspiracy and in breach of the plaintiff's contract, the defendant maliciously and unlawfully requested the plaintiff to meet with Mr. Kennedy, Audit Manager.

14. It is claimed that the Special Investigation Report produced by Mr. Kennedy dated 23<sup>rd</sup> August, 2001, was framed in a manner that was biased against the plaintiff on foot of incomplete investigations and was produced to concede the existence of Mr. Muckian as the source of malicious and untrue complaints against the plaintiff.

15. It is said that the report was produced by Mr. Kennedy after the plaintiff's proceedings for interlocutory relief had been instituted but before the application had been heard and report was deliberately couched in language that depicted the plaintiff as a person, the defendant believed to be involved in dishonest and/or criminal activities in order to defeat the plaintiff's proceedings.

16. It is claimed that a breach of the plaintiff's contract of employment and the principles of constitutional and natural justice that Mr. Kennedy and Mr. Byrne conducted the investigations in a grossly partial, biased and improper manner.

17. The plaintiff instituted proceedings on 4<sup>th</sup> July, 2001, to challenge the lawfulness of his suspension and sought interlocutory relief restraining the defendant from disciplining the plaintiff on foot of said investigation. It is claimed that the defendant wilfully and maliciously conspired through its servants or agents:-

(i) perjurally to misrepresent the origin and purpose of the investigation/disciplinary process against the plaintiff;

(ii) perjurally to mislead the High Court by representing that the process against the plaintiff had its origin in an audit of the branch as opposed to the complaints of Mr. Muckian;

(iii) perjurally to conceal the role of Mr. Byrne in directing an audit

in order to procure the removal of the plaintiff it is claimed that the plaintiff suffered incalculable damage to his good name as a result of his suspension and the averments contained in the affidavits.

18. It is claimed that the plaintiff was obliged to be legally represented at the disciplinary inquiry under the chairmanship of Mr. John Dunne, in order to vindicate his good name against the conspiracy of the defendant.

19. It is claimed that Mr. Dunne and Messrs. Byrne Kennedy and Mitchell conspired at the inquiry to conceal or cover-up the malicious and unlawful position adopted by Mr. Byrne and refused to furnish documentation. It is claimed that Mr. Dunne colluded their actions and failed to call relevant witnesses in breach of assurances given to the High Court.

20. Aided and abetted by Mr. Dunne conspired during the course of the inquiry it is claimed to bolster the false and malicious averments contained in the affidavit sworn by Mr. Byrne and Mr. Kennedy.

21. It was claimed that at the said inquiry, the plaintiff addressed all the matters in the Special Investigation Report and admitted to breaches of procedures where they had taken place and that such breaches could not have warranted the suspension or dismissal of the plaintiff.

22. The plaintiff particularised some 33 grounds relating to the said inquiry which it was contended was conducted in breach of the principles of natural justice and fair procedures and in breach of the plaintiff's contract of employment.

23. It is further claimed that the inquiry was conducted unlawfully by reason of the defendant representing to the fraud squad of An Garda Síochána that the plaintiff was guilty of money laundering and criminality without disclosing such allegations to the plaintiff or affording the plaintiff an opportunity of dealing with same. The plaintiff relies on this as evidencing malice, bias and prejudice by the defendant.

24. It is claimed that in or around the months of October and November 2002, the defendant made false and malicious complaints concerning the plaintiff to the fraud squad to the effect that the plaintiff was involved in money laundering and/or fraudulent and/or criminal activities. It is claimed that the defendant sought maliciously to procure An Garda Síochána to initiate a criminal prosecution in circumstances where the defendants knew that the plaintiff had no involvement in such activities.

25. It is specifically pleaded that the defendants by its servants, Messrs. Dunne, Byrne Kennedy and Mitchell conspired together:-

(i) to procure the termination of the plaintiff's employment.

(ii) to the plaintiff and injure his good name.

(iii) to interfere with the constitutional rights of the plaintiff and to procure the bringing of a malicious prosecution against the defendant.

26. It is claimed that the complaints concerning the plaintiff were made to the fraud squad at a time when the defendant well knew that the allegations of complicity in tax evasion and criminal on which the defendant had relied in the affidavits of the High Court were not tenable.

27. It is claimed that the defendant conspired to carry out the said inquiry in an unlawful manner for the sole purpose of unlawfully procuring and effecting the plaintiff's dismissal unlawfully. It is claimed that the defendant maliciously and deliberately made findings that were false and contrary to the evidence before the inquiry and thereby procured the plaintiff's unlawful dismissal with effect from 13<sup>th</sup> October, 2003 and that the said dismissal was imposed summarily on the plaintiff.

