THE COURT OF APPEAL

Appeals: 2014/235 and 2015/118

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN:

MARTIN MURRAY

APPELLANT/RESPONDENT

AND

CONAN BUDDS, AND ANTHONY T. HANAHOE, TERENCE HANAHOE AND MICHAEL E. HANAHOE TRADING AS MICHAEL E. HANAHOE SOLICITORS

RESPONDENTS/APPELLANTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 19th DAY OF NOVEMBER 2015:

1. Before this Court are two appeals from interlocutory orders made in the High Court, the details of which I shall shortly set forth. The proceedings themselves comprise a claim for damages for professional negligence and/or breach of contract by the defendant firm arising from its retainer to defend the plaintiff at Naas Circuit Criminal Court against a charge of possession, with intent to supply, of a significant quantity of heroine. He was convicted of that offence on the 11th February 1999 and received a seven year sentence of imprisonment from which he was released in September 2004. I should add that the plaintiff was unsuccessful in two separate appeals against his conviction to the Court of Criminal Appeal. The first appeal in 2000 was based on a number of alleged errors on the part of the trial judge. His second appeal was heard in June 2005 after his release from prison, and was based on the alleged failure of his solicitor to adequately and properly prepare for his trial, and the failure of both solicitor and counsel to pay heed to his instructions during the course of his trial. As I have said, neither appeal succeeded.

2. He commenced these proceedings by way of Plenary Summons on the 2nd February 2005, being just within a period of six years from the date of his trial, being the relevant period under the Statute of Limitations, 1957 as amended, provided that the claim is not one in respect of personal injuries. That reservation assumes some significance in one of the appeals before the Court, as we shall see.

3. Because there are two appeals - one by each party to these proceedings - I will refer to the parties as plaintiff and the defendant, rather than cause confusion by referring to them as appellant and respondent.

4. The plaintiff's appeal is against an order of Charleton J. dated 20th April 2009 whereby he ordered:

> (a) that the proceedings be struck out as an abuse of process because, being an action alleging professional negligence, it was launched without first ascertaining that there were reasonable grounds for so doing by obtaining appropriate expert evidence to support it; and
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> (b) further ordered that the plaintiff pay the defendant's costs of the motion when taxed and ascertained.

5. The defendant's appeal is against an order of Clark J. dated 23rd of November 2010 whereby she:

> (a) permitted the plaintiff to amend his pleadings in order to introduce a new claim for "loss and damage in the week of the 3rd to 10th February 1999" the particulars of which loss were that "the plaintiff was exposed to the worry and stress from the uncertain position where he found himself in the criminal justice system facing an imminent trial without knowing who his counsel would be";
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> (b) declined the defendant's' application to strike out the proceedings in their entirety on the basis of section 3 (1) of the Statute of Limitations (Amendment) Act, 1991; and
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> (c) directed that the issue of the application of the statute of limitations be determined by the trial judge.

6. Before addressing the appeals themselves, some background narrative would assist an understanding of the basis for permitted claim in negligence, and the loss and damage said to have been sustained. The plenary summons was served on the defendants in January 2006. The Statement of Claim was delivered in June 2006. It contained many allegations in relation to the defendants' handling of his case and their preparation of his defence at trial. There is no need to set out those allegations extensively, but merely to refer to one of the complaints which is now the only complaint which remains relevant to the plaintiff's claim following the amendment permitted by the said order of Clark J., namely that they failed to retain and instruct Counsel in a timely fashion, indeed until the night before the trial was scheduled to commence. Clark J. permitted the plaintiff to amend his claim in the manner which I have described in paragraph 5 above, but struck out the remainder of his claims relating to the conduct of the trial itself and his conviction, on the basis that they represented a collateral attack upon the previous decision of the Court of Criminal Appeal.

7. The allegation that Counsel was retained by the defendants only on the evening before the plaintiff's trial is pleaded in the Statement of Claim as follows:

> *"(v) although the defendant's solicitors had nearly two years to prepare the trial, the defendant found himself the weekend before the trial without counsel. Such was his panic that he endeavoured to contact counsel on his own but unsuccessfully. Indeed, when he met his instructing solicitor at Naas the day before his trial, there was still no counsel appointed. It was only on the evening of the same day that he was introduced to his new legal team, and a consultation*

lasting around 30 minutes was held."

