



THE COURT OF APPEAL

Court of Appeal Record Number: 2023/139

High Court Record Number: 2020/7098P

Neutral Citation Number [2024] IECA 81

**Power J.
Butler J.
O'Moore J.**

BETWEEN/

ALAN MOYNE

PLAINTIFF/APPELLANT

- AND -

**SAM TODD, EUGENE F. COLLINS, PAUL DEMPSEY, ABIGAIL BUTLER,
MARK WALSH, AILISH COLGAN, KARL SMITH, PATRICK MABRY AND
STEVE RODGERS**

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 19th day of April 2024

1. This is my judgement on an appeal by the plaintiff, Mr. Moyne, against a decision of the High Court (Roberts J.) striking out this action as against all defendants on the grounds that it is vexatious, an abuse of process and bound to fail.
2. The proceedings arise from a hearing before the Circuit Court (Judge Keenan Johnson) on the 7th November, 2019. On that day, Mr. Moyne made an application to the court for a copy of the DAR in respect of an earlier hearing. This application was made in

proceedings entitled *Tanager DAC v Alan Moyne & Elena Moyne*. Elena Moyne is Mr. Moyne's wife. During the course of that hearing, counsel for Tanager who is now the first defendant to these proceedings (Mr. Todd) made the following statement: -

"In the ordinary course of it, judge, there is no issue in respect of the taking up of the DAR. I think what needs to be pointed out is that Mr. Moyne is appealing an order of this court made on the 30th July. That order was adjourning the substantive proceedings but it also made a direction that a copy instrument from the Property Registration Authority be provided to the plaintiff and that arose because there was an issue in the registration of title on the property. Basically, numbers one and two had become reversed, the court may recall.

Judge: Oh yes. I remember it, yes."

3. Critically, Mr. Todd went on: -

"And the issue is Mr. Moyne is appealing that court order releasing the document to the plaintiff. Now, two things arise. The first is that document is already in my possession and the second is, as has become apparent because Mr. Moyne is now trying to suppress that document, he exhibited an altered copy that landed squarely in his favour and put it before the court and on that and on that -"

4. Mr. Moyne then interrupted, claiming that Mr. Todd was accusing him of

"committing perjury before the Court."

5. Mr. Todd continued;

"Well, I ...what I would suggest, Judge, if the Court wishes to review the document I have and the document that Mr. Moyne swore that was a true copy of the instrument provided from the PRA, because they are different and the only differences relate to areas where his name appears as purchaser of the property."

6. This is the central exchange that has given rise to the current proceedings. It will be seen immediately that Mr. Todd's statement is, at least on the face of it, one made in a court. This statement has caused Mr. Moyne not only to sue Mr. Todd, but also to sue a number of other parties. Those parties are the firm of Eugene F. Collins (the second defendant), partners in the firm of Eugene F. Collins (the third, fourth and fifth defendants) and directors of Tanager DAC (the sixth, seventh and eighth defendants). Before considering the arguments made on appeal against the order of the High Court, it is necessary to put the events of the 7th November, 2019 in context. It is then necessary to consider the claims made by Mr. Moyne in the current action. I will then summarise the judgment of the High Court, before moving on to describing and deciding the issues raised in this appeal.

The background to the events of the 7th November, 2019

7. In proceedings taken by Tanager DAC ("Tanager") an order for possession was sought against Mr. Moyne and his wife Elena over property in County Westmeath. The possession proceedings bear the record number 2015/00035, which in itself indicates how long they have been ongoing. As part of his defence of the Circuit Court proceedings, Mr. Moyne asserted that the relevant property was not one in which he or his wife had a "vested interest", as Mr. Moyne put it. In those proceedings, Mr. Moyne filed a motion seeking certain reliefs, including an order transferring the Circuit Court proceedings to plenary hearing. This motion was grounded on an affidavit dated the 5th March, 2019, sworn by Mr. Moyne. In his affidavit, Mr. Moyne swore that the property (in respect of which possession was sought by Tanager) "*has never been in the possession of the defendants*". At the hearing before this court, it was submitted by counsel for the defendants to these proceedings that documentation exhibited by Mr. Moyne to his

affidavit of the 5th March, 2019 had been selectively assembled, and in particular that documentation identifying Mr. Moyne and his wife as the owners of the property had not been exhibited by him. Counsel for the defendants argued that this was a particularly pernicious omission by Mr. Moyne, in that pages had been removed from exhibited documents which had the effect of concealing the interest that the Moynes had in the relevant property. The submission made by counsel at the appeal hearing can be summarised in this excerpt from the transcript of the DAR (at p. 29): -

“So you had a situation which Mr. Moyne, on affidavit, had told the Circuit Court that he had never possessed this property and had no dealings with it. He exhibited what he said was a true copy of the relevant instrument, but omitted from that instrument, for whatever reason - I can't speak to his motivation - all of the pages that identify the property and identified him and his wife as the purchasers of that property.”

In his reply before this court, Mr. Moyne initially accepted the premise of this submission of counsel for the defendants/respondents, but he then changed his position.

8. Given the possibility that, notwithstanding the decision of this court, this matter at some time may go to trial it would not be appropriate to express a view about the state of the documentation exhibited by Mr. Moyne with his affidavit of the 5th March, 2019. The summary I have provided is, however, both necessary and sufficient to understand the nature of the dispute between Tanager and Mr. Moyne when the matter came back before the Court on the 7th November, 2019. It should be said that, between the issuing of Mr. Moyne's motion in early March 2019 and the hearing on the 7th November of that year there had been an intermediate hearing before Judge Johnson on the 30th July, 2019, at which time the Circuit Court made an order directing the PRA to make available to

Tanager a copy of the relevant instruments in respect of the property in which Mr. Moyne claimed that neither he nor his wife had any interest.

