THE COURT OF APPEAL

[2018] IECA 64

[Appeal No. 2016:339]

DUNNE J.
MAHON J.
HEDIGAN J.

BETWEEN:

JERRY BEADES

PLAINTIFF/APPELLANT

AND

IRELAND, THE ATTORNEY GENERAL, JUDICIAL APPOINTMENTS ADVISORY BOARD AND THE MINISTER FOR JUSTICE AND EQUALITY

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Dunne delivered the 14th day of March 2018.

This is an appeal from a decision of the High Court (Haughton J.) of the 3rd June, 2016, in which he concluded that the proceedings herein should be dismissed pursuant to Order 19, rule 28 of the Rules of the Superior Courts (hereinafter referred to as the RSC) or alternatively pursuant to the inherent jurisdiction of the Court striking out the plenary summons and the statement of claim on the grounds that they disclose no reasonable cause of action and/or are frivolous or vexatious and on the grounds that the proceedings are bound to fail and constitute an abuse of process.

Jurisdiction to strike out
The courts have the power, pursuant to Order 19, rule 28 of the RSC and their inherent jurisdiction, to strike out proceedings where they can be shown to be unsustainable, frivolous or vexatious.

Order 19, rule 28 of the RSC provides:

> "The Court may order any pleading 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."

In addition to the power of the Court to stay proceedings on the basis that they are frivolous or vexatious, the Court has an inherent jurisdiction to make an order to similar effect.

The difference between the terms frivolous and vexatious is somewhat nuanced. The *Concise Oxford English Dictionary*, 10th Ed., (Oxford, 1999) defines the word frivolous as:

> "Not having any serious purpose or value . . . carefree and superficial."

It defines vexatious as:

> "(1) Causing annoyance or worry.
>
> (2) *Law* (of an action) Brought without sufficient grounds for winning, purely to cause annoyance to the defendant."

In *Farley v. Ireland* (Unreported, Supreme Court, 1st May, 1997), Barron J. stated:

> ". . . if [a plaintiff] 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."

The fact that the Court has an inherent jurisdiction to make a similar order to that provided for in Order 19, rule 28 of the RSC is specifically referred to by Costello J. in *Barry v. Buckley* [1981] I.R. 306. The subject matter of that case was the defendant's application to stay the plaintiff's action and vacate a *lis pendens* in relation to a dispute arising from a claimed offer by the plaintiff to purchase land from the defendant. In the course of his judgment, Costello J. stated:

> "But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see *Wylie's Judicature Acts* (1906) at pp. 34-37 and *The Supreme Court Practice* (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* at p. 765.
>
> This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If,

having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant. . . ."

The remarks of Costello J. in *Barry* were, in effect, adopted and followed by the Supreme Court in *Lopes v. The Minister for Justice, Equality and Law Reform* [2014] 2 I.R. 301. It is useful at this juncture to quote a number of extracts from the judgment of Clarke J. (as he then was) in *Lopes*, namely:

> "Against that background, it is important to distinguish between the jurisdiction which arises under O. 19, r. 28 of the RSC and the inherent jurisdiction often invoked. The inherent jurisdiction can be traced back to the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306 . However, that jurisdiction needs to be carefully distinguished from the jurisdiction which arises under the RSC, precisely because it would be inappropriate to invoke the inherent jurisdiction of the court in circumstances governed by the RSC."

And:

> "17. . . . An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in *Barry v. Buckley* [1981] I.R. 306 , an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. 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.
>
> 18. It is important to keep that distinction in mind. It is also important to note the many cases in which it has been made clear that the inherent jurisdiction of the court should be sparingly exercised. This was initially recognised by Costello J. in *Barry v. Buckley* [1981] I.R. 306 and by the Supreme Court in *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 . In the latter case, McCarthy J. stated at p. 428 that '[g]enerally, the High Court should be slow to entertain an application of this kind'. This point has been reiterated more recently in *Kenny v. Trinity College Dublin* [2008] IESC 18 , (Unreported, Supreme Court, 10th April, 2008) at para. 35 and in *Ewing v. Ireland* [2013] IESC 44 , (Unreported, Supreme Court, 11th October, 2013) at para. 27.
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> 19. . . . In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan v. Osseous Ltd.* [1992] I.R. 425 , at p. 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance."

And finally:

> "23. On the other hand, so far as the inherent jurisdiction of the court to protect against abuse of process is concerned, the court can at least consider whether there is a credible basis for suggesting that Mr. Lopes might be able to establish the facts which he asserts. If there is no such basis, then these proceedings are bound to fail and their maintenance must, therefore, be an abuse of process, such that the proceedings ought now be dismissed. . . "

Those principles have to be borne in mind in considering this appeal.

The pleadings

The reliefs sought by the plaintiff in the plenary summons issued on the 17th December, 2015, are as follows:

> "(1) an order compelling the defendants and each of them singly and collectively to adhere to the provisions under the Irish Constitution and the Courts and Court Officers Act, 1995;
>
> (2) a declaration that nominee, Peter Kelly, as publicly published for the post of President of the High Court is unsuitable and an unfit person for the position;
>
> (3) a declaration that Peter Kelly does not comply with s. 16(7)(b) of the Courts and Court Officers Act, 1995. (Particulars are set out in the general endorsement of claim in support of this relief).
>
> (4) an order compelling the first and second named defendants to set up a Judicial Council to regulate the judiciary as is commonly required in other common law jurisdictions to protect the citizens of the State and in further compliance with obligations under Article 6 of the European Convention;
>
> (5) Failure to comply with the specific statutory requirements under the Courts and Court Officers Act 1995;
>
> (6) such further and other [relief] as this Honourable Court shall deem necessary (if it can) ; and
>
> (7) costs."

The statement of claim was then delivered by the plaintiff on the 29th January, 2016, and is summarised in the judgment of the learned trial judge as follows (see para. 12):

> "The following is a summary of the claims made by the plaintiff in his statement of claim:-
>
> (i) That the plaintiff, as a citizen, has an entitlement that the Government's executive function in relation to the appointment of judges be exercised without risking due process, integrity or imperilling justice.
>
> (ii) That the Government fails in its duty if it knowingly or carelessly nominates as a judge a person who falls short

of the 'model judge' described in a passage by an 'Israeli Chief Justice set out in Schedule A.' It is claimed that Kelly J. 'does not measure up to that model and yet the Government knowingly nominated him pursuant to Article 13.11 of the Constitution'…

(iii) That a failure by Government to assess on any basis the suitability of a nominee 'may jeopardise justice' and is actionable as a breach of constitutional rights – even if the person nominated is suitable. It is similarly a breach for the Government to knowingly nominate a person who is unsuitable. It is no answer to such a claim that an unsuitable judge may subsequently be impeached under the Constitution.

