



THE HIGH COURT

[2024] IEHC 531

[Record No. 2019/5431P]

BETWEEN

JOHN O'CONNOR

PLAINTIFF

AND

LEGAL AID BOARD, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND

THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Liam Kennedy delivered on the 18th day of September 2024.

1. This judgment is exclusively concerned with the Plaintiff's claim against the second, third and fourth defendants ("the State Defendants") who seek an order pursuant to Order 19, rule 28 of the Rules of the Superior Courts ("RSC"), dismissing the Plaintiff's claim against the State Defendants on the grounds that it discloses no reasonable cause of action against them, and/or that it is frivolous and/or vexatious and/or bound to fail or an abuse of process. In a second motion, the Plaintiff seeks judgment against all defendants in default of defence.

2. This is a second of three related proceedings commenced by the Plaintiff arising from his interaction with the first defendant, the Legal Aid Board ("the Board"). The first

proceedings seem to have involved much the same issues as these proceedings, but only the Board was named as a defendant. These proceedings and the third proceedings were issued in quick succession. The third proceedings involved a claim for defamation. The State Defendants obtained an order striking out the proceedings against them and the Board subsequently obtained a similar order, so those proceedings have been entirely resolved. However, prior to the dismissal of the third proceedings as against the Board, the High Court had directed the consolidation of the three proceedings (on the Board's application).

3. The Plaintiff's claims are primarily directed against the Board. Whereas the Plenary Summons in the first proceedings was exclusively directed at the Board, the Plenary Summons in the second proceedings seeks twelve substantive reliefs and damages, but the first nine reliefs are directed at the Board's discharge of its functions in the provision of legal aid in dealing with the Plaintiff's legal affairs. They concern how it allegedly dealt with the Plaintiff's legal aid applications, allegedly making decisions *ultra vires*, acting unlawfully, being negligent and guilty of misfeasance and in breach of fiduciary duty and of a duty of care. Declarations are sought in relation to the Board and its actions. Damages, including punitive and/or exemplary damages, are claimed against all defendants.

4. Although relief 12 seeks a declaration against all defendants under the European Convention on Human Rights Act 2003 ("the ECHRA"), reliefs 10 and 11 are the only reliefs specifically directed at the State Defendants. In fact, they are not framed as reliefs but are assertions of vicarious liability for the alleged wrongful acts or omissions of the Board and its servants or agents including:

"in particular due to defined statutory authority, appointment of senior staff, management, policy, and reporting specified under the Civil Legal Aid Act 1995, specifically sections 3, 4, 6, 7, 9, 10, 11, 18, 19, 20, 21, 28, 29, 30, 33, 36, 37, and 38, are vested in the second named Defendant."

5. The facts in these proceedings and the third proceedings are different - the latter was a defamation claim. However, the sole basis upon which liability is asserted as against the State Defendants is substantially the same in both proceedings – namely that the State Defendants are vicariously liable for the Board’s allegedly wrongful acts and omissions. Twomey J. struck out that claim against the State Defendants. His decision was upheld by the Court of Appeal. The Supreme Court refused leave to appeal. The State Defendants submit that the contention of vicarious liability is therefore *res judicata*, and they seek to dismiss these proceedings against them pursuant to O.19, r.28 RSC, on the grounds that they disclose no reasonable cause of action, are frivolous and/or vexatious and/or bound to fail and are an abuse of process.

6. The grounding affidavit sworn on behalf of the State Defendants states that the State Defendants cannot be held liable, vicariously or otherwise, in respect of any wrongs allegedly committed by the Board, and that the second named defendant in particular is precluded from exercising any power or control in relation to any individual case with which the Board may be concerned. This was essentially the basis on which the High Court struck out the third proceedings on 20 February 2020.

7. Paragraphs 1 to 16 of the Plaintiff’s first replying affidavit raises procedural points about the consolidation of the proceedings and the naming of the State Defendants. I do not consider that any of those points raise any point of substance which is relevant to the disposition of the current application. The main submission from the Plaintiff was that, if the State Defendants were minded to bring the current motion, they should not have consented to the Board’s consolidation motion, and they were therefore estopped from seeking to have this claim dismissed. Indeed, the gist of the Plaintiff’s affidavit appears to be his contention that the consolidation order precludes the State Defendants from seeking to dismiss the proceedings. The Plaintiff’s submission *might* have had somewhat more substance if, at the time of the consolidation motion, a Statement of Claim had been delivered in respect of the

second proceedings (2019/5431P), which is the only remaining claim that concerns the State Defendants. However, although the Plaintiff had filed a Statement of Claim (apparently in very similar terms) in the first proceedings, which were solely against the Board, no Statement of Claim had been delivered in the second proceedings at the time of the consolidation motion. Accordingly, the State Defendants could have had no basis at that point to determine whether it was appropriate to seek to strike out the second proceedings. Accordingly, no question of an estoppel arises nor any other point of substance in paras. 1 to 16 of the Plaintiff's first replying affidavit. It should also be noted that the making of the consolidation order did not prevent the Board (being the party which originally sought such consolidation) from subsequently successfully seeking the dismissal of the claim against it in the third proceedings (the defamation claim). Stack J. struck out those proceedings "*in their entirety*" on 8 May 2024.

