

THE HIGH COURT

[2022] IEHC 411
[2018 8542 P]

BETWEEN

FERGAL O'CONNELL

PLAINTIFF

**AND
SOLAS**

DEFENDANT

JUDGMENT of Ms. Justice Emily Egan delivered on the 31st day of May, 2022

Introduction

1. The defendant in these proceedings ("SOLAS") sought an order restraining the plaintiff ("Mr. O'Connell") from instituting any further proceedings against SOLAS, its agents, officials or employees without first obtaining leave of the court together with an order that if further proceedings are initiated without leave, SOLAS is not required to appear or to take any steps in relation to those proceedings which are to be treated as void and of no effect.
2. SOLAS presented this application for an *Isaac Wunder* order on an alternative basis. The primary relief sought was a general *Isaac Wunder* order restraining Mr. O'Connell from instituting any further proceedings whatsoever against SOLAS. In the alternative it seeks an order restraining Mr. O'Connell, without leave of the court, from bringing future proceedings against SOLAS in relation to what is known as the Safe Pass Scheme in particular. The Safe Pass Scheme, which was first established under the Health Safety and Welfare at Work (Construction) Regulations 2013 ("the 2013 Regulations"), requires all construction workers to attend a mandatory one day health and safety awareness programme. Mr. O'Connell has attempted to challenge the Safe Pass Scheme on a number of prior occasions which I will set out in due course.
3. It is pertinent to note that the 2013 Regulations have now been replaced by secondary legislation promulgated in 2019, the Safety Health and Welfare at Work (Construction) (Amendment) Regulations 2019 ("the 2019 Regulations"). The 2019 Regulations were not opened to the court by either party and I will not comment upon them in any detail. Suffice it to say that Mr. O'Connell informed the court that he has no issue with the 2019 Regulations. He stated that he has no present intention to challenge either the 2013 Safe Pass Scheme (now replaced) or the new 2019 Safe Pass Scheme. In addition, Mr. O'Connell indicated that he would undertake to give SOLAS seven days' notice of his intention to issue any further proceedings against it.
4. SOLAS requested an opportunity to take instructions on the proffered undertaking and, having done so informed the court that it would accept this undertaking provided that Mr. O'Connell would also undertake not to bring any future challenge to either the 2013 Safe Pass Scheme or the 2019 Safe Pass Scheme. As Mr. O'Connell was unrepresented, I

afforded him a two-week period in which to take time to reflect on the matter and, if he wished, take legal advice before indicating his attitude towards the undertaking sought.

5. When the matter was re-listed, Mr. O'Connell confirmed that he was prepared to undertake to provide seven days' notice of any future proceedings against SOLAS and to undertake not to challenge the current 2019 Safe Pass Scheme. However, having taken legal advice on the significance of certain documentation first obtained from SOLAS in 2020, he did not wish to shut himself out from the possibility of mounting a further challenge to the 2013 Regulations. SOLAS was not prepared to accept an undertaking in these terms and the parties therefore requested that the court deliver its judgment on the present application.

Factual Background

6. Mr. O'Connell has provided drilling and blasting services to contractors engaged in construction and quarrying in Ireland and in the UK over the past 20 years. Broadly speaking, his complaints and previous litigation against SOLAS and its predecessor, FAS, relate to aspects of the Construction Skills Certification Scheme ("CSCS Scheme"), the Quarries Skills Certification Scheme ("QSCS Scheme") and to the operation of the Safety Awareness Scheme ("the Safe Pass Scheme") as provided for in secondary legislation promulgated in 2007-2013 to which I will refer in greater detail below. As is common in cases where *Isaac Wunder* orders are sought, there is a complex history of litigation between the parties which it is necessary to set out.

2008 and 2012 proceedings

7. In 2008, Mr. O'Connell issued proceedings ("the 2008 proceedings") by way of judicial review against the Health and Safety Authority ("HSA") and the Minister for Enterprise, Trade and Employment in relation to the Minister's decision to defer the postponement of CSCS certification from May 2008 to July 2009. In *an ex tempore* judgment delivered on the 13th March, 2009 Sheehan J. refused the reliefs sought. Mr. O'Connell appealed this decision to the Supreme Court, which appeal was subsequently struck out.
8. In 2012, Mr. O'Connell issued proceedings by way of judicial review ("the 2012 proceedings") against a number of parties including FAS, FETAC (now Quality and Qualifications Ireland, QQI), the Minister for Education and Skills, HSA and the Minister for Enterprise, Trade and Employment. In those proceedings Mr. O'Connell sought an order declaring invalid the assessment, certification and issue of QSCS shot firing registration cards on the basis that the relevant practical assessments were being conducted by individuals who did not themselves hold a valid QSCS card. In a reserved judgment *O'Connell v Fás & Ors* [2013] IEHC 181, Peart J. dismissed the action on the ground that it had not been commenced within the permitted period from when the complaints first arose. In the course of his judgment, Peart J. observed that Mr. O'Connell was in a unique position compared to other construction workers, in that he already held the relevant registration card under the pre-existing procedure. Granting the relief sought

by Mr. O'Connell would therefore impact upon the right to work of other construction workers who held, or had applied for, such registration cards under the impugned procedure.

