THE COURT OF APPEAL

UNAPPROVED
Court of Appeal Record No: 2022/47
High Court Record No: 2019/7318

Whelan J. **Neutral Citation Number [2022] IECA 270**

Haughton J.

Binchy J.

BETWEEN/

GERALDINE SCANLAN

APPELLANT

-AND-

PAUL GILLIGAN

MAURICE COLLINS

JOE JEFFERS

SHANE O'BRIEN

FIONA O'BEIRNE

GRANT THORNTON CORPORATE FINANCE LIMITED

AIDAN CONNAUGHTON

IRELAND AND THE ATTORNEY GENERAL

THE DATA PROTECTION COMMISSIONER

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 25th November, 2022

Introduction

1. This is an appeal by the appellant, Ms. Scanlan (who has at all times represented herself in these proceedings), against the judgment of Butler J. dated 21 December, 2021 and her orders dated 26 January, 2022 whereby the proceedings were dismissed by consent as against the first defendant, now retired judge Paul Gilligan, and were struck out in respect of all other defendants pursuant to the inherent jurisdiction of the court, and all other motions brought by the appellant (she had issued motions to transfer the proceedings to the jury list, and to join a Mr. Frank Mullen and a Mr. Declan Geary as notice parties) were dismissed, and costs were awarded to the second to tenth defendants against her.
2. Ms. Scanlan also appeals against an 'Isaac Wunder' order made by Butler J. which prohibits Ms. Scanlan from issuing any further proceedings, without prior leave of the High Court, against the fourth to seventh defendants, the firm of Grant Thornton and current or former partners or employees, the firm of McCann Fitzgerald and current or former partners or employees who acted in any proceedings involving Ms. Scanlan on behalf of Grant Thornton, its partners or employees, and any current or former member of the Bar of Ireland who have acted or are acting on behalf of Grant Thornton its partners or employees in proceedings involving Ms. Scanlan.
3. Only the consent order dismissing the proceedings against the first named defendant is not appealed. I will refer for convenience to the sixth and seventh named respondents together as "Grant Thornton" which term extends where the context so admits to the firm of Grant Thornton, which, although not itself a party, is covered by the 'Isaac Wunder' order made by Butler J., and features as a party in other relevant proceedings. Mr. Connaughton is sued as "a senior partner and risk manager in Grant Thornton [A Firm]".
4. These proceedings ("the 2019 proceedings") were commenced by Ms. Scanlan by plenary summons issued on 20 September, 2019. Following appearances and repeated requests a

statement of claim was delivered belatedly on 13 June, 2020. Following that various motions were issued, and those heard in the High Court and most relevant to this appeal are the following strike out applications:–

- Ms. Scanlan's motion to remove the first named defendant from the proceedings – on foot of which an order was made on consent.
- A motion on behalf of the 2nd and 3rd named defendants, then barristers acting for Grant Thornton, to dismiss the proceedings pursuant to O. 19 r. 28 of the R.S.C. as disclosing no reasonable cause of action or being frivolous or vexatious, or alternatively pursuant to the inherent jurisdiction of the court as being bound to fail and/or an abuse of the process, and also seeking an 'Isaac Wunder' order.
- A similar motion on behalf of the fourth and fifth named defendants who are solicitors in McCann Fitzgerald, and their clients the sixth and seventh defendants.
- A similar motion on behalf of the Ireland and the Attorney General ("the State parties").
- A similar motion on behalf of the Data Protection Commissioner ("the Commissioner").

5. The motions to dismiss proceeded before the High Court judge over three days, and were based on the pleadings, affidavit evidence, written legal submissions and oral arguments, and a transcript is available to this court. The court has also considered the Notice of Appeal, the Respondents' Notices, and written and oral submissions from the appellant and from each of the four sets of respondents opposing the appeal.
6. As the party appealing, the onus is on Ms. Scanlan to persuade this court that the trial judge erred materially in law or in fact, or in the application of the law to the facts. Her conspicuous failure to address the judgment of the High Court in any meaningful way is a recurring theme in the appeal and this judgment.
7. In *Greenwich Project Holdings Limited v. Cronin* [2022] IECA 154, this Court recently affirmed that the standard of review for the appellate court is as follows:

> "[H]aving due regard to the jurisprudence and including *Ryanair Limited v. Billigfluege.de GmbH* [2015] IESC 11 (Unreported, Supreme Court, Charleton, 19 February 2015) and *McDonagh v. Sunday Newspapers Limited* [2017] IESC 46, [2018] 2 I.R. 1, a somewhat deferential approach ought to be taken by this Court to the exercise engaged in by the trial judge albeit however it is to be recognised that this Court is not in any less position than the trial judge to evaluate the affidavits and to form its own view after having afforded due weight to the views of the trial judge."

8. It must be said that the judgment appealed from, which runs to 45 pages and 117 paragraphs, is detailed and comprehensive, and conducts a most careful appraisal and analysis of the claims made by Ms. Scanlan. It sets out why the trial judge comes to the conclusion that all her claims in the 2019 proceedings have already been decided with finality, or fall to be decided at trial, in the claims and counterclaims made in extant proceedings of *Grant Thornton and Grant Thornton Corporate Finance Limited v. Geraldine Scanlan* Record No. 2015/9954 P ("the 2015 proceedings") which are due to be tried in the High Court in January 2023, or are otherwise bound to fail.
9. The trial judge in para. 8 emphasises the care required of a judge asked to dismiss proceedings being prosecuted by a litigant in person:

> "8. This is not to say that cases brought by litigants-in-person are invariably bad cases.
> Frequently, at the core of the litigation there may be a point of real substance although it is often obscured by excessive pleading and by an insistence on pursuing all points,
> however unmeritorious, to the detriment of the real issue. The court's task is to ensure
> that if there is a point of merit in the case, it is not overlooked or disregarded because of the verbiage by which it is sometimes surrounded. The task is unenviable not least
> because of the tendency of the litigant-in-person to take the view that unless the judge

accepts all of their applications and arguments, they have not received justice. Needless to say, all of this absorbs a disproportionate amount of court time which is a cause of real concern as the time taken to deal with these applications is often completely disproportionate to the importance of the case. That time is then not available to enable other litigants to have their cases heard."

10. As the trial judge observes (para. 34) the statement of claim is lengthy and "the detail in which it is pleaded makes a meaningful summary of its contents a very difficult exercise." However it is clear that she has made allowance for the appellant's lack of skill in legal drafting, and has considered and analysed the component parts of the central theme of "breach of the plaintiff's fundamental rights which allegedly occurred through the taking of the 2015 proceedings" (para. 34). At para. 39 she observes –

    "…Thus, in examining the applications brought by the defendants to strike out the plaintiff's claim, the court must consciously disregard the poor state of the pleadings and focus on what is, so far as the court can ascertain, their true intent."

11. The care with which the trial judge considered the applications to dismiss is very evident from the thoroughness of her judgment. There is in truth little difference between the parties as to the facts relevant to the applications to dismiss. In these circumstances, and for the reasons just given, it is appropriate that this court pay particular deference to the careful analysis and conclusions of the trial judge.

Factual Background

12. These proceedings were issued by the appellant in response to the 2015 proceedings, following the striking out by the High Court of certain pleas in her defence and counterclaim in the 2015 proceedings in which the second and third respondents were instructed by McCann Fitzgerald as counsel for the plaintiffs, Grant Thornton. The appellant is the defendant and counterclaimant in the 2015 proceedings. There were however earlier proceedings.

