

THE HIGH COURT

[2017 No. 639 P]

BETWEEN

CHRISTOPHER GRIFFIN

PLAINTIFF

AND

WILLIAM DAVID WALSH, GARDA COMMISSIONER AND MINISTER FOR JUSTICE

DEFENDANTS

**EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 26th day of January, 2018**

1. This judgment concerns an application described in a notice of motion issued on 17th July, 2017, pursuant to Order 19, rule 28 of the Rules of the Superior Courts or pursuant to the inherent jurisdiction of the court to dismiss or strike out the plaintiff's claim on the grounds that the plaintiff's statement of claim delivered in March 2017: -
  - (a) failed to disclose a reasonable cause of action;
  - (b) is frivolous or vexatious (as those words have been applied by the courts pursuant to common law);
  - (c) is unsustainable; or
  - (d) is bound to fail.
2. Following the determination of this application, the Court will determine any issue arising out of the plaintiff's notice of motion seeking judgment in default of defence which had been issued in June 2017. That sequencing of the motions for hearing is the usual practice where such motions come before the court because a motion like that of the defendants can have a significant impact on a motion for judgment in default of defence.

**Background**

3. The statement of claim refers to the plaintiff's arrest on 25th April, 2015, by the first named defendant Garda and subsequent charging for alleged criminal damage and possession with intent. The plaintiff summarised at para. 6 of the statement of claim how a bag and tools were inspected by the first named defendant beside the clamped car of the plaintiff's mother at Marlborough Place, Dublin.
4. At para. 11 the plaintiff referred to the request of his mother to bring tools to remove the clamp as she was not going to pay a clamp release fee due to her inability to pay. Paragraph 12 of the statement of claim read: -

*"The plaintiff travelled by bicycle to Marlborogh [sic] Place where [his mother] was waiting, a hammer, two junior hacksaws and red and grey scotch wire wool were brought to the scene for the purpose of cutting the lock off the clamp as an offer of contract does not mention the lock."*

5. Paragraph 13 then described how a man informed the plaintiff and his mother that a woman in a nearby car also "clamped had called the clampers" and the Gardaí. "The

*plaintiff and his mother sat on the ground with the unused tools placed in the bag beside the car."*

6. Paragraph 14 of the statement of claim then referred to the arrival of the first named defendant Garda, who the plaintiff contends could not have witnessed the "*alleged criminal damage as none had occurred*".
7. Paragraph 15 describes how the plaintiff, upon his release from Store Street Garda Station, returned to find that the clamp and lock were placed beside the car without the lock having been cut. The lock and clamp was retained by the plaintiff's mother. The plaintiff then described in the statement of claim how the first named defendant came looking for him and asked a neighbour about his whereabouts. The plaintiff referred to a statement of the first named defendant with a copy of the custody record in relation to his prosecution. That statement is, according to the plaintiff, to have read that the first named defendant Garda saw the plaintiff using tools on the clamp chains.
8. The plaintiff then fell seriously ill and was detained for thirteen days in the Mater Hospital, according to the statement of claim. Ultimately, the prosecution of the plaintiff came before Judge Hugh O'Donnell, who, according to the plaintiff, refused the plaintiff to adduce physical evidence to show that the clamp was undamaged, thereby purporting to undermine the prosecution's case. The plaintiff referred in his submissions at the hearing of this motion to special damages of fines imposed and health expenses incurred while also outlining general damage to his reputation among neighbours.

#### **Application to dismiss, strike out or stay**

9. The law is that in an application under O. 19, the court should consider the pleadings and ignore affidavit evidence filed. See *Barry v. Buckley* [1981] I.R. 306 at 308. However, Costello J., as he then was, at p. 308 stated that the court has an inherent jurisdiction to stay proceedings and to hear affidavit evidence relating to the issues "*to ensure that an abuse of the process of the Courts does not take place.*" Costello J. continued that: -

*"This jurisdiction should be exercised sparingly and only in clear 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."*

10. An action may be dismissed where an action or defence is shown to be frivolous or vexatious. Barron J. in *Farley v. Ireland* (*ex tempore* judgment, unreported, Supreme Court, 1st May, 1997) explained: -

*"... 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."*

11. Therefore, the terms frivolous and vexatious at law do not have the ordinary day meaning which may imply jocular or irksome type pleadings. The onus is on the defendants and Mr. O'Callaghan, counsel for the defendants outlined in this context under the following headings.

### **Malicious prosecution**

12. Mr. Kelly of the Office of the Chief State Solicitor, solicitor for the defendants, at para. 17 of his affidavit sworn on 17th July, 2017, described the uncontroversial right to clamp and exhibited the authorisation of the entity which clamped in order to show that nothing avails the plaintiff by reason of the clamping.
13. More significantly, he summarises correctly at para. 22 of his affidavit, the law as explained in detail by Costello J. (as he then was) in *Dorene Ltd v. Suede (Ireland) Ltd* [1981] I.R. 312 at 315 ("*Dorene Ltd*"), and I quote from Mr. Kelly's affidavit:-

*"It is well settled that in order to be actionable, a claim for malicious prosecution must involve the institution of unsuccessful criminal proceedings by a defendant maliciously and without reasonable and probable cause as a result of which the plaintiff has suffered damage." (emphasis added).*

