THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA

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 Maurice Collins delivered on 17 December 2019

1. I have read in draft the judgment just given by Haughton J and I agree with it.

2. I write separately for the purpose of emphasising the exceptional nature of the *Isaac Wunder* jurisdiction and the care that needs to be taken to ensure that so-called *Isaac Wunder* orders are made only where the court called upon to make such an order is satisfied that it is proportionate and necessary to do so.

3. I accept, of course, the observations made by Keane CJ (Murphy and Hardiman JJ agreeing) in *Riordan v Ireland (No 4)* [2001] 3 IR 365 to the effect that "*there is an inherent jurisdiction vested in the courts 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."* As Keane CJ went on to explain, courts are bound to uphold the rights of other citizens and to protect them from unnecessary harassment and expense. In addition, the pursuit of vexatious litigation has wider implications in terms of the use of limited court resources.

4. At the same time – as was expressly acknowledged by Keane CJ in *Riordan (No 4)* – any court should be "*extremely reluctant*" to make an order restraining the access of any citizen to the courts. Though concerned with section 260 of the Mental Treatment Act 1945 rather than the *Isaac Wunder* jurisdiction, the decisions of the Supreme Court in *Murphy v Greene* [1990] 2 IR 566 and *Blehein v Minister for Health* [2009] 1 IR 275 illustrate how closely such a restriction is scrutinised. In addition to constitutional considerations regarding the right of access to the courts, (which, while not absolute, must be accorded significant weight) Article 6(1) ECHR is also relevant in this context: see *Riordan v Ireland (No 5)* [2001] 4 IR 463.

5. In *O' Malley v Irish Nationwide* (Unreported, High Court, 21 January 1984), which is cited in Riordan (No 5), Costello J referred to the *Isaac Wunder* order as an order that is made

"*in very rare circumstances*" though also stating that it was an order the court should make when it concludes that its processes are being abused.

6. As Haughton J observes in his judgment, an *Isaac Wunder* order is not absolute in its effect and the party subject to it can apply to the court for leave to issue proceedings. That is obviously an important protection for the person subject to such an order but the order nonetheless imposes on that person a restriction on their access to the courts that is not applicable to the general body of litigants. True it is that in certain areas of litigation, leave to institute proceedings is a requirement. Order 84 judicial review proceedings are perhaps the paradigmatic example. However, the Order 84 procedure is not exclusive, at least in the absence of a statutory provision mandating its use: see *O' Donnell v Dun Laoghaire Corp* [1991] ILRM 310. More importantly, in this context, the requirements of Order 84 apply generally (within its area of application), whereas an *Isaac Wunder* order imposes on its subject requirements that are not applicable to litigants generally.

7. It is, therefore, critically important that a court asked to make an *Isaac Wunder* order should anxiously scrutinise the grounds advanced for doing so. It should not be seen as some form of ancillary order that follows routinely or by default from the dismissal of a party's claim, whether on its merits or on a preliminary strike-out motion. That is so even if considerations of *res judicata* and/or *Henderson v Henderson* arise. The court must in every case ask itself whether, absent such an order, further litigation is likely to ensue that would clearly be an abuse of process. Unless the court is satisfied that such is the case, no such order should be made. It is equally important that, where a court concludes that it is appropriate to make such an order, it should explain the basis for that conclusion in terms which enable its decision to be reviewed. It is also important that the order made be framed as narrowly as practicable (consistent with achieving the order's objective).

8. It might appear to follow from the above that the *Isaac Wunder* order at issue should be set aside. As Haughton J explains, while an application for such an order was before the High Court on 9 October 2017 that application related only to future proceedings relating to *McCabe's Field* whereas the order made by McGovern J encompassed proceedings relating to any of the four parcels of land set out in the First Schedule, First Part to the Summons in High Court Proceedings Record Number 2017/8964P (proceedings which had only been commenced on 6 October 2019). In addition, the Judge dismissed those proceedings as being vexatious, bound to fail and an abuse of process even though no motion seeking the dismissal of those proceedings was before the High Court.

9. Notwithstanding these procedural issues, I agree with Haughton J that, in the particular circumstances here, the Judge was justified in proceeding as he did. As Haughton J explains in his judgment, McGovern J had, in the course of the proceedings which he had heard relating to McCabe's Field (resulting in his judgment of 7 July 2017), become familiar with the Contract for Sale of 5 November 1992, the 2000 Proceedings and the order of 10 November 2003, made by Kearns J (which was not appealed), the Terms of Settlement and the steps taken to implement that Settlement (including the payment of

monies to the Appellant premised on him having vacated all of the lands). Against this background, with which he was intimately familiar, the Judge was particularly well-positioned to form a view that the New Proceedings were vexatious and an abuse of process and to conclude on that basis that those proceedings should be struck out and that the *Isaac Wonder* order sought by the daa should be expressed to encompass all of the lands the subject of those proceedings. The order here was appropriately tailored to address the mischief.

10. If the Appellant is in a position to formulate an arguable claim to the 1.6 acres plot, and a plausible basis for contending that he should be permitted to litigate that claim despite the history summarised in the preceding paragraph (and as Haughton J in has explained in his judgment, he has not done so to date), it will of course be open to him to seek leave from the High Court to institute proceedings in respect of that plot. Useful guidance as to how such applications are to be dealt is provided by the decision of this Court in *Daire v The Wise Finance Company Limited* [2018] IECA 126