13. The procedural history is complex, and is more fully set forth in the grounding affidavit sworn by Shane O'Brien on 4 August, 2020 on behalf of the fourth to seventh respondents. In so far as it is necessary to set it out, the starting point is that Danske Bank A/S (the "Bank") advanced a loan facility to the appellant in 2008. This loan facility was secured over a property owned by the appellant. In 2013, a receiver, Mr. Tennant of Grant Thornton, was appointed over certain assets of the appellant by the Bank. In 2014, the Bank instituted summary summons proceedings seeking judgment against the appellant (*Danske Bank AS v Scanlan*, Record No. 2014/1456S). The appellant then initiated cross proceedings on 21 October, 2014 against the Bank and Mr. Tennant, with High Court Record No. 2014/8950P, claiming damages for negligence and misrepresentation, which were met by a motion to dismiss.
14. On 25 February, 2016, Fulham J delivered judgment in the summary summons proceedings giving judgment against the appellant, and he made an order striking out the appellant's claim against the Bank and the receiver on the basis that it disclosed no reasonable cause of action and was bound to fail.
15. By plenary summons issued on 19 July, 2017 the appellant initiated a further set of proceedings in the High Court of *Scanlan v Danske Bank, Keenan, Tennant and Targeted Investment Opportunities ICAV* Record No. 2017/6470, making claims *inter alia* of breach of duty, negligence, fraud, conspiracy, breaches of the European Convention on Human Rights, and unlawful use of personal data. Those proceedings were recently struck out in the High Court by Heslin J. who delivered a reserved judgment, reported at [2022] IEHC 160, running to 50 pages with 166 paragraphs, and dealing comprehensively with all aspects of the claims made, as an abuse of the process on the ground that Ms. Scanlan was impermissibly attempting to relitigate issues decided by Fulham J. in 2016.
16. Arising out of the proceedings brought against her, and the appointment of the receiver, the appellant made a data protection access request to Grant Thornton. On foot of this request, a CD

was sent by Grant Thornton to the appellant on 11 September, 2015, which contained her personal information and data. Inadvertently, Grant Thornton included on the CD additional confidential data and information relating to unconnected third parties, and confidential proprietary information belonging to Grant Thornton.

17. Grant Thornton requested that the appellant return the confidential information and sought undertakings from her in this regard. The appellant refused to provide the undertakings requested and Grant Thornton commenced the 2015 proceedings by plenary summons issued on 27 November, 2015 seeking injunctive relief requiring the appellant to deliver up the confidential information and restraining her from disseminating, communicating, or otherwise making use of that data. The proceedings also claimed damages for breach of confidence, misuse of private information, breach of privacy and breach of statutory duty, including breach of statutory duty under sections 2(1)(a), 2D, 2(1)(c), 2A and 22 of the Data Protection Acts 1988 and 2003 ("the Data Protection Acts"), and damages pursuant to section 7 of the Data Protection Acts.

18. On 27 November, 2015, Mr. Justice Gilligan granted an interim injunction restraining the appellant from disseminating the confidential information. On 4 December, 2015, the appellant appeared in person and consented to the grant of a series of interlocutory orders pending the determination of the proceedings. Importantly, there was no appeal from this Order.

19. In the course of the 2015 proceedings to date the appellant has accepted that she copied material from Grant Thornton's CD to three USB keys. At this point the original CD has been returned to Grant Thornton, along with two of the USB keys – but not a third one. At para. 14 of her defence and counterclaim in the 2015 proceedings the appellant admits to "issuing a negligible amount of information to Mr. Gerard Scriven, the aforementioned trusted confidante of 20 years", but denies any other disclosures. Mr. Scriven has furnished undertakings to Grant Thornton's solicitors in respect of the material disclosed to him by the appellant. In the course of the hearing of this appeal Ms. Scanlan admitted disclosing material from the CD to five other parties, who, along

with Ms. Scanlan, have recently initiated proceedings against the Commissioner, the State Parties and Grant Thornton.

20. The response of Grant Thornton to the appellant's data access request was delayed, and this was the subject of a complaint by the appellant to the Commissioner. In a decision issued by the Commissioner on 16 November, 2017 it was found that initial delay in responding to the appellant's request outside the 40-day period constituted a contravention of the Data Protection Acts by Grant Thornton.

21. A large number of interlocutory motions were issued by the appellant in the 2015 proceedings. As of the date of the hearing of the present motions in the High Court, there had been eleven separate interlocutory applications, some forty affidavits had been filed, and the proceedings had had seventy separate court listings (the trial judge records that the number of times the various applications had been in court then exceeded one hundred). Since then there have been further applications to the High Court and (unsuccessful) appeals by Ms. Scanlan to this court, and counsel for Grant Thornton advised the court that there have now been over one hundred appearances in the 2015 proceedings. The trial of the 2015 proceedings, including Ms. Scanlan's counterclaim for damages pursuant to s.7 of the Data Protection Acts, is now due to take place in early 2023.

22. On 14 May, 2019, Ms. Justice Reynolds made an order in the 2015 proceedings restricting the appellant from issuing any further motions in that action without leave of the court. In breach of that order on 26 April, 2021, Ms. Scanlan issued a motion without leave of the High Court seeking determinations as to the jurisdiction of that court.

23. Grant Thornton have repeatedly offered to resolve the 2015 proceedings by requesting that the appellant agree to permanent injunctive relief. While the appellant claims to be willing to return all *confidential* data, she excludes all *personal* data from this, not recognising that the same

material can be both the personal data of third parties and confidential business information belonging to Grant Thornton.

24. Grant Thornton have also withdrawn all claims for damages, including pursuant to s.7 of the Data Protection Acts, as appears from a ruling of Ní Raifeartaigh J dated 5 October, 2018, at para. 5, and this has since been confirmed to this court, and a revised statement of claim delivered by Grant Thornton no longer claims damages, whether pursuant to s.7 of the Data Protection Acts or otherwise. However, the appellant has refused to agree to this and in the 2019 proceedings asserts *inter alia* a cause of action arising from the claims of breach of duty under the Data Protection Acts pleaded and maintained for a period of time by Grant Thornton in the 2015 proceedings, arguing that such claims cannot be made in the High Court and are a matter for the Commissioner. She asserts that she has been "traumatised" by the maintenance of such claims for a period of years, and that this gives rise to a claim for damages.

25. The appellant has repeatedly contended in the 2015 proceedings that the High Court does not have jurisdiction to hear and determine the proceedings on the basis that the claim is one within the exclusive jurisdiction of the Data Protection Commissioner. This contention has been rejected by two High Court judges (Stewart J and Pilkington J) and by the Court of Appeal on two occasions (judgment of Baker J for the court on 31 October, 2019, and judgment of Haughton J. for the court on 1 March, 2021).

26. It appeared from the appellant's own written submission that since delivery of the High Court judgment under appeal Ms Scanlan had, with five other plaintiffs, instituted yet another set of plenary proceedings. The plenary summons bears High Court Record No. 2022/1823P, and was issued on 11 May, 2022, and names as defendants the Data Protection Commissioner, the Attorney General, Ireland, Grant Thornton and Grant Thornton Corporate Finance Ltd. Ms. Scanlan is the sixth plaintiff in those proceedings (These are the proceedings referred to in para.19above). Ms. Scanlan accepts that she did not seek leave of the High Court to initiate these

proceedings. She also accepted that she had disclosed to the five other plaintiffs' confidential information which she admitted she obtained from the CD inadvertently containing such information and furnished to her by Grant Thornton in 2015.

The inherent jurisdiction to dismiss

27. In her judgment the trial judge considers the law relating to dismissal under O.19 r.28 and also the inherent jurisdiction to dismiss. She decides that the applications should be decided under the inherent jurisdiction of the court, for reasons identified in para 47:

> "47. The somewhat greater flexibility allowed to the court under its inherent jurisdiction is potentially relevant to this application. Because the plaintiff is a litigant-in-person, she has not clearly pleaded the factual basis for her claims. Instead, her pleadings comprise a series of statements which are a mixture of alleged fact, assertion and legal argument all bundled into single pleas. Consequently, it is difficult for both the court and the defendants to identify those elements of her claim which should be taken as factual and which, as a result, should be assumed to be true and capable of proof by her for the purposes of O. 19, r.28. I have given some thought as to how the court could go about extracting the facts which must be assumed to be true from the plaintiff's pleadings and I have ultimately concluded that it is not really possible to do this. When this matter was teased out with counsel for the barristers, he acknowledged the difficulties arising because of the manner in which the plaintiff's claim is pleaded and indicated that, whilst maintaining his application under O.19, r.28, he was concentrating on the application pursuant to the court's inherent jurisdiction."

28. No issue is taken with this reasoning, and accordingly it is not necessary for this court to dwell upon whether these proceedings should be dismissed under O. 19 r. 28, although the respondents for the most part also contend that the 2019 proceedings fail to disclose any reasonable cause of action and are frivolous and vexatious.

