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THE COURT OF APPEAL

Record No: 2019/4

Edwards J. **Neutral Citation Number [2023] IECA 56**

Faherty J.

Ní Raifeartaigh J.

Between/

DAMIEN MURPHY

Appellant

-AND-

ROBERT RYAN

Respondent

Judgment of Mr Justice Edwards delivered electronically on the 16th of March, 2023.

Introduction

1. This is an appeal against the judgment of the High Court (Noonan J) delivered *ex tempore* on the 13th of November 2018 and the consequent Order of the same date (perfected on the 12th of December 2018) following an application brought by the respondent pursuant to O.19 r.28 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the Court, dismissing the appellant's proceedings as being bound to fail and as being frivolous and vexatious.

The Background to the Plaintiff's Proceedings and to the Motion.

2. As was outlined in the judgment of Noonan J., the appellant was a taxi driver by occupation. He is now retired. On the 22nd of May 2002 he had taken out an Income Protection policy with Canada Life Assurance (Ireland) Limited ("Canada Life"), which he maintained and renewed annually until it was terminated in October 2011. On a date in January 2010 the appellant was involved in a road traffic accident as a result of which he sustained neck and back injuries and found himself unable to continue as a taxi driver due to those injuries. He then sought to make a claim on the said Income Protection Policy.

3. The appellant's intended claim having been intimated to them, Canada Life sent him for an independent medical examination with the respondent who is an occupational health physician. As would be entirely usual with the type of policy in question, it was a term of the appellant's Income Protection Policy that he would submit to such an examination if required to do so. The respondent saw and assessed the appellant on the 6th of September 2011. The assessment was conducted with reference to criteria for the performance of a Physical Health Test as set out in the terms and conditions applicable to the policy in question.

4. Seemingly when the policy was first taken out in 2002 the relevant terms and conditions defined "a permanent inability", such as would qualify under the policy for the payment of benefit, as being:

> "*The permanent inability, as a result of illness or injury contracted after the commencement date of the policy, to perform three of the first six activities listed below OR the seventh activity only, without the help of another person but with the use of appropriate assistive aids and appliances.*
>
> *1. Walking - defined as the inability to walk more than 200 m without stopping or suffering severe discomfort.*

2. *Kneeling and bending - defined as the inability to kneel or bend as if to pick something up from the floor and straighten up again.*
3. *Use of pen/pencil/keyboard - defined as the lack of physical ability to use a pen, pencil or keyboard with either hand or any artificial aids.*
4. *Rising - defined as the inability to rise from sitting in an upright chair with a back with no arms without the help of another person.*
5. *Lifting and carrying - defined as the inability to pick up from the ground and carry for 3 m at 2.5 kg weight with either hand.*
6. *Vision - vision (as corrected by spectacles, contact lenses or other aids) is defined as the inability to see well enough to read a large print book namely 16 point.*
7. *Mental Agility - mental incapacity which has failed to respond to optimal treatment and requires the need for continuous psychotropic medication, professional psychiatric supervision and care, and results in persistent severe mental dysfunctioning*."

5. At the time of the claim the original terms and conditions had been superseded by updated terms and conditions, and I infer that the appellant would have been deemed, by virtue of having renewed his policy following notification of those updated terms and conditions, to have agreed to them. The updated terms and conditions required that in order to benefit under the policy the policyholder should, when being subjected to a Physical Health Test, simultaneously satisfy three or more of the first ten conditions thereafter described or the eleventh condition only. The revised list now comprising eleven conditions was:

1. *Sitting in a chair - unable to sit in a chair for 30 minutes.*
2. *Getting up from a chair - cannot get up from a chair without using its arms.*
3. *Standing - unable to stand for a period of 10 minutes.*

4. *Walking - unable to walk a distance of more than 200 m on flat ground without stopping.*
5. *Lifting - unable to lift a 2kg bag of potatoes from counter height using either hand.*
6. *Walking up and down stairs - unable to walk up and down a flight of 12 stairs without holding on or taking a rest.*
7. *Bending and kneeling - unable to either bend or kneel as if to pick up something light from the floor and straighten up unaided.*
8. *Dexterity - unable to turn on a sink tap or the control knobs on a cooker with one hand.*
9. *Reaching -unable to reach behind your back or put on a coat or jacket with either arm.*
10. *Fits and blackouts - suffering fits and blackouts such that reasonable medical opinion requires the revocation of an ordinary driving licence (or in such circumstances were such a condition would preclude one from obtaining an ordinary Irish driving licence if not previously held)*
11. *Seeing - certified either blind or partially sighted by an Irish registered consultant ophthalmologist.*