28. It is claimed that whilst Mr. Dunne confirmed that the inquiry was being conducted under the 1985 Disciplinary Procedures that Mr. Dunne by letter dated 8<sup>th</sup> September reported to limit the plaintiff's right of appeal against his dismissal on the issue of penalty as opposed to granting him the full right of appeal provided by the 1985 procedures.

29. It is claimed that IR£8,000 and STG£8,800 were seized from the plaintiff by Mr. Byrne at the time of his suspension on 20<sup>th</sup> April, 2001. It is claimed that no explanation has been furnished by the defendant for withholding the said sum.

30. It is claimed that on 8<sup>th</sup> September, 2003, the defendant falsely and maliciously published the report and findings of Mr. Dunne.

31. It is claimed that the words used in the report in their natural and ordinary meaning meant, and were understood to mean or alternatively by way of innuendo were understood to bear the meanings pleaded which included:-

(i) That the plaintiff was dishonest.

(ii) That the plaintiff had engaged in fraudulent, dishonest and criminal practices for the purposes of personal gain.

(iii) That the plaintiff involved or pressurised other employees of the defendant to engage in fraudulent and dishonest practices.

(iv) That the plaintiff was guilty of corrupt, criminal and illegal practices.

(v) And some further 74 particulars.

32. It is claimed that the said words in the report of Mr. Dunne were published by him in the knowledge of their falsity and/or he was reckless as to whether they were true or false and that was actuated by actual malice.

33. The malice particularised under this heading against the defendants is that:-

(a) They were determined to procure the removal of the plaintiff from the outset.

(b) The disciplinary procedures against the plaintiff and the report of Mr. Dunne was totally tainted by bias and lack of fair procedures from the outset sought to conceal the wrongful actions of the defendants and the perjury of the defendants in the affidavit sworn.

34. Particulars of personal injury and emotional distress are also pleaded.



35. It is claimed that the defendants failed to comply with an order for discovery made by the High Court on 17<sup>th</sup> July, 2008, and withheld disclosure of documents that fell within the ambit of the order of discovery in category 13. The disclosure related to documentation furnished by way of supplemental affidavit on 3<sup>rd</sup> October, 2011.

36. The plaintiff also claims aggravated and exemplary damages arising from the conduct by the defendant of the defence in the two sets of proceedings due to impugning the good name and reputation of the plaintiff in a false and malicious manner.

### **Amended Defence**

37. The Amended Defence comprises extensive pleas in response to the Amended Statement of Claim. The plaintiff is put on proof in respect of various matters in the Statement of Claim whilst in respect of other matters there is a general denial. Specifically there is detailed denial of the additional plea in the Amended Statement of Claim.

38. It is denied that during his 30 years employment with the Defendant the plaintiff had an exemplary work record and it is pleaded by the Defendant that the termination of the Plaintiff's employment was by reason of findings of breaches on the part of the Plaintiff in the performance of his duties as manager of the Defendants branch and in particular that he knowingly and repeatedly breached branch operating procedures and that he also created a situation where a conflict of interest could arise between his own interest and that of a consumer in breach of the Bank's Code of Conduct, and that he knowingly and repeatedly breached the Bank's procedures in a manner which breached the bank's Code of Conduct such as constituted gross misconduct on his part warranting his dismissal from the employment of the Defendant Bank.

39. It is denied that if disciplinary action was justified against the Plaintiff that at all material times the Plaintiff's employment was governed by the Defendant's disciplinary procedures 1985 edition and it is pleaded by the Defendant that at all material times the disciplinary procedure in force at any given time applied to the Plaintiff's employment and any investigation, application of disciplinary sanction or appeal.

40. It is denied that in or about the month of December 2000 and/or the month of January 2001 one Hugh Muckian made malicious or false allegations of or concerning the Plaintiff.

41. It is admitted that the said Mr. Hugh Muckian brought to the attention of the servants or agents of the Defendant concerns on the part of the said Mr. Muckian as to the manner in which the business and affairs of the Defendant's Branch at Clanbrassil Street in the County of Louth was conducted by the Plaintiff in the course of him performing his duties as Manager of the said Branch and arising out of the said concerns the Defendant initiated inquiries and investigations which were undertaken by servants or agents of the Defendant including and in particular staff members of the internal audit department. The Defendant will rely on the entirety of the said two reports being reports entitled "Group Internal Audit, Bank of Ireland, Report Re John Higgins, Manager, Clanbrassil Street, Dundalk 24/08/2001" and "Group Internal Audit, Bank of Ireland, Report on Dundalk, 23/08/2001" (in these proceedings referred to as the "Special Investigation Report").

