

THE HIGH COURT

Record No. 2013/14296P.

Between/

ALAN DONOGHUE

Plaintiff

– and –
JOHN NASH

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 22nd October, 2015.

1. Mr O'Boyle sold a car to Mr Donoghue. Mr Donoghue sold the car to Mr McNamara. The next day, Mr McNamara crashed the car into Mr Dahill's motorbike. Mr Dahill and his pillion passenger instituted personal injuries proceedings against Mr McNamara. Mr McNamara joined Mr Donoghue to the proceedings, claiming that the car had been deficient. Mr Donoghue joined Mr O'Boyle to the proceedings. Mr Donoghue was represented by Mr Nash, a solicitor. Mr Nash engaged Senior and Junior Counsel to represent Mr Donoghue. On the advice of counsel on the day that the hearings were to commence, Mr Donoghue agreed to settle the proceedings brought against him. That was in November 2009. The following June, Mr Donoghue secured judgment against Mr O'Boyle. It does not appear that Mr Donoghue has recovered much if any money pursuant to that judgment.

2. Arising out of the above, Mr Donoghue commenced proceedings in December 2014 seeking damages from Mr Nash. The general indorsement of claim on the summons indicates that damages are being sought for negligence and breach of contract. However, the Statement of Claim delivered by Mr Donoghue makes all kinds of claims, including what appears to be a personal injuries claim. Notably, however, Mr Donoghue, at the time a so-called 'lay-litigant', had drafted up the Statement of Claim himself. When the present application came on, he was represented by Senior Counsel who freely accepted that the pleadings would need to be amended so that they no longer include any claim for personal injuries. Counsel also indicated, however, that Mr Donoghue does not resile in any way from the essence of his claim which is that he received bad advice from his legal advisors back in 2009 when he was encouraged to settle the above-mentioned proceedings brought against him.

3. Mr Nash considers that the claim now made against him is so fanciful that he has brought the within application seeking, by way of principal relief, an order under O.19, r.28 of the Rules of the Superior Courts (1986), as amended, that Mr Donoghue's claim "*discloses no reasonable cause of action and/or that same is frivolous or vexatious*". Certain other orders are sought in relation to the personal injuries dimension of the proceedings; however, the court understands from counsel for Mr Donoghue that if the within action is allowed to proceed, the personal injuries claims will be withdrawn. This being so, it does not seem necessary for the court to rule on these aspects of the present application.

4. Absent the personal injuries dimension to the proceedings, the crux of Mr Nash's case seems to rest on the observation by Henchy J. in the long-ago case of *Millard and Kinsella v. McMahon* [1965] WJSC-HC 5109, 5125 that "*It is well settled that where a solicitor lays his client's claim before fully competent Counsel and acts on Counsel's advice, he is not liable for negligence*". Mr Donoghue appears to contend at this time that:

(1) the immunity to which Henchy J. refers in *Millard* proceeds from the putative immunity that has traditionally been considered to attach to counsel in their labours;

(2) counsel were concerned in this case with advisory work done within the penumbra of legal proceedings that ultimately settled, and thus were not engaged in any form of 'advocacy' within any but the most self-serving of definitions of that term; and

(3) no vicarious immunity attaches to Mr Nash in this context because no immunity attaches to counsel because they were not engaged in advocacy, as that term is generally understood.

5. There are suggestions in some of the relevant case-law that the form of immunity that Mr Donoghue's claim seeks in effect to assail extends, or at least historically was perceived to extend, rather wider than the above contentions might appear to apprehend. Even so, taking Mr Donoghue's claim at its height, his does not seem to the court to be a claim that is 'frivolous or vexatious'. On the contrary, it seems a form of claim that has perhaps been inevitable, and which has real substance to it, since at least the time of the abandonment of immunity for advocates in the United Kingdom in *Arthur JS Hall v. Simons* [2002] 1 A.C. 615. That case went unmentioned at the hearing of the within application and is not therefore a case on which the court proposes to tarry herein, save to note that the decision in *Hall* was and is consistent with a general trend throughout the common law world and, notably –given the fact of Ireland's being a signatory to the European Convention on Human Rights, and the enactment by the Oireachtas of the European Convention on Human Rights Act 2003 – was decided by the House of Lords within the penumbra of that Convention. The court does not intend in any of the foregoing to predict the likely future outcome of the within proceedings; however, it finds in the foregoing basis enough to conclude that there is real substance to the negligence claims made by Mr Donoghue; whether or not he falls to succeed in those claims will be a matter for another court at some future time to decide.

6. The court is mindful in reasoning through to its conclusions in the within application, of the observations of Denham J. in *Aer Rianta cpt v. Ryanair Ltd.* [2004] IESC 23 that the court should exercise caution in utilising its jurisdiction under r.28, albeit that Denham J. accepted that a pleading could be struck out where it would fail. Here, the court does not consider that the pleadings as regards the claims for breach of contract or negligence will necessarily fail and thus declines to strike them out. Indeed, when it comes to the claims for breach of contract (which appear to centre largely on the handling of certain monies allegedly given to Mr Nash, as agent, for one purpose, and allegedly used for another) it does not appear to the court that the observations of Henchy J. in *Millard* are of any avail to Mr Nash.

7. The court is not without sympathy for Mr Nash. He considers himself to have done everything right. Maybe he is correct in this; the court does not know. Certainly, at this time, Mr Donoghue's claim comprises as yet unproven, and perhaps never to be proven, allegations. Even so, the proceedings that Mr Donoghue now seeks to make in respect of breach of contract and negligence appear neither frivolous nor vexatious and thus they must be allowed to continue.