29. The trial judge correctly identifies in para. 45 the principles that a court should apply when exercising its inherent jurisdiction to dismiss:

> "45. The inherent jurisdiction of the High Court to strike out proceedings which, if allowed to proceed to trial, would constitute an abuse of the court's processes, was first recognised by Costello J. in *Barry v. Buckley* [1981] 1 IR 306. Whilst there are many reasons why proceedings might constitute an abuse of process, central to most of them is the fact that the proceedings are ones which simply cannot succeed. As Barron J. pointed out in *Jodifern Ltd v. Fitzgerald* [2000] 3 IR 321, the test in these circumstances is not to ask whether the plaintiff would succeed (which necessarily involves the court making some evaluation of the evidence which is, at the time of the motion, incomplete) but rather asking whether the plaintiff could succeed. There is, however, an important difference in the manner in which the court approaches this question when exercising its inherent jurisdiction rather than its jurisdiction under O. 19, r. 28. The difference lies in the extent to which the court can look behind the pleaded facts in order to determine that the proceedings are bound to fail. This distinction was explained by Clarke J. in the Supreme Court in *Lopes v. Minister for Justice* [2014] IESC 21 where he stated:-
>
> > *"The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious. The reason why, as Costello J. pointed out at p. 308 of his judgment in Barry v Buckley, an inherent jurisdiction exists side by side with that which arises under the RSC is to prevent an abuse of process which would arise if proceedings are brought which are bound to fail even though facts are asserted which, if true, might give rise to a cause of action. If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the*

RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked.'"

30. While Ms. Scanlan disagrees with the application of these principles by the trial judge, I do not understand her to suggest that these principles have not been correctly set out. Accordingly the onus lies with her to persuade this court that the 2019 proceedings are not bound to fail, and are not vexatious or an abuse of the process.

Second and third respondents and the fourth and fifth respondents ("the lawyers")

31. The appellant's key claims against these respondents appear to be that they represented Grant Thornton in the 2015 proceedings and thereby committed an actionable wrong; that the breach of Data Protection Acts claims of Grant Thornton in the 2015 proceedings are within the jurisdiction of the Data Protection Commission (which now carries out the functions formerly carried out by the Data Protection Commissioner) and these respondents should not have launched that claim in the High Court; that by drafting a motion seeking leave to seek orders for attachment and committal these respondents sought to remove the appellant's freedom and liberty; that in taking certain steps as counsel for Grant Thornton they committed "an abuse of legal privilege"; and that by pleading certain claims on behalf of Grant Thornton, and drafting affidavits and making legal submissions accordingly, they made defamatory statements which are alleged to have damaged the appellant's reputation.

32. The trial judge made the following findings in respect of the claims against the second and third respondents, and also in respect of the claims made against the fourth and fifth respondents, the partners in McCann Fitzgerald who had instructed them, which were usefully summarised in the written submissions of the second and third respondents:

"(a) A plaintiff is required to procure an expert report before professional negligence proceedings are instituted, so that professionals do not face the burden of defending, and the

reputational damage caused by, the issuing of unwarranted professional negligence proceedings. It was an abuse of process for the Appellant to institute proceedings against the lawyers without having firstly obtained a report from an expert confirming that there were stateable grounds for her intended claim (§53).

(b) The Second and Third Respondents (and McCann Fitzgerald) did not owe the Appellant a duty of care in circumstances where they were instructed to act on behalf of the opposing party in adversarial litigation. There are strong policy reasons why the law has not applied to lawyers a duty of care to the opposing side in litigation (§ 56-58).

(c) The conduct of proceedings and statements made either in pleadings or in court are covered by an absolute privilege designed to protect the administration of justice. That privilege now has an express statutory basis under s. 17(2)(g) of the Defamation Act 2009 (§57).

(d) Adversarial litigation necessarily means that claims and defences will not succeed. The fact that a claim or a defence does not succeed does not mean that it is unlawful, unstateable or in some way impermissible (§61).

(e) The Appellant made a fundamental mistake in equating the lawyers with the client on whose behalf they acted (§62).

(f) The withdrawal of a plea is not a concession that the plea is impermissible or unlawful (§64).

(g) The Appellant has not established a stateable claim against the lawyers simply because they acted on behalf of Grant Thornton in the 2015 proceedings. Equally, the fact that certain pleas originally made in the 2015 proceedings are now not being pursued by Grant Thornton does not give rise to a stateable cause of action against the lawyers. The whole of the Appellant's argument on these issues is fundamentally misconceived (§66).

(h) The bringing of proceedings against the lawyers who acted in a professional capacity in earlier proceedings against the plaintiff is manifestly oppressive. This is not simply a case

where the Appellant is mistaken as to the legal basis of the action she wishes to pursue. The Appellant has already made complaints to the professional regulatory bodies to whom the lawyers must answer, which were dismissed at a threshold level as being without foundation. The Appellant did not withdraw the allegations against the lawyers following receipt of the rulings of the professional bodies. The pursuit of a claim against the lawyers in these circumstances cannot be said to be for a proper purpose (§68)."

33. This led the trial judge to conclude that the claims made against these respondents were misconceived and bound to fail, that many of the issues that the appellant seeks to litigate in these proceedings have been determined against her in the 2015 proceedings, and that the 2019 proceedings were an abuse of the process. She therefore struck out the proceedings against these respondents under the inherent jurisdiction. This also fed into her decision to grant the 'Isaac Wunder' order.

34. In considering this appeal the court is not helped in its task by the prolix and repetitive nature of the Notice of Appeal (running to forty-eight Grounds), which in essence contests every finding made by the trial judge and seeks to raise afresh issues already decided against her in the High Court or this court. Nor is it helped by the appellant's written and oral submissions which have little by way of logical structure and are not focussed on submitting why the appellant asserts the trial judge was wrong in law of in fact, and in places are quite incomprehensible. In a similar vein, her replying affidavits are regrettably prolix and repetitive.

35. The appellant repeatedly expresses her belief that the Data Protection Commission alone had jurisdiction to act in connection with any data breach, and that she was obliged to seek the joinder of the Commissioner, and the decision to refuse to join the Commissioner was unjust or irrational. She therefore submits that everything done in connection with the 2015 proceedings is unlawful for want of jurisdiction and this seems to be the foundation for her claim for declarations and

damages against the second and third respondents, and the fourth to seventh respondents in the 2019 proceedings.

36. The trial judge found that these legal arguments in relation to jurisdiction and the role of the Commissioner had already been decided being the subject of court rulings and judgments in the 2015 proceedings – by Stewart J. and Pilkington J. in the High Court, and upheld this court (judgment of Baker J. *nem dis.* on the joinder appeal reported at [2019] IECA 276, and Haughton *nem dis.* on the appeal from Pilkington J, 1 March, 2021). The appellant submits that these rulings were not final determinations at the trial of an action, and are therefore not *res judicata.* She relied on the judgment of MacMenamin J. *Ennis v. AIB* [2021] IESC 112 to argue that judgments in interlocutory applications are not final. The trial judge rejected this argument noting that MacMenamin J. states, at para.22:

> "An interlocutory order will, generally, not have the quality of finality sufficient to give rise to a plea of *res judicata*. It may, however, have that effect if it was intended finally to determine rights between the parties."

37. Butler J. reasoned (para 79 of the judgment) that the interlocutory orders dealing with the issue of jurisdiction were intended to have the quality of finality such that they could not thereafter be revisited.

38. I agree with her finding and her reasoning. It is often the case that in an action or a statutory appeal one or other party raises an issue of jurisdiction; it does not necessarily matter how this is done, whether by motion, or the court directing and hearing a preliminary issue of law, or deciding it at trial at the outset, provided the process allows the issue to be fully ventilated and a determination made.

39. It is clear that where a decision on a discrete issue of jurisdiction is sought at an interlocutory stage, and the opportunity is given to the opposing parties to argue it fully, the usual inference will be that the parties, and the court, intended the determination of the issue to have the character

of finality. That this is so is supported by *Jones v Coolmore Stud* [2020] IECA 116, which is a decision of particular relevance as it also concerned a situation in which the appellant sought to relitigate matters that had been decided in earlier proceedings, and argued an entitlement to do so on the basis that the judgments delivered in the early proceedings were interlocutory in nature. This argument was rejected by this court (paras. 24-25), which held that findings of law that were made in the previous proceedings are binding as a matter of precedent and that the mere fact that findings of law were made in an interlocutory application is not a reason to depart from the previous decision of the same court. Donnelly J concluded that the appellant was attempting to relitigate manners that had recently been decided against him and held that,

> "as it was going to cause expense and trouble to the same defendant to defend, it was vexatious" (para. 61).