42. It is denied that the servants or agents of the defendant including and in particular Pat Byrne were aware of the alleged or any malice and animus which Mr. Muckian allegedly bore the Plaintiff (which malice and animus are denied).
43. It is denied that since in or about the month of December 2000 or at all that Mr. Byrne unlawfully or at all combined and conspired with Mr. Muckian to remove the Plaintiff from his position as manager as alleged or at all.
44. It is denied that Pat Byrne purported to summarily suspend the Plaintiff on foot of the findings on 20<sup>th</sup> April 2001 without giving the Plaintiff any particulars of the alleged findings as alleged or at all and it is pleaded by the Defendant that the Defendant through its servants or agents, including Mr. Byrne, were entitled to and did place the Plaintiff on special paid leave pending the carrying out of further inquiries having regard to the information then available to the Defendant its servants or agents in relation to the conduct of the Plaintiff and having regard to the serious concerns which were reasonably held at that time having regard inter alia to the initial findings during the course of the audit.
45. It is denied that the Plaintiff was at any time summarily suspended or unlawfully suspended and it is pleaded by the Defendant that the placing of the Plaintiff on "special paid leave" was valid, lawful and in accordance with the Defendant Bank normal practice and procedure in such circumstances and it is further pleaded by the Defendant that the placing of the Plaintiff on such special paid leave did not constitute a disciplinary sanction.
46. It is denied that the placing of the Plaintiff on special paid leave and/or the suspension of the Plaintiff (which suspension is denied) constituted the subjection of the Plaintiff to a disciplinary procedure which Pat Byrne had intended to preside over as alleged.
47. It is denied that the Defendant its servants or agents conspired throughout the course of the disciplinary procedures against the Plaintiff or at any time to conceal that the allegations against the Plaintiff originated in the allegations of Mr. Muckian (which is denied) and it is further denied that the Defendant falsely or at all represented that the sole source of complaint against the Plaintiff was the auditors. It is pleaded by the Defendant that the only accusations that the Plaintiff had to meet were the allegations set forth in the report sated 23<sup>rd</sup> day of August 2001 and it is pleaded by the Defendant that at no material time was the Plaintiff obliged to meet any accusations made by High Muckian against him and it is further pleaded by the Defendant that in arriving at its decision to place the Plaintiff on special paid leave and ultimately in arriving at the decision to dismiss the Plaintiff no reliance was placed on any allegations, complaints or concerns reported to the Defendant by the said Mr. Muckian.
48. It is denied that Pat Byrne and High Muckian unlawfully combined and conspired together to procure the termination of the Plaintiff's employment.
49. It is denied that Pat Byrne compromised senior bank personnel, including and in particular Paddy Murphy and/or Des Crowley by falsely alleging to them that the auditors had substantiated the complaints of Hugh Muckian prior to the Plaintiff's suspension (which suspension is denied) and it is denied that in those circumstances or at all the said persons "thereby warranted" the said suspension (which suspension is denied) as alleged or at all.
50. It is denied that during the course of defending the said application for

interlocutory relief the Defendant its servants or agents wilfully or maliciously conspired in the manner pleaded by the Plaintiff in paragraph 41 of the Statement of Claim and each and every particular therein pleaded is as if same were set forth herein and traversed seriatim. Further pleas in relation to the Defendants through its servant or agent perjuring himself in the interlocutory proceedings are denied.

51. It is denied that the Defendant its servants or agents perjuriously represented that the suspension of the Plaintiff arose from and was warranted by the bona fide belief of the Defendant that the Plaintiff was guilty of facilitating money laundering, tax evasion and other alleged activities as alleged or at all.

52. It is denied that the Defendant its servants or agents and in particular Pat Byrne, John Kennedy, Gerry Mitchell and John Dunne further conspired at the Inquiry to conceal or cover up the alleged malicious or unlawful position adopted by Pat Byrne or to protect his position in the context of the Plaintiff's suspension and the disciplinary proceedings against the Plaintiff as alleged or at all.

