Neutral Citation [2013] IEHC 135

THE HIGH COURT

[2012 No. 462 P.]

BETWEEN

J.O'N.

PLAINTIFF

AND

S.McD, P.F, J.K., C.M., E.D., C.M., R.L., M.C. AND A.K.

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 22nd day of March 2013.

1. Before the Court are motions that have been brought by eight of the nine defendants, the exception is the sixth named defendant, C.M. who has not brought a motion. While the notices of motion brought by the defendants are not structured identically, in essence each of the defendants seeks to achieve the same objective. The defendants seek orders pursuant to O.19, r. 28 of the Rules of the Superior Courts striking out the plaintiff's claim for failing to disclose a reasonable cause of action and as being frivolous and/or vexatious. The motions also seek an order pursuant to the inherent jurisdiction of the Court striking out the plaintiff's claim on the grounds that the proceedings are an abuse of process. Also before the Court are motions brought by the plaintiff to strike out the notices of motion brought against him by the first, third and seventh named defendants. These counter motions have not really been the focus of attention and instead the grounding affidavits in these cases have been regarded and dealt with as if they were affidavits in reply to the motions brought by the defendants and the affidavits on which those motions were grounded.

The background to the present applications

2. The background to the present applications is to be found in the fact that the plaintiff and the ninth named defendant, who is his former wife, have been involved in protracted and acrimonious family law proceedings. Issues relating to custody and access to the two children of the marriage have proved particularly difficult.

3. On the 12th November, 2010, the family law proceedings were before His Honour Judge Michael White, as he then was. The question of the possible appointment of a *guardian ad litem* was canvassed and it appears that Judge White invited the parties to consider this. When the matter next appeared before Judge White on the 27th January, 2011, the plaintiff, who at the time was represented by a solicitor, opposed the appointment of a *guardian ad litem*, while the suggestion was supported by the ninth named defendant. The fifth named defendant, E.D. acted as solicitor for her and the first named defendant was her counsel. Judge White decided to appoint the *guardian ad litem*. The matter was back in the Circuit Court on the 11th May, 2011, when Judge White directed that no further action was to be taken on foot of his order providing for a *guardian ad litem* which had been made on the 28th January, 2011. This was in a situation where a question had been raised as to whether there was jurisdiction to appoint a *guardian ad litem* in the course of family law proceedings. At a later stage Judge White reversed his decision regarding the appointment of a *guardian ad litem* and the guardian who had been nominated was stood down. It should be noted that no report was ever produced by the proposed *guardian ad litem*, nor did she ever give evidence at the hearing of the family law case. Notwithstanding that, the plaintiff has described the decision to appoint a *guardian ad litem* as the step that triggered the present proceedings. At this stage it may be noted that s. 28 of the Act of 1964, as inserted by s. 11 of the Children's Act 1997 makes provision for the appointment of *guardian ad litem* in family law cases in circumstances where this is necessary in the best interests of the child. However, while the bulk of the Children's Act 1997 came into operation one month after the date of its passing, this was not true in the case of s. 11 which inserted ss. 20, 21, 22, 26, 28 and 29 into the Act of 1964 which comes into operation on such day or days as may be fixed by the Minister by order. To date, s.11 has not been commenced by ministerial order.

4. The plaintiff has launched the present proceedings naming nine persons as defendants. The first named defendant is a barrister who, as I have stated, acted as counsel on behalf of the plaintiff's former wife. The second named defendant is the county registrar for the county where the family law proceedings were listed. The third named defendant is a general practitioner. He has performed that role on behalf of the ninth named defendant and for "C", daughter of the ninth named defendant and the plaintiff. Following a consultation in July, 2010, he referred "C" to a child and family consultation service, which responded stating that the service would recommend referral to the primary care and child psychology service. The fourth named defendant is an experienced *guardian ad litem*. She was appointed to perform that role by Judge Michael White but was then "stood down". In this situation the role of the fourth named defendant was confined to meeting with "C" and her mother on one occasion after she had been appointed by order of the Circuit Court. She was stood down before she had an opportunity to meet with the son of the plaintiff and the ninth named defendant. It was not in dispute that she had at all times complied with all the orders of the Circuit Court. I indicated that I was in a position to deal with the motion brought by her summarily and that I would dismiss the case against her. The fifth named defendant is a solicitor and acted in that capacity on behalf of the plaintiff's former wife, the ninth named defendant. The sixth named defendant has not brought a motion but is described on the plenary summons as a social worker. The seventh named defendant is a general practitioner. In October, 2008 he was requested to prepare reports on the two children of the plaintiff and the ninth named defendant. Reports were prepared but it appears these reports were never handed into court nor did the seventh named defendant give evidence at any stage. The eighth named defendant is described on the plenary summons as a relationship counsellor. The eighth named defendant was requested by the ninth named defendant to see her daughter and did so on the 22nd September, 2008, and again on the 2nd October, 2008. The eighth named defendant was served with a subpoena requiring her attendance at a hearing to take place on 18th November, 2008. She attended but was not called on to give evidence on that occasion. The ninth named defendant is the plaintiff's former wife.

In camera proceedings

5. At the start of the case counsel on behalf of the first named defendant, supported by a number of his colleagues sought an order directing that the case should be heard *in camera*. It was urged that this was necessary and appropriate as dealing with the motions before the Court would involve disclosing in considerable detail what occurred during the course of the family law proceedings, proceedings which were themselves heard *in camera*. This application was strongly opposed by the plaintiff who stated that the proceedings would serve to reveal grave wrongdoing on the part of the defendants and that it was important that details of this

wrongdoing should be made public. I indicated that because it appeared that there was going to be reference, and indeed quite extensive reference, to what had occurred during the family law proceedings that it was appropriate that the application should proceed *in camera*. However, I stated that if ultimately grave wrong doing on the part of individuals was established I would consider permitting the identity of those against whom the findings had been made to be disclosed. I referred in that context to the approach of McGuinness J. in *Eastern Health Board v. E. (No. 2)* [2000] 1 I.R. 451 where the media was permitted to identify a pregnancy counselling agency which had been referred to during the course of an Article 40 inquiry.

