THE HIGH COURT

1998 No. 9515p

BETWEEN

MARY CHARLTON

PLAINTIFF

H.H. THE AGA KHAN'S STUDS SOCIÉTÉ CIVILE

DEFENDANT

JUDGMENT of Mr. Justice Declan Budd delivered on the 22nd day of February, 2000

This contentious matter first came before me on the 27th October, 1999 by way of no less than seven motions; these included motions to attach and commit for contempt of court, and motions in respect of amendment of pleadings and discovery of documents and in respect of replies to notice for particulars. While dealing with allegations of misconduct in respect of flouting and defiance of Court Orders and of deception, both of the Plaintiff's advisers and of the Court, by the expurgation of passages from crucial documents material to the issues and long before the subject of Orders of Discovery, I have endeavoured, by making Orders in respect of amendments to the pleadings, replies to notices for particulars, inspection of documents, third party discovery and by dealing with various other matters to try to push this case towards a trial of the basic issues between the parties. However the preliminary issues between the parties in this case have been fought so strenuously that they have taken up a considerable length of time and as the matter has evolved the parties have raised further issues and

have filed further Affidavits to the extent that the Court has had to deal with at least eleven motions over a protracted period of time, not to mention a number of Orders which eventually became, often grudgingly, the subject matter of Orders by consent. I sympathise with and echo the words of my colleague, Miss Justice Laffoy, when in her judgment in this matter delivered on 22nd December, 1998 she said at page 8:-

> *"In this case, serious allegations have been made by each side against the other and they have been made with extraordinary vehemence."*

BACKGROUND

In her judgment delivered on 22nd December, 1998 Laffoy J. sets out the context of the matter which came before her at the end of the Michaelmas terms 1998. She sets out the matters with her usual clarity and with some temerity I propose to paraphrase her account of the facts of the matter. In the proceedings which were instituted by Plenary Summons which issued on 28th August, 1998 the Plaintiff seeks, *inter alia*, various declarations and injunctions in relation to her position as an employee of the Defendant Société Civile which is registered in Luxembourg and is an extensive organisation and has properties in France as well as no less than four stud farms in Ireland. In July 1998 the Plaintiff had been in the employment of the Defendant for twenty seven years as secretary to the manager of the Defendant's studs in Ireland. From 1975 until in or about June 1998 the manager of the studs was a Mr. Drion, and throughout that period the Plaintiff acted as Mr. Drion's secretary and took her instructions from him. In July 1998 her gross salary was £1,186.13 per month. She was

also paid an annual bonus in line with other equivalent employees. The sum of £68.64 per month was deducted from her salary to fund a pension. It is not in controversy that the Plaintiff applied herself diligently on the Defendant's behalf over the years and she has had an admirable work and attendance record. Indeed she has received gracious letters from His Highness commending and thanking her for her work. On the afternoon of 28th July, 1998 the Defendant's Personnel Manager and Head of Security, Frank Faughnan (Mr. Faughnan) handed a letter written by him to the Plaintiff. This letter was headed *"Inquiry into disciplinary matters",* and by it Mr. Faughnan confirmed that he was holding an inquiry *"into matters relating to your involvement in the improper use of HH The Aga Khan's Studs' resources and/or property"*. It was stated that an inquiry, conducted by Mr. Faughnan, would take place on 4th August, 1998 at 10:00a.m. at which Mr. Faughnan would be enquiring, in particular, into the Plaintiff's role in the improper use of the studs' resources by certain individuals, including Mr. Drion, and certain companies and institutions. The Plaintiff was told that she might attend with a representative, if she wished, and that she would be presented with material bearing on the matter being enquired into and would have an opportunity of asking questions and *"of presenting a defence"*. The Plaintiff was advised that the matter was *"most serious"* and she might wish to take advice. Specifically she was told of the possible outcome of the inquiry as follows:-

> *"If it is determined that you are involved in assisting any of the above in the improper use of the studs' resources, disciplinary action may be taken against you up to and including your dismissal".*

On the next day, 29th July, 1998, the Plaintiff was furnished with a written statement of the allegations of misconduct to be enquired into, namely, at various times during the period 1998 being involved in the following activities:-

1. Using the Defendant's resources in the production of invoices and/or instructions on behalf of persons or companies or entities whose operations were damaging to the interests of the Defendant;
2. Assisting in the administration on behalf of various persons or companies or entities, such companies and entities, operations and activities being damaging to the interest of the Defendants;
3. Assisting in the administration on behalf of various person or companies or entities involved in the fraudulent use of the Defendant's property or resources.

The various persons, companies and entities were identified and included Mr. Drion, and the various resources were identified as the Defendant's farms in County Kildare, transport
owned by the Defendant, staff and computers.

By letter dated 30th July, 1998 to Mr. Faughnan the Plaintiff's Solicitor sought a postponement of the inquiry and sought "*material bearing on the matter being enquired into"* which had been promised. By letter dated 31st July, 1998 both requests

were refused and the commencement of the inquiry on 4th August, 1998, the Tuesday after the August Bank Holiday weekend, was confirmed. By further letter dated 31st July, 1998 the Plaintiff's Solicitor sought particulars in relation to the inquiry and this elicited a faxed response dated 1st August, 1998, the Saturday of the August Bank Holiday weekend, indicating that Mr. Faughnan would deal with the Plaintiff's request at the hearing on the following Tuesday in the course of setting out the procedural aspects of the inquiry and insisting that the Plaintiff must attend the inquiry. In the events the Plaintiff did not attend on 4th August, 1998. On that date her Solicitors informed Mr. Faughnan that the Plaintiff was not then in a position to attend the inquiry and that she was under the care of her doctor and that verifying medical certification would be furnished. By letter dated 4th August, 1998 Mr. Faughnan told the Plaintiff that the inquiry would be held on Friday 7th August, 1998 and that the Plaintiff was required to attend at that time. His letter and previous document referred to a deleted *"Wurz file"*. Mr. Faughnan furnished the Plaintiff's Solicitors with documentation, including an outline of the procedures he intended to follow at the inquiry, five pages of questions which it was intended to put to the Plaintiff and a list of fifteen documents relating to the inquiry, including copies of the documents in question. As to the conduct of the inquiry, the documentation indicated that Mr. Faughnan intended that his decision would be made without any undue delay and that, as soon as he came to a view on the allegations, he would inform the Plaintiff and arrange a meeting at which she could be represented. If he were to make a determination of misconduct, the Plaintiff or a representative might make submissions on her behalf before *"any question of consequences or punishment are considered"*. Subsequently the Plaintiff presented a medical certificate from her general

practitioner certifying that she was unfit for work and her Solicitors informed Mr. Faughnan that she would not be attending the inquiry on 7th August, 1998. The inquiry was then postponed until 14th August and subsequently until 25th August and finally to 3rd September, 1998. In the interim there was a fraught correspondence between the Plaintiff's Solicitors and Mr. Faughnan which included a threat by Mr. Faughnan to sue them for defamation.

The nub of the case made by the Plaintiff in her Affidavit sworn on 28th August, 1998 in support of her claim for interlocutory relief was, first, that she was not being afforded basic fairness of procedures, in that Mr. Faughnan was proceeding with indecent haste and was coercing her into a situation where she would have to face serious allegations without being fully prepared and, secondly, that Mr. Faughnan, who had been head of security while Mr. Drion was the manager of the Defendant's studs, was at the very least complicit in the activities he purported to enquire into and so he was not an appropriate person to conduct the inquiry and that there was at least a real risk of an inference of bias or prejudgment on his part.

The two crucial matters which came before Laffoy J. were (a) whether the Defendant should be restrained from continuing an inquiry into disciplinary matters of which the Plaintiff was first notified by letter dated 28th July, 1998 from Mr. Faughnan and (b) whether the Defendant should be obliged to pay to the Plaintiff sick pay during her absence from work on medical grounds and the other emoluments of her employment.

In his replying affidavit sworn on 9th October, 1998, Mr. Faughnan averred that it was his impression that the Plaintiff had no intention of making herself available for questioning and this placed the Defendant in an extremely difficult position.