53. It is denied that the investigative inquiry was conducted in gross breach of the principles of natural and constitutional justice or in breach of the Defendants own procedures or in breach of the Defendant's duty to act in good faith towards the Plaintiff and it is denied that the Defendant was simultaneously representing to the Fraud Squad of the Garda Síochána that the Plaintiff was guilty of money laundering and criminality without disclosing these allegations to the Plaintiff insofar as sane is pleaded it is denied that the Defendant knew that such allegations were untrue.

54. It is pleaded by the Defendant that its communications with An Garda Síochána were made pursuant to its statutory obligations, particularly its duties under the Criminal Justice Act 1994. The money laundering section of the Defendant is charged with the prevention of money laundering and fraud prevention. All of the communications between personnel in the money laundering section of the Defendant and the Garda Síochána occurred in the course of the normal, proper and bona fide discharge of those functions.

55. It is denied that the Defendant, its servants or agents, made allegations to members of the Fraud Squad or sought to induce them to believe that the Plaintiff was involved in unlawful or improper activities in relation to trusts and it is denied that the Defendant, its servants or agents, conveyed to the Fraud Squad that there were grounds for serious suspicion in relation to the Plaintiff's operation of bank accounts of his own and his wife at the Defendant's Dundalk branch.

56. It is admitted that the Plaintiff was not advised by the Defendant of its reports to An Garda Síochána and it is pleaded by the Defendant that it was under no obligation to so advise the Plaintiff and it is further pleaded that to advise the Plaintiff would have constituted in itself wrongdoing on the part of the Defendant bank. It is pleaded that in advising the Plaintiff of the making of such a report would constitute "tipping off" contrary to the provisions of the Statute.

57. It is denied that the matters pleaded in paragraph 59 of the Amended Statement of Claim evidence the alleged or any malice, bias or prejudice on the part of the Defendant and each and every particular thereof pleaded is denied.

58. It is denied that the Defendant, its servants or agents, sought to maliciously or at all procure or induce the initiation by An Garda Síochána of a criminal prosecution or prosecutions of the Plaintiff as alleged or at all and the particulars thereof pleaded

in paragraph 62 of the Amended Statement of Claim are denied.

59. It is denied that the Defendant, its servants or agents, sought to ascertain from the Fraud Squad how the Defendant might formulate a complaint to ensure that a prosecution could be initiated against the Plaintiff as alleged or at all.

60. It is denied that the purpose of the Defendant making complaints to An Garda Síochána was for the purposes of procuring or inducing a prosecution of the Plaintiff or to injure the Plaintiff in his good name or to lend a false veneer of regulatory concern to the actions of the Defendant.

61. It is denied that the referral of complaints to An Garda Síochána was for the purpose of undermining the defence offered by the Plaintiff to the disciplinary allegations in the inquiry proceeding before John Dunne.

62. It is denied that the Defendants, its servants or agents, were in gross or any breach of its obligations to act in good faith towards the Plaintiff and/or to maintain trust and confidence in the Plaintiff as alleged or at all and the particulars pleaded in paragraph 72 of the Amended Statement of Claim are denied.

63. It is denied that the Defendant, its servants or agents, defamed the Plaintiff in communications made by the Defendant by way of complaint or allegation against the Plaintiff to the Fraud Squad of An Garda Síochána as alleged or at all and each and every particular thereof pleaded is denied.

64. It is denied that the allegations made to An Garda Síochána concerning the Plaintiff were made maliciously in his personal and professional capacity as alleged or at all.

65. It is denied that the Defendant, its servants or agents, including Patrick Byrne, John Kennedy and/or Gerry Mitchell, unlawfully conspired together in the manner pleaded in paragraph 76 of the amended Statement of Claim and each and every particular therein is denied as if same were set forth herein and traversed seratim.

66. It is denied that the complaints made concerning the Plaintiff to An Garda Síochána were made at a time when the Defendant, its servants or agents, knew that the allegations of complicity and tax evasion and/or criminality upon which the Defendant had relied in the Affidavits of Patrick Byrne and John Kennedy were not tenable as alleged or at all and it is pleaded by the Defendant that the Affidavits of Patrick Byrne and John Kennedy were truthful

67. It is admitted that the report of John Dunne was internally circulated to persons who had an interest in receiving same. It is denied that the report and its contents have been circulated or available to non bank employees other than the Defendant's external auditors and/or to regulatory agencies and it is denied that the fact that the report remains as part of the Defendant's records and is available to the Defendant that same constitutes continuing publication as alleged or at all.

**Extracts from affidavits of the defendant's sworn in connection with the interlocutory High Court proceedings.**

(1) Extract from affidavit of Mr. Mitchell sworn on 22<sup>nd</sup> October, 2001.