8. Paragraphs 17 to 23 of the Plaintiff's affidavit are to much the same effect and the same conclusion applies. The latter part of the Plaintiff's affidavit denies the applicability of the decision in the third proceedings and accuses the State Defendants of ignoring the differences between the two proceedings (without detailing the alleged differences or explaining their significance). The Plaintiff's second affidavit again fails to advance matters.

9. In the course of submissions, I informed the Plaintiff that, on considering an application of this kind, the Court will consider whether there is a possibility of amending the pleadings to better articulate a stateable claim. However, the Plaintiff made clear that the basis on which he wished to pursue the claim against the State was as set out in the current pleadings. No allegations have been advanced against the State Defendants except on the basis of vicarious liability for the Board's allegedly wrongful acts or omissions.

The Statement of Claim

10. After identifying the parties, paragraphs 15-44 of the Statement of Claim set out the Plaintiff's complicated litigation history and what appears to be the gravamen of his claim against the State Defendants. In brief, he alleges that:

- a. in 2014, he applied for legal aid from the Board in respect of two High Court actions against his former solicitors and his ex-spouse's solicitors;
- b. the Board and the solicitors which it appointed were negligent in representing him in relation to that litigation and in respect of various issues (including failing to enforce divorce access terms negotiated on his behalf or to provide the legal aid to which he claimed to be entitled); and
- c. he issued judicial review proceedings against the Board and the proceedings were compromised. However, the Board has failed to comply with the settlement agreement.

He accordingly alleges breach of fiduciary duty, breaches of his ECHR and constitutional rights and that the Board and its servants or agents were guilty of bias when dealing with his applications for legal aid and related issues, including appeals. The basis for the claims against the State Defendants are not clearly set out in the Statement of Claim, other than its description of the second defendant as:

“the only state officer granted statutory powers, granted under the 1995 Act, over the Board.”

However, the Plaintiff makes clear that he will rely on his:

“Constitutional right to provision of statutory Legal [aid] in a fair and effective manner, the rights to access to Court to vindicate rights, right to fair process, right to family life as protected under Constitution Art. 40.1, 40.3.1°, 40.3.2° and 41.1.2°”.

11. The Plaintiff invokes the ECHRA provisions on “*statutory interpretation (S. 2 (1)), Irish State duty to protect convention rights (S. 3 (1)), and redress for breached ECHR rights (S. 3 (2))*” [sic].

12. Paragraphs 46 to 48 of the Statement of Claim provide certain additional detail as to the supposed basis for the claims against the State Defendants. In 2019, the Plaintiff wrote to the Minister complaining about the Board’s failure:

“to comply with the 2017JR Consent terms; and send a letter dated around October 2020 alleged the wilful breach of the 2017JR Consent amounted to misfeasance in public office and requested this complaint be investigated by the Director of Public Prosecution, which the Minister rejected; this was a breach of the “Code” reporting of non-compliance with statutory obligations to the relevant Minister, in particular:

- a. “3.3 Non-compliance: if a Board member/Director finds evidence that there is non-compliance with any statutory obligations [...] should immediately bring this to the attention [...] should also be brought to the attention of the relevant Minister by the Chairperson indicating (i) the consequences of such non-compliance and (ii) the steps [...] to rectify the position”.*”

13. The Plaintiff alleges that the Board failed to notify the Minister of the risks of its non-compliance with statutory duty, in particular its breach of its duty to comply with the “*Consent*” in the 2017 judicial review proceedings, and/or that the Minister was negligent in dealing with the reported “*non-compliance*”, which was a negligent breach of the “*Code*” and the Board’s “*Corporate Governance Manual*”. The Plaintiff also alleges that all the defendants are jointly liable for the breach of his ECHR rights in failing to provide statutory legal aid to enforce the breach of his access agreement. He seeks damages for breach of consent agreements and orders by the defendants in earlier proceedings (being the solicitors who acted for him and his ex-spouse in the judicial separation proceedings).

