



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 309

Record Number: 2018 34

Donnelly J.  
Haughton J.  
Collins J.

**BETWEEN/  
UDARAS EITLIOCHTA NA hEIREANN THE IRISH AVIATION AUTHORITY and daa  
PUBLIC LIMITED COMPANY**

**PLAINTIFFS/RESPONDENTS**

**-AND-**

**GERARD MONKS AND MARK MONKS**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice Haughton delivered on the 17th day of December 2019**

**The order appealed**

1. This is an appeal from an order of McGovern J. made on 9th October, 2017 in High Court proceedings bearing Record Number 2017/245P on foot of a Notice of Motion dated 13th July, 2017 in which the plaintiffs/respondents sought an order restraining the second named defendant from issuing any further proceedings against the plaintiffs in respect of lands known as McCabe's Field contained in Folio DN2591, without prior leave being granted by the Court.
2. Having recited that counsel for plaintiffs and the second named defendant in person were present, the Order dated 9th October 2017 then recites: -

"And it appearing that the Second Named Defendant issued another set of proceedings on Friday last the 6th day of October, 2017 bearing High Court record number 2017/8964P and entitled *Between/Mark Monks Plaintiff v. DAA Public Liability Company and Udaras Eitliochta Na hEireann, Defendants* (the New Proceedings)

And Counsel for the Plaintiffs placing a copy of the New Proceedings before the Court

And it appearing that the New Proceedings were served on A & L Goodbody Solicitors this morning

And on reading a copy of the said New Proceedings

And on the application of said Counsel for the Plaintiffs for an *Isaac Wunder* order against Mark Monks and for an Order striking out the New Proceedings issued by Mark Monks on the 6th day of October, 2017 on the grounds that they are vexatious and bound to fail

And on hearing said Counsel for the Plaintiffs and the Second Named Defendant in person

**IT IS ORDERED** that the New Proceedings bearing High Court Record No. 2017/8964 P be and the same are hereby struck out on the grounds that these proceedings are vexatious, bound to fail and an abuse of process

And **IT IS ORDERED** that Mark Monks (the Second Named Defendant in the within proceedings) be restrained from bringing any further proceedings against any party in relation to any of the four parcels of lands referred to in paragraphs 1, 2, 3 and 4 of the First Schedule First Part to the Plenary Summons bearing High Court Record Number 2017/8964 P without the permission of this court (the said First Schedule First Part being appended as a Schedule to this Order)

And Mark Monks (the Second Named Defendant in the within proceedings) confirming to the Court that he has registered a Lis Pendens in the New Proceedings bearing High Court Record number 2017/8964 P

**IT IS ORDERED** that the Lis Pendens registered by Mark Monks on the 9th day of October 2017 in proceedings bearing High Court Record Number 2017/8964 P already referred to be vacated

and **IT IS ORDERED** that Mark Monks be restrained from registering any further Lis Pendens in respect of any of the properties set out at paragraphs 1, 2, 3 and 4 of the First Schedule First Part to the above mentioned Plenary Summons bearing High Court Record Number 2017/8964 P already referred to without the permission of this Court

And on the application of said Counsel for the Plaintiffs for costs and on hearing said Counsel and said Defendant

**IT IS ORDERED** that the Plaintiffs do recover as against the Second Named Defendant the costs of this Motion and Order, such costs to be taxed in default of agreement"

3. The said Order then set out in a schedule four parcels of land, as referred to in the First Schedule First Part of the Plenary Summons bearing High Court Record No. 2017/8964 P, as follows: -

"FIRST SCHEDULE

FIRST PART

1. **ALL THAT AND THOSE** part of the lands of Hunstown in the Barony of Coolock County of Dublin containing 42.862 aces or thereabouts statute measure, being part of the property comprised in Folio 329 of the Register County Dublin more particularly delineated on a map thereof attached hereto and thereon shaded red

and marked with the letter C, together with a right of way from the said property to the public roadway along the way marked XY on the said map and thereon shaded yellow.

