THE HIGH COURT

[2017 No. 240 C.A.]

BETWEEN

R. C.

PLAINTIFF

AND

K. E.

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 28th June, 2018

1. This is a Circuit Court appeal brought by the plaintiff against the Circuit Court's order dismissing the claim in the circumstances hereafter appearing. The background is that the plaintiff was in a relationship with a lady who I will refer to as K.B. and he had a child as a result of that relationship with K.B. and the child has been referred to in these proceedings as A.B. After that relationship ended K.B. formed a new relationship with the defendant in these proceedings.

2. Arising out of the breakup of the relationship between the plaintiff and K.B. family law proceedings were commenced in the District Court which considered matters relating *inter alia* to custody and access to A.B. In the course of those proceedings the District Court made an order pursuant to s. 20 of the Childcare Act of 1991 and that section insofar as is relevant to these proceedings provides that where it appears to the court that it may be appropriate for a care order or supervision order to be made with respect to the child concerned in the proceedings the court may of its own motion or on the application of any person adjourn the proceedings and direct the health board for the area in which the child resides or is for the time being to undertake an investigation of the child's circumstances and the functions of the health board under this section have now been taken over by the Child and Family Agency otherwise known as TUSLA. Subs. 3 of s. 20 provides that where the court gives a direction under subs. 1 the health board concerned shall undertake an investigation of the child's circumstances and shall consider a number of factors that are set out in the subsection.

3. Now as I have said the District Court made an order under s. 20 of the Childcare Act, 1991 and in compliance with that order the Child and Family Agency/TUSLA appointed a social worker to carry out the investigation that is identified in the section and in the course of that investigation the social worker conducted interviews with the relevant parties which of course included the plaintiff and the defendant in these proceedings. In the course of interviewing the defendant the plaintiff alleges that the social worker was told by the defendant that the plaintiff had previously been guilty of abducting a woman and detaining her without her consent for a number of days. In a subsequent interview with the plaintiff, the plaintiff again alleges in his civil bill in these proceedings that this information was disclosed to him by the social worker and arising out of that the plaintiff instituted proceedings in the Circuit Court seeking damages for defamation against the defendant.

4. Arising out of those defamation proceedings the defendant brought a motion before the Circuit Court and in that motion the defendant seeks the following reliefs:

> 1. First, an order dismissing or striking out the proceedings for failing to disclose any reasonable cause of action as against the defendant.
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> 2. Secondly, an order dismissing or striking out the proceedings on the basis that they are frivolous, vexatious and are bound to fail.
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> 3. Thirdly in the alternative an order dismissing or striking out the proceedings on the basis that same constitute an abuse of process.

Those are the grounds upon which the defendant seeks to have the proceedings struck out and the defendant's motion is essentially based on two matters: First, that the proceedings constitute a breach of the *in camera* rule and are accordingly an abuse of process and should be struck out on that ground alone; secondly, that the alleged statement of the defendant which is the subject matter of the complaint in the defamation proceedings is subject to absolute privilege in law.

5. So, dealing with each of those propositions in turn first the alleged breach of the *in camera* rule. To my mind there is no doubt that this claim made by the plaintiff arises solely and directly from the *in camera* proceedings that are or have been before the District Court. In that regard it seems relevant to refer to the decision of Laffoy J., then a judge of the High Court, in *M.P. v A.P.* [1996] 1 IR 144. In that case these again were family law proceedings where the usual issues that one expects in family law proceedings arose. They involved Guardianship of Infants Act matters as well as Judicial Separation and Family Law Reform Act matters. The original family law proceedings in that case were settled as between the parties and the settlement provided that the applicant in the case before Laffoy J., Dr. John Connolly, who was a consultant psychologist, in the event that there was a breakdown in the settlement, should first be consulted and that happened, the settlement did break down.

6. Dr. Connolly was consulted and he prepared a report based on his assessment of the matters that were in issue as between the parties. The defendant was dissatisfied about the contents of that report and it ultimately resulted in a complaint being made against Dr. Connolly to the Psychology Society of Ireland, the relevant governing body and Dr. Connolly applied to the court for directions in relation to that complaint having regard to the fact that of course he was aware that the proceedings were subject to the *in camera* rule. Laffoy J. considering the relevant authorities said in relation to the complaint at p. 154 of her judgment as follows:

> "Although the applicant has not asked the court for an order restraining the defendant from prosecuting the complaint to the Society, the plaintiff, who I am satisfied has a legitimate interest to be protected, has sought an order which will have this effect. Moreover, in my view the court has an inherent jurisdiction to take whatever steps are necessary on its own motion to ensure that s. 34 of the Act of 1989 is complied with," [s. 34 is the section which gives effect to the *in camera* rule in family proceedings.]

And she went on to say

> "I find support for this view in the approach adopted by Budd J. in *S.(P.S.) v. Independent Newspapers(Ireland) Ltd*. (Unreported, High Court, Budd J., 22nd May, 1995) where, having been informed that material concerning an *in camera* case had been broadcast, he joined RTE as a notice party of his own motion to a contempt motion initiated by the plaintiff and directed to other parties."

So that was an instance where the jurisdiction of the court was invoked of its own motion to protect its processes in relation to *in camera* proceedings.

7. It follows from all of that in my view that the bringing of these proceedings constitutes a clear breach of the *in camera* rule and can only be viewed as an abuse of process. As Laffoy J. has pointed out the court is entitled to take whatever steps it considers appropriate to protect its processes in the event of such a breach occurring and such steps I am satisfied include if necessary the striking out of a claim which is brought in breach of the rule and on foot of an abuse of process.

