UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 203
Appeal Number: 2018/143

Faherty J.
Haughton J.
Power J.

BETWEEN/

WILLIAM MULROONEY

PLAINTIFF/ APPELLANT

- AND –

BRENDAN J. LOONEY FORMERLY PRACTISING UNDER TITLE AND STYLE OF BRENDAN J. LOONEY SOLICITORS

FIRST NAMED DEFENDANT

- AND –

FORENSIC SCIENCE NORTHERN IRELAND

SECOND NAMED DEFENDANT/ RESPONDENT

JUDGMENT of Ms. Justice Faherty dated the 27th day of July 2020

1. This is the plaintiff's appeal from the Order of the High Court (Coffey J.) made on 6 March 2018 dismissing the within proceedings against the second defendant (hereinafter "FSNI") pursuant to the inherent jurisdiction of the Court on the ground that they are an abuse of process.

2. Before embarking on a consideration of the issues which arise in the appeal it is, I believe, necessary to set out in some detail the factual and legal landscape against which the within proceedings were instituted and, indeed, against which the motion to dismiss was brought.

3. On 16 April 1994, Mr. John Mulrooney (the father of the plaintiff), as tenant, entered into a lease of certain lands situated at Garyduff, Piltown, County Kilkenny with Mr. Edward Malone as landlord. Prior to the term of the lease expiring a new lease (hereinafter "the Lease") was struck and executed dated 1 April 1999. It is common case that a dispute arose in regard to the term of the Lease as agreed, with Mr. Malone contending that it was for five years while Mr. John Mulrooney argued that it was for three. It was Mr. John Mulrooney's case that the document had been fraudulently altered so as to appear on its face to be for the longer term.

4. This dispute led to the institution of proceedings in the Circuit Court, bearing Record Number 1055/02 before the South/Eastern Circuit, County Tipperary between Edward Malone as plaintiff and the Mulrooneys (father and son) as defendants, the claim against William Mulrooney (the plaintiff herein) being based on an allegation that the interest of his father under the Lease had been transferred to him. Mr. Malone's claim was for damages and other reliefs based on the Lease being for a five-year term.

5. The plaintiff and his father joined a third party to the Circuit Court proceedings, being Shee & Hawe Auctioneers. They alleged that the third party had "unilaterally and wrongfully and unlawfully altered the term of the Lease from a period of three years to five years". Ultimately, the Mulrooneys' claim against the third party was settled and the proceedings discontinued against the third party.

6. The proceedings as between Mr. Malone and the Mulrooneys proceeded and on 9 March 2005, His Honour Judge O' Donnabhain determined the matter in favour of Mr.

Malone. He held that the plaintiff and Mr. John Mulrooney were liable in damages for the sum of €12,436.82, representing the sums which had fallen due in the fourth and fifth years of the Lease.

7. The plaintiff and his father duly appealed the decision of the Circuit Court. On 5 November 2005, the appeal was settled, with the Mulrooneys agreeing to pay Mr. Malone the sum of €13,500 inclusive of costs, and the appeal was struck out. It appears that the sum was in fact paid to Mr. Malone. At all relevant times for the purposes of the Circuit Court proceedings and the appeal to the High Court, the plaintiff and Mr. John Mulrooney were legally represented.

8. It appears that in 2008 the plaintiff issued a second Circuit Court action bearing record number 698 of 2008 against Mr. Malone, John Shee & Co Solicitors and Shee & Hawe Auctioneers, again relating to the Lease and the allegation that it was unlawfully altered. Those proceedings were dismissed by the Circuit Court on 11 November 2008 as frivolous, vexatious and an abuse of process.

9. In or about August 2009, the plaintiff made a formal complaint to the Gardaí alleging that the Lease had been altered by the substitution of five for three years and that the date of 31 March 2004 had been substituted for 31 March 2002. The Lease was duly examined by D/Garda John Leonard of the Garda Technical Bureau (Document and Handwriting Section). D/Garda Leonard issued a report on 29 June 2009. He concluded that there was no evidence of fraud, finding no evidence of any alteration or addition around the area where the number 5 appeared.

10. In July 2010, the plaintiff and Mr. John Mulrooney instructed the first named defendant (their then solicitor) to engage the services of one Brian Craythorne a questioned document examiner in the employment of FSNI. FSNI is an agency with the Department of Justice in Northern Ireland which provides forensic laboratory services for litigation

purposes, predominantly to the Police Service of Northern Ireland and, on request, to other clients.

11. Initially, Mr. Craythorne was furnished with a copy of the Lease. He, however, required sight of the original Lease. On 3 August 2010 he wrote to the solicitor identified as being in possession of the original Lease seeking that it be provided to FSNI for examination. It appears that the original Lease was sent to FSNI by registered post on 23 August 2010.

12. In a report dated 20 September 2010, Mr. Craythorne expressed the view, having examined the figures "under the microscope, under specialised lighting conditions, by comparison with other handwritten numerals within the document …" that "all the evidence supports the position that the figure 5's (sic) and the figure 2004 have not been altered and thus the term was originally for five years and the year end was 2004". He concluded that he could find no evidence that the Lease was "anything other than for five years ending in 2004".

13. It is common case that the plaintiff and his father were dissatisfied with the results of both D/Garda Leonard's and Mr. Craythorne's reports and duly instructed other experts, namely Ms. Margaret Webb and Mr. Michael Ansell from the United Kingdom. A copy of the Lease was furnished to these experts. Their respective reports dated, respectively, 28 April 2011 and 3 May 2011 canvassed the possibility that changes might have been made to the Lease but both reports made it clear that sight of the original Lease was required before reaching a definite decision.

14. By plenary summons issued and dated 17 January 2011, bearing Record Number 2011/386P, hereinafter referred to as "the First High Court Proceedings", Mr. John Mulrooney instituted proceedings against some twenty four defendants, including Shee & Hawe auctioneers, who had been joined as a third party in the Circuit Court proceedings,

the lawyers who acted for both sides in the Circuit Court, the Department of Agriculture and Food, Glanbia Foods Society, the Garda Bureau of Fraud Investigation and the Minister for Justice and Law Reform, to name but a few. The claims against the defendants in the First High Court Proceedings were predicated on the contention that the Lease had in fact been fraudulently altered. It was claimed, *inter alia*, that the Gardaí had failed to investigate the claim that the Lease was altered or provide a full report on the forensic tests that were carried out on the Lease.

