



**THE COURT OF APPEAL**

**CIVIL**

**Neutral Citation Number [2020] IECA 365**

**[2019 No. 411]**

**The President  
McCarthy J  
Ní Raifeartaigh J**

**BETWEEN**

**EUGENIE HOUSTON**

**APPLICANT**

**AND**

**DAVID BARNIVILLE & ORS**

**RESPONDENT**

**JUDGMENT of the Court delivered (by remote hearing) on the 30th day of November 2020 by Birmingham P**

1. This is an appeal from a decision of the High Court (Twomey J) of 18th July 2018, dismissing a consolidated action that had been brought by the plaintiff. Her proceedings consisted of five separate actions. The defendants were, at relevant times, members of the General Council of the Bar of Ireland (the Bar Council) or members of the Professional Practice Committee (the PPC) of the Bar Council or members of the Barristers Professional Conduct Tribunal (the Tribunal) or members of the Barristers Professional Conduct Appeals Board (the Appeals Board).
2. As emerges from the judgment of the High Court, Ms. Houston was called to the Bar of Ireland in July 2008. Prior to her call, she applied to become a member of the Law Library.
3. While a member of the Law Library, the plaintiff directly contacted clients of two solicitors who had previously instructed her as a Barrister, notwithstanding that the code of conduct at the time appeared to provide that a Barrister could only make contact with a client at a consultation at which the client and the Solicitor are both present, or in writing to the client through the Solicitor. This led to complaints against her by two Solicitors; a complaint in 2011 by Solicitor, Mary Morrissey, and by a Solicitor in 2013, Ms. Wendy Doyle.
4. These complaints, in one case, to the PPC and in the other case to the Tribunal, did not result in a penalty or censure, still less, exclusion or suspension from the Law Library, but

rather, an “advisory” opinion issued on 19th February 2015 by the Tribunal which advised Ms. Houston not to engage with clients in a manner giving rise to the complaints, or in any other manner that would be contrary to the code of conduct for the Bar of Ireland.

5. On 18th March 2016, Ms. Houston was excluded from the Law Library following protracted correspondence regarding outstanding Law Library subscription fees. Following her exclusion, she initiated the first of her proceedings; a claim against members of the PPC and the Standing Committee of the Bar Council. A second set followed in January 2018, being a claim against the Appeals Board.
6. By order of the High Court (Noonan J) of 25th April 2018, the various sets of proceedings, five in number at that stage, brought by Ms. Houston were consolidated into one action.
7. The High Court judge pointed out that the plaintiff’s Statement of Claim had referred to more than 40 reliefs that she was seeking, but he identified that there were essentially three broad heads of claim, namely:
  - Competition Law claims
  - Defamation claims
  - Assault claims
8. In the course of the judgment, the High Court judge reviewed in some detail the nature of the claims. He then turned to the application to dismiss, addressing first the relevant law in this area. In doing so, he reviewed authorities such as the Supreme Court decision in *O’Toole v. Heavey* [1993] 2 IR 544, and the decision of Clarke J in *Moorview Developments v. First Active* [2009] IEHC 214, as well as the relatively recent decision of this Court in *Burke v. Mullaly & Ors* [2019] IECA 82. Following the application to non-suit the plaintiff, judgment was reserved and the judge was in a position to deliver judgment, but was asked not to do so in order to allow consideration of the significance of *Burke v. Mullaly & Ors*. Subsequently, the trial judge concluded, correctly, in the view of this Court, that the decision in *Burke v. Mullaly & Ors* did not significantly alter the existing law in relation to applications to dismiss, but rather, saw an application of well-established existing principles.

### **The Competition Claim**

9. The trial judge quoted Ms. Houston as claiming that the actions of the defendants, and in particular, the actions of the Bar Council, the PPC, the Tribunal and the Appeals Board were anti-competitive and that they had abused their dominant position. He quotes her as commenting during her opening submissions to the Court that the case was “at its foundation a competition case”. He instances some of her criticisms as including the fact that different charges apply for membership, depending on the number of years in practice, and that there are different charges, depending on whether one is Dublin-based, and so, close to the Law Library, or Cork-based. He comments that the competition claims are unsubstantiated by any evidence, and this despite an acknowledgement by Ms. Houston in the Statement of Claim that expert evidence is required to substantiate her

various anti-competitive claims. Despite this, the judge points out that not a shred of evidence had been provided by Ms. Houston. He says that at its most basic, Ms. Houston provided no evidence as to what product market was being subjected to anti-competitive practices and suggests that she equates a mere assertion of a claim with proving such a claim.