8. It appears that after the defendant firm was first instructed by the plaintiff, a particular experienced Senior Counsel was retained and a consultation took place with him in April 2007. In due course a trial date was fixed for February 1998 but the trial was postponed to a later date, presumably to February 1999 when the trial in fact took place. The plaintiff has stated in Replies to Particulars that he was not made aware of the reason for the postponement of his trial but he goes on to state that *"[he] believes that the trial was postponed due to the fact that the defendants were completely unprepared for a trial at that time"*. It appears to be common case that the particular Counsel retained was heavily engaged in another lengthy trial by February 1999 and was therefore unavailable to represent the plaintiff. His complaint essentially is that despite knowing for some time that Counsel would be unavailable, no new Counsel was engaged to defend the plaintiff until the day before the trial was due to take place. The Defence delivered by the defendants contains a denial that counsel was retained only on the night before the trial.

9. I believe that I have provided sufficient by way of background in order to understand the rather limited basis on which Clark J. allowed the plaintiff's claim to be amended, namely to a claim for *"loss and damage in the week of the 3rd to 10th February 1999"* arising from the fact that *"the plaintiff was exposed to the worry and stress from the uncertain position where he found himself in the criminal justice system facing an imminent trial without knowing who his counsel would be"*. That is now the nature and extent of the plaintiff's claim, and there is no cross-appeal by the plaintiff against the order striking out the remainder of the plaintiff's claims as being an abuse of process. The defendants say that the only claim that has been permitted to be litigated is a personal injuries claim to which only a two year limitation period applies, and is therefore statute-barred, and should be struck out, firstly because it is clearly statute-barred and cannot succeed, and secondly because the type of injury in respect of which compensation is sought, namely "worry and stress" is not one for which damages can be awarded, absent some recognised psychiatric injury.

The defendants' appeal:
10. As I have said, the defendants' appeal is from an order of Clark J. made on the 23rd November 2010 whereby she permitted the plaintiff to amend his claim in the manner described, struck out the remainder of his claims as an abuse of process, and directed that any issue on the statute of limitations on the amended claim should be addressed by the trial judge. That motion first came before Clark J. in December 2008. Having heard the parties' submissions she expressed certain views as appear below in paragraph 12 and put the matter back. Between that date and it coming back before her, the defendants had brought a further motion to have the proceedings struck out on the basis of the doubt expressed by Clark J. that a professional negligence action may not be commenced in the absence of an expert opinion having been obtained showing a basis for such a claim. That matter was determined by Charleton J. in the defendants' favour on the 20th April 2009, and is the subject of the plaintiff's appeal which I shall address in due course. There is further procedural history but none that is particularly relevant to the present appeals.

11. The defendants' motion to strike out the plaintiff's claims had come before Clark J. on foot of a notice of motion dated 5th March 2007 in which the defendants sought to have the plaintiffs' claims (as then pleaded) dismissed as being statute-barred, and/or on the basis of inordinate and inexcusable delay, and/or as an abuse of process on the basis of being a collateral attack upon the decision of the Court of Criminal Appeal, and/or finally on the basis that the plaintiff's statement of claim (as then pleaded) disclosed no reasonable cause of action.

12. As already explained, Clark J. acceded to the application based on abuse of process, but permitted the plaintiff to amend his claim. In her judgment, she stated at paragraph 10 thereof:

> *"Having heard submissions from both parties, I indicated that the proceedings as constituted did indeed represent an impermissible collateral challenge to a decision of the Court of Criminal Appeal and that the application would succeed on that ground. However, I recommended that if the plaintiff confined his claim to the alleged upset claimed for the short period before the trial when he became aware that his original counsel with whom he was familiar would not be available to represent at the trial, and that no substitute senior counsel had been located or briefed, then he might possibly have a claim, but that the claim as constituted would fail. I also expressed doubt as to the propriety of commencing a negligence action against a professional without first obtaining an independent opinion from an expert in the area stating that the actions of the solicitor in question fell below the expected professional standard in such circumstances. The Court expressed its understanding that a practice direction to this effect existed."*

13. The doubt expressed by Clark J. in the final sentence quoted above is what led to the motion which was heard by Charleton J. and which I have referred to in paragraph 10 above. In addition, following the judge's suggestion, the plaintiff issued a motion seeking to amend his claim. That motion came before Clark J. on the 21st April 2010, and led to the judgment and order now under appeal.

