THE HIGH COURT

[2014/6262P]

BETWEEN

J. O'C.

PLAINTIFF

AND

G. D. AND J. O'C.

DEFENDANTS

THE HIGH COURT

[2014 No.6263P]

BETWEEN

J. O'C.

PLAINTIFF

AND

K.W.

DEFENDANT

JUDGMENT of Mr Justice David Keane delivered on the 20th December 2017

Introduction

1. The parties in these two related sets of proceedings have brought a raft of different interlocutory applications before the court. The plaintiff in each case is J. O'C., a litigant in person. In the first action, the defendants are the solicitors who represented J. O'C. in judicial separation proceedings. In the second action, the defendant is the solicitor who represented the wife of J. O'C. in those proceedings. For both clarity and ease of reference, I propose to refer to J. O'C. as 'the husband'; the defendants in the first action ('the 6262P action') as 'the husband's solicitors'; and the defendants in the second action ('the 6263P action') as 'the wife's solicitors'.

2. Without for one moment underestimating the importance or potential significance of this litigation for each of the parties involved, it has now reached a level of procedural complication out of all proportion to the relative simplicity of the underlying dispute.

The applications

3. The applications before the court (in the order in which each motion issued) are the following.

4. First, the application of the wife's solicitor, pursuant to a notice of motion issued on 10 March 2015, seeking an order dismissing or staying the plaintiff's action against him on one or more of seven separate grounds ('the strike out application'). Those grounds are:

> (i) that it falls within the terms of Order 19, rule 28 of the Rules of the Superior Courts ('RSC') in disclosing no reasonable cause of action or in being an action shown by the pleadings to be frivolous or vexatious;
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> (ii) that it merits the exercise of the inherent jurisdiction of the court to dismiss or stay proceedings that are frivolous, vexatious or bound to fail;
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> (iii) that it falls within the terms of O. 19, r. 27 of the RSC in that the entirety of the indorsement of claim in the plenary summons and pleadings in the statement of claim comprise matters which are unnecessary or scandalous, or which may tend to prejudice or embarrass the defendant in the defence of that action;
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> (iv) that it merits the exercise of the inherent jurisdiction of the court to dismiss or stay proceedings that have been brought for improper, vexatious or oppressive motives, amounting to an abuse of process;
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> (v) that it merits the exercise of the inherent jurisdiction of the court to dismiss or stay a professional negligence action that has been brought without having first obtained appropriate expert evidence to support it, thus amounting to an abuse of process;
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> (vi) that it merits the exercise of the inherent jurisdiction of the court to dismiss or stay proceedings that have been brought in breach of the 'in camera' rule; and
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> (vii) that it merits the exercise of the inherent jurisdiction of the court to dismiss or stay proceedings as an abuse of process, since the husband's complaints should more properly be addressed within the rubric of existing family law proceedings between the husband and wife brought under the Family Law (Divorce) Act 1996, entitled '*The Dublin Circuit Family Court, Record No. 1574/2014, Between J. O'C., Applicant, and F. McM., Respondent*.'

5. Second, the application of the husband pursuant to a notice of motion issued on 31 July 2015, seeking an order in the 6262P action against the husband's solicitors, consolidating those proceedings with the 6263P action against the wife's solicitors ('the consolidation application').

6. Third, the application of the husband pursuant to a notice of motion issued on 24 November 2015, seeking an order in the 6263P action against the wife's solicitor, seeking various reliefs comprising: (i) a declaration that the wife's solicitor is in breach of the *in camera* rule; (ii) a declaration that a third party – a solicitor who has more recently represented the wife in the husband's divorce proceedings and who swore an affidavit on behalf of the wife's solicitor in the strike out application – is in breach of the *in camera*

rule; (iii) a declaration that the wife's solicitor's strike out application is an abuse of process; (iv) an order for discovery; and (v) an order disallowing all of the wife's solicitor's costs incurred in the proceedings to date ('the *in camera rule* application').

7. Fourth, the application of the husband pursuant to a motion issued on 24 November 2015, seeking orders in the 6262P action against the husband's solicitor, broadly similar to those sought against the wife's solicitor in the third application just described. In the course of the hearing of these applications, it became apparent that, on 14 December 2015, Gilligan J adjourned the hearing of that motion to the trial of the 6262P action. For that reason, I do not propose to consider it any further here.

Background to the proceedings

8. The husband was the respondent in judicial separation proceedings brought by the wife in the Dublin Circuit Family Court under the title *'F. McM. v J. O'C., Record No. 1715/2010'.* The husband filed his own defence in those proceedings in January 2011. The husband's solicitors were retained to represent him in July. The proceedings were scheduled for trial on 10 November of that year.

9. A pre-trial settlement meeting took place at Phoenix House, Smithfield, Dublin 7 on 7 November 2011. The husband and the husband's solicitors attended, as did the wife and the wife's solicitor. A judicial separation agreement was reached at that meeting. Its terms were reduced to writing and it was signed by the husband and the wife.

10. The Dublin Circuit Family Court granted a decree of judicial separation on 22 February 2012, together with ancillary orders in accordance with the agreed terms of separation, which terms were made a rule of court, as part of the Circuit Family Court Order made on that date.

11. Although the Circuit Court Order was not produced for the purpose of the various applications now before the court, it appears to be common case that one of the terms of the separation agreement and, hence, one of the terms of that Order was that the family home was to be transferred into the sole name of the wife on foot of a payment to the husband of €50,000 that was to have been made on or before 1 February 2012. The wife was to take over the mortgage loan on the property and indemnify the husband in respect of it.

12. It also seems to be common case that the said Order of the Circuit Court granted 'liberty to apply' to both the wife and the husband.