(iv) That an express duty to ensure compliance with the European Convention on Human Rights is imposed on the defendants by virtue of s. 3(1) of the European Convention on Human Rights Act, 2003, … and that the defendants failed to comply with the European Convention on Human Rights.

(v) That as a judge of the Court of Appeal, Kelly J. was not eligible or qualified to be appointed as President of the High Court under the Courts and Court Officers Act 1995, as amended ("the 1995 Act").

(vi) That as the 1995 Act governs procedures for judicial appointments, the expected vacancy was not the subject of advertisement or consideration by the Judicial Appointments Advisory Board ("JAAB"), and no list of names was submitted to the Government, the nomination of Kelly J. was premature and contrary to the provisions of the 1995 Act.

(vii) That although the Government may nominate a sitting judge whose name has not been listed by the JAAB, the decision to nominate an unlisted person can only be valid after the Government has duly considered the listed persons and has decided to appoint none of these and that a JAAB recommendation can only be rejected if there is evidence that the persons selected are not suitable for office or not the best candidates on merit.

(viii) That the decision to nominate is a statutory decision which must be reasonably exercised only after due diligence and after JAAB 'peer review', and the Government decision failed to meet the standard of reasonableness required in judicial review.

(ix) That the Government unlawfully delegated the performance of its duty to the Attorney General or the Minister for Justice and Equality.

(x) That the intention to decide to nominate Kelly J. was announced publicly a week before the decision to nominate him was made.

(xi) That Kelly J. was not a suitable candidate for nomination as President of the High Court, or alternatively, if the facts as to suitability were not known to the Government, then the Government erred in its discretion to nominate him. In relation to this allegation, the plaintiff details eight matters which he alleges rendered the nomination unsuitable. The plaintiff adds to this the five further matters pleaded at paras 16 to 19 in his Statement of Claim, and relies upon further alleged 'practices' set out in para. 19.

(xii) At para. 15 the plaintiff claims exemplary damages arising out of the claimed commencement of the injunction hearing before Baker J. and its resumption and conclusion before Gilligan J., and pleads that any application to strike out his claim as unstateable or vexatious would be an abuse of the process and deny him his constitutional right of access to the courts.

(xiii) At para. 20 of the Statement of Claim, the plaintiff refers to the 'Judges Association', … and asserts that it has failed to adopt 'the relevant sections of the Bang[a]lore Principles' that he alleges would create clear separation between the Irish judiciary and financial institutions."

The learned trial judge then went on to set out the reliefs claimed by the plaintiff in the statement of claim, namely:

"(a) An order quashing the Government's nomination of Peter Kelly as President of the High Court;

(b) A declaration that Peter Kelly has not been validly appointed and is not the President of the High Court not being a fit and proper person;

(c) Nominal damages for breach of the plaintiff's constitutional rights;

(d) Exemplary damages;

(e) Other order; and

(f) Costs."

In summarizing the pleadings as set out above, the learned trial judge noted that the plenary summons and statement of claim were prepared by a lay person and without the precision that would be expected of lawyers and he expressly stated that he took that fact into account.

The learned trial judge also set out certain factual matters, namely that Kelly J. was appointed an ordinary judge of the High Court in 1996. In 2014 upon the establishment of the Court of Appeal, he was appointed an ordinary judge of the Court of Appeal and he served in that capacity until his appointment as President of the High Court. On 15th December, 2015, the Government nominated Kelly J. for appointment as President of the High Court. Pursuant to that nomination, the President of Ireland appointed Kelly J. President of the High Court on 21st December, 2015. For ease of reference, I shall refer to the President of the High Court as "Kelly J." in the course of this judgment.

Legal provisions relating to the appointment of Judges

At this point it would be useful to refer to certain provisions of the Constitution and the Courts and Court Officers Act 1995 ("the Act of 1995") before proceeding further. Article 35.1 of the Constitution provides:

> "The judges of the Supreme Court, the Court of Appeal, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President."

Thus it can be seen that the position is that judges are appointed by the President. Article 13.9 of the Constitution is also of importance in that it provides as follows:

> "The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body."

It is also relevant to note the provisions of Article 35.4.1° of the Constitution which is to the following effect:

> "A judge of the Supreme Court, the Court of Appeal or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal."

In addition to the various constitutional provisions referred to above, it is necessary to refer to a number of provisions of the Act of 1995 (as amended).

Part IV of the Act deals with the subject of judicial appointments. The interpretation section, s. 12, defines "judicial office" as follows:

> "[A]n office being the office of ordinary judge of the Supreme Court, ordinary judge of the Court of Appeal, ordinary judge of the High Court, ordinary judge of the Circuit Court, specialist judge of the Circuit Court, or judge of the District Court (other than the President of the District Court)."

Section 16(1) provides:

> "A person who wishes to be considered for appointment to judicial office shall so inform the Board in writing and shall provide the Board with such information as it may require to enable it to consider the suitability of that person for judicial office, including information relating to education, professional qualifications, experience and character."

Section 16(6) provides:

> "In advising the President in relation to the appointment of a person to a judicial office the Government shall firstly consider for appointment those persons whose names have been recommended to the Minister pursuant to this section."

Section 17 provides:

> "Where the Government proposes to advise the President to appoint to judicial office a person who is for the time being -
>
> (a) a judge of the Court of Appeal,
>
> (b) a judge of the High Court,
>
> (c) a judge or specialist judge of the Circuit Court, or
>
> (d) a judge of the District Court,
>
> or who is eligible for appointment to the Supreme Court, the Court of Appeal or the High Court under section 5(2)(b) (amended by section 11 of the Court of Appeal Act 2014) of the Act of 1961, the provisions of section 16 of this Act shall not apply."