The pleadings

6. The plaintiff has delivered what might be described as a composite plenary summons in the sense that it sets out a case that is being made against each of the nine defendants. The plaintiff then delivered individualised statements of claim. A number of the defendants protest that the case that is made against them in the statement of claim is a different one to that which had been set out in the plenary summons. The plaintiff has also sworn an affidavit on the 16th January, 2012, which is of general application and which exhibits some of the documents which are central to the plaintiff's claims.

7. It is convenient to set out here, in edited form the contents of the plenary summons and the affidavit to which I have referred.

8. Dealing first with the plenary summons at para. 11 thereof, it is pleaded that the first named defendant, barrister for the plaintiff's ex-wife, knowingly colluded with and concocted an agreement with the sixth named defendant, social worker, with the fifth named defendant, solicitor for the plaintiff's ex-wife and with the plaintiff's ex-wife to execute a *guardian ad litem* order pursuant to s. 28 of the Act of 1964 which is prohibited by law in the presence of Judge Michael White. At para. 12 it is pleaded that the fifth named defendant, solicitor for the plaintiff's ex-wife, knowingly, illegally and unlawfully, colluded with the plaintiff's ex-wife to put this matter before the court without *prima facie* evidence which is expressly prohibited by law. At para. 13 it is pleaded that the first named defendant, barrister for the plaintiff's ex-wife, knowingly colluded with and concocted an agreement with the sixth named defendant, with the fifth named defendant and with the ninth named defendant to obtain an unlawful order without the plaintiff's consent and against the plaintiff's wishes.

9. At para. 14 it is pleaded that the first named defendant and the fifth named defendant knowingly lied, deceived and cheated the court in order to obtain an order pursuant to s. 28 of the Act of 1964, which is prohibited by law, in the presence of Judge Michael White. At para. 15 it is pleaded that the first named defendant, the fifth named defendant and the second named defendant, the country registrar, knowingly colluded with, deceived and concealed *prima facie* evidence from the court which is expressly prohibited by law in the presence of Judge Michael White.

10. In para. 16 it is pleaded that the fourth named defendant, described as a psychologist, knowingly facilitated and colluded with the first named defendant and the fifth named defendant to illegally, unlawfully and without proper authority carry out an assessment and make unlawful and illegal representations to the court in the presence of Judge Michael White.

11. At para. 17 it is pleaded that the second named defendant, the County Registrar, knowingly concealed and withheld court documents which is expressly prohibited by law and that this fact has been brought to the attention of Judge Michael White. At para. 18 it is pleaded that the seventh named defendant knowingly authored an unlawful report without the consent of both guardians to deceive the court in the presence of Judge Michael White and to present material in court not relevant to the matter in hand in order to purposely mislead the court, and lead the court to an illegal, unlawful judgment. At para. 19 it is pleaded that the eighth named defendant, ninth named defendant and fifth named defendant knowingly deceived the court in the presence of Judge Michael White unlawfully and without proper authority and consent, authored an unlawful report and presented material in court not relevant to the matter in hand in order to purposely mislead the court and lead the court to an illegal and unlawful judgment. Paragraph 20 deals with the situation of the sixth named defendant and is not relevant to the motions before the court. Paragraph 21 pleads that the third named defendant involved himself with the plaintiff's daughter, without the consent of the plaintiff and referred her to social workers and authored an unlawful report without the knowledge or consent of both guardians.

12. The plenary summons then goes on to seek the following reliefs:

> (a) Injunctive relief from the court against the defendants to restrain all defendants from trespass into or on to his family,
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> (b) Damages where the defendants have destroyed the life, peace and mental well being of the plaintiff.
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> There is also a claim for further and other relief and costs as the court may deem fit.

13. The affidavit sworn by Mr. O'N. repeats the contents of paras. 11 to 21 of the general endorsement of claim.

14. I will refer to the contents of the individual statements of claim where necessary when dealing with the individual motions.

The motion brought by the first named defendant

15. The first named defendant is applying for the following orders:-

> (i) an order pursuant to O.19, r. 28 of the Rules of the Superior Courts striking out the entirety of the plaintiff's claim insofar as it relates to the first named defendant on the basis that it fails to disclose a reasonable cause of action and/or is frivolous and/or is vexatious.
>
> (ii) an order pursuant to O.19, r. 27 of the Rules of the Superior Courts striking out such parts of the plaintiff's claim as the court sees fit on the basis that such parts are unnecessary and/or scandalous and and/or tend to prejudice and/or embarrass and and/or delay the trial of the action.
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> (iii) an order pursuant to the inherent jurisdiction of the court striking out the entirety of the plaintiff's claim or such parts thereof as the court sees fit in so far as it applies to the first named defendant.

Order 19, r. 28 of the Superior Courts provides as follows:-

> "The Court may order any pleadings to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

16. Order 19, r. 27 provides as follows:-

> "The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client."

17. Before considering how the Court should address this application and before considering the arguments that have been advanced, it is convenient to refer to the statement of claim. At para. 3 of the statement of claim it is pleaded that the first named defendant made representations to and within and without the court of a grievous and damaging nature, to and about the plaintiff and about the plaintiff's character and good name. At para. 4 it is pleaded that because of the actions of the first named defendant and by reasons mentioned in the affidavit, the plaintiff has suffered substantial financial loss, damages and inconvenience. It is then pleaded that the plaintiff claims:-

> (1) Judgment in the sum of €312,000,
>
> (2) Such further sums as to this Honourable Court shall deem appropriate for:
>
> - Damages for slander,
> - Damages for libel,
> - Damages for defamation of character,
> - Damages for stress,
> - Damages for mental trauma.
> - Interest to pursuant to the Courts Acts 1981 and for an order for costs.