13. The husband's solicitors plead that, under cover of a letter dated 14 February 2012, the wife's solicitor forwarded to the husband's solicitors both a deed of conveyance and a family home declaration for signature by the husband. The husband's solicitor forwarded the executed documents to the wife's solicitors on 17 May 2012.

14. In circumstances that are in issue between the parties to each of these two actions, the payment of €50,000 that the wife was required to make to the husband under both the separation agreement and the Order of the Circuit Court was not made but, rather, was retained by the wife's solicitor in his client account. A controversy arose about whether that payment represented a free-standing obligation under that agreement and Order, as the husband contends, or one subject to a condition precedent that the husband first comply with all of his various different obligations under both and, in particular, his obligations to execute a deed of waiver and to put in place a life insurance policy, which was, and remains, the position adopted by the wife's solicitor. A further controversy later arose in respect of the extent to which the husband had, in any event, complied with each of those various obligations.

15. Both the husband and, more strikingly, the wife's solicitor are conspicuously silent about when precisely payment of the €50,000 due to the husband under the separation agreement and Circuit Court Order was made. The wife's solicitor has averred, in an affidavit sworn on 6 October 2015, to having withheld payment in the past tense, suggesting that the relevant payment had – at least by then - been made.

16. One of the husband's solicitors has averred without demur by the husband, that the husband has now received payment of the €50,000 but continues to maintain each of these actions in order to pursue a claim in damages for the interest due on that sum, and for the loss of opportunity or the consequential loss occasioned by the failure to make that payment when it fell due. However, correspondence exchanged in the context of these two actions between the solicitors representing the husband's solicitors and those representing the wife's solicitor, strongly suggest that payment had still not been made in February or March 2015, approaching three years after it fell due under the separation agreement and Circuit Court Order.

17. It is perhaps unsurprising against that background that the husband, as a litigant in person, sought legal redress on 21 July 2014 (more than two years after the obligation to make the payment of €50,000 to him first arose under the Circuit Court Order).

18. Remarkably, it is common case that, despite the existence of that dispute concerning the compliance of each side with the requirements of the separation agreement and Circuit Court Order, and despite the apparent inclusion in the terms of that Order of 'liberty to apply', neither side made the appropriate application to the Circuit Court during the relevant period, much less did either side purport to sue on the separation agreement.

19. What is surprising, even in that context, is that the husband launched three sets of High Court proceedings on that date, rather than bringing an application before the Dublin Circuit Family Court. The first of those three High Court actions is titled (as I have redacted it) *'J. O'C. v. F. McM, The High Court, Record No. 6261P/2014'* ('the 6261P action'). As those initials suggest, the defendant was the wife. The pleadings in that action were not produced to me in the course of the hearing of these applications and I know nothing about the nature or substance of that claim. The other two sets of proceedings are the 6262P action and the 6263P action, in which the applications now before the court were brought. Leaving aside the issue of why the relevant disputes were not dealt with in the Dublin Circuit Family Court, the necessity for three sets of proceedings in the High Court was never explained in the context of the present applications.

20. At some point in 2014, the husband brought divorce proceedings against the wife in the Dublin Circuit Family Court entitled *'J. O'C. v F. McM., Record No. 1574/2014*.' As with the earlier judicial separation proceedings, I have not had sight of any of the pleadings or principal orders made in those proceedings. However, the husband has since averred that a further settlement agreement was reached between the husband and wife at some point in June 2015. The husband further avers that an Order of divorce was granted on 1 July 2015 and that the terms of settlement between the parties in those proceedings were made a rule of court under that Order. There is some suggestion in the most recent affidavit sworn by the husband that payment of the outstanding €50,000 (though not of any interest that may be due on that sum) was made a term of the divorce settlement. There is also some suggestion that the 6261P action that the husband had taken against the wife was compromised in the context of that settlement and has since been struck out.

21. For completeness (and, perhaps also, to put in context an apparent misunderstanding on the part of the husband to which I will return later in this judgment), it should be noted that the husband avers that he sought legal aid for the purpose of the 6262P and 6263P actions from the Legal Aid Board in June 2015, but that his application was refused in December 2015, which refusal was upheld on review in early 2016. The husband then brought an application for judicial review of that decision in proceedings entitled, as I have redacted them, *'J. O'C. v Legal Aid Board, The High Court, Record No. 2016/243JR'*. That application for judicial review was still pending when the present applications first came before this Court for hearing on the 14 April 2016.

Procedural history of the applications
22. The hearing of each of the three motions now before this court, which were called on by reference to an aggregate estimate of one day, commenced on 14 April 2015 and continued on 15 April and 26 April, at which point the court reserved judgment. The matter was listed for mention on 16 December 2015, when the husband applied to have the various applications and, in particular, the strike out application re-opened for the purpose of permitting him to adduce further evidence of which, or of the significance of which, he had only become aware after judgment had been reserved on 26 April 2016. The court gave directions permitting the issue to be addressed on affidavit, and fixed 11 January 2017 to hear argument on that issue. On 11 January 2017, the court permitted further evidence to be adduced. On 2 February 2017, the court heard submissions on that evidence before, once more, reserving its decision.

The *in camera* rule applied to the applications
23. Counsel for the wife's solicitor sought an order directing that these applications be heard otherwise than in public. The husband opposed that application. The application was made in reliance upon the terms of s. 38(6) of the Family Law Act 1995, which operates to extend the requirement under s. 34 of the Judicial Separation and Family Law Reform Act 1989 - that proceedings under that Act be heard otherwise than in public - to proceedings under the 1995 Act. But although the 6262P and 6263P actions appear to arise out of judicial separation proceedings brought pursuant to those Acts, they do not constitute such proceedings.