She concluded, therefore, that the trial judge was correct in his finding that the appellant's claim disclosed no reasonable cause of action and was frivolous and vexatious, and dismissed the appeal.

40. Even if this were not so, the attempt to relitigate the issue of jurisdiction amounts to the sort of abuse of the process identified in *Henderson v. Henderson* (1843) 3 Hare 100. In any event in the 2015 proceedings Grant Thornton is no longer pursuing any claim for damages, and specifically has withdrawn any claim against the appellant for breach of duty under the Data Protection Acts or for damages under s.7. Any issue of the *locus standi* of Grant Thornton to raise these issues is now moot. Accordingly there cannot be any possible legal basis for a claim against Grant Thornton's lawyers for their involvement in the pleading of a claim that has since been withdrawn by Grant Thornton.

41. Equally clear is the principle that in litigation there is no duty of care owed by one party's lawyers to the opposing party. Indeed it appears that in the High Court Ms. Scanlan accepted this to be so.

Scott L.J. in the High Court of England and Wales in *Business Computers International Limited v. Registrar of Companies* [1988] Ch. 229 at p.241, put it succinctly:-

> "[T]here is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to the service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort."

42. That was a decision relied on extensively by Heslin J. in his recent judgment dismissing the proceedings Record No. 2017/6470P, in addition to the judgment in this jurisdiction of *O'Malley v Irish Nationwide Society* (Unreported, High Court, 21 January, 1994) which is also relied on by the trial judge (para.59). The principle that a lawyer owes a duty of care to the party for whom he/she is acting, but generally owes no duty of care to the opposing party, was also affirmed in *Orchard v South Eastern Electricity Board* [1987] QB 565 – relied on by the trial judge at para.60 – and more recently applied by the UK Supreme Court in *NRAM Limited v Steel* [2018] UKSC 13, at para.25:

> "A solicitor owes a duty of care to the party for whom he is acting but generally owes no duty to the opposite party: *Ross v Caunters*… The absence of that duty runs parallel with the absence of any general duty of care on the part of one litigant towards his opponent: *Jain v Trent Strategic Health Authority...*"

43. The rationale for this is explained by the authors of *Jackson & Powell on Professional Liability* (Stewarts *et al*. (eds.), 8th ed., Sweet & Maxwell, 2019):

> *"Even if there would otherwise be a duty of care, additional problems arise where the claimant is the solicitor or client on the other side of a transaction or, to an even greater extent, on the other side in litigation. Any duty of care owed to the claimant would be likely to conflict with the solicitor's duty to his own client, and this implies that no duty will be owed to the other side."*

The further strong policy reason for this, identified by the trial judge at para.58, is "the seriously chilling effect on the administration of justice, and, in particular, on the ability of litigants to secure legal representation" if such a duty existed and lawyers acting on behalf of unsuccessful litigants could be sued by the successful litigant after the litigation has concluded.

44. I also agree with the trial judge that the appellant's argument that the lawyer defendants owed her a duty of care based on *Doran v Delaney* [1998] 2 IR 61 does not stand up for the reasons identified in her judgment. In essence that case concerned the duty owed by a vendor's solicitor to a purchaser in answering requisitions on title, and the Supreme Court held that where the solicitor assumes the responsibility for the information furnished, knowing that the other party may rely on it, a duty of care arises. However as the trial judge observed (para 56):

> "Conveyancing is not an adversarial pursuit whereas litigation is necessarily so….it is difficult, if not impossible, to see how a lawyer engaged in litigation on behalf of a client could ever be taken to be furnishing advice to the opposing lay client on which that person is likely to rely. It is wholly contrary to the adversarial nature of litigation that an opposing client could ever reasonably understand the other side's lawyers to be assuming personal responsibility for providing him with advice on foot of which they are aware he will likely rely."

45. I agree with that reasoning. To this should be added that there does not appear to be any evidence on affidavit to suggest, let alone establish, that the lawyer respondents gave Ms. Scanlan any advice or information in the 2015 proceedings. I also agree with the submission of counsel that in attempting to pursue claims against the lawyers Ms. Scanlan is conflating the lawyer with the client. The lawyer in litigation represents the client, but is not to be equated with the client; there is no authority for the proposition that a parties' lawyer can be made vicariously liable to the opposing party for any alleged wrong of their client in the initiation or pursuit of claims in the course of litigation.

46. Ms. Scanlan sought to rely on her claim to have been defamed by these respondents. However the conduct of proceedings and statements made either in pleadings or in court are covered by an absolute privilege designed to protect the administration of justice, which now has an express statutory basis under section 17(2)(g) of the Defamation Act 2009. Consequently, even if it were the case that anything said or done by the second and third respondents in the 2015 proceedings were to have caused the appellant unjustified reputational damage (something which it is not accepted has occurred), the lawyers would be absolutely immune from suit – as correctly found in the judgment under appeal at para. 57.

47. I also agree with the submission on behalf of these respondents that the High Court judge correctly found that the commencement by the appellant of these proceedings against them, in circumstances where she had not obtained a report from an expert confirming that there were stateable grounds for her intended claim, was an abuse of process (judgment, para.53). That an expert advice should be obtained before taking professional negligence proceedings is well-established – see Kelly J. in *Connolly v Casey* (unreported, High Court, 12 June 1998) at p.19, Denham J. in *Cooke v Cronin* [1999] IESC 54 and in *Murray v. Budds* [2017] 2 I.R. 178, at p.182, and most recently the decision of this court in *Murphy v HSE* [2021] IECA 3. The appellant did not adduce any evidence that she had made any efforts to obtain an expert report from outside of the jurisdiction (or, indeed, within the jurisdiction). Her excuse was that the COVID-19 pandemic prevented this. But this cannot be true, because she initiated the 2019 proceedings on 24 September, 2019, well before March 2020 when the effect of the pandemic was first felt in Ireland. In these circumstances, the Judge did not err in failing to identify the difficulties the appellant now appears to suggest — for the first time in this appeal and not on affidavit — that she encountered in obtaining an expert report (see ground of appeal number 26).

48. It is also the case that the 2015 proceedings have yet to be heard. It is not possible to say what the outcome will be, and it was not for the High Court on the motions to dismiss, and it is not for

this court, or for the appellant, to try to predict the outcome. The claim may succeed or fail; the counterclaim may succeed or fail. It is therefore misconceived for the appellant to try to base any claim in the 2019 proceedings on the 2015 proceedings which have yet to be determined.

49. Insofar as the appellant persists with a claim that any of the lawyers breached their professional standards, even if this were so (and it is firmly denied) it would not be actionable at her suit. Complaints of professional misconduct fall to be considered by the appropriate professional body. Complaints were made by Ms. Scanlan to the Barristers Professional Conduct Tribunal, a body composed partly of practising barristers but with a significant number of lay members. The complaints were dismissed on 6 July, 2020 on the basis (a) that they arose from a case subject to oversight by a judge before whom the complaints could have been (but were not) raised, and where that judge could have referred the complaints to the Tribunal; (b) that the complaint related in essence to a mistake which Ms. Scanlan said counsel for the other party in the case made as to law, and that could not, in and of itself, be a ground of misconduct that the Tribunal could consider; and (c) plenary proceedings – presumably the 2019 proceedings – had been issued dealing with the matters raised in the complaint. I also note that complaints of professional misconduct were initiated by Ms Scanlan against the fourth and fifth respondents on or about 26 October, 2019, and were deemed inadmissible by the Legal Services Regulatory Authority on 7 February, 2020 as being "without substance or foundation" under s.58(2) of the Legal Services Regulation Act 2015. Regrettably notwithstanding these findings the complaints of professional misconduct have not been withdrawn, and in her supplemental replying affidavit sworn on 3 May, 2021 at para. 26, and in her oral submissions, Ms. Scanlan continues without any justification to assert that the second and third respondents did not act in accordance with the Code of Conduct of the Bar of Ireland and breached a duty of care which she mistakenly believes was owed to her.

50. The appellant has singularly failed to satisfy the onus of proof that is on her to show that the learned High Court judge erred in law or in fact. I am satisfied that the trial judge correctly

identified and the law and applied it to the facts, and was entitled, if not obligated, to dismiss the proceedings against the lawyers under the inherent jurisdiction.