18. So far as the application under O. 19, r. 28 is concerned, and this applies also to O. 19, r. 27 applications, the court focuses only on the pleadings. See in that regard the observations of White J. in *Rayan Restaurant Limited v. Gerald Kean practising as Kean Solicitors* [2012] IEHC 29 (Unreported, High Court, White J., 17th January, 2012), where he commented:-

> "The court in dealing with an application pursuant to O. 19, r. 28 must deal with it on the pleadings only, and ignore any extraneous evidence."

While the court is concerned with the form and contents of the pleadings, it must be noted that an application under O. 19, r. 28 will fail if the deficiency in the pleadings can be rectified by means of an amendment that will set out a good cause of action or defence. See in that regard Delaney and McGrath, *Civil Procedure in the Superior Courts*, 3rd Ed., at para. 16.06. In my view, that observation which is of general application has a particular relevance when pleadings have been drafted by a lay litigant. Clearly, there can be no questions of a lay litigant being deprived of his right of access to the courts by reason of any lack of skill as a draftsman. It is also important to avoid a situation where the tone and style of the pleadings so grate on one that it leads to an assumption on the part of the reader that the pleadings are frivolous or vexatious. In that regard the words "frivolous" and "vexatious" are terms of art, they are legal terms and they are not used in a pejorative sense. They merely mean that the plaintiff has no reasonable chance of succeeding and that, because there is no reasonable chance of success, it is frivolous to bring the case. By the same token it imposes a hardship on the defendant if he has to expend time, effort and money in defending an action which cannot succeed and that is regarded as vexatious. See the judgment of Barron J. in *Farley v. Ireland* (Unreported, *ex tempore*, Supreme Court, 1st May, 1997). However, while the phrase "frivolous or vexatious" as it appears in O. 19, r. 28 is not necessarily pejorative it must be said that the arguments advanced on behalf of the first named defendant, and indeed arguments advanced on behalf of other defendants, categorise the proceedings as vexatious in the ordinary meaning of that word and indeed as wrong headed and malicious. It is clear that the jurisdiction provided by O. 19, r. 28 and indeed the parallel jurisdiction to dismiss under the inherent jurisdiction of the court is not one to be exercised lightly. It is to be exercised only when the appropriateness of doing so is very clear.

19. However, while it is not a jurisdiction to be exercised lightly but rather one to be exercised with real caution, it is the case that if a court is convinced that a claim will fail then the pleadings will be struck out. In the course of his judgment in *Bula Holdings Limited and Others v. Roche* [2008] IEHC 208 (Unreported, High Court, Edwards J., 6th May, 2008), Edwards J. commented as follows:-

> "It is clear from the decision of the Supreme Court in *Aer Rianta v. Ryanair* [2004] 1 I.R. 506 that the jurisdiction conferred by O. 19, r. 28 is a jurisdiction to strike out the whole (as distinct from part only) of a claim. It is also clear from the decision in that case that, although [a] court will exercise caution in utilising this jurisdiction, that 'if a court is convinced that a claim will fail [the] pleadings will be stuck out'. (At 509, per Denham J.)."

20. On behalf of the first named defendant, and this is a point that is echoed by other defendants, it is noted that the statement of claim pleads an entirely different cause of action to what had been pleaded in the statement of plenary summons. It is contended that this is an impermissible form of pleading and that for this reason the proceedings should be struck out. There is no doubt that the form of pleadings is unorthodox and indeed quite irregular. However, I am conscious that the pleadings have been drafted by a litigant in person and, if I was of the view that the plaintiff was seeking to pursue a legitimate cause of action and had identified such a cause of action, I would not be prepared to strike out the proceedings but rather would afford him an opportunity to regularise his pleadings.

21. There are, however, more fundamental difficulties with what the plaintiff is setting out to do. The first named defendant is alleged to have made representations "to and within and without the court of a grievous and damaging nature to and about the plaintiff and about his character and good name". The plaintiff then seeks *inter alia* damages for slander, libel and defamation of character. By virtue of s. 6 of the Defamation Act 2009, the torts of libel and slander ceased to be so described. However, in ease of the defendant/plaintiff, the statement of claim already refers to damages for defamation of character and I would in any event have readily been prepared to regard the references to slander and libel as being references using outdated language to the tort of defamation.

22. However, what is clear is that the plaintiff is seeking to sue the defendant in defamation arising from what he had to say in his

role as advocate during the family law proceedings.

23. The difficulty for the plaintiff is that s. 17 of the Defamation Act 2009 affords absolute privilege to a statement made by a party, witness, legal representative or juror in the course of proceedings presided over by a Judge, or other person, performing a judicial function. The first named defendant was acting throughout as counsel on behalf of the ninth named defendant and so the provisions of s. 17(2) (g) apply. The already formidable difficulties confronting the plaintiff are compounded still further by the fact that the proceedings in which the first named defendant acted were proceedings that were held *in camera*.

24. So far as the claim in respect of damages for stress and damages for mental trauma is concerned, this element is in the nature of a claim for personal injuries. It does not appear that the plaintiff ever made an application to the Personal Injuries Assessment Board (P.I.A.B.) seeking authorisation to issue proceedings. It is clear from *Sherry v. Primark* [2010] IEHC 66 [2010] 1 I.R. 407 and *Cunningham v. North Eastern Health Board* [2012] IEHC 190 (Unreported, High Court, Hedigan J., 15th May, 2012) that the requirement to seek authorisation is a jurisdictional matter and without authorisation a court has no jurisdiction to entertain proceedings.

25. Even if the plaintiff could somehow have found a way around the P.I.A.B. difficulty, the position would still be that the first named defendant does not as a matter of tort or contract law owe a duty of care to the plaintiff who is not his client.