*"I am satisfied that if the plaintiff attends at the disciplinary inquiry now proposed that all his rights will be fully respected. He has been supplied with all relevant documentation. He will be entitled to be*

*legally represented at that inquiry, will be entitled to cross examine any person relevant to the inquiry and to adduce evidence or call witnesses on his own behalf."*

(2) Extract from affidavit of John Kennedy sworn on 22<sup>nd</sup> October, 2001.

*"15. In reply to paragraph 24 it is not correct that the issues discussed at the meeting on 22<sup>nd</sup> and 23<sup>rd</sup> May, related to issues which had arisen subsequent to the plaintiff being placed on Special Paid Leave. I say that the central issues which were raised during the course of those meetings and which required more extensive investigation related to a significant fear that the plaintiff had cooperated with a client PR. In money laundering and/or tax evasion that the operation of an account in a false name (Ref: T MCK) constituted money laundering or tax evasion and also that credit card facilities were issued on foot of information altered by the plaintiff. I say that these issues were of such significance that extensive and wide ranging investigation was warranted.*

*21. By way of general reply to the plaintiff's affidavit, I repeated my averment set out heretofore that the audit investigation has raised matters of very serious concern to the bank. I believe that as an auditor, that the bank is under an obligation not only to its staff and to its customers but also to the appropriate authorities to conduct a full inquiry into these matters and to take such action as is appropriate. Such action might include discipline of staff and the making of appropriate reports to the gardaí, the Criminal Assets Bureau and/or the Revenue Commissioners...From my investigations it is clear to me that many of the transactions undertaken by the plaintiff in the course of his duties as manager have all of the hallmarks of money laundering and assisting customers with tax evasion and other illegal activities. I believe that my investigation discloses very serious disregard by the plaintiff of policies and procedures issued by the Bank particularly those relating to encashment of cheques, issuing of drafts, safe custody and money laundering."*

(3) Extracts from affidavit of Patrick Byrne sworn on 22<sup>nd</sup> October, 2001.

*"11. In the instant case I say that as is clear from the audit report the Bank has very serious concerns relating to the plaintiff's performance. I will deal more fully later in this affidavit with the contents of the report. However as is clear from same the Bank has very serious concern regarding the plaintiff's involvement, not only in matters which are contrary to the Bank's practices and procedures but which may involve breaches of the criminal law including and in particular the law relating to money laundering.*

*20. It is further incumbent on the defendant Bank to make reports to appropriate authorities in relation to certain of the affairs of the branch and this has been done and having regard to the nature of some of the transactions detailed in the audit report there is a significant possibility of additional inquiries being undertaken by other authorities including the gardaí and/or Revenue Commissioners.*

He had no input into the authorship of the Special Investigation Report or Mr. Dunne's report.

He said that no regulatory sanction was ever imposed on the defendant in relation

to the plaintiff's activities.

#### **Schedule 4**

#### **Selected Extracts from the findings of the Dunne Inquiry**

Page 5-6

#### **APPROACH**

In dealing with the evidence as recorded in each days transcript I have referenced each, section of the Group Internal Audit Report with Mr Higgins explanations, admissions and where relevant arguments were made on his behalf by his solicitor. These references tend to refer to the last days of the hearings because it was only at that point that Mr Higgins addressed in evidence the specific matters raised in the Group Internal Audit Report, being the matters at issue in the disciplinary proceedings.

I want to record here that I have listened to and read and have considered all the evidence put in front of me and the fact it is not all referenced should not be seen as other than a practical solution to dealing with a large volume of written material.

I wish to state again that I am the sole decision maker in this case and in the light of the contentions made by Mr Higgins' solicitor I feel it necessary to restate this fact clearly. I have been charged with conducting the Bank's Disciplinary Procedures and this I have sought to do in a fair manner and mindful of Mr Higgins rights in natural and constitutional justice.

#### **MY RULING DATED 4 DECEMBER 2002**

Having heard evidence over a period of 14 days it became apparent to me that Mr Higgins' solicitor was endeavouring to widen the scope of the disciplinary hearing way beyond that' which I was charged with carrying out on behalf of the Bank.

Over the course of this evidence numerous submissions were made and witnesses time was taken up with addressing the question of the Bank's entitlement to place an employee on Special Paid Leave. This issue is the subject of the High Court Proceedings brought by Mr Higgins against the Bank and not an issue which I can determine.