9. After the 30th July, 2019, but before the hearing on the 7th November, 2019, the PRA released the relevant documents to Tanager. It is against that background that one must consider the statement made to the court by Mr. Todd.

10. As already observed, Mr. Moyne took immediate umbrage with this statement. He then issued the current proceedings.

Mr. Moyne's claim

11. The plenary summons issued by Mr. Moyne seeks the following reliefs: -

“Damages for defamation, malicious falsehoods, loss of reputation and a breach of constitutional rights.”

Interest is also sought as well as costs and further or other relief.

12. I will set out the general indorsement of claim in full, as it is important to understand precisely the claim being made by Mr. Moyne. It reads: -

“The defendants, each acting individually, together collectively in collusion, by professional negligence, dereliction of duty or otherwise with intent, did cause damage to the good name and standing of the plaintiff in the eyes of the Court, the public and community to which the plaintiff belongs, contrary to the Defamation Act, 2009.

The defendants, each acting individually, together collectively or in collusion, by professional negligence, dereliction of duty or otherwise with intent, did cause or instruct counsel Sam Todd to produce an altered copy and/or utter instrument ... to have been altered and to produce same in open public court with the intention to defame did cause damage to the good name and standing of the plaintiff in the eyes of the court, the public and community to which the plaintiff belongs.

The defendants, each acting individually, together collectively or in collusion, by professional negligence, dereliction of duty or otherwise with intent to cause counsel Sam Todd to accuse the plaintiff Alan Moyne of suppression and failure to produce evidential material, alteration of Statutory Instrument ..., use of a false instrument, making a copy of said instrument by forgery and alterations to create a false instrument and exhibiting same under oath as an exhibit attached to a sworn affidavit of 6th March, 2019 with the intent to commit perjury and pervert the course of justice, which did defame and cause damage to the good name and standing of the plaintiff in the eyes of the court, the public and community to which the plaintiff belongs, contrary to the Defamation Act, 2009.

The defendants, each acting individually, together collectively in collusion, by professional negligence, dereliction of duty or otherwise with intent, did with the intent to damage the reputation of the plaintiff by making statements of malicious falsehoods in a public place by making accusations of criminal acts. The said false statements were calculated to damage the plaintiff's reputation in the eyes of right thinking members of society, and did so damage it."

13. The first ten paragraphs of the Statement of Claim simply identify the parties. The final four paragraphs read as follows: -

"11. The defendants when acting in their respective professional capacities have Professional and/or fiduciary duties. The plaintiff claims that the herein defendants did, whether acting individually, severally and/or collectively, in collusion, did publish a false document and did present said false document to a public Court at Mullingar Criminal Circuit Court, 7th November, 2019, declaring same to be authentic and true evidence to support allegations of fraud and forgery against the herein plaintiff.

12. The plaintiff claims that the defendants, while acting in both their individual professional capacities, by instruction, and/or collectively, as servants and/or agents of their respective principles, did openly make and in fact actually and/or impliedly condone/consent to the utterance/publication of the said defamatory statement/document, in circumstances where the knew or ought to have known that such unrelated statements made outside the matter before the court, were made with the sole intent to cause damage to the good name and standing of the plaintiff in the eyes of the court, the public and community contrary to the Defamation Act, 2009.

13. The plaintiff claims that the herein defendants have, individually and/or collectively, seek to deprive the herein plaintiff of his right to due process, and his rights to the defence of his good name and reputation, by means of a veiled threat of probable liability of the plaintiff to legal costs should he choose to pursue his lawful recourse to due process.

14. The plaintiff claims that the deliberate defamatory statements and publication of the documentation as set out above, were entirely separate and discrete from the net issue before the court, that being the plaintiff's application for the DAR.

Therefore, the statements and publication of the aforementioned document may only be construed as deliberate, with the intent to defame the plaintiff herein."

14. Taking the two documents together, it is clear that some of the claims made by Mr. Moyne cannot withstand even the most cursory examination. For example, the claim made at para. 13 of the statement of claim cannot succeed. It is not unlawful to indicate to a plaintiff (or a potential plaintiff) that if they lose their case the defendants will seek the costs of defending the action. There is also a significant amount of duplication in the claims made. Helpfully, in a document prepared by Mr. Moyne for the appeal hearing (and circulated to the court, with the consent of the defendants/respondents after the appeal had

been heard) Mr. Moyne defines his case as one for damages for defamation, malicious falsehood, loss of reputation and breach of constitutional rights as is set out in the plenary summons. The trial judge felt that all of these claims were bound to fail. I will now, briefly, consider her judgment.

The judgment of the High Court

15. In considering her jurisdiction to strike out this action, the trial judge referred to the judgment of Clarke J. (as he then was) in *Lopes v Minister for Justice* [2014] 2 IR 301 at paras. 17 and 19. She also referred to the judgment of Clarke J. in *Moylist Construction Limited v Doheny* [2016] 2 IR 283 in which the caution that a court should exercise when dealing with a strike-out application was emphasised. In particular, she referred to the judgment in Clarke J. at para. 8 to this effect: -

“... all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff’s case is very weak or where it is sought to have an early determination on some point of fact or law. It is against that background that the extent of the court's entitlement to look at the facts needs to be judged.”

16. When considering the appeal, I will return to *Moylist*. In particular, I will consider the portion of that judgment which particularly stresses the undesirability of striking out cases which may be viewed as complex. This section of the decision of Clarke J did not feature in the judgment of the High Court in the current case. However, the conclusion of the trial judge having reviewed the authorities is unimpeachable. It is to this effect (at para. 20 of the judgment):-

“The question I must ask in considering the strike-out application therefore is not whether the plaintiff would succeed at trial... but rather asking whether the plaintiff

could possibly succeed if he was allowed to proceed to trial, assuming he could establish the facts he alleges.”