2. The outer houses and buildings known as the "Twenty-two Cowshed, the Feeding Shed and Calf Shed" adjacent to Hunstown House, being part of the property comprised in Folio 329 of the Register County Dublin more particularly delineated on the map attached thereto and thereon shaded red and marked with the letter D 1, 2 and 3 together with a right of way from the said property to the public roadway along the way marked WV on the said map annexed hereto and thereon shaded yellow.
3. **ALL THAT AND THOSE** part of the lands at Hunstown in the Barony of Coolock and County of Dublin comprising 0.425 acres or thereabouts statute measure being part of the property comprised in Folio 2591R of the Register County Dublin, more particularly delineated on the map thereof attached hereto and thereon outlined in red and marked with the letter A.
4. **ALL THAT AND THOSE** the dwelling house and premises situate at Hunstown in the Barony of Coolock and County of Dublin being the property comprised in Folio 15150 of the Register County Dublin."

It is not disputed that the third parcel, comprising 0.425 Acres and being part of Folio 2591R, is McCabe's Field.

#### **Procedural History**

4. In order to better understand why these orders were made by McGovern J., it is necessary to refer to the procedural history of these and related proceedings.
5. These proceedings were commenced by Plenary Summons issued on 12th January, 2017 wherein the plaintiffs sought various injunctions restraining trespass by the defendants on a single property, namely McCabe's Field, being the property comprised in Folio 2591R. The plaintiffs claimed to be the legal and beneficial owners and they required vacant possession for the construction of a new Control Tower at Dublin Airport. On the 2nd February, 2017, Costello J. granted interlocutory injunctions restraining trespass by the Second Named Defendant. The orders were not applied to his brother, the first named defendant who does not appear to have opposed the plaintiffs or taken any further part in the proceedings. Following this, pleadings were then exchanged in the normal way between the plaintiffs and the second named defendant, and a full trial took place before McGovern J. on 27th/28th June, 2017. The Second Named Defendant appeared in person, called witness evidence and gave evidence himself.
6. McGovern J. reserved his decision, and gave judgment on the 7th July, 2017. His core findings were that the Plaintiffs had good title to McCabe's Field, that the Second Named Defendant had failed to establish ownership by adverse possession, and that the plaintiffs were entitled to permanent injunctions in the terms of those granted by Costello J.

McGovern J. accordingly made final orders on 7th July, 2017, including orders that the Plaintiffs recover their costs from the Second Named Defendant, and an order granting leave to the Plaintiffs to issue a motion seeking an order vacating the *Lis Pendens* then registered against the property, which motion was to be returnable to 24th July, 2017. This order was perfected on 14th July, 2017.

7. It is important to note that the judgment and order of McGovern J. dated 7th July, 2017 have never been appealed by the Second Named Defendant. However, the Notice of Appeal herein lodged on 28th January, 2018 does set out grounds of challenge to that decision. At the outset, this Court sought to clarify with Counsel for the Second Named Defendant that the appeal did not extend to the judgment and orders of 7th July, 2017. After some discussion Counsel confirmed that the appeal did not so extend, and was confined to the orders made by McGovern J. on 9th October, 2017, which were perfected on 3rd January, 2018. He indicated accordingly that the only relevant grounds of appeal were those at 5 and 7 of the Notice of Appeal.
8. This has to be so, because even by January 2018 any appeal of the judgment and order dated 7th July, 2017 would have been several months out of time, and no application was ever made by the Second Named Defendant to extend time to appeal. Moreover, the DAR Transcript of the hearing on 9th October, 2017 shows that the Second Named Defendant, who appeared in person, was live to the possibility of appealing the order and judgment of 7th July, 2017, and the fact that he was already out of time was the subject of some discussion between the Second Named Defendant and McGovern J. It is clear from this that the Second Named Defendant knew that he was out of time but took no steps at that stage or subsequently to apply for an extension of time.
9. Returning to the procedural history, the Second Named Defendant, unbeknownst to the Plaintiff, issued his own Plenary Summons on 23rd January, 2017 in proceedings entitled *The High Court Record No. 2017/542 P Between Mark Monks Plaintiff and DAA Public Liability Company and Údaras Eitlíochta na hEireann the Irish Aviation Authority Defendants*. In those proceedings, the Second Named Defendant sought an order that he was the beneficial owner of McCabe's Field and ancillary declarations, and injunctive relief against the defendants named therein. On issuing those proceedings the Second Named Defendant registered a *lis pendens* against McCabe's Field. That Plenary Summons was never served (and a copy of it was not available in Court) and did not come to the respondents' attention until 23rd July, 2017 when they learned of the registration of the *lis pendens*.
10. Accordingly, following the judgment and order of 7th July, 2017 the Plaintiffs in the present proceedings issued two Notices of Motion on 13th July, 2017, both returnable to 24th July, 2017. The first one, in the present proceedings bearing Record No. 2017/245 P, sought: -
  - "1. An order restraining the Second Defendant from issuing any further proceedings against the Plaintiffs in respect of lands known as McCabe's Field contained with Folio DN2591 without prior leave being granted by this honourable Court;