Grant Thornton and Aidan Connaughton – sixth and seventh respondents

51. To a large extent the reasons given by the trial judge for dismissing the claims made in the 2019 proceedings against Grant Thornton coincide with the reasons for dismissing the claims against the lawyers. This is because the claims made against Grant Thornton are substantially the same as those made against the lawyers.

52. At risk of repetition, the trial judge correctly decided that the applicant cannot revisit the issue of jurisdiction, which is *res judicata*; it is not open to Ms. Scanlan to continue with a claim that only the Commissioner or the Data Protection Commission has jurisdiction to deal with allegations of misuse of personal data, or that the High Court cannot address Grant Thornton's claims of misuse of confidential information that fall to be decided in the 2015 proceedings. To do so would be to allow a collateral attack on the decisions, adverse to Ms. Scanlan, already made in the 2015 proceedings, and would be inherently abusive. Also, as the trial judge points out (para.73) Ms. Scanlan can pursue her counterclaim for damages pursuant to s.7 of the Data Protection Acts in the 2015 proceedings.

53. Further, by ceasing to pursue any claim for breach of duty or damages under the Data Protection Acts in the 2015 proceedings, there is no longer any issue raised by Grant Thornton which engages the Data Protection Acts or could involve the Commissioner. The abandonment of that claim, and the fact that Grant Thornton now pursue a narrower claim, manifestly cannot give rise to a (new) cause of action. Nor does the fact that the narrowing of the claim was announced verbally in court before Ní Raifeartaigh J., and later confirmed to this court on 1 March, 2021, rather than by bringing a formal motion under O. 26 r. 1, or Order 28 governing applications to amend pleadings, of the R.S.C. alter this. Order 26 relates primarily to discontinuance of an entire action and does not in my view prevent a party to litigation, before or at the trial of the action and without

issuing a motion, informing another party and the court that a particular claim or issue is not being pursued. I also note that because the withdrawal of the claim for damages in the 2015 proceedings had not been made as clear as it might have been when motions in relation to jurisdiction and the scope of claim were heard by Pilkington J., on appeal from her decision this court decided to vacate her order for costs against Ms. Scanlan on the jurisdiction motion, and substituted 'no order' as to the costs in the High Court on that motion - see transcript from 1 March, 2021, at page 20.

54. Conversely, it is open to Ms. Scanlan to pursue her own counterclaim for damages pursuant to s.7 of the Data Protection Acts in the 2015 proceedings. Her suggestion that the claim to damages in the 2019 proceedings is different because it sounds in the general law of tort was rightly rejected by the trial judge at para. 76 on the basis that while "the two claims maybe framed differently, they seek damages for the same alleged acts of wrongdoing, or, at best, for the defendants having wrongfully pursued these matters in the 2015 proceedings."

55. Further as the 2015 proceedings have yet to be determined, and the outcome cannot be anticipated, the trial judge correctly observed (para 74) that –

    " …it would be manifestly absurd to allow the plaintiff pursue a cause of action which is predicated on those proceedings having been wrongfully taken against her."

56. Further, as with the lawyers, it cannot be the case that in litigation one party owes a duty of care to the opposing party such as could ground the claims made by Ms. Scanlan against Grant Thornton in the 2019 proceedings. The trial judge at para.75 finds support for this in *O'Malley v Irish Nationwide Building Society* (Unreported, 21st January, 1994) where Costello J. not only struck out the proceedings against the lawyers, but also the plaintiff's attempt to issue new proceedings against the building society and directors and officials of the building society for which there was "no justification", and in the judgment of Scott L.J. in *Business Computers* to which I have referred earlier, and in which he said –

> "….The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd."

I agree with this reasoning.

57. The appellant also asserts that she is entitled to bring the 2019 proceedings for breach of her rights under Article 40.3 of the Constitution. As the trial judge found (para.82), such a claim for damages only arises if the complaint does not fall into any existing or recognised cause of action. She proceeded –

> "…it does not follow that a plaintiff who cannot fashion a stateable claim under any recognised tort or other recognised cause of action automatically has a default claim under Article 40.3 of the Constitution. In this case although the plaintiff has pleaded that all of the wrongs allegedly committed against her constitute breaches of the Constitution, the ECHR and the EU Charter, she has not pleaded any factual basis for these contentions save the fact that Grant Thornton brought the 2015 proceedings against her and took certain steps in the conduct of those proceedings. As I have already held that there is no duty of care owed by Grant Thornton as a litigant to the plaintiff as the opposing party, there is no sustainable basis for the plaintiff's assertion that the mere bringing and prosecution of that litigation constitutes a breach of her fundamental rights. Therefore, the question of a discrete cause of action pursuant to Article 40.3 of the Constitution does not arise."

58. I agree with this analysis. In her submissions the appellant seeks to expand her argument by reliance on Articles 15 and 34, as well as 40.1 and 40.3. She then refers to "unlawful rulings" and that she has "endured constant abuse in these courts by certain jurists" as "demonstrable evidence of systemic misconduct" giving rise to her constitutional claim to damages. In so far as "rulings" is a reference to the determinations of the High Court and this court in the 2015 proceedings on the issues of joinder of the Commissioner or State parties, those decisions were

made after due process and in accordance with law, and are binding; they also have such finality as to be *res judicata.* The bringing and conduct to date of the 2015 proceedings cannot of itself give rise to a cause of action, and any suggestion of misconduct by "jurists" has been explored by professional bodies who have dismissed the complaints. For the reasons articulated by the trial judge she has failed to establish any factual basis for a breach of constitutional right claim to damages.

59. Some further reference should be made to seventh named respondent, who is sued in the 2019 proceedings as "a senior partner and risk manager of Grant Thornton [A Firm]". He does not appear to be sued in a representative capacity. It is hard to identify any pleas specific to him in the statement of claim in the 2019 proceedings. For instance, there is a plea in para. 28 that the second to seventh defendants "advanced impermissible claims against the Plaintiff in a Statement of Claim", which appears to be a reference to the statement of claim in the 2019 proceedings. However Mr. Connaughton is not a party to the 2015 proceedings. Similarly in paras. 29 and 30 claims of defamation are made against him along with the second to sixth named respondents. No particular alleged defamatory statement is pleaded against Mr. Connaughton, and in so far as this plea relates to the conduct of the 2015 proceedings, he is not a party to those proceedings. Again, in para. 32 there is a claim that the second to seventh defendants "pursued the Plaintiff in the High Court in the first instance over "misuse of private data"" and the statement of claim continues in a similar vein. Grant Thornton is of course a party to the 2015 proceedings, and it appears that in her pleadings in the 2019 proceedings the appellant is conflating Mr. Connaughton with that firm. Absent any representative order, that cannot be done.

60. In para. 39 the appellant does plead directly in relation to seventh named respondent –

> "….The Plaintiff claims the seventh named Defendant was not honest in their disclosure to the DPC regarding the Plaintiff and disclosed data and subsequently mislead the Court to seek relief. The Plaintiff claims Mr. Aidan Connaughton of the firm (seventh named defendant)

was author of this notification to the DPC and is not obliged to inform the DPC of a data breach unless it is disclosure of 'personal data within the meaning of the Acts…The Plaintiff claims in light of the accusations and claims against them pursuant to specific sections of the Acts for "misuse of private data" in the Statement of Claim (2015 9954 P) they are entitled to substantial damages and/or compensation from the seventh named defendant for false defamatory and/or misleading statements negatively affecting the Plaintiff, their right to due process, dignity and reputation in the course of these events pursuant to Section 6 (but not limited to) of the Defamation Act 2009 and/or general damages pursuant to Article 403 of the Constitution."*[sic]*

61. In so far as the statements complained of arise out of the 2015 proceedings, as discussed earlier they cannot be the subject of a claim in defamation. In any event any such a claim would long be statute barred by virtue of s.11(2)(c) of the Statute of Limitations, as inserted by s.38(1) of the Defamation Act 2009, which sets an outer limit of two years from the date of publication for the initiation of proceedings for defamation.

62. A further plea against the seventh respondent appears in para. 59 in relation to a notice concerning data breach posted on Grant Thornton's website, but is hard to understand as the appellant in the same paragraph claims "no such notice exists and that the website was never updated nor amended at that specific juncture".