9. SOLAS accepts that no weight can be attached to either the 2008 or 2012 proceedings for the purposes of the application. This is sensible. Neither SOLAS nor FAS were involved in the 2008 proceedings and the 2012 proceedings did not traverse the same ground as Mr. O'Connell's subsequent proceedings in relation to the Safe Pass Scheme.

The 2015 proceedings

10. The first intimation of a challenge by Mr. O'Connell to the Safe Pass Scheme was in proceedings he commenced as a litigant in person against SOLAS in 2015 ("the 2015 proceedings"). Mr. O'Connell was given liberty to issue and serve a motion for interlocutory relief requiring SOLAS *"to stop the requirement of Fergal O'Connell from having to do an onsite shot firing practicing assessment in order to have the CSCS and QSCS and for me to attend the one-day Safe Pass course in order for me to receive a Safe Pass registration card"* (emphasis added). The interlocutory application was ultimately struck out on the basis that SOLAS agreed to extend Mr. O'Connell's registration cards until after the proceedings were determined. As the 2015 proceedings progressed, Mr. O'Connell came to be represented by solicitor and counsel. Although these proceedings initially included a challenge to the Safe Pass Scheme, as they progressed same were confined to a challenge to the practical assessments required under the CSCS and QSCS Certification Scheme.

Judgment of Humphreys J. in the 2015 proceedings

11. In a reserved judgment, *O'Connell v Solas* [2017] IEHC 242, ("the 2015 judgment"), Humphreys J. observed that, prior to 2008, there was no statutory requirement for persons such as Mr. O'Connell, engaged in drilling and blasting activities, referred to as "shot firing", to be in possession of any particular qualifications. A requirement to hold a registration card was first introduced in the Safety, Health and Welfare at Work (Quarries) Regulations, 2008 (in relation to QSCS certification) and the 2013 Regulations (in relation to CSCS certification). These two Regulations (collectively referred to as "the 2008-2013 Regulations") required SOLAS to issue QSCS/CSCS registration cards in compliance with Directive 2005/36/EC of the European Parliament and of the Council of the 7th September, 2005 on the Recognition of Professional Qualifications. The Schedules to the 2008-2013 Regulations specified that the relevant "*requirement*" (singular) for the grant of such registration cards was the possession of the appropriate FETAC award (or corresponding award from another member state). Such FETAC awards were granted on completion of training as set out in the Schedule to the 2008-2013 Regulations. Mr. O'Connell had completed the appropriate training and obtained the relevant FETAC registration cards under the 2008-2013 Regulations and was thus in possession of a registration card, which was, however valid for only five years. He maintained that SOLAS did not have power to require him to complete on-site shot firing re-assessment or self-assessment as a condition for renewal of the certification.

12. Humphreys J. held that SOLAS did not have jurisdiction to impose any additional requirements above and beyond the sole requirement specified in the 2008-2013 Regulations – i.e. the holding of the FETAC qualification or equivalent. Enforcement of the 2008-2013 Regulations was, the court held, primarily a matter for the Health & Safety Authority. The whole scheme of the 2008-2013 Regulations was premised on the assumption that qualification is a historical matter for which one trains, completes the training and acquires the relevant qualification. There was nothing in the Regulations which made the qualification dependent upon post award ongoing experience, self-certification, auditing or continuing assessment. Indeed, such a requirement would be a major restriction on the rights of qualification holders and would tend to limit or impair the freedom of movement inherent in the single market in the context of the mutual recognition of EU qualifications. Humphreys J. therefore granted Mr. O’Connell a declaration that SOLAS was not entitled on renewing his registration cards to impose, as a condition of such renewal, a requirement that he self-assess, be assessed or be reassessed in relation to his having undergone any practical experience since the previous grant or renewal of the registration card concerned. The court granted SOLAS a stay on the declaratory order granted until 3rd July, 2017.