2. Further to such further orders this honourable Court shall seem appropriate; and
  3. Costs."
11. The second Notice of Motion was issued in the proceedings bearing Record No. 2017/542 P, and in it D.A.A. and I.A.A. as defendants sought the following orders: -
- "(1) An order striking out the herein proceedings on grounds that the proceedings are frivolous, vexatious, and bound to fail and an abuse of the process.
  - (2) An order vacating the *lis pendens* registered by the Plaintiff on the 23 January 2017 in respect of the property known as McCabe's Field contained in Folio DN2591.
  - (3) An order restraining the Plaintiff from issuing any further proceedings against the Defendants in respect of the lands known as McCabe's Field contained in Folio DN2591 without prior leave being granted by this Honourable Court.
  - (4) If necessary, an order granting entry of these proceedings into the commercial list grounded on Order 63 Rule 1(b) of the Rules of the Superior Courts.
  - (5) Such further or other Order as to this honourable Court shall seem appropriate; and
  - (6) Costs."
12. Both motions were grounded on affidavits sworn by Kim O'Neill on 12th July, 2017 and were returnable to 24th July, 2017, that date having been fixed in court with no objection by the Second named Defendant. Subsequently, at the Second Named Defendant's request because he was going to be on holidays, the hearing date was deferred to 31st July, 2017. He did not file any replying affidavits.
13. It appears that on the morning of 31st July, 2017 the Plaintiff's solicitor Mr. Gill received a text from the Second Named Defendant to say he had difficulties in getting to Court. This prompted Counsel for the Plaintiffs to indicate to McGovern J. that they would be content to leave over the applications for *Issac Wunder* Orders, but that they wished to proceed with the application to strike out the proceedings bearing Record No. 2017/245 P, and to vacate the *lis pendens*.
14. The motions proceeded to that limited extent on 31st July, 2017 and in the proceedings bearing Record Number 2017/542 P McGovern J. made an order striking out the proceedings on the grounds that they were "frivolous, and vexatious, and bound to fail and an abuse of the process", and ordered that the *lis pendens* registered on 23rd January, 2017 in respect of McCabe's Field be vacated. He also ordered costs against the Second Named Defendant. McGovern J. then adjourned the balance of the application for an *Issac Wunder* Order, together with the application for a similar order in the present proceedings, to 9th October, 2017.

15. The Second Named Defendant was duly notified of the orders made on the 31st July, 2017. No appeal was lodged in respect of those orders, and no application for an extension of time in which to appeal was ever made. Nor was any complaint made about the matters proceeding, to the limited extent that they did, on 31st July, 2017 in the absence of the second named defendant.
16. No replying affidavit was filed by the Second Named Defendant in the period between 31st July, 2017 and 9th October, 2017.
17. On Friday 6th October, 2017 the Second Named Defendant issued a further Plenary Summons being that bearing Record Number 2017/8964 P ("the New Proceedings"), and served this on the respondents' solicitors A & L Goodbody. These are the further proceedings which were struck out by McGovern J. on 9th October, 2017 on the grounds that they were "vexatious, bound to fail and an abuse of the process". In those proceedings Mr. Monks claimed firstly an order that he is the beneficial owner of the four properties described in the Schedule, as set out in full earlier in this judgment. Secondly he sought a declaration that the Contract of Sale dated 5th November, 1992 concerning this property and made between James Monks, his spouse Ellen Monks and DAA Public Limited Company "is a fraudulent, null, void and of [sic] legal effect." Thirdly he sought a declaration that the DAA Public Liability Company "coerced James Monks to enter into the Contract of Sale dated 5th November, 1992... in the knowledge that the said James Monks was seriously ill at that time." The General Endorsement of Claim goes on to seek numerous other orders including declarations, injunctive relief and damages, that may be characterised as ancillary to the first three pleaded reliefs.
18. Counsel for the Plaintiffs/Respondents brought the New Proceedings to the attention of McGovern J. on 9th October, 2017. In the course of the hearing, at which the Second Named Defendant was present in person, he confirmed that he had also applied to register a further *Lis Pendens* based on these proceedings, although he was not sure whether it had yet been registered.
19. The Transcript of the hearing before McGovern J. on 9th October, 2017 shows that the appellant argued variously that the New Proceedings related to different lands, and related to the Contract of Sale dated 5th November, 1992, and concerned matters that were not litigated before McGovern J. or the subject of his judgment and order of 7th July, 2017, which concerned only McCabe's field. He argued variously that the "land was sold too cheap" and that his father's and mother's signatures were "fraudulent", and that his father had been ill and had been taken out of bed and brought in to sign the contract.

