

**THE HIGH COURT**

**[2010 No. 10487 P]**

**BETWEEN**

**SEAN McANDREW**

**PLAINTIFF**

**AND**

**PETER WEST AND SHIREEN WEST AND PATRICK O'CONNOR, ANNE LEONARD AND SAMANTHA GERAGHTY PRACTISING UNDER  
THE TITLE AND STYLE OF P. O'CONNOR AND SON SOLICITORS**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Noonan delivered the 23rd day of April, 2015.**

**Introduction**

1. In the within motion, the defendants seek an order pursuant to Order 19, rule 28 of the Rules of the Superior Courts striking out the plaintiff's claim on the grounds that it discloses no reasonable cause of action and/or is frivolous and vexatious. In the alternative, an order is sought pursuant to the inherent jurisdiction of the court dismissing the claim on the grounds that it is bound to fail.

**Background Facts**

2. This matter originally arises out of the construction of a dwelling house at Castle Hill, Ballina, County Mayo. The plaintiff ("Mr. McAndrew") is a farmer and building contractor. The first and second defendants ("Mr. and Mrs. West") were a married couple but unfortunately Mr. West recently died on the 5th of August, 2014. The third, fourth and fifth defendants are a firm of solicitors ("Messrs O'Connor"), who at all material times represented Mr. and Mrs. West.

3. On the 23rd of December, 2003, Mr. McAndrew entered into a contract for sale and building agreement with Mr. and Mrs. West, whereby he agreed to sell a plot of land to the Wests upon which he was to construct a dwelling house. A deed of transfer was executed on the 13th of February, 2004, whereby the lands in question were conveyed to Mr. and Mrs. West. At that time, the Wests had different solicitors but Messrs O'Connor became their solicitors as of February, 2005.

4. As sometimes occurs, a dispute arose between the parties in relation to the construction of the house. Mr. and Mrs. West had various complaints about the manner in which the works were done and Mr. McAndrew claimed he was owed money. Ultimately, the matter went to arbitration. An arbitrator was appointed and both sides were represented by solicitors and counsel. The matter was settled and the arbitrator made a consent award on the 20th of June, 2006. It recorded that the Wests were entitled to possession of the relevant property being the property comprised in Folio 45873F County Mayo and that Mr. McAndrew would make a contribution of €10,000 including VAT towards the legal costs of the Wests. The consent was stated to be in full and final settlement of all issues between the parties in relation to the property.

5. Mr. McAndrew did not comply with the award and later that year, Mr. and Mrs. West instituted proceedings in the Circuit Court against Mr. McAndrew seeking enforcement of the arbitrator's award. A default judgment was ultimately obtained on the 10th of December, 2007. The plaintiff thereafter brought a motion to set aside the judgment but did not appear at the hearing. Various steps were taken by Mr. and Mrs. West to enforce the judgment. A judgment mortgage was registered over various properties owned by Mr. McAndrew and an instalment order was obtained against him in the District Court. The Wests obtained a garnishee order against the Department of Agriculture in relation to payments due by the Department to Mr. McAndrew. The grounding affidavit avers that there is currently a sum of €19,019 due by Mr. McAndrew to the Wests.

6. During the course of 2005, before the arbitration took place, the Wests alleged that they were threatened by the plaintiff and his son at the property arising out of the dispute. At this stage, Mr. and Mrs. West had moved into the house but Mr. McAndrew disputed their entitlement to do so on the basis that although he had conveyed the property to Mr. and Mrs. West on foot of the deed of transfer, the house remained his until the money he considered to be owed to him was paid. As I have said, that issue was subsequently resolved in 2006.

7. However, arising from the alleged intimidation by Mr. McAndrew and his son towards the Wests, they instructed Messrs O'Connor to write to the solicitors who, at that time, were on record for Mr. McAndrew. Those solicitors, Messrs Egan, Daugherty and Company, were written to by Messrs O'Connor on the 13th of May, 2005 in a letter which included the following:

"We have now been advised by our clients that your client has attended the property in possession of firearms and has used force and intimidation against our clients. Furthermore, your client attended the property on Friday last and attempted to bury the individual who was installing a water connection. This behaviour cannot be allowed to continue and we confirm that we now have instructions to apply for an injunction against your client."