17. On the question of absolute privilege, the trial judge referred to s. 17 of the Defamation Act, 2009 (to which I will return),the judgment of this court in *Scanlon v Gilligan* [2022] IECA 270 and of the High Court (Hedigan J.) in *Reid v Commissioner of An Garda Síochána* [2014] IEHC 246. The trial judge also referred to the judgment of the High Court (Noonan J.) in *RC v KE* [2018] IEHC 549 where it was held: -

“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.”

18. The trial judge therefore concluded that the defendants were entitled to avail of the complete defence of absolute privilege. She also found that an argument made by Mr. Moyne - to the effect that the Criminal Justice (Perjury and Related Offences) Act, 2021 overrode or dissolved the relevant provisions of the Defamation Act, 2009 - was

misplaced. She found in particular with regard to the legal defendants to the action that they did not owe any duty of care to the opposing party and that any failure to reach relevant professional standards did not give rise to a cause of action on the part of Mr. Moyne. With regard to the directors of Tanager, she found that these had been conflated with the company and that this could not be done in the absence of any representative order, which had not been sought or made.

19. Finally, the trial judge decided that Mr. Moyne's claim that his constitutional rights had been breached was also bound to fail.

20. It should be noted that the trial judge expressly considered whether any amendment to the pleadings could save the case. She concluded that there was no amendment to the proceedings which could render them statable. At the appeal hearing, Mr. Moyne claimed that he had applied to amend his proceedings during the course of the hearing before the High Court. Indeed, one of the grounds of appeal (at ground number 8) reads: -

“The learned Judge erred in law and reasoning in not allowing the application of the plaintiff to amend the pleadings, Order 28, Rule 1 Superior Court Rules.”

21. At the hearing of the appeal, Mr. Moyne said (at p. 44 of the DAR transcript): -

“I did not make a written application to amend my pleadings. I most certainly made an oral application to amend my pleadings before the judge in the High Court.”

22. This is something of an overstatement by Mr. Moyne. Because of the differences between the parties as to whether or not an application to amend was made, this Court directed that the transcript of the hearings before the High Court be made available to us. At p. 100 of the DAR transcript of the day on which the motion was argued Mr. Moyne said the following: -

“Now like I said, I want leave to amend, should defamation on Article 17 give them absolute privilege, that I wish to amend my pleadings under Rule 28.1.”

The trial judge responded “yes”. Mr. Moyne continued: -

“To bring this matter forward to thrash out the real matters of issue.”

23. This appears to be a reference back to an exchange at pp. 90 and 91 of the DAR transcript. At p. 90, the issue about the contents of the exhibits to Mr. Moyne’s affidavit of the 5th March, 2019 was being addressed by him in his main submission to the court. He then said: -

“When were they taken out is the question? Right. It’s not a question for me because I can’t guess. Now, in circumstances that I have clearly demonstrated by way of irrefutable evidence, I am going to seek leave of this court to amend my pleadings, pursuant to Order 28, Rule 1 of the Superior Court Rules.”

There was then an exchange between counsel for the defendants, Mr. Moyne and the trial judge. The High Court Judge made it plain that Mr. Moyne was “*obviously*” entitled on notice to seek to amend the pleadings. He replied: -

“Yes, thank you. There are multiple recurring irregularities, inconsistencies, I believe perjury, within the pleadings and evidence produced surrounding this notice of motion of the defendants, the plaintiff seeks the following orders: An order for leave to amend or alter the pleadings, pursuant to Order 28, Rule 1 of the Superior Court Rules; and order striking out the defendant’s motion in regard to the multiple in - an order transferring the matter back to the Common Law Court; costs of defending this motion and any other order that this court should deem fit.”

Mr. Moyne then went on to address the trial judge about a variety of other issues.

24. Following delivery of the High Court judgment, the matter was listed before the trial judge on the 17th May, 2023 to deal with costs. During the course of the hearing, Mr. Moyne made complaints again about Mr. Todd and about the behaviour of other “*legal*

professionals” during the course of a hearing before a different Circuit Court judge. Mr. Moyne went on (at p. 5 of the DAR transcript): -

“I now apply to the Honourable Court and ask the judgment be reviewed and more primarily the reasoning be expanded on the Court’s refusal of my application to amend my pleadings pursuant to Order 28, Rule 1 of the Superior Court Rules.”

25. It can be said with confidence that Mr. Moyne never brought any application before the trial judge to amend the pleadings. Even having considered the transcript, it is not particularly clear what form of amendment Mr. Moyne was proposing. However, the nature of the proposed amendment appears to relate to the controversy about the exhibit sheets to his affidavit of March 2019. No more extensive change to the pleadings was proposed. Needless to say, no suggested amended plenary summons or statement of claim was made available to this Court on appeal. The particular ground of appeal (ground number 8) is clearly unstatable, given that Mr. Moyne never sought in any proper or meaningful way to amend his pleadings before the trial judge and given that he accepted that such a motion to amend would have to be brought properly on notice to the defendants. However, of more consequence for the purpose of this appeal hearing is the fact that, despite proposing that he would do so, Mr. Moyne does not appear either in the High Court or in this court to have indicated any proposed amendment to the pleadings which he feels would meet the infirmities in the case identified by the High Court judge in her judgment. This is notwithstanding the fact that, both in the submissions of counsel for the defendants before the High Court and in the judgment itself, it is made plain that the proceedings would not be struck out if they can be saved by amendment.

The appeal

26. It is clear from the hearing before the High Court, and indeed the hearing before this Court, that Mr. Moyne's complaints range far and wide. However, the grounds of appeal are just eight in number, and are relatively confined. I will therefore consider this appeal by reference to the individual grounds of appeal advanced by Mr. Moyne.