He described the Plaintiff's contention that he was complicit in the activities he was seeking to enquire into as scurrilous and untrue. He contended that it was only in the event of the Plaintiff failing to provide satisfactory explanations in response to his queries that the question of disciplinary sanction would fall for consideration and that he would not be the decision maker in such contingency, since his sole function was to carry out an investigation and to prepare a report, which he would in turn furnish to his employer. He denied any bias or prejudgment on his part and he asserted that the Plaintiff had not been denied natural justice at any stage, particularly since she was not as then involved *"in a disciplinary process"*. Finally Mr. Faughnan alleged serious misconduct on the part of the Plaintiff in having obtained the services of the Defendant's stallions for her own brood mares without paying the requisite stud fees over a period of years. Further affidavits were filed by the parties and Laffoy J. alluded to one matter in that in November 1998 the Plaintiff discovered that she had been removed as an authorised signatory for cheques drawn on the Defendant's account at Bank of Ireland, Kilcullen branch. Mr. Faughnan has averred that the Plaintiff was so removed upon his ascertaining the particular matters which he was anxious to pursue with her and which he indicated on 28th July, 1998. He denied the Plaintiff's assertion that this removal of her as a signatory was indicative of prejudgment or of a decision to dismiss her and suggested that her removal was a necessary precaution in circumstances where the Defendant had been a victim of an elaborate fraud and had been occasioned serious losses as the plaintiff acknowledged in the generality of her Affidavits. At page 7 of her judgment Laffoy J. held that there was a fair issue to be tried on the Plaintiff's challenge to the continuance of the inquiry initiated by the letter of 28th July, 1998. She said that there was

undoubtedly a fair issue to be tried as to the true nature of the inquiry, whether it was merely an investigation or was a disciplinary process. She said that there was also a fair issue to be tried as to whether, if the inquiry was conducted by Mr. Faughnan, the Plaintiff could be assured of a hearing in accordance with the principles of natural and constitutional justice, which was her entitlement, and, in particular, whether Mr. Faughnan could conduct the inquiry without infringing the *audi alteram partem* principle and the principle *nemo iudex in causa sua*.

Laffoy J. stated at page 7:

> *"The Plaintiff contends that it is crucial to her defence that she should be in a position to examine or cross examine Mr. Faughnan, having regard to his day to day involvement in the matters at issue in the inquiry. On this ground alone, it seems to me that there is a fair issue to be tried as to whether Mr. Faughnan should step aside and let somebody else conduct the inquiry".*

Laffoy J. concluded at page 7 that, because of the seriousness of the allegations against the Plaintiff and the possible gravity of the outcome of the inquiry, dismissal from her employment having been signalled as a possible outcome from the outset, damages would not be an adequate remedy for the Plaintiff if she was subjected to an inquiry which was subsequently found to have contravened the principles of natural and constitutional justice. She also found that the balance of convenience clearly favoured granting an injunction to restrain the prosecution of the inquiry until the issues between the parties in relation to the conduct of the inquiry had been determined at the trial of the action. On

behalf of the Defendant it was contended that the Plaintiff had made a wholly unnecessary case in asserting that the conduct of the inquiry by Mr. Faughnan would breach the principle *nemo iudex in causa sua* and it was suggested that Mr. Faughnan had been vilified and excoriated by the Plaintiff and had been branded as a fraud or worse. Laffoy J. made it clear that she was making no finding whatsoever on the allegations and counter allegations made by the parties.

Laffoy J. then turned to the second matter, being the Plaintiff's entitlement to sick pay. By letter dated 25th August, 1998 from the Defendant, the Plaintiff was advised that, in the event of her continued absence from work due to illness, she would be paid up to the 31st August, 1998. Thereafter she would not receive payment until she resumed work. On 7th August, 1998 Mr. Faughnan on behalf of the Defendant, had furnished the Plaintiff with a copy of a notice issued by the Labour Court of the making of an Employment Regulation Order fixing the statutory minimum remuneration and statutory conditions of employment of workers in relation to whom the Agricultural Workers Joint Labour Committee operates. That Order, which the Defendant contends applied to the Plaintiff, was dated 10th July, 1998 and provided for three weeks sick pay for full time agricultural workers after one year of service. The expression *"agricultural worker"* was defined in the Order as meaning *"a person employed under contract of service or apprenticeship whose work under the contract is or includes work in agricultural, but does not mean a person whose work under such a contract is mainly domestic service"*.

It was common case that the terms of the Plaintiff's employment with the Defendant are not contained in a written contract. It is also common case that it is not an

express term of the Plaintiff's employment with the Defendant that she is entitled to be paid her salary while absent from work due to illness or incapacity. The Plaintiff's contention is that her entitlement to sick pay is an implied term of her contract of employment. Her case is that it has always been the position in the Defendant's studs that long standing employees were paid their salary in full when they were absent through illness and that this custom is part of her terms of employment. This is disputed by the Defendant. At pages 11-12 Laffoy J. continued:-

"The first issue which arise on the sick pay matter is whether the Plaintiff has established that there is a fair issue to be tried that she is entitled to sick pay while absent from work on medical grounds. In my view, she has established that there is a fair issue to be tried that it is an implied term of her contract of employment that she is entitled to be paid her salary, after allowing for disability benefit which she receives, for a reasonable period while absent from work on medical grounds and that the Defendant is not entitled to rely on the provisions of the Employment Regulation Order made by the Labour Court on 10th July, 1998 in relation to her employment.

On the question of the balance of convenience, I propose to follow the line of authorities which commence with the decision of Costello J., as he then was, in ***Fennelly -v- Assicurizoni Generali Spa*** *[1985] 3 ILTR 73, in holding that damages would not be an adequate remedy for the Plaintiff if it were to be found that at the trial of the action that she has the entitlement she contends for to sick pay, and that, having regard to the*

circumstances of the matter, justice requires that the Defendant should be ordered to discharge her sick pay and preserve her pension entitlements pending the trial of the action, subject to the Defendant's reasonable requirements in relation to verification of the Plaintiff's incapacity for work on medical grounds being adhered to.

The Plaintiff has given the usual undertaking as to damages and I am satisfied that, although the Plaintiff's liquidity is an issue, she has sufficient assets to support the undertaking as to damages.

If the Plaintiff becomes fit for work before the trial of the action, her entitlement to sick pay will cease. The Defendant acknowledges that the Plaintiff's contract of employment still subsists and, if the Plaintiff's incapacity ceases and she presents for work, it would be for the Defendant then to decide what steps to take."

She then expressed the view that it was of the utmost importance that the trial of the action should be expedited and she fixed a date for the trial and made Orders in relation to pleadings, discovery and such like. She concluded her judgment by saying:-

"Pending the trial of the action the following Orders will be in force:-

A) An Order restraining the Defendant, its servants or agents from prosecuting the inquiry into disciplinary matters notice of which was given to the Plaintiff in the Defendant's letter of 28th July, 1998;

B) An Order that the Defendant pay to the Plaintiff a weekly sum equivalent to her net salary less such sum as the Plaintiff is entitled to by way of disability benefit or other benefit from the State, provided that the Plaintiff furnishes to the Defendant on a weekly basis evidence in the form of a certificate from a medical practitioner of her unfitness for work and that the Plaintiff complies with the reasonable requirements of the Defendant that the Plaintiff be examined by a medical practitioner nominated by the Defendant, and

C) That the Defendant maintains the Plaintiff's pension/superannuation and other benefits by paying the premiums in respect thereof.

Each party will have liberty to apply".

The material parts of the perfected Order read:-

"A) IT IS ORDERED that the Defendant its servants or agents be restrained until the trial of this Action or until further Order in the meantime from prosecuting the inquiry into disciplinary matters notice of which was given to the Plaintiff in the Defendant's letter of 28th July 1998

B) IT IS ORDERED that until the trial of the Action or until further Order that the Defendant pay to the Plaintiff a weekly sum equivalent to her net salary less such sum as the Plaintiff is entitled to by way of disability benefit or

other benefit from the State provided that the Plaintiff furnishes to the Defendant on a weekly basis evidence in the form of a certificate from a medical practitioner of her unfitness for work and that the Plaintiff complies with the reasonable requirements of the Defendants that the Plaintiff be examined by a medical practitioner nominated by the Defendant a copy of such medical report to be furnished to the Plaintiff's Solicitors;

C) IT IS ORDERED until the trial of the Action or until further Order that the Defendant maintain the Plaintiff's pension/supperannuation and other benefits by paying the premiums in respect thereof;

IT IS ORDERED that the weekly sum referred to at (B) be paid to the Plaintiff retrospectively."

Finally the Court fixed Friday 26th February, 1999 for the hearing of the Action; reserving the costs of the application and Order; liberty to both parties to apply.

Some controversy has arisen between the parties as to whether some remarks were made to the Court anticipatory of difficulty if the Plaintiff were to recover her health and to return to work but as there is conflict between the parties as to the gist of what was said and concluded on this, and since the judge clearly anticipated that the matter would come to trial shortly and made various Orders to facilitate this, including Orders for discovery, I take the view that I should be influenced as to what was before the Court by the contents of the Affidavits and the exhibits therein which were opened to Miss Justice Laffoy, and in particular by the wording in her judgment and in the perfected Order. After all, if there was any conflict as to what was intended by the Court then the

parties had liberty to apply, particularly if either party contemplated taking a drastic course unilaterally which would dramatically alter the continuing position of the payment of the Plaintiff's salary particularly in the light of the Plaintiff's need for an income as noted by Laffoy J. in her judgment at page 10.