8. A second letter was written on the 11th of July, 2005 by Messrs O'Connor to the same solicitors:

"We refer to the above matter and it is with dismay that we find ourselves corresponding with you again in relation to the behaviour of your client.

We are instructed that your client has, once again, threatened one of our clients' witnesses, namely a Mr. Cathal Fetan, who provided sewage containers to our client.

We write to ask you to inform your client that his behaviour will not be tolerated any further. Your client can rest assured that these arbitration proceedings will go ahead and will not be delayed or interfered with any further by your client's behaviour.

In anticipation of your reply that 'you are again totally misinstructed by your clients', please note that all of the people contacted by your client in relation to this matter are willing to testify in open court as to the threatening and harassment suffered by them."

9. On the 15th of November, 2010, Mr. McAndrew issued a plenary summons in the within proceedings claiming damages for defamation and for wrongfully taking possession of the property in issue. In his statement of claim, Mr. McAndrew alleges that on the 12th of May, 2005, the Wests unlawfully entered the property, thereby occasioning loss and damage to him. In effect, this amounts to a claim in trespass.

10. Mr. McAndrew goes on to allege that the two letters above referred to are defamatory of him and he seeks damages. He also alleges that Messrs O'Connor negligently caused irreparable damage to him by failing to verify their instructions, although in effect this is the same claim as the claim for defamation. No particulars of any loss have been given by Mr. McAndrew either in his statement of claim or his subsequent reply of the 1st of July, 2011 to the defendants' notice for particulars.

11. In their defence, the defendants plead that the statement of claim does not disclose any reasonable cause of action. As well as generally traversing the plaintiff's claim, the defence pleads the facts I have referred to above. In relation to the defamation claim, there is a plea of justification with an alternative plea of qualified privilege of which particulars are given.

12. Mr. McAndrew has sworn three affidavits in reply to the defendant's affidavits grounding this application. In those affidavits, he makes a number of wide ranging and extremely serious allegations against a number of parties including the defendants. I do not propose to set out an exhaustive list of these but rather refer to some of the more striking allegations. Mr. McAndrew accuses both firms of solicitors involved in the original building agreement of negligence in failing to amend the agreement to take account of additional works he had to do. Messrs O'Connor were not involved at that time. He acknowledges that the land in question was in the legal ownership of the Wests but says that the house was in his legal ownership while he was owed money pointing to a fundamental misunderstanding of the legal concept of ownership of real property. In relation to the arbitration, Mr. McAndrew says that he was deliberately misled as a result of collusion between the solicitors and other parties who benefited financially from a deception. He says he was duped into signing the arbitration settlement agreement as a result of verbal misrepresentation by his own solicitor to him. He claims he did not read the agreement before he signed it. He claims it was predicated on a series of frauds in particular by the defence solicitors, Messrs O'Connor, who fraudulently deprived him of substantial monies. He accuses the defendants of misleading the court in their affidavits and of an abuse of process.

13. In his second affidavit, Mr. McAndrew continues the same theme accusing Messrs O'Connor of deliberate deceit for the purpose of defrauding Mr. McAndrew and deliberately misleading the court. He accuses the defence of various forms of legal trickery to forestall, obstruct or prevent the fair and proper progress of the case. In short, it is difficult to imagine a more serious litany of allegations against any solicitor.

14. The same approach continues in Mr. McAndrew's final affidavit sworn on the morning of the hearing. In this, he accuses an engineer retained by the Wests of producing an utterly fraudulent report. He accuses an electrical engineer of producing a contrived report. He says that a plasterer produces a fraudulent estimate of work to be done. He says that when he signed the consent arbitration settlement agreement, rather than him having to pay €10,000, he understood that he was going to receive €35,000 as a result of what his solicitor told him.