27. Before doing so, it should be noted that at a case management hearing on the 6th October 2023, before this Court, there was an objection by the defendants/respondents to the inclusion of arguments by Mr. Moyne in the appeal documents to the effect that the defence of absolute privilege is in breach of his rights under the Constitution and the European Convention on Human Rights. The order made by Noonan J. at the case management hearing reads: -

“The Court doth direct that the declarations of unconstitutionality and incompatibility sought in the said Notice of Appeal are not properly the subject matter of the within appeal as they were not canvassed in the High Court and that those matters should be litigated at first instance and not in the within appeal.”

Notwithstanding this, a significant portion of Mr. Moyne's written submissions to this court canvass the very issues which he was directed not to agitate before us.

28. I will now consider the grounds of appeal in the sequence in which they occur on the notice of appeal.

29. The first ground of appeal reads as follows: -

“(1) The learned judge has infringed the Applicant's right to a fair hearing as protected by Article 6.1 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Right (*sic*) of the European Union.”

30. This would appear to be the type of ground of appeal prohibited by Noonan J. in his order of the 6th October, 2023. Whether or not it is, however, the written submissions of

Mr. Moyne do not refer at all to Art. 47 of the Charter or Art. 6.1 of the Convention.

While his ground of appeal is advanced, therefore, it is simply not argued in any coherent way by Mr. Moyne.

31. With regard to the right to a fair hearing, which it is stated that the trial judge has infringed, this may be a reference to a complaint ventilated by Mr. Moyne at the conclusion to his written submissions where he says: -

“65. Finally, I respectfully submit that the former position of the learned judge as Managing Partner, of a Leading Firm of solicitors may constitute a subjective bias who (*sic*) prevented her to identified (*sic*) effective remedy against former peers and/or colleagues.”

This allegation of subjective bias was never raised before the trial judge. This is despite the fact that the hearing before the trial judge appears to have lasted considerably longer than the two hours which it was scheduled to take, and there was therefore plenty of time to raise this issue. It is also despite the fact that there was a period of some weeks between the hearing (the 31st March, 2023) and the judgment (the 5th May, 2023). There was a further gap between the delivery of the judgment and the hearing with regard to costs and any other adjectival matters, which took place on the 17th May, 2023. Given that at no stage did Mr. Moyne raise this particular concern about the trial judge, he cannot do so on appeal. In addition, it is not a complaint that was fleshed out in any meaningful way, either in written or oral submissions by Mr. Moyne. An allegation of subjective bias is a very serious one. Even were it properly part of the appeal, it was not made out in any way before this court. For the sake of completeness, I should say that in a case such as this an allegation of bias against a judge grounded solely on the fact that she was a prominent solicitor is manifestly unsustainable. That would be the case even if the allegation was one of objective bias. All the more so, to assert that the trial judge was subjectively biased

against Mr. Moyne merely because she had been a successful solicitor is utterly without merit.

32. I therefore find no ground of appeal one fails.

33. Ground of appeal two reads: -

“The learned judge erred in law and reasoning in ruling that malicious falsehood, loss of reputation and breach of constitutional rights falls within the scope of defamation. In doing so the learned judge did breach constitutional right of the applicant to a fair hearing and equality before the law, Article 40.”

34. Again, this appears to be a ground of appeal which the order of Noonan J. prohibits Mr. Moyne from advancing, at least to some extent. Mr. Moyne was certainly entitled to advance the argument that malicious falsehood does not fall within the scope of defamation, as defined by the Defamation Act, 2009 and he was therefore entitled to argue that the absolute privilege provided by s. 17 of the 2009 Act does not apply to the separate tort of malicious falsehood. It should, however, be noted that this argument was not made by Mr. Moyne before the High Court. In construing this ground of appeal as broadly as I have, I am giving Mr. Moyne the benefit of the doubt. This opacity on the part of Mr. Moyne’s position on this particular issue may explain why it was not until the delivery of their written submissions that the defendants/respondents raised the argument that Mr. Moyne’s pleadings could not sustain a claim for malicious falsehood. However, by the time of the appeal hearing Mr. Moyne at least appeared to have raised the question of the scope of s. 17 as far as his malicious falsehood claim was concerned, and the defendants/respondents had countered that argument (in part) by reference to Mr. Moyne’s pleadings. In all the circumstances, and notwithstanding that these issues were not apparently canvassed before the trial judge or set out with precision in the appeal papers, I will decide

these points now. It is significant that neither side suggested that these related questions were not properly before this court.

35. Considering, therefore, the portion of this ground of appeal which is permitted given the order of Noonan J, it appears to raise two issues. The first is that a claim for loss of reputation and a breach of constitutional right to one's good name does not fall within the scope of the tort of defamation, and that therefore the defence of absolute privilege is not available to parties sued for these wrongs. I disagree. "*Defamation*" is defined at s. 6(2) of the 2009 Act as: -

"(2) The tort of defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person), and "defamation" shall be construed accordingly."

36. Section 2 of the Act defines "*defamatory statement*" as: -

"a statement that tends to injure a person's reputation in the eyes of reasonable members of society..."

The existence of the tort of defamation therefore ensures that an individual's right to their good name and reputation can be vindicated by the bringing of proceedings. There is no separate claim for "*loss of reputation*". While there is, of course, a constitutional right to one's good name this is not at all inconsistent with absolute privilege applying to court proceedings. In *Looney v Bank of Ireland WJSC – SC (9 May 1997)* O'Flaherty J. observed: -

"However, there is at issue a far more fundamental point which is the need to give witnesses (and also indeed the judge) in court, a privilege in respect of oral testimony and also with regard to affidavits and documents produced in the course of a hearing. Such persons, either witnesses or those swearing affidavits, are given an immunity from suit. Otherwise, no judge can go out on the bench and feel that he or she could

render a judgment or say anything without risk of suit. Similarly, witnesses would be inhibited in the way that they could give evidence. The price that has to be paid is that civil actions cannot be brought against witnesses even in a very blatant case...”