#### **Ruling in the High Court**

20. The transcript of the hearing records that McGovern J. in a short *ex tempore* ruling stated: -

"It's frankly beyond belief that in light of my judgment delivered in July, and everything I said therein, that on the 6th of October, within the last few days, Mr. Monks has issued further proceedings which make various claims in relation to what

is described as "the property" and the properties described in the First Schedule. And the properties described in the First Schedule are four pieces of land, which are precisely the four pieces of land which Mr. Monks' late father had sold to Aer Rianta on the 23rd December, 1992. And I am absolutely satisfied that the latest proceedings, bearing Record No. 2017/8964 P are bound to fail. They are vexatious, they are an abuse of process, having regard not only to the earlier proceedings before me but the earlier proceedings before Kearns J. and the order which he made many years ago. I am going to strike out those proceedings on the basis that they are bound to follow and on that basis they are vexatious and an abuse of process. I am going to make an *Issac Wunder* order restraining the defendant... in proceedings 2017 number 245 P... from bringing any proceedings against any party in relation to any of the four parcels of land referred to in the First Schedule of the Plenary Summons in the proceedings bearing Record No. 2017/8964 P..."

### **The Appeal**

21. In the Grounds of Appeal, at para. 5, the Appellant pleads that the New Proceedings should not have been struck out as they "relate to a completely different subject matter". At para. 7 the Appellant pleads that he was "not given an opportunity to litigate the proceedings in full before this honourable Court." The Appellant's written Submissions argue at para. 5.6 that the Appellant has been denied access to the courts contrary to Article 6.1 of the European Convention on Human Rights and article 43 of the Constitution, and the submission is made at para. 6.6 that "The legal issue he seeks to have heard has not been previously litigated, it is not vexatious and frivolous and is a fair issue to be tried."
22. In the course of oral argument counsel for the appellant accepted that the third parcel described in the First Schedule First Part in the New Proceedings describes McCabe's Field and therefore cannot be re-litigated. Counsel further accepted that the First Schedule First Part made a claim to more land than his client was now asserting was his. Indeed the pleaded claim appears to bear little or no relation to the claim that counsel articulated on the appellant's behalf in this court. Counsel explained that the claim that the appellant desires to pursue in the New Proceedings is in fact limited to a plot of some 1.6 acres situate "across the road from McCabe's Field, beside the pub" which the appellant claims was excluded, or intended to be excluded, from the 1992 Contract for Sale, and in respect of which he claims beneficial ownership. This plot appears to be part of property first described in the Schedule (which appears now to be part of Folio 105077F). There was however no evidence on the Affidavit before the High Court or in this court supporting any such claim and when invited to identify the legal basis for such claim, counsel for the appellant was not really able to do so.

### **Decision on the New Proceedings**

23. This court is satisfied that any such claim by the appellant, or indeed any claims by him to ownership of any of the lands described in the Schedule to the New Proceedings, or to invalidate the 1992 Contract of Sale, are bound to fail, for a number of reasons: -

- (1) The Contract for Sale dated 5th November, 1992 is made between James Monks, the appellant's father as vendor of property owned by him and it was endorsed by Ellen Monks, as his spouse, and it agreed to sell the four parcels of property to Aer Rianta for IRE340,000. The appellant was not a party to that Contract. James Monks died in 1996 without challenging the validity of the Contract for Sale. While the appellant in his evidence before McGovern J. in June 2017 asserts he was the executor to his father's estate, no proceedings were ever brought on behalf of James Monks' estate challenging the validity of the 1992 Contract for Sale.
- (2) In 2000 Aer Rianta issued proceedings in the High Court entitled *Aer Rianta Cuideachta Phoiblí Theoranta Plaintiff and Mark Monks Defendant* bearing Record No. 2000/10996 P ("the 2000 Proceedings") against the appellant seeking vacant possession, an injunction and the payment of certain arrears in respect of the subject lands, including McCabe's Field. The appellant was at all material times legally represented, but did not deliver any defence. On foot of a motion for judgment in default of defence, by order dated 10th November, 2003 Kearns J. (as he then was) ordered that the appellant "do deliver up possession of the lands comprised in Folio 105077F, 329 and 2591R of the Register of County Dublin" and also ordered that Aer Rianta recover against the defendant arrears of rent in the sum of €37,729 and costs, with a stay of four weeks. That order erroneously records that there was no attendance in Court by or on behalf of the defendant. It is apparent from the evidence given by a solicitor Mr. Jerome Gallagher before McGovern J. at the trial of the present proceedings on 27th June, 2017 that he was present in court when Kearns J. made his order. Moreover, the appellant accepted in his own evidence before McGovern J that he was notified of that order. That order was never appealed by the appellant.