63. Amongst the myriad of reliefs (some 76 in number) there are many sought against Grant Thornton and Mr. Connaughton, but I could only identify one that is claimed solely against the seventh named respondent - in para.79 there is a claim for damages for negligence, breach of duty and statutory duty pursuant to s.29 of the Data Protection Acts. Section 29(1) concerns offences under the Act committed by a body corporate, and extends the criminality to directors or other officers consenting or conniving in the conduct giving rise to the offence; and s.29(2) extends the criminal

responsibility to members managing a body corporate. That section does not impose any civil liability on directors or officers and cannot be the basis for a civil claim.

64. The claims against the seventh named respondent relating to actions taken by him by or on behalf of the firm of Grant Thornton that are the subject of the 2015 proceedings cannot be relitigated in the 2019 proceedings. Nor can there be any cause of action against him for bringing the 2015 proceedings in which he is not a party, and where in any event those proceedings have yet to be heard. The appellant has also failed to address the argument that claims that she might have made against the seventh named respondent as a partner or employee of Grant Thornton in the 2015 proceedings, could have been advanced against him as a party if she had joined him to her counterclaim in those proceedings, and that to attempt to make them now in fresh proceedings is contrary to the rule in *Henderson v Henderson* (1843) 3 Hare 100.

65. I am also of the view that the claims made against the seventh respondent are in essence the same as those made against the sixth named respondent. In *O'Malley v Irish Nationwide Building Society and others* (Unreported, 21st January, 1994), where the plaintiff issued proceedings against INBS and its lawyers, and the managing director and four other directors, and an auctioneer, Costello J. not only struck out the claims against the lawyers, but also struck out the plaintiff's attempt to issue new proceedings against INBS and the directors on the grounds that there was "no justification" for issuing those proceedings. As the trial judge correctly concluded, Grant Thornton and its legal team did not owe any duty of care to Ms. Scanlan as an opposing litigant in the 2015 proceedings, and *a fortiori* this applies to a partner or employee of Grant Thornton acting on its behalf in relation to the matters that gave rise to those proceedings. It is an abuse of the process for Ms. Scanlan to now attempt to make the same claims against the seventh named respondent.

66. For these reasons I agree with the decision of the trial judge that so far as Grant Thornton, and Mr. Connaughton, sued as a partner in Grant Thornton, is concerned the 2019 proceedings should be dismissed under the inherent jurisdiction as being bound to fail and an abuse of the process.

State parties

67. The appellant' s complaints against the Attorney General are set out at paragraphs 38 and 70 of the statement of claim. She claims that the Attorney General refused to join the 2015 proceedings and that this was a violation of her right to fair procedures, her constitutional right to validly join the "state authority" to matters concerning the Data Protection Acts, and a breach of Constitutional duty on the part of the Attorney General. She claims an entitlement to damages for the alleged failure to join in the 2015 proceedings.

68. The appellant further claims that the State is liable to her in damages in tort and under the Constitution for alleged breach of her constitutional rights, her European Convention on Human Rights (ECHR) rights, and EU law rights in the 2015 proceedings. She asserts that her rights were breached by (a) the proceedings being initiated by Grant Thornton in the High Court rather than before the Commissioner, in circumstances where she asserts the High Court has no jurisdiction to determine the matter; (b) an interlocutory injunction being granted against her (on consent) in circumstances where she did not have adequate knowledge of her legal position; and (c) her application to join the Attorney General being refused. Her complaints in respect of the conduct of the 2015 Proceedings are set out in paragraphs 36, 38, 41, 45-46, 51-53 and 70 of the Statement of Claim.

69. The appellant also complains about the conduct of the Commissioner, primarily in respect of that authority's failure to intervene in the 2015 proceedings, and suggests that the State is liable in damages for the actions of this body (paras 141 and 142 of the statement of claim).

70. Finally, the appellant suggested that she would amend her statement of claim to make a complaint against the State in the 2019 proceedings about the constitutionality of the interpretation that she

asserts was placed on section 7 of the Data Protection Acts by Pilkington J. in her interlocutory decision in the 2015 proceedings, to assert a claim against the State in respect of the decision of the Court of Appeal delivered by Haughton J on 1 March, 2021, and to assert a claim against the State arising from the withdrawal by Grant Thornton of certain claims in the 2015 Proceedings.

71. The trial judge reached the following conclusions:

    a. The appellant's claims against the State premised on the alleged failure of the Attorney General to join the 2015 proceedings are barred by the doctrine of *res judicata* and are an abuse of process and were dismissed pursuant to the inherent jurisdiction of the Court as being frivolous and vexatious and bound to fail.

    b. The Attorney General does not have an automatic entitlement to join private litigation.

    c. It cannot constitute a failure to vindicate a litigant's rights that the Attorney General has not involved himself with that litigant's proceedings; it is a matter for the courts hearing the case to ensure that parties' rights are protected and in the event of an error on the part of the court, it is a matter for the appellate courts to correct that error.

    d. Arising from the independence of the judiciary and the separation of powers mandated by the Constitution, the State is not liable in damages or otherwise for the conduct of members of the judiciary in the hearing and determination of cases before the courts or for individual judicial decisions.

    e. The State discharges the duty it owes to individual litigants under the Constitution through the provision of the courts system including appellate courts with the power to review and correct any error made by a trial judge.

    f. The appellant' s allegation of a breach of fair procedures in the High Court has no credible factual basis and was rejected by the Court of Appeal in the 2015 proceedings.

g. The appellant cannot maintain any claim against the State in respect of the action of the judiciary under the ECHR Act 2003 as the judiciary is expressly excluded from the definition of "organ of state" under s.1 of that Act.

h. The Commissioner is independent of the State in the performance of her functions under the Data Protection Acts and the State is not vicariously liable for any action of the Commissioner.

72. The appellant has failed to discharge the onus on her to demonstrate that in these findings the trial judge erred in law or fact, and in my view they are unimpeachable. The decisions of the High Court, affirmed on appeal by this court (in the joinder appeal no grounds were given for the contention that Gilligan J. was in error, but this court addressed the question in any event), refusing the joinder of the State parties and the Commissioner are *res judicata.* Even if they are not, there is an issue estoppel such that it would be an abuse of the process to allow the appellant to relitigate the issues of joinder or jurisdiction in the 2019 proceedings, and the court has the power to put an end to attempts by an unsuccessful party to circumvent decisions that are binding on them. Counsel for the State parties relies, as did the trial judge, on the decision of the Supreme Court in *McCauley v McDermott* [1997] 2 ILRM 486 which establishes that an issue estoppel arises (1) where the same question has been decided; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised. Those criteria are met in respect of both the decision to refuse joinder, and the decision on jurisdiction, and in circumstances where both decisions were appealed unsuccessfully (and, in the case of the joinder decision of this court, leave to further appeal to the Supreme Court was refused by that court) it follows that there is at minimum an issue estoppel. The Supreme Court in *McCauley* went on to approve the following statement of Smith L.J. of the English Court of Appeal in *Stephenson v. Garnett* –

> "The court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous or vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court."

The Supreme Court added –

> "38. Similarly in Reichel v. McGrath Lord Halsbury LC said:
>
> > "I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.""

73. In her grounds of appeal the appellant asserts that the trial judge was incorrect in her determination that claims premised on the non-joinder of the Attorney General to the 2015 proceedings were bound to fail, and that the Attorney General is obliged to participate in proceedings which "alter/derogate data privacy law in this State", and that *res judicata* does not apply to the interlocutory orders. I have already disposed of the latter argument – either *res judicata* applies, or it would be an abuse of the process to allow the appellant to relitigate the issue of joinder which has already been decided against her.

74. As to the former, the appellant fails to provide any authority for the proposition that there could be any cause of action against the State arising out of a decision of courts to refuse joinder. In principle it is not the function of the Attorney General to become involved in private law proceedings, and to actively participate in order to protect private rights. The trial judge correctly found that "[l]itigation between private parties does not become public law litigation just because it concerns statutory provisions…" (para.94). As Gilligan J. found in refusing joinder (his decision of 27 July, 2017) "no issue is being raised in relation to the constitutionality of any statute nor is any issue being raised in relation to incompatibility of any statute with the European Convention on Human Rights". This court agreed, Baker J. holding at para.15 that –

"…the claims in the [2015] proceedings are private law claims and the fact that what is asserted are rights which belong to all citizens or to a cohort of citizens does not make the proceedings, in their nature, public law proceedings or those in which the Attorney General has a role."