26. The first named defendant complains, and again this is a complaint which is supported by other defendants, that the proceedings as constituted amount to an impermissible collateral attack upon a decision of the Circuit Court. A decision, which it is noted was arrived at a time when Mr. O'N. was legally represented and a decision which he has never appealed nor sought to have judicially reviewed. In my view while it is the case that the plaintiff is seeking to re-canvass issues that were before the Circuit Court, insofar as it is possible to determine what reliefs he is seeking, it is to overstate matters to describe the proceedings as a collateral attack on the decision. That is not to say that there is not an element of this.

Mr. O'N. for his part is adamant that there is nothing frivolous or vexatious about his proceeding. Certainly his approach to these proceedings is not frivolous in the ordinary meaning of that word. On the contrary he feels a deep sense of grievance and is utterly convinced that he has been gravely wronged. The strength of his convictions in that regard are linked to the contents of a letter from the Legal Aid Board to his former wife's then solicitors. The letter that has so agitated Mr. O'N. was written in a situation where the fifth named defendant was exploring options for funding the involvement of a *guardian ad litem*. In response to queries directed to the Legal Aid Board, Kathleen Lynch of the Private Practitioners Scheme section of the Legal Aid Board laid out the position of the Legal Aid Board with regards to *guardians ad litem*. The material portion of the email with the section on which the plaintiff places such emphasis is as follows:-

"This is the Board's position regarding Guardian Ad Litem.

The Board is a statutory body and acts in accordance with the Civil Legal Aid Act 1995 and the Regulations made thereunder. Section 5(1) of the Act states as follows:

5(1) The principle function of the Board shall be to provide, within the Board's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfied the requirements of this Act.

Section 11(7) of the Act provides that:

S.11(7) The Board may engage under contracts for services such, and such number of persons to provide such services to the board under such terms and conditions as may, with the approval of the Minister given with the consent of the Minister of Finance be determined by the Board.

The board has not been empowered to retain or pay for the costs of guardians ad litem. It is noted in this regard that section 28 of the Guardianship of Infants Act 1964 provides for the appointment of guardian ad litem in private family law proceedings, (***though it is the Board's understanding that this section has yet to be commenced).***

Section 28(5) of the Act provides as follows:

S.28(5) The fees and expenses of a guardian ad litem appointed pursuant to subsection (1) and the costs of obtaining legal representation pursuant to an order under subsection (4) shall be paid by such parties to the proceedings concerned, and in such a proportions, or by such party to the proceedings, as the court may determine.

This section was inserted by the Children's Act 1997 which at the same time amended the Civil Legal Aid Act 1995 to provide that where a guardian ad litem is appointed on foot of section 28 and a solicitor is appointed to the guardian ad litem, the Board shall present a legal aid certificate in respect of the solicitor's appointment. The subsection would not contemplate that the Board would be responsible for *guardians ad litem* fees.

> I should also point out that the function of granting legal is vested in the Board on foot of the aforementioned Act. The Board is obliged to determine applications for legal aid in accordance with the provisions of the Act and also to determine what ancillary services or expense may or should be authorised on foot of any application. That function is not vested in the judiciary."

It was the decision to appoint a *guardian ad litem* which provoked the proceedings that the plaintiff has launched; this was the document that, to quote the plaintiff, ignited the proceedings.

28. What the plaintiff seeks to achieve in the proceedings against the first named defendant emerges most clearly from the affidavit sworn by Mr. O'N. in support of his motion to strike out the motion brought by the first named defendant.

29. Paragraphs 5, 6 and 10 are worth quoting. I do so substituting the first named defendant for this defendant's name.

30. Paragraph 5:-

> "The first named defendant's actions are a direct contravention of Court Rules and clearly demonstrate this defendant's Contempt for due process and for this Honourable Court. The first named defendant is and has falsely misrepresented the matter to at least ten other persons that are NOT concerned with "***any previous history***" of any other matters, directly

> or indirectly related to the matter in hand. The matter being that the first named defendant did factually and wilfully inculcate and involve himself in an UNLAWFUL Order and set of actions. This is proven. Now he is contemptibly attempting to weasel his way out of being prosecuted for his crimes."

31. Paragraph 6:-

> "The first named defendant is in Contempt of this Honourable Court. This is the act of a Criminal and that of a guilty man. He has set out on a "dirty tricks" campaign from the start"…

32. Even assuming in favour of the plaintiff that the first named defendant withheld from the court the fact that a ministerial order bringing s.28 of the Act of 1997 into operation had not been signed, that could not provide any basis for the present proceedings. No report was ever prepared by a *guardian ad litem*; no evidence was ever given by a *guardian ad litem*. Nothing of substance happened on foot of Judge White's order appointing a *guardian ad litem*, an order that was thereafter stayed and then reversed. In my view the proceedings against the first named defendant failed to disclose any reasonable cause of action and are vexatious. In the course of his judgment in *Farley v. Ireland* (Unreported, *ex tempore*, Supreme Court, 1st May, 1997) Barron J. made the point that the phrase frivolous and vexatious is a legal term and not pejorative. He commented as follows:-

> "So far as the legality of the matter is concerned frivolous and vexatious are legal terms, they are not pejorative in any sense or possibly in the sense that Mr. Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

In my view the plaintiff has no reasonable chance of succeeding against the first named defendant and it would be oppressive to require the defendant to have to take on the burden of defending proceedings which are fundamentally misconceived.

33. Accordingly, I will strike out the plaintiff's claim as against the first named defendant in its entirety; for failing to disclose a reasonable cause of action and for being vexatious. I will do so pursuant to O.19, r.28 but also pursuant to the inherent jurisdiction of this Honourable Court. I regard these proceedings as an abuse of process.