### **The Relevant Legal Principles**

15. It is well settled that quite apart from the power conferred by Order 19, rule 28, the court has an inherent jurisdiction to strike out or stay proceedings that are either frivolous or vexatious or bound to fail – see *Barry v. Buckley* [1981] I.R. 306. It seems to me that this is not a case in which the jurisdiction conferred by Order 19, rule 28 arises. That is confined to cases where, on the face of the pleadings, even if the facts alleged are made out, they do not amount to a sustainable cause of action. In the present case, two causes of action are pleaded; one in trespass and one in defamation. It cannot be said from a perusal of the statement of claim that on its face, no cause of action in trespass is demonstrated. Mr. McAndrew alleges that the Wests entered his property unlawfully and if that were so, it would amount to trespass.

16. It is also true to say that the matters referred to in the two letters from Messrs O'Connor are certainly capable of being defamatory if they are untrue. Here again, it seems to me that it could not be said that the statement of claim discloses no cause of action.

17. The real case made by the defendants is that on the undisputed facts as they emerge from the affidavits, the plaintiff's claim is bound to fail. In *Riordan v. Ireland* (No. 5) [2001] 4 I.R. 463, the High Court identified a number of factors which might be taken to indicate that proceedings were vexatious. These included:

- (a) the bringing up on one or 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 person can reasonably expect to obtain relief;
- (c) where the 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 decisions.

18. In the present case, it will be seen that many of the features referred to above are present including the fact that many costs orders have been made against Mr. McAndrew, both in these proceedings and elsewhere, none of which have been satisfied. In *O'Siodhacháin v. O'Mahony* (Unreported, Supreme Court, 7th December, 2001) the Supreme Court considered that making serious allegations against a party without any or any adequate foundation may be regarded as an abuse of process in itself.

### **Analysis**

19. With regard first to the claim for trespass, Mr. McAndrew alleges that this occurred on the 12th of May, 2005. The evidence before the court on affidavit shows conclusively that the property was conveyed to the Wests on the 13th of February, 2004. Mr. McAndrew concedes this and alleges no infirmity in the deed of transfer. Rather, he says that whilst the land was conveyed, the house was not. This is an unstatable proposition. Since at the time of the alleged trespass, the property was clearly owned by the Wests and Mr. McAndrew had no interest therein, it is absolutely clear that this claim is unsustainable and must fail.

20. Turning to the defamation claim, whilst justification is pleaded, it seems to me that for the purpose of this application, I must assume that the plaintiff has some prospect of establishing at trial that the allegedly defamatory allegations are not in fact true.

21. However, the defendants have pleaded qualified privilege and particularised same in their defence. The defamation allegation is made against Messrs O'Connor by the publication of the letters complained of to Mr. McAndrew's solicitors. It is not suggested that Messrs O'Connor were not acting on instructions when they wrote these letters. In fact, the converse is alleged. There is no doubt that they were under a professional duty to act on foot of those instructions when they wrote the letters. Similarly, there is no doubt that Mr. McAndrew's solicitors had a corresponding duty and interest in receiving the communication insofar as they represented him in relation to the dispute which gave rise to the allegations and the subsequent arbitration.

22. Accordingly, there can be no doubt that the letters in question were written on an occasion of qualified privilege. A defence of qualified privilege can only be overcome if the plaintiff establishes malice in the legal sense. The burden of proving such malice rests on the plaintiff and it is a significant burden. The plaintiff has to establish that the letters were written for an improper motive and/or out of ill will towards the plaintiff. There is absolutely no evidence of malice in this case. Indeed, in the normal way where qualified privilege is claimed, it is a matter for the plaintiff to join issue with that plea by way of a reply pleading malice and giving detailed particulars of same. No such pleading has been furnished by the plaintiff in this case, nor has any credible suggestion been made of an improper motive on the part of Messrs O'Connor.

23. In those circumstances, in my view the plaintiff's defamation claim is bound to fail irrespective of the truth or otherwise of the allegations made.

24. It seems to me that the reality of this case is that Mr. McAndrew is seeking to revisit issues that have already been conclusively determined many years ago. Any complaints Mr. McAndrew may have regarding how that determination was arrived at are not matters that can be agitated against these defendants. It would be quite unjust to the defendants to require them to incur the very considerable cost of defending to trial a claim that cannot succeed, particularly where there is little prospect of recovering costs from Mr. McAndrew.

25. Accordingly, I will dismiss the plaintiff's claim.