10. The failure to point to and prove the existence of a market that was affected by alleged anti-competitive practices was pointed to in the course of the application for a non-suit. In reply, Ms. Houston asserted that the relevant market was barristers' services, but the judge observed that submissions after evidence in response to an application to dismiss was no substitute for evidence. In the High Court, and again, before this Court, the plaintiff, now appellant, has raised the issue of a reference to the European Court of Justice. In the course of his judgment, the High Court judge observed that the reference jurisdiction was confined to matters of EU law so that it was obvious that no such issues arose in the case, and that therefore, the Court would not entertain an application to refer. He went on to point out that in her closing submissions, responding to the application to dismiss, that Ms. Houston had appeared to resile from her application, quoting what she had to say in that regard. He concluded his consideration of this issue by saying that it was clear that the referral to the CJEU was moot, and if it was not moot, that there was no basis for such a referral. Whatever her final position in the High Court may have been, there is no doubt that before this Court, Ms. Houston has been unequivocal in seeking a referral. However, in the Court's view, there is absolutely no basis for a reference; no issue of EU law has been identified. There is no suggestion of European competition law with its focus on inter-State trade being engaged. Counsel on behalf of the respondent did raise one possible exception relating to the decision of the Bar Council not to provide a Certificate of Good Standing. This would never seem to have been a major part of the case, in that Ms. Houston mentioned it in the High Court only when reminded of the issue by counsel on behalf of the defendants. In any event, as was pointed out in the High Court judgment, and as counsel for the respondent submitted before this Court, the decision was based on the fact that Ms. Houston had outstanding fees, certificates are not issued to individuals where there are fees outstanding; she was not prepared to discharge those fees or to enter into any arrangement in relation to them. Accordingly, we are quite satisfied that no question of a reference arises.

#### **Defamation Claim**

11. Part of the consolidated action sees Ms. Houston claiming that when dealing with the Morrissey and Doyle complaints, that statements were made by the defendants which were defamatory of her. The key defamation claim made by her is that in replying to a letter from the Data Protection Commissioner regarding personal data held about her by the Bar Council, the defendants made defamatory statements. On the other hand, the defendants say that the statements in question are true and also that they were made on an occasion of qualified privilege. The judge explained the background to this aspect of the claim, the making of a data access request by Ms. Houston to the Bar Council, responded to by the Director of the Bar Council, but not in a manner satisfactory to Ms. Houston, followed by a complaint by her to the Data Protection Commissioner.

12. The reply from the Director of the Bar Council which is in issue was in these terms:

"I note that you have commenced an investigation and that Ms. Houston supplied you with materials with her complaint. As you may be aware, by virtue of the correspondence shared with you by Ms. Houston, the requests in relation to data protection by Ms. Houston arose specifically in the context of a complaint by Hugh Millar, Solicitor, on behalf of Mary Morrissey, Solicitor, seeking to have the Professional Practices Committee (PPC) of the Bar Council direct Ms. Houston to desist from what was implicitly alleged to have been misconduct. Following three pre-hearing rulings, two in favour of Ms. Houston, the complaint was not pursued. Apart from standard membership data, the correspondence of the parties in relation to the complaint comprises the only material held by the Council with reference to Ms. Houston at the time of the request.

. . .

Finally, I should say that, since the request and reply, Ms. Houston's complaint against the members of the PPC has been pursued and resolved, as has an appeal."

The judge referred to the fact that the letter was a response to a request from the Data Protection Commissioner, and therefore, in his view, issued clearly on an occasion of qualified privilege. He felt that in those circumstances, Ms. Houston could succeed only by establishing malice and he was of the view that there was not a shred of evidence that would provide a basis for a finding of malice. Any suggestions of malice by her amounted to mere assertion. Moreover, the statement of which Ms. Houston particularly complains is true, 'following three pre-hearing rulings, two in favour of Ms. Houston, the complaint was not pursued'."