15. Neither of the defendants in the within proceedings was named as a defendant in the First High Court Proceedings.

16. Motions were duly brought by the first, fifth, sixth, eight, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, eighteenth and nineteenth defendants to have the proceedings dismissed on the basis that they were frivolous and vexatious or in the alternative that they disclosed no cause of action.

17. In an *ex tempore* judgment of Charleton J. delivered on 20 December 2011 ([2011] IEHC 521), the First High Court Proceedings were dismissed as against the moving defendants in the motion before Charleton J. for being frivolous, vexatious and disclosing no clause of action.

18. In the course of his judgment, Charleton J. stated: -

> *"3. …The assumption, which is not displaced in this case, is that the Circuit Court in March 2005 did its best to reach the right decision. And there is nothing before me to show that the settlement in the High Court in November 2005 was produced by undue influence or fraud or anything else like that. But we turn, however, to the document which seems to be at the core of all of this; the lease. A document can be only unsatisfactorily examined by experts looking at a photocopy. That what was done in this case by two experts in England, a Mr. Antel who gave a report of the*

3rd May 2011, and Margaret Webb who gave a report of the 28th April 2011. Both of them concluded in effect that it was possible that the original figure 5, as to the number of years the lease was to run, was in fact originally a figure of 3. However at the request of the plaintiff in this case Mr. John Mulrooney, acting through his then solicitors, the original lease was sent to two places. First of all it was sent to the Garda Síochána and a Detective Sergeant Courtney examined it; he concluded that there was nothing to indicate that it was forgery. In addition to that, a forensic scientist from the police forensic science service in North Ireland examined the document and has clearly stated that there is no basis on which it could be alleged that there has been any alteration to it at all. Both examined this original lease not just on the basis of what they could see with the naked eye but with microscope side light and also examined the indentation in the pages underneath; something that is known as ESDA examination and the basis of the resulting conclusion is very strong.

4. Now what I am asked to do today is to adjourn making any decision on this application to dismiss the proceedings and instead to allow Mr. Antel and Ms. Webb in England to again examine the original lease to see what their opinion would be. That to my mind was an attractive option at one particular point in this case, given that I was in the course of considering whether or not I could invoke mediation proceedings, which is a general rule that is now been added into the Rules of the Superior Courts taken from the Commercial Court rules. That option which, frankly would have been pushing the jurisdiction of the Court probably about as far as it goes, if not further, became highly unattractive when I learnt that the original lease had at the request of the plaintiffs been already examined twice by two independent experts, as I have said, who concluded that there was nothing

wrong with the lease and that there was no basis whatever for anyone to claim in the circumstances that there was any forgery."

19. Mr. John Mulrooney duly appealed to the Supreme Court. On 9 May 2013, the Supreme Court dismissed the appeal ([2013] IESC 20), holding that the First High Court Proceedings were correctly dismissed as against the moving defendants as an abuse of process. Writing for the Supreme Court, Clarke J. (as he then was) concluded, at para. 8 of his judgment, as follows: -

"8.1 ...I am, therefore, satisfied that the trial judge was correct in dismissing Mr. Mulrooney's proceedings as being an abuse of process. Mr. Mulrooney is seeking, in these proceedings, to re-litigate an issue and a cause of action which he has already settled. The question of unlawful altering was put before the Circuit Court by Mr. Mulrooney and was alive at the time when he settled both the third party issue against Shee and Hawe and the claim brought against him by Mr. Malone. The question of the legal advice given to him which led to that settlement is a matter between him and his then lawyers and is not a matter which can affect the rights of the continuing defendants. While Mr. Mulrooney seeks to make, in these proceedings, an allegation of fraud, it was that very same allegation of fraud by virtue of unlawful altering of the lease that was before the Circuit Court and which he settled. He has, therefore, settled the allegation of fraud and cannot bring it again."

20. The plaintiff was not initially a party to the First High Court Proceedings. However, following Mr. John Mulrooney's death on 17 July 2013, on 25 November 2013, upon the *ex parte* application of the plaintiff, it was ordered that the First High Court Proceedings be prosecuted in the name of the plaintiff.

21. On 27 November 2014, by order of Kearns P., the First High Court Proceedings as against the State defendants were struck out on consent. The proceedings were dismissed by Kearns P. as against further defendants on 19 January 2015. The latter Order was appealed to the Court of Appeal which appeal appears to have been compromised.

22. By Plenary Summons issued and dated 7 September 2015 and bearing Record Number 2015/7723P (hereinafter "the Second High Court Proceedings"), the plaintiff issued proceedings against a Chief Superintendent of An Garda Síochána, the Garda Commissioner, Ireland and the Attorney General. The claim sought to be made in the Second High Court Proceedings was again predicated on the allegation that the Lease had been unlawfully altered. The plaintiff's principal complaint was that the Gardaí had failed to properly investigate his criminal complaints regarding the alteration of the Lease.

23. Subsequent to the issuing of the Second High Court Proceeding and the motion to dismiss brought by the defendants named in that action, the CSSO wrote to the plaintiff on 11 December 2015 therein providing the plaintiff with a copy of a further forensic report by D/Garda Leonard dated 23 March 2015. It appears that this report came about following a meeting between the plaintiff and the Gardaí in February 2015 at which an offer was made to resubmit the Lease to the Document and Handwriting Section of the Garda Technical Bureau *"for clarification"*. The examination was again conducted by D/Garda Leonard. He found the Lease to be a sixteen-page document the last two pages of which were photocopies "and do not contain original handwriting". He noted, *inter alia*, that "[p]ages 1, 10 and 13 contain correction fluid on some entries. Using transmitted light I am unable to establish what the original entries were." The results of his examination were that having examined "the number 'five' along the area of the 'term years' on page 1", he found no evidence of any alteration around this area. His opinion was that the page had not been altered where the number five and the word five were displayed. He reached the same

conclusion in respect of pages 3 and concluded similarly in respect of page 13 where the number five and the date 'March 2004' were displayed.