The fifth named defendant

34. Issues very similar to those that required consideration in the case of the motion brought by the first named defendant also arise in the case of the motion brought by the fifth named defendant who had acted as solicitor for the plaintiff's former wife. The proceedings brought by the plaintiff against her are wholly concerned with her role in the family law proceedings and to a very large extent with her role in the appointment of the *guardian ad litem*. The fifth named defendant is entitled to absolute privilege in respect of statements made in the course of the judicial proceedings by virtue of s. 17(2) of the Defamation Act 2009.

35. The immunity is a wide one extending to words spoken by an advocate in court, to statements contained in pleadings or other documents incidental to the action, including inter parties correspondence.

36. In my view the plaintiff's claim in defamation is misconceived and doomed to failure.

37. It is also the case that the fifth named defendant as solicitor to the wife in the family law proceedings did not owe a duty of care to the husband who was not her client, but an opposing party. In *Al-Kandari v. J.R. Browne and Company*, [1988] 1 Q.B. 665, the Court of Appeal held, at p. 672:-

"A solicitor acting for a party who is engaged in 'hostile' litigation owes a duty to his client and to the court, but he does not normally owe any duty to his clients opponent... In the context of 'hostile' litigation, public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless re-litigation of disputes".

It must be said that Mr. O'N. is not the first disappointed family law litigant who has sought to bring proceedings against the solicitors who acted for the opposing party in the family law proceedings. An example is *Talbot v. McCann Fitzgerald and Others* [2010] IEHC 383 (Unreported, High Court, Hanna J., 8th October, 2010), where the plaintiff sought to institute the proceedings against his former wife's solicitors. The proceedings were dismissed as being an abuse of process by Hanna J. who said that:-

> "In my view, the documents, insofar as the set out allegations against the first named defendant, disclose no reasonable cause of action against it and are unsustainable in law and are frivolous and vexatious. In my view, they constitute a vehicle whereby the plaintiff seeks to vent his spleen and frustration in respect of legal "reverses" which he cannot otherwise reopen. It was apparent in his oral submissions to me that the plaintiff availed of the court time to recite in full his complaints in respect of the family law proceedings... I therefore accede to the first named defendant's application to strike out the proceedings for the reasons stated."

38. The Canadian case of *Dykun v. Odishaw*, (Unreported, Alberta Court of Queen's Bench, Judicial District of Edmondson, 3rd August, 2000), has been referred to in the course of a number of decisions. See *Riordan v. Ireland* (No. 5), [2001] 4 I.R. 463, in *Bula Holdings Limited and Others v. Roche and Others* [2008] IEHC 208 (Unreported, High Court, Edwards J., 6th May, 2008) and *McCabe v. Minister for Justice*, (Unreported, High Court, Murphy J., 29th June, 2006). The Canadian courts commented that the following matters had been indicated as tending to show that a proceeding is vexatious:-

> (a) The bringing up of one 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 persons can reasonably expect to obtain relief,
>
> (c) Where an 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 decision.

Paragraphs (a) to (d) would seem relevant to the present proceedings, which bear the classic hallmarks of proceedings that are frivolous and vexatious.

39. So far as the question of the appointment of the *guardian ad litem* is concerned and in particular so far as the email from the Legal Aid Board on which the plaintiff places such emphasis is concerned, the fifth named defendant in the course of her grounding affidavit has sworn that she understood from the Legal Aid Board email of the 7th December 2010 and in particular from the last paragraph therein that the Legal Aid Board could exercise its discretion to engage a *guardian ad litem*. She has sworn that she certainly did not and would not have asked the court to make an order that she knew to be unlawful. However, even making the assumption in favour of the plaintiff that the fifth named defendant, contrary to what she has sworn, knew or ought to have known that s. 28 had not been brought into force, this would not provide a justification for the present proceedings. As in the case of the proceedings against the first named defendant, the proceedings brought by Mr. O'N. against his wife's former solicitor offer no reasonable prospect of success, do not disclose any reasonable cause of action, are vexatious and amount to an abuse of process and, accordingly, I will also strike out the proceedings against the fifth named defendant.

The second named defendant
40. I turn now to the motion brought by the second named defendant. The relevant paragraphs of the plenary summons are paras. 15 and 17. These paragraphs are as follows:-

"I say that the first named defendant (barrister for my ex-wife) and the fifth named defendant (solicitor for my ex-wife) and the second named defendant (County Registrar) did knowingly collude with and deceive and conceal *prima facie* evidence from the court that which is expressly prohibited by Law in the presence of Judge Michael White (exhibit D)"– (a reference to the Legal Aid Board email).

Paragraph 17:-

"I say that the second named defendant (County Registrar) did knowingly conceal and withhold court documents that which is expressly prohibited by "law" which has been brought to the attention of Judge Michael White. (Exhibit M)."

(Exhibit M comprises correspondence passing between the plaintiff and the County Registrar beginning with the letter of 20th July 2011, from the plaintiff in which he asks to be forwarded a full copy of his attested file, enclosing €10 to cover photocopying expenses and ending with the letter from the plaintiff of the 1st November 2011. In the course of that letter the plaintiff comments that his difficulty in obtaining documentation is causing him a great deal of stress and delaying justice. He describes the attitude of the County Registrar of being cavalier and as being outrageous.)

41. The operative part of the statement of claim is as follows:-

> "That the second named defendant did pervert the course of justice, by purposely and wilfully withholding prima facie evidence from the court, that which was supplied by the fifth named defendant.
>
> Because of the actions of the second named defendant and by reasons mentioned in the affidavit the Court Record No. 2012/462P, the plaintiff has suffered financial loss, damages and inconvenience."

The plaintiff claims judgment in the sum of €78,000 and such further sums as the court should deem appropriate for:-

(1) Damages for stress,

(2) Damages for mental trauma.