I have set out the matters in contention before Laffoy J. and the gist of her judgment and the material parts of her Order as I think that about nine tenths of the time spent on the eleven or more Motions brought before me has been taken up with the opening of affidavits and with submissions made in respect of alleged defiance of the Order made on 22nd December, 1998 and of a further Order made by O'Higgins J. on an *ex parte* application on 2nd July, 1999 by which he ordered that the Defendant, its servants or agents or any person acting in concert with or upon the instruction of the Defendant its servants or agents, be restrained until further Order from conducting or attempting to conduct or carry out any inquiry into the Plaintiff or any alleged misconduct on the part of the Plaintiff in relation to her employment with the Defendant.

I reiterate that there were a large number of motions before the Court. As the matters evolved various Orders were made but further motions and affidavits were spawned as the matter developed. There were overlaps between the various motions and information adduced in respect of one motion often had a relevance to other motions. In the hope of trying to achieve some simplicity and clarity I propose to deal with aspects of the matter in sequence but it should not be forgotten that matters actually progressed on a number of fronts at the same time. The initial accusation made against the Plaintiff by letter dated 28th July, 1998 was her alleged involvement in the improper use of HH The Aga Khan's Stud's S.C.'s resources and/or property. She was informed that Mr.

Faughnan intended to conduct an inquiry into her conduct on 4th August, 1998 at 10:00a.m. at Sallymount Stud Offices. He warned that if it was determined that she was involved in assisting in the improper use of the studs' resources disciplinary action might be taken against her up to and including her dismissal. She was advised that this was a most serious matter and that she might wish to take advice. A memo was handed to her on 29th July, 1998 setting out her alleged misconduct and accusing her of assisting in the administration on behalf of various named persons or companies or entities involved in the fraudulent use of HH The Aga Khan's Stud's property or resources. The persons included Mr. and Mrs. Drion and Mr. and Mrs. Wurtz and the resources included farms, transport, staff and computers. In his letter Mr. Faughnan said that the Plaintiff would be presented with material bearing on the matter being enquired into and would have an opportunity of asking questions and of presenting a defence. Although this was the Bank Holiday weekend the Plaintiff's Solicitor sent a fax to Mr. Faughnan requesting the material promised. By further letter dated 4th August, 1998 the Plaintiff's Solicitor informed Mr. Faughnan that she would not be attending the inquiry until Mr. Faughnan had complied with their request for the material and had afforded the Plaintiff a reasonable opportunity of considering it and preparing her defence to *"the totally spurious allegations levelled against her"* . He concluded by stating that his client was presently under the care of her doctor by reason of the stress and trauma inflicted on her by these events and was taking medication and was not in a position to attend an inquiry. Medical certification was subsequently furnished. Mr. Faughnan responded promptly and by letter dated 4th August, 1998 to the Plaintiff's Solicitor he pointed out that an employer was entitled to inquire into allegations of misconduct by an employee using fair

procedures and said it was unfortunate that because of the Solicitor's advice he was being prevented from conducting the enquiry. Subsequently he wrote:-

"Your client understands full well that in my position as Personnel Manager within Mrs. Charlton is an employee of the Studs I suggest it is not unreasonable that when allegations of misconduct against her arise that such an inquiry be held by me".

Subsequently he wrote:-

"You will note a reference in the outline of procedure to the fact that the contents of a file have been deleted at some time between the 28th July, 1998 and the 1st August, 1998. This file, entitled Wurz, was part of the Studs' records and was on Mrs. Charlton's computer, and, most importantly, related to the subject matter of the enquiry as outlined in the document provided to Mrs. Charlton".

After expressing his concern that there should have been any interference with the records of the studs including files, he went on to request that any documents removed or copied be returned to the studs and that he be informed of any files that have been interfered with. He went on to write:-

"It is my intention to raise the matter of the deletion of the Wurz file from her office computer with Mrs. Charlton as part of a current internal enquiry. There could be a consequence adverse to her arising from my enquiring into this particular matter, including disciplinary action."

He enclosed a document headed procedures. On the second page under the heading *"ENQUIRY"* this reads:-

"I am enquiring into serious allegations that could, if substantiated, result in serious consequences to Mrs. Charlton ranging from censuring to dismissal." Further down on the same page he wrote:

"Decision. I do not intend to have any undue delay. As soon as I have come to a view on the allegations I will inform Mrs. Charlton and arrange a meeting at which she can be representated (sic).

If I have made a determination of misconduct by Mrs. Charlton she or her representative may make submissions on her behalf before any question of consequences or punishment are considered."

He included a list of proposed questions which includes frequent references to her office computer and to files maintained by her. Further correspondence culminated in the issue of a

Plenary Summons on 28th August, 1998 which, among other things, sought a declaration that the internal inquiry as currently constituted was unlawful in that it represented a failure to afford the Plaintiff basic fairness of procedures, and sought a declaration that any inquiry to be held by the Defendant concerning the Plaintiff should not be carried out by Mr. Frank Faughnan and a further declaration that any inquiry to be held by the Defendant into the Plaintiff should be carried out by an independent and impartial person.

It will be recalled that after two days of contentious hearings before Laffoy J. on 16th and 17th December, 1998 she reserved judgment and on 22nd December, 1998 she gave judgment in favour of the Plaintiff and made the Order set out above.

By letter dated 1st September, 1998 the Plaintiff's Solicitor had respectfully informed His Highness as follows:-

"As previously stated by us, our client has no objection to an Inquiry subject to and without prejudice to the issues to be determined in the High Court proceedings. We wish to proceed with our preparations and the interviews of the witnesses already indicated with the addition of Mr. Carnegie, Mr. Downes and Mr. Faughnan. Mr. Coulton, we have already specified.

We wish to see copies of all notes of those mentioned in the foregoing paragraph and of all reports prepared by or passing between the said persons relative to the matters to be enquired into with particular reference to any purported alteration in the terms, conditions or status of Mrs. Charlton's

employment."

The final paragraph read:-

"We wish to inspect the blood stock movement, records of the Studs whether documentary or film for the period of the Inquiry and those records should of course be carefully preserved and be available at the Inquiry."

It will be recalled that Laffoy J. found that there was a fair issue to be tried as to whether Mr. Faughnan could conduct the inquiry without infringing the *audi alteram partem* principle and the principle *nemo iudex in causa sua*. The Plaintiff had contended that it was crucial to her defence that she should be in a position to cross examine Mr. Faughnan having regard to his day to day involvement in the matters at issue in the inquiry. The judge held that on this ground alone it seemed that there was a fair issue to be tried as to whether Mr. Faughnan should step aside and let somebody else conduct the inquiry. The case was vehemently fought before Laffoy J. and the Plaintiff was strongly criticised by the Defendants for suggesting that Mr. Faughnan was an inappropriate person to conduct the inquiry. It is also quite clear from the contents of the letter dated 28th July, 1998 and the memo handed to the Plaintiff the next day and the further letter dated 4th August, 1998 from Mr. Faughnan, with the enclosed memo with regard to procedure and the questions to be asked, that computer files and records loomed large and were clearly well within the contemplated ambit of the inquiry into disciplinary matters which was restrained until the trial or until further Order in the meantime by the

Order made on 22nd December, 1998. It is clear from page 4 of the judgment that Laffoy J. had in mind the letter dated 4th August, 1998 by which Mr. Faughnan furnished to the Plaintiff's Solicitors certain documentation, including an outline of the procedures which would be followed at the inquiry, including the five pages of questions which he intended to put to the Plaintiff and a list of fifteen documents relating to the inquiry, including copies of the documents involved. These documents in questions referred frequently to the computer files. From all this one would have thought and I have concluded, that it was beyond contention that the injunction restrained the inquiry into disciplinary matters and that this included questions about computer files as these had featured prominently in the contemplation of Mr. Faughnan and the parties to the interlocutory hearing before Laffoy J. and so were clearly embraced by the clear terms of her injunction.

THE COULTON MEMO DATED 18TH JUNE, 1988

It will be recalled that Laffoy J. fixed Friday 26th February, 1999 for the hearing of the action and made Orders for Discovery. An extraordinary episode then occurred. Apparently on the 14th January, 1999 an expurgated document which has been referred to as *"the Coulton Memorandum of 18th June, 1998"* was faxed to the Defendant's Solicitor. While there was considerable obfuscation and prevarication as to who were employees of the Defendant, the author of this memorandum, Richard Coulton, would appear to be an employee or agent of the Secretariat of the Defendant Société. Only a three page extract from the document was sent to the Defendant's Solicitor and included in the discovery affidavit sworn by Mr. Faughnan. From the first page of this expurgated edition it would seem that Richard Coulton created this memorandum on 18th

June, 1998 and sent a copy to His Highness and to Mr. H.C. Carnegie, a lawyer who is presumably either an employee or agent of the Secretariat of the Société. A final expurgated version of this memorandum was the subject of the discovery and was inspected by the Plaintiff's Solicitor on 27th January, 1999. It is significant that no draft expurgations have been included in two affidavits. Despite voluminous affidavits from the Defendants no adequate explanation has been given for the editing of this document nor has it been revealed who was responsible for these deceptive excisions. It is significant that the Plaintiff's Solicitor was not informed that the original copies of the document were sent to His Highness and to Mr. Carnegie with a copy being retained by Mr. Coulton. Presumably there was also a copy on record on disk and another in the back up on the computer all of which contained at least six pages dated 18th June, 1998. On the first page it is stated:-

"In this memo I have also explained the initial improvements in the internal control systems that I think should be put in place as a result of the investigations that Mr. Faughnan and I have carried out on the unauthorised horses."