6. Following the conducting by the respondent of his independent medical examination the respondent reported in writing to Canada Life, as he was required by his contract to do. He furnished a report dated the 9th of September 2011 in which he detailed the appellant's occupational history as provided to him, his family history, social history and the history of his presenting complaints. The respondent described the appellant's current complaints, the appellant's description of how he claimed to occupy his day, and his (i.e. the respondent's)

findings upon a physical examination of the appellant. His report concluded with a section entitled “Impression” in which he stated:

> *“It was difficult to get an understanding of the nature of this gentleman’s complaints or the extent of his injuries. Physical examination was inconsistent in some regards. I note that he has been examined on behalf of the injuries board and this may be an issue with regard to his delayed recovery and return to work. Certainly, he does not express any motivation to return to employment, which he feels unfit to do.*
>
> *Specifically with regard to his eligibility for the Physical Health Test, I do not believe that this gentleman meets the criteria as laid out. He is clearly capable of sitting in a chair for 30 minutes, capable of standing for 10 minutes and walking for 200 metres. He acknowledges his ability to lift 2 kg items, he was able to bend down in surgery today to a kneeling position to pick up an item from the floor. He readily acknowledges that he is able to turn taps and able to reach behind his back to put on his coat. He does not suffer from fits or blackouts and his vision is satisfactory.*
>
> *The only task he expressed difficulty in carrying out was getting off the chair without using the arms or walking up and down stairs without holding onto the handrail. I am not certain, however, that this represents a physical disability, a lack of practice or indeed an apprehension that he might either fall on the stairs or be unable to stand up from a seated position.*
>
> *Therefore, while this gentleman’s medical complaints are somewhat ill-defined to me, I am satisfied that he does not meet the criteria of the policy.”*

7. In reliance upon the respondent's said report Canada Life refused the appellant's claim, and declined to pay any benefit to him on foot of the said policy.

8. The appellant was not happy with Canada Life's decision and complained to Canada Life that he felt that the respondent had not examined him properly and that he had not been fair to him in the manner in which he had reported. The appellant further complained about Canada Life's decision to the Financial Services Ombudsman (FSO). Canada Life duly notified the respondent of the appellant's concerns and of the complaint to the FSO. By a letter to Canada Life dated the 22nd of December 2011 the respondent offered an overview of his contact with the appellant in further elaboration of the views he had expressed in his initial report. He was not disposed to alter his views and concluded by saying:

> *"In summary, I believe a reasonable and thorough assessment was carried out of this gentleman.*
>
> *I hope this is of some assistance to you in response to the Ombudsman."*

9. Upon being notified of the appellant's complaint the FSO canvassed with him the possibility of going to mediation, but the appellant declined mediation. In those circumstances the FSO embarked upon an investigation of his complaints. The parameters of his complaints are apparent from the following paragraph in a letter from the FSO to the appellant dated the 10th of January 2012, exhibited by the appellant, in which the author states:

> *"Having carefully examined your submissions, I note that some clarification from you is necessary in relation to your complaint. It is my understanding that your complaint concerns the following:*
>
> - *termination of your benefit from October 2011,*
> - *the alleged failure to pay maximum benefit on your policy from 2009 up until the time when the provider decided to cease the payment,*

- *customer service issue.*

Furthermore, I note that on the complaint form you provided the following date as the date when the advice, service or transaction you are complaining about took place "01.05.2002". Therefore I would be obliged if you could please clarify this discrepancy."

