[2019] IEHC 926

THE HIGH COURT

[Record No. 11826P/2011]

BETWEEN

GERARD MARTIN FULHAM

PLAINTIFF

AND

CHADWICKS LIMITED,
INDEPENDENT NEWSPAPERS (IRELAND) LIMITED,
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 20th day of December, 2019

Introduction

1. The Plaintiff brings these proceedings to recover damages for breach of constitutional, including the right to liberty, as a consequence of what he claims was his unlawful imprisonment at Mountjoy Prison, Dublin, in December, 2007. Full defences were delivered to the claim by all defendants further to which motions were issued to have the action dismissed on the grounds that no cause of action was disclosed and/or was variously an abuse of process, frivolous, vexatious, and bound to fail. The State Defendants also sought to challenge the Plaintiff's entitlement to a jury trial and sought directions in relation to the notice of trial by judge and jury served in the proceedings. The applications were moved under Order 19 Rule 27 and Rule 28 of the Rules of Superior Courts 1986, as amended, and/or alternatively on foot of the inherent jurisdiction of the Court.

2. The Plaintiff was incarcerated in Mountjoy Prison on foot of committal orders for non payment of judgment debts from the 21st to the 28th of December, 2007, a committal which he claims violated his constitutional rights. Two questions fall for determination on the motions:

   (a) Whether the Plaintiff has an entitlement to trial by judge and jury in an action for infringement of constitutional rights; and

   (b) Whether or not, having regard to the decision of the Supreme Court in *A v The Governor of Arbour Hill Prison* [2006] 4I.R. 88, (the *A Case*) the Plaintiff's claim should be struck out as disclosing no reasonable cause of action, as being frivolous and vexatious and/or bound to fail and an abuse of process.

Background

3. Certain non-controversial facts emerge from the affidavits sworn by or on behalf of the parties herein which may be found useful by way of background and placing the issues in context can be summarised as follows. Between 2002 and 2006 the Plaintiff was gainfully employed on his own account as a building contractor, trading as 'Rathfarnham Construction'. His incarceration arose from unpaid debts due to the first and second Defendants. The first Defendant brought proceedings to recover monies due for goods supplied and services rendered to the Plaintiff between the 1st July, 2004 and 1st March, 2005; judgment was obtained for €14,245.63 on the 11th April, 2005. In separate

proceedings brought in the District Court to recover monies due for advertising services rendered to the Plaintiff by the second Defendant, a decree for €4,158.97 was obtained on the 18th October, 2004.

4. Although the Plaintiff did not contest, appeal or otherwise challenge any of these orders, he also failed to satisfy the judgments as a consequence of which enforcement proceedings were brought against him in the District Court whereby the first and second Defendants sought and were granted instalment orders for payment of the respective judgment debts. Once again these orders were not appealed or otherwise challenged by the Plaintiff nor were they complied with whereupon the first and second Defendants sought and were granted orders for his committal to prison pursuant to s. 6 of the Court Orders Act 1940, (the 1940 Act).

5. Although the Plaintiff informed the Court he considered imprisonment for debt to be unlawful from the outset he did not seek to challenge the committal at the time by way of an application for an enquiry under Article 40 of the Constitution into the lawfulness of his detention nor did seek leave to have the committal orders judicially reviewed. Notwithstanding this, having intimated his intention to issue proceedings as early as January 2008. Some eighteen months later, the regime established by s.6 of the 1940 Act was challenged and came under scrutiny by the High Court in *McCann v Judge of Monaghan District Court and Ors* [2009] IEHC 176. Having regard to the provisions of the Constitution and in particular Articles 34, 40.3 and 40.4.1. Laffoy J., delivering judgment of the court on the 18th June, 2009, held that s.6 of the 1940 Act was invalid. The Plaintiff relied upon this decision to ground these proceedings as per his reply to the second Defendant's notice for particulars, dated 26th November, 2012 and his replying affidavit on the motions herein. However, in argument he sought to maintain that his claim arose independently and would have been brought even if McCann had not been decided, though it was nevertheless a precedent on which the Court could rely in reaching its decision.