24. The Second High Court proceedings were ultimately dismissed by Eager J. on 27 July 2017 ([2017] IEHC 493) on the grounds that they were frivolous, vexatious and an abuse of process, Eagar J. concluding (with reference to the findings of Clarke J. in the 2013 Supreme Court Appeal) that the proceedings related to the same issue that had been raised in the Circuit Court proceedings.

25. It should be noted that on the same day as the Second High Court Proceedings issued, other proceedings (hereinafter referred to as "the Third High Court Proceedings") were commenced by the plaintiff against John Shee and Company Solicitors (Record Number 2015/7224P). These proceedings were struck out or dismissed by Noonan J. on 8 July 2016. On 18 December 2017, the Court of Appeal struck out the appeal in the Third High Court Proceedings.

26. The within proceedings (which on occasions I will refer to as "the Fourth High Court proceedings") were instituted by the plaintiff on 12 November 2015, essentially around the same time as the Second and Third High Court Proceedings were instituted. FSNI entered a conditional appearance on 21 December 2015. A statement of claim was delivered on 11 April 2016.

27. The statement of claim alleges that the examination of the Lease conducted by FSNI was negligent and fundamentally flawed as Mr. Craythorne failed, *inter alia*, to use ESDA testing in his examination of the Lease and failed to detect correction fluid on certain pages of the Lease as had been detected by an examination conducted by D/Garda Leonard in his examination of the Lease on 23 March 2015. It is pleaded that as a result of the alleged negligent examination, the plaintiff has suffered "irreparable loss and damage including reputational damage" for which he claims, *inter alia*, damages for irreparable loss and

damage including reputational damage occasioned to the plaintiff by the actions of the defendants, particularly that of the second named defendant in negligently examining the Lease.

28. FSNI delivered a full defence on 21 September 2016, including a plea by way of objection that the proceedings were frivolous or vexatious and/or failed to disclose a reasonable cause of action and/or were bound to fail.

29. By Notice of Motion dated 15 November 2015, FSNI sought Orders dismissing the proceedings, either pursuant to Order 19, rule 28 RSC or in the exercise of the inherent jurisdiction of the Court on the basis that the proceedings were bound to fail and/or an abuse of process. The motion was grounded on the affidavit of Stephen Barnes of Eversheds, FSNI's solicitors, sworn 16 November 2017 to which the plaintiff swore a replying affidavit on 19 January 2017. A further affidavit was sworn by Miss Emma Traynor of Eversheds on 16 November 2017.

30. Albeit that it was pleaded that the first named defendant acted without the instructions of the plaintiff and his late father in dealing with FSNI in relation to the examination of the Lease, the plaintiff served a Notice of Discontinuance dated 23 November 2017 in respect of his proceedings against the first named defendant.

The Judgment in the Fourth High Court Proceedings

31. FSNI' s motion to dismiss came on for hearing before Coffey J. on 30 and 31 January 2018.

32. In his judgment, the trial judge carefully reprised the litigation history relating to the Lease and its alleged alteration, as obtained as of the date of judgment, largely as I have set set out above. He noted FSNI's reliance, in invoking the Court's inherent jurisdiction under *Barry v. Buckley* [1981] I.R. 306 to have the within proceedings struck out as an abuse of process, on the decision of the Supreme Court ("the 2013 Supreme Court

Appeal") in the appeal of the First High Court Proceedings. The gravaman of FSNI's application to have the proceedings struck out was that they constituted an impermissible collateral attack on the finding of Clarke J. that Mr. John Mulrooney was no longer in a position to attempt to re-litigate the allegation of unlawful altering of the Lease, a claim which he and the plaintiff had long since settled.

33. The plaintiff's response to that argument was that the findings of the Supreme Court did not apply to his claim against FSNI by reason of the fact that FSNI was not a party to the settlement of the Circuit Court Appeal in 2005.

34. The trial judge addressed this issue in the following terms: -

> "14…this is to overlook the way in which the plaintiff has formulated his claim for damages and specifically the contention made at para. 64 of his written submissions which discloses that his true purpose in bringing this case is to seek damages on the basis he has been wrongfully deprived of an entitlement to reopen his litigation with Edward Malone and Hawe & Shee Auctioneers. It further ignores the fact that the Supreme Court held that by virtue of their settlement of the Circuit Court Appeals in 2005, the Mulrooneys had lost the right to litigate the issue of whether the lease document had been wrongfully altered as a result of which it dismissed John Mulrooney's appeal against, *inter alia*, John Shee & Company Solicitors notwithstanding the fact that the solicitors were not a party to the settlements of 2005.
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> 15. It is implicit in the reasoning of the Supreme Court…that even if the plaintiff had procured an expert report from the second named defendant in 2010, which supported his allegation of unlawful altering, it still would not have assisted him. This is because he was not at that stage by virtue of his settlements entitled to bring an allegation of unlawful altering of the lease document."

35. The trial judge then addressed the other argument canvassed by the plaintiff in opposition to the motion to dismiss, namely that the settlements of 2005 were induced by fraud, in particular the allegation that Mr. Malone and his legal advisors fraudulently concealed the fact that consent under s.12 of the Land Act 1965 for the granting of the Lease was not obtained until a date after the decision of the Circuit Court of 9 March 2005. In relation to this argument, the trial judge stated:

> "Even if one assumes without deciding that the granting of the consent was a necessary proof in the case, the fact of the matter is that such point of objection, as might have arisen, was not taken by the plaintiff either in the Circuit Court or on appeal to the High Court prior to the settlement of the actions. However, the true significance of this argument is that it provides yet further evidence of an underlying intention on the part of the plaintiff to reopen the Circuit Court proceedings of 2002 and to reagitate the issue of unlawful altering by whatever means it takes."

36. The trial judge went on to conclude: -

> "For the reasons stated, this Court is satisfied that the true substance and intent of these proceedings is to re-litigate the issue of whether the lease document of 1999 was wrongfully altered, and thereby to challenge the outcome of the 2002 Circuit Court proceedings which the Supreme Court has already determined can no longer be the subject of litigation. Accordingly, this Court will accede to the application and make an order dismissing the plaintiff's claim as against the second named defendant on the grounds that the proceedings are an abuse of process."

Developments post the judgment of Coffey J.