8. It is suggested by the plaintiff in answer to this application that it would be premature to give effect to such a draconian remedy at a stage where no defence has been delivered and the defendant should be required to plead to the claim before such an application should be brought. I do not accept that submission. I am certainly aware from experience of hearing applications to strike out on the basis of claims being statute barred that this is commonly done before defences are delivered by defendants but in any event I think it is clear from the judgment of the Court of Appeal in *Vico Ltd & Ors v Bank of Ireland* [2016] IECA 273 that it is not necessary for a defence to be delivered before an application to strike out for abuse of process can be entertained, as the court's judgment given by Finlay Geoghegan J. makes clear at para. 33 where she said:

> "Further I do not accept the appellant's submission that the High Court was incorrect in deciding the defendant's application to strike out the proceedings as an abuse of process in advance of their filing a defence. As pointed out by Lord Bingham in *Johnston v. Gore Wood* at p. 34 'an application to strike out for abuse of process is not a defence; it is an objection to an action being brought at all'. The nature of the action now sought to be brought by the plaintiff herein was evident from the statement of claim filed and the application could be determined having regard to the statement of claim."

9. I am satisfied that precisely the same considerations arise in the present case and it is not necessary for the court to await the delivery of defence before taking action on foot of what I have held to be a manifest abuse of process. That seems to me to dispose of the matter but for completeness I think I should also refer to the second point in the case which is the question of privilege and in a way this flows directly from the first point. It is argued on behalf of the defendant that absolute privilege would in any event attach to his statement and in that regard counsel for the defendant relies on a number of passages in Cox and McCullagh's work on the *Law of Defamation in Ireland* and in particular where the authors say at para. 7–40:

> "At common law the privilege extended to statements that were incidental to the proceedings, but that were necessary for the administration of justice (as, for example, where a solicitor takes the evidence of a client before a hearing actually takes place)."

And then further down the page:

> "Similarly where criminal investigations are at issue, any statement that forms part of the investigation of a crime or possible crime (including an initial complaint) would appear to be absolutely privileged at common law."

And the authors go on to say then at para. 7-48:

> "At common law, interviews with witnesses and potential witnesses are absolutely privileged where a proof of their evidence is being taken, as also are out of court witness statements taken in the course of criminal and other investigations. On the other hand, it would appear that such "pre-proceedings" statements must be genuinely connected with the proceedings that will follow. To the extent that such "pre-trial statements" are protected at common law then clearly they remain protected by the terms of s 17 (1) [of the Defamation Act of 2009] but it is doubtful that they can be characterised as statements made in the course of court proceedings, and hence they are probably not covered by the express protection under s. 17(2) (g)."

10. That view of the law seems to me to be consonant with the views expressed by Barrett J. in *Jeffery v. The Minister for Justice and Equality* [2014] IEHC 99 which was not a defamation case but concerned the issue of immunity from suit in respect of statements made by witnesses in the course of preparations for legal proceedings. Barrett J. in giving judgment referred with approval to the decision of the English High Court in *Evans & London Hospital Medical College and Others* [1981] 1 All E.R. 517 where Drake J. said the following at pp. 719 - 720:

> "It seems to me that this immunity would not achieve its object if limited to the giving of evidence in court and to the preparation only of the statements or proofs of evidence given by the witness. Any disgruntled litigant or convicted person could circumvent the immunity by saying he was challenging the collection and preparation of the evidence, to be taken down as a statement of proof of evidence later, and not challenging the statements of proof itself. In other words he would seek to base his claim on things said or done by the witness at some time prior to the statement of proof given by him. In my opinion this would largely destroy the value of the immunity… It remains, of course, a question to be decided on the facts of each case (or, in the present instance of an application to strike out, on the alleged facts) whether or not the negligent act or omission arose from the course of preparation of the evidence."

11. Then Barrett J. went on to say at para. 11:

> "It is perhaps worth noting in this regard that it is a longstanding feature of the Irish law of defamation since at least the time of *Kennedy v. Hilliard* (1859) 10 Ir. CLR 195 and *MacCabe v. Joynt* [1901] 2 I.R. 115, that there are acts done prior to court proceedings which attract the same privilege that clothes those later proceedings. This is a feature of defamation law because of the public policy cogently identified by Pigot C.B. in the earlier case whereby:
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> 'It is of far less importance that occasional mischief should be done by slander … than that the whole course of justice should be enfeebled and impeded.' "

12. I am satisfied that the alleged statements that were made in this case are covered by absolute privilege. Not only were they made in contemplation of the litigation but they were made it seems to me on foot of an order of the court and to that extent I have

to disagree with the submission by counsel for the plaintiff that it is not covered by s. 17 of the Defamation Act. It seems in my view to be correct to say that both s. 17 (2) (g) and s. 17 (2) (w) are pertinent in this case so even if common law privilege did not attach which I am satisfied it does, the privilege afforded by the Act of 2009 would attach also.

13. Counsel for the plaintiff made the argument that the statements in question have nothing to do with the childcare proceedings or indeed the welfare of the child. That may or not be correct and I express no view on that. However, it seems to me that if it were necessary for the court to embark upon parsing and analysing of pre-trial, or indeed during the course of trial, statements as to whether they related directly to the subject matter of the proceedings, or perhaps something else gratuitously inserted by the person against whom the complaint was made, it would be virtually impossible for the court to operate if witnesses and other parties were to be exposed to an analysis of what they said to see if it was directly pertinent. I am satisfied for that reason that the rule as to absolute privilege is a rule that is clear and requires to be upheld if the process of the court is to be protected and witnesses are to be free to give evidence without their ability to do so being in some way fettered by a concern as to whether what they say is going to be the subject matter of analysis and possible defamation proceedings.

14. So for all of these reasons I am satisfied that the learned Circuit judge came to the correct conclusion and I accordingly affirm her order and dismiss this appeal.