So far as the claim for €78,000 is concerned, the plaintiff responded to a notice of particulars and explains that that figure represents 5% of his overall claim of €1.56M calculated on the basis of working 50 hours per week, 52 weeks per year for twelve years at €50 per hour. In so far as the plaintiff is claiming only 5% of his overall claim from the second named defendant, it might be thought that the plaintiff does not see the County Registrar as prime culprit.

42. While the plaintiff and the second named defendant have exchanged correspondence in relation to the plaintiff's efforts to access the court files, the plaintiff has failed to particularise his claim that the second named defendant perverted the course of justice by purposefully and knowingly withholding *prima facie* evidence from the court, that which was provided by the fifth named defendant.

43. In so far as the appointment of the *guardian ad litem* is central to the plaintiff's claim it seems to me that the plaintiff fundamentally misunderstands the role and function of the county registrar. The county registrar is not a co-decision maker.

44. The plaintiff's claim might be seen as one in deceit, misfeasance, and conspiracy. In addition the reply to particulars contains for the first time a reference, almost a passing reference to damages for libel. In *Ennis v. Butterly*, [1997] 1 I.L.R.M. 28, Kelly J., at p. 40, commented that in order to sustain the common law of deceit, the following facts must be established, *i.e*. they must be pleaded and proved:-

(1) There must be a representation of fact made by words or by conduct,

(2) The representation must be made with knowledge that it is false,

(3) It must be made with the intention that it should be acted upon by the plaintiff in the manner which resulted in damage to such plaintiff,

(4) It must be proved that the plaintiff acted upon such false statement,

(5) It must be proved that the plaintiff has sustained damage by so doing.

None of the five constituent elements identified by Kelly J. have been made out in the present case. In particular in a situation where

the order appointing the *guardian ad litem* was reversed and where no report was ever prepared or submitted to the court, the plaintiff cannot establish any loss. Insofar as the plaintiff is seeking to bring proceedings against a public official it seems proper to consider whether the plaintiff might have a stateable claim for misfeasance of public office, even though the proceedings have never been so categorised by the plaintiff. The ingredients that go to make up misfeasance in public office were considered by Kearns J., as he then was, in *Kennedy v. The Law Society of Ireland (No. 4)* [2005] 3 I.R. 228 and again by the Supreme Court on appeal. From the decisions in both courts it emerges clearly that misfeasance in public office encompasses two forms of misconduct, namely where there was targeted malice towards an individual involving the exercise of the public power for an improper or ulterior motive or, where there was reckless indifference as to the illegality in question and the consequence of same. Both forms involve an element of bad faith on the part of the officer. No matter how the proceedings brought by Mr. O'N. are viewed, it seems to me to be clear that he is not in a position to formulate a stateable claim that the County Registrar was guilty of misfeasance of public office. In my view the claim against the County Registrar is misconceived, discloses no reasonable cause of action, is bound to fail, is frivolous and vexatious, and amounts to an abuse of process. Accordingly, I will strike out the claim against the second named defendant pursuant to O. 19, r.28 and pursuant to the inherent jurisdiction of the court.

The third named defendant

45. The third named defendant is a medical doctor practicing as a general practitioner. He has acted as general practitioner for the ninth named defendant and her children, including C. who is the daughter of the ninth named defendant and of the plaintiff. The relevant paragraph of the plenary summons is para. 21. It states that the third named defendant involved himself with his daughter C. without the plaintiff's consent, referred her to social workers and authored an unlawful report without the knowledge or consent of both guardians (exhibit L). (Exhibit L comprises a letter dated the 4th October, 2010, from the fifth named defendant to the plaintiff's then solicitors in which they advise that C. has been referred by her G.P. (the third named defendant), to Dr. Filomila Grigoriou, network psychologist of the Primary Care and Child Psychology Service in Kilkenny. A copy of a handwritten referral note was enclosed.) The statement of claim pleads that the third named defendant did make representations to and within and without the court of a grievous and damaging nature, to and about the plaintiff and about his character and good name. Now, there are a number of somewhat curious aspects to this claim. Notwithstanding the reference in the statement of claim to the defendant making representations to and within and without the court of a grievous and damaging nature, this defendant had no involvement with the litigation. Nor, despite the reference in the plenary summons to the defendant authoring an unlawful report does it appear that he did this. Indeed, it is not alleged that he authored a formal report as such; rather the objection is taken to the referral note or referral form. It appears that the plaintiff's complaint against this defendant relates to a visit to the defendant's surgery by the ninth named defendant and her daughter C. Arising from that consultation, the plaintiff referred "C.", to a child and family consultation service. Thereafter, and unknown to this defendant, the fifth named defendant provided the plaintiff with a copy of the referral note.

46. Insofar as the plaintiff is seeking an injunction, matters have been overtaken by the order of the Circuit Court. The Circuit Court order of the 29th June, 2011, had directed that the plaintiff might nominate a general practitioner to treat the son of the marriage without the consent of the ninth named defendant and refer him for counselling if necessary without consent and had also directed that the ninth named defendant might nominate a general practitioner to treat "C", without the consent of the plaintiff and might refer her to counselling, if necessary, without that consent. The injunction now sought would seem designed to set-aside the order of the Circuit Court. This is impermissible. There is a further reason why an injunction cannot be pursued at this stage. The plaintiff in the course of his submission informed the court that given the history of conflict between the parties that the third named defendant had ceased to act as general practitioner on behalf of C. In these circumstances granting an injunction would not achieve any practicable purpose.

47. Insofar as the claim for damages is concerned, the point made in earlier motions arises. The claim for damages for stress and damages for mental trauma would seem in substance to be a claim for damages for personal injuries and no authorisation from P.I.A.B. has been obtained.