From page 2 it is clear that Mr. Faughnan was in liaison with Mr. Coulton about falsification of records on Mr. Drion's instructions. On page 2 at paragraph 6 the following appears:-

"6. Mr. Drion's Secretary.

From records and information obtained from her computer it is clear that she was not only aware of the unauthorised horses but actually assisted Mr. Drion to pay invoices on their account etc. from his Swiss bank accounts. She was also responsible for keeping the accounting records for the syndicates, which leave much to be desired. Mrs. Charlton is not very competent from a work point of view and had her position protected by Mr. Drion. We intend that she should be released as soon as she has finished assisting Mr. Magee with his queries on the stallion syndicates. That Mrs. Julie White should take over her responsibilities for the sale of nominations and that a new secretary/telephone operator/receptionist should be taken on".

At the foot of the next page there appears:-

"Conclusions

I think that Mr. Drion has been very lucky to get away with his actions for so long. However, he has been supported by a secretary who appears to have been, at least passively if not actively, in league with him".

The Defendant has complained long and loud about delay on the part of the Plaintiff and indeed pressed strenuously for the case to proceed on 26th February, 1999. Mr. Faughnan has sworn that he was unaware of the contents of the Coulton memorandum until after the hearing before Laffoy J. and Mr. Coulton in an affidavit dated 18th November, 1999 has sworn that in April 1998 he was advised by *"Frank*

Faughnan of an apparent fraud .... and carried out an investigation with Mr. Faughnan, the Defendant's Personnel Manager, to ascertain the extent of the fraud." He says that he prepared the memo dated 18th June, 1998 and that in the paragraph about Mr. Drion's secretary when he used the pronoun "we" in that paragraph, he referred to the organisation in France. Mr. Coulton says that the memorandum was only sent to His Highness and Mr. Carnegie. Nevertheless, it is quite clear, even from this expurgated edition of the memorandum that Mr. Faughnan was heavily involved in the investigation and as the head of security he obviously had a personal involvement and interest in the outcome. He must have had a considerable role in the provision of information contributing to the discussions in France and it would be rather surprising if he was not made aware of the discussions and the decisions being made about these matters in France. After all the Secretariat must have been well aware that there was impending litigation in the Irish Courts before Christmas 1998. However, assuming that Mr. Faughnan is correct and that he was not aware of the contents of the memorandum dated 18th June 1998, nevertheless he was certainly aware that the Plaintiff's solicitor regarded him as being a person who had been involved in the Drion affair and the investigation thereof and both Mr. Faughnan and the Defendant were aware that the Plaintiff's solicitor regarded him as a potential witness. Even if he was not aware of the precise contents of the Coulton memo, nevertheless he had to have considerable knowledge of the matters covered therein and had been involved in discussions which had led to Mr. Coulton's conclusions. The Coulton memorandum was not properly discovered until the week of 15th November, 1999. It was suggested by Counsel for the Defendant that the expurgations were because there was confidential and sensitive matters in the rest of the

memorandum. Having studied the uncensored edition, I find this contention surprising and quite unconvincing. However, Counsel did have the grace to concede that several of the passages which had been excised were of assistance to the Plaintiff. As for the suggestion that confidentiality or sensitivity can be put forward as a justification for the perpetration of an apparently deliberate deception by the Defendant on the Court and on the Plaintiff's Solicitor, this is a wholly untenable proposition. I propose to quote a number of passages from what I hope is an unedited edition of the memo. At paragraph 8, Mr. Coulton wrote:-

"In my previous reports I have explained that there was a gradual build up of his horses and that it would seem likely that your stud staff thought that they were authorised.

After he had been employed a week ago, Mr. Downes told Mr. Faughnan and myself that he had been aware that Mr. Drion had horses on your Studs and thought that they might not have been authorised and suspected that the farm belonging to Isola Limited belonged to Mr. Drion as it did not appear to be necessary."

The significance of this passage is that when Mr. Faughnan was stood down as the person to conduct the inquiry it was suggested that Mr. Downes should take his place despite the fact that the Plaintiff's Solicitor had given notice that he regarded

Mr. Downes as a potential witness. As Mr. Downes had been an assistant manager to Mr. Drion previously it should have come as no surprise that he was a prospective witness. The above passage about Mr. Downes copperfastens his involvement and his likely significance as a witness. Secondly in the paragraph headed CONCLUSIONS the third sentence was deleted in the copy memorandum referred to in Mr. Faughnan's Affidavit of Discovery. The deleted sentence reads:-

> *"He has managed to mislead the auditors, employ a low quality accounts clerk, confuse your stud staff or coerce them to obey him and somehow get the*
>
> *compliance of Mme O'Bin."*

The paragraph continues:

> "*Under these conditions any internal control system would break down, which*
>
> *has been the case. I hope Your Highness will appreciate that Mr. Drion has made my job difficult and I much regret that this matter has not come to my attention sooner."*

In the penultimate paragraph on page 6 there is a heading *"The renting of the farm owned by Isola Limited"*. This aspect allegedly touches on contentious matters concerning Mr. Faughnan's own role and is a further confirmation that the Defendant should have conceded that he was an inappropriate person to be put forward as an impartial conductor of an inquiry.

It is very disturbing to realise that some person in the Defendant's organisation has taken it upon himself or herself to delete parts of this Coulton memo so that what remained was misleading and a snare and a deception to the Court and the Plaintiff's legal advisors.

I have come to the conclusion that even if Mr. Faughnan was unaware of the actual recommendations in the Coulton memo, he nevertheless must have been well aware of his own participation in the gathering of information and partaking in discussions which led to the recommendations in the report. Even if he was insensitive to the inappropriateness of his conducting an inquiry in respect of the Plaintiff, at least three people in France involved in the Société must have been aware from the contents of the memo that Mr. Faughnan was ineligible and an inappropriate person to conduct the inquiry. In the light of this information and the letters from the Plaintiff's Solicitors it seems incomprehensible that the senior people in France failed to instruct Mr. Faughnan and the Société's Solicitors in Ireland of the general conclusions in the Coulton memo when the Defendant Society was vehemently fighting the motion before Laffoy J. In the light of the Coulton Memorandum it seems to me that the senior people in the Société should have realised that they were trying to maintain a completely untenable stance. The contents of the Coulton memo make it quite clear that Mr. Faughnan, as head of security and personnel manager, and Mr. Downes were both likely to be potential witnesses and both clearly were in a position of having vested interests in broad terms in respect of the outcome of the inquiry as it might well affect their own actions or omissions. The Société is responsible for the instructions and conduct of the litigation before Laffoy J. It is obvious in the Coulton memo that discussions had taken place involving Mr. Faughnan

and Mr. Coulton, and probably others, and that conclusions had been reached by senior management about the Plaintiff's future in the summer before the hearing in December 1998 and these matters rendered Mr. Faughnan and Mr. Downes inappropriate as persons to conduct the inquiry. Counsel for the Plaintiff characterised the hearing, which was fought so strenuously, as a charade and the contents of the memo certainly bear out the wisdom of Laffoy J.'s finding that there was a fair issue that if Mr. Faughnan were to conduct the inquiry then he would be infringing the principle that a person should not be a judge in a cause in which he had a personal interest.

An extraordinary proposition was put forward on behalf of the Société that Richard Coulton was not a servant or agent of the Defendant. While I am not aware of the precise structure of the Société, nevertheless Mr. Coulton described himself as an employee of the Secretariat and while this may not be a legal entity it is significant that when eventually the contract of employment of Diane Kavanagh was made available by way of discovery and the missing third page was produced at long last and after much procrastination it transpired that Mr. Coulton had signed as a witness to this contract of employment on behalf of the Société.

I also mention in passing that there was a considerable reluctance on the part of the Defendant to co-operate with the Court by nominating an appropriate officer to make a further Affidavit of Discovery. This reticence was combined with reluctance to nominate a Solicitor to accept service of documents on behalf of Mr. Coulton and Mr. Carnegie. All this prevarication regrettably fostered the impression of non co-operation. Coming after the improper and misleading editing of the Coulton memo, there was the unfortunate failure to nominate an appropriate officer to make the affidavit of Discovery

on behalf of the Société Civile in France. Eventually it seemed that the appropriate person to swear the affidavit was Eric Magrini, the Secretary of the Company as registered in Luxembourg, but it transpired that Mr. Magrini was unwilling or not in a position to make the affidavit and this caused even more and further delays on the part of the Defendant.