Mr Higgins' solicitor made repeated allegations that there was an internal conspiracy to remove Mr Higgins from his position as manager of Dundalk Branch. Despite lengthy and rigorous cross examination of the various witnesses no evidence whatsoever emerged to give credence to the alleged conspiracy. In any event my function was to deal with the matters raised in the Group Internal Audit Report.

As stated above, I am the sole decision maker in this case and I want to put on record the fact that no person employed by the Bank or otherwise tried to pre-empt or influence my decision in any way.

During the course of the early hearings the list of witnesses which Mr. Higgins' solicitor requested the Bank to produce for cross examination grew longer and

longer. Having taken independent legal advice and having invited submission from Mr Higgins' solicitor and the Bank's solicitor, I made a ruling on 4 December 2002 regarding procedural matters arising in the course of the disciplinary proceedings. That Ruling is attached as Appendix II to this document.

#### CONVERSION (p6)

Considerable time and effort has been expended discussing the meaning of the above word in a Banking context.

Mr Higgins in his evidence claims never to have heard the word "conversion" in his 32 years Banking experience. In my letter of 25 February 2003 to his solicitors I set out my understanding of the meaning of the word "Conversion" in the Banking Industry. For ease of reference I set this out again below.

Accepting a cheque or draft which is not in favour of the individual whose account is being credited and which has not been endorsed by the payee.

Accepting a cheque or draft which is- crossed "account payee" for credit to an account of someone other than the payee.

Accepting a cheque or draft payable to a limited company or a business name for credit to another account, perhaps that of an individual.

Accepting cheques or drafts made payable to individuals, companies or other legal entities as cover for drafts made payable to different individuals, companies or legal entities.

Page 29

#### GENERAL OBSERVATIONS

Mr Higgins in his evidence has admitted that he processed the vast majority of the transactions outlined in the Group Internal Audit Report and that he had sole control over the items on his desk, in his filing cabinet and in his diaries. The explanations given in evidence by Mr Higgins and the submissions of his solicitor not only illustrate the very low standards of compliance that Mr Higgins set for himself and observed but they also highlight a fairly unique set of values. Mr Higgins appears to believe the old adage that "rules are for fools" by the cavalier manner in which he failed to observe even the most rudimentary aspects of compliance such as getting customers to endorse cheques.

My view of the submission made by Mr Higgins' solicitor is that he describes a "hands on" manager who was always very busy and who believes that wealth equates to integrity and that normal Banking practice in terms of compliance such as endorsing cheques, proper completion of draft requisitions, conversion, money laundering requirements etc. etc. do not apply to himself or his wealthy customers.

The explanation given for Mr Higgins' failure to comply with Bank procedures for issuing drafts, failure to ensure cheques were endorsed, failure to ensure cheques were not converted for the benefit of other than the payee was that many of these transactions were carried out under time pressure for high value or potentially high value customers and that Mr Higgins was a "poor housekeeper" (i.e. a poor

administrator).

Pages 30-31

However, Mr Higgins does not appear to have any appreciation of the fact that as the Manager of a Commercial Branch he is expected to know and comply with branch Procedures and he is the ultimate custodian of the Bank's requirement for high standards of compliance with all internal rules and regulations and compliance with legislation, and Regulatory Authorities. Those who occupy these senior Branch Manager positions are in leadership positions responsible for setting high personal standards of compliance and ensuring that their staff follow their own good example. The Bank's Code of Conduct, which was issued on 20 February 1998, is attached at Appendix III for reference. The Compliance Policy Statement as set out at Page 2 clearly states in unambiguous terms the high standards of compliance expected of all Bank of Ireland staff.

Mr. Higgins is "the Bank" on a day to day basis in a large commercial branch with the responsibility to ensure that all transactions are processed in a compliant manner. Whilst Bank Managers may be occasionally subjected to pressure from high value customers to process non compliant transactions it is imperative that the Bank can rely on all its staff and its Managers in particular to have the resolve to withstand this type of pressure and to ensure that all transactions are carried out in a compliant manner.

The evidence of Mr Higgins and the representations made on his behalf by his solicitor point to "carelessness", "omissions", "pressure of work" and "poor housekeeping" as the reasons why so many transactions were processed by Mr Higgins in a non compliant manner. However, having considered all the evidence there are reasonable grounds for me to conclude that there was a deliberate and intentional breach of Bank Procedures by Mr Higgins to facilitate writing new business particularly for Lifetime Assurance Co. and for Credit Card Services. Mr. Higgins has no authority to take money from an internal Bank Account (Sundry Debits Suspense) to pay Life Assurance Premiums for customers. This practice amounted to granting unsecured credit facilities to customers without assessment process to evaluate the risk involved and seriously damaging any possibility of recourse against these customers in the event of default because of lack of any signed customer credit agreement. The motivation as outlined in evidence was to stop Lifetime credit coming off Mr Higgins' branch credit figure. The new business involved would help increase credit figure to help him reach his targets.

