

THE HIGH COURT

[2011 No. 9930 P.]

BETWEEN

JOHN JAMES MUNGOVAN

PLAINTIFF

AND
CLARE COUNTY COUNCIL

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on 11th day of May, 2018

Introduction

1. By notice of motion issued on the 16th November, 2015 the defendant sought orders dismissing or striking out the plaintiff's claim on the basis that certain claims were not sustainable in law and are bound to fail following a decision of the High Court on the 17th August, 2015 and in relation to other claims pursuant to the inherent jurisdiction of the court on the basis that the claims as pleaded are bound to fail following the judgment of the High Court. The decision of the High Court, which was affirmed on appeal, related to certain matters which had been ordered by consent to be disposed of by way of a modular hearing of the trial. The defendant sought an order resuming the modular trial by directing a modular hearing of the remaining claims of the plaintiff and an order directing a hearing of the issue whether the remaining claims are sustainable in law and, if found not to be sustainable, an order dismissing the plaintiff's remaining claims.

The facts

2. The facts relevant to this case have been fully set out in the judgment of Peart J. in the Court of Appeal decision of the 13th December, 2017 in this case from paras. 6 – 20 of the judgment. For the purposes of this judgment I shall synthesise further the facts as set out in that judgment.

3. The defendant is the planning authority for the County of Clare. From November 2004 until 7th March, 2013 the defendant established and maintained a "Register of Independent Suitably Qualified Agents/Consultants for Waste Water Treatment" ("the Register") in conjunction with a requirement for applications to the defendant on or after 15th November, 2004 for planning permission for development in its functional area involving the proposed use of a septic tank, or other on site treatment system. All applications in writing were to be accompanied by site suitability assessment tests specified in Appendix A of the Environmental Protection Agency (2000) Manual (or any updated document). The assessment and tests were required to be carried out only by persons who were on the Register, who were required to have professional indemnity insurance.

4. The plaintiff is an environmental engineering consultant with a number of professional qualifications including an honours degree in environmental engineering (NUIG) specialising in waste water treatment. On the 22nd August, 2005 the plaintiff wrote to the defendant requesting that his name be included on the Register. Ultimately, on the 7th March, 2006 he was informed that he could not be placed on the Register but was advised that the panel was a rolling panel and that he could, if he felt it appropriate, submit a further application for inclusion in the future. On the 26th November, 2008 the plaintiff again requested that his name be added to the panel and ultimately on the 16th March, 2010 he was again informed that on the basis of the information available to the defendant he had not been placed on the recommended panel of agents to carry out site assessments. His application was reviewed again in the light of additional reports received from the plaintiff and on the 28th May, 2010 once more the plaintiff was not recommended for inclusion on the panel. Over the next year the parties endeavoured to resolve the issues between the plaintiff and the defendant regarding the suitability of the plaintiff for inclusion on the Register. As of the 11th April, 2011 the defendant's solicitors set out a number of serious deficiencies and concerns which the defendant had regarding the plaintiff's site report and noted that it was the defendant's recommendation that the plaintiff should not be included on the Register of Independent Suitably Qualified Agents/Consultants for Waste Water Treatment. On the 4th November, 2011 the plaintiff commenced these proceedings.

5. At paras. 17 and 18 of the Statement of Claim he sought the following reliefs:

"(a) a Declaration that the purported Register of Independent, Suitably Qualified Agents/Consultants for Waste Water Treatment lately commenced and operated by the Defendant is ultra vires the Defendant and otherwise unlawful.

(b) a Declaration that the purported Register of Independent, Suitably Qualified Agents/Consultants for Waste Water Treatment as operated by the Defendant, its servants or agents is without a legal or statutory basis.

(c) if necessary a Declaration that the continued operation of said Register of Independent, Suitably Qualified Agents/Consultants of Waste Water Treatment by the Defendant is ultra vires, void and of no effect.

(d) if necessary a Declaration that the actual operation of any purported Register of Independent, Suitably Qualified Agents/Consultants for Waste Water Treatment by the Defendant, its servants or agents constitutes an unjust attack on the property rights of the Plaintiff contrary to the provisions of Article 40.3 and/or Article 43 of the Constitution of Ireland.

(e) such Interim or Interlocutory reliefs as may be required.

18 (a) damages for all financial loss and damage caused or occasioned to the Plaintiff Consultant arising on his exclusion from said purported Register of Independent, Suitably Qualified Agents/Consultants for Waste Water Treatment unlawfully operated and wrongfully executed by the Defendant, its servants or agents.