13. The trial judge was of the view that the statement that two pre-hearing rulings were in Ms. Houston's favour did not imply, as suggested by Ms. Houston, that the Director of the Bar Council was insinuating that there was a ruling that went against her. He points out that the letter from the Director explicitly stated that the complaint against Ms. Houston was not pursued, and thus, that any statement could not be regarded as being in any way negative, so far as Ms. Houston was concerned, or defamatory of her.

**Other Alleged Defamatory Statement**

14. The trial judge dealt with suggestions that findings made by the PPC and then by the Tribunal and then by the Appeal Board in relation to the Morrissey complaints and Doyle complaint were defamatory. He addressed the role of the PPC, the Tribunal and the Appeal Board. He was of the view that so far as the PPC is concerned, its role was advisory in nature, but in any event, being the recipient of an adverse finding was in no way commensurate with the finding being defamatory. So far as the Tribunal and Appeal Board were concerned, these were manifestly on occasions of qualified privilege and absolutely no evidence had been provided to the Court of malice on the part of those defendants. To the extent that there were claims of malice, they amounted to mere assertions. He then went on to dismiss the defamation element of the plaintiff's claim.

### **The Assault Claim**

15. When giving evidence, Ms. Houston made clear that her claim, her trespass to the person claim lay in assault. She placed reliance on the fact that she had made a complaint to Gardaí in November 2011. The complaint to Gardaí came against a background of the fact that she had received a text from one of the defendants, Mr. Fergal Foley. Thereafter, her position was that because she had complained to Gardaí, that this proved she had been assaulted, her position being that she was apprehensive and that this constitutes an assault. Perhaps not surprisingly, the judge was of the view that the fact that the plaintiff had gone to the Gardaí after receiving a text was very far removed indeed from what would be regarded as sufficient evidence to support a claim for reasonable apprehension of an immediate battery, and thus, an assault. Furthermore, the judge was of the view that if the claim was to be regarded and dealt with as one for the intentional infliction of emotional distress, for Ms. Houston to succeed, she would be required to establish that she had suffered some recognised psychiatric injury, whereas, Ms. Houston was, in fact, very clear that she had not suffered any personal injuries.

### **Discussion**

16. In the course of the appeal, the appellant has implicitly asked this Court to reverse the findings of the judge in the High Court in relation to the competition claim, the defamation claim and the assault claim. We say implicitly, because the focus of her submissions has very much been on the competition aspect.
17. A significant part of the appellant's appeal is a contention that she was denied fair procedures in the High Court. She alleges bias against the trial judge (Twomey J). The appellant advances a number of reasons. Firstly, she points out that he is a Bencher of Kings Inns, as are all Benchers of the Superior Courts. However, it is noteworthy that while Ms. Houston has cast her net widely when naming defendants in her various actions, she has not, at least to date, sued the Benchers of Kings Inns, though there was, perhaps a hint during the course of the hearing of the appeal that she is not done yet. On 30th June 2008 when Ms. Houston furnished her declaration to the Benchers of the Kings Inns, declaring that she would only practice as a Barrister while a member of the Law Library; that she would continue in practice only while retaining membership of the Law Library and that she would submit to the disciplinary jurisdiction of the Bar Council and comply with the rules and regulations of the Bar Council. Mr. Michael Twomey, Solicitor, as he then was, was not a Bencher of Kings Inns.
18. The other issue that she raises is that the trial judge, at a time after judgment had been reserved, but before delivery of the reserved judgment, went on circuit with the first named defendant, David Barniville, who is, of course, now a High Court judge. We feel bound to say that we find her attempt to raise this issue now as quite disingenuous. As appears from the High Court order, the Court had set aside 31st May 2019 as the date for delivery of judgment and the matter was listed before the Court on that date. In fact, judgment was not delivered, because it was on that occasion that the plaintiff made a request that delivery of judgement be deferred to allow for consideration of the impact of the Court of Appeal decision in *Burke v. Mullally*. The order recites that on that occasion, the plaintiff expressed concerns that a "perception of bias" might taint the Court's

judgment, given that this Court had spent several weeks hearing cases on circuit in Ennis with one of the defendants, now a judge of the High Court, David Barniville. The order recites that the plaintiff said that she was not asking the Court to recuse itself.