For the record and in the hope that this may cause the parties to give pause for thought and to seek a way of circumventing the anxieties and expense of litigation, it may be helpful if I put on the record that Counsel for the Defendant conceded that the Defendant was no longer saying that the Plaintiff was a beneficiary of or aided and abetted any such fraud as was perpetrated. Perhaps this concession may help to alleviate the feelings of hurt and resentment and enable the parties to find a way to surmount the present turbulence. As for the role of Mr. Faughnan in respect of the Coulton memo, he has averred that he did not have this memo at the time of the interlocutory application. There is no doubt from the contents of the memo that he participated in the inquiries and liaised with Mr. Coulton in the production of this report and its conclusions and recommendations. The Defendant Société made the decision that he was the person to swear the affidavits on behalf of the Defendant for the hearing before Laffoy J. The Defendant had at least four or five original copies of the Coulton Memorandum and, knowing that the issue before the Court was whether there was prejudgment and personal involvement on the part of Mr. Faughnan in the transactions to be investigated, the existence of and thinking in and behind the Coulton Memorandum was concealed from the High Court and the Plaintiff and her legal advisers. Subsequently in late December 1998, when the existence of this memorandum was disclosed to the Defendant's

Solicitor, he was only sent a heavily censored and edited version consisting only of three of the six pages. Furthermore no warning was given that relevant sentences had been expurgated or that the residue was deceptively misleading.

Due to the Defendant's failure to make proper discovery of documents, the Plaintiff's legal advisers were not in a position to proceed on 26th February, 1999. Indeed, they even encountered difficulty in delivering an amended Statement of Claim which was rendered necessary by reason of a clerical error which had caused the omission of a paragraph in the Statement of Claim. Subsequently arising out the inspection of the edited copy of the Coulton memo dated 18th June, 1998 an amended Statement of Claim in draft was delivered on 23rd March, 1999. No consent to this amendment was forthcoming and accordingly the Plaintiff's Solicitor had to issue a motion seeking liberty to amend the Statement of Claim. This was surprising as the Defendant had created the need for the amendment. The failure to give this consent has caused further delays until 27th October, 1999 when eventually consent to the delivery of the amended Statement of Claim was belatedly given in Court.

On 17th May, 1999 a motion for judgment and to strike out the Defendant's defence was brought because of the Defendant's failure to comply with the High Court Order for discovery made on 22nd December, 1998. In the alternative the Plaintiff sought further and better discovery as was perfectly reasonable in view of the belated production of a part of the Coulton memo. Since then a very large number of documents have been extracted in a trickle out by way of discovery in dribs and drabs from the Defendant, despite assistance being given by the Plaintiff's Solicitor in indicating by correspondence the type and nature of the documents which would be

relevant.

On 8th February, 1999 a motion for third party discovery against the accountants Deloitte and Touche was sought. I made this Order for third party discovery. However, all these documents should have been within the power and procurement of the Defendant and if arrangements had been made by the Defendants for discovery of these documents and for inspection thereof then much time and expense could have been saved.

On 26th February, 1999 an Order for Discovery was made against the Minister for Defence as a third party. Certain complications arose in respect of this third party Discovery and on 19th November, 1999 the parties announced agreement to the Court in respect of further inspection of files and this aspect was further dealt with by an Order made on 21st December, 1999. I reserved the costs of this application for Discovery and the further motions and Orders in respect of this third party discovery to the hearing of the trial.

On the day on which Laffoy J. had delivered her judgment the Defendant's solicitors wrote to the Plaintiff's solicitors stating that their client had now instructed them that Mr. Frank Faughnan would not conduct the inquiry and that it would now be conducted by Mr. Patrick Downes. The Plaintiff's Solicitor replied by letter dated 5th January, 1999 to the effect that his client found this proposal both extraordinary and unrealistic. He continued:-

> *"It was extraordinary considering that your clients had fought tooth and nail to maintain Mr. Faughnan as the person to conduct the Inquiry and in so doing made on Affidavit and in Court the most serious and hurtful*

allegations against our client and put her through the unnecessary trauma, expense not only of the Interlocutory Application but other substantial expense, and not least the attendant wide publicity in the Press of very distressing allegations including those of involvement in fraud and disloyalty to His Highness.

The proposal was unrealistic in that (inter alia) Mr. Downes will be a relevant witness in any Inquiry. Mr. Downes was Mr. Drion's assistant manager at a time which is critical to the issues arising in this case and must have had the most intimate and detailed knowledge of all of Mr. Drion's apparently improper activities, according to your clients".

The final paragraph in that letter was:-

"Mr. Faughnan was the only representative of the Defendants present and instructing during the Interlocutory proceedings in the course of which in response to a specific query from the Court as to what would happen if Mrs. Charlton returned to work, [he] instructed that she would be suspended on full pay. When was that decision made and on what authority?"

The Defendant's Solicitor replied by letter dated 8th January, 1999 and concluded their letter as follows:-

"With regard to your final query as to when the decision was made that if Mrs. Charlton returned to work she would be suspended on full pay, the issue had not been raised before and instructions were given to Counsel by the Defendant when the query was raised by the Court. This is in accordance with the Defendant's normal policy in this situation."

In June 1999 the Plaintiff regained her health and her Solicitor informed the Defendant's Solicitor that she was ready to return to work. By letter dated 29th June, 1999 the Defendant's Solicitor requested her to report to work on Monday 5th July next at the usual time of 9:00 a.m. and to report to Mr. Faughnan at that time in the offices at Sallymount. No criticism is made of this letter. However by letter of the same date Mr. Faughnan wrote direct to the Plaintiff as follows:-

"You are to return to work on Monday 5th July, 1999 at the usual time of 9:00 a.m. You should report to me at that time/date in Sallymount offices.

There are some matters that have to be dealt with, firstly the deletion of files from your office computer as set out in the attached list. These files appear to have been deleted on 31/7/98 at a time when you were in your office.

Secondly an explanation is required into the circumstances in which a letter from Mr. Drion to His Highness the Aga Khan came into your possession.

A copy of this letter is attached. You will recall that you were offered access to all materials in the offices but that removal or copying of anything was permitted only with prior permission.

You will appreciate that both these matters require explanation and you should be in a position to assist in our understanding of the circumstances when you report to Sallymount on the 5th July, 1999.
Yours faithfully, Frank Faughnan, Personnel Manager."

A list of nine files was annexed under the heading FILES DELETED FROM MRS. CHARLTON'S P.C. together with a letter dated 5th May, 1998 from Mr. Drion to His Highness.

MOTION FOR INJUNCTION AND FOR ATTACHMENT AND/OR COMMITTAL OF THE DEFENDANT AND FRANK FAUGHNAN FOR CONTRAVENTION OF ORDER OF HIGH COURT DATED 22/12/98(LAFFOY J.)

Having studied the letter dated 29th June, 1999 from Mr. Faughnan to the Plaintiff and taking the view that Mr. Faughnan's instruction to report to him for the purpose of his making enquiry about the deletion of files would be in contravention of the Order of the High Court made on 22nd December, 1998, and being conscious that the instruction was to attend on Monday 5th July, 1999 at Sallymount which was not the

Plaintiff's usual office, the Plaintiff's Counsel moved *ex parte* before the High Court (Mr. Justice Kevin O'Higgins) on Friday 2nd July, 1999. O'Higgins J., after reading the affidavit of Mary Charlton sworn on 2nd July, 1999 and the documents and exhibits therein referred to, including the judgment delivered on 22nd December, 1998 and the Order made on the same day, ordered that the Defendant, its servants or agents or any person acting in concert with or upon the instruction of the Defendant its servants or agents, be restrained until further Order from conducting or attempting to conduct or carry out any inquiry into the Plaintiff of any alleged misconduct on the part of the Plaintiff in relation to her employment with the Defendant and reserved the costs of the motion. This Order was duly served on the Defendant and on Mr. Faughnan. O'Higgins J. further indicated that the matter should be mentioned before Miss Justice Laffoy on Monday 5th July, 1999 at 10:30a.m. The Defendants were made aware of this, although I note that the actual interlocutory motion was drafted as for 14th July, 1999. Despite the making of this further High Court Order the Plaintiff received no message from the Defendant over the weekend, despite her telephone number and address being known and used in the past for messages to her, and accordingly as an employee she felt bound to comply with the instruction to report for work. Accordingly she attended at Sallymount Stud at about 9:00a.m. on 5th July, 1999, being about an hour and a half before the matter was due for mention before the High Court. The transcript of the discussion which took place between the Plaintiff and Mr. Faughnan has been produced as an exhibit and I have read this transcript. Mr. Faughnan stated that he had just been made aware of the application to the Courts and in those circumstances he could not proceed with the question of the security files and tapes which would be essential before she could resume

work and he had no choice but to suspend her until the matter had been clarified in Court. Despite being aware of the making of the two Orders of the High Court he then went on:-

> *"The idea of this meeting was in fact to give you an opportunity, perhaps there is an innocent explanation for the deletion of the files,....., perhaps there is an innocent explanation for the removal of the letter,..... that was the purpose of it.*"

The Plaintiff says that the raising of these issues was continued so as to elicit answers from her under threat of suspension and in breach of both Court Orders.