14. Her judgment indicates that when the amendment application came before her, counsel for the plaintiff accepted her ruling that the claims as originally pleaded represented a collateral attack on the decision of the Court of Criminal Appeal, and stated that the limited claim now being advanced was *"not a new claim but rather a modification of the original claim outlined in the plenary summons which was issued … within six years of the events complained of"*. Her judgment goes on to note counsel as stating that the plaintiff does not claim any out of pocket expenses *"but seeks damages for the mental distress suffered by the alleged professional negligence/breach of contract of the defendant".*

15. I should add at this point that the amendment first sought to be made by the plaintiff claimed that the worry and stress which he suffered during the week from the 3rd to the 10th February 1999 in advance of his trial *"constituted an invasion of his constitutional right to fairness and justice"*. The defendants submitted that this amounted to dressing up a claim for personal injuries (*i.e.* mental distress) as a constitutional tort in order to escape the clutches of s. 3 of the Statute of Limitations (Amendment) Act 1991, as amended.

16. In reaching her conclusions, Clark J. stated as follows:

> *"17. The Court has a wide discretion pursuant to Order 28 of the Rules of the Superior Courts 1986, to amend or alter pleadings to do justice between the parties and to determine the real questions in controversy between the parties. It seems to this Court that it is now clear that the only issue in controversy between the parties is the issue of mental distress and upset alleged to have been suffered by the plaintiff in the period between when he was made aware that his expected counsel would not be available to represent him or to have a further consultation with him and his trial which was listed for a week later [sic]. He alleges that during that week he was' messed about'. This is not a collateral attack on the decision of the Court of Criminal Appeal to the effect that the trial was fair and that the plaintiff was adequately represented but rather recites the ingredients – subject to proof – of a claim for negligence and breach of contract. It is no function of this Court to determine the merits of that claim. That function falls to another judge. The claim the plaintiff makes is that due to the lack of communication with his legal representative he suffered distress during the*

period that he was in limbo when he had no idea who would represent a matters forthcoming trial. The issue will be whether this constitutes professional negligence and breach of contract."

18. It is now established that in certain circumstances where a contract has been established, the negligence of a solicitor in the performance of that contract to provide professional services can ground a claim for distress provided that the claim passes the test of foreseeability. See Hamilton-Jones v. David & Snape (a firm) [2004] 1 W.L.R. 924; Farley v. Skinner [2002] 2 A.C. 732; Heywood v. Wellers [1976] Q.B. 446 or that damages for distress can arise from breach of contract since Jarvis v. Swan Tours [1973] 1 Q.B. 233. See also, Hussey v. Dillon & others [1995] 1 I.R. 111.

19. It is not, however, open to the plaintiff to plead an ill-defined constitutional tort in the manner sought or indeed at all at this stage of the proceedings. The issue of whether a plaintiff on the facts of this case or indeed at all, can plead a constitutional tort against an individual rather than an organ of the State is not one which falls to be determined in this case. The Court adopts the dictum of Barrington J in McDonnell v. Ireland [1998] 1 I.R. 134 where at p. 148 when he stated:

> *'constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action.'*

20. In all the circumstances, I do not believe that it is appropriate for the plaintiff to be permitted to ground his claim for worry and distress in the guise of a constitutional tort. If he has a cause of action is lies in the perfectly well recognised tort of professional negligence. I am prepared to allow a limited amendment to determine the real questions in controversy between the parties which is confined to a claim for 'loss and damage in the week of the 3rd to the 10th February 1999 as a result of the defendants' negligence and breach of duty'. Particulars of loss and damage: – 'the plaintiff was exposed to the worry and stress from the uncertain position where he found himself in the criminal justice system facing an imminent trial without knowing who is counsel would be.