Finally, it is relevant to set out the provisions of s. 23 of the Act of 1995, as amended:

> "Where the Government proposes to advise the President on an appointment to the office of Chief Justice, President of the Court of Appeal, President of the High Court, President of the Circuit Court or President of the District Court it shall have regard first to the qualifications and suitability of persons who are serving at that time as judges in courts established in pursuance of Article 34 of the Constitution."

The judgment of the High Court

In the course of his judgment the learned High Court judge noted the basis for the application made on foot of the notice of motion, namely, that Mr. Beades had advanced no grounds to support the relief sought, that the appointment of the President of the High Court is a matter within the discretion of the Executive, that Mr. Beades had advanced no basis upon which the Court should interfere in the exercise of that discretion and further that JAAB had no role in the appointment of the President of the High Court. Further, complaint was made that the proceedings were being used by Mr. Beades

> ". . . as a vehicle to make scandalous and unsubstantiated allegations of bias and impropriety against the courts in general, and against Gilligan J. and the President of the High Court in particular."

Mr. Beades, in his affidavit and in the course of his submissions placed particular emphasis on the provisions of s. 23 of the Act of 1995 and the requirement that the Government must "have regard first to the qualifications and suitability of persons who are serving at that time as judges in courts" when making its nomination to a President. In essence, he made the case that the Government did not have regard to the qualifications and suitability of the person ultimately appointed to the position as President of the High Court.

The learned High Court judge concluded that Mr. Beades' claims under s. 16 of the Act of 1995 were misconceived. He pointed out that the requirements of s. 16 only apply where a person seeks to be considered for appointment to judicial office for the first time and do not apply to a person who has already been appointed a judge and furthermore that those provisions only apply where the judicial office being filled is that of an ordinary judge of the relevant court.

He referred to the fact that a special appointment procedure is provided in s. 23 for the appointment of the President of a court. He observed that the effect of s. 23 is that the Government:

> ". . . must first look at existing judges in order to find a nominee. Only having first undertaken that exercise can it nominate for appointment to the presidency of a court a person who is not an existing judicial office holder."

As the learned trial judge observed the effect of s. 23 is to ensure that "experienced/existing judges" are considered in the first instance for nomination for the presidency of a court. Thus, he concluded that insofar as Mr. Beades had claimed that Kelly J. was not eligible to be appointed as President of the High Court, his claim was entirely misconceived. On the contrary he was as an existing judge one of the class of serving judges to which the Government must have regard when deciding on nomination as pointed out by the learned trial judge.

The learned trial judge then considered what he described as the core claim of Mr. Beades, namely, the allegation that the Government failed to comply with s. 23 of the Act of 1995 before nominating Kelly J. as the President of the High Court. In considering this issue, the learned trial judge made a number of observations. First of all, he noted that in nominating a serving judge, the Government clearly did have regard to the qualifications and suitability of "persons serving at that time". Secondly, he noted that the decision to nominate a person as President of a court or any judge is a decision of the Government in the exercise of its executive power, a point not disputed by Mr. Beades. As such the President is mandated by the Constitution to appoint the Government's nominee. (See *The State (Walshe) v. Murphy* [1981] I.R. 275). Thus he concluded that the courts could only intervene in the appointment of a judge where an eligibility requirement was not complied with. As the learned trial judge observed this was very different to questions of suitability relating to an existing judge. In this context, he also referred to the constitutional provision relating to the removal of a judge from office and commented that it was

> ". . . abundantly clear from this that the courts constitutionally have no jurisdiction in relation to any claim that a sitting judge be removed from office for stated misbehaviour or incapacity."

The third point made by the learned trial judge was that having regard to what was clearly an executive act of the Government acting as a collective authority, that bearing in mind the separation of powers between the legislative, executive and judicial functions of Government, the claim being made by Mr. Beades was one which was not justiciable before the courts. He then referred to a number of authorities in support of that contention, namely, *Boland v. An Taoiseach* [1974] I.R. 338 at page 362 in which Fitzgerald C.J. stated:

> "Consequently, in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

He also referred to the decision in the case of *District Judge McMenamin v. Ireland* [1996] 3 I.R. 100 to like effect. As was observed by the learned trial judge:

> "There is no claim made by the plaintiff in the pleadings to the effect that the Government, in nominating Kelly J. for appointment as President of the High Court, has disregarded its powers and duties under the Constitution. The plaintiff is not therefore entitled in these proceedings to challenge before the courts the validity of a decision that is clearly one falling within the constitutional remit of the Government in cabinet."

The final point made in this regard by the learned trial judge related to cabinet confidentiality. As he pointed out, in order to succeed in his case, Mr. Beades would have to prove that the Government had failed to "have regard first to the qualifications and suitability of the persons who are serving at that time as judges". He could only do this if he was able to call evidence in relation to the discussions that took place at cabinet or records thereof in relation to the nomination of Kelly J. In that regard he referred to the provisions of Article 28.4.3° of the Constitution which provides:

> "The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –
>
> (i) in the interests of the administration of justice by a Court, or
>
> (ii) by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance."

As was noted by the learned trial judge the exception provided for at (ii) above does not apply. Equally he made the point that it was hard to see how the plaintiff could ever succeed in a claim under (i) above. He rejected the suggestion made by Mr. Beades that reliance could be placed on the decision of the Supreme Court in *Ambiorix Ltd. v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277 and concluded that that decision, whilst it upheld the right of a court to examine documents with a view to deciding whether they should be disclosed, did not undermine cabinet confidentiality as enshrined in Article 28. Accordingly he decided that the claim made by Mr. Beades, to challenge the validity of the appointment based on the Act of 1995 or based on any suggested constitutional right, was misconceived and bound to fail.