The 2017 Proceedings

13. Unknown to SOLAS, Mr. O’Connell had also instituted separate proceedings against it (and other defendants) in respect of the 2013 Safe Pass Scheme in May, 2017 (“the 2017 proceedings”). In those proceedings, Mr. O’Connell sought an injunction “*to stop the requirements of Fergal O’Connell and other construction workers from having to do the one-day safety awareness course in order to renew their registration cards*” and an order restraining the defendants from “*doing any training in respect of SOLAS CSCS, QSCS and safety awareness courses*”.
14. In the course of the 2017 proceedings, Mr. O’Connell made several applications for injunctive relief in respect of the 2013 Safe Pass Scheme. Thus, on 15th May, 2017 Abbott J. granted an interim injunction restraining SOLAS from requiring construction workers to do the one-day safety awareness training (under the Safe Pass Scheme) in order to renew their SOLAS registration cards. Thereafter, SOLAS brought an application to discharge the said interim order.
15. On 19th May, 2017 Abbott J. discharged the said interim order on the basis that Mr. O’Connell had not disclosed to the court all matters relevant to the exercise of the court’s discretion. Specifically, Mr. O’Connell had not informed the court that the Safe Pass Scheme had not been held invalid by Humphreys J. or that the court had placed a stay on the declaratory order.
16. In a subsequent similar interlocutory application in the 2017 proceedings, Mr. O’Connell advanced serious allegations that SOLAS and its legal representatives had deliberately misled Abbott J. during the course of the application to discharge the injunction. On the basis of the papers before me I can see no reasonable or fair basis whatsoever for these allegations which were most regrettable.

17. Very shortly after Abbott J. discharged his original interlocutory order, Mr. O'Connell made a second attempt to obtain injunctive relief in respect of the Safe Pass Scheme. This motion was struck out in June, 2017 with no further order.
18. In late June 2017, Mr. O'Connell made yet another attempt to obtain injunctive relief in respect of the Safe Pass Scheme, contending that the motion issued earlier that month had been struck out in error. In this motion Mr. O'Connell sought precisely the same injunctive relief as had been originally granted by Abbott J. on an *ex parte* basis and then subsequently discharged. SOLAS objected to this. After an exchange of correspondence and affidavits, no resolution was reached in respect of this motion which was adjourned from time to time until the Autumn of 2017.
19. Matters were further complicated by disagreement between the parties as to whether the declaratory relief granted by Humphreys J. pursuant to the 2015 judgment covered the Safe Pass Scheme. During this period, Mr. O'Connell represented to the media that the Safe Pass Scheme had also been declared invalid. In October, 2017 Mr. O'Connell unsuccessfully applied to Humphreys J. to vary the order made in the 2015 proceedings to encompass the Safe Pass.
20. The motion for interlocutory relief issued in June 2017 came on for hearing before O'Connor J. on 31st October, 2017. Having heard Mr. O'Connell who once again represented himself, O'Connor J. dismissed Mr. O'Connell's interlocutory motion and adjourned the issue as to SOLAS's costs to a later date. O'Connor J. however declined to order that the entire proceedings be struck out on the basis that same constituted an abuse of process, and instead ordered that Mr. O'Connell be at liberty to amend his statement of claim to limit his challenge to a contention that SOLAS did not have power to provide any training. It is unclear to me whether or not Mr. O'Connell, who was representing himself at that time, contested this limitation of the scope of his proceedings. Certainly, it appears that Mr. O'Connell was not particularly invested in bringing forward his challenge to the Safe Pass Scheme at the time of the 2017 proceedings (or indeed the 2015 proceedings) because his Safe Pass was then current and the Scheme did not at that time directly affect him.
21. Mr. O'Connell's principal argument in these amended 2017 proceedings was that neither the Further Education and Training Act, 2013, nor any Regulations made pursuant thereto, conferred on SOLAS the power to directly operate as a training body. SOLAS, on the other hand, contended that s. 7 of the Further Education and Training Act, 2013 which provides that part of SOLAS's general function shall be to provide, or arrange for, the provision of training and retraining for employment and to assist in and coordinate the provision of such training, provided it with the necessary *vires*.
22. The substantive hearing of the 2017 proceedings took place on 15th December, 2017 before O'Connor J. who delivered an *ex tempore* judgment determining that Mr. O'Connell had no *locus standi* to challenge the training programme and courses because he had neither applied for nor participated in these courses as a candidate. Notwithstanding this finding regarding lack of standing, O'Connor J. considered the substantive issue and

determined that SOLAS have the requisite statutory power to provide training by virtue of the express provisions of the Further Education and Training Act, 2013. The court also ordered that the defendant recover the costs of the interlocutory motion together with the reserved costs of the proceedings, all such costs to be taxed in default of agreement.