75. The same applies to the 2019 proceedings. |In particular there is no challenge to the constitutionality of any provision of the Data Protection Acts such as to warrant joining the State parties. Equally the appellant produces no authority for the proposition that the State can be liable for (alleged) want of fair procedures in the conduct of the 2015 proceedings. I find no fault in the trial judge's findings at paras. 88-91 where she finds this claim bound to fail, and her conclusion that the State's obligation is to provide a court system, with access for claims and where appropriate a right of appeal, but extends no further. As counsel for the State parties colourfully put it "the State provides the scaffolding but is not involved in the work".

Data Protection Commissioner

76. The trial judge's findings in respect of claims against the Commissioner were, in summary:

i. Having unsuccessfully sought to join the Commissioner in the 2015 proceedings it was an abuse of the process to issue the 2019 proceedings claiming breach of her fundamental right by virtue of the Commissioner's non-participation in the 2015 proceedings.

ii. while recognising that there were new elements to Ms. Scanlan's claim against the Commissioner in these proceedings which were not in the 2015 proceedings, the trial judge considered (para. 103) that the gravamen of the complaint underlying the pleas of professional negligence and breach of statutory duty appeared to be either the alleged failure of the Commissioner to exercise its "exclusive" jurisdiction by taking action against the other defendants or its failure to join the 2015 proceedings, both of which issues were already determined against the plaintiff in the 2015 proceedings.

iii. Insofar as Ms. Scanlan raised an alleged failure to investigate and enforce the law, the trial judge held (paras. 105-106) that this claim was inconsistent with the documentary evidence before the Court which showed that her complaints were fully and actively investigated. Moreover, the trial judge considered (para. 106) that it was manifestly unsustainable for Ms. Scanlan to allege that investigations were not carried out whilst relying in the same proceedings on the content and conclusions of those investigations. For this reason, the trial judge concluded that any such claim was bound to fail.

iv. While the trial judge accepted that it was not possible to conclude that there was no credible basis for the factual assertion of delay or breach of statutory duty by reason of that delay on the part of the Commissioner, the trial judge concluded (para. 108) that, as a matter of law, insofar as any complaint of delay in the investigation might have arisen, it was a matter which ought to be brought by way of judicial review proceedings, rather than by way of plenary proceedings alleging a breach of statutory duty. As summarised in her judgment at para. 110, these were "claims concerning the exercise of a statutory function by a statutory body and thus are matters for which the Commission does not bear any liability in tort". On this basis, the trial judge concluded that this aspect of the claim was misconceived and bound to fail. In reaching that conclusion, the trial judge emphasized that she had not reached a conclusion that the Commissioner was "guilty of any, much less any unreasonable, delay in dealing with the plaintiff's complaint".

77. It is submitted on behalf of the Commissioner that the appellant has failed to identify, whether by reference to the judgment or the Notice of Appeal, or the Respondents' Notices, the basis for appealing the conclusion that the claims against the Commissioner must be struck out. I agree with this. A trawl through the Notice of Appeal does identify certain areas of complaint, for instance, in para. 38 she challenges the independence of the Commissioner, in para.42, she asserts that the "Commissioner is liable to ensure correct application of data privacy law and legal

effectiveness of our rights" and "The Appellant by law was entitled to statutory investigation with the DPC for alleged data privacy violation"; and in 43 she once again suggests that the Commissioner "has a case to answer on subject matter jurisdiction"

78. The problem is that the appellant does not develop any argument in any logical or cogent manner, fails to engage with the respondents' notices, and fails to back up any contention with relevant authority. Her written submissions, which are difficult to read, and in places incomprehensible, add nothing that really assists this court, and in her oral submissions she did not put forward any explanation or authority that would support the proposition that her attempt to relitigate issues from the 2015 proceedings was not an abuse of the process.

79. On page 3 of her submissions she writes as follows:

   > "To avoid these proceedings, all Respondents relied on res judicata using interim rulings in 2015 9954P, departed from law and SC precedent. The State/Court fails to identify any appropriateness with the Appellants application to join the Data Commissioner for claims pursuant to sections 2, 7, 22 of the Data Acts in 2015 9954P. Precedent on interim decisions to substantiate res judicata were provided in Ennis v AIB McMenamin J. SC."

   I have earlier rejected the argument based on *Ennis* that interlocutory decisions cannot form the basis of *res judicata.* It is not open to her to make claims based on any assertion that the court should have joined the Commissioner, or that the Commissioner should have allowed such joinder, in the 2015 proceedings, or that this in some way gives rise to a fresh cause of action. Similarly the issue of jurisdiction is *res judicata* or alternatively an issue estoppel arises by virtue of the decisions of the High Court and this court in the 2015 proceedings.

80. In her submissions on page 6 and in her oral submissions the appellant suggests that the decisions on jurisdiction in the 2015 proceedings breached Article 28 of the Directive 95/46/EC on protection of individuals with regard to the processing of personal data, and the principle of primacy of EU law, and conflicted with the judgment of this court in *Nowak v. Data Protection*

Commissioner [2020] IECA 174. I accept the Commissioner's submission that this is not the case. It is quite clear that the enforcement of data protection was a matter for the Commissioner (now the Data Protection Commission), who under statute is independent of government, and who has jurisdiction to receive complaints – and indeed Ms. Scanlan has availed of that jurisdiction in making complaints against Grant Thornton to the Commissioner. The fact that the High Court does not have the jurisdiction to receive, investigate or pursue complaints does not breach the Directive, and the principle of primacy of EU law has no relevance, and I fail to see how this court's decision in *Nowak* (which was an appeal on a point of law concerning whether exam scripts were personal data, and whether Mr. Nowak was entitled to inspect his original script) has any relevance to the present appeal.

81. It remains the case, as found by Baker J. at para.56 [2019] IECA 776, that Ms. Scanlan's claim is a private law one, and is pursued in the counterclaim in the 2015 proceedings, and she cannot in the 2019 proceedings sustain any claim against the Commissioner for damages for not joining in those proceedings.

82. As to the alleged failure on the part of the Commissioner to investigate and enforce the law, the trial judge was entitled to find that that claim was inconsistent with the documentary evidence before the court, and bound to fail. There was ample evidence to support her conclusions, and the appellant has failed to identify any error in her findings of fact or conclusions in law. The trial judge was also entitled to find that it was manifestly unsustainable for the appellant to allege that investigations were not carried out whilst relying in the 2019 proceedings on the content of those investigation.

83. As to the claim of delay, the High Court did not conclude that the Commissioner was "guilty of any, much less any unreasonable, delay in dealing with the [P]laintiff's complaint" but took the view that, on the basis of the timeline for the handling of the plaintiff's complaints, it was not possible to conclude that there was no credible basis for the factual assertion of delay or breach

of statutory duty by reason of that delay on the part of the Commissioner. However, the trial judge concluded that, as a matter of law, insofar as Ms. Scanlan had a remedy in respect of such delay, it took the form of judicial review proceedings, rather than plenary proceedings seeking to sue the Commissioner in tort.

84. I agree with the Commissioner's submission that where an individual wishes to take issue with an alleged delay on the part of a public body in the exercise of its functions the appropriate legal route for doing so is, as recognised by the trial judge, judicial review proceedings. This has the consequence that the time constraints in O. 84 of the RSC apply. By contrast, any such delay would not give an individual a cause of action in tort against a public body such as the Commissioner, at the very least in the absence of *mala fides* on the part of the public body. As the Supreme Court confirmed in *Beatty v. The Rent Tribunal* [2006] 2 IR 191 – a decision appropriately relied on by the trial judge (para.108) - a statutory body exercising statutory adjudicative duties in the public interest enjoys an immunity from an action in negligence, provided it acts *bona fide* within its jurisdiction.

85. The trial judge was therefore entitled to find that the claims against the Commissioner in the 2019 proceedings are bound to fail, and that they are manifestly an abuse of the process.

Abuse of the process and 'Isaac Wunder' orders

86. As to what may constitute an abuse of the process, at para.67 the trial judge recites well-established caselaw pointing to the factors that may indicate an abusive or vexatious claim.