The Plaintiff asked on what grounds she was suspended and Mr. Faughnan replied that she was suspended pending the hearing of the High Court action. When she asked if this was on full pay he replied:-

> *"For the moment, but that won't carry on indefinitely."*

He then referred to the files again and reiterated that she was suspended with pay and was to leave the stud property and he asked her if there was anything she wished to say to which she responded in the negative.

I note in passing that Mr. Faughnan was present during the hearing before Miss Justice Laffoy and must have been aware of the contents of her judgment and Order particularly with regard to himself and her remarks about his not acting in the inquiry because of the principle of *nemo iudex in causa sua*. He must also have been only too

well aware that the Defendant's Solicitor had written subsequently indicating that he was being stood down from conducting the inquiry. He himself had written the letter dated 28th July, 1998 and had compiled the subsequent documents with regard to the computer files as being the subject of his proposed inquiry. Any lingering doubts which he might supposedly have had, that perhaps he could ask questions of the Plaintiff about the files, must have been dispelled when he received the Order indicating that O'Higgins J. had read the judgment and Order of Laffoy J. and was restraining the Defendant, its servants or agents, from attempting to conduct or carry out any inquiry into the Plaintiff or into any alleged misconduct on the part of the Plaintiff in relation to her employment with the Defendant. It is beyond belief that a person who is capable of hearing and literate, and who has been a non-commissioned officer, could construe such Orders as permitting him, the very person who had been stood down from making such inquiry, to interview the Plaintiff. He went further by making it clear that he intended to suspend her in the absence of an innocent explanation being given by her for the deletion of files, this being one of the very topics into which he himself particularly was forbidden from making any inquiry. There can be no doubt whatsoever but that the matter of the deletion of files was firmly in the contemplation of Laffoy J. since computer file deletion had been raised in Mr. Faughnan's letter of 4th August, 1998 and in his letter dated 13th August, 1998. Furthermore his affidavit sworn on 9th October, 1998 complained that several files had been deleted from the computer. In an affidavit sworn on 8th October, 1999 Mr. Faughnan makes the point that the Defendant was not restrained by Miss Justice Laffoy's Order from raising other issues with the Plaintiff in the context of her employment with the Defendant. I doubt if anybody would quarrel with this statement as there would be

many issues which could be discussed with regard to her employment which would not touch on or pertain to the ambit of the prohibited inquiry, if and when the Plaintiff recovered her health and returned to work. At paragraph 5 of his affidavit Mr. Faughnan contends that Counsel was specifically instructed by him to inform the Court that in the event of the Plaintiff being declared fit by her doctor and seeking to return to her employment, the issue of the deletion of the computer files would be raised with her and that if the Plaintiff failed to provide a satisfactory explanation, then she would be suspended. He says counsel was at pains to stress that the Plaintiff would not be permitted to return to her work until this issue was resolved and that Miss Justice Laffoy did not make any criticism of the Defendant's stance. Mr. Faughnan's recollection of such an exchange in Court is borne out by an affidavit sworn on 26th October, 1999 by Jackie Buckley who was attending Counsel on behalf of the Defendant . On this aspect there is some conflict with the affidavits filed on behalf of the Plaintiff. However it is perfectly clear from the wording of the judgment and the Orders that Mr. Faughnan of all people was not to conduct such an inquiry as he proposed to conduct on 5th July, 1999 nor should he, with a threat of suspension to her, have broached the very topics which were prohibited. If he felt that an inquiry was in fact imperative in respect of the computer files, then the obvious course was to apply to the Court for directions as to how, and by whom, this could be done. If there was need for a particular file, then one would have thought that there was no reason why the Defendant's Solicitor could not write to the Plaintiff's Solicitor indicating the need for a particular file. Given a moment's thought it should have been realised that the last person to conduct any interview for the purpose of enquiring about the files would have been Mr. Faughnan himself. I do not

accept the contention that the deletion of computer files was deliberately excluded from the ambit of the Order made on 22nd December, 1998. On the contrary, this topic was clearly within the embrace of both Orders.

Counsel for the Defendant points to the passage at page 12 of the judgment of Laffoy J. *"if the Plaintiff's incapacity ceases and she presents for work, it would be for the Defendant then to decide what steps to take."* He contends that this envisaged the Defendant taking further steps in relation to the deletion of the computer files. This contention is quite untenable and is only contrived by taking this sentence entirely out of its proper context. That remark was made by Laffoy J. in the context of her finding that justice required that the Defendant should be ordered to discharge the Plaintiff's sick pay and to preserve her pension entitlement pending the trial of the action, subject to the Defendant's reasonable requirements in relation to verification of the Plaintiff's incapacity for work on medical grounds being adhered to. The paragraph in which the phrase appears actually reads:-

> *"If the Plaintiff becomes fit for work before the trial of the action, her entitlement to sick pay will cease. The Defendant acknowledges that the Plaintiff's contract of employment still subsists and, if the Plaintiff's incapacity ceases and she presents for work, it would be for the Defendant then to decide what steps to take."*

The crucial point is that the contract of employment was to be regarded as subsisting and accordingly, until the Plaintiff's contract of employment is lawfully

terminated, she is entitled to the contractual entitlements thereunder. The Defendants have repeatedly made it clear that the normal procedure is that an employee who has been suspended is entitled to be paid her wages until resignation or termination of employment. In his affidavit sworn on 9th July, 1999 Mr. Faughnan reiterates that in the event of a failure to provide a satisfactory explanation in respect of the computer files then she would be suspended on full pay.

Counsel for the Defendant puts forward the contention that the use of the words *"attempted"* or *"intended"* in the Plaintiff's affidavits indicates that no actual contempt is alleged. I regard this as casuistry. The clear instruction was given to her to attend at Sallymount by Mr. Faughnan for the purpose of answering questions about the files and his subsequent attempt to elicit a response on these topics from her on pain of suspension was manifestly in clear defiance of both Court Orders. Counsel for the Defendant has criticised the Plaintiff for attending at Sallymount on 5th July, 1999 when it was her contention that this was an attempt to breach a Court Order. This is an unfair criticism as, being an employee, she was bound to respond to the instruction from the Defendant's Solicitor to attend at Sallymount particularly in view of the fact that no message had been sent to her over the weekend, although the Defendant through Mr. Faughnan and others must have been well aware of the making of the Order by O'Higgins J. which included the listing for mention before Miss Justice Laffoy at 10:30a.m. on Monday 5th July, 1999.

I have come to the conclusion that only an ignoring of the meaning of the words in the judgment and both Orders, or arrogant obduracy or reckless insouciance could have lead Mr. Faughnan on behalf of the Defendant to proceed himself

with an inquiry into the alleged deletion of computer files. It was quite clear that he was stood down not only by the Order of Laffoy J. but also by the confirmation of his being stood down by the letter from the Defendant's Solicitor. I have no doubt that the Defendant has been in clear contempt of both the Court Orders. Laffoy J. had decided that there was a fair issue to be tried on the ground alone that Mr. Faughnan had an involvement in the matters at issue and that Mr. Faughnan should step aside and let somebody else conduct the inquiry at least pending the trial of the action. The Defendant is not a small shop with a proprietor and a couple of staff. It is a world wide concern with considerable interests including four studs in Ireland and valuable properties and organisations in France. The Société would have little difficulty in engaging an impartial qualified person to conduct an inquiry if this were thought necessary. For example Mr. Magee of Deloitte and Touche was engaged to conduct the previous inquiry. While Mr. Faughnan in his affidavit has sworn that Mr. Coulton and others are not employees of the Société, nevertheless it would be very surprising if such a prestigious and substantial organisation as the Defendant did not have appropriate senior staff who had not been previously involved and who would be in a position to conduct an impartial and unbiased inquiry, untainted by suspicions of self interest, bias and prejudgment.

UNILATERAL ALTERATION FROM SUSPENSION ON FULL PAY TO CESSATION OF PAYMENT OF SALARY ON 31ST AUGUST, 1999

By letter dated 31st August, 1999 from the Defendant's Solicitor to the Plaintiff's Solicitor a catalogue of complaints about delays on the part of the Plaintiff

were set out and the letter concluded with a peremptory final paragraph as follows:-

> *"Our Clients are under no legal or contractual obligations to pay your Client's salary during her suspension. Our Clients therefore instruct us that your Client's suspension as and from today will be unpaid. Payment of pension contribution will continue in accordance with the terms of Miss Justice Laffoy's Order of the 22nd December last. Our client has recently sent her pay cheque, less a deduction relating to sickness benefit. When a final certificate from the Department of Social Welfare is furnished to our client by yours, any necessary adjustments or refunds will be made."*

Thus the Defendant unilaterally and without any prior notice, and using as a sole justification the alleged delay by the Plaintiff in the High Court proceedings, stopped payment of salary. There is no suggestion in the letter that her employment has been lawfully terminated. There was no contention at that stage that her contract had been discharged. The Defendant was well aware that the Plaintiff had been out of work for certified medical reasons including acute stress disorder which had been allegedly exacerbated directly by virtue of the matters in contention in the case, particularly the publicity attracted by the allegations against her, and by her financial situation. It was well known that the Plaintiff contends that her husband is currently incapacitated and that she and her husband are almost totally dependent on her income. The Defendant is a large, powerful and wealthy organisation and it is quite clear from the affidavits filed on behalf of the Defendant and correspondence from the Defendant's Solicitor that the

normal practice is to suspend on full pay.