(b) damages for malicious falsehood by (sic) s.42 of the Defamation Act, 2009.

(c) interest pursuant to the provisions of the Courts Act, 1981."

6. At para. 6 of the Statement of Claim the plaintiff set out his case in relation to malicious falsehood against the defendant. It provides as follows:-

"The Economic Development and Planning Department of the Defendant then issued a Circular in 2010 containing in tabular form the Register being a panel of persons deemed suitable by the Defendant for the conduct of tests carried

out in accordance with Appendix A of the Environmental Protection Agency (2000 manual or any updated document), including the following words:

'This register has been made available for the benefit of applicants and as part of the Council's efforts to increase awareness and promote best practice in waste water treatment. All applications for single houses (except applications for approval and permissions consequent) (sic) lodged on or after 15th November, 2004 (or requiring further information after this date) must include tests carried out in accordance with Appendix A of the EPA (2000) manual (or any updated documents). Only persons on the above register may be used for this purpose.

All register members have been advised by the Council to have current professional indemnity insurance. Applicants are advised to check the status of insurance before engaging a member of the register. The register is of a rolling nature and it is the applicant's own responsibility to ensure that they have the most up to date listing.

The Council accepts no responsibility for any disputes in relation to fees, service or other issues. The members of the register have been assessed only in terms of their technical competence to carry out site characteristics assessments based on their qualifications, experience and an interview. The submission of a report by a person on the register is not itself a guarantee of securing planning permission and all planning applications will be assessed on their own merits in accordance with the proper planning and sustainable development of the area. Any further queries can be addressed by the planning department during office hours."

7. By Notice for Particulars dated the 5th March, 2012 the defendant sought particulars of the plaintiff's claim for damages for malicious falsehood under s.42 of the Defamation Act, 2009. The plaintiff was requested to furnish full and detailed particulars of:

"(a) The statement(s) by the Defendant, upon which the action for malicious falsehood as alleged by the Plaintiff is found and in particular the precise words allegedly published of the Plaintiff by the Defendant which are alleged to be false.

(b) The untruth as alleged by the Plaintiff in the statement(s) aforesaid ...

(f) The malice as is alleged against the Defendant.

(g) The special damage allegedly occasioned to the Plaintiff as a result of the malicious falsehood.

(h) The basis for the Plaintiff's contention that the statement aforesaid was calculated to cause and was likely to cause financial loss to him as alleged.

(i) The Plaintiff's office, profession, calling, trade or business, to which the publication of the statement aforesaid was calculated to cause and was likely to cause financial loss to him as alleged."

8. On the 4th October, 2012 the plaintiff's solicitors replied to these particulars as follows:

"(a) The statement is set out in 3 paragraphs in italics in 6 of the Statement of Claim repeated on the website of the Defendant 21 days from the letter written by the Plaintiff's solicitors dated the 20th September, 2011.

(b) The falsity of the statement set out in said 3 paragraphs 6 of the Statement of Claim said the defendant has no lawful authority by which it may draw up or limit the list of its preferred experts in that way without being so authorised by common law nor by the Oireachtas...

(f) By letter the 20th September, 2011 the Defendant was called upon to cite the lawful power or authority by which it might protest it was entitled to make such a unilateral discriminatory choice and since then it has either been unable to do so or has refused to do so. No such power in fact exists.

(g) Customers or clients who might have hired or attained the Plaintiff from the 14th October, 2011 and who have since retained any one or all of the 36 preferred insiders of the Defendant's list failed to make enquiries of the Plaintiff or gave up prematurely upon making due enquiry of the Plaintiff.

(h) The Defendant knew that by the Plaintiff's exclusion from the list of 36 preferred intermediaries any intending applicant could be driven into the limited class of those 36 intermediaries, and away from the Plaintiff, and expressly warranted him to be outside the wrongfully favoured class and so a waste of time and money and effort.

(i) The Plaintiff's office professional qualifications are set out in 1 of the Statement of Claim."

9. On the 7th March, 2013 the defendant ceased to maintain the Register. In February 2012, the plaintiff emigrated to Perth, Western Australia and has remained there and thus has been unavailable to practice as a waste water engineer within the County of Clare or within the State.