It is also important to note that although the three Folio numbers appearing in the order of Kearns J. differ slightly from the Folio numbers given in the the Schedule in the New Proceedings, it was not disputed, and I am satisfied, and that there is absolute identity between the four parcels referred to in the Schedule and Folios 105077F, 329 and 2951R referred to in the said order, the explanation being that Folio 105077F was carved out of the parent Folio 329.

- (3) By Terms of Settlement dated 26th February, 2004 ("the Settlement"), entered into between Aer Rianta of the one part and Mark Monks and Ella Monks of the other part, in final settlement firstly of Circuit Court proceedings that had been brought against Ella Monks and Mark Monks seeking possession of the property in Folio 105077F and secondly the 2000 Proceedings, the parties agreed on the following terms: -

"(a) An Order for Possession of the lands and premises situate at Hunstown, Cloghran in the County of Dublin, together with a stay on the said Order until the 31st of December 2003.



- (b) The sum of £35,000 (€44,440.83) together with the interest thereon, currently being held in a joint account between BCM Hanby Wallace, Solicitors and McAlinden & Gallagher, Solicitors to remain on deposit pending the delivery up of vacant possession of the lands and premises situate at Hunstown, Cloghran, in the County of Dublin comprised in Folios 105077F, 329 and 2591 of the Register, County of Dublin.
- (c) On the delivery of vacant possession of the lands hereinbefore referred to on or before the 30th of June 2004, the sum of €23,000 to be paid out of the said account to Aer Rianta in full and final settlement of all arrears due and owing, the balance to be released to the estate of the late James Monks, deceased.
- (d) On the immediate delivery of vacant possession of the lands known as "McCabes field" being part of the lands contained in Folio 2591 of the Registrar, County of Dublin and of the out buildings and the yard adjacent to the Hunstown House, contained in Folio 329 of the Registrar, Co. Dublin
- (e) The Defendants agree to allow the Plaintiff access to and inspection/survey facilities in relation to the lands, the subject matter of the proceedings herein, if necessary during the period up to and including the 30th of June 2004.
- (f) No Order as to costs.

3. Further to the foregoing agreements, the parties agree the following matters:

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- 1. To have same made Orders of Court and where necessary received and ruled.
- 2. No order as to costs."

Once again it is clear that the Possession Orders to which the Appellant agreed in the Settlement relate to exactly the same parcels of land as described in the Schedule to the New Proceedings.

- (4) At the time of the Settlement it is apparent that Aer Rianta's solicitors still held some €44,000 pending completion of the 1992 Contract of Sale, and as part the Settlement it was agreed that on delivery up of vacant possession €23,000 would be paid out to Aer Rianta and the balance would be released to the estate of the late James Monks (clauses (b) and (c)). This was the subject of evidence in these proceedings before McGovern J. on 28th June, 2017 from which it appears that on 28th June, 2004 the appellant's solicitors McAlinden & Gallagher wrote to Aer Rianta's solicitors indicating that "All of the lands, the yard and McCabe's Field are available to Aer Rianta to take over on the 30th June." The appellant agreed that this letter was written on his instructions and enabled the release of the balance of the monies due under the Settlement to James Monks' estate. In relation to this the appellant said in evidence (p. 73 of the Transcript) –

"My mother was fed up with all that was going on over the years and she wanted out of over there. And she wanted the money..."

In his evidence at that time the appellant also accepted that he had signed the Settlement, and that he had the benefit of legal advice at the time.