24. It is common case that, on foot of an application brought by the husband, an Order was made by Judge Hannan on 2 July 2015 in the husband's divorce proceedings:

> 'lifting the "in camera rule" in relation to the within proceedings and the related proceedings between [F. McM], Applicant, and J. O'C., Respondent bearing [Record No. 1715/2010] to allow pleadings, orders and documents to be used in evidence in the High Court proceedings entitled [the 6263P action] and the [the 6262P action].'

25. This appears to be an Order made pursuant to the terms of s. 40(8) of the Civil Liability and Courts Act 2004.

26. That prompted me to raise with Counsel the issue of whether there was any material in any of these applications that would attract the provision of s. 45(1)(b) or (c) of the Courts (Supplemental Provisions) Act 1961, whereby justice may be administered otherwise than in public in matrimonial causes or matters, or in matters involving minors. At the time, I concluded that the matters at issue in these proceedings that arise out of the judicial separation proceedings appear to relate to an alleged undervaluation of the family home and an alleged failure to comply with the requirement of the separation agreement whereby the husband was to receive €50,000 in consideration for relinquishing his interest in that property. They seemed to me quite distant from the core of the marital and infant privacy interests that the relevant in camera rule is designed to protect. Accordingly, I refused to order that the applications should proceed otherwise than in public.

27. However, in preparing the present judgment I have become aware that there are certain passing references in the voluminous affidavits exchanged to what seem, at best, to be peripheral issues regarding access to the children of the marriage. I have also concluded on reflection that the wife, who is not a party to either of the two actions, has an obvious marital privacy interest that requires protection. For that reason, following the approach adopted by Birmingham J in *J. O'N. v S. McD & Ors* [2013] IEHC 135 (Unreported, High Court, 22nd March 2013), I have decided to treat the application (which was in any event heard in an empty courtroom) as one that should have been heard otherwise than in public and in which the judgment should be anonymised accordingly.

The claim in the 6263P action
28. In considering the application to strike out the 6263P action, it is necessary to first describe the nature of the claim that the husband makes in it against the wife's solicitor.

29. The husband's undated statement of claim runs to 67 paragraphs over 12 closely-typed pages. With all due respect to the husband, it is self-evidently the work of a litigant in person and, as such, is not as amenable to straightforward analysis as it might otherwise be. Working backwards, the concluding prayer seeks damages for injury, loss and damage caused by 'negligence, negligent misstatement, fraudulent misstatement, fraud, breach of duty, breach of good faith, breach of fiduciary duty, conspiracy and collusion' on the part of the wife's solicitor, or his servants or agents.

30. At the risk of oversimplifying a discursive pleading that is not very easy to follow, the husband's claims against his wife's solicitor are that:

> (a) He is liable to the husband in negligence, or for negligent or fraudulent misrepresentation, in the manner in which he represented the wife's position in the settlement negotiations on 7 November 2014, particularly in the manner in which he represented the wife's financial position and the value of the family home (paragraphs 16 and 17 of the statement of claim).
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> (b) He is liable to the husband in negligence for the manner in which he drafted the separation agreement and represented the wife's position before the court on 22 February 2012 (paragraphs 18 and 19).
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> (c) He is liable to the husband in negligence, deceit, breach of undertaking and breach of fiduciary duty in failing to arrange for payment of the €50,000 in funds that were under his control and to which the husband was entitled under the separation agreement and Order of the Circuit Court. (paragraphs 20 to 49).
>
> (d) He is liable to the husband in conspiracy (or collusion), for conspiring (or colluding) with the husband's solicitor to withhold from the husband payment of the €50,000 to which he was lawfully entitled in order to coerce him into relinquishing his interest in the family home (paragraphs 50 to 60),

31. In the defence delivered on his behalf on 26 February 2015, the wife's solicitor denies all of the husband's claims.

The application to strike out the 6263P action

32. Each of the three motions before the court has been the subject of an elaborate exchange of affidavits between the parties concerned, none more so than the one dealing with the application of the wife's solicitor for an order striking out the 6263P action.

33. It was brought grounded upon an affidavit of the solicitor for the wife's solicitor, sworn on 10 March 2015 and running to 71 paragraphs over 17 pages, accompanied by nine documentary exhibits. The husband replied by swearing not one but two affidavits, the first on 9 April 2015, running to 148 paragraphs over 29 pages, and the second on 8 July 2015 (apparently - the copy handed into court was not sworn), covering 13 pages and 66 paragraphs. There then followed a 20-paragraph affidavit of the wife's solicitor, sworn on 6 October 2015, and a 13-paragraph affidavit of the solicitor who took over the representation of the wife for the purpose of the divorce proceedings, sworn on 15 October 2015. The husband was quick to respond, swearing another 68-paragraph affidavit on13 November 2015.

34. There matters rested until the hearing of the application on 14, 15 and 26 April 2016, after which judgment was reserved until, on 16 December 2016, the husband sought leave to re-open the application for the purpose of adducing further evidence. This resulted in the husband swearing a further 110-paragraph affidavit on 4 January 2017. Another solicitor on behalf of the wife's solicitor replied to that in a 34-paragraph affidavit, sworn on the 23 January 2017. I held a further hearing on 11 January 2017, at the conclusion of which I ruled that it was appropriate to consider the further evidence adduced on affidavit by each side. That resulted in a further hearing to consider the submissions of the parties on that evidence on 2 February 2017, at the conclusion of which judgment was, once again, reserved.

35. On the second day of the original three-day hearing (which the parties had estimated would take one day), I alluded from memory to observations made by Denham CJ for the Supreme Court in *Talbot v Hermitage Golf Club & Ors* [2014] IESC 57 (Unreported, Supreme Court, 9th October, 2014) about the significant onus on the court to engage in effective judicial case management whenever appropriate and necessary.