As for the suggestion that culpability for delay in bringing this case to trial should be laid at the door of the Plaintiff, this contention is manifestly absurd. I have listened carefully to innumerable affidavits in this case and to a string of motions and I have listened patiently to Counsels' lengthy submissions. I have become more and more convinced that responsibility for the delays in this case have been largely and almost exclusively through the default of the Defendant. For example, the Defendant prevaricated by objecting to the delivery of the amended Statement of Claim which had been necessitated by the Defendant's own culpable omission in failing to make discovery of the Coulton memo. This was exacerbated by the illegal, deceptive and misleading deletion of portions of the memo. Furthermore the Plaintiff's Solicitor has been obliged to bring motion after motion in order to extract compliance with the Order for Discovery made on 22nd December, 1998. Even today, despite a number of further Orders with regard to further Discovery there are still outstanding documents to be discovered. It has been contended on behalf of the Defendant that there has been dilatoriness on the part of the Plaintiff in the preparation of her case. Having gone carefully through the sequence of events in this case and having heard numerous motions, I have come to the firm conclusion that the Plaintiff's solicitor has moved with commendable expedition throughout this matter in despite of the huge volume of documents which have eventually been made the subject of Discovery. For example, when the existence of the Coulton memo at last was made known to the Plaintiff's advisers, they moved with commendable speed and issued motions on 8th February, 1999 and 17th February, 1999. These motions would not have been necessary if the Defendant had disclosed the true position involving

the unexpurgated edition of the memo dated 18th June, 1998 and all relevant documentation which has since had to be extracted.

The Defendants have sought to justify the suspension without pay on the grounds of alleged delay on the part of the Plaintiff in the High Court proceedings. The letter dated 31st August, 1999 makes it clear that the Plaintiff is still an employee. It is significant that in the Defendant's Solicitor's letter dated 8th January, 1999 it was stated that suspension on full pay was in accordance with the Defendant's normal policy in this situation. It is also significant that in his letter dated 9th August, 1999 from Mr. Faughnan to the Plaintiff he requested her to get a note from Social Welfare Benefit claim section about benefit paid so that *"we can consider the matter and if appropriate make the necessary adjustment to your salary"*. It is clear from the Industrial Relations Act, 1990 Code of Practice on Disciplinary Procedures (Declaration) Order 1996 (SI 117/1996) that, save in exceptional circumstances, salary should continue to be paid while a person is under suspension. Counsel for the Defendant, while conceding that the inquiry was now almost academic as they do not any longer say that the Plaintiff was a beneficiary of or aided and abetted the fraud, nevertheless made it clear that the Defendants would make no concession with regard to the payment of the Plaintiff's salary. The Defendants contend that alleged delays on the part of the Plaintiff in bringing the case to a hearing justifies their cessation of payment of her salary. It is quite clear that the Defendant initially intended to pay her salary while she was suspended and then, unilaterally and without any warning stopped her salary on 31st August, 1999. Since her contract of employment is still in existence I can envisage at present no justification for this unconscionable and oppressive conduct. It is inappropriate for the Court at this stage

to come to a final decision on this issue but it seems to me for the present the Plaintiff's contract is still subsisting and that she is entitled to be paid even though she is presently suspended. I should add that it was only towards the conclusion of the arguments before me, after some months of intermittent hearings, that the submission was made on behalf of the Defendant that the Defendant regarded the Plaintiff as having repudiated her employment on 31st August, 1999. This would be a matter for the trial judge to adjudicate upon but for the present I can see nothing in the Plaintiff's conduct which would indicate any hint of repudiation on her part of her contract of employment.

Counsel on behalf of the Defendant said that the Defendants would have no dialogue with the Plaintiff in the meantime and accordingly the Order made by O'Higgins J. was moot and there was no need for it as the Defendant had no intention of conducting an inquiry or speaking to the Plaintiff. In view of the contentiousness of this case and because the Defendants have in my view been in breach of Court Orders and have consistently obstructed and thwarted the timely preparation of this case for trial I propose to leave both the Orders already made by Laffoy J. and O'Higgins J. in place.

As for the further motion to attach and commit, which also seeks an Order for the sequestration of the assets of the Defendant, I think that I have already dealt with the issues with regard to defiance of the Court Orders. I am happy to say that there have been efforts to comply with the Orders in respect of Discovery and in view of my adjudication in respect of the suspension of the Plaintiff's salary, I direct that the Defendant should pay the Plaintiff's salary and emoluments and benefits until the trial of this action. Apparently there is outstanding a sum of £117. 55 on foot of a previous Order and hopefully the parties will have resolved this in the meantime.

As for the motion brought on the 17th May, 1999 to strike out the defence and for judgment because of the Defendant's failure to make full and proper discovery it seems to me that this was initiated because of the Defendant's decision to edit an extract from the Coulton Memorandum dated 18th June, 1998 and the subsequent failure and refusal to furnish a full copy thereof to the Plaintiff until the matter came before me. There was also a motion to re-enter the matter before Miss Justice Laffoy for the purpose of varying her Order. Unfortunately Laffoy J. is unable to deal with this case and it has landed firmly on my desk and I have had to deal with lengthy submissions on a string of motions. It is agreed that Laffoy J. has relinquished seisin of this case and that her Order reserved the costs of the application made for two days before her and the Order made on 22nd December, 1998.

I propose to go through the list of motions and to make appropriate orders in line with my conclusions and findings. I am conscious that I have made orders as matters have evolved, particularly as documents have been produced by the Defendant and as Orders made were complied with in part or in whole in respect of matters such as discovery and inspection and replies to notices for particulars. I have tried by making several Orders in respect of preparatory matters to push this case into a state of readiness for trial. I have endeavoured to express my disapproval of the conduct of the Defendant Société in mild terms. I have come to the conclusion that nine-tenths of time spent before me was involved with the issue of contempt of Court and the issues spawned by the failure on the part of the Defendant to reveal the existence of and misleading expurgation from the Coulton memo. It seems to me that all the issues have been opened fully before me on affidavits concerning these aspects of a preliminary nature and that I should grasp

the nettle of making a decision with regard to the question of costs. I take the view that the Court should mark strong disapproval of the conduct of the Defendant Société in

(a) Fighting the motion before Laffoy J. when documents in the possession of the Société, including the Coulton memo, and knowledge of the role of Mr. Faughnan as head of security and as a person with a perceived vested interest in the mode and outcome of the inquiry made him an obviously inappropriate person to conduct the inquiry.

(b) Prevarication, obfuscation and obstruction in the conduct of the motions before this Court in -

(1) failure to nominate persons to make affidavits of discovery,

(2) by failure to nominate Solicitors to accept service on behalf of agents of the Société outside the jurisdiction and causing delays and difficulty by contending that agents of the Société did not have authority to hire and fire employees when averments in the affidavits and signed documents manifest the contrary in practice.

(c) Persistent prolongation of these proceedings by maintenance of what transpired to be quite untenable stances on issue after issue, for example, by firstly the contention that Mr. Faughnan was an appropriate person to conduct the inquiry and, secondly, the contention that Mr. Downes was an appropriate person to conduct the inquiry. Notification had already been given by the Plaintiff's Solicitor that Mr. Downes was likely to be a prospective witness and that he had involvement in the subject-matter of the inquiry, having been Mr. Drion's assistant manager. Thirdly, by

simply ignoring the suggestion made that in a prestigious and world-wide organisation such as the Defendant, there must be other employees or agents not previously intimately involved, or at least the Defendant could have engaged a person (as with Mr. Magee in the Drion inquiry) who would have been an appropriate person to carry out an impartial inquiry or investigation in respect of the Plaintiff.

(d) Persistently breaching Court Orders.

(e) Deceiving the Court by non-disclosure of relevant documents such as the Coulton memo of 18th June, 1998. Trust was further eroded by the delay by the Defendant in the production of the Coulton letter hiring Diane Kavanagh and especially the failure to produce the third page thereof which, when eventually produced, revealed that Mr. Coulton had signed the hiring letter on behalf of the Defendant. It is not for the Defendant to choose which documents will be discovered or which documents will have expurgations particularly when such documents embarrass the Defendant's case.

(f) Compounding and aggravating this deception of the Court by deleting relevant passages from the Coulton memo which included excisions which altered the meaning and excluded obviously significant and relevant passages from the memo.