The Plaintiff's Submissions

6. The Plaintiff submits that he was unlawfully incarcerated by the Defendants and that this violated his constitutional rights. He disputes that his claims are frivolous or vexatious and conversely submits that the Defendants' motions are frivolous, vexatious and a waste of time on the grounds that defences to the proceedings have been delivered and a notice of trial served. He contends that the decision in the A Case, supra, is not relevant to these proceedings since he has always maintained from the time of his committal that his detention was unlawful. On the issue of entitlement to trial by judge and jury, the Plaintiff accepted in the course of the hearing that he has no statutory right to a jury trial; however, he invited the Court to find he had an entitlement on equitable grounds.

The Defendants Submissions

7. The Defendants are *ad idem* on the applications and invoke the inherent jurisdiction of the court described by Costello J in *Barry v Buckley* [1981] I.R. 306.

They contend that the proceedings are vexatious and frivolous and bound to fail. Their submissions are founded on the principle set out by the Supreme Court in the *A Case,* namely that where the State relies in good faith on the validity of a statute and the accused person does not challenge the validity of the incarceration before the case reaches finality, the final decision of the court on which the incarceration was based stands even if a later decision finds that the statute or provision of the statute upon which it was founded was invalid.

9. In this regard the kernel of the submissions of all of the defendants is that, as a matter of law, the *McCann* decision on the constitutionality of s.6 of the 1940 Act cannot ground a cause of action in damages. If it did, the Defendants argue, it would amount to giving a citizen a right to sue in respect of proceedings which had reached finality brought on foot of a post 1937 statute which enjoyed the presumption of constitutionality. Finally, it was argued the law recognised no entitlement to trial by jury in an action for damages for breach of constitutional rights.

10. Junior counsel for the second Defendant, Mr Ryan, made the forceful submission that the alleged cause of action essentially amounts to a claim by the Plaintiff that his incarceration under a statute which enjoyed a presumption of constitutionality gives rise to an actionable wrong. Having regard to the relevant jurisprudence he argued no wrong had been committed against the Plaintiff and, furthermore, no such wrong had arisen. Moreover, he contended a party could not be liable for damages for violation of constitutional rights unless it was established that the breach giving rise to the claim was deliberate, conscious and unjustified per the criteria in *Kennedy v Ireland* [1987] IR 587, none of which had been established by the Plaintiff. Accordingly, the committal orders having been made pursuant to a statute which enjoyed a presumption of constitutionality, the detention was lawful.

11. Senior counsel for the first Defendant, Mr McCarthy, rejected the Plaintiff's submission that he could divorce his claim from the *A Case* since he could not maintain a free-standing claim for damages for breach of constitutional rights arising from a statute which enjoyed a presumption of constitutionality at the time when the committal orders were made. It was highly significant that the Plaintiff had never sought to challenge his detention at the time either by bringing an Article 40 application for an enquiry into the lawfulness of the detention or by way of judicial review of the committal orders; accordingly, the Plaintiff's claim comes within the ambit of and is governed by the decision in the A Case since whatever way the Plaintiff sought to present his case he was attempting to take advantage of or "piggyback" on the decision in *McCann.*

12. Even if the Plaintiff was successful in his contention in argument that he would still be bringing the case notwithstanding *McCann* he faced an insurmountable obstacle, namely his detention in 2007 was grounded upon a statute which enjoyed the presumption of constitutionality; notwithstanding which, he was attempting to claim his detention was unlawful. Thus it is a claim which must be bound to fail in circumstances where he had also acquiesced in the very state of affairs about which he now complains.

The Right to Trial by Jury in Civil Cases

13. It is convenient to address firstly the issue of whether or not the Plaintiff is entitled to a trial with a jury. No authorities were opened to the Court in relation to this issue either in relation to civil actions generally or specifically in respect of an action to recover damages for infringement of constitutional rights. As mentioned earlier, the Plaintiff argues that he should have such an entitlement in equity and the Court should grant him the right or direct such a trial, a submission I took to mean that the Court had vested in it the jurisdiction to make such an order. For the reasons which follow I am satisfied that the Plaintiff's submission in this regard is misconceived.