10. I am prepared to infer that insofar as there is a reference in that letter to a "*customer service issue*", that this would have included the appellant's complaints concerning the medical examination conducted by the respondent and the respondent's subsequent report to Canada Life. I am supported in this view by subsequent correspondence from the FSO to the appellant, dated the 26th of January 2012, pointing out that while it would investigate his complaint, and in particular the circumstances concerning the termination of his benefit, and in doing so would take into account the terms and conditions of his policy and any information that Canada Life had relied upon when making its decision, it was not within the remit of the FSO to investigate a medical professional. The letter went on to suggest that the appellant should contact the Medical Council if he wished to continue to pursue that aspect of the matter. It concluded by asking the appellant to let them know *"within the next 10 days whether you still intend to pursue the matter raised regarding the doctor with another institution as we cannot investigate same."*

11. There appears to have been some reply to the FSO's letter to the appellant dated the 26th January 2012 from the appellant on the 27th of January 2012, but this has not been exhibited. However, a further letter from the FSO to the appellant, which is exhibited, dated the 2nd of February 2012 refers to it and states, *inter alia*:

"Whilst I can understand your disappointment with our limitations, I must reiterate that this office is not in a position to investigate the way your assessment was carried out and whether the report prepared by the Doctor in dispute contained false

statements. As previously advised you may pursue this complaint via other avenues, if you wish. Please bear in mind that if you decide to have your complaint considered by the Medical Council it is up to you to contact them in order to log your complaint.

In addition, I feel it is prudent to advise you that we do not work in conjunction with the Medical Council or any other separate body which may be able to deal with your complaint against the Doctor.

I hope that clarifies the matter for you.

We shall be in touch with you again once the investigation of your complaint commences and that our investigation will be based on the evidence before us."

12. Seemingly, the appellant did not engage further with the FSO, and on the 11th of June 2012 the FSO wrote to the appellant stating:

"Re: Your dispute with Canada life Assurance (Ireland) limited

Reference No: [provided]

Account / Policy number [provided]

"Dear Mr Murphy,

The investigation into the above complaint is now concluded.

A copy of the finding is enclosed herewith.

Yours sincerely,"

13. The FSO's finding was that based upon the two reports of the respondent it was *"reasonably appropriate for Canada Life to conclude that the complainant no longer met the policy criteria of disability"*, and accordingly the appellant's complaint was rejected. The decision of the FSO stated that its finding was *"legally binding on the parties, subject only to*

an appeal to the High Court within 21 calendar days". No such appeal was taken by the appellant.

14. That was not the end of the matter, however. In parallel with complaining to the FSO the appellant seemingly commenced legal proceedings by Plenary Summons against Canada Life Assurance (Ireland) Limited, bearing record number 2015 No 846P, claiming damages for breach of contract in respect of their failure to pay income protection benefit to him on foot of the said income protection policy. In those proceedings, Canada Life brought a motion seeking to have the proceedings dismissed pursuant to the inherent jurisdiction of the court on the basis that the plaintiff's proceedings disclosed no reasonable cause of action. The basis for doing so was that s. 57CI(9) of The Central Bank Act 1942 (as inserted by s. 9 of the Central Bank and Financial Services Authority of Ireland Act 2004) expressly provides that:

> "*Subject to the outcome of any appeal against a finding of the Financial Services Ombudsman in respect of a complaint, the finding is binding upon the complainant, the regulated financial service provider concerned and every other person who is a party to the complaint*."

15. Canada Life's motion to dismiss was heard before the High Court on the 30th of July 2015, and was granted by White (Michael) J., the plaintiff having been self-represented. A copy of a transcript of the *ex tempore* judgment of White J. has been exhibited before us.

16. The appellant was dissatisfied with the High Court's ruling and subsequently appealed it to the Court of Appeal. In a written judgment delivered by Hogan J (Irvine and Mahon JJ concurring) on the 4th of May 2016, the Court of Appeal rejected the appeal, expressing the view that the High Court was entirely correct to strike out the proceedings as disclosing no reasonable cause of action. See [2016] IECA 128. At para. 8 of his judgment on behalf of the Court of Appeal, Hogan J. stated the rationale for doing so:

"*In my view, it is perfectly clear, both as a matter of principle, statute and authority that, broadly speaking, a claimant cannot advance a complaint to the FSO and then, should that claim prove unsuccessful, re-litigate the same matter before the High Court under the guise of separate proceedings. There is a clear public interest in the finality of litigation, coupled with a requirement that a litigant should advance the entirety of a claim and not endeavour to litigate matters in a piecemeal basis. The potential for the abuse of the litigious process by repeated applications is manifest.*"

17. Although nothing turns on it, the originally approved judgment of the Court of Appeal contained a typographical error in the title thereto, in that the plaintiff was misdescribed as "*David Murphy*" whereas his correct name is Damien Murphy. However, this was corrected by the Court by invocation of the slip rule when the error was brought to the notice of the Court of Appeal office.