The learned trial judge then dealt with a number of specific pleas set out in the statement of claim, namely at paragraph 10 and 11 relating to an allegation of alleged unlawful delegation of the duty to assess suitability to the Attorney General and the Minister for Justice and the announcement of the nomination a week before the actual decision to nominate was on the Government's agenda. He also dealt with issues raised concerning hearings in these proceedings before Baker J. and Gilligan J. in relation to injunction proceedings. The learned trial judge explained why those pleas could not succeed. The learned trial judge then proceeded to consider pleas contained at paragraph 4 of the plenary summons coupled with paragraph 20 of the statement of claim in which the plaintiff appeared to contend that the absence of a judicial council in Ireland incorporating "the Bangalore Principles" was contrary to Article 6 of the European Convention on Human Rights. It was noted by the learned trial judge that that issue was not the subject of any oral argument made by Mr. Beades at the hearing. However, as he observed, in making a claim under these headings Mr. Beades was effectively seeking an order compelling the defendants to set up a judicial council to regulate the judiciary. The learned trial judge pointed out that this was in effect looking for an order requiring the introduction and passing of legislation and having regard to the separation of powers he observed that such a claim was not justiciable. He noted a passage in the case of *McMenamin* which has already been cited in which Geoghegan J. at page 116 observed:

> "Under the clear separation of powers under the Constitution it is not the function of the courts, nor have the courts in my view any jurisdiction, to order that any particular form of legislation at any given time be introduced and, still less, passed."

He also dealt with a claim under s. 3(1) of the European Convention on Human Rights Act 2003. Again this was an area in relation to which Mr. Beades made no oral submissions. It would appear that this provision was relied on in support of the claim that the defendants had failed to comply with their statutory duty, presumably being a failure to comply with the provisions of s. 16 and/or s. 23 of the Act of 1995 and the learned trial judge found that as there was no reasonable cause of action under those provisions it followed that s. 3(1) could not afford Mr. Beades any identifiable cause of action.

The learned trial judge then proceeded to consider the question as to whether or not the proceedings should be dismissed on the grounds that they were "frivolous or vexatious" within the meaning of Order 19, rule 28 of the RSC and/or an abuse of process such that the Court should exercise its inherent jurisdiction to dismiss. He considered the decision in the case of *Behan v. McGinley* [2011] 1 I.R. 47, a decision of Irvine J. in which she set out a list of "indicators" of the kinds of action that might be regarded as frivolous or vexatious. She summarised the principles to be considered in that context and the learned trial judge said that two of those indicators were of relevance to the present case, namely:

> (a) "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;"
>
> and
>
> (b) "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."

It was noted that there was no decision of Kelly J. before or after his appointment as President of the High Court in respect of which Mr. Beades sought any particular or corresponding relief. Therefore it was difficult to see what benefit in any material or personal sense could be obtained by Mr. Beades in bringing these proceedings. It was also the view of the learned trial judge that the proceedings were brought for an improper purpose. In this regard at paragraph 71 of the judgment of the learned trial judge he stated as follows:

> "I am satisfied that one of the plaintiff's motives in bringing and pursuing these proceedings is to damage the reputation of the named judges, and in particular Kelly J., and that he does so out of a misplaced sense of grievance. I am satisfied that a further and related motive is to excite adverse publicity and to thereby damage the judges whom he has named in these proceedings. This latter purpose was borne out by the plaintiff's attempts to 'read into the record' the allegations (and they are no more than that) of unsuitability on the part of Kelly J. to be a judge or the President of the High Court. It was further borne out by the plaintiff's protests in the afternoon of the hearing when he pronounced to the court that he assumed that the absence of members of press from the court in the morning was due to the case being assigned from court 3 to court 16, and his further statement that he had alerted the press and as a result they were now attending court."

The learned trial judge referred to the entitlement of the press to attend court but went on:

> "But the pursuit of publicity by a litigant in furtherance of a cause or grievance as an end in itself by instituting or prosecuting proceedings, and in the conduct of those proceedings, is altogether another matter."

Accordingly the learned trial judge concluded that the litigation was instituted and was conducted primarily for the improper purpose of exciting adverse and damaging publicity and accordingly he dismissed the plaintiff's claim as being vexatious and an abuse of the process.

Mr. Beades appealed that decision to this Court. The grounds of appeal can be summarised as follows:

> (a) That the learned trial judge failed to weigh, evaluate and consider the application of the right to fair procedures under Article 40.3 of the Constitution in the context of cases heard and determined by Kelly J.
>
> (b) That the learned trial judge erred in relation to his conclusions as to an improper purpose in pursuing the litigation and relying on that conclusion to strike out the proceedings as an abuse of process.
>
> (c) That the learned trial judge erred in law in not accepting the submissions of Mr. Beades that the issue of cabinet confidentiality can be pierced in the interests of the administration of justice.
>
> (d) That the learned trial judge failed to adhere to a constitutional right to legal representation in not appointing a lawyer to represent Mr. Beades.
>
> (e) That the learned trial judge compromised the administration of justice by not allowing and refusing to allow documents to be read out in open court.
>
> (f) That the learned trial judge erred in concluding that Kelly J. was a suitable candidate to be President of the High Court.
>
> (g) That Kelly J. is an unsuitable candidate to be a judge.
>
> (h) That the procedures of the Court and Court Officers Act 1995 were not followed in that the position was not advertised and there was no consideration of the appointment of Kelly J. by the Judicial Appointments Advisory Board.
>
> (i) That Kelly J. was unsuitable to be President of the High Court by reason of his "intervention and promotion of a settlement for the church in child abuse matters".
>
> (j) That the Government did not follow principles of "customary international law" and in particular the Bangalore Principles in the appointment of Kelly J. as President of the High Court'

Discussion
At the commencement of the hearing, Mr. Beades made a number of preliminary applications which were ruled upon by the Court. The first of those was a request to refer his appeal to the Supreme Court on the basis that Kelly P. was formerly a member of the Court of Appeal, the suggestion being that the Court of Appeal was not an appropriate venue in which to hear the appeal. The Court pointed out to Mr. Beades that it was he who brought an appeal to this Court and further that the Thirty Third Amendment to the Constitution sets out the basis on which appeals can now be brought to the Supreme Court. Quite simply, this Court does not have the jurisdiction to transfer a matter to the Supreme Court.

The second issue raised by Mr. Beades was to have the issues in his case referred to Europe. It was not entirely clear from Mr. Beades' submissions as to whether by this he meant that the appeal should be referred to the European Court of Human Rights in Strasbourg or the European Court of Justice in Luxembourg. The Court explained to Mr. Beades that it was a matter for him to consider whether or not he had a remedy which could be pursued before the European Court of Human Rights in Strasbourg but that in any event it would be necessary for him to first exhaust his domestic remedies. Secondly, it was explained that a reference to the Court of Justice in Luxembourg is made in the event that an Irish court needs to refer an issue of European law for the purpose of guidance where such issue of European law arises in the case before the court referring. As no such issue arises in these proceedings, it was pointed out that such a reference could not be made.