- (5) Leaving aside any questions of the barring of claims by the Statute of Limitations or otherwise (none of which were argued before this court) after the order made by Kearns J. in 2003 and the Settlement made in 2004 it was no longer open to the appellant to challenge the 1992 Contract of Sale whether in his own right or as executor of the estate of James Monks, or to assert or maintain any claim or proceedings to any part of the lands the subject of the New Proceedings.
  - (6) The claim to beneficial ownership of McCabe's Field was fully heard and rejected by McGovern J. in his judgment and order of 7th July, 2017, which has not been appealed.
  - (7) In the Defence and Counterclaim delivered in the present proceedings on 28th February, 2017, at para. 16 the appellant positively pleads the Contract for Sale dated 5th November, 1992 but asserts that it does not include the property known as McCabe's Field. That plea did not suggest or assert that any other property was excluded from the Contract, nor did it suggest that the Contract was fraudulent or void.
  - (8) It is extraordinary that some twenty-five years after the Contract of Sale the appellant should for the first time plead a claim that Contract was fraudulent and void. It is also extraordinary that it was only at the hearing before this Court on 29th November, 2019 that counsel for the appellant first articulated on his behalf a more limited claim to some ill-defined part comprising 1.6 acres within the lands first described in the Schedule to the New Proceedings. The absence of any affidavit evidence before the trial judge or this Court further undermines any such claim.
24. Accordingly, I am satisfied that the learned trial judge was entitled to find the New Proceedings bound to fail, vexatious and frivolous, and to make orders dismissing them and vacating the *Lis Pendens* registered by the appellant following the issue of those proceedings. His orders in this regard should be affirmed.

***Isaac Wunder order***

25. The jurisdiction to make an *Isaac Wunder* order derives from the decision in *Wunder v. Irish Hospitals Trust (1940) Limited* (unreported, Supreme Court, 24th January 1967) and it must be looked at in the context of the constitutional right to access to the courts, which is an important constitutional right, but not an absolute one. In *Riordan v Ireland (No.4)* [2001] 3 I.R. 365, the Supreme Court noted (Keane CJ, p.370) noted the –

"inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious".

26. There is no doubt that the jurisdiction to grant an *Isaac Wunder* order should be exercised sparingly. In *McMahon v WJ Law & Co. LLP* [2007] IEHC 51 at para 20, MacMenamin J. identified the principles applicable: -

“Among features identified by Ó Caoimh J. in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463 as justifying such an order, or militating against the vacating of such an order already granted are: -

1. The habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings.
2. The earlier history of the matter, including whether proceedings have been brought without any reasonable ground, or have been brought habitually and persistently without reasonable ground.
3. The bringing up of actions to determine an issue already determined by a court of competent jurisdiction, when it is obvious that such action cannot succeed, and where such action would lead to no possible good or where no reasonable person could expect to obtain relief.
4. The initiation of an action for an improper purpose including the oppression of other parties by multifarious proceedings brought for the purposes other than the assertion of legitimate rights.
5. The rolling forward of issues into a subsequent action and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.
6. A failure on the part of a person instituting legal proceedings to pay the costs of successful proceedings in the context of unsuccessful appeals from judicial decisions.”

In his concurring judgment in the present case, which I have read in draft, Collins J emphasises the exceptional nature of the *Isaac Wunder* jurisdiction and the care that needs to be taken to ensure that such orders are made only where the court called upon to make such an order is satisfied that it is proportionate and necessary. They are not to be made simply because a proceeding has issued that is bound to fail, or because considerations of *res judicata* or the rule in *Henderson v. Henderson* apply. I agree with these observations which fall to be applied to the facts of this appeal.

#### **Discussion**

27. The earlier history of this matter has been set out in this judgment and was deposed to in the two affidavits sworn by Kim O'Neill grounding the applications for *Isaac Wunder* orders. It was also well known to the learned trial judge from hearing the substantive action in these proceedings, and it is to some extent reprised in his judgment of 7th July, 2017. It is such that no proceedings relating to the Scheduled Property could be maintained by the appellant after the order of Kearns J. and the Settlement entered into by him in 2004. Insofar as he could make any claim to have acquired title by adverse possession to McCabe's field in the period post-dating the Settlement, that claim has been rejected after a full hearing. If the appellant wished to pursue a claim in relation to any part of the scheduled properties other than McCabe's field, then that was the time to

pursue it, but he did not do so, not even in the proceedings bearing record number 542P which he issued in January, 2017. The issue of the New Proceedings and the registration of a fresh *lis pendens* in October 2017, just days before the plaintiff's motion was due to be heard is further evidence of the appellant's willingness to institute vexatious and frivolous proceedings that are bound to fail, and is an abuse of the process. Furthermore, the registration of a *lis pendens* extending to the lands described in the Schedule, placing as it does a significant burden on the plaintiff's title, was clearly oppressive, and must also be viewed in light of the fact that the *lis pendens* previously registered by the appellant in respect of McCabe's field had only been vacated by order of the High Court on 31st July 2017.