37. Subsequent to Coffey J.'s dismissal of the within proceedings, the plaintiff's appeal of the Second High Court Proceedings came on for hearing before the Court of Appeal. His appeal was dismissed for the reasons set out in the judgment of Costello J. delivered on

15 July 2019. ([2019] IECA 195). I will return to the judgment of Costello J. in due course.

38. On 21 February 2019, the Supreme Court refused the plaintiff leave to appeal from the Order of the Court of Appeal of 18 December 2017 in respect of the Third High Court Proceedings ([2019] IESC DET 47).

The appeal against the judgment and order of Coffey J.

39. Albeit legally represented in the court below, by the time of the lodging of his appeal, the plaintiff was self-represented. In the Notice of Appeal, he asserts that the trial judge:

> "erred in law and fact in striking out the Plaintiff's claim in circumstances where it was established in the course of the hearing that the Respondent had been negligent in failing to carry out a full and proper examination of the Lease in suit by failing to conduct an ESDA test, thereby occasioning loss and damage to the Plaintiff/Appellant"

The plaintiff's submissions

40. The plaintiff duly filed written submissions. He refers to his late father having permitted Mr. Malone's solicitors to send the Lease to FSNI but asserts that he does not know what in fact was transmitted and he takes issue with FSNI for not retaining a copy of what they examined. He asserts that Mr. Craythorne's report of 20 September 2010 "was inadequate and negligent in its creation and contents" and that "a full and proper series of tests, including but not limited to an ESDA test, were never performed on the said lease." He refers to the report prepared by D/Garda Leonard on 29 June 2010 which he asserts was "wholly inadequate" as only the first page of the Lease was examined. He further asserts that it was represented to the High Court (Charleton J.) in the First High Court Proceedings and to the Supreme Court in the 2013 Supreme Court Appeal that the Lease had been

subject to a full examination, which was not the case and that, accordingly, both Charleton J. and Clarke J. "were actively misled as to the adequacy of the examinations of the said Lease". The plaintiff asserts that in the First High Court Proceedings, Charleton J. was incorrect in his judgment as he had not in fact been furnished with a copy of Mr. Craythorne's report or the first report of D/Garda Leonard and that all that had been submitted to Charleton J. was a letter from a Chief Superintendent Courtney which incorrectly stated that the Lease had been the subject of a full examination.

41. The plaintiff points to the second report of D/Garda Leonard of 23 March 2015 (obtained post the 2013 Supreme Court Appeal) wherein reference is made to correction fluid having been used on the Lease, an observation not made by Mr Craythorne in his report. He further points out that Mr. Craythorne never remarked on the fact that the final two pages of the Lease (if he was ever furnished with them) were photocopies, whereas D/Garda Leonard had remarked on this in his March 2015 report. It is asserted that D/Garda Leonard's second report seriously undermines the credibility of FSNI's claim that the Lease was correctly analysed and that no alterations were found.

42. He submits that Charleton J. (in the First High Court Proceedings) was in error in holding that an ESDA examination had been carried out on the Lease which error was carried over into Clarke J.'s decision in the 2013 Supreme Court Appeal.

43. The plaintiff asserts that the trial judge erred in ignoring the fact that he has pleaded that the investigation of the Lease by FSNI was inadequate as no ESDA test was performed upon the Lease to establish whether there is consistency in the inks used upon the Lease. He submits that if the within proceedings are permitted to proceed he can seek an inspection of the Lease and procure an appropriate expert to perform an ESDA test.

44. The plaintiff further submits that the trial judge was in error in ignoring his credible causes of action for claims in misfeasance in public office and for breach of his rights under the European Convention of Human Rights ("ECHR").

45. The plaintiff also contends that the trial judge, in dismissing the within proceedings, "… failed to appreciate that the proceedings as brought by Mr. Malone (in the Circuit Court) were based upon a Lease that was void" by reason of Mr. Malone's failure to comply with the requirements of s.12 of the Land Act 1965 and that the trial judge erred in failing to find that Mr. John Mulrooney was induced to settle the Circuit Court action in circumstances where a fraud had been committed. He submits that as Mr. Malone's legal representatives had not informed the Circuit Court that consent under s.12 of the Land Act 1965 was not in place, the decision of the Circuit Court was obtained illegally. Accordingly, the reliance placed by Charleton J. and Clarke J. on the outcome of the Circuit Court proceedings (including the settlement of the Circuit appeal) was in error.

46. In furtherance of this argument, the plaintiff contends that the alleged fraud perpetrated by Mr. Malone was the "different allegation of fraud" which Clarke J., in the 2013 Supreme Court Appeal, opined might have allowed for the question of the alteration of the Lease to be revisited. The plaintiff asserts that there was no evidence upon which the trial judge could have concluded (as he did) that the plaintiff could have raised the issue of the s.12 consent either before the Circuit Court or in the subsequent appeal to the High Court. This was because the plaintiff had relied upon his then legal representatives to raise this matter. It is thus asserted that the trial judge erred in finding that the s.12 consent issue was something that should have been raised in the Circuit Court or on the appeal to the High Court.

47. The plaintiff's written submissions also contend that the trial judge failed to treat his claim at its high watermark, as required by established jurisprudence. In this regard, he

cites *McCourt v. McTiernan* [2015] IEHC 268. He further submits that the trial judge failed to consider whether any perceived deficiency in his pleadings could be remedied by an amendment, as required by *Sun Fat Chan v. Osseous Limited* [1992] I I.R. 425. In essence, the plaintiff asserts that the trial judge's decision did not meet the required threshold of confidence to dismiss proceedings on the basis that they could not possibly succeed, as required by *Jodifern Limited v. Fitzgerald* [2005] IESC 294 and *Salthill Properties v. Royal Bank of Scotland* [2009] IEHC 207.

48. By the time of the hearing of the within appeal, the plaintiff was represented by solicitor and counsel. The oral submissions advanced by counsel for the plaintiff were largely a reprise of the written submissions.

FSNI'S submissions

49. In his written and oral submissions, counsel for FSNI contends that the nub of the plaintiff's within case is that the Lease was unlawfully altered. It is submitted that that claim has been found not to be available to the plaintiff to maintain for the reasons set out by Clarke J. in the 2013 Supreme Court Appeal and by Costello J. in the dismissal of the plaintiff's appeal of second High Court Proceedings. Accordingly, FSNI's position is that the respective *dicta* of Clarke J. and Costello J. are entirely dispositive of the appeal in this case.