Decision

14. In all cases before the common law courts prior to the enactment of the Supreme Court of Judicature Act (Ireland), 1877 (the 1877 Act), the parties enjoyed a right to jury trial except in a limited class involving substantially only matters of account within s.6 of the Common Law Procedure, Act 1856. Following the fusion of the Common Law and Chancery Courts and the creation of the Supreme Court of Judicature (High Court and Court of Appeal) by 1877 Act, wherein law and equity were to be administered concurrently, the pre-existing right of parties at common law who might have required any matter of fact to be decided by a jury was recognised, declared and preserved. See s.48 of the 1877 Act and Order XXXV Rule 2 of the Rules of the Supreme Court (Ireland) 1877. In this way it may be said that any entitlement to jury trial in civil cases today is entirely statutory.

15. Prior to the enactment of the 1877 Act, the situation with regard to entitlement and mode of trial in the courts of chancery was quite different. The parties enjoyed no right to trial with a jury except in a very few cases, the most important of which was that of an heir-at-law who, unless he deprived himself of it by his conduct, had a right to an issue *devisavit vel non*, as to which – see *Rossborough v Boyse* 3 I. Ch. R. p 496. However, by virtue of the Chancery Amendment Act 1858 and the Chancery Regulation (Ireland) Act 1862, (the Acts of 1858 and 1862) the Courts of Chancery were vested with jurisdiction to direct, at the court's discretion, the assessment of damages and the finding of fact by a jury. The provisions of the 1858 and 1862 Acts in this regard were applied to the Chancery Division of the High Court as constituted by the 1877 Act. Order XXXVI Rule 3 of the subsequent 1891 rules provided:

> *"3. All causes or matters assigned by the Principle Act to the Chancery Division, and all other causes or matters which the parties are not entitled as of right to have tried with a jury, shall be tried by a judge without a jury, unless the Court or a judge shall otherwise order."*

Commenting on the changes brought about by the 1877 Act Hogan J., in *Lennon v. Health Service Executive* [2015] IECA 92 para 14 observed that one of the primary motivations behind the Act was to provide a procedure for individuals whereby common law and equitable claims could be merged in one set of proceedings and heard by a judge sitting alone; subject to the exercise of the right to trial by jury in appropriate cases.

Right to Jury Trial in Civil matters Post Independence

16. Following the achievement of legislative and executive independence in 1922 the entitlement to jury trial in civil actions as recognised, declared and preserved by the Act of 1877, was substantially confirmed and continued by s.94 of the Courts of Justice Act, 1924. Thereafter the position remained essentially unaltered until the right to jury trial in personal injury actions was abolished by s. 1 of the Courts Act 1988. However, not all causes of action concerning a claim involving personal injury were affected; certain intentional torts were excluded from the operation of the section and provision made where other causes of action were joined in the same set of proceedings. In this regard s 1(3) of the 1988 Act provided as follows:

> *"(a) an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both,*
>
> *(b) an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission, unless it appears to the court … that, having regard to the evidence likely to be given at the trial in support of the claim, it is not reasonable to claim damages for false imprisonment or intentional trespass to the person or both … in respect of that act or omission, or*
>
> *(c) a question of fact or an issue arising in the action referred to in paragraph (a) or (b) of this subsection other than an issue arising in an action referred to in the said paragraph (b) as to whether, having regard to the evidence likely to be given at the trial in support of the claim concerned, it is reasonable to claim damages for false imprisonment, intentional trespass to the person or both, as the case may be, in respect of the act or omission concerned."*

Trespass to the Person; Violation of Constitutional Rights; Effect on Right to Jury Trial by Joinder of other Causes of Action