28. In my view there was ample evidence before the High Court to justify the making of an *Isaac Wunder* order not just in relation to proceedings that might relate to McCabe's field, but an extended order relating to all the property described in the Schedule in the New Proceedings.

#### **Fair procedures**

29. A further argument was made at the appeal hearing that there was no notice of motion before the High Court seeking the order actually made (as opposed to one limited to McCabe's field) and that as a matter of fair procedures the High Court should have required a notice of motion and affidavit.
30. This argument was not made in the Notice of Appeal but was entertained because at the time it was lodged the appellant was unrepresented.

#### **Discussion**

31. Counsel for the respondent accepted that neither of the notices of motion adjourned to 9th October, 2017 sought an *Isaac Wunder* order wider than one related only to proceedings concerning McCabe's field, but counsel argued that the trial judge nevertheless had an inherent jurisdiction to make such an order.
32. It is of course true that the Rules of the Superior Courts do require the service of a notice of motion setting out the reliefs sought, and one or more grounding affidavits setting out the evidence relied upon. A respondent to a motion then has time in which to consider the application and file a replying affidavit. The purpose is to give a respondent an opportunity to consider the papers, to address the applicant's evidence and arguments, to put before the court their own evidence and argument, and to prepare for the hearing at which they have an opportunity to respond. It is to comply with the principle of *audi alteram partem* and the right to a fair hearing enshrined in the ECHR and protected by the Constitution.
33. However, the Rules of the Superior Courts governing procedure must be considered in the wider context that where the substantive right to a fair hearing is satisfactorily met, or there is urgency or some other imperative, then compliance with a purely procedural requirement may be dispensed with or may not be such as to justify quashing the order made. Thus the Rules expressly provide that the High Court retains the power in some circumstances to abrogate them e.g. by bridging time for serving a notice of motion.

Moreover, it frequently happens in practice that orders actually made do not fully or accurately reflect the reliefs or orders initially sought. This is particularly so where an injunctive relief is under consideration. The High Court has an inherent power to fashion orders appropriate to the circumstances, and often does so when granting an injunction where circumstances have changed or new facts have come to light between the date of issue of a motion and the hearing, or where adjustment is required to ensure that the order made is one that is reasonable and can be enforced. The *Isaac Wunder* order is a form of injunctive relief, and the same considerations apply.

34. It must also be borne in mind that the *Isaac Wunder* order is not absolute in its effect. The party subject to such an order can still apply to the court for liberty to issue proceedings in relation to the same subject matter and is not thereby prevented from initiating proceedings in respect of unrelated matters.
35. Counsel for the appellant did not disagree with the proposition that the trial judge had inherent jurisdiction to grant an *Isaac Wunder* order. In addition to the evidence in the affidavits of Kim O'Neill, the fact of the New Proceedings, and the registration of a fresh *lis pendens* were admitted evidence before McGovern J. The appellant was present and was made aware that an extended order was being sought; and he did in fact avail of his opportunity to argue against the making of *Isaac Wunder* orders so far as the New Proceedings were concerned. The DAR Transcript shows that he was given an appropriate opportunity to argue his case. It cannot be said – and is not argued before this court – that the second named defendant suffered any particular or general prejudice by the absence of service of any new and expanded notice of motion or any further affidavit evidence. In the circumstances, I am satisfied that there was nothing to be gained by adjourning the application for further affidavits, or by requiring the plaintiffs to serve a further notice of motion, or giving the appellant a further opportunity to argue his position, none of which were requested at the time. Further in the light of my earlier findings I am satisfied that the order made by McGovern J was appropriate and proportionate, particularly in light of the fact that the second named defendant had never previously made or litigated any claim to the Scheduled lands other than McCabe's Field, and the suggested claim to a 1.6 acre plot was raised for the first time before this court.

#### **Decision**

36. In the particular circumstances of the hearing before McGovern J on the 9th October, 2017 I am satisfied that the trial judge acted within his powers and that fair procedures were observed.
37. This further ground of appeal must also be rejected and I would dismiss this appeal.