The point has been repeatedly made by Mr Higgins' solicitor that Mr Higgins did not benefit in any material way as a result of processing all these transactions. I would, however, observe that to an extent Mr Higgins did benefit personally from many of these transactions as they helped him achieve or beat targets for new business which resulted in him being paid a bonus.

A common theme emerges from Mr Higgins' solicitors submissions, which were made throughout the Disciplinary Hearing, regarding the fact that the Bank suffered no apparent loss so far resulting from. Mr Higgins various activities described in the Group Internal Audit Report. This common theme was that as no loss was suffered by the Bank Mr Higgins should not be asked to account for his actions. Compliance with the Banks Internal Rules and Regulations and the requirements of legislation and regulatory authorities not only protects the assets of the Bank but also its good name. Non compliance with the Banks rules and regulations and the requirements of legislation and regulatory authorities not only puts assets of the Bank at risk but



also runs the risk of damage to its good name.

Because of the nature of the business, Banks are highly regulated and within Bank of Ireland the Branch Operating Procedures is a detailed manual covering the operational procedures required to run a branch. Significant and repeated deviations from those rules and regulations undoubtedly increase the risk of financial loss to the Bank. In addition the Regulatory Authorities can impose significant fines for breaches of regulations and repeated breaches can result in the loss of Banking Licence. The publicity surrounding such fines are damaging to any Bank's good name. The fact that there may be no apparent loss so far to the Bank in this case is not a mitigating factor.

The Group Internal Audit Report chronicles a litany of abject failure in relation to one of Mr Higgins primary managerial functions to operate the branch in a compliant manner and not to expose the Bank to unacceptable risk. He has failed utterly as the standard bearer of 'compliance in his branch and in his role as gatekeeper of operational standards.

There is little appreciation coming forward in his evidence that Mr Higgins actually understands or accepts the necessity to carry out all transactions in a compliant manner.

Mr Higgins appeared to be operating his own bank with his own rules within the Dundalk, Branch of Bank of Ireland.

Pages 32-34

#### OVERALL FINDINGS:

I have considered the entire contents of the Group Internal Audit Report dated 23 August 2001, the evidence given by Mr Higgins, the submissions made by his solicitor and the evidence of John Kennedy, Audit Manager and his team and author of the Report and all the other witnesses listed at Page 3. I have set out my findings in each case and in relation to the Summary of Findings at A3 Page I of the Group Internal Audit Report, my findings are reflected as follows:

##### 1. Breaches of the Banks Code of Conduct

I find that Mr Higgins breached the Banks Code of Conduct as described above.

##### 2. Facilitating Money Laundering

After considering all the evidence I cannot say that money laundering took place in any individual case.

However, I must observe and note that Mr Higgins failed to observe Bank Procedures which are, of course, driven by compliance with relevant legislation including money laundering legislation and exposed the Bank to an unacceptable risk that money laundering might take place and to that extent he may have facilitated money laundering.

##### 3. Facilitating Customers with Tax Evasion

After considering all the evidence I cannot say that tax evasion took place in any

individual case.

However, I must observe and note that Mr Higgins failed to observe Bank Procedures which are, of course, driven by compliance with relevant legislation including tax legislation and exposed the Bank to an unacceptable risk that tax evasion might take place and to that extent he may have facilitated tax evasion.

#### 4. Assisting Customers with the Conversion of Cheques made payable both to Personal and Non-Personal Entities

I find that Mr Higgins assisted customers with the conversion of cheques made payable to Personal and Non-Personal entities in the cases described above.

#### 5. Assisting Customers with the operation of Accounts with False Names/Addresses

I find no evidence that Mr Higgins assisted customers with the operation of accounts with false names

However, Mr Higgins did assist customers in operating accounts at false addresses in Northern Ireland, UK and USA in circumstances where he was aware and accepts he knew these customers were resident in the Republic of Ireland as described above.

#### 6. Non-Adherence to the Bank's Policies/Procedures on issuance of drafts to customers/non-customers

I find that Mr Higgins did not adhere to the Banks policies/procedures on issuance of Drafts to customers/non customers as described above.

