

THE HIGH COURT

[2023] IEHC 472

2018 No. 7123P

BETWEEN

PETER BARRY

PLAINTIFF

AND

**THE GOVERNOR OF CORK PRISON and THE MINISTER FOR JUSTICE AND
EQUALITY and IRELAND and THE ATTORNEY GENERAL**

DEFENDANTS

Ex tempore JUDGMENT of Ms. Justice Eileen Roberts delivered on 26 July 2023

Introduction

1. These proceedings arise from the plaintiff's detention in 2012 in Cork Prison for a period of approximately twelve days. The plaintiff was released from custody by Order of the High Court on 22 August 2012 on foot of a *habeas corpus* application.
2. The plaintiff seeks damages for breach of his right to liberty and breach of his rights to dignity, privacy, bodily integrity and protection of his health as guaranteed by Articles 40.3.1 and 40.3.2 of the Constitution. He also seeks damages for false imprisonment and various declaratory reliefs regarding his conditions of imprisonment. It is the plaintiff's claim for damages for false imprisonment that is the relevant plea for this application.

3. The application before this court is the defendants' application for an order striking out that part of the plaintiff's claim seeking damages for false imprisonment. Two grounds are relied on in support of this application:
 - (i) Such claim arises from a judicial act and as such is subject to the principle of judicial immunity; and/or
 - (ii) There is a statutory means of seeking compensation for unlawful imprisonment on foot of a judicial act pursuant to s. 3A(5)(b) of the European Convention on Human Rights Act 2003, as amended by s. 54 of the Irish Human Rights and Equality Commission Act 2014. Prior to instituting these proceedings, the plaintiff issued, but subsequently withdrew, a motion seeking an extension of time to issue proceedings pursuant to this statutory provision. In the circumstances the defendants say that the present proceedings amount to an abuse of process.

4. Before addressing the substantive grounds advanced by the defendants, it is relevant to consider the preliminary objections raised by the plaintiff to the strike out application. In the first instance the plaintiff says this application should be dismissed on the grounds of delay. He says that this motion issued on 25 July 2022 in respect of a claim which issued on 3 August 2018 and where a full defence was delivered as long ago as 13 January 2020. In response, the defendants say that there is no prejudice alleged by the plaintiff who has not himself yet set this case down for hearing. The defendants say that para 5 of their defence pleaded the defence of judicial immunity expressly and the plaintiff has not been taken by surprise or otherwise prejudiced by the timing of this motion. While delay may well be a relevant factor in refusing relief in appropriate cases, I am of the view that the court should consider this application despite the timing of the motion – there is no evidence of any prejudice to the plaintiff who has been on notice for some time of the defendants' position.

5. Counsel for the plaintiff also argued that as the defendant's motion seeks to challenge only that part of the claim concerning damages for false imprisonment, the court should not deal with it. It is clear that the plaintiff will retain the right to claim damages for breach of his other constitutional rights, whether this motion by the defendants succeeds or not. It was submitted that hearing this motion was not a proper use of court time and resources. The defendants say that while success in this strikeout motion would not entirely dispel the plaintiff's proceedings, nevertheless it would reduce the claim to one dealing only with the remaining causes of action regarding the conditions of imprisonment. The defendants say that they should not be put to the expense of defending a false imprisonment claim which simply cannot succeed in light of the defence of judicial immunity. While it is clear that the strike out motion is directed to only part of the plaintiff's claim, I am satisfied that it is directed to the most substantial aspect and that it is also clearly directed to a stand-alone claim for damages which can be severed from the remainder of the plaintiff's claim. In those circumstances there is a purpose and a reality to an application to strike out this part of the claim and I will not refuse to hear this application because it will not dispense with the entire claim even if it succeeds.
6. Counsel for the plaintiff submitted that the entitlement to damages in this plenary action for unlawful detention is not appropriate to being struck out at the interlocutory stage. Reliance in that regard was placed on the decision of the Supreme Court in *Sun Fat Chan v Osseous Ltd* [1992] IR 425 where McCarthy J said that where a statement of claim admits of an amendment which might save it and the action founded on it then the action should not be dismissed. Counsel for the plaintiff said that in light of the complaints regarding the allegedly confusing manner in which the case was pleaded, it may be necessary for the statement of claim to be amended or for oral evidence to be adduced. Counsel for the defendants said there was no indication as to what amendment might be

undertaken or why it had not yet occurred. He said the claim advanced in the pleadings was clearly one for false imprisonment on foot of a judicial act and he noted that there was no application before the court to amend the pleadings. The defendants enquired why the relevant evidence was not before the court at this point and submitted that there was no new evidence which might be introduced nor had any reason been advanced as to why it was not before the court now. In respect of these arguments, I believed there was some merit in what was argued by the plaintiff, and I will return to this matter later in this judgment.

7. Turning then to the substance of the defendants' application. Their essential argument relates to the issue of judicial immunity, which they say is a complete defence to the false imprisonment claim in this case, and why this court should now strike out that aspect of the claim in these proceedings as one which must fail..
8. The plaintiff's allegation of false imprisonment relates to the conduct of a contempt hearing in the Circuit Court on 8 August 2012, following which he was imprisoned.
9. The defendants say that as the plaintiff's imprisonment resulted from a judicial act, any claim arising from that imprisonment (including a claim for damages for false imprisonment) is not actionable. The defendants rely on the decision in *Kemmy v Ireland* [2009] IEHC 178, [2009] 4 IR 74.
10. In *Kemmy*, the plaintiff had argued that the State was directly liable or vicariously liable for a trial judge's failure to respect his constitutional right to a fair trial. This proposition was roundly rejected. McMahon J. held that the normal, strict principles of vicarious liability did not apply to judges, having regard to the provisions of the Constitution dealing with the separation of powers and guaranteeing the independence of the judiciary.