The third issue raised by Mr. Beades concerned the question of legal assistance or legal aid. Mr. Beades did not indicate whether he had applied for free legal aid. It was noted that Mr. Beades conducted these proceedings as a lay litigant in the High Court and had prepared the papers for this appeal in a thorough and comprehensive manner. It was further pointed out to Mr. Beades that the Court has no jurisdiction to make an order providing for legal aid in proceedings such as these.

Before embarking on a consideration of the issues raised by Mr. Beades in the course of this appeal, it would be sensible to recall the nature of the application before the High Court which is the subject of this appeal. It was a motion brought by the respondents seeking to dismiss the proceedings on the basis that they disclosed no reasonable cause of action and/or were frivolous or vexatious or constituted an abuse of process pursuant to Order 19, rule 28 of the Rules of the Superior Courts and the inherent jurisdiction of the courts. Mr. Beades had, as will be recalled, also filed a motion for judgment in default of defence. The learned trial judge granted an order pursuant to Order 19, rule 28 striking out Mr. Beades' preliminary summons and statement of claim on the grounds that they "disclose no reasonable cause of action and/or are frivolous or vexatious, and further on the ground that they are bound to fail and constitute an abuse of process". As a consequence of making that order, it followed that it was appropriate to dismiss Mr. Beades' motion for judgment in default of defence.

At the outset, it has to be said that some of the grounds of appeal contained in Mr. Beades' notice of appeal cannot be maintained by Mr. Beades for the simple reason that the issues raised were not the subject of the application and hearing before the learned trial judge and, consequently, no decision was made or could have been made by the learned trial judge on those issues. While a number of allegations were made by Mr. Beades against Kelly J. in the course of his pleadings and affidavits, the hearing before the learned trial judge was for the purpose of determining the issues raised in the notice of motion, namely, whether the proceedings should be struck out pursuant to Order 19, Rule 28 of the RSC or dismissing the proceedings on the basis that the pleadings disclosed no reasonable cause of action and so on. Thus, for example, it was not a matter for the learned trial judge to consider or conclude whether or not Kelly J. was suitable for appointment to the position of President of the High Court. It was simply never an issue before the Court on the application to dismiss the proceedings. Equally, it would not have been appropriate for the learned trial judge to have carried out an assessment of cases heard and determined by Kelly J. with a view to seeing whether or not the right to fair procedures was afforded to the parties concerned by Kelly J. One might add that if any party in a case had a complaint as to the manner of a hearing before Kelly J., it would be for that party to deal with any such complaint by way of appeal. It could never be appropriate for a third party to come along later and complain that a party to proceedings was not afforded fair procedures.

Mr. Beades in the first instance submitted that the test to be applied by the Court on an application such as this is "arguability". He said that arguability is about whether the plaintiff can succeed, as a matter of law, if he proves his allegations at trial. The test on an application such as this has been set out at the commencement of this judgment and Mr. Beades is mistaken in his view as to the appropriate test. It is not a question of proving allegations at trial. It is a question of whether the pleadings disclose a reasonable cause of action or whether the pleadings are shown to be frivolous or vexatious as described above. It is worth recalling the point made by Clarke J. in the case of *Lopes* which was referred to at the beginning of this judgment, namely that:

> ". . . an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. 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."

Thus as can be clearly seen, the fact that allegations can be proved does not of itself dispose of an application to dismiss a case either on the basis that it is frivolous and vexatious or alternatively on the basis that it is an abuse of process. Accordingly it is necessary to consider not whether Mr. Beades can prove any of the allegations he has made but rather whether his pleadings are either frivolous and vexatious within the meaning of Order 19, rule 28 or whether the proceedings are such that they are bound to fail and thus amount to an abuse of process.

The appointment of judges
The relevant constitutional and statutory provisions in relation to the appointment of judges have been set out above. Many of the arguments made by Mr. Beades before the learned trial judge were based on Mr. Beades misapprehension as to the scope of the Act of 1995 in respect of the appointment of persons to judicial office. Thus his initial compliant was that the appointment of Kelly J. did not comply with section 16 (7) (b) of the Act of 1995. It is clear from s. 17 of the Act of 1995 that insofar as the appointment of a sitting judge to another judicial position is concerned, the provisions of s. 16 of the Act of 1995 do not apply. Further, it is clear from s. 23 of the Act of 1995 that in appointing a Court President, the Government "shall have regard first to the qualifications and suitability of persons who are serving at that time as judges in courts established in pursuance of Article 34 of the Constitution". Mr. Beades appears now to accept that the provisions of s. 16 of the Act of 1995 do not apply to the appointment of a serving judge as President of a Court. Accordingly, he now places emphasis on the phrase "suitability and qualifications" used in s. 23. Mr. Beades contends in his submissions that the Government did not undertake any assessment of the suitability of Mr. Justice Kelly to be appointed as President of the High Court. That raises an issue as to cabinet confidentiality to which I will return later.

Therefore, it is necessary to examine the approach taken by the learned trial judge in relation to the effect of s. 23 of the Act of 1995 in some detail. He stated at paragraph 40-41 of the judgment having set out the provisions of s. 23 as follows:

> "It is easy to see why this scheme was established by the Oireachtas. The importance of establishing appropriate educational and professional qualifications, experience and character arises at the point before a person is first appointed to any judicial office, and s. 16 of the 1995 Act governs this. It has no application to the present case. Section 17 applies where the Government proposes that an existing judge be promoted to an ordinary judicial post in a higher court and has no application. Then the only requirement of s. 23, when a president of a court is to be appointed, is that prior to nomination the Government will have regard first to the qualifications and suitability of persons who are serving at that time. The clear effect of this is that the Government must first look at existing judges in order to find a nominee. Only having first undertaken that exercise can it nominate for appointment to the presidency of a court a person who is not an existing judicial office holder. It simply ensures that experienced/existing judges are considered first for nomination for the presidency of a court.
>
> It is quite clear from these provisions that the plaintiff's claim that Kelly J. was not eligible to be appointed to be President of the High Court is entirely misconceived. Far from not being eligible for nomination and appointment, as an existing judge he was one of that class of serving judges mentioned in s. 23 of the 1995 Act to which the Government must first have regard when deciding on a nomination."