#### 7. Non-adherence to the Bank's Encashment Policies

I find Mr Higgins did not adhere to the Banks Encashment Policies as described above.

#### 8. Failure to ensure that items cashed were endorsed and/or date branded

I find that Mr Higgins failed to ensure that cheques/drafts cashed for customers/non customers were endorsed as described above.

The evidence does not indicate if these items were date branded. I am therefore not making any finding regarding date branding.

#### 9. Misuse of Impersonal Accounts at Clanbrassil Street Branch for customer transactions.

I find that Mr Higgins misused Impersonal Accounts at Clanbrassil Street for customer transactions as described above.

#### 10. Abuses relating to Revenue & Expenditure accounts at Clanbrassil Street Branch including Personal Expenses claimed.

I find that Mr Higgins-abused Revenue & Expenditure Accounts at Clanbrassil Street Branch.

In the light of the approval of Mr Higgins line manager being sought and obtained in all cases in relation to personal expenses, I do not find an abuse in this regard.

11. Serious breaches of the Bank's Safe Custody and Hold Mail Procedures.

I find that Mr Higgins seriously breached the Banks Safe Custody and Hold Mail Procedures as described above.

12. Unauthorised withdrawals on customer accounts

I find that Mr Higgins processes unauthorised withdrawals on customer accounts as described above.

13. Breaches of Lending Discretion

I find that Mr Higgins breached his lending discretion as described above.

14. Alteration of financial information on Application Forms with a view to having facilities made available by way of Credit Cards to customers.

I find that Mr Higgins altered the net monthly income figure on two Credit Card Applications (Barron and Duffy) and certified that the unauthorised alterations to the net monthly income figure on three other Credit Card Applications with a view to having credit facilities made available by Way of Credit Cards to these customers.

15. Financial transactions, incorporating unauthorised withdrawals and conversion of funds involving a customer of both Clanbrassil Street and Kildare Branches.

I find that Mr Higgins processed financial transactions incorporating unauthorised withdrawals and conversion of funds involving a customer/Elizabeth Weston (Prendergast) of both Clanbrassil Street and Kildare Branches as described above.

16. A number of PINS and signed withdrawals were held by J.H. This practice is unacceptable, as it could facilitate/indicate improper use

I find that Mr Higgins held a number of PINS and signed withdrawals which is not acceptable as it could facilitate improper use.

## DECISION

I have carefully considered all the issues raised in the Group Internal Audit Report and I have set out my findings above. I have heard evidence from 15 witnesses over 21 days. I have read the Book of Pleadings from the High Court Proceedings. I have considered numerous submissions, representations and lengthy correspondence from Mr Higgins' Solicitor.

The Group Internal Audit Report chronicles a litany of repeated breaches of the Branch Operating Procedures. Mr Higgins in his evidence confirmed that he was fully aware of the Bank's procedural requirements in relation to the various transactions. I have found that Mr Higgins knowingly and repeatedly breached Branch Operating Procedures as set out above. Mr Higgins created a situation where a conflict of interest could arise between his own interest and that of a customer in breach of the Bank's Code of Conduct as outlined above. Mr Higgins did not act with Integrity and

Honesty in breach of the Bank's Code of Conduct as outlined above.

Mr Higgins knowing and repeated breaches of Bank Procedures and the manner in which Mr Higgins breached the Bank's Code of Conduct which I have set out in my findings amounts to Gross Misconduct on-his part.

I then had to consider the question of the appropriate disciplinary sanction in this case.

My conclusion is that Mr Higgins has little regard for or appreciation of the importance of transacting business with all customers, be they high value or low value, in a manner that complies with the Banks Internal Procedures and with the requirements of legislation and regulatory authorities. His attitude appears to be that the end justifies the means. The issues raised in this case are not only the necessity for Bank employees to operate in a compliant manner but they cut to the core of the trust and confidence at the heart of the employee/employer relationship. The evidence of Mr Higgins and the representations of his solicitor would suggest that Mr Higgins does not in any way accept the gravity of his actions. All employees and in particular Senior Branch Managers are expected to operate in a compliant manner.

The manner in which Mr Higgins conducted the affairs of the Bank in Dundalk Branch has destroyed the trust and confidence that the Bank must have in him. I find that Mr Higgins has broken the bond of trust that must be present between employer and employee. That bond is broken to the extent that it cannot be repaired.

In such circumstances, I have decided that the appropriate disciplinary action to propose is Mr Higgins' dismissal from the employment of the Bank.