21. While the defendants seek to resist any amendment to the proceedings on the basis of the provisions of the Statute of Limitation (Amendment) Act, 1991, in particular, section 3 (1), as amended, and further seek to have the proceedings struck out on that basis, the Court will not accede to that motion as to do so would deprive the plaintiff of any opportunity to pursue his asserted and now limited grievance. Courts must be slow to use their inherent power to strike out proceedings in their entirety unless it is clearly evident that the claim is unsustainable and bound to fail. Mindful of that restraint on the power to strike out proceedings, the limited amendment will be allowed with costs but the costs of the application will be in favour of the defendants. The issue of the application of the statute of limitations will be one to be determined by the trial judge." [emphasis added]

17. The defendants submit on this appeal that while Clark J. struck out the claims as originally constituted as an abuse of process, she erred by allowing the plaintiff to amend his proceedings in the manner described, and by not simply striking out the entire proceedings.

18. Firstly it is submitted that a claim for damages for worry and stress simpliciter is not recognised within the law of tort, and that the trial judge erred by permitting such a claim to be litigated.

19. Secondly, it is submitted that even if such a claim is possible (which is denied) it could only be one for personal injuries, and is therefore in any event statute-barred given the time limit applicable to such claims under s. 3 (1) of the Statute of Limitations (Amendment) Act, 1991 as amended. I leave aside any issue concerning whether the claim would first have to be brought to the Personal Injuries Assessment Board. It is to be noted that a personal injury action where the cause of action accrues before 5th March 2005 must be commenced not later than three years from the accrual of that cause of action, and where the accrual date is after the 5th March 2005, not later than two years from such accrual, as provided by s. 3 of the Act of 1991 as amended by s. 7 of the Civil Liability and Courts Act, 2004. In the present case it is submitted that it is beyond any doubt that the plaintiff's new cause of action accrued not later than the 10th February 1999, and cannot possibly be any later date given the express terms in which the amendment was permitted.

20. Thirdly in so far as it is being argued by the plaintiff that the stress and worry results from the breach of contract of retainer of the defendants for his trial, it is submitted (a) that the plaintiff has identified no duty arising under that contract that has been breached, (b) that there cannot be implied into that contract a term that obliges the defendants to ensure that the plaintiff is not caused any stress and worry in the week prior to his trial, and (c) even if there is such a claim for worry and distress in this case arising from the contract of retainer, the accrual date for the alleged breach is still the 3rd February 1999 or latest 10th February 1999, and the six year limitation period for a claim in contract had passed by the date on which Clark J. allowed the proceedings to be amended. In that regard, it is submitted that the amendment amounted to an entirely new claim, and not simply an amendment to any existing claim which might be saved by the issue of the original proceedings on the 2nd February 2005.

21. The plaintiff has not delivered an amended Statement of Claim. But the factual basis subtending his amended claim (and with those facts being assumed to be proven for the purpose of the strike out application and this appeal) is clear from the affidavits filed on the defendants' motion, and indeed from the plaintiff's written submissions on this appeal. For convenience I will set forth that factual basis as it appears in the plaintiff's written submissions as follows:

"The proposition of the Respondents in this Appeal is that on the facts of this case (which are disputed) he was subjected to unnecessary stress and aggravation in the week before the trial. Notwithstanding that he had been arrested and charged with a serious criminal offence in October 1996, no steps had been taken by the appellants to prepare for his trial. It is accepted that all persons facing criminal trial must endure fear and upset, but in this matter, the respondent believing himself innocent and conscious of the risks of a substantial custodial sentence became increasingly concerned in the week before the trial that no steps were being taken to meet his concerns. His fears were well grounded. Despite the period of time since his arrest, no directions or advice on proofs had been prepared; no detailed witness statement had been taken and finally there had been no detailed consultation with leading or junior counsel. The respondent in the week before the trial repeatedly sought an assurance from the appellants that matters were under control but received none. He did not meet his counsel until late in the evening of the day before the trial. These facts, if proven before a trial judge, could be held to constitute a disturbance of his peace of mind sufficient to justify an award of damages."

23. The plaintiff submits that his claim is not simply one arising from some general anxiety before his trial, which might be expected of anybody facing such a trial, but is grounded on an alleged specific lack of preparation which was fundamental to the obligations upon the defendant firm by virtue of its retainer to defend him, namely the failure to have engaged counsel in a timely fashion, thereby unnecessarily causing him a level of stress and anxiety above and beyond that which to be expected of any person facing trial on serious charges. By making that distinction he seeks to escape the several authorities to which the defendants have referred this court, where a claim in tort for general worry and stress has been found not to exist, whether in contract or tort. I will come to some of those.