Appeal of the order of O'Connor J. in the 2017 proceedings

23. In February, 2017 Mr. O'Connell sought the consent of SOLAS to the late filing of a Notice of Appeal in respect of the above orders of O'Connor J. SOLAS did not consent to this and Mr. O'Connell proceeded to apply to the Court of Appeal for an extension of time to appeal on the grounds that he had been prevented by ill health from taking any timely steps to file a Notice of Appeal.
24. On 23rd July, 2018 the Court of Appeal rejected Mr. O'Connell's application for an extension of time. On the same date, Mr. O'Connell wrote to SOLAS indicating that his Safe Pass card was for renewal in August 2018 and that, if he did not receive confirmation that it would be renewed, he would make an application to the court the following day. SOLAS declined to offer the confirmation sought, and after further correspondence in which Mr. O'Connell threatened, *inter alia* to make a complaint to An Garda Síochána against the Director General of SOLAS for engaging in illegal activities, he ultimately served a further set of proceedings (as to which see below) and applied for and obtained short service to issue a motion seeking injunctive relief.

The 2018 proceedings

25. The 2018 proceedings are the above entitled proceedings in which SOLAS presently seeks an *Isaac Wunder* order. In the 2018 proceedings Mr. O'Connell sought essentially the same relief as had been sought in the 2017 proceedings, namely "*an order for an injunction requiring SOLAS to stop the requirements of me the plaintiff from having to be retested again in the one-day safety awareness course in order to renew my SOLAS Safe Pass registration card.*"
26. The 2018 proceedings came on for hearing before O'Connor J. on 2nd November, 2018 on which date O'Connor J. gave an *ex tempore* judgment ordering that the proceedings be struck out as an abuse of process and as offending the rule in *Henderson v. Henderson* (1843) 3 Hare 100. O'Connor J. awarded SOLAS the costs of the motion to strike out the proceedings but made no order as to costs in respect of Mr. O'Connell's application for interlocutory relief.
27. In the course of his *ex tempore* judgment, O'Connor J. observed that the rule in *Henderson v. Henderson* had a potentially wider application than the doctrine of issue estoppel. *Henderson v. Henderson* captured not merely subsequent litigation which amounts to a direct or collateral attack on an earlier judgment but also the strategic withholding of claims which might have been brought forward in previous proceedings along with the negligent failure to do so. O'Connor J. noted that Mr. O'Connell's only explanation for why he had not pursued his challenge to the Safe Pass Scheme in the

context of either the 2015 or the 2017 proceedings was because the Scheme did not then impact upon him as his Safe Pass was extant at that time. O'Connor J. held that the reason tendered was insufficient, struck out the proceedings and acceded to an application by SOLAS for liberty to bring the present application for an *Isaac Wunder* order. The present motion seeking an *Isaac Wunder* order was issued approximately a year later on 19th November, 2019.

Appeal of the order of O'Connor J. in the 2018 proceedings

28. Prior to that, on 6th December, 2018, Mr. O'Connell sought SOLAS's consent to the late filing of an appeal against the order of O'Connor J. in the 2018 proceedings. When SOLAS did not consent to this, Mr. O'Connell eventually served motion papers in March, 2019 seeking an extension of time to appeal to the Court of Appeal. The application for an extension of time was heard by the Court of Appeal on 24 June, 2019. The court rejected the application for an extension of time on 3rd July, 2019 and awarded the costs of the motion to SOLAS.
29. Subsequent to this, Mr. O'Connell expressed an intention to appeal the decision of the Court of Appeal to the Supreme Court and sought SOLAS's consent to an extension of time within which to appeal to the Supreme Court. A dispute arose between the parties as to whether or not Mr. O'Connell had been sent the perfected order of the Court of Appeal in adequate time to enable him to appeal within time. Ultimately, it appears that Mr. O'Connell has not proceeded with this appeal.
30. It appears that no further proceedings have been brought between July 2019 and the date of the issue of the present motion November 2019; or indeed between November 2019 and the date of this court's hearing.