36. Regrettably, that expression of concern did nothing to expedite the conduct of the application. It did elicit criticism from the husband in the affidavit that he subsequently swore on 4 January 2017 to the effect that in reiterating that allusion when refusing an application that the husband made on 22 April 2016 for the adjournment of each of the applications to await the outcome of his judicial review proceedings against the Legal Aid Board, I was by implication 'raising questions or possible concerns about the [husband's] credibility.'

37. It is perhaps important to record that, as I hope is self-evident, I was raising no such questions or concerns in invoking that authority. The passage from the judgment of Denham J. that I had in mind was the following one (at para. 12 *et seq*) in which, having described modern developments in England and Wales; in the jurisprudence of the European Court of Human Rights; and, indeed, in the jurisprudence of our courts, the Chief Justice continued:

> '12. We have now reached a position in Ireland where as Mr Justice Hardiman explained in *Cruise v Judge O'Donnell* [2007] IESC 67:
>
> > "We live in an era of case management, when a serious attempt is being made to deal with all litigation, civil or criminal, in an efficient manner."
>
> 13. The use of judicial case management is crucial to the effective conduct of litigation, including where litigants are unrepresented by lawyers. This approach helps to define the key issues and to clarify the responsibilities between the parties. It enables managed use of limited court resources. It can assist by making the case more understandable for all those concerned, and may facilitate an early settlement between the parties.
>
> 14. Further, case management assists a court in determining a case within a reasonable timeframe. This is important for all parties in an action."

38. That is what I was alluding to, and nothing else. As a melancholy aside, I note that, even before the turn of the present century, Denham J was reflecting, in *Cooke v Cronin* [1999] IESC 54 (Unreported, Supreme Court, 14th July, 1999), there is a 'need to consider developing a modern case management process for professional negligence cases.'

Analysis
(i) jurisdiction to strike out proceedings

39. Order 19, rule 28 of the RSC applies only where it is sought to strike out an entire pleading, such as a statement of claim and not part of a pleading – it is not a 'blue pencil' jurisdiction; *Aer Rianta cpt v Ryanair Ltd* [2004] 1 IR 506 at 509. That interpretation is consistent with a policy of cost effective litigation enabling matters to come with reasonable expedition before a trial court for consideration and contrary to costly lengthy litigation with multiple interlocutory motions; *ibid*, *per* Denham CJ (at 510-511).

40. The court must be slow to exercise its jurisdiction under O. 19, r. 28, although where it is convinced that a claim will fail that pleading will be struck out; *ibid* (at 509). An application under the rule is decided on the assumption that the statements in the relevant pleadings are true and will be proved at trial.

41. The jurisdiction under O. 19, r. 28 arises where a pleading discloses no reasonable cause of action or where an action is shown to be 'frivolous or vexatious'. As Barron J explained in *Farley v Ireland & Ors* (Unreported, Supreme Court, 1st May, 1997), when used in this context 'frivolous and vexatious' are legal terms and are not intended to be pejorative:

> '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 a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious.'

42. Quite apart from O. 19, r. 28, the court has an inherent jurisdiction to stay proceedings (or strike out an action) and, in considering its exercise, is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case; per Costello J in *Barry v Buckley* [1981] 1 I.R. 306 (at 308). Like the jurisdiction under O. 19, r. 28, it is one that should be 'exercised sparingly and only in clear cases'; *ibid*.

43. In the Supreme Court decision in *Lopes v Minister for Justice* [2014] 2 IR 301, Clarke J summarised the position in the following way (at 309):

> 'If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the court to prevent abuse can be invoked.'

44. Cases wholly or significantly dependent on the construction of documents may be more amenable than others to the exercise of the inherent jurisdiction to dismiss but, as Clarke J. pointed out in *Salthill Properties Ltd & Anor. v Royal Bank of Scotland plc & Ors* [2009] IEHC 207 (Unreported, High Court, 30th April, 2009) (at paras. 11 and 12), it is important to emphasise the different role that documents may play in proceedings. Some cases may turn exclusively on the construction of a written contract, whereas in others there may be a plethora of documents in the form of correspondence, minutes of meetings, memoranda and the like, capable – when proved in evidence - of throwing light on the testimony of witnesses and, hence, on disputed questions of fact but unlikely to determine any such question solely by reference to their own contents. As Clarke J explained (at para. 12):

> 'Contemporary documentation is often a very valuable guide to such facts, buts such documentation is not necessarily determinative. It is important, in that context, not to confuse cases which are dependent on documents themselves with cases where documents may be a guide, albeit often most important guide, to the underlying facts which need to be determined in order to resolve the issues between the parties.'

45. In the present application, neither the judicial separation agreement nor the Dublin Circuit Family Court Order, under which it was made a rule of court, have been produced in evidence. Thus, whether the construction of either of those documents is capable of resolving the issues that arose concerning the asserted entitlement of the wife's solicitor to withhold payment of the €50,000 due to the husband under that agreement for approximately three years, I do not know. It seems innately unlikely, in circumstances where the position adopted by the wife's solicitor (in the affidavit that he swore on 6 October 2015) is that: (a) he was entitled to withhold that payment until all of the terms of the separation agreement had been complied with by the husband; and (b) that the husband had failed to comply with two separate obligations under that agreement. Accordingly, even if the wife's solicitor is correct about the proper construction of the separation agreement, it will still be necessary to establish that the husband failed to comply with his obligations under it, if the ultimate issue is to be resolved in favour of the former.