24. I should add at this point that counsel for the plaintiff has conceded that if the plaintiff's claim is now to be considered to be a personal injuries action, then it is statute-barred. But he seeks to satisfy the court that it is a claim for damage resulting from breach of contract. In so far as the defendants have submitted that no such claim can be made under contract by reason of the general rule in *Addis v. Gramophone Co Ltd* [1909] AC 488, the plaintiff prays in aid certain passages from the judgment of Neuberger J. (as he then was) in *Hamilton Jones v. David & Snape* (a firm) [2004] 1 All ER. 657 which, it is submitted, lend support to his submission firstly that Addis may no longer be considered to be as sound an authority as in the past, and secondly, that where one purpose of the retainer was to minimise that stress normally to be expected of a client facing a criminal trial, a breach of that contractual duty which causes additional stress and anxiety to the plaintiff can sound in damages.

25. The facts of the present case are of course very different to those in *Hamilton Jones*. That case involved an allegation of negligence against a firm of solicitors who acted for the plaintiff in relation to proceedings commenced by her husband relating to the couple's children. An order was obtained prohibiting the husband from removing the children from the United Kingdom. However, due to a failure on the part of her solicitors, the Passport Office did not maintain the names of the children on their records beyond twelve months, and the husband was thereby enabled to obtain a new passport with the children's names included on it, which in turn enabled him to remove the children from the United Kingdom while on an arranged unsupervised contact visit, thereby defeating the very purpose which she had sought to guard against when she retained her solicitors. It was on such facts that Neuberger J. carried out a lengthy examination of the legal principles in relation to the availability of a claim for worry and distress arising from a breach of retainer by a solicitor. On the facts of that case he concluded:

> *"It appears to me that both the claimant and the defendants would have had in mind that a significant reason for the claimant instructing the defendants was with a view to ensuring, so far as possible, that the claimant retained custody of her children for her own pleasure and peace of mind. It would, I think, be a relatively unusual parent who, in the position of the claimant in the present case, would not have had, and would not be perceived by her solicitors to have had, her own peace of mind and pleasure in the company of her children as an important factor. In these circumstances, subject to any further argument which the defendants might raise, I consider that the principles as developed in Watt's case and in Farley's case indicate that the claimant should be entitled to recover damages for mental distress."*

26. As far as the present case is concerned, however, one must bear in mind firstly the very different facts and circumstances which distinguish it significantly from *Hamilton Jones*. It can hardly be argued that when an accused person retains a firm of solicitors to defend him against a serious charge, the solicitor undertakes, inter alia, a duty to preserve the client from worry and stress. I do not read *Hamilton Jones* as going that far.

27. But in the present case one must have regard to the nature of the amendment which was permitted by Clark J. and the fact that she struck out all the other claims. The facts relied upon in the Statement of Claim were professed in that document to constitute a beach of contract or in the alternative negligence. They were struck out in their entirety as being a collateral challenge to the decision of the Court of Criminal Appeal. Clark J. stated in paragraph 20 her judgment:

> *"if [the plaintiff] has a cause of action it lies in the perfectly well recognised tort of professional negligence. I am prepared to allow a limited amendment to determine the real questions in controversy between the parties which is confined to a claim for loss and damage in the week of the 3rd to the 10th February 1999 as a result of the defendants' negligence and breach of duty".*

28. This passage makes clear the nature and scope of the amendment permitted, and there has been no cross-appeal by the plaintiff against this part of the judgment. The permitted claim is a claim in tort only, and can only therefore be a personal injury claim. The fact that contract was pleaded as part of the claims originally made is no longer relevant since all of those claims have been struck out.

29. There is no doubt in my view that the claim permitted is statute-barred. I appreciate that no amended Statement of Claim has been delivered by the plaintiff, presumably because the order of Clark J. is under appeal, but it can be noted and had regard to that in its Defence to the Statement of Claim originally delivered, the defendants pleaded the statute. There have been cases where a defendant has attempted to have a plaintiff's claim struck out ahead of the delivery of its defence, and that application has been considered to be premature, since a plea on the statute is a plea by way of defence. But here the position is clear. The plaintiff's claim has been permitted by way of amendment where the cause of action accrued at latest on the 10th February 1999. That is not in dispute. It is now a new personal injury claim in tort. A two year, or at best from the plaintiff's point of view a three year, limitation period applies. In my view, Clark J. ought not to have permitted an amendment of the claim in order to introduce a personal injury claim that was clearly statute-barred. She was already in possession of all the facts and circumstances said to give rise to that claim, as is clear from the very precise nature of the amendment permitted by her. On that ground alone I would allow this appeal and vacate that part of the order of Clark J. which permitted an amendment to the plaintiff's claim.