The issues of the circumstances of these expurgations and when and by whom they were made, are not germane to the issues before me at present as it is quite

clear that they were made by the agents of the Defendant Société.

Counsel for the Société stated that a "check list" had also been edited because it was highly sensitive. However, as the Plaintiff's Solicitor has now been given sight of the unedited check list, I indicated that the complaint about this further non-disclosure could either be regarded as resolved or left for the future hearing. However, I should not be taken as condoning the making of such unilateral expurgations.

I regret to have to say that it was reprehensible on the part of those giving instructions on behalf of the Defendant Société to try to force this case on on 26th February, 1999 when only the expurgated edition of the Coulton memo had been seen by the Plaintiff's Solicitor and no disclosure had been made that this was a mutilated and censored document.

When the parties' legal advisors and the parties have had an opportunity of considering this judgment, then the Court will sit for the purpose of making Orders on each of the motions in respect of which I have not already made Orders. I will also deal with the question of costs on each of the motions. It may be of assistance if I give an indication of my views on the aspect of costs at this stage. This Court has had seisin of many of these motions for more than six months now in an effort to bring this case to a state of preparedness for trial. All the affidavits on the motions have been opened to me and the relevant documents have been brought to my attention and I have had the benefit of the submissions of Counsel. I have had to make decisions and I have made Orders on a string of motions. Many of these motions dealt with preliminary and preparatory aspects which should not encroach on the time of the trial judge. This Court has a full grasp of the issues which have arisen in respect of these motions and has been able to

form a definite view about the manner in which the parties have conducted themselves in respect of these preparatory matters. There is no reason why these vehemently contentious aspects should be rehearsed again at such length before the trial judge who will have to decide on such issues as are knit in the amended pleadings. In the light of the concessions made by the Defendant's Counsel on behalf of the Defendant with regard to some of the allegations made initially against the Plaintiff, it would seem that the focus of the Defendant's complaints has changed from complicity in an alleged fraud to a complaint about the deletion of several computer files. However, these issues will be matters for the trial Judge and I would not wish to encroach on this terrain more than is necessary from the point of view of resolving the preparatory issues. I have come to the conclusion that I must grasp the nettle of making an Order with regard to costs both in respect of the two days of hearing before Laffoy J. and the judgment on 22nd December, 1998 and also in respect of the motions in respect of contempt and defiance of the two Orders of the High Court which have taken up nine-tenths of the time before me. When Miss Justice Laffoy reserved the costs of the application and Order before her, she did not reserve those costs to the judge at the conclusion of the trial. It is common case that she is no longer available to deal with these matters and accordingly the motion to re-enter the matter before Laffoy J. for the purpose of varying the Order made in respect of the costs before her is one of the plethora of motions which has come before me. I have come to the clear conclusion that the costs of the interlocutory hearing before Laffoy J. must be awarded to the Plaintiff on a solicitor and own client basis against the Defendant Société for the reasons which I have given. Having considered the contents of the Defendant's affidavits and both the expurgated and unexpurgated copies of the Coulton

memo, it is quite clear that the Defendant's stance before Laffoy J. was quite untenable and that senior persons in the Defendant Société should have made clear to the Solicitors and to the Court that Mr. Faughnan would be an inappropriate person to conduct an inquiry because of his personal involvement in the matters and also his having liaised with and given his views and information to Mr. Coulton which culminated in paragraph (6) of the memorandum of the 18th June, 1998. This memo indicates that an intention had been formed that the Plaintiff should be dismissed and that consideration had already been given to the allocation of her duties to her successors. After careful consideration, I believe that the Court is coerced into awarding the costs of the hearings before Laffoy J. to the Plaintiff on a solicitor and own client basis.

With regard to the contempt motions, it seems to me that, because of the length and vehemence of the hearings of the motions for contempt, I should also deal with the question of the costs of these motions which Counsel for the Defendant has urged as being of urgent and prime importance and in respect of which I estimate that probably nine-tenths of the time of this Court on all these motions has been taken up. I have already expressed the Court's disapproval of the Defendant Société's failure to disclose to their own Solicitor and Counsel the strategy, recommendations and decisions formulated in June 1998 indicative of prejudgment which were revealed by the Coulton memo concerning the future dismissal of the Plaintiff. The unlawful expurgation of relevant material in the Coulton memo was tantamount to the hood-winking of the High Court. The expurgated six further pages were only revealed eventually on 15th November, 1999. The heading "Conclusion" in the last paragraph on page 3 gave a false impression that it was the last paragraph and a crucial sentence was even deleted from

this. I emphatically reject the flimsy pretext and weak excuse about confidentiality in respect of matters affecting world-wide interests as being any justification for these excisions.

As for the contempt of Court, I have already set out the reasons why I have come to the conclusion that there was a contemptuous defiance of both the Orders of the High Court. I am satisfied beyond reasonable doubt that the Defendant Société committed the contempt through its agent, Mr. Faughnan. Whether I adopt the test of a standard beyond reasonable doubt or such standard as the Court, with its responsibility, regards as consistent with the gravity of the charge, I have no doubt that Mr. Faughnan of all people, after what Laffoy J. had said with regard to the principle of *nemo judex in causa sua*, was culpably acting in defiance of the Court Orders. Accordingly, the costs of each of the motions to attach and commit in respect of the defiance of the Court Orders must be borne by the Defendant Société on a solicitor and own .client basis and these motions should be regarded as having taken up about nine-tenths of the time spent before me on the plethora of motions. This Order may, in some small way, assist to put the parties approaching the trial on a more level footing. The huge costs of this litigation already and the peremptory and unlawful withdrawing of the payment of salary from the Plaintiff has oppressively tilted the scales against the Plaintiff in the preparation of this case. I hope that the Orders in respect of costs may assist to redress this imbalance created by the Defendant's misconduct. As for Mr. Faughnan, it is quite clear that Laffoy J. decided that there was a fair issue to be tried as to whether Mr. Faughan should step aside because of his personal interest and involvement in the subject-matter of the inquiry. Accordingly, at least until the trial it was clear that he at least, should not

conduct such inquiry. Only ill-considered self-delusion or reckless insouciance can explain, but not justify, his letter of 29th June, 1999 to the Plaintiff. In the light of the Order of 22nd December, 1998 his subsequent conduct at the interview on 5th July, 1999 further aggravated the situation. I am making decisions on the motions which have come before me and I am trying to re-assert *"a level playing field"* for the adjudication on the basic issues which emerge between the parties, namely, about a fair and impartial inquiry into the Plaintiff's conduct as an employee of the Defendant who is threatened with dismissal. The findings on those basic issues are a matter for the trial judge. My efforts have been directed to trying to tidy up the residue of the motions before Laffoy J. and O'Higgins J. and to dealing with the preliminary and preparatory motions before me and to attempt to bring this case to a state of readiness for trial.

I have dealt with this aspect in the mildest terms which I can muster in the circumstances, being aware that this is in the nature of an interlocutory application. While I have come to the conclusion that there have been flagrant breaches of both the Court Orders, either from arrogant insouciance or reckless perversity, I ascribe this to misguided zealousness on the part of the Defendant's personnel manager and misconceived notions of the interests of his employer. It would certainly be open to the Court to make orders to attach and commit and to order sequestration of the Defendant's assets and to strike out the Defendant's defence for failure to comply with the Orders of 22nd December, 1998 and 2nd July, 1999. However, the Court is always reluctant to impose a prison sentence and I am mindful that the personnel manager is an employed person. I trust that the rebuke implicit in this judgment both to the personnel manager and the Defendant should suffice in the circumstances, although it must be understood

that the Court cannot countenance disregard of or defiance of Court Orders. The Court's concern at the defiance of Orders will be reflected in the Orders in respect of costs.

It is a matter of regret that I have had to come to such conclusions. I am sure that His Highness will be surprised and upset at the manner in which the litigation has been approached and at how the Orders of the High Court have been dealt with by his agents on behalf of the Defendant Société. It is most unfortunate in view of the high regard in which his family, and in particular his grandfather, have always been held in this country where his name is well remembered annually in the competition for the famous Aga Khan trophy. This is all the more a matter for regret in a case in which the letters of praise and commendation of the Plaintiff, written in such gracious terms to the Plaintiff by His Highness, stand out as a ray of sunshine amid the bleak atmosphere of confrontation and distrust engendered by the conduct of some of the agents and employees of the Defendant. I should make clear that no criticism is intended of Solicitor or Counsel acting on behalf of the Defendant who act on instructions given and can only divulge such documents as are given to them and cannot be criticised if they have not been made aware by their own clients of improper, unauthorised and misleading excisions.

Finally, I wish to thank both Solicitors and in particular the Plaintiff's Solicitor for the exemplary and most efficient manner in which the papers on this plethora of motions has been presented to the Court. The indexes and the layout of the multitude of files have been of great assistance in providing a thread to follow through the labyrinth of motions, documents and affidavits which have been opened to this Court.