46. In *Fay v Tegral Pipes Ltd* [2005] 2 IR 261, the Supreme Court (McCracken J, Denham and Geoghegan JJ concurring) explained that the real purpose of both the inherent jurisdiction to strike out proceedings and the jurisdiction to do so under O. 19, r. 28 of the RSC is to ensure that there will not be an abuse of the process of the courts. McCracken J continued (at 266):

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

47. I am satisfied that this is not a case in which it would be appropriate to exercise either the court's jurisdiction under O. 19, r. 28 to strike out the husband's statement of claim or its inherent jurisdiction to stay the action on the grounds that it is bound to fail.

48. That is because of the issue identified at paragraphs 20 to 49 of the statement of claim, in which it is alleged, albeit without anything approaching the clarity or concision that might be considered desirable, that the wife's solicitor is liable to the husband in negligence in not making payment for approximately three years of the €50,000 that was under his control and to which the husband was entitled under the separation agreement and Order of the Circuit Court.

(ii) jurisdiction to strike out any matter in a pleading

49. Order 19, rule 27 of the RSC provides that the court may, at any stage of the proceedings, order to be struck out any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action.

50. In *Doherty v Minister for Justice, Equality and Law Reform* [2009] IEHC 246 (Unreported, High Court, 15th May, 2009), McGovern J observed (at para. 14):

> 'Where the extent of the scandalous or vexatious pleading is sufficiently gross and extensive, it seems to me that it is not the function of the court to sift through the material in the statement of claim to see if, perhaps, somewhere within it, a claim can be found in the proper form. The court is entitled to have regard to the document as a whole. There might well be cases where there is an isolated pleading here or there which may be scandalous or vexatious, but the greater part of the document contains pleadings in the proper form. In those cases, the courts can strike out the offending portions of the pleadings.'

51. I conclude that, while the husband's statement of claim contains a number of vexatious pleas that would tend to embarrass or delay the fair trial of the action, they are not so gross and extensive to make it impossible or impractical to strike each out in isolation.

(iii) a solicitor owes no duty of care to his client's opponent in contentious matters

52. In *J. O'N. v S. McD. & Ors*, already cited, Birmingham J noted that the relevant defendant in that case, who was the solicitor to the wife in family law proceedings, 'did not owe a duty of care to the husband who was not her client, but an opposing party.' Birmingham J cited with approval the following passage from the judgment of Lord Donaldson M.R. for the England and Wales Court of Appeal in *Al-Kandari v J. R. Brown & Co* [1988] 1 Q.B. 665 (at 672A):

> '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 client's opponent: *Business Computers International Ltd v Registrar of Companies* [1987] 3 W.L.R. 1134.
>
> …
>
> I would go rather further and say that, 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: *Rondel v Worsley* [1969] 1 A.C. 191.'

53. In the same case, Bingham LJ put the matter in the following way (at 675F):

> 'In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary. The theory underlying such litigation is that justice is best done if each party, separately and independently advised, attempts within the limits of the law and propriety and good practice to achieve the best result for himself that he reasonably can without regard to the interests of the other party. The duty of the solicitor, within the same limits, is to assist his client in that endeavour, although the wise solicitor may often advise that the best result will involve an element of compromise or give and take or horse trading. Ordinarily, however, in contested civil litigation a solicitor's concern is to do what's best for his client without regard to the interests of his opponent.'

(iv) assumption of obligations that give rise to a duty of care towards third parties

54. However, Lord Donaldson went on to observe that, in the unusual circumstances of that case, where a firm of solicitors had agreed to hold the husband's passport to the order of the court on which the names of the parties' children were also included, a duty arose on its part to avoid acts or omissions which it could reasonably foresee would be likely to injure the rights and interests of the plaintiff wife.

55. In the words of Bingham LJ (at 675E):

> 'A solicitor owes a duty of care to his client. If the client intends to confer a benefit on a third party, the solicitor may owe a duty to the third party to take reasonable care to see that effect is given to the client's intentions. The solicitor is subject to an enforceable obligation to observe the professional standards binding upon him as a solicitor and an officer of the court. He is liable in contempt if he breaks an undertaking given by him to the court or knowingly procures or connives at a breach by his client of an undertaking given by his client.'

(v) arguable assumption of a duty of care

56. Because it seems to me arguable that a similar duty of care arose in this case in relation to the payment to the husband of the €50,000 in the client account of the wife's solicitor (and I say no more than that), the plea of negligence and breach of duty arising from what is alleged at paragraphs 20 to 49 of the statement of claim must survive an application to strike it out as one that is bound to fail.

57. Before leaving this point, I should note that, in the submissions made on his behalf, the wife's solicitor contends that any such negligence or breach of duty claim against him is bound to fail because the husband had the opportunity to take the matter up in the Dublin Circuit Family Court either by invoking the liberty to apply granted under the judicial separation Order or by raising it in the course of the subsequent divorce proceedings. In respect of the latter, the wife's solicitor points to the requirement of s. 20(3) of the Family Law (Divorce) Act 1996, whereby, in considering the appropriate ancillary orders in divorce proceedings, the court must have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.

58. Quite how the obligation upon the court considering the appropriate ancillary orders in the divorce proceedings to have regard to the terms of the judicial separation agreement might negate, or render nugatory, the husband's claim that the wife's solicitor was negligent in withholding the payment of €50,000 due to him under that agreement is, I must confess, not clear to me. But the resolution of any such issue will have to await the trial of the action because I am certainly not satisfied on the basis of the arguments so far advanced and the limited evidence before me that the husband's claim is bound to fail on that basis.

(vi) protection under the general rule

59. The same cannot be said of much of the remainder of the statement of claim. In particular, I am satisfied that those pleas which allege negligence or negligent misrepresentation, in the manner in which the wife's solicitor represented her position at the settlement negotiations on 7 November 2014 (at paragraphs 16 and 17 of the statement of claim) and those which allege negligence in the manner in which he drafted the separation agreement and represented the wife's position before the court on 22 February 2012 (at paragraphs 18 and 19) are squarely captured by the general rule that a solicitor acting for a party who is engaged in adversarial litigation owes no duty to his client's opponent.