17. The potential effect on a cause of action carrying an entitlement to jury trial by the joinder of claims for other torts in the same proceedings where no such entitlement is enjoyed was one of two issues which fell for determination by the Supreme Court in *DF v Commissioner of An Garda Síochana* [2015] IESC 44. The Plaintiff claimed damages, inter alia, for unlawful arrest and breach of his constitutional right to liberty, bodily integrity and privacy. Charleton J. delivering the judgment of the court considered the effect on the entitlement to a jury by the joinder of claims for other torts to claims for false imprisonment and/or intentional trespass to the person at para 18 as follows:

> *"Clearly, actions for false imprisonment and assault are within the province of a jury trial in the High Court. Joining other causes of action to false imprisonment or intentional trespass to the person, assault, may preserve the entitlement to jury trial but only where there is one act or omission at issue in the trial, consisting in terms of the external facts of an assault or of false imprisonment, or both, and the subsidiary torts are allegedly based on that assault or on that false imprisonment. An example would be where it is alleged that as well as an action for deprivation of*

liberty taking place contrary to the statutory defence offered by a defendant, that the application of the power of arrest was negligent: though here it must be added that this may be a more than unhelpful conflation of separate torts. This is not to state that any such pleading is possible. As to whether adding allegations of other torts to false imprisonment and assault is reasonable having regard to the circumstances determines the balance as to whether the result should be a trial by a judge sitting alone or a trial by a judge sitting with a jury."

18. Accordingly, where claims for torts which carry no entitlement to jury trial are joined with one of the causes of action which does by reason of s.1(3) of the 1988 Act, it will be a matter for the court to determine in the circumstances of the case whether or not the entitlement has been vitiated by the joinder. Without accepting that the torts claimed in *D.F.* for breach of constitutional rights to liberty, bodily integrity and privacy existed as a matter of law, Charleton J., having observed that any entitlement to a jury trial in civil matters was entirely statutory found that no such entitlement exists for constitutional torts as they could not have been covered by the statutory entitlement to jury trial for civil wrongs preserved by the 1877 Act, such torts being unknown to the law prior to 1937.

19. Where, however, one or more causes of action not carrying an entitlement to jury trial, including claims for breach of constitutional rights, are joined in proceedings with a claim for false imprisonment or intentional trespass, which carry such right, the entitlement is preserved by s.1(3) (b) of the 1988 Act provided the damages claimed, whether in addition or in the alternative to other damages claimed, arose '*…in respect of the same act or ommission'*; the *fons* must be the same for each of the wrongs claimed. Where, however, the joinder of other torts takes the substance and nature of the case away from the core jury-trial torts the trial should take place with a judge sitting alone. The effect of joinder on the entitlement to jury trial in defamation or the other causes of action not involving a claim for damages for personal injury where the entitlement to jury trial remains as per the 1924 Act is beyond the scope of this judgment. Suffice it to say that, subject to the 1988 Act, while in all causes or matters where the parties are not entitled as of right to trial by jury the trial is to be by a judge sitting alone, the court is nevertheless vested with a jurisdiction pursuant to Order 36 r. 5 of the Rules of the Superior Courts 1988, as amended, to order otherwise, a provision no doubt rooted in the 1877 Act and the Rules of Court made thereunder, though in the absence of argument on the point it is far from clear on what basis the Court could now exercise such jurisdiction to order a trial for breach of constitutional rights. In *D.F.* supra, Charleton J., at para 11, commented on Rule 5 and considering the wording of Rule 7 doubted whether it was worthwhile retaining it due to what he considered to be its lack of utility.

Conclusion; Right to Trial by Jury

20. In the course of argument there was some debate as to whether the Plaintiff's claim was limited to seeking damages for breach of constitutional and natural rights or whether he was also seeking damages for false imprisonment. The Court is satisfied and finds that the Plaintiff's claim is to recover damages for breach of constitutional rights based upon

the decision in *McCann*, supra. For the reasons already enunciated there is neither a statutory right to trial by jury nor is the Court vested with a jurisdiction in equity to grant or direct a trial by jury for violation of constitutional rights *simpliciter*. It is not in dispute that an action for false imprisonment in the High Court is within the province of jury trial and that the joinder of other causes of action, including an action for breach of constitutional rights, where no such entitlement exists, may or may not, depending on the circumstances, result in the preservation, restriction or loss of the right.