Considerations

50. Based on the parties' written and oral submissions, the following issues arise for consideration:

(a) Did the trial judge err in failing to consider that the proceedings might be continued to be maintained if same were amended;

(b) Are the proceedings capable of being distinguished from the rationale applied by Clarke J. in the 2013 Supreme Court Appeal by reason of alleged errors of fact said

by the plaintiff to be made by Charleton J. in the First High Court Proceedings and thereafter carried over into the 2013 Supreme Court Appeal;

(c) Did the trial judge err in rejecting the plaintiff's claim that the Circuit Court decision of 2005 and/or the settlement of November 2005 were vitiated by the alleged failure of Mr. Malone and/or his legal team to apprise the Circuit Court judge and /or the plaintiff that consent pursuant to s. 12 of the Land Act 1965 was not in place prior to the determination of the Circuit Court proceedings in March 2005; and

(d) Did the trial judge fail to apply the applicable legal principles when considering an application to dismiss under the inherent jurisdiction of the Court.

The alleged failure to consider that the proceedings might be amended

51. It is submitted by the plaintiff that in dismissing the proceedings the trial judge gave no consideration to the test set out in *Sun Fat Chan v. Osseous Ltd* to the effect that an amendment to the proceedings should be permitted if it would save proceedings which otherwise did not disclose a reasonable cause of action or which were bound to fail. Counsel argues that in failing to address this possibility the trial judge erred. It is urged that on this ground alone the appeal should be allowed and that the plaintiff be afforded the opportunity to make his case against FSNI by way of an appropriate amendment to the within proceedings. It is asserted that the plaintiff's case in this regard is supplemented by the obvious errors of fact set out in the decision of Charleton J. in the First High Court Proceedings and carried over by Clarke J. in the 2013 Supreme Court Appeal.

52. Counsel submits that the appropriate amendment would be a plea that the plaintiff's ECHR rights were breached and/or a claim against FSNI for misfeasance in public office and a consequent claim for damages for economic loss by reason of FSNI's failure to carry

out an ESDA test, and for allowing the representation that same had been done to stand when no such test had been conducted.

53. In aid of his submission that the proceedings might be saved by a claim for misfeasance in public office, counsel cited the *dictum* of Clarke J. in *Jeffrey v. Minister for Justice* [2019] IESC 27:

> *" it is…apparent from the decision in (Spring v. Guardian Assurance Plc. [1995] 2 A.C. 296]) that economic loss (as opposed to damage to reputation) flowing from a negligent statement may, at least in the United Kingdom, form the basis for a successful suit. It was clear from the hearing before this Court that it was at least contended on behalf of Mr. Jeffrey that his business as a gardener and odd job man suffered because of what was said in court. It, therefore, remains arguable that the persuasive authority of Spring will find favour in this jurisdiction and that it will be ultimately found to be possible to maintain a claim for negligent misstatement giving rise to economic loss. On that basis, it seems clear that it would be possible to re-cast Mr. Jeffrey's claim in a way which confined the scope of the damages which he sought to one in respect of economic loss rather than damage to reputation. It is at least arguable that such a claim can be maintained in this jurisdiction and it follows it would be possible for Mr. Jeffrey to re-cast his claim in a way which made it clear that it was not bound to fail but rather would be dependent on the facts as to whether statements made in court were negligently made and whether he suffered economic loss as a result of them."*

54. The plaintiff contends that an amendment of the type described above would assist in preventing the decision of Clarke J. in the 2013 Supreme Court Appeal from being a bar to the plaintiff continuing with these proceedings.

55. Counsel for FSNI contends that any allegation of misfeasance in public office or breach of the plaintiff's ECHR rights in connection with the conduct of FSNI in examining the Lease is, clearly, inextricably bound up with the plaintiff's attempt to establish that the Lease was in fact unlawfully altered. It is submitted that for the reasons set out by Clarke J. in the 2013 Supreme Court Appeal and Costello J. in the appeal of the Second High Court Proceedings, the plaintiff has no basis upon which to pursue any claim against FSNI.

56. Over and above urging the Court to reject the plaintiff's submissions in relation to an amendment of the proceedings for the specific reasons set out by Costello J. in the appeal of the Second High Court Proceedings, counsel further argues that the question of an amendment is advanced only at a very late stage in the continuum of the within proceedings. It is also contended that FSNI was not dealing with the plaintiff *qua* public office or exercising power as such: rather FSNI was engaged by the plaintiff and his late father in a private capacity. It is further argued that the assertion that the tort of misfeasance in public office might assist the plaintiff in pursuing a legal case against FSNI is unsupported by any authority and, moreover, unsustainable.

57. In my view, the first thing to be observed is that it is not immediately obvious that the question that the proceedings might be amended was ever canvassed before the learned trial judge. Moreover, the precise nature of the proposed amendment of the within proceedings as contemplated by the plaintiff is entirely unclear. These, however, are the least of the obstacles which the plaintiff faces.

58. Fundamentally, and as can be seen from the pleadings herein, the plaintiff's case against FSNI is entirely predicated on a claim that the Lease was fraudulently altered. Essentially, he alleges that there was a negligent investigation by FSNI of an allegedly forged document. The plaintiff now wishes either to replace and/or supplement his pleadings against FSNI by a claim of misfeasance in public office based, presumably, on

their alleged failure to carry out the function with which they were charged *qua* their status as a public body.

59. Quite apart from the question as to whether such a claim for misfeasance in public office is even open to the plaintiff to make, or whether FSNI could be said to have been acting in a public capacity (which I very much doubt), it is indisputably the case that the underlying circumstance upon which FSNI was engaged to act for the plaintiff, the alleged unlawful alteration of the Lease, has been found by Clarke J. in the 2013 Supreme Court Appeal to be a claim that cannot be advanced at this remove. That precise cause of action had been raised by the plaintiff and his late father (as defendants) in the 2005 Circuit Court proceedings, the appeal of which was ultimately compromised as between Mr. Malone and the Mulrooneys (and indeed as between the Mulrooneys and the third party in the Circuit Court action itself).