37. In *Bebenek v Minister for Justice & Equality and Ors. (No. 2)* [2019] IEHC 154

Keane J. commented: -

“50. Lawyers and judges are often obliged to explain to curious members of the public that, despite the obligation upon the State under Article 40.3.2 of the Constitution to protect the good name of every citizen, persons (whether parties, witnesses, or others) can have their reputations assailed in public court proceedings that may be widely reported upon under the umbrella of absolute immunity from proceedings in defamation as long as those reports are fair and accurate, even if the attack concerned proves to be baseless or malicious (as long as the report does not). The explanation is that ‘it is an important aspect of public policy that those involved in the administration of justice should be freely able to speak their minds without fear of legal challenge’.”

38. Finally, in *Shatter v Guerin* [2021] 2 I.R. 415, at paragraph 45, O’Donnell J (as he then was) commented;

“...the good name of the citizen is one of the personal rights the State is obliged to defend and vindicate...In most contexts, the legal protection of a person’s good name as required by the Constitution is to be found in the law of defamation...Some commentary which is damaging to a citizen’s good name may not be actionable without proof of malice, or even at all, such as a statement made on an occasion of absolute privilege. It is not the case, therefore, that the Constitution requires that even false statements which are damaging to a person’s reputation should always give rise to a remedy at law.”

39. Section 17(2) of the Defamation Act, 2009 provides: -

“Subject to section 18(3) or 78(2) of the Houses of the Oireachtas (Enquiries, Privileges and Procedures) Act, 2013 and without prejudice to the generality of *subsection (1)*, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was -

(g) made by a party, witness, and legal representative or juror in the course of proceedings presided over by a judge, or other person, performing a judicial function...”

40. The existence of the tort of defamation vindicates the individual’s right to a good name, as provided for in the Constitution. However, that constitutional entitlement is moderated, for the reasons explained in *Looney* and in *Bebenek*, because of the need to have individuals involved in judicial proceedings able to speak without fear of provoking a claim for defamation. Mr. Moyne has not in these proceedings sought a declaration that s. 17 of the 2009 Act is unconstitutional, though he does belatedly and impermissibly in his Grounds of Appeal seek to argue that “...the granting of Absolute privilege to legal professional (sic) while engaged in unlawful proceedings and abuse of process is a violation of constitutional and ECHR right to equality in law.” Mr. Moyne cannot escape the consequences of s. 17 by seeking to describe his action as a claim for breach of his constitutional right to his good name. For these reasons, the trial judge did not err in finding that this part of Mr. Moyne’s claim in these proceedings was in reality a claim in defamation, which would allow s. 17 of the Act to be raised as a defence.

41. I will now return to the claim for malicious falsehood, which is the second issue which I am treating as falling under the rubric of the second ground of appeal. Mr. Moyne is quite correct in saying that malicious falsehood is not a defamation claim. It is a separate tort recognised by s. 42 of the 2009 Act. Section 42 reads: -

“42.— (1) In an action for slander of title, slander of goods or other malicious falsehood, the plaintiff shall be required to prove that the statement upon which the action is founded—

(a) was untrue,

(b) was published maliciously, and

(c) referred to the plaintiff, his or her property or his or her office, profession, calling, trade or business.

(2) In an action for slander of title, slander of goods or other malicious falsehood, the plaintiff shall be required to prove—

(a) special damage, or

(b) that the publication of the statement was calculated to cause and was likely to cause financial loss to the plaintiff in respect of his or her property or his or her office, profession, calling, trade or business.”

42. It is accepted by counsel for the defendants/respondents that the statutory defence of absolute privilege set out in s. 17 of the Act is not available in respect of the claim for malicious falsehood. However, two distinct arguments are raised by them in respect of this aspect of Mr. Moyne’s claim.

43. Firstly, it is said that Mr. Moyne has not pleaded the matters set out in s. 42.

Secondly, it is submitted that absolute privilege has been found both by the Courts of Scotland and the Courts of England and Wales to provide a defence to claims for malicious falsehood.

44. Section 42 requires four relevant matters to be established by a plaintiff in a malicious falsehood action. It follows that these matters should be pleaded.

45. The first of these is that the statement upon which the action is founded was untrue.

The second is that the statement was published maliciously. The third is that the statement

referred to the plaintiff. The fourth is that the statement caused the plaintiff either special damage or that it was both calculated to cause *and* was likely to cause financial loss to the plaintiff in respect of his property or his office, profession, calling, trade or business.

46. A fair reading of the pleadings as they stand suggest that Mr. Moyne is alleging that the relevant statement was untrue. It is also very clear that Mr. Moyne pleads that the statement refers to him. Less clear is an express assertion by reference to each of the individuals concerned that the statement was published maliciously. For a claim of malicious falsehood to be made against each of the named defendants it would be necessary that the responsibility of each for (and the part they each played in) the publication of the relevant statement would be identified, as would the malicious intent of each party. However, it could be argued that the reference to the defendants/respondents “*making statements of malicious falsehoods in a public place by making accusations of criminal acts...*” captures an assertion that the relevant statement was published maliciously.

47. However there is nothing in the pleadings to suggest that Mr. Moyne has suffered special damage as a result of the alleged malicious falsehood, or that he is likely to be caused financial loss in respect of his property or his business. While Mr. Moyne has been careful to make an allegation that the statement was made “*with the intent to damage the reputation of the plaintiff...*” - in the general indorsement of claim to the plenary summons - he has equally carefully not alleged damage in his profession or business, or any special damage.