60. For that reason, it does seem to me appropriate to strike out those pleas in the exercise of the broad discretion conferred upon me under O. 19, r. 27 as, should I forebear to do so, it would tend to embarrass, or delay the fair trial of the action.

(vii) multiple allegations of fraud

61. Further, it seems to me that the husband's allegations of fraudulent (as opposed to negligent) misrepresentation and of deceit or fraud, though not on the scale of those of the plaintiff in *Kearney v K.B.C. Bank Ireland plc & Anor*. [2014] IEHC 260 (Unreported, High Court (Birmingham J), 16th May, 2014), are allegations of the utmost gravity that are repeated in several different contexts throughout the statement of claim.

(viii) pleading fraud

62. In *Keaney v Sullivan & Ors* [2007] IEHC 8 (Unreported, High Court, 16th January, 2007) Finlay Geoghegan J had to consider an application for an order pursuant to the inherent jurisdiction of the court striking out almost all of the claims of fraud, deceit, misrepresentation and/or undue influence against certain of the defendants in that case by reason of the failure of the statement of claim to particularise the allegations as required by O. 19, r. 5(2) of the RSC.

63. Order 19, rule 5(2) provides:

> '(2) In all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings.'

64. The Court adopted the following passage from Delany and McGrath, *Civil Procedure in the Superior Courts,* 2nd ed. (at paras. 5.38 and 5.39) – now paras. 5.74 to 5.76 of the 3rd ed. - as correctly summarising the law in relation to allegations of fraud:

> **'5-74** The long established practice of the courts has been to require allegations of fraud to be pleaded with particularity. Rule 5(2) now provides that, in all cases alleging misrepresentation, fraud, breach of trust, wilful or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) must be set out in the pleadings. The rationale of this requirement was explained by Barrington J in *Hanly v Finnerty* [1981] ILRM 198 in relation to a plea of undue influence as follows:
>
> > "Undue influence is a plea similar to fraud and it appears to me that it would be quite unfair to require a party against whom a plea of undue influence is made to go into court without any inkling of the allegations of fact on which the plea of undue influence rests. Because of the seriousness of the plea counsel will not lightly put his name to a plea of undue influence so that his solicitor will usually have in his possession some allegations of fact which justify the raising of the plea or at least excuse the plea from being irresponsible."
>
> **5-75** Thus a party is not only required to expressly plead fraud or misrepresentation *etc*., but he must also give full particulars of how it is alleged to have occurred.
>
> …
>
> **5-76** It should be noted that, given the difficulty of proving fraudulent intention, malice or any other condition of the mind (which is often a matter of inference to be drawn from the proven facts), Order 19, rule 22 provides that it suffices to allege this as a fact without setting out the circumstances from which it is to be inferred.'

65. Finlay Geoghegan J also endorsed as a correct statement of the law in Ireland, the following extract from Bullen and Leake and Jacob's *Precedents of Pleading* (12th ed., 1975) (at 452-3) on the equivalent English rule of court:

> 'The statement of claim must contain precise and full allegations of fact and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of (see *Lawrance v Lord Norreys* (1890) 15 App Case 201 at 221). It is not allowable to leave fraud to be inferred form the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy v Garrett* (1878) 7 Ch D 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice"…
>
> …
>
> Moreover, the necessary particulars of the fraudulent intention relied upon must also be contained in the pleading (R.S.C., Ord. 18, r. 12(1)(b), and accordingly, the pleadings must set out the facts, matters and circumstances relied on to show that the party charged had or was activated by a fraudulent intention.'

(ix) unsustainable pleas of fraud

66. In the present case, as I have already noted, the husband asserts that the wife's solicitor is liable for negligent misstatement in making various assertions of fact on the wife's behalf, both in the course of the settlement negotiations that led up to the separation agreement and at the hearing of the judicial separation proceedings that resulted in an Order granting a judicial separation and making the terms of the separation agreement a rule of court. At paragraphs 16, 17 and 19 of his statement of claim, the husband asserts that these representations were negligent or, in the alternative, fraudulent.

67. The husband faces two problems in advancing a claim of fraud in that regard. The first is that I have already decided that the relevant claims of negligent misrepresentation are caught by the rule of public policy that protects a solicitor involved in adversarial litigation from a claim in negligence by his client's opponent. It seems to me that to take an allegation of fraudulent misrepresentation in the same circumstances outside the scope of the same public policy rule, it would be necessary to identify some further or other element or elements to that claim, beyond the bald proposition that, if a solicitor's instructions turn out to be inaccurate, incomplete or incorrect in any material respect, then that solicitor is liable to his client's opponent for fraudulent misrepresentation in putting the relevant assertion forward in the course of negotiation or litigation.

68. The husband's second problem is that, if, on the other hand, his claim is that there is some additional element present in this case that would take it outside the scope of the rule, he has singularly failed to identify it, much less to particularise it in accordance with the more stringent requirements that apply to a plea of fraud.

69. For that reason, in the exercise of the broad discretion conferred on me under O. 19, r. 27 and of the inherent jurisdiction vested in me in to strike out any plea that fails to comply with the requirements of O. 19, r. 5(2), I would order that each of the pleas of fraudulent misrepresentation and fraud in paragraph 16, 17 and 19 of the statement of claim be struck out. As I have already decided that the pleas of negligence in paragraphs 16 to 20 inclusive must be struck out, this aspect of my determination really only means that those paragraphs must be struck out in their entirety and that no residual claim of fraudulent misrepresentation or fraud can be maintained in respect of the matters pleaded there.