18. The appellant then attempted to further appeal to the Supreme Court but without success. In a Determination bearing the neutral citation [2016] IESCDET 115 the Supreme Court refused leave to the appellant to further appeal to that Court.

19. Having exhausted his appeals in his misconceived proceedings against Canada Life the appellant then issued new proceedings, again by plenary summons, naming the respondent herein as sole defendant. Those are the present proceedings and they bore the High Court record number 2017 No 7024P. The plenary summons, issued on the 31st of July 2017, claims no actual relief such as damages but asserts that "*Dr Robert Ryan is guilty of FRAUDULENT MISREPRESENTATION, DECEIT, RECKLESS NEGLECT, BREACH OF FIDUCIARY DUTY AND DEFAMATION*."

20. A Statement of Claim was later delivered which contains a lengthy narrative in which the appellant (as plaintiff) refers to the report of Dr Ryan to Canada Life and confronts in a

narrative and discursive way various assertions made in Dr Ryan's report and takes issue with them. It concludes by listing the orders being sought by the plaintiff which are listed as:

(1) Damages for Breach of Contract: €54,600

(2) Damages for Fraudulent Misrepresentation

(3) Damages for Professional Negligence

(4) Damages for Breach of Fiduciary Duty and Breach of Trust And/or Fidelity

(5) Interest Pursuant to Statute

(6) Damages for Reckless Falsehood

(7) Deceit and Dishonesty Intent

(8) *Costs*

21. By a motion on notice dated the 1st of November 2017 the defendant applied for an order pursuant to Order 19 Rule 28 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court dismissing and/or striking out the proceedings on the grounds that:

a. portions of the claim are statute barred;

b. that the claims do not comply with the requirements of the Rules regarding the provision of particulars of the claims;

c. that the claims in the proceedings are based on an allegation of professional negligence that is unsupported by the opinion of any suitably qualified expert;

d. that the proceedings are frivolous and vexatious

e. that the claims in the proceedings have no reasonable prospects of succeeding;

f. that the proceedings are an abuse of the court.

22. The motion was grounded upon an affidavit of Barry Finnegan, solicitor for the defendant, sworn on the 1st of November 2017 and the documents therein exhibited. The history to the matter as rehearsed thus far in this judgment is set out in Mr. Finnegan's

affidavit. The affidavit alleged that the plaintiff in the proceedings was seeking to relitigate issues which had previously been determined against him. It asserted that to the extent that the proceedings alleged defamation and claimed for personal injuries they were statute barred. Points were made *inter alia* that the Statement of Claim did not comply with the Rules of the Superior Courts; that there had never been any contract between the plaintiff and the defendant; that the plaintiff was alleging professional negligence without having obtained an expert report to support a claim of professional negligence; that the plaintiff was making a wholly unsubstantiated claim of fraudulent misrepresentation, and; that insofar as a breach of fiduciary duty was being alleged no reasonable cause of action was disclosed because the circumstances of the defendant's interface with the plaintiff were not such as would give rise to a fiduciary duty. The same applied to the claim of a breach of trust. Further, insofar as the defendant had reported to Canada Life following his examination of the appellant the communications in question were clearly privileged. Insofar as a claim alleging personal injuries was being advanced, the plaintiff had failed to identify any injury suffered by him attributable to the writing of the report and subsequent letter by the defendant. The affidavit concluded by contending that the proceedings were frivolous and vexatious and had no reasonable prospects of succeeding and indeed constituted an abuse of the procedures of the court.

23. The appellant filed an initial and lengthy replying affidavit on the 18th of January 2018, which it can only be said was contumacious and scandalous in its terms. To give just a flavour of it, he refers *inter alia* to the respondent's *"perverted report"*; calling the respondent *"a deceitful disgusting liar"*; suggesting without a scintilla of evidence that the respondent *"should be tested for drink or drug problems"*, and; saying that the respondent's report was *"deliberately and deceitfully falsified"*. He then refers to what he calls the *"perverted ombudsman"*, equating him at one point to a clerical child abuser. He refers to the

High Court *"farce"* and questions *"why can't a proper judge be employed by the State instead of settling for the likes of that idiot"*. He refers to the court stenographers suggesting that they had been paid to falsify transcripts and describes them as *"a bunch of gangbangers"*. The Court of Appeal was not spared either, and was described as *"a three-headed snake straight from the sewer of the Four Courts"*, amongst other insults. He suggested at one point that its judgment must have been produced at *"a seance"*. The section of his affidavit relating to what had occurred before the Supreme Court is entitled *"The Supreme Court, Summer Sales Now On"*, and suggests that *"if Supreme Court judges see nothing wrong so far then they should just resign"*, and refers to their *"crooked and twisted cover-up designed to obfuscate the facts"*.