10. An issue arose on the pleadings as to whether or not the plaintiff's proceedings were time barred pursuant to either the Statute of Limitations, 1957 as amended, or were instituted promptly as required by O.84 r.21 of the Rules of the Superior Courts and/or s. 50 of the Planning and Development Act, 2000 as amended within the time limits prescribed.

11. By an order on consent on the 30th May, 2013 Gilligan J. directed a modular trial of that issue based on a statement of agreed facts. The modular trial was heard by Keane J. and on the 17th August, 2015 he delivered judgment where he held that the plaintiff's public law claim for declaratory relief was barred having been brought outside the time limited by s.50 of the Planning and Development Act, 2000 as amended and also that it had been brought outside the time limit applicable to judicial review applications under O.84 r.21 of the Rules of the Superior Courts which time limits must apply by analogy in the circumstances of the case in the absence of any good reason to extend that time limit.

12. The judgment of Keane J. was appealed to the Court of Appeal and it was that order which was the subject of the judgment of the 13th December, 2017 referred to above. At para. 24 of his judgment Peart J. held that, apart from his claim for damages for economic loss, the plaintiff seeks only declarations that the operation and maintenance of the register is *ultra vires*, unlawful and without any legal or statutory basis and that it constitutes an unjust attack upon his constitutional right to earn a livelihood. "In reality the claim for damages is not free standing. It is entirely dependent upon a finding of unlawfulness in respect of the operation

and maintenance of the Register. The proceedings are a challenge to the lawfulness of the Register, and not an attack upon any decision made by the defendant not to include the plaintiff's name on it, the first of which was communicated to him by letter dated 7th March, 2006."

13. At para. 47 of the judgment, the court referred to the plaintiff's claim for damages for malicious falsehood and for breach of his constitutionally protected property rights (specifically the right to earn a livelihood). The court held:

"if [the plaintiff] fails to obtain such declarations he cannot succeed in obtaining an award of damages. They are fundamental to, and underpin, that claim for damages."

The court dismissed the appeal and affirmed the order of the High Court dated 14th October, 2015. That order provided that the plaintiff's claim for the relief sought in para. 17(a), 17(b), 17(c), 17(d), 17(e) and 18(a) of the statement of claim delivered on the 30th January, 2012 are time barred.

14. Following the decision of the High Court, the defendant issued the present motion on the 16th November, 2015. The motion was adjourned pending the hearing of the appeal by the Court of Appeal. After the decision of the Court of Appeal, the defendant sought a date for the hearing of the motion in January 2018, to which no objection was made by the plaintiff, and the matter was listed for hearing on the 26th April, 2018.

15. On the morning the motion was listed for trial, counsel for the plaintiff applied for an adjournment to facilitate an application by the plaintiff to the Supreme Court for leave to appeal. I was informed that the application had not been made and was in the process of being either considered or prepared. I refused an adjournment in circumstances where this was raised for the first time on the day the motion was listed for hearing and on the basis that the plaintiff had taken no steps in relation to a possible appeal to the Supreme Court for a period of four months. The proceedings had commenced in 2011 and the defendant was entitled to have the proceedings disposed of.

Issues resolved at modular hearing

16. The Court of Appeal affirmed the order of the High Court of the 14th October, 2014 which held that the plaintiff's claim for relief sought at paras. 17(a), 17(b), 17(c), 17(d), 17(e) and 18(a) of the Statement of Claim are time barred. This means that the plaintiff cannot succeed in these claims. The only order which can be made in respect of these claims is to dismiss them.

Damages for malicious falsehood

17. In para. 18(b) of the Statement of Claim the plaintiff seeks damages for malicious falsehood pursuant to s.42 of the Defamation Act, 2009. Section 42 of the Act provides:

"(1) In an action for ... malicious falsehood, the plaintiff shall be required to prove that the statement upon which the action is founded—

(a) was untrue,

(b) was published maliciously, and

(c) referred to the plaintiff, his or her property or his or her office, profession, calling, trade or business.

(2) In an action for... malicious falsehood, the plaintiff shall be required to prove—

(a) special damage, or

(b) that the publication of the statement was calculated to cause and was likely to cause financial loss to the plaintiff in respect of his or her property or his or her office, profession, calling, trade or business."

18. It is therefore necessary for the plaintiff to prove that the statement was untrue, was published maliciously and referred to the plaintiff, his property or his profession, calling, trade or business. He is also required to prove either special damage or that the publication of the statement was calculated to cause and was likely to cause financial loss to him in respect of his property or his profession, calling, trade or business. The question of the office of the plaintiff does not arise in the circumstances of this case.