> "67. In summarising the findings of the court in relation to the application brought by the lawyers, it may be useful to have regard to a number of factors which have been identified as tending to show that a proceeding is vexatious. These are not criteria to be met on an application to strike out but rather indicia of an abusive or vexatious claim. These were originally identified in a Canadian case, *Dykun v. Odishaw* (Unreported, Alberta Court of Queen's Bench, 3rd August, 2000); considered by the High Court (Ó Caoimh J.) in *Riordan*

v. An Taoiseach [2001] 4 IR 463 and approved of by the Supreme Court in *Ewing v. Ireland* [2013] IESC 44. These are:-

> *"(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;*
>
> *(b) where it is obvious that an action that cannot succeed, or if the action would lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;*
>
> *(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;*
>
> *(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;*
>
> *(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;*
>
> *(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.""*

These indicia were most recently endorsed and applied by me in *Sheridan v Allied Irish Banks plc* [2022] IECA 139. Again, I do not take the appellant to take any issue with these indicia, which also guide this court on this appeal.

87. The trial judge had no hesitation in finding that the 2019 proceedings were an abuse of the process. In relation to the claims against the lawyers the trial judge found that the 2019 proceedings were oppressive, and for reasons summarised in para.68, and which it is not necessary to repeat, she concluded that –

> "…most of these factors, with the exception of (e), are present in this case."

88. The taking of this appeal is further evidence of Ms Scanlan's abuse of the process. As the trial judge presciently observes (para.95) "The difficulty here is that the plaintiff refuses to accept any decision made by a court adverse to the case that she advances." Ms Scanlan repeatedly told this court that this is "a public interest matter" - which it is not – and that she will "keep going" until she is presented with a single authority that proves she is wrong. Such an approach to litigation, and the repeated pursuit of claims that have been rejected or are bound to fail, is unacceptable and a clear abuse of the right of access to the courts.

89. I agree with the trial judge's findings in relation to abuse of the process, and it is worth reflecting on the effects of these abusive proceedings. The second and third respondents have had to arrange and attend to legal representation to assess the 2019 proceedings, and prepare replying affidavits, and represent them in court – they had no choice in this as the Bar of Ireland Code of Conduct at 3.13 provides that "Barristers may not appear as Counsel:- (a) in any matter in which they themselves are a party or have a pecuniary interest;…". Mr. Jeffers swore two affidavits, and in the second understandably felt compelled to address Ms. Scanlan's entirely unfounded suggestions on affidavit that the barristers' actions, or failure to act, amounted to "inherent dishonesty". Their legal representatives had to prepare submissions, and attend the High Court and advocate over three days (apart from any other listings or 'for mentions'). They have now had to face an appeal, with a further round of pleadings and submissions and a day in this court, on top of complaints to their professional bodies which have been dismissed. The prospect of recovering any costs from the appellant is, I would have thought, remote. These respondents may or may not have insurance that provides for representation in these circumstances, or perhaps they have colleagues prepared to provide legal representation free of charge or at a reduced rate, but if so they will feel beholden to such colleagues who by providing such representation will have given of their time and professional skills when they could have been attending to regular practice. They will also have had to endure the stress of being sued in the High Court, and of having to

attend to the complaints to their professional bodies, and there is always the possibility of reputational damage in the eyes of those who are not privy to the full circumstances. Of note is that Mr. Jeffers felt obliged at para.49 of his first affidavit to aver that he "did not behave in any way inappropriately toward the Plaintiff" and that counsel "complied in full with the Code of Conduct of the Bar of Ireland", and his averment in para.64 that he was obliged to notify his insurer "…and dealing with the claim has absorbed a considerable amount of my time".

90. Also of note is an unwarranted and inappropriate letter written by Ms. Scanlan on 24 October, 2019 to the second named respondent advising him not to take up a position as a judge of the Court of Appeal, which includes the following:

> "While my position in law in these matters is impeachable, your position as a Judge would be wholly impeachable in light of case 2015/9954P and 2019/7318P. It would be inconceivable that an individual involved in legal proceedings regarding the application of Supreme and EU law should be appointed to the bench? I am certain parties who seek your appointment are ignorant of the circumstances and the serious repercussions of same. I inform the President of the Republic by way of letter (and by email) that a proposed appointment should be suspended this time. It is contaminated by deceit (alleged or otherwise) and wholly incompatible with our Supreme Law by which you would be appointed."*[sic]*

That letter on its face was copied to the then Chief Justice, and then Taoiseach, and Ms. Scanlan said she also sent it to the Department of Justice and the Courts Service. She could not remember whether she sent it to the President. It is government's function to nominate persons for appointment as judges, and it is the President's function to appoint them. This scandalous communication was clearly calculated by Ms. Scanlan to cause damage to the second named respondent, and to prevent his appointment to the bench.

91. Apart from the foregoing, the 2019 proceedings have also wasted the valuable resource of court time, which should be used for resolving real disputes, and consequently Ms. Scanlan has indirectly wasted public money.

92. Although some of these considerations do not apply, or do not apply with the same force to the other respondents, the expenditure of time and money on legal representation certainly does. It is also a feature of Ms Scanlan's submissions that at times she descends into the use of abusive language. For instance, in submitting that the State or the Commissioner should have been joined in the 2015 proceedings and that citizens should not have to take on the legal challenge, she submits at page 3 of her submission that –

> "This is misappropriation of State funds. The defendant will not successfully bully this Appellant into submission. It is the State's default position to bully citizens…. This bullying is indicative of systemic contamination. The State descends on any citizen as malcontent…. The State created this appalling mess in 2015 9954P…. the Judge ensured that the Appellant cannot revisit damages by an Isaac Wunder order. This is another strategy to smear citizens oppressed by the State."

In oral submissions she described herself as being "bullied", "terrorised" and "traumatised" by the respondents in the taking and conduct of the 2015 proceedings. Such exaggerated and gratuitously insulting and unwarranted language has no place in submissions to the court, and is itself an abuse of the process. In so far as Ms. Scanlan feels stressed, or under pressure, it is a situation entirely of her own making, and it appears that Grant Thornton continue to offer her a straightforward way out of the litigation.

93. It may seem that a litigant in Ms Scanlan's position can to a considerable extent make statements and act abusively before the courts with impunity. That she can do so at all is because she has a Constitutional right of access to the courts, and in this instance a right of appeal, and the judiciary at all levels will strive to give due consideration to claims and arguments made by lay litigants,

and to adjudicate them in accordance with law and the Constitution, and without fear or favour, in accordance with their declaration of office, notwithstanding difficulties in the presentation of their case – and the judgment of Butler J. in the High Court in this case is a prime example of this.

94. However there are limits to this fundamental right and freedom, and statements and actions that are misconceived and vexatious or an abuse of the process will give rise to strike outs, and where this has occurred and the abuse has been repeated – and there is a clear pattern of abuse by Ms. Scanlan - the courts are entitled to place some restriction on the access to the courts by the use of 'Isaac Wunder' orders. The appellant does not contest that this jurisdiction, which is well established, exists. The imposition of such orders requires a cautious approach, and is not something that occurs very often.

95. In my view the trial judge was fully entitled to impose restrictions on Ms. Scanlan on the issue of further proceedings in the proportionate manner in which she did, and for the reasons that she gives, particularly at paras 115 and 116 of her judgment. These restrictions were proportionate. Regrettably Ms. Scanlan has already breached the 'Isaac Wunder' order made by Reynolds J. It is relevant to note that since then in his judgment delivered on 16 March, 2022 Heslin J. has dismissed as an abuse of the process the proceedings High Court Record No. 2017/6470P brought by Ms. Scanlan against *inter alia* Danske Bank A/S and the receiver Mr. Tennant of Grant Thornton. Also of relevance is that the latest Plenary Summons issued by Ms. Scanlan and five other persons on 11 May, 2022 involves claims against the Commissioner, the State Parties and Grant Thornton, and on its face it should not have been issued by Ms. Scanlan without leave of the High Court in accordance with the order of Butler J., which leave was not obtained. Nothing in the grounds of appeal or the appellant's submissions persuades me otherwise than that the 'Isaac Wunder' order is fully justified.

96. I would therefore dismiss this appeal, which is entirely without merit and is in itself an abuse of the process.

Costs

97. As this judgment is being delivered electronically I will give an indication as to the order that I would propose should be made in respect of the costs of the appeal. As all the respondents have been entirely successful they should be awarded their costs of the appeal against the appellant, such costs to be adjudicated by a legal costs adjudicator in default of agreement. If any party wishes to seek a different order then they should so indicate in writing or by email to the Office of the Court of Appeal within 21 days from the date of electronic deliver of this judgment, and a short hearing will be arranged; in default of any such indication the order proposed will be made.

Whelan and Binchy JJ. have indicated that they agree with this judgment.