24. The appellant later filed a further affidavit, sworn by him on the 23rd of January 2018, which, although shorter, was equally contumacious and scandalous in its terms. This was replied to by a further affidavit of Mr Barry Finnegan in which he, properly, declined to engage with what he describes, with some understatement, as the appellant's allegations and accusations *"of an inflammatory and possibly defamatory nature"*. He reserved the right to do so if the court considered it necessary, and went on to make the point that the appellant had not addressed any of the legal points constituting the basis on which the application was be made.

25. The matter came on for hearing before Noonan J in the High Court on the 13th of November 2018. The court granted the relief being sought by the defendant and dismissed the plaintiff's (i.e. the appellant's) claim, giving its reasons for doing so in a lengthy and detailed *ex tempore* judgment. In the course of that judgment Noonan J. sought to address each of the various claims made by the appellant in his Statement of Claim. He pointed out (correctly) that in so far as there appeared to be a claim for defamation any such claim was manifestly statute barred inasmuch as proceedings for defamation must be commenced within one year

of the defamation complained of. Insofar as there appeared to be a claim for damages for personal injuries, the High Court judge commented that *"it is not clear to me that any case is made out which supports that plea in the statement of claim but even if it was the limitation period again is a two-year period … so whatever way one looks at it any claim for personal injury again seems to be long since statute barred."* The High Court judge also made the point that an intended plaintiff in proceedings for personal injuries must as a precondition to issuing proceedings obtain an authorisation from the Personal Injuries Assessment Board (PIAB), which the appellant had not done.

26. The High Court judge was further of the view that insofar as, in substance, the appellant was seeking to ventilate the same claim that had been the subject of his complaint before the FSO, that aspect of the proceedings was *res judicata* and for that reason bound to fail.

27. Next, the High Court judge considered the claim against the respondent based on breach of contract. He made the point that there was, in fact, no contract between the appellant and the respondent. The appellant had a contract with Canada Life, and the respondent had a separate contract with Canada Life but there was no contractual relationship between the appellant and the respondent. For that reason any claim based on breach of contract was bound to fail.

28. Turning then to the claim alleging professional negligence, Noonan J adverted to the rule that a claim based on professional negligence must be underpinned and supported by expert evidence and referred to *Cooke v. Cronin* and related subsequent jurisprudence in that respect – See *Cooke v. Cronin* [1999] IESC 54, and *Flynn v. Bon Secours Hospital* [2014] IEHC 87. The rule provides that it is an abuse of the process to pursue a professional negligence claim against any professional person without first obtaining the benefit of a supportive independent expert who will effectively stand over the alleged negligence. The

appellant in this case had issued these proceedings claiming, *inter alia*, damages for professional negligence without having obtained a supportive expert opinion and accordingly his proceedings in that respect were abusive of the process.

29. The High Court judge then turned to the claim based on fraudulent misrepresentation. He interpreted the matters as pleaded as being a concern of the part of the appellant that the respondent had fraudulently misrepresented the outcome of the examination of the plaintiff to the party that engaged him, i.e. Canada Life. He referred to the test which must be satisfied to establish a fraudulent misrepresentation as enunciated by the late Shanley J. in *Forshall v. Walsh* (Unreported, High Court, Shanley J., the 18th of June 1997), and recently reiterated by Meenan J. in *Kieran v. Ireland* [2018] IEHC 212. Shanley J. held:

> "*A plaintiff seeking to establish the commission of the tort of fraud or deceit must prove-*
>
> *(i) the making of a representation as to a past or existing fact by the defendant;*
>
> *(ii) that the representation was made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false;*
>
> *(iii) that it was intended by the defendant that the representation should be acted upon by the plaintiff;*
>
> *(iv) that the plaintiff did act on foot of the representation; and*
>
> *(v) suffered damages as a result.*"

In Noonan J.'s view *"even if it could be established that there was something fraudulent about the conduct of the doctor the fundamental constituent ingredient for pursuing a claim for fraudulent misrepresentation is that there was reliance by the party complaining on the misrepresentation on that representation and of course that is not the position here, it is not suggested by Mr Murphy that he in some way relied upon what had happened and suffered*

loss as a result." Accordingly, the claim based on fraudulent misrepresentation was also bound to fail.