48. On the pleadings as they stand, therefore, the claim for malicious falsehood is bound to fail. Essential elements of the tort are not even pleaded, even in the most general of terms. Of course, had the relevant ingredients of the tort (as set out by statute) been pleaded in vague terms the defendants/respondents would have been entitled to raise a

notice for particulars on such pleadings and would have been entitled to full and proper answers to such a notice.

49. This significant failing in the pleadings raises the question as to whether or not there is an amendment which would save the action.

50. On this issue, the fact that Mr. Moyne has not proposed any amendment to his pleadings weighs heavily against him. He was alert to the fact that an amendment to save the pleadings was possible, and he became aware of this (at the very latest) with the delivery of the judgment in the High Court in May of last year. The submissions of the defendants/respondents (filed on the 11th December, 2023) expressly identify the failure of Mr. Moyne to plead special damage or to plead the publication or the relevant statement was calculated and likely to cause financial loss to him. This is set out with admirable clarity at para. 25 of those submissions. After receipt of those submissions, and prior to the hearing on the 11th January, 2024, Mr. Moyne did not at any stage indicate an intention to amend his pleadings to address this gap. At the hearing of the appeal, and despite the fact that there was discussion of what happened in the High Court in respect of a proposed amendment to the pleadings, Mr. Moyne indicated no intention or desire to seek to amend the pleadings to deal with the specific failings in respect of the claim for malicious prosecution.

51. In addition, the fifteen page typewritten note prepared by Mr. Moyne for the purpose of the appeal hearing (which, as I have noted earlier, was sent to the Court after the appeal had been heard) does not even in the most general sense propose an amendment of the pleadings, notwithstanding the fact that there are two headings relating specifically to malicious falsehood (at p. 9 of the document).

52. Finally, it should be noted that, while Mr. Moyne is a lay litigant, he is clearly experienced in presenting a case and was not inhibited at the appeal hearing in marshalling

facts and arguments, no matter how complicated. He was also assisted at the appeal hearing by a third party who, with the permission of the court, acted as a McKenzie friend.

53. Given the history of the proceedings, not least the several references to a possible amendment of the pleadings, it is important that Mr. Moyne has not sought to amend the pleadings to deal with the deficiencies in respect of the malicious falsehood claim. In suggesting amendments to save a case which otherwise would be struck out, the primary responsibility lies on the relevant party and not on the court. Notwithstanding this, I have carefully considered all of the materials to see whether the circumstances of this case would admit of an amendment to the pleadings which could allow the claim for malicious falsehood to be advanced. I have considered the affidavits sworn by Mr. Moyne, his written submissions, the transcripts recording his oral submissions, his correspondence (in as much as it is provided to the court) and any other available material. I can find no basis for amending the pleadings to make the case that the statement sued upon has caused Mr. Moyne special damage, or has caused financial loss to him within the meaning of s. 42(2)(b).

54. I therefore find that the malicious falsehood claim is bound to fail, as the necessary constituent parts are not even pleaded. I also find that, in the circumstances of this case, there is no amendment to the pleadings available to Mr. Moyne which could rescue this claim.

55. It is therefore not strictly necessary to decide the alternative argument made by the defendants/respondents, to the effect that a malicious falsehood uttered in open court can attract the defence of absolute privilege. I will nonetheless now, for the sake of completeness, consider the submission of the defendants/respondents on this point.

56. At the outset, it should be remembered that the defence as set out in s. 17 of the 2009 Act is a statutory one. The tort of malicious falsehood is also recognised in the Act.

Notwithstanding the fact that s. 17 stipulates that absolute privilege is a defence to a claim for defamation, and notwithstanding the fact that the requirements of a claim in malicious falsehood are set out in the Act, the Oireachtas has deliberately not provided that it would be a statutory defence to a claim in malicious falsehood that the relevant statement was made in the course of proceedings presided over by a judge or another person performing a judicial function. That legislative decision raises a question as to whether or not such a defence is available at common law.

57. We were referred to three authorities by counsel for the defendants/respondents supporting such a common law defence. One is a statement in *Gatley On Libel and Slander* (13th edn. (2022)) at para. 22 - 012 to this effect: -

“Where a statement is made in circumstances in which an absolute privilege or immunity from suit would attach to the words for the purpose of the law of defamation (*e.g.*, a statement in Parliament or in judicial proceedings), there is a complete defence to a claim for malicious falsehood also.”

58. There is only one citation underpinning this statement, which is *Trapp v Mackie* [1979] 1 WLR 377. This was a decision by the House of Lords on appeal from the Court of Session in Scotland. The appellant, Dr. George Trapp, appeared in person. The respondent was represented by a legal team led by J.P.Mackay Q.C., a future Lord Chancellor. The case related to what Dr. Trapp described as “*maliciously false evidence*” alleged to have been given against him in an enquiry pursuant to the Education (Scotland) Act, 1946. In his speech, Lord Diplock commended Dr. Trapp, in these terms: -

“In the course of the hearing which, as in both courts below, has been conducted by Dr. Trapp in person with skill and erudition, your Lordship’s attention has been drawn to what must be nearly every reported case upon this topic in Scotland, and in England where most of the authorities are to be found.”

59. The overall rule identified by Lord Diplock was: -

“That absolute privilege attaches to words spoken or written in the course of giving evidence in proceedings in a court of justice is a rule of law, based on public policy, that has been established since earliest times. That the like privilege extends to evidence given before Tribunals which, although not courts of justice, nevertheless act in a manner similar to that in which courts of justice act, was established more than a hundred years ago by the decision of this House in *Dawkins v Lord Rokeby* [1875] LR 7 HL 744, where the unanimous answer of the judges to the question asked them by the House was adopted in the *ratio decidendi* of the judgment of the Court of Exchequer Chamber [1873] LR 8 QB 255 was approved.”