60. In other words, the misfeasance being urged on the Court by counsel for the plaintiff is the alleged failure of FSNI to conduct a proper analysis of the Lease alleged by the plaintiff to have been fraudulently altered. As already referred to, the plaintiff has foregone the latter claim by virtue of the settlement effected in November 2005. I have earlier quoted the conclusion arrived at by Clarke J. at para. 8 of his judgment. In arriving at that conclusion, he opined, at para. 7.3:

> *"Where a party settles proceedings then whatever cause of action was raised in those proceedings can no longer be the subject of litigation. A party has, by entering into an agreement to settle, given up their right to whatever claim might have been made in the proceedings in question."*

61. At para. 7.10, he stated:

> *"Mr. Mulrooney was aware of the allegation of unlawful altering at the time of the Circuit Court proceedings. It was in fact he who had made the allegation. Having*

made that allegation he thereafter settled the proceedings. He must, therefore, be taken to have settled proceedings including the allegation of unlawful altering, for that allegation was squarely before the court at the time when he entered into the settlement. If Mr. Mulrooney is, as all of the legal authorities make clear he must, to be kept to his word in the settlement, then his word involves him agreeing by his settlement not to re-litigate the allegation of unlawful altering. It follows that Mr. Mulrooney is no longer in a position to attempt to re-litigate that very same allegation of unlawful altering which he has long since settled."

62. I note that before the Supreme Court, the late Mr. John Mulrooney had argued that if the original lease could be examined by an expert in the UK it might be possible to obtain evidence of its unlawful alteration. Likewise, in the within appeal, the plaintiff asserts that he wishes to have the Lease examined by experts such as might then undermine the credibility of FSNI's assertion that the Lease was correctly analysed and that no alterations were found.

63. Clarke J. addressed this argument, as follows:

"7.12 … To whatever extent it might be open to a party to go back on a settlement reached because of the availability of fresh evidence (and the circumstances in which such a course of action could be adopted, if it is possible at all, would, undoubtedly, be extremely limited), it could never be open to a party to seek to rely on the availability of fresh evidence which could, with reasonable diligence, have been made available at a time when a previous action involving the same allegation came to a settlement. It seems to me that the discovery of fresh evidence relevant to a case which has settled could never be a ground for seeking to reopen the case if the party, at the time of the settlement, could, with reasonable diligence, have obtained the evidence in question. I should emphasise that it does not follow

that, even if it could be established that the evidence was genuinely new in the sense that it could not have been obtained with reasonable diligence at the time in question, a settled case can be reopened. It would be necessary that the case could be brought within the established jurisprudence concerning the circumstances in which issues once settled can be re-litigated. The point which I seek to emphasise at this stage in this judgment is that the courts will never have regard to fresh evidence which could have been earlier obtained by reasonable diligence.

7.13 The original of the lease was, of course, available, if required, at the time of the Circuit Court proceedings. An application could have been made to have that lease made available to an expert of Mr. Mulrooney's choosing. For whatever reason it was decided not to go down the road of having the lease examined forensically at that stage. However, Mr. Mulrooney nonetheless had made an allegation of unlawful altering.

…

7.15 The time to have obtained the forensic examination which Mr. Mulrooney now seeks is when he first made the allegation of unlawful altering in the context of the Circuit Court proceedings…".

64. In the words of Clarke J., by virtue of the settlement in November 2005 and the failure to have the Lease examined either prior to the determination of the Circuit Court or the appeal thereof, the plaintiff "*has now lost the right to seek to re-litigate the same question of unlawful altering which he has already settled. He is, in substance, asking not to be taken at his word when he settled those proceedings. The law does not allow him to depart from his word. He is bound by the settlement…"* (at para. 7.15)

65. The rationale employed by Clarke J. in rejecting the appeal in the First High Proceedings was also adopted by the Court of Appeal in the plaintiff's appeal of the

Second High Court Proceedings. There the plaintiff alleged negligence against the Gardaí in the manner in which they investigated the alleged unlawful alteration of the Lease. It is also the case that in the application to strike out those proceedings the plaintiff contended that they could be maintained if he were permitted to amend his proceedings. In giving judgment for the Court, Costello J. firstly stated, (at para. 31):

> "*The appellant's case is that there was a negligent investigation of an alleged forgery. If the appellant cannot establish that the lease was unlawfully altered, he cannot establish that the respondents were negligent in failing, through proper forensic investigation, to uncover this alleged unlawful alteration of the lease. To put it another way: if the lease has not been altered, there can be no case in negligence against the respondents in these proceedings. Accordingly, it would be essential for the appellant to prove in these proceedings that the lease was altered in the manner he alleges. This is precisely what the Supreme Court says that he may no longer litigate. The fact that these respondents are different to the defendants in the 2011 proceedings (or indeed the parties in the original Circuit Court proceedings) does not alter this express finding of the Supreme Court. This finding of the Supreme Court is based upon the fact that the appellant (and Mr. Mulrooney Snr) settled their claims based upon the alleged unlawful alteration of the lease in 2005 with the third party and with the plaintiff, Mr. Malone. Since the judgment of the Supreme Court of the 2011 proceedings, the appellant settled his claim against the 2011 State defendants in the 2011 proceedings by consent, which claim included the same allegation of unlawful altering of the lease. Precisely the same principles and reasons apply now to his claim against the respondents as applied in 2013 to the claim against the defendants in the 2011 proceedings.*"

66. Costello J. went on to address the submission that the proceedings might be saved by the same type of amendment as is now proposed in respect these Fourth High Court Proceedings. She had this to say:

> "*33. It was submitted that the proceedings might be saved by an amendment to permit the appellant to plead misfeasance in public office against the respondents. Counsel for the appellant relied on the decision in Sun Fat Chan v. Osseous Ltd [1992] 1 I R 425 to the effect that an amendment to the proceedings should be permitted if it would save proceedings which otherwise did not disclose a reasonable cause of action or which were bound to fail.*
>
> *34. The respondents argued in reply that this principle can have no application or a very limited application, where there had been prior multiple proceedings brought and disposed of either by a final court on appeal or by consent. I agree with the submissions of counsel for the respondents. While undoubtedly any court will exercise the jurisdiction to strike out proceedings on the basis that they constitute an abuse of process or are bound to fail only in exceptional circumstances, nonetheless, as has been clear since Barry v. Buckley [1981] IR 306, it is in fact the duty of a court to grant such an order where the continuance of the proceedings would, in fact, constitute an abuse of process. I agree that the suggestion that these proceedings could be saved at this late stage by an amendment to plead misfeasance in public office at the end of the whole series of litigation going back to 2002 would in itself amount to condoning an abuse of process. On this basis alone, I would not be minded to allow any amendment based upon a mere assertion that such a cause of action existed without any attempt whatsoever to substantiate the plea.*

35. Furthermore, the misfeasance alleged would be the malicious failure properly to investigate the alleged unlawful alteration of the lease. To repeat myself, all roads lead to Rome. This is precisely what the appellant may not do."