30. Finally, the High Court judge considered the aspect of the claim which alleged breach of fiduciary duty. He was of the view that there was no basis for a suggestion that a fiduciary duty was owed by the defendant to the plaintiff, but that even if there was the Statement of Claim did not disclose a basis on which a claim for breach of fiduciary duty could be sustained. In the circumstances, such a claim was bound to fail and was frivolous and vexatious.

31. In circumstances where the High Court judge was satisfied that none of the claims pleaded in the Statement of Claim could be advanced on a stateable basis, the proceedings were bound to fail in his assessment, and he considered that the defendant (i.e. the respondent) was entitled to succeed in his motion to dismiss the proceedings.

The appeal herein

32. In his Notice of Appeal the appellant invokes "*Article 47*" and asserts that he has the right to an effective remedy and to a fair trial. While he does not identify the instrument it is presumed that he is referring to Article 47 of the Charter of Fundamental Rights of the European Union. His complaint in that respect seems to focus on the fact that he did not have the benefit of civil legal aid. However, the High Court judge had no role in relation to any application he may have made for civil legal aid. Insofar as he came before the court as a lay litigant he was treated with scrupulous fairness and courtesy and this is manifest from the judgment of Noonan J. There is not a scintilla of evidence to suggest that he was disadvantaged by virtue of being self-represented. All of the points that he had put forward were considered, but unfortunately the High Court judge felt that they were unsustainable in law. Insofar as his complaint of a want of fairness relates to the issue of his self-representation before the High Court, I am satisfied that it is not made out.

33. There is also a complaint that Noonan J. produced his *ex tempore* judgment within just a short time after the conclusion of the hearing. While it is not couched in these terms it would appear to amount to a claim of pre-judgment on Noonan J.'s part. I am satisfied that there is no substance whatever in this complaint. A High Court judge assigned to a list such as that in which Noonan J. was presiding on the occasion in question is invariably provided with the papers in each case in advance, precisely so that the judge would have had an opportunity to read them and in most cases to prepare the uncontroversial parts of a speaking note, to be finalised after the hearing, for the purposes of delivering an *ex tempore* judgment in the event that it is decided not to reserve judgement. It is no surprise in the circumstances that Noonan J. had ostensibly done some preparatory work towards a possible *ex tempore* judgment in advance of the hearing. It would be normal judicial practice for a judge to do this. Usually such preparatory work is confined to summarising the facts and procedural history of the case to the extent that such matters are uncontroversial and identifying the issues that will arise for decision. Where a judge has done this kind of preparation in advance, the judgment is then completed after the hearing when decisions on controversial issues are made, in the light of the submissions both written and oral that have been received, and the curial section of the judgment is then prepared. However the process of finalising a proposed *ex tempore* is greatly speeded up by virtue of the aforementioned advance work having been done. I consider there is not a scintilla of evidence to suggest pre-judgment on Noonan J.'s part.

34. The appellant maintains that Noonan J.'s finding that he was attempting to relitigate complaints that had earlier been rejected both by the FSO, and by Courts in the other litigation outlined earlier in this judgment for the reasons stated in their judgments, had the effect of denying him an effective remedy, in denying him access to justice in respect of his grievance arising out of the report made by the respondent to Canada Life. Once again, the appellant

makes contumacious and scandalous references to the FSO officials, and to the various judges concerned with his litigation. Ignoring such provocative matters, and concentrating on the substance of his complaint of being denied access to justice and an effective remedy, I am satisfied that this complaint is not made out. He had a choice as to whether to pursue his complaint before the FSO or before the courts. He opted to pursue it before the FSO, and even though he was advised by them that they could not entertain that aspect of his claim which related to the performance by the doctor of his professional duties, he did not withdraw his complaint. In the circumstances the FSO proceeded to determine those aspects of the appellant's claim which did not relate to the performance by the doctor of his professional duties, and unfortunately for him his remaining complaints were not upheld. That being so, the aspects of the case that were in fact determined by the FSO became *res judicata* by virtue of s. 57CI(9) of The Central Bank Act 1942 (as inserted by s. 9 of the Central Bank and Financial Services Authority of Ireland Act 2004). It therefore cannot be said that he was denied access to justice or to an effective remedy insofar as the claims that were determined by the FSO were concerned.