11. The State is required by Article 40.3 of the Constitution, by its laws, to defend and vindicate the personal rights of the citizen, which includes the right to litigate a justiciable controversy and to recover damages in respect of a tortious act. As against this, immunity from suit in respect of judicial acts appears to be implicit in Articles 34 and 35, which guarantee the administration of justice by judges and judicial independence. The constitutional right to litigate has had to give way to this judicial immunity from suit and such a possibility is accommodated in Article 40.3.1° by the words “*as far as practicable*”. As McMahon J. explained in *Kemmy v Ireland* at p. 100:

“The State cannot guarantee that no error will ever occur in the judicial process. The judges it appoints are human and inevitably will make mistakes. In these circumstances, it is incumbent on the State to provide a corrective mechanism to address these errors. This is the appeal process. In my view, failure by the State to do so would be a breach of its obligations to guarantee ‘as far as practicable’ the citizen’s right to a fair trial. But by doing so, the State has fulfilled its obligations under the Constitution.”

Section 3A of the European Convention on Human Rights Act 2003 (as inserted by Section 54 of the Irish Human Rights and Equality Commission Act 2014)

12. It is accepted that judicial immunity is not absolute. Section 3A of the European Convention on Human Rights Act 2003 was introduced to reflect the judgment of the European Court of Human Rights in *DG v Ireland* (2002) 35 E.H.R.R. 1153. This statutory provision provides for a limited exception to the rule of judicial immunity where a detention subsequently determined to be unlawful was brought into effect by the decision of a judge. Section 3A provides in general terms that a person who has been unlawfully deprived of their liberty as a result of a judicial act may institute proceedings

in the Circuit Court to recover compensation for any loss, injury or damage suffered by them as a result of that judicial act. Such proceedings may only be taken against (a) Ireland, and (b) the Minister for Public Expenditure and Reform. No court or member of the judiciary may be sued in such an action. Section 3A provides for a limitation period for such proceedings of 1 year from the date of the relevant Court Order but that period may be extended by the Circuit Court in the interests of justice. A ‘judicial act’ is defined to mean "*an act of a court done in good faith but in excess of jurisdiction and it includes an act done on the instructions of or on behalf of a judge*" (s. 3A(8)).

13. There is no suggestion in the present case that the Circuit Court Judge was not acting in good faith. Accordingly, but for s. 3A, judicial immunity applies to the Circuit Court decision at issue in these proceedings.
14. This court was provided with and considered the papers grounding the plaintiff’s previous application to the Circuit Court for an extension of time to issue proceedings under S3A. This application unsurprisingly sought compensation for the plaintiff *being “unlawfully deprived of his liberty arising from a judicial act.”*
15. That application was based on the same circumstances and factual assertions that are advanced by the Plaintiff in the present case. The grounding affidavit sworn by the plaintiff’s solicitor states at para 16 that:

“I say that the unfairness of the Circuit Court hearing and the High Court’s subsequent direction that the Applicant be released pursuant to Article 40.4.2 of the Irish Constitution is a judicial act exercised in excess of jurisdiction within the meaning of Section 3A(8) of the European Convention on Human Rights Act, 2003. Accordingly, I say that the time spent by the Applicant in detention was unlawful, by virtue of the Circuit Court’s act being in excess of jurisdiction. I say that the

Applicant has a statable case and that the interests of justice are best served by granting the Applicant an extension of time to issue proceedings in respect of the foregoing matters.”

16. On 20 July 2018, that motion was struck out on consent with no further order.
17. It was suggested in the plaintiff’s legal submissions (but not apparent from the pleadings) that the plaintiff does not blame the trial judge for imprisoning him. Instead, the plaintiff alleges that the second to fourth defendants effectively caused the trial judge to wrongfully imprison the plaintiff and that this case is thus distinguishable from the case of *Kemmy v Ireland*. I do not believe that this argument withstands analysis. The reference to the imprisonment arising as a result of a judicial act could not be clearer in the previous application made by the plaintiff under s. 3A.
18. However, mindful that the jurisdiction to strike out a claim must be exercised with considerable caution, and the arguments made by counsel for the plaintiff that it was possible that an amendment to the pleadings could save these proceedings, I adjourned matters on 17 May last to give the plaintiff time to consider what amendments would reflect an argument that his false imprisonment did not arise from a judicial act. Having afforded him that opportunity, the matter came back before this court, most recently on 18 July when counsel for the plaintiff confirmed that the plaintiff was not in a position to replead his case or to make any amendment to the pleadings and that this court should therefore proceed to deal with matters on the basis of the pleadings before it.
19. In those circumstances, it appears to me that the plaintiff’s claim for damages for false imprisonment is in fact a claim for damages against the defendants arising from a judicial act. The principle of judicial immunity provides a complete answer to these proceedings on the facts of the present case. *Kemmy v Ireland* establishes this clearly.

20. It follows that the plaintiff's claim as it relates to unlawful detention is subject to the principle of judicial immunity and these proceedings (which are clearly not brought pursuant to s. 3A) must fail.
21. The defendants also seek to strike out the plaintiff's claim for false imprisonment on the grounds of abuse of process given the earlier application for an extension of time within which to commence proceedings seeking compensation under s 3A.
22. Given my view that the plaintiff's claim in these proceedings as it relates to unlawful detention cannot succeed by virtue of the principle of judicial immunity, and where there is no amendment that can alter that position, it is not necessary for me to consider this alternative argument advanced by the defendants.
23. I therefore make an order striking out the plaintiff's claim for damages for false imprisonment as advanced in these proceedings pursuant to this court's inherent jurisdiction as one that is bound to fail.