The learned trial judge then proceeded to examine in some more detail the contention that the State failed to comply with s. 23 before nominating Kelly J. As he said,

> "it is trite to observe that in nominating an existing judge self evidently the Government did have regard to the qualifications and suitability 'of persons serving at that time'."

It is difficult to see any basis for disagreeing with that observation given that the person appointed to the position of President of the High Court was a person serving at that time as a judge in the courts established under the Constitution.

The separation of powers and non-justiciability
Assuming for the sake of argument that the learned trial judge was wrong in his conclusion that the Government did have regard to the qualifications and suitability of existing judges, two further issues arise, the first being whether the courts could interfere with an executive decision of the Government having regard to the separation of powers, and secondly if that was permissible, how could it be established that the Government did not make the appointment of the President of the High Court in accordance with the provisions of s. 23 of the Act of 1995?

The issue of the separation of powers was dealt with by the learned trial judge between paragraphs 44 to 51 of his judgment to which I have referred above at page 13 and 14 of this judgment. In this context the learned trial judge referred to the fact that the appointment of a judge by the President of Ireland was done by the President on the advice of the Government. As such the decision to appoint a judge, be it an ordinary judge of the court or a president of the court, was a "government executive function" as was accepted by Mr. Beades in his pleadings. The learned trial judge pointed out that the President was effectively mandated to appoint the Government's nominee. Having referred to the decision in *The State (Walshe) v Murphy*, referred to above, he observed that the courts could only intervene in the appointment of a judge where an eligibility requirement as opposed to a suitability requirement was at issue. As he pointed out, no such issue was made or could be made in this case.

The learned trial judge then considered the provisions of Article 35.4.1° of the Constitution which deals with the circumstances in which a judge may be removed from office:

> "A judge of the Supreme Court, the Court of Appeal, or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal."

On that basis he concluded that it was "abundantly clear from this that the courts constitutionally have no jurisdiction in relation to any claim that a sitting judge be removed from office for stated misbehaviour or incapacity". As he stated, that was something which was the preserve of the Oireachtas under the provisions of the Constitution. This was indeed a point emphasised in the case of *Lopes v. Minister for Justice* [2008] 4 I.R. 743 in which Hanna J. in the High Court, in striking out proceedings in that case in which the plaintiff had claimed that he had been the subject of racial discrimination by the High Court and Supreme Court, held that no action was maintainable against a judge for anything said or done by him or her in the exercise of his or her jurisdiction Hanna J. quoted from a decision of Lord Denning M.R. in *Sirros v. Moore* [1975] Q.B. 118 at page 132:

> "Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for *habeus corpus*, or a writ of error or *certiorari*, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to any action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

The passages cited above serve to illustrate the separation of powers between the legislative, executive and judicial arms of the State.

The learned trial judge went on to consider whether this was a claim that was justiciable before the courts notwithstanding the separation of powers, assuming that Mr. Beades was in a position to prove all of the facts he asserts in the plenary summons or in the statement of claim, given that this was an executive act of the Government acting as a collective authority, Mr. Beades deals with this issue in his submissions by pointing out that the exercise of discretion by the Government in making such an appointment is one which is prescribed in statute by the Oireachtas. He argued that the concept of the separation of powers was something that could only apply to acts of the executive which involve policy issues and resource allocation. In support of his arguments in this regard, Mr. Beades relied on two authorities, namely, *T.D. v. Minister for Education & Ors.* [2001] 4 I.R. 259 in which Keane J. stated:

> "If it was established in any proceedings that the Government had acted in a manner which is in contravention of the Constitution, then the exclusive role afforded to them in the exercise of the executive power of the State would not prevent the courts from intervening with a view to securing compliance by the Government with the requirements of the

Constitution."

The second authority relied on by Mr. Beades was the analysis of non-justiciability by Charleton J. in the case *Garda Representative Association v. Minister for Finance* [2010] IEHC 78 in which he stated:

> "One of the criteria for analysis, in that regard, must be the nature of the decision under consideration. Is it one based on policy, or is it one based upon meeting terms for entitlement? Is the decision one which is capable of being analysed by a court on the same basis that the court decides litigation between parties, or is it a decision within the political sphere? The more the discretion tends to be exercised within the sphere of what is best for the balancing of burdens and benefits within the community at large, the more inherently likely it is to carry with it the hallmarks of an amplitude of discretion that is characteristic of policy making and political decisions. . . . The further a decision operates within the boundary of political choice, the more care the court should exercise in interfering with a discretion granted by statute. As I have already indicated, in some policy areas, political decision making is beyond judicial review."

Charleton J. continued:

> "The Government has the power to set policy on areas of national interest and to disperse funds in accordance with that policy. These decisions are, in my view, in a category beyond the scope of judicial review. . . . Where, on the other hand, rights and obligations are set out in statute, whereby funds may be made available to those applying in particular circumstances, or where a licence to conduct an otherwise prohibited activity may be made available, the executive power is limited in its operation by the wording of the statute and, in taking decisions, it must act within the legislative scheme."

The State in its submissions referred to a number of authorities including *Boland v. An Taoiseach* [1974] I.R. 338 in which Fitzgerald C.J., in an action in which the plaintiff had sought an injunction prohibiting the executive from signing the 1974 Sunningdale Agreement on the grounds that it was repugnant to the Constitution, stated:

> "Consequently, in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

In turn that case was relied on by the Supreme Court in the case of *District Judge McMenamin v. Ireland* [1996] 3 I.R. 100 in which the issue of separation of powers also arose. Hamilton C.J. in that case at page 130 to 131 said:

> "1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.
>
> 2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene.
>
> 3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution.
>
> Having regard to the respect which each of the organs of government must pay to each other, I am satisfied that where it is alleged that either the Oireachtas or the Government has acted other than in accordance with the provisions of the Constitution, such fact must be clearly established."