48. Implicit in the plaintiff's case is that the third named defendant acted wrongfully in consulting with C. without the plaintiff's consent and in referring her for counselling. Even assuming in favour of the plaintiff, that the third named defendant ought to have sought the consent of both parents, I do not believe the present proceedings can be maintained. The proceedings operate on the assumption that as a parent the plaintiff enjoyed some form of property right vis a vis his daughter and that in consulting with her and referring her on, that the third named defendant had interfered with the plaintiff's property rights. I do not believe that even on the assumption that the doctor should have sought the consent of the plaintiff that his failure to do so gives rise to an action for damages. A highly relevant consideration is that the referral did not proceed. The letter from the fifth named defendant of the 4th October, 2010, had stated that the assessment appointment had been made for the 13th November, 2010. In the time that was available the plaintiff vetoed the daughter's assessment. He cannot now establish loss or damage.

49. While I approach the case on the view most favourable to the plaintiff that his consent should be sought before the third named defendant referred on his daughter, I am not convinced that the third named defendant was not entitled to act as he did. However, one way or another the plaintiff's claim against the third named defendant does not disclose any reasonable cause of action, is incapable of achieving what is sought and is bound to fail. That being so it would be oppressive to require the defendant to defend the proceedings. Accordingly I will strike out the proceedings against the third named defendant.

The fourth named defendant

50. I am in a position to deal with the claim against the fourth named defendant very briefly. By order of Judge White, the fourth named defendant was appointed as *guardian ad litem* on the 27th January, 2011. Following her appointment the fourth named defendant met with "C". and the ninth defendant on the 26th April, 2011. It was the intention of the fourth named defendant to make an appointment to meet with R., the son of the plaintiff and the ninth named defendant, and to meet with "C". again, but her appointment was brought to an end before this could happen.

51. In a situation where the only involvement of the fourth named defendant was to hold one meeting with C. at a time when she had, as she believed, been appointed as *guardian ad litem*, it seemed to be that the plaintiff's case against the fourth named defendant was quite unstateable. The plaintiff puts his case on the basis that the fourth named defendant, as an experienced *guardian ad litem*, should have realised that the court was acting outside its jurisdiction. In my view there is just no reality to that argument. The fourth named defendant was entitled to begin acting on foot of a court order. When her appointment was first suspended and then reversed she took no further action and no report was ever prepared by her and she took no part in the subsequent family law proceedings. In those circumstances the proceedings against the fourth named defendant lacked any reality or substance and accordingly I will strike out the proceedings as failing to disclose any reasonable cause of action and as proceedings that were bound to fail.

The seventh named defendant

52. So far as the seventh named defendant is concerned, the relevant section of the plenary summons is para. 18 which pleads that

the seventh named defendant knowingly authored an unlawful report without the consent of both guardians to deceive the court in the presence of Judge Michael White and present material in court not relevant to the matter in hand in order to purposely mislead the court and lead the court to an illegal and unlawful judgment. There is then a reference to exhibit F. (Exhibit F consists of two medical legal reports dated the 7th October, 2008, one in respect of "C." and one in respect of "R.") The statement of claim pleads that the seventh named defendant made representations to and within and without the court of grievous and damaging nature to and about the plaintiff and about the plaintiff's character and good name. The statement of claim then claims judgment in the sum of €78,000 and further sums by way of damages for defamation as well as damages for stress and mental trauma.

53. After the seventh named defendant's motion papers were served, a letter from the plaintiff was sent requesting that the seventh named defendant swear a verifying affidavit in relation to correspondence he had sent to the Medical Council in 2009. By way of background it should be explained that the plaintiff lodged a complaint with the Medical Council against this defendant, which concluded in January, 2010 as there was insufficient cause to warrant further action. In the usual way the seventh named defendant corresponded with the Medical Council following the complaint. The solicitor for the seventh named defendant responded to this request pointing out that in the context of the existing proceedings there was no requirement on their client to swear the affidavit requested. This produced a very unpleasant response from the plaintiff. This asserted that the solicitor had a duty of care not only to her client but also to the plaintiff and that ensuring that her client was truthful and honest was one of the elements of the duty of care. The letter then concluded:-

"Now that I have made you aware of your legal responsibilities and obligations I insist you address this issue immediately and give it your utmost attention as you too may find yourself before the courts for your conduct. We will give you four days in which to respond."

Now, in fairness to the plaintiff, he accepted an invitation from me to apologise to the solicitor in question for the tone of that letter and this is to his credit. Nonetheless the original correspondence is quite disconcerting and is suggestive of a willingness on the part of the plaintiff to use proceedings and the threat of proceedings to harass and intimidate. Insofar as the correspondence with the solicitor for the seventh named defendant might indicate a desire on the part of the plaintiff to re-open the matters that were before the Medical Council, this is not something that can be countenanced. The plaintiff's focus, indeed pre-occupation with the Medical Council issue also emerges from an affidavit sworn by him on the 19th October, 2012. So far as the medical legal reports that were prepared by the seventh named defendant are concerned, these were prepared for the purpose of proceedings and enjoy absolute privilege. The plaintiff's defamation claim based on the contents of these medical reports cannot succeed and is bound to fail. As it happens, it does not appear that the reports were ever actually submitted to court but whether they were, or were not, absolute privilege attaches to them. The points made in relation to the claim for damages for shock and mental trauma that had been considered in the context of other motions, also apply in the present case.

54. The plaintiff has requested that this motion should be struck out on the basis that an affidavit sworn by the solicitor for the seventh named defendant contains hearsay. That application ignores the fact that the motion to dismiss the proceedings was grounded on the affidavit of the seventh defendant sworn on the 27th July, 2012. The affidavit sworn by the solicitor deals with matters subsequent to the service of the motion to dismiss the proceedings and it is an affidavit which is appropriate for the solicitor to swear. Once again the case against the seventh named defendant is one that is bound to fail, has no reasonable prospect of success, and is vexatious and an abuse of process. The pleadings fail to disclose any reasonable cause of action and accordingly for all these reasons I will dismiss the claim as against the seventh named defendant.