14. The reliefs sought in the Statement of Claim differ from the Plenary Summons. The Plaintiff seeks declarations concerning his entitlement to legal aid and the alleged breach of his rights in that regard by the Board and that the first and second Defendants breached:

- a. “governance standards, in particular non-compliance reporting under the Code, and duty to ensure governance standards are complied with by a statutory body”;*

- b. “*constitutional rights due to delays/failure in provision of Legal Aid*”;
- c. “*ECHR right, under Art. 8 to family life and provision Legal Aid*”.

15. The Plaintiff sought damages, including exemplary damages, for misfeasance in public office, breach of duty and statutory duty, breach of contract, breach of constitutional rights; “*in particular rights under Articles 40.3 and 43 of the Constitution of Ireland to family life and proper provision and for provision statutory Legal Aid in a timely, fair, and effective manner*” and for “*legitimate expectation/loss of chance for provision of Legal Aid for 6262P, 6263P, and enforcement of breached Divorce access terms.*”

The Law

16. Order 19, rule 28 RSC provides:

“(1) *The Court may, on an application by motion on notice, strike out any claim or part of a claim which:*

- (i) discloses no reasonable cause of action, or*
- (ii) amounts to an abuse of the process of the Court, or*
- (iii) is bound to fail, or*
- (iv) has no reasonable chance of succeeding.*”

Chapter 16 of *Delany and McGrath on Civil Procedure* (5th ed., 2023) (“*Delany*”) notes that the current rule 28 effectively amalgamates the narrower jurisdiction provided for under the earlier iteration of the provision with the Court’s powers pursuant to its inherent jurisdiction (as recognised in *Barry v Buckley* [1981] IR 306 (“*Barry*”) and subsequent authorities). The present provision thus “*enables a court to strike out any claim or defence that has no reasonable prospect of success or that constitutes an abuse of process*” (*Delany*, 16-02).

17. The principles relating to such applications are well-established and the earlier authorities remain applicable to the interpretation of the new iteration of rule 28. In *Lopes v Minister for Justice* [2014] 2 IR 301, Clarke J. compared the then-separate mechanisms:

“*An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the*

case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v. Buckley [1981] IR 306, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked.”

18. The courts have repeatedly emphasised that the jurisdiction to dismiss is “*exercised sparingly and only in clear cases*” (Barry, at p. 308). Nevertheless, in the words of Costello J., in *Morrissey v Irish Bank Resolution Corporation* [2015] IEHC 200:

“the courts have always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the rights of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process.”

19. A number of factors may indicate that a claim is vexatious. *Riordan v Ireland (No. 5)* [2001] 4 IR 463 (“*Riordan*”) and *Ewing v Ireland* [2013] IESC 44, show that these include:

- a. the bringing of one or more actions to determine issues already determined by another court;
- b. where it is obvious that an action could not succeed, if an action could lead to no possible good, or if no reasonable person could expect to obtain relief;
- c. where an action is brought for an improper purpose, such as harassment and/or oppression of other parties by various proceedings brought for purposes other than the realisation of legitimate rights;
- d. where issues tend to be “*rolled forward*” into subsequent actions and repeated or supplemented (often with actions brought against legal professionals who acted in previous iterations of proceedings);

e. where the party instituting proceedings has failed to comply with costs orders in previous proceedings; and

f. where the respondent persistently, and unsuccessfully, appeals judicial decisions.

20. In *Flanagan v Kelly* [1999] IEHC 116, O’Sullivan J. stated:

“The Court will approach an application such as the present one by studying carefully the Statement of Claim and, it seems, insofar as its inherent jurisdiction is invoked, satisfactory evidence in relation to the allegation of frivolity or vexatiousness.” [sic]

21. In *Riordan*, Ó Caoimh J. referred, with approval, to the decision of the Ontario High Court in *Re Lang Michener and Fabian* (1987) 37 DLR (4th) 685 as to what may be considered “vexatious”. One factor identified by the Ontario Court (at p. 691) was: “(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 relief”.

22. McGovern J. emphasised the importance of preventing “abuse of process” in *Doherty v Minister for Justice, Equality & Law Reform* [2009] IEHC 246. He cited McCracken J. in *Fay v Tegral Pipes Ltd* [2005] 2 IR 261, at p. 265:

“... the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such abuse cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed.”

McGovern J. found the plaintiff’s complaints to be such an abuse of process, determining them to have been “brought for an improper of ulterior purpose, which is to cause embarrassment and vexation to the defendants and they do not fit within the rubric of inter partes disputes which are justiciable”. In particular, the plaintiff had “made no attempt to formulate a legal

claim in the manner in which this is normally understood”, failing to set out what duty was owed to him by the defendants, “how that duty was breached and what consequences arose from the breach”.