70. Further, I am satisfied that the various pleas of 'fraudulent misrepresentation', 'fraudulent actions', 'fraudulent conveyance' and 'fraud' at paragraphs 27, 29, 38, 47, and 49 of the statement of claim have not been properly or adequately particularised in accordance with the procedural rules described above. For that reason and in the exercise of the same jurisdiction, I will direct that those pleas be struck out also, together with the reference to damages for 'fraudulent misstatement' and for 'fraud' in the prayer for relief at paragraph 67 of the statement of claim.

71. In conclusion on this point I should make it clear that, in accordance with the suggestion of Barton J in *O'Driscoll & Anor. v McDonald & Ors*. [2015] IEHC 100 (Unreported, High Court, 11th February 2015), I have not overlooked the desirability of affording some latitude to the husband as a litigant in person obliged to deal with matters of law, practice and procedure in the context of an application to strike out certain of his pleadings, if not his proceedings as a whole. Nor have I overlooked the importance of exercising great caution in considering any act restraining or limiting the citizen's right of access to the court in respect of any claim that he or she may wish to ventilate, as emphasised by Hanna J in *Talbot v McCann Fitzgerald & Ors* [2010] IEHC 383 (Unreported, High Court, 8th October, 2010).

72. But the exercise of the jurisdiction conferred under O. 19, r. 27 and of the inherent jurisdiction to restrain a breach of O. 19, r. 5(2) involves a rights-balancing exercise, whereby the court must also take into consideration the interests of a defendant who should not be forced to defend an allegation that is improperly brought or one that is bound to fail. Further, as Clarke J noted in *Burke*

v O'Halloran [2009] 3 IR 809 at 819, 'a party who chooses to represent him or herself is no less bound by the laws of evidence and procedure and any other relevant laws, and by the rulings of the court in that regard, than any other party.'

(x) reasonable grounds for instituting professional negligence proceedings?

73. The wife's solicitor submits that the husband's claims against him in negligence are unsustainable and should be struck out because the commencement of the action was not preceded by the procurement of an expert report confirming that there is, at least, a *prima facie* case in solicitor's professional negligence.

74. There is a line of authority, going back at least as far as the decision of Barr J in *Reidy v National Maternity Hospital* [1997] IEHC 143 (Unreported, High Court, 31st July, 1997) that it is irresponsible and an abuse of process to launch a professional negligence action without first ascertaining that there are reasonable grounds for doing so. That proposition was endorsed by Kelly J in *Connolly v Casey & Anor* [1998] IEHC 90 (Unreported, High Court, 12th June, 1998), before receiving its most authoritative restatement to date in the judgments of the Supreme Court (Lynch, Denham and Keane JJ) in *Cooke v Cronin*, already cited. In that case, Lynch J expressed the view that, in all cases of alleged negligence on the part of a qualified professional person in carrying out his professional duties, 'there should be some credible evidence to support the plaintiff's case before such an action is commenced.' Denham J adopted the 'reasonable grounds' formulation of Barr J, endorsed by Kelly J, in the cases cited above.

75. The need for credible evidence or reasonable grounds before the commencement of a professional negligence action is generally taken to mean, in practice, that an expert report confirming that there is at least a *prima facie* case that the particular professional has been negligent should be obtained prior to the institution of proceedings.

76. However, in *Murray v Budds* [2015] IECA 269 (Unreported, 19th November, 2015), the Court of Appeal (per Peart J, Finlay Geoghegan and Hogan JJ concurring) stated *obiter dicta* that it would have allowed an appeal against an Order striking out professional negligence proceedings against a solicitor on the ground that they had been launched without first ascertaining that there were reasonable grounds for doing so by obtaining appropriate evidence to support it. Peart J commented (at para. 33):

> 'In my view it is unnecessary now to dispose of that appeal, save to say 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.'

77. For his part, the husband relies upon a letter that he received from his solicitors (the husband's solicitors), dated 2 May 2014, in which, according to what was averred by the husband in an affidavit sworn on 8 July 2015, it was stated:

> 'In relation to the payment of the €50,000 sum to you…I confirm that we have raised the issue with [the wife's solicitor] that [his] client is in breach of the Court Order terms by not releasing the funds and it is open to you to instruct us to write a similar letter to that received from [the wife's solicitor] stating that you reserve your right to apply to the High Court to bring this matter to a conclusion.'

78. This, the husband contends, amounts to credible evidence or reasonable grounds (in the form of the opinion of the solicitors retained by him at the material time) that the wife's solicitor was in breach of the Circuit Court order that the relevant monies be paid and, by necessary implication, in breach of the duty to the husband, which he had assumed, to take reasonable care to see that effect was given to the wife's agreement to make that payment.

79. Finally, in this context, it seems to me that it must be appropriate to give the husband a limited degree of latitude as a litigant in person.

80. Thus, on the particular facts of this case and not without some hesitation, I have concluded that it would not be appropriate to dismiss as an abuse of process on this ground the husband's remaining claims in negligence against the wife's solicitor.

The *in camera* rule application

81. I have already noted that, by taking the unusual step of consulting the digital audio recording ('DAR'), I was able to confirm that Gilligan J had adjourned the husband's application against the husband's solicitors for various reliefs in respect of alleged breaches of the *in camera* rule in the 6262P action to the trial of that action, contrary to the husband's submission that it was properly before me for determination. The necessary and appropriate respect for the ruling of Gilligan J in those proceedings dictates that I should make a similar order concerning the husband's application for similar reliefs against the wife's solicitor in the 6263P action and that is what I will do.

82. As I do not accept that the alleged breaches of the *in camera* rule concerned are in any way directly relevant to the issues in the strike out application as I have identified them, I must refuse the husband's application for an order striking out that application on the basis of those alleged breaches of that rule.