67. I adopt the above observations of the learned Costello J. as having equal force and applicability to the submission now being advanced in this case.

The alleged fundamental errors of fact by Charlton J. in the First High Court Proceedings said to undermine the rationale of Clarke J. in the 2013 Supreme Court Appeal

68. In advancing his plea that the within proceedings should be allowed to be maintained, counsel for the plaintiff emphasises what he claims were fundamental errors of fact made by Charleton J. in the First High Court Proceedings. It is alleged that Charleton J. erred in holding that he had sight of the 2009 report of D/Garda Leonard and Mr. Craythorne's report of 20 September 2010 in circumstances where all that was before Charleton J. was a letter from a Detective Sargeant Courtney stating that the Lease had been examined by D/Garda Leonard. It is also asserted that Charleton J. erred in finding that an ESDA test had been conducted on the Lease, when no such test was carried out. These errors, it is said, were carried over into the decision of Clarke J. in the 2013 Supreme Court Appeal. On these bases, counsel for the plaintiff submits that the plaintiff's claim against FSNI should not be captured by the rationale upon which Clarke J. dismissed the appeal of the First High Court Proceedings.

69. Counsel for FSNI contends that there is no merit in the plaintiff's reliance on any alleged error of fact by Charleton J. It is further asserted that any alleged error was in any event overtaken by the findings of Clarke J.

70. I find myself entirely in agreement with counsel for FSNI, for the following reasons. Even taking at its height the plaintiff's contention that errors of fact were made by

Charlton J., as I am bound to do in circumstances where was is at issue for the plaintiff is a dismissal of his proceedings as an abuse of process, it is unfortunately the case for the plaintiff that there was no error (of fact or otherwise) made by Clarke J. in the 2013 Supreme Court Appeal when he observed that the Circuit Court proceedings in which the plaintiff and his late father alleged the unlawful altering of the Lease had been settled in an agreement reached with Mr. Malone in November 2005, and where he observed that the claim against the third party in the Circuit Court proceedings had also been compromised. I need not rehearse again the *dicta* of the learned judge. As the alleged alteration of the Lease (the foundation stone for the within proceedings) may no longer be maintained by the plaintiff, it cannot be the case that any factual errors by Charleton J. (if there were such) in holding that a full examination of the Lease had been conducted by D/Garda Leonard and Mr. Craythorne and that an ESDA test had been carried out can have any bearing on Clarke J.'s essential finding, premised as it was on the fact of settlements having been entered into as between the plaintiff and the parties against whom the allegation of the fraudulent altering of the Lease was levied.

The alleged non-compliance with s. 12 of the Land Act 1965

71. In the court below, and in his written and oral submissions to this Court, the plaintiff argues that the Circuit Court settlements of 2005 were induced by fraud. Specifically, it is asserted that Mr. Malone and his legal advisors fraudulently concealed the fact that consent under s.12 of the Land Act 1965 for the granting of the Lease had not been obtained by the time the Circuit Court judge rendered his decision on 9 March 2005.

72. In essence, s.12 of Land Act 1965 provides that an agricultural holding shall not be let, sublet or subdivided without the consent in writing of the Land Commission. Section 12(3) provides that any attempted or purported letting or subletting in contravention of s.12 "shall be null and void as against all persons; provided, however, that in any case where

the consent of the Land Commission under this Act is given after the attempted or purported letting, subletting or subdivision, such consent shall, if the Land Commission so direct, so operate as to validate with retrospective effect such attempted or purported letting, subletting or subdivision." I note, in passing, that as recorded in the judgment of Eagar J. in the Second High Court Proceedings, the plaintiff asserts that s.12 consent was obtained on 14 March 2005.

73. The plaintiff contends that the trial judge erred in rejecting his submission that the finding of Clarke J. in the 2013 Supreme Court Appeal should not debar him from proceeding with his action in circumstances where the judge hearing the Circuit Court action in 2005 was actively misled into believing that what was in issue was a valid lease. It is contended that an egregious fraud was committed on the Circuit Court by reason of the failure on the part of Mr. Malone and his legal advisors to inform the Circuit Court judge that the Lease was void in the absence of the requisite s.12 consent. It is in those circumstances that it is urged that the fact that the plaintiff and his late father compromised the Circuit Court appeal should not be a bar to the continuance of the within proceedings.

74. The potential significance (entirely hypothetical at the time) that an allegation of fraud or wrongdoing other than that of the unlawful alteration of the Lease might be of relevance to the plaintiff's circumstances was referred to by Clarke J. in the 2013 Supreme Court Appeal, in the following terms:

> *"7.9 The second issue concerns fraud. It is true that there are circumstances in which a court will allow a judgment or settlement which is procured by fraud to be set aside so that the underlying cause of action can be litigated. However, the problem which Mr. Mulrooney faces in this case is that the fraud which he alleges now is the same fraud which he alleged in the Circuit Court proceedings. There is no reason in principle why proceedings alleging fraud can not be settled in exactly*

the same way as any other type of proceedings. The public policy which favours giving effect to settlements and holding parties to their word when they have settled applies just as much in the case of an allegation of unlawful altering of a document as it does in any other type of litigation.

7.10 If there was now a different allegation of fraud which was said to have induced the settlement of the Circuit Court proceedings then the situation might be different."

75. In his written and oral submissions, the plaintiff places considerable reliance on this element of the judgment of Clarke J. and contends that it provides a basis upon which the within proceedings can be maintained.