60. However, the conclusion of the speech of Lord Diplock sounds a warning note.

Having listed ten characteristics of non-judicial tribunals or bodies which might suggest that absolute privilege applies to the evidence of witnesses appearing before them, he continued: -

“My Lords, I am far from suggesting either that the presence of any of these characteristics taken in isolation would suffice to attract absolute privilege for witnesses in respect of testimony given by them before a Tribunal without the absence of any one of these characteristics would be fatal to the existence of such absolute privilege. An appeal which has been argued on one side by a litigant in person, however skilfully, does not, in my view, afford an appropriate occasion for stating propositions of law in any wider terms than are necessary to dispose of that particular appeal.”

61. Lord Fraser of Tullybelton, giving the only other speech, described as “*well settled*” the proposition that no action will lie against a witness for evidence given in court “*even if the evidence is falsely and maliciously given.*” He referred to *Watson v McEwan* [1905]

AC 480 and *Roy v Prior* [1971] AC 470. Both of these cases contain trenchant statements of the policy behind the immunity conferred upon witnesses in respect of their evidence.

62. Nothing in *Trapp v Mackie*, understandably, deals with the construction of statutory provisions such as those that appear in the 2009 Act.

63. The third authority to which we were referred was *BHX v GRX* [2021] EWHC 770. As noted, in *Trapp v Mackie* Dr. Trapp represented himself. In *BHX v GRX* both the claimant and the defendants appeared in person before Nicklin J. This claim also involved a claim of malicious falsehood, and at para. 55 (17) -under the heading “*Immunity from Suit*”- Nicklin J. held: -

“(17) No person taking part in legal proceedings, including the judge, the advocates, the witnesses and the parties - can be sued for anything written or spoken in the course of the proceedings. The immunity is absolute and cannot be defeated even by proof of malice... The immunity from suit extends to statements made by the witness to a party and his legal advisers with a view to giving evidence... it also applies to out of court statements which can fairly be said to be part of the process of investigating a crime or a possible crime with a view to prosecution... and applies to the initial complaint to the police as regards a matter which might lead to a prosecution, and therefore to cover the initial complaint... The only exception to immunity from suit is the tort of malicious prosecution...”

64. However, it appears to be the case that the malicious falsehood claims were struck out because of failings in the pleadings as opposed to substantive immunity from suit grounds.

65. Just as in *Trapp v Mackie*, there is nothing in the judgment in *BHX v GRX* which engages with a statutory backdrop analogous to that which applies here.

66. As noted at para. 15 of this judgment, the trial judge referred to a section of the decision of Clarke J. in *Moylist*. Later in the judgment, Clarke J. makes the following observations: -

“3.16 But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might arise come within the strictures identified in *Keohane*, nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex. In such cases, the very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff’s case is such that it can safely be said that it is bound to fail.

3.17 For the reasons identified by Murray J. in *Jodifern Ltd. v. Fitzgerald* [2000] 3 I.R. 321, and as applied in *Keohane*, a motion to dismiss should not be used as a means of obtaining a summary disposal of the case in circumstances where the issues which will need to be addressed in deciding whether the proceedings are bound to fail are themselves complex. Leaving aside those cases which might fall into the ‘seventeen noughts are still nothing’ category, it is necessary to consider whether a case where the issues have to be analysed on appeal, as they were in this case, for a full days hearing, can avoid the appropriate depiction of being too complex to be properly dealt with within the ambit of a motion to dismiss as being bound to fail.”

67. It is quite probably the case that a claim for malicious falsehood, grounded on a statement made in court, will be successfully defended by relying upon absolute privilege at common law in respect of such statements. Nonetheless, I see the force in the comment by Lord Diplock in *Trapp* that one should be slow to state general propositions of law by reference to a case where one side was unrepresented. That is all the more so in

circumstances where the only authorities to which this court has been referred on this issue involve one case where no one was represented and another case where Dr. Trapp represented himself. In addition, both *Trapp* and *BHX* are foreign authorities which are at best of persuasive value. No Irish authority to establish this proposition has been put before the court. While it is correctly submitted by counsel for the defendants/respondents that Mr. Moyne has not put forward any authority in which a plea of absolute privilege in respect of a malicious falsehood uttered in court has failed, that is not at all conclusive given that the burden lies on the defendants/respondents to establish that Mr. Moyne's case will not succeed. Finally, there has been no argument whatsoever put forward to address the possible impact on the common law position of the enactment of the 2009 Act and in particular of the decision by the legislature to refuse to stipulate that a malicious falsehood, uttered in court, attracts a defence of absolute privilege.

68. While I continue to hold the view that the defendants/respondents may well successfully plead absolute privilege as a defence to this claim for malicious falsehood (were that claim in itself properly pleaded) I am not deciding this aspect of the appeal on these grounds. I believe that this part of Mr. Moyne's case would be too complex, to use the phraseology of *Moylist*, to decide on a motion such as this. For the reasons set out earlier, it is not necessary for me to determine this issue at this time.

69. The third ground of appeal reads: -

“The learned Judge erred in law and reasoning in not considering the uncontested evidence that the Plaintiffs have never had a vested interest in the property the subject matter of the Circuit Court Proceeding. It was not contested by the plaintiff that the statements made were during lawfully constituted Circuit Court proceeding taken against persons not in possession of the property, the subject matter of the Circuit Court proceedings.”

This does not give rise to a coherent ground of appeal against the High Court judgment. In addition, whether or not the defendants to the Circuit Court proceedings were in fact in possession of the Westmeath property is of no relevance to the central question of whether the current proceedings should be struck out. Inasmuch as Mr. Moyne maintains that the Circuit Court did not have jurisdiction in the proceedings before it, and therefore s. 17 of the Defamation Act does not apply, I consider this argument at paragraph 75 of this judgment.