Reference was also made in the submissions of the State to the decision in the case of *T.D. v. Minister for Education* referred to above and *Sinnott v. Minister for Education* [2001] 2 I.R. 545. Accordingly it is contended by the State that given that this is an executive function of the State and even though there are certain statutory provisions which concern the eligibility of those applying to be appointed as a judge in the first instance, and secondly, statutory provisions in relation to those who must be considered for appointment to the position of President of a court, this being an executive function of the State, it is not one in which the courts can interfere.

The learned trial judge at paragraph 49 of his judgment, having regard to the doctrine of the separation of powers, concluded as follows:

> "The plaintiff is not therefore entitled in these proceedings to challenge before the courts the validity of a decision that is clearly one falling within the constitutional remit of the Government in cabinet."

It would be helpful to reiterate the point that the provisions of s. 16(6) of the Act of 1995 specify that in advising the President the Government shall firstly consider for appointment those persons whose names have been recommended by JAAB to the Minister pursuant to the provisions of s. 16. In the case of an appointment of an existing judge to the position of President of a court, the Government should first consider existing judges. However, it is also important to bear in mind the provisions of s. 16(2) of the Act to the effect that it is only on a request made by the Minister that JAAB becomes involved in the process of submitting to the Minister the names of those who wish to be considered for appointment to the relevant judicial office. Clearly therefore, the Government may appoint a person to judicial office without going through the statutory mechanism provided for in the Act of 1995. This rarely occurs in practice but it has happened. Whether or not that has happened is something that will emerge following an appointment as it is clear from the provisions of s. 16(8) that notice of an appointment to judicial office is required to be published in Iris Oifigiúil and the notice should indicate whether or not the person so appointed was recommended by the Board pursuant to the provisions of s. 16. The relevance of pointing this out is to demonstrate that the Government has a very large measure of discretion in its approach to the appointment of judges. Section 16 as previously explained has no relevance to the appointment of serving judges to another judicial office; in the case of the appointment of the President of a court, the only limitation put on the exercise of the discretion of the Government is that it shall first have regard to the qualifications and suitability of persons who are already serving as judges at the relevant time. Accordingly, it can be seen that the arguments put forward by Mr. Beades relating to the role of the Act of 1995 are overstated. However, Mr. Beades goes further and says that having regard to the provisions of the Act of 1995, the Government's discretion in relation to the appointment of judges is subject to the requirement that the person's "qualifications and suitability" be confirmed either by JAAB or by the Government itself in the case of a serving judge. It is, as was said by the learned trial judge trite to observe, that in making the appointment of Kelly J. to the position of President of the High Court, the Government clearly had regard to the qualifications and suitability "of persons serving at that time" and thus it is difficult to see any basis for contending that

the Government in nominating Kelly J. did not have regard to his qualifications and suitability.

The learned trial judge in this case noted that there was nothing in the pleadings to suggest or contend that the Government had acted otherwise than in accordance with the provisions of the Constitution in nominating Kelly J. for appointment as President of the High Court. Clearly, the decision of the Government to nominate a person as President of the High Court is a function within the remit of the Government. It is a decision that falls within the boundary of political choice, to use the language of Charleton J. referred to above in *Garda Representative Association v. Minister for Finance*. As such, being a matter of political choice it is simply not possible for the Court to interfere with the discretion of the Government exercised in an area of political decision making. It seems to me that the decision of the Government to nominate an individual as President of the High Court could only be regarded as a "political" decision of the Government and one in which the Government is at large, subject to ensuring that the person concerned meets the eligibility requirements for such office, and secondly, provided that the Government has complied with the statutory obligation to first have regard to sitting judges.

Mr. Beades argues nonetheless that even if the appointment or nomination of a person as President of the High Court is the exercise of discretion by the executive, it is not an unfettered discretion. He contends that the Government was obliged under both s. 16(6) in relation to the appointment of a person as a judge for the first time to firstly consider a recommendation made by JAAB and in the case of a person being appointed to a position as President, that the Government must "have regard first" to the "qualifications and suitability" of sitting judges. He contends therefore that in the case of the appointment of a president, unless the Government first had regard to the qualifications and suitability of the person nominated, then the decision is "*ultra vires* the provisions of s. 23 of the Act of 1995". This raises another difficult issue. How is Mr. Beades to establish that the Government in making its decision to advise the President on the nomination of Kelly J. as President of the High Court, did not first have regard to the qualifications and suitability of persons already serving as judges in the courts. The only way that this could be done, it would appear, is by establishing in evidence that the Cabinet did not consider the qualifications and suitability of Kelly J. Mr. Beades contends that the learned trial judge was in error in not accepting that cabinet confidentiality "can be pierced in the interests of the administration of justice". He contends that the decision made to appoint Kelly J. as President of the High Court was "*ultra vires*" the provisions of s. 23 in that the Government either did not consider its provisions at all or if in fact they did consider the relevant factors, the decision made was one which was "contrary to reason and perverse". The learned trial judge in considering this aspect of the arguments made by Mr. Beades noted firstly that he would bear the onus to prove that the Government had failed to comply with the provisions of s. 23 and that the only manner in which he could do this would be if he had access to cabinet discussions or relevant records. The learned trial judge referred to Article 28.4.3° of the Constitution which provides as follows:

> "The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –
>
> > i in the interests of the administration of justice by a Court, or
> >
> > ii by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance."

As the learned trial judge pointed out the exception at (ii) does not apply. Mr. Beades sought to rely before the High Court and indeed before this Court on the decision of the Supreme Court in *Ambiorix Limited v. Minister for Environment (No. 1)* [1992] 1 I.R. 277. Finlay C.J. in that case had stated:

> "The Executive cannot prevent the judicial power from examining documents which are relevant to an issue in a civil trial for the purpose of deciding whether they must be produced."

The learned trial judge concluded:

> "It is clear from this decision that it upholds the right of a court to examine documents with a view to deciding whether they should be disclosed, but it does not undermine the cabinet confidentiality enshrined in Article 28."

It is difficult to disagree with the conclusion of the learned trial judge in this regard. It is worth pointing out that the decision in *Ambiorix* relied on by Mr. Beades was one decided prior to the Seventeenth Amendment to the Constitution in 1997 which inserted Article 28.4.3° referred to above into the Constitution.