14. The plaintiff in reply to this stresses that the criminal proceedings should not have succeeded for the reasons mentioned. The Court can understand the plaintiff's dilemma but it must apply the law. The plaintiff's claim will fail if he proceeds without having the conviction overturned or set aside.
15. Therefore, in this respect, the Court will stay the plaintiff's claim as against the defendants insofar as it relates to malicious prosecution until after he exhausts all avenues open to him to enlarge the time to appeal and prosecute any such appeal if he is allowed to do so.
16. If and when the plaintiff succeeds in having the time enlarged and succeeds in overturning his conviction, he will have liberty to apply to this Court to lift this stay as long as he puts forward an amended statement of claim in accordance with this judgment setting out the allegations of fact to be relied upon and for which he can adduce admissible evidence. In other words, this Court cautions the plaintiff to tread carefully when making allegations of malice because it is a difficult claim to prove and it cannot be inferred from what the plaintiff just believes. He must prove without hearsay evidence the matters identified by Costello J. in *Dorene Ltd*.

### **Defamation**

17. The plaintiff also claimed damages for defamation relating to:-
- (i) the conduct of the prosecution before Judge O'Donnell; and
  - (ii) the alleged conversation between the first named defendant Garda with one of the plaintiff's neighbours, called Joyce, where the neighbour said that she had seen the

plaintiff earlier. This was followed by the first named defendant leaving a card about the disclosure order made by the court.

18. Mr. O'Callaghan, counsel for the defendants, referred the Court to s. 17(2) of the Defamation Act 2009 which provides a defence to a defamation action where a statement is made at trial by a party, witness or legal representative in proceedings presided over by a judge.
19. The plaintiff in his submissions suggested that the District Court and the Circuit Court are not courts which could apply the provisions of the Constitution or the European Convention on Human Rights ("the Convention"). This is incorrect. Courts are provided for by statute and are bound by the provisions of the Constitution and the Convention.
20. The plaintiff has not challenged the constitutionality of any section of the Defamation Act 2009 or alleged incompatibility of that Act with the Convention in these proceedings. Such a challenge must comply with the rules provided for seeking that type of relief.
21. Therefore, the plaintiff is bound to fail in relation to his claim for defamation against the defendants for statements made at his prosecution in the District Court because the defendants have informed this Court and the plaintiff that that provision is relied upon and will be relied upon. As for the claim in respect of the conversation with the neighbour called Joyce, the first named defendant Garda was fulfilling his duties to furnish a copy of what the plaintiff calls the 'Garry Doyle Disclosure'.
22. Moreover a claim for defamation must be pleaded with particularity and nothing set out in the statement of claim can be construed as alleging defamation of the plaintiff in regard to that alleged conversation.
23. In those circumstances, the plaintiff's claim for damages in respect of defamation is struck out because it is bound to fail and will be an unnecessary burden on each of the defendants to proceed to a preliminary trial in relation to same.

#### **Negligent misstatement**

24. The plaintiff alleges that the first named defendant Garda was negligent and made a negligent misstatement. The plaintiff appeared to be unaware as to the law relating to negligence which provides a common law remedy.
25. It is not the role or function of this Court to teach or advise the plaintiff about the law. Suffice to say that I accept the submissions made by Mr. O'Callaghan, counsel for the defendants, that the plaintiff, in order to succeed under this heading, would have to show that the plaintiff himself who claims that he is the injured party relied on the statements of the first named defendant Garda.
26. In addition, this cause of action will only succeed where it relates to economic loss which is different to the fines and medical expenses mentioned by the plaintiff.

27. The loss of earnings pleaded at para. 25(i) of the statement of claim which has no particulars do not assist the plaintiff to overcome the requirement for a successful claim. In addition, he does not allege that he relied upon the word of the first named defendant Garda. The complaint is that the District Court Judge relied on the impugned statement.
28. Therefore, the Court determines that the plaintiff is bound to fail in respect of this alleged cause of action. Nothing could be achieved by allowing the plaintiff to amend his statement of claim as the plaintiff's case, on its facts, does not allege that he relied upon the first named defendant Garda's statement.
29. In those circumstances, the plaintiff's claim for damages in respect of alleged negligence and misstatement will also be struck out.
30. This Court has read the eighteen paragraphs contained in the seven pages of written legal submissions furnished to the defendants and this Court yesterday.
31. It appears that the plaintiff prepared those submissions believing that the Convention rights sought to be described therein allows him to launch an attack on his conviction through these proceedings which are collateral to his right to apply for an extension of time to apply or to judicially review the decision of Judge O'Donnell.
32. Lest it be misunderstood, the legislature has provided for ways to appeal and there are judicial review procedures available for consideration by the plaintiff. Rather than spending time, effort and money in pursuing these proceedings, the plaintiff could have pursued his rights under those mechanisms for appeal.
33. However aggrieved the plaintiff may feel about his conviction, those proceedings have not served him or the defendants well in the context of the time which has been expended.

**Summary**

34. The Court, therefore, will strike out all of the plaintiff's claims in these proceedings while putting a stay on his claim for malicious prosecution until he exhausts all available options open to him to overturn his conviction by the District Court in or about June 2016.
35. Thereafter, and following any setting aside of his conviction, if it occurs, the plaintiff will have liberty to apply to this Court by way of notice of motion served on the solicitors for the defendants to set aside such stay provided he exhibits to the affidavit grounding any such application, a revised statement of claim excluding any claim for defamation, negligence or misstatement and identifies the proposed manner for adducing evidence to establish the other onerous proofs for a successful claim in respect of malicious prosecution.