70. The fourth ground of appeal reads: -

“The learned Judge erred in law and reasoning in not considering the Adverse Possession of the property by a third party and the intent and knowledge of the Plaintiffs in the Circuit Court Proceedings.”

Again, whether or not there was adverse possession of the property is irrelevant to the grounds upon which the High Court judge found that this action was bound to fail.

71. The fifth ground of appeal reads: -

“The learned Judge erred in law and reasoning that the Circuit Court Proceedings were lawful and therefore properly constituted as a Court with Jurisdiction and subject matter Jurisdiction, forming a Court in which the defendants could be afforded the protection of absolute privilege. In doing so has denied the Plaintiff’s constitutional rights, Article 40.3.1 to defend and vindicate personal rights.”

72. This is a ground of appeal without any substance whatsoever. Judge Johnson was sitting on the 7th November, 2019 to hear a number of matters, the relevant one being Mr. Moyne’s own application for release to him of the DAR Transcript. It is simply unreal to suggest that this was not a sitting of the Circuit Court, within the meaning of s. 17(2)(iii) of the 2009 Act. Mr. Moyne himself was asking the judge to carry out a judicial function, and was himself seeking an order from the Circuit Court, at the time that the statement was

made. To argue, therefore, that the High Court judge was wrong in finding that this was a sitting of a court is without merit.

73. In their submissions, the defendants/respondents suggest a more nuanced, but equally unreal, meaning may be meant by Mr. Moyne in advancing this ground of appeal. It is that the Circuit Court did not have jurisdiction to hear the possession proceedings, and that the Circuit Judge should either have dismissed those proceedings or transferred them to the High Court. This is, in terms, the argument to be found at para. 24 of Mr. Moyne's written submissions. However, this ground of appeal (understood in this way) is based on the fallacy that a court sitting does not constitute a "*proceeding presided over by a judge*" in the event that there is ultimately a successful challenge to the jurisdiction of that court. This is not the case. Frequently, proceedings are launched in which there is a challenge to the jurisdiction of the court. In determining whether or not such a challenge is well made, the judge sits as a court and as a court decides the question of jurisdiction. It is fanciful to suggest that a court in these circumstances is not in fact conducting the administration of justice when deciding questions of jurisdiction. Whatever the final outcome of the challenge to the jurisdiction of the Circuit Court, the High Court judge was clearly right in proceeding on the basis that the impugned statements of Mr. Todd were ones made in the course of proceedings presided over by a judge, as provided for by s. 17(2)(g) of the Act.

74. The sixth ground of appeal reads: -

"The learned Judge erred in law and reasoning that absolute privilege be afforded to parties who with intent and in full knowledge engaged in unlawful proceedings with criminal intent."

75. The seventh ground of appeal can be considered along with the sixth. It reads: -

"The learned Judge erred in law and reasoning in not considering the perjury within the affidavit of Sam Todd on behalf of all the Defendants."

76. As a matter of logic, it is difficult to understand how any perjury (even if this were established) in the affidavit grounding the motion to strike out the proceedings could justify the continuation of proceedings which the trial judge found were frivolous and vexatious, an abuse of process, and/or bound to fail. Mr. Moyne has not explained how this could possibly be the case. It is also plain from the authorities that (even if the assertion at ground of appeal 6 is correct) ill will, bad feeling or malice on the part of a witness (or an advocate) does not rob them of the absolute privilege to which they are otherwise entitled. Just by way of example, the portion on the judgment of Keane J. in *Bebenek* to which I have referred earlier supports that proposition. The position is very well put by the authors of *Cox & McCullough in Defamation Law and Practice* (2nd edn., 2020) at paras. 7 - 55. Having referred to the judgment in *Looney*, the authors go on:-
“In this case, the court dismissed an action taken by a claimant who alleged that he had been defamed in an affidavit used in earlier proceedings. The court stressed that the privilege attaching to judicial proceedings derived, at its core, from the constitutional protection of the independence of the judiciary. Moreover, it determined that the administration of justice would be best served by giving witnesses (and presumably, by extension all other relevant parties) the highest possible level of privilege... In similar vein, where a person claims to be defamed by malicious and irrelevant comments made by a lawyer during the course of proceedings, it may now be said that, from the law’s perspective, the appropriate response is to make a complaint to the Bar Council or Law Society, but not to issue defamation proceedings.”

77. I have already dealt with the eighth ground of appeal.

78. Having considered all eight grounds of appeal, I find that none of them are convincing. I would therefore dismiss the appeal.

79. It should be noted that several of the bases upon which the trial judge struck out the claims against certain of the defendants were not even challenged in the grounds put forward by Mr. Moyne in his Notice of Appeal. For example, the case against the sixth, seventh and eighth defendants were struck out for a number of free-standing reasons. One of these was that Mr. Moyne had improperly conflated the position of those individuals with the position of Tanager, the company of which they were directors. This finding was not challenged in the grounds of appeal. It is also not contested in the written submissions of Mr. Moyne. This has not, unfortunately, prevented him from purporting to appeal the striking out of the action against these individuals, and unnecessarily keeping them in the proceedings.

80. I would dismiss the appeal in its entirety. My provisional view is that Mr. Moyne should pay the costs of all of the respondents to the appeal, given that they have been entirely successful. In the event that a different order is sought by either side, the Court of Appeal Office is to be notified of this (and the details of the proposed alternate order) on or before 5pm on the 3rd of May 2024. If such an alternate order is sought, then directions will be given as to the making of submissions in that regard.

81. Power and Butler JJ. agree with this judgment, and with the order which I propose.