Article 28.4.3° clearly limits the circumstances in which the courts can examine such documentation and can provide for disclosure of documents notwithstanding the principle of cabinet confidentiality. In the circumstances of this case it is difficult to see how any such disclosure could be ordered. Even if it could be argued by Mr. Beades that it was necessary in the interests of the administration of justice to disclose material, relating to either the discussions at cabinet or the documents or memoranda relating to the relevant nomination, Mr. Beades would have to face the fundamental problem that his underlying claim to have the nomination of Kelly J. quashed is a claim which cannot be made having regard to the fact that the decision to nominate Kelly J. is one which cannot be litigated before the Courts by reason of the separation of powers and accordingly it could not be in the interests of justice to make any order for such disclosure.

In the circumstances, it is not possible to disagree with the learned trial judge's conclusion that Mr. Beades's claims to challenge the validity of the appointment of Kelly J. as President of the High Court are misconceived and bound to fail.

Other issues

In the course of his submissions, Mr. Beades made a number of points in relation to the test applicable to an application pursuant to Order 19, rule 28 of the RSC and the inherent jurisdiction of the courts to strike out proceedings on the basis that they are bound to fail and constitute an abuse of process. Perhaps somewhat surprisingly, it is not suggested by Mr. Beades in his notice of appeal that the learned trial judge erred in his application of the test to be applied in such cases. I have already set out above the principles to be applied on an application such as this but I wish to comment on one point made by Mr. Beades. He has suggested that the procedure by which his action was struck out is a denial of his right of access to the court and in that regard he relies on Article 6 of the European Convention on Human Rights. In that context he referred to the decision in the case of *Osman v. U.K* (2000) 29 EHRR 245. That case concerned domestic proceedings brought against the police for negligence which were struck out as showing no reasonable cause of action. The European Court of Human Rights in the course of its judgment commented at paragraph 147:

> "The Court recalls that Article 6(1) embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

> However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved... "

That case concerned very complex issues in relation to police immunity and the European Court of Human Rights went on to observe at paragraph 151-152 as follows:

> "The Court would observe that the application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.
>
> In its view, it must be open to a domestic court to have regard to the presence of other public-interest considerations which pull in the opposite direction to the application of the rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case. It is to be noted that in the instant case Lord Justice McCowan (see paragraph 64 above) appeared to be satisfied that the applicants, unlike the plaintiff Hill, had complied with the proximity test, a threshold requirement which is in itself sufficiently rigid to narrow considerably the number of negligence cases against the police which can proceed to trial. Furthermore, the applicants' case involved the alleged failure to protect the life of a child and their view that that failure was the result of a catalogue of acts and omissions which amounted to grave negligence as opposed to minor acts of incompetence. The applicants also claimed that the police had assumed responsibility for their safety. Finally, the harm sustained was of the most serious nature.
>
> For the Court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police. In the instant case, the Court is not persuaded by the Government's argument that the rule as interpreted by the domestic court did not provide an automatic immunity to the police."

Mr. Beades relies on that passage to suggest that his case is one in which there is a disproportionate response to a legitimate domestic legal issue. In this case, the legal issue at the heart of this case the separation of powers, which in turn has given rise to an issue as to cabinet confidentiality.

There are two points to note. As the European Court of Human Rights observed the right of access to a court is not absolute. There is no right of access to pursue a case which is unstateable. Other parties to proceedings have rights too. It is not appropriate to allow somebody to embark on a full hearing of a legal grievance in circumstances where that legal grievance is clearly unstateable and where permitting the case to go to full hearing would be an abuse of process. This point was made by Woolf L.J. in *Kent v. Griffiths (No.3)* [2001] QB 36 where he said at paragraph 38 as follows:

> "In so far as the Osman case [1998] 1 FLR 193 underlined the dangers of a blanket approach so much the better. However, it would be wrong for the *Osman* decision to be taken as a signal that, even when the legal position is clear and an investigation of the facts would provide no assistance, the courts should be reluctant to dismiss cases which have no real prospect of success. Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. There is no question of any contravention of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) in so doing. Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although a strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law."

Thus it seems to me to be quite clear that the strike out procedure is one which can be deployed when it is clear that the proceedings have no chance of success and as such are an abuse of process and are bound to fail. This is such a case.

The other point I want to refer to is the complaint made by Mr. Beades in the course of his submissions as to the observations of the learned trial judge to the effect that the litigation had been instituted and was conducted for the improper purpose of exciting adverse and damaging publicity. Mr. Beades takes issue with that finding. Mr. Beades made the point that he did not bring these proceedings in his own interest but rather as an exercise in the public interest. Motivation may be an issue in considering whether or not proceedings should be struck out as an abuse of process. Mr. Beades in the course of his written submissions acknowledged that motivation can have a bearing as he referred to the decision of *Norton v. Norton* [1908] 1 Ch. 471 in which it was explained that a case may be an abuse of process where the plaintiff has commenced the action in order to gain "some unfair advantage or for some sinister or *bye* purpose". It certainly seems to me that the observations of the learned trial judge as to the conduct of the proceedings were open to him to make having regard to the way in which the case was dealt with by Mr. Beades.

The final point to make is that before considering striking out the proceedings, the Court should consider whether, in the event that an appropriate amendment was made to the pleadings, it would be possible to permit the case to proceed. However, this is one of those cases where, no matter what amendment could be made or might be made, it will in its essence always be an unstateable one and no amount of amendment will change that.

Conclusion

The relief sought by Mr. Beades in the Statement of Claim herein seeks to have the nomination of Kelly J. as President of the High Court quashed. The decision of the Government to nominate Kelly J. as President of the High Court is an executive decision of the Government and as such is not one that can be interfered with by the Courts having regard to the separation of powers. In any event, Mr. Beades would face an insuperable problem in making out such a claim having regard to the Constitutional protection given to cabinet confidentiality. Further, Mr. Beades sought a declaration that Kelly J. had not been validly appointed and "is not the President of the High Court not being a fit and proper person". Such a declaration cannot be granted by the Courts. Once appointed, a judge cannot be removed from office save by resolution of the Houses of the Oireachtas. Accordingly, given that the Courts have no role to play in the removal of a judge from office, it is quite clear that the relief sought by Mr. Beades could never be granted by the Courts.

In all the circumstances of this case, I cannot see how the learned trial judge could have come to any other conclusion on the application before him and accordingly I would dismiss the appeal.