83. As the husband confirmed during legal argument that the order that he seeks disallowing all of the legal costs incurred by the wife's solicitor to date is a consequential relief, contingent on establishing a breach or breaches of the *in camera* rule by the wife's solicitor, I must adjourn that application also to the trial of the 6263P action.

84. I must refuse the husband's application for discovery as it appears to me that it has not been brought in accordance with the appropriate rules of court and, in particular, that it has not been preceded by a letter containing a request for voluntary discovery in the manner or form prescribed by those rules. In ease of the husband's position, I wish to make it clear that I am dismissing his discovery application on a 'without prejudice' basis, by which I mean that I see no impediment to him bringing an application for the relevant discovery in future, as long as he does so promptly and in accordance with the rules.

The consolidation application

85. The final motion the subject of the present judgment is that which concerns the husband's application in the 6262P proceedings against the husband's solicitors for an order consolidating them with the 6263P proceedings against the wife's solicitor. The wife's solicitor is a notice party to that application.

86. The application is grounded on an affidavit apparently sworn by the husband on 31 July 2015 (the copy provided to the court was unsworn). The averments in it are not easy to follow. No explanation is provided for the husband's original decision to issue three separate sets of High Court proceedings before now moving to consolidate two of them.

87. The husband's solicitors support the husband's application in this regard. As presaged at paragraph 70 of the defence that they delivered on 20 February 2015, they wish to claim an indemnity or contribution against the wife's solicitor on the basis that any damage suffered by the husband was wholly caused or contributed to by the wrongful actions of the wife's solicitor in breach of agreement, negligence or breach of his duty as an officer of the court.

88. The wife's solicitor opposes the husband's consolidation application. It is submitted on his behalf that any commonality of questions of law is absent between the two actions because the 6262P action against the husband's solicitors is about breach of contract, whereas the 6263P action against the wife's solicitor is about breach of an undertaking.

89. The legal principles by reference to which an application for consolidation of actions must be considered are well-settled, having been set out by the Supreme Court (*per* McCarthy J) in *Duffy v News Group Newspapers* [1992] 2 I.R. 369 (at 376) in the form of the following three questions:

> '(1) Is there a common question of law or fact of sufficient importance?
>
> (2) Is there a substantial saving of expense or inconvenience?
>
> (3) Is there a likelihood of confusion or miscarriage of justice?'

90. Applying the test represented by those three questions, I have come to the following conclusions.

91. First, there is an obvious commonality of questions of fact between the two actions. Second, I am satisfied that there is a significant commonality of questions of law. In each action, an allegation of negligence is made against the solicitors or solicitor concerned regarding, amongst other matters, the circumstances in which payment of the €50,000 due to the husband under the judicial separation agreement was withheld, or allowed to be withheld, by the wife's solicitors for a considerable period of time. And in each action, the husband alleges that the defendants or defendant committed the tort of conspiracy against the husband by conspiring with the defendants or defendant in the other action to threaten or coerce him into taking certain steps ostensibly to comply with his obligations under the judicial separation agreement. I think it is fair to say that a more obvious common question of fact and law is difficult to imagine.

92. Addressing the third question next, I can identify no obvious likelihood of confusion or miscarriage of justice that would arise out of consolidating these two actions.

93. That brings me to the second question, which I have elected to address last. In doing so, I derive considerable assistance from the judgment of Quirke J in *Lismore Homes Ltd (In receivership) v Bank of Ireland Finance Ltd* [2006] IEHC 212 (Unreported, High Court, 30th June 2006). Just as in that case, there is no evidence before the court that consolidating the two actions concerned at this stage will effect a substantial saving of expense. And just as in that case, the consolidation of the two actions will not avoid unnecessary duplication in pleadings since the pleadings have already closed in each. Moreover, as Quirke J observed in that case, '[t]he delivery of new and consolidated pleadings is also likely to add to an already unacceptable delay in bringing the substantive issues … to trial.' There is no more apt final comment I can make on this point than the one Quirke J made in *Lismore Homes Ltd* when he added, '[i]t may also cause or add confusion to actions which are at present, far from ordered.'

94. I am satisfied, therefore, that these are not causes that should be consolidated in exercise of the jurisdiction to do so conferred on me under O. 49, 6 of the RSC.

95. The matter does not end there, however. As was the position in *Lismore Homes Ltd*, these are actions in which it is appropriate that the evidence be heard at the same time and I will order accordingly.

96. It is clear from the decision of Blayney J in *O'Neill v Ryanair Ltd* [1992] 1 IR 160 (at 163) that the court has the inherent jurisdiction to order that cases be heard simultaneously, which jurisdiction was recognised by Fitzgibbon J in *Malone v Great Northern Railway Co*. (Ir.); *Ennis & Ors v Same* [1931] IR 1. It is worth noting that *O'Neill v Ryanair* was another case involving two separate sets of proceedings alleging the same conspiracy.

97. On the level of more general principle, as Clarke J. observed, albeit in the context of the Commercial Court, in *Kalix Fund Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2010] 2 IR 581 (at 596):

> '[T]he court has an inherent jurisdiction to manage the conduct of a series of cases which are connected by reason of having significant factual or legal overlap for the purposes, in the words of Kelly J in *Re Norton Healthcare Ltd* [2005] IEHC 441, [2006] 3 IR 321, of bringing about "a just and expeditious trial whilst seeking to minimise costs" (at p. 331). Applied to a number of cases, the obligation is to ensure that each party to each of the cases, nonetheless will achieve, as best as can be done, a just and expeditious trial, but also that, across the range of cases, costs be minimised and scarce court resources not be wasted.'

Conclusion

98. I will hear the parties concerning the appropriate form of order required to reflect the findings I have made.