Judgment of Twomey J.

23. It is helpful to have regard to the terms of the *ex tempore* judgment delivered by Twomey J. in these proceedings on 20 February 2020, which, *inter alia*, dismissed the 2019/5432P proceedings as against the State Defendants, on the grounds that they disclosed no reasonable cause of action. It appears from Faherty J.’s judgment confirming the first instance decision that the learned judge stated:

*“the deciding factors in this matter are that, firstly, under section 3 and section 7(3) of the Civil Legal Aid Act 1995 the Legal Aid Board is a body corporate with perpetual succession and capable of being sued, capable of suing and being sued and, crucially, that the Minister has no control in relation to any particular area or case with which the Board is concerned. Secondly, if the order were to be granted, Mr. O’Connor would still be entitled to recover in full from the Legal Aid Board and that therefore he would not be prejudiced by any such order. And thirdly, that it is clear from *McSorley v. O’Mahoney* that proceedings should be struck out if they confirm (sic) no gain on the plaintiff. And this appears to be such a case, since Mr. O’Connor has, in effect, a State body to sue – the Legal Aid Board – and does not need to have three other State defendants which can only result in greater cost to the taxpayer in defending, effectively on the double those proceedings.*

On this basis, the Court concludes that Mr. O’Connor has no reasonable cause of action against the State defendants, whatever about the Legal Aid Board, and so these proceedings against these parties should be dismissed.”

In the absence of a Statement of Claim in these proceedings (the second proceedings), the claim against the State Defendants in these proceedings was not dismissed by Twomey J., at that juncture. His decision was subsequently upheld by the Court of Appeal.

Discussion

24. For completeness, I should note that the defendants also cited authorities dealing with the doctrine of *res judicata*, but I have not referenced those authorities because I do not consider it appropriate to determine this application on that basis. I consider that the analysis of Twomey J. in respect of the defamation claim is helpful but would not automatically or necessarily be determinative in the context of the second proceedings. Now that a Statement of Claim is available in respect of that claim, it is still necessary to consider whether or not it should be dismissed.

25. Having carefully considered the Statement of Claim, however, I have reached the same conclusions in respect of the second proceedings as were set out in respect of the third proceedings in the *ex tempore* judgment delivered by Twomey J. on 20 February 2020. I consider that the claims in the second proceedings must be dismissed because they disclose no reasonable cause of action and are bound to fail. Once again, the deciding factors are that:

- firstly, under ss. 3 and 7(3) of the Civil Legal Aid Act 1995, the Board is a body capable of suing and being sued. The Minister has no control in relation to any particular area or case with which the Board is concerned;
- secondly, if his allegations were to be established, the Plaintiff would still be entitled to recover from the Board and that therefore he would not be prejudiced by the removal of the State Defendants; conversely, the basis for or prospects of his claim are not reinforced by the retention of the State Defendants as parties. As the authorities establish, proceedings should be struck out if they provide no basis for legal redress for the Plaintiff. This appears to be such a case, since the Plaintiff has a more appropriate body to sue. The inclusion of the State Defendants serves no

legitimate purpose and can only result in greater cost to the taxpayer in defending the proceedings; and

- Twomey J. concluded, in respect of the defamation proceedings, that the Plaintiff had no reasonable cause of action against the State Defendants, and I reach a similar conclusion in respect of these proceedings.

26. Having carefully examined the Statement of Claim, I am satisfied, that, even if the alleged facts were proved, the Plaintiff would still have failed to establish a reasonable cause of action against the State Defendants. In the circumstances, I am satisfied that the claim against the State Defendants is bound to fail, has no reasonable prospect of success and constitutes an abuse of process.

27. I am reinforced in this conclusion by my belief that the inclusion of the State Defendants cannot benefit the Plaintiff. If he succeeds against the Board, he does not require their joinder. Conversely, if he fails against the Board, then I can see no basis on which he could conceivably succeed against the State Defendants. Nor on the basis of the Statement of Claim can I see any basis on which the Plaintiff could reasonably expect to obtain relief against the State Defendants. In those circumstances, it would be inappropriate for the State Defendants (and, ultimately, the taxpayer) to be subjected to the time consuming, expensive and tedious burden of being asked to defend a claim which cannot succeed.

28. It would also appear to follow that the Plaintiff should pay the State Defendants their costs of this application and of the proceedings, to be adjudicated in default of agreement. If any party wishes to contend for an alternative costs order or to raise any other issue, then they may file written submissions (maximum word length 1000 words) within 21 days of the date of this judgment, following which I will confirm the terms of the costs order.