19. The Statement of Claim and the replies to particulars make clear that the statement upon which the plaintiff founds his action for damages for malicious falsehood is the Circular of the 2010 quoted in full in para. 6 of the Statement of Claim. He says that the statement is false because the defendant had no lawful authority to draw up or limit the list of its preferred experts in the manner in which it did when operating the register. This is a *non sequitur*. The lawfulness or otherwise of the Register is irrelevant to whether what was stated in the Circular was true or untrue. Furthermore, the plaintiff is debarred from challenging the lawfulness of the Register which therefore enjoys a presumption of lawfulness. That being so, the plaintiff has not actually pleaded or alleged that the statement upon which he founds his action is actually untrue.

20. In order to succeed in his action the plaintiff will be required to prove that the statement was published maliciously. The plaintiff was asked to identify the alleged malice of the defendant and replied that the defendant was called upon to cite the lawful power or authority by which it was entitled to "make such a unilateral discriminatory choice". The plaintiff then says that the defendant has not cited a lawful authority for establishing the Register because no such power in fact exists. This is stating that the defendant was not entitled to maintain the Register and on that basis the maintenance of the Register was malicious within the meaning of s.42 of the Act. However, it is not open to the plaintiff to challenge the lawfulness of the maintenance of the Register and therefore his claim of malice which relies expressly on this allegation must fail.

21. Thirdly the plaintiff is required to prove that the action refers to the plaintiff. The quoted statement does not refer to the plaintiff. He was never listed as one of the authorised site inspectors on the Register. But that is very far from being a statement published of the plaintiff. There could be any number of reasons why the plaintiff's name did not appear on the Register only one of which is the fact that the defendant declined to place his name on the Register. The absence of the plaintiff's name on the Register without anything more cannot be taken to amount to a statement published of the plaintiff. In *McMahon and Binchy Law of Torts*, 4th ed. para. 35.27 the authors state:

"The essence of the tort is that the falsehood deceives others about the plaintiff so as to cause loss to the plaintiff."

22. It seems to me that the statement recited at para. 6 of the Statement of Claim even when combined with the Register which does not include the plaintiff as an approved site inspector cannot amount to a statement – never mind a falsehood – which deceives others about the plaintiff.

23. In summary, the plaintiff's claim for damages for malicious falsehood cannot succeed following the judgment of the Court of Appeal which prevents him from challenging the lawfulness of the maintenance and operation of the Register.

24. The implications of the barring of the claims for declarations on the plaintiff's claims for damages were expressly noted by Peart J, as I have recorded. He said that the claim for damages is not free standing and is entirely dependent upon a finding that the maintenance and operation of the Register was unlawful. He further held that if the plaintiff fails to obtain the declarations sought in para.s 17 (a) – (e) of the Statement of Claim he cannot succeed in obtaining an award of damages. In the circumstances, the Court of Appeal has held that the effect of the order of Keane J, which the Court of Appeal affirmed, is that the plaintiff's claims for damages also cannot succeed.

25. I entirely agree with the conclusions of Peart J. If the judgment does not constitute a determination to this effect which is binding upon me, for the reasons I have set out, I find that the claim for damages for malicious falsehood pursuant to s.42 of the Defamation Act is bound to fail.

26. The jurisdiction to dismiss claims pursuant to the inherent jurisdiction of the court is well known and not in controversy. While being fully conscious of the fact that the jurisdiction should be exercised cautiously and sparingly, nevertheless it should be exercised in appropriate cases, as failure to do so amounts to an injustice to defendants. In this case, following the decision of the Court of Appeal it is very clear that the remaining claims are unsustainable and bound to fail. That being so the defendant is entitled to an order dismissing the balance of the proceedings pursuant to the inherent jurisdiction of the court.

Conclusion

27. The defendant is entitled to an order dismissing the plaintiff's claim for the reliefs sought in para. 17 (a), (b), (c), (d) and (e) and 18(a) of the Statement of Claim on the grounds that, following the decision of the Court of Appeal of 13th December, 2017, the reliefs sought are unsustainable in law and are bound to fail. The defendant is also entitled to an order pursuant to the inherent jurisdiction of the court striking out the claim for reliefs sought at para.s 18 (b) and (c) of the Statement of Claim on the grounds that they are bound to fail.