The eighth named defendant

55. So far as the eighth named defendant is concerned, the relevant paragraph of the plenary summons is para. 19. It pleads that the eighth named defendant, the ninth named defendant and fifth named defendant knowingly deceived the court in the presence of Judge Michael White unlawfully and, without proper authority and consent, authored an unlawful report and presented material in court not relevant to the matter in hand in order to purposely mislead the Court, and lead the Court to an illegal and unlawful judgment. Then there is reference to exhibit G. (Exhibit G is described as a psychological report dated the 7th October, 2008. The report records that "C" accompanied by her mother presented for counselling on the 22nd September, 2008 and on the 2nd October, 2008.) It also records that the ninth and fifth named defendants requested a report on "C" for an access and custody application that was before the Circuit Court on the 10th October, 2008. A number of points that have been considered in the context of other motions arise for consideration. So far as the claim for an injunction to restrain the eighth named defendant from trespassing into or on to the family of the plaintiff is concerned, this either ignores the order of the Circuit Court that permits the ninth named defendant to bring her daughter C to a general practitioner and for C to be referred on for counselling, without the consent of the plaintiff, or alternatively it is an attempt to set-aside the order of the Circuit Court. If it is such an attempt, then it is clearly impermissible. Furthermore, the report of the 7th October, 2008, was clearly prepared for the purposes of the Circuit Court proceedings that were scheduled to take place on the 10th October, 2008, and, accordingly, the report enjoys absolute privilege.

56. It is not suggested that the eighth named defendant had an involvement in the family law proceedings in 2011 when the question of the appointment of a *guardian ad litem* was under consideration. Her involvement was confined to 2008 and was confined to preparing a report for the purpose of court proceedings. It thus brings the question of defamation into particularly sharp focus and the fact that in preparing a report for the court the eighth named defendant enjoyed absolute privilege.

57. In these circumstances, this is a claim that is misconceived, has no realistic prospect of success but rather is bound to fail. The proceedings fail to disclose any cause of action and that is so whether one focuses on the plenary summons or on the statement of claim, where a cause of action quite different to what had been pleaded in the plenary summons is pleaded. In the circumstances I am satisfied that this is a case where, pursuant to O. 19, r. 28 and pursuant to the inherent jurisdiction of the Court it is proper to strike out the proceedings.

The ninth named defendant

58. So far as the ninth named defendant is concerned, who is the plaintiff's former wife; a number of paragraphs of the plenary summons contain references to her role. Paragraph 11 pleads that the first named defendant, her barrister, knowingly colluded with and concocted an agreement with the sixth named defendant, social worker, with the fifth named defendant, solicitor for the ninth named defendant with the ninth named defendant to execute a *guardian ad litem* order pursuant to s. 28 of the Act of 1964 which was prohibited by law. Paragraph 12 pleads that the fifth named defendant knowingly illegally and unlawfully colluded with the ninth named defendant to put this matter before the court without *prima facie* evidence which is expressly prohibited by law. Paragraph 13 states that the first named defendant knowingly colluded with and concocted an agreement with the sixth named defendant, social worker, with the fifth named defendant, and ninth named defendant to obtain an unlawful order without the consent of the plaintiff and against the plaintiff's wishes. Paragraph 19 pleads that the eighth named defendant, the ninth named defendant and fifth named defendant knowingly deceived the court in the presence of Judge Michael White, unlawfully and without proper authority and consent, authored an unlawful report and presented material in court not relevant to the matter in hand in order to mislead the court and lead

the court to an illegal and unlawful judgment.

59. So far as the reliefs sought against the ninth named defendant are concerned, these failed to take into account that the ninth named defendant is the mother of C and R and the injunctions would inhibit contact with her family members. Moreover, the proceedings either fail to take into account the fact that the Circuit Court has made orders in relation to custody and access or alternatively seeks to set-aside the orders of the Circuit Court.

60. It seems to me that the argument that this in an impermissible attempt to re-litigate matters that have already been considered and decided in the Circuit Court has a particular resonance in the case of the ninth defendant.

61. So far as the ninth named defendant's involvement in the appointment of a *guardian ad litem* is concerned, she was at the time represented by both solicitor and counsel and no doubt acted on their advice. There is a complete lack of reality in any suggestion that she could be expected to second guess her solicitor and counsel in relation to the jurisdiction of the Circuit Court to make a particular order.

62. In my view the criticisms that can be made of the proceedings that have been brought against the various professional defendants apply with equal, if not greater force to the proceedings against the ninth named defendant. I am quite satisfied that these proceedings are vexatious, are bound to fail, and amount to an abuse of process, and as such ought to be dismissed pursuant to O. 19, r. 28 and the inherent jurisdiction of the court.

63. I will conclude with one general observation. The plaintiff has stressed that he has been involved in family law proceedings of one sort or another for some thirteen years now and that over that time his wife has had a number of different professional advisors but that until he issued the present proceedings, he never had cause to sue any of them, nor, as I understand him to say, did he have any acrimonious dealings with them. He says that this establishes that it is unfair to categorise the present proceedings as vengeful and vexatious.

64. It is unfortunate that these family law proceedings should have gone on as long as they have. It may be that the present proceedings were prompted by the fact that an order was made without jurisdiction appointing a *guardian ad litem* and in particular to use the word chosen by the plaintiff it may be that the present proceedings were ignited by the plaintiff coming across the Legal Aid Board email but nonetheless the contents of the proceedings, the tone and style of the pleadings and the multiplicity of defendants, some with the most peripheral involvement in the matters at issue strongly suggest that the plaintiff is prepared to issue proceedings in an indiscriminate and irresponsible fashion. The present proceedings are, in every sense of the word vexatious. They are an abuse of process. Accordingly, as I have indicated, I will make the orders sought by the defendants who have brought motions.