76. In their submissions to this Court, FSNI took no position whatsoever on whether the allegation of a different fraud could sustain an action by the plaintiff against Mr. Malone and his legal advisors. They accept that the plaintiff is, at least at the level of principle, potentially free to litigate that issue against those who he contends are culpable for the fraud, subject entirely to whether he can establish that he is not estopped from doing so having settled his appeal of the Circuit Court case in 2005. Counsel submits, however, that a desire on the part of the plaintiff to pursue this new allegation of fraud does not provide any proper basis on which he can maintain the within proceedings against FSNI, in which his claim his entirely contingent on establishing that the Lease was unlawfully altered. It is contended that the allegation of unlawful alteration of the Lease on which he premises the within proceedings is one which he is definitively precluded from continuing to litigate, as was made clear by Clarke J. in the 2013 Supreme Court Appeal

77. The first observation I would make is that, as noted by the trial judge, a point of objection that the Lease was subject to the requirements of s.12 of the Land Act 1965 could have been raised by the plaintiff in the Circuit Court and/or on appeal to the High

Court, prior to the settlement effected in November 2005. Secondly, this alleged s.12 fraud appears nowhere in the plaintiff's pleading in the within action. Indeed, this does not come as any great surprise given that his claim against FSNI is premised on an alleged fraud of an entirely different nature, and where by no stretch of logic could it be argued that FSNI bear any responsibility for any alleged actions or omissions on the part of Mr. Malone or his legal team in or about the conduct or eventual settlement of the Circuit Court proceedings in 2005. Thirdly, even if it could conceivably be argued that the alleged fraud pertaining to the conduct of the Circuit Court proceedings had some bearing on the question whether the within proceedings should be maintained, the plaintiff's replying affidavit contains not one whit of evidential support for his claim that both he and the Circuit Court were misled. It ill-behoves any litigant to assert fraud against any person, let alone members of the legal profession, in the absence of evidential support for that allegation. The plaintiff's assertion amounts to no more than a bare assertion, devoid of any evidential basis.

78. In any event, the submission advanced on behalf of the plaintiff is entirely illogical when viewed in the context of the within proceedings. The alleged fraud, said to comprise the concealment of or non-compliance with certain statutory formalities in the making of the Lease, is in no way connected to the allegation sought to be maintained by the plaintiff against FSNI in the within proceedings. The allegation of fraud relating to the alleged concealment of non-compliance of s.12 of the Land Act 1965 constitutes a free-standing allegation of wrongdoing by Mr. Malone and his legal advisors, separate and distinct from the allegation that the Lease was unlawfully altered. I hasten to add that there is absolutely no evidence of any wrongdoing on the part of Mr. Malone or his legal advisors.

79. At the risk of repeating myself, there is no basis upon which any alleged concealment from the Circuit Court or the plaintiff on the part of third parties (who are not parties to

these proceedings) of their alleged failure to observe certain statutory requirements can shore up the within proceedings which are premised on an alleged fraud of an entirely different nature and in respect of which the plaintiff is debarred from pursuing by dint of the settlements entered into in 2005. The plaintiff cannot latch on to the purely hypothetical surmising of Clarke J. as the foundation or stepping stone for the allegations he now wishes to pursue. More especially, he cannot use the within proceedings as the vehicle in which to pursue such a claim.

Did the trial judge fail to apply the requisite legal principles when determining the motion to dismiss?

80. In his written submissions, the plaintiff complains that the trial judge failed to treat his claim at its high watermark as required by established jurisprudence.

81. While it is true that the trial judge did not engage on a lengthy discourse of the appropriate legal principles against which the exercise of his discretion to dismiss proceedings for being an abuse of the process of the court should be measured, I am entirely satisfied that in the particular circumstances of this case the absence of such discourse cannot assist the plaintiff.

82. In aid of his argument, the plaintiff's written submissions cited *Salthill Properties v. Royal Bank of Scotland* [2009] IEHC 207 and *Jodifern Limited v. Fitzgerald* [2005] IESC 294. The *dictum* of Barron J. in *Jodifern v. Fitzgerald* [2000] 3 IR 321 bears reciting: -

> *"In my view, a defendant cannot succeed in an application to strike out proceedings on the basis that they disclose no reasonable cause of action or are an abuse of the process if the court on the hearing of such application has to determine an issue for the purpose of deciding whether the plaintiff could possibly succeed in the action. It is not the function of the court to determine whether the plaintiff will succeed in the action. <u>The function of the court is to consider one</u>*

> *question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself."* (at p.323) (Emphasis added)

83. When viewed against the guidance provided by Barron J., I am entirely satisfied that the approach of the learned trial judge reflected the proper test. He considered the question of whether it was proper to have commenced the proceedings by viewing the claims advanced by the plaintiff in his statement of claim through the prism of the findings of Clarke J. in the 2013 Supreme Court appeal, as he was bound to do once that case and the litigation history which preceded Clarke J.'s findings were brought to his attention. In my view, the decision of the Supreme Court in the 2013 Supreme Court appeal was the type of "*incontrovertible evidence"* Barron J. spoke of in *Jodifern* and which impelled the trial judge to dismiss the within proceedings for being an abuse of the process of the court.

Summary

84. Taking, as I am bound to do, the plaintiff's case at its height, i.e. that FSNI were negligent and/or committed misfeasance in public office, as I am satisfied that as he is debarred from maintaining the claim that the Lease was unlawfully altered (which is the foundation stone for his claim against FSNI), that puts paid to the argument that he should somehow be allowed to maintain these proceedings by way of an amendment thereto. Equally, for the reasons set out, there is absolutely no merit to the argument that the proceedings can be maintained against FSNI on the basis of some other alleged fraud unconnected to the alleged fraudulent alteration of the Lease.

85. Accordingly, I would dismiss the appeal and affirm the Order of the trial judge.

86. Both Haughton J. and Power J. are in agreement with this judgment and with the Order I propose. That is an Order dismissing the appeal. Costs will normally follow the event. It is the intention of the Court to so order fourteen days from the date of this judgment unless either party applies within that time to request that the Court should otherwise order. If so applying, the plaintiff must first notify the office in writing of his intention to object within the fourteen-day period and should file short written submissions within one week of his so notifying the Court. FSNI will then have a further week to file its submissions.