21. Having regard to the reasons which follow and to the decision of the Court hereunder in relation to the remaining issue, I consider it unnecessary to decide whether or not the Plaintiff has joined with his claim for breach of constitutional rights a separate or alternative claim for false imprisonment or whether, if such be the case, the right to trial by jury is in the circumstances of the case preserved, restricted or lost. In fairness to the Plaintiff it was not as a result of joinder with a s.1(3) cause of action that he sought to claim or maintain a right to jury trial but rather on the ground that such entitlement arose in equity. In any event, as stated earlier, it seems to me on their face that these proceedings are founded on a subsequent declaration of invalidity of a statutory provision in another suit on foot of which the Plaintiff claims his prior incarceration was unlawful, accordingly, the Plaintiff is not entitled to trial by jury and the Court so finds.

Decision: Whether Claim Frivolous, Vexatious and Bound to Fail

23. Turning to the question of whether a cause of action is disclosed and or whether or not the claim is frivolous, vexatious, scandalous and bound to fail, as outlined above, the judgment in *McCann* occurred in 2009 some eighteen months after the Plaintiff's incarceration in 2007. It follows axiomatically that s.6 of the Court Orders Act 1940 enjoyed a presumption of constitutionality at the time of the Plaintiff's committal in 2007. Regardless of his contention that the decision in the *A Case* is not relevant to these proceedings, it is quite clear that the Plaintiff's claim comes squarely within its remit.

24. The *A Case* modified the orthodoxy established by *Murphy v Attorney General* [1982] IR 241 that unconstitutional statutes are void ab initio. The court rejected complete or absolute retrospectivity on the basis that this would be incompatible with legal certainty and justice in an ordered society. However, the jurisprudence which favours limiting the retroactive effect of declarations of unconstitutionality began with *McDonnell v Ireland* [1998] 1 IR 134. In this case O'Flaherty J. made a number of obiter comments which would later prove to be influential. He considered the possibility of limiting a declaration of unconstitutionality to prospective effect only, with the consequent denial of a remedy. He based his views on the premise that, "*laws should be observed until they are struck down as unconstitutional*." Given the mandatory nature of the requirement to obey enacted laws, at p. 144 O'Flaherty J reasoned that:

> *"A rule of constitutional interpretation, which preserves the distinct status of statute law which, as such, is necessitated by the requirements of an ordered society and by "the reality of situation" (to adopt Griffin J.'s phrase), should have the effect that laws must be observed until struck down as unconstitutional. The consequences of*

striking down legislation can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity."

25. Other jurisprudence predating the A Case also merits attention. In *CC v Ireland* [2006] 4 IR 1 the Supreme Court found that the provision criminalising unlawful carnal knowledge with a child was unconstitutional because it did not allow for a defence that an accused person was honestly mistaken as to the age of the child. In the *A Case*, the applicant had been convicted of unlawful carnal knowledge of a child, whom he knew to be twelve years old. In the High Court Laffoy J., found he had not been validly convicted on the grounds that as the unconstitutional provision had ceased to exist with the coming into force of the Constitution in 1937, "*the offence with which the applicant was charged did not exist in law when it was purported to charge him with it*." [2006] IEHC 169

26. On appeal the Supreme Court reversed the decision. Murray CJ., qualified the abstract rule that unconstitutional statutes are void ab initio as incompatible with the administration of justice and construed Murphy as authority against the undoing of all that was done pursuant to a law subsequently found to be unconstitutional. This principle was rooted in the common law by drawing an analogy with a principle thereof that previously decided and finally determined cases were not generally permitted to be reopened. Of particular relevance to the facts in the case with which this Court is concerned is the dictum of Geoghegan J. in *A* supra, where he observed at p 125 that *"concluded proceedings whether they be criminal or civil, based on an enactment subsequently found to be unconstitutional cannot normally be reopened."*