19. Ms. Houston is very critical of the High Court judge whom she claims accused her or found her guilty of perjury. She makes that claim despite the fact that the judge, in the course of his judgment, was at pains to state that he found the plaintiff a truthful witness. Perhaps more unusually, the order of the High Court recites the fact that the Court, in its judgment, found the plaintiff to be a truthful and honest witness in relation to her perception of the events which occurred to her (see s. A-59 of the Core Book). Lest there be any doubt about the matter, we, too, do not doubt her truthfulness. We do not doubt that she truly believes that the defendants attacked her rights and dehumanised her and that she was treated like a Jew in Nazi Germany; that she was the subject of a punishment beating; that she was inflicted with modern-day slavery and subjected to a reign of terror. The question is not whether she actually believes those things, but the really sad thing is that she apparently does.

20. In the course of her oral submissions to this Court, she states that she saw hatred in the eyes of the trial judge as he delivered judgment. This is a slightly surprising complaint as the judgment of the High Court records her saying exactly the same thing about another High Court judge. It is not clear whether this is a result of confusion on the part of the appellant, or whether she now says that she saw hatred in the eyes of a number of judges. Counsel on behalf of the respondent points out that, apart from specifically saying, in the context of asking for a deferral of delivery of judgment, that she was not seeking recusal, that she reiterated that position on 9th July. The transcript for that date records her as saying:

“Now, Judge, I think we’ve established very clearly that objective bias arises because of the Bencher situation, which is not your fault, but I’m satisfied no actual bias arises, so we’re not going to – there’s no recusal issue or anything like that.

...

And I could count on one hand the number of judges who would fall into the same category as you, Judge Twomey.”

21. It seems to us that the change in attitude from the very positive tone being expressed on 9th July, to a situation where she now claims that she was treated unfairly and observed hatred in the judge’s eyes, has more to do with the outcome of the proceedings than any issue with the procedures actually followed. We are satisfied that the outcome was determined by the nature of the proceedings and their inherent weakness, rather than by reference to the procedures followed. Indeed, it has to be said that Ms. Houston has been indulged to a very considerable extent; indeed, a great many people would say to an unwarranted extent.

22. We are satisfied that the judge's ruling in respect of the three issues – the competition issue, the defamation issue and the assault issue – was correct, and indeed, the only conclusions reasonably open to him. We have already indicated why we are in agreement with the judge's approach to the competition issue. So far as the defamation issue is concerned, we are in agreement that the publications pointed to could not, under any circumstances, be held to be defamatory, and also in agreement that they were uttered on what were clearly occasions of qualified privilege. In the case of the communication between the Director of the Bar Council and the Data Protection Commissioner, the fact of communication was triggered and precipitated by the actions of Ms. Houston. Those actions necessitated a communication from the Director of the Bar Council and the communication was accurate and truthful and could not be regarded as defamatory. So far as the assault claim is concerned, in proceedings entirely without merit, this is, by some distance, the most bizarre aspect of the claim. We find it hard to see how such a claim could ever have been advanced, but we will confine ourselves to saying that the judge was absolutely correct to dismiss it.
23. We are satisfied that the proceedings are misconceived and are, and always were, without merit.
24. The manner in which the appeal has been pursued gives rise to disquiet on our part. We would instance the fact that almost by way of an aside, the appellant comments that a doctor, who was one of the lay members of the Tribunal, was, she believed very strongly, somebody who should be struck off as a doctor for the conduct that he was engaged in. On a number of occasions, she referred to another lay member, a distinguished academic, in disparaging terms as "Mammy Hyland" or "Irish mammy", this, prompted by the fact that the lay member in question had a daughter who was practising at the Bar. She repeated a suggestion that a Barrister, who acted as Chairman of the Tribunal, was suffering from dementia. This remark was insensitive and quite disrespectful of those who do suffer from this condition and the families of sufferers. We deprecate in clear terms the way which this appeal was conducted by Ms. Houston.
25. We are firmly of the view that this is an appeal that must be dismissed.