30. There is, however, another important aspect to the appeal which should be addressed by reference to the judgment of Hogan J. in *Walter and another v. Crossan and others* [2014] IEHC 377. It is the entirely separate question whether, even if this claim was not statute-barred, damages for the alleged worry and stress during the week of 3rd February 1999 is recoverable at all, given the absence of any pleaded recognizable psychiatric injury. In *Walter*, Hogan J. examined the relevant case-law in this area both from this and the neighbouring jurisdiction with typical care and exhaustion, and concluded on the facts of that case that even though there was a duty of care owed to the plaintiff purchasers by the firm of solicitors acting for the builder of the house, the only damages claimed were for *"mental distress, upset and inconvenience falling short of nervous shock or psychiatric injury"* and as such were not recoverable. I appreciate that in *Walter* there was no contractual relationship between the plaintiffs and the solicitor firm and that the only remedy, if any, was in negligence predicated on a duty of care being owed. But in the present case, the claims based upon a breach of contract have been expressly struck out by Clark J., and cannot subtend the claim that was permitted by way of amendment. It is now solely a claim in negligence, and it seems to me in such circumstances that the damage being claimed are, as in *Walter*, in respect of a category of claim for which damages are not recoverable, namely mental distress, stress generally and worry, but short of any recognised psychiatric illness.

31. That being my conclusion, I am satisfied that having struck out all the plaintiff's existing claims in the proceedings, Clark J. erred in permitting the plaintiff to amend his Statement of Claim by inserting the new claim for damages in negligence and breach of duty which are provided for in her order under appeal by the defendants.

32. I would therefore allow the appeal by the defendants against that part of the said order.

33. In view of these conclusions it is unnecessary to address the plaintiff's appeal against the order of Charleton J. dated 20th April 2009 wherein he acceded to a motion by the defendants to strike out the plaintiff's proceedings as an abuse of process on the ground that being an action alleging professional negligence it was launched without first ascertaining that there were reasonable grounds for so doing by obtaining appropriate expert evidence to support it. In my view it is unnecessary now to dispose of that appeal, save to say that if I was required to reach a determination I would have allowed that appeal because, while there is certainly authority to the effect that in cases alleging medical negligence against a doctor or other professional person, it would be an abuse of process or irresponsible to launch such proceedings in the absence of the plaintiff's solicitor satisfying himself or herself that there were reasonable grounds for the allegations of negligence being made, I would not exclude the possibility that where the action is being contemplated against a solicitor for professional negligence, the plaintiff's solicitor may not in every case require to obtain an independent expert opinion from another solicitor or counsel in order to form the relevant opinion that the facts of the case disclose a *prima facie* case, and that it is not irresponsible to commence the proceedings.

34. Every case will depend on its own facts, and a plaintiff's solicitor ought to exercise caution in every such case. In any case where he or she has a doubt, prudence suggests that an opinion from another expert be sought in advance of commencement. I believe that such a view is consistent with what was stated by Denham J. (as she then was) when, having considered the views expressed by Barr J. in *Reidy v. National Maternity Hospital* [1997] IEHC 143, and those of Kelly J. in *Connolly v. Casey & Fitzgibbon* [2000] 1 IR 345, she expressed agreement as follows:

> *"While bearing in mind the important right of access to the Courts I am satisfied that these statements of law are correct. To issue proceedings alleging professional negligence puts an individual in a situation where for professional or practice reasons to have the case proceed in open Court may be perceived and feared by that professional as being unprofessional conduct".*

34. In so far as Charleton J. concluded (as the agreed note of his decision indicates) that *"the advices of the plaintiff's junior counsel did not fulfil the exacting requirements of obtaining an expert's report on the merits or otherwise of the plaintiff's claim against his former solicitors"*, I would very respectfully disagree that this of itself was necessarily a basis for a finding of an abuse of process. However, it is unnecessary to reach a concluded view in this case, given that the appeal against the order of Clark J. must be allowed in any event.