27. The governing principle which emerges from the decision in A is that a party who chooses not to challenge but acquiesces in the alleged unlawfulness of a statutory provision on which the proceedings are grounded and that have reached finality will not afterwards be permitted to rely on a subsequent declaration of unconstitutionality and finding of invalidity to found a cause of action in damages. Although the Plaintiff considered his imprisonment for debt in Mountjoy Prison to be unlawful from the outset he neither contested the proceedings nor appealed any of the orders which ultimately led to his committal nor did he seek judicial review thereof or when imprisoned mount a challenge thereto by bringing an application under Article 40.4 of the Constitution for an enquiry into the lawfulness of his detention. In the event the law is clear; he cannot take advantage of or rely upon a finding of unconstitutionality in proceedings brought subsequently, at the suit of another litigant, to challenge the lawfulness of s.6 of the 1940 Act.

Conclusion: Whether Plaintiff's Claim Frivolous, Vexacious and Bound to Fail

28. Each of the defendants invite the Court to exercise its inherent jurisdiction as outlined as follows by Costello J. in *Barry v Buckley* [1981] IR 306 at 308:

"Basically its jurisdiction exists to ensure that an abuse of process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail."

As to the exercise of that jurisdiction, Costello J. stated that it was to be "…*exercised sparingly and only in clear cases*."

29. The phrase 'frivolous and vexatious' in this context is not used in a pejorative sense but rather is to be understood as a legal instrument which may be utilised to strike out a claim in circumstances where no reasonable cause of action is disclosed. O'Caoimh J., in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463, para.46 cited a Canadian decision of the Ontario High Court in *Re Lang Michener & Fabian* (1987) 37 D.L.R. (4th) 685 at p.691 which categorised a series of factors which, where apposite, tend to show litigation as being vexatious, namely:

"(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(b) Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain reliefs;

(c) Where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) Where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) Where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) Where the respondent persistently takes unsuccessful appeals from judicial decisions."

Having regard to the discussion already had herein the Defendants urge the Court to find that the Plaintiff has no cause of action, accordingly, the factor at para (b) in particular having been satisfied, the proceedings should be dismissed. While the Plaintiff may well feel aggrieved by his imprisonment his claim is misconceived and bound to fail.

29. The Plaintiff's undoubted sense of injustice was quite apparent in the course of argument; indeed, it was also apparent he has maintained these feelings since his incarceration in 2007. However, neither his sense of injustice nor the subsequent finding of unconstitutionality gives rise to the alleged cause of action, especially in circumstances where he chose not agitate his grievances either by appealing any the committal orders or by way of judicial review thereof or upon imprisonment by way of an enquiry under Article 40.4 of the Constitution into the lawfulness of his detention. Applying the principles outlined earlier, the Plaintiff's acquiescence in the consequences of proceedings that have long since reached finality are critical factors which, in my judgment, operate to deprive him of the alleged cause of action and reliance upon the subsequent declaration of invalidity in *McCann*, and the Court so finds.

Decision:

30. I consider it appropriate to add that, in my judgment, any system of law would be rendered at least less effective and at worst chaotic by legal uncertainty if it was constantly beset by the retrospective setting aside of decisions in concluded litigation, intended to be final, by reason of a declaration or finding of invalidity in subsequent proceedings. The Plaintiff was incarcerated on foot of orders made pursuant to a post-1937 statute which enjoyed the presumption of constitutionality. For the reasons set out above the Court finds the proposition advanced that the Plaintiff's incarceration amounted to a violation of his constitutional rights gave rise to an actionable wrong is misconceived and bad in law. Quite apart from the forgoing, I should add for completeness, that to be liable for breach of constitutional rights the breach by the defendant must be shown to be deliberate, conscious and unjustified per the criteria set out in Kennedy, supra; I accept the Defendants submission that none such appear to have been established or are capable of being met by the Plaintiff.

Ruling

31. In the exercise of the Court's inherent jurisdiction I am satisfied that these proceedings example the "*clear case",* described by Costello J., in *Buckley* and warrant the exercising of discretion by acceding to the Defendants applications, accordingly, the proceedings will be struck out as being frivolous and vexatious, disclosing no cause of action and being bound to fail. And the Court will so order.