35. It is true that, as the FSO had not been in a position to consider the aspect of the appellant's claim that related to the performance by the doctor of his professional duties, it remained open to him to pursue a claim through the courts directly against the doctor for professional negligence provided, as Noonan J rightly pointed out, that he had first obtained a report from a properly credentialled expert who was prepared to stand over an allegation of professional negligence. This the appellant did not do. That was his failure, rather than any systemic denial to him of access to justice or the provision of an effective remedy.

36. While the appellant's written submissions on this appeal (which I am relieved to note were in rather more temperate terms than the complaints made in his Notice of Appeal, although not with respect to the respondent who he persists in characterising, *inter alia*, as *"a*

liar" and also refers to as being *"like a paid assassin"*) are long on criticism of those who have, at various stages along the way, made findings against the appellant, there has been no engagement with him whatever with the substantive legal decisions which formed the basis of Noonan J.'s judgment. While he criticises the decisions made by Noonan J. in respect of each of his claims as being wrong, he does not provide a legal basis for suggesting that they are wrong. He simply expresses vehement disagreement with them. He does not identify how any of the decisions made could be said to have been wrong in law, and refers to no statute law or legal precedents as supporting his position. In fact, the only legal provision cited by him in his submissions is "*Article 40*" (presumably of the Constitution) to which a passing reference is made in the penultimate paragraph of the document. In that regard he says, *"I refuse to be ground down by all this because I unlike some people I believe in article 40 and justice"*. He disagrees with findings of fact made by the High Court judge, and by earlier judges in the related litigation, but having regard to *Hay v. O'Grady* [1992] 1 I.R. 210 it would not be appropriate for this court to seek to look behind findings of fact made by the court below. In any case I do not believe that any of the findings of fact made by the High Court judge were erroneous. Rather, they appear to have been entirely supported by the evidence that was before the High Court. Further, there was no *prima facie* error of law in Noonan J.'s approach.

37. It seems to me therefore that for all of the reasons enumerated by Noonan J. the appellant's proceedings were doomed to failure and that the High Court was right in the circumstances to dismiss the appellant's claims on that basis.

38. I would dismiss the substantive appeal.

The appeal against the award of costs in the court below and the costs of the appeal

39. The respondent was awarded his costs in the court below. The appeal by the appellant was in respect of the entirety of the Order of the High Court, including the awarding of costs to the respondent. In relation to costs, both in the High Court and before the Court of Appeal,

as the appellant has been wholly unsuccessful both at first instance and in his appeal, I would propose by way of an indicative order as to costs that the appellant should have to pay the costs of the respondent above and below, the amount of which is to be determined by adjudication in default of agreement.

40. If the appellant wishes to contend that a different order as to costs should be made in substitution for the indicative order, I propose that he be permitted, within 14 days of the delivery of this judgment, to submit a request in writing to this Court via the Office of the Court of Appeal, requesting the Court to make such different Order as he contends should be made, and such request shall be on notice to the respondent. In that event, the indicative order shall not take effect pending further adjudication on the costs issued by the Court. If the request for a further adjudication is not made within the said 14-day period, the indicative order will become final at the expiry of the 14th day from the date of this judgment.

41. In the event that a further adjudication is requested within time the appellant shall have a further 14 days from the making of that request in which to file written submissions in support of his case for an alternative costs order, said submissions not to exceed 2,500 words. The respondent in turn shall have 14 days from the filing of the appellant's written submissions in which to file responding written submissions, which again are not to exceed 2500 words. Following receipt of both sides' respective submissions the court will then determine and rule on the costs issues arising, and will do so either on the papers, or at our discretion following a short hearing (should we consider it necessary to convene one). The Court's ruling on any such costs adjudication will be delivered electronically.

42. The appellant should note that in the event that he is unsuccessful in altering the indicative costs Order, he may be required to pay the costs associated with the Court's adjudication on the costs issue.

Faherty J: I agree

Ní Raifeartaigh J: I also agree.