Submissions of the parties

31. SOLAS submitted that Mr. O'Connell is a vexatious litigant determined to persistently relitigate the same issues time and again and is intent on causing as much disruption as possible to SOLAS and to persons employed in the construction industry who require to have their Safe Pass registration cards renewed in order to gain access to construction sites for the purposes of earning a living. The objective of this one-day course is merely to ensure that all workers in construction will have a basic knowledge of health and safety, so that they may work on-site without a risk to themselves or to others. Mr. O'Connell could at any time have completed the one-day Safe Pass course which is provided by various approved trainers at multiple venues countrywide and costs approximately €200 (to include €25 for the issuance of a new registration card).
32. SOLAS submitted that, instead of simply taking this course, Mr. O'Connell had repeatedly brought vexatious and/or frivolous proceedings seeking injunctive relief against SOLAS in an attempt to coerce the latter into renewing his Safe Pass registration card without his having to attend the safety awareness training.

33. SOLAS contended that Mr. O'Connell's actions have resulted in it incurring very significant legal costs and expenses over the past number of years and in the diversion of time and resources which would otherwise have been used to the benefit of its functions. SOLAS observed that, notwithstanding the fact that several orders for costs had been made against Mr. O'Connell, those costs had not been discharged and indeed that Mr. O'Connell had not discharged his own legal team's costs. This, SOLAS argued, is indicative of a litigant who is determined to repeatedly bring litigation which has the potential to adversely affect third parties without any consequence whatsoever for himself. SOLAS observed that a further hallmark of Mr. O'Connell's behaviour was the making of repeated serious allegations of wrongdoing against members of SOLAS and against its legal advisors.
34. Mr. O'Connell made extremely short submissions to the court. Mr. O'Connell submitted that he was not a vexatious litigant, that each of his previous proceedings had been properly taken and that each separate action had been directed towards a different aim. He also explained that he had not pursued his challenge to the Safe Pass Scheme in the context of either the 2015 or the 2017 proceedings because the scheme did not then impact upon him as his Safe Pass was extant at the time. Mr O'Connell also tendered to the court the undertaking outlined at paragraph 5 above.

Legal principles

35. The jurisdiction of the court to make *Isaac Wunder* orders stems from its inherent jurisdiction, as outlined in the Supreme Court case of *Riordan v Ireland & Ors.* (No. 4) [2001] 3 IR 365, at 370:
- "It is, however, the case that there is vested in this court, as there is in the High Court, an 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. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."*
36. The basis upon which an applicant may seek an *Isaac Wunder* order was articulated in the High Court case of *Riordan v Ireland & Ors.* (No. 5) [2001] 4 IR 463, at 465 as follows:
- "Where the court is satisfied that a person has habitually or persistently instituted vexatious or frivolous civil proceedings it may make an order restraining the institution of further proceedings against parties to those earlier proceedings without prior leave of the court. In assessment of the question whether the proceedings are vexatious, the court is entitled to look at the whole history of the*

matter and it is not confined to a consideration as to whether the pleadings disclose a cause of action. The court is entitled in the assessment of whether proceedings are vexatious to consider whether they have been brought without any reasonable ground. The court has to determine whether the proceedings being brought are being brought without any reasonable grounds or have been brought habitually and persistently without reasonable ground.”.

37. These principles were confirmed by the Supreme Court in *Tracey v Burton & Ors.* [2016] IESC 16 where, at paragraph 45, MacMenamin J. observed:

*“As Denham J pointed out in **O’Reilly McCabe v. Minister for Justice, & Patrick Cusack Smith & Co (Agents of Thomas McCabe, Ward of Court & Minor)** [2009] IESC 52 at par. 33, the constitutional right of access to the courts, while an important right, is not an absolute one.*

As a corollary of that right, a court must also protect the rights of opposing parties; the principle of finality of litigation; the resources of the courts; and the right to fair procedures which accrue to each party to litigation, as well as plaintiffs. It is an injustice that defendants or plaintiffs be exposed to repeated and vexatious litigation, in which either party incurs unnecessary legal costs which may not easily be recoverable against an offending party. The public have a right to a court system which operates effectively and expeditiously in the public interest, while ensuring that justice is administered as the Constitution requires. Finality is necessary in the interest of justice.” [Emphasis added].

38. In the recent Court of Appeal decision of *The Irish Aviation Authority v Monks & Anor.* [2019] IECA 309, Haughton J. noted that in *McMahon v WJ Law and Co. LLP* [2007] IEHC, MacMenamin J. had identified the principles applicable as follows:

*“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 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.”*
39. In his decision in the same case, Collins J. emphasised the exceptional nature of the *Isaac Wunder* jurisdiction, stating that care needed to be taken to ensure that such orders were made only where the court, called upon to make such an order, was satisfied that it is proportionate and necessary. Such orders are not to be made simply because a proceeding had issued that is bound to fail, or because considerations of *res judicata* or the rule in *Henderson v. Henderson* apply.

Decision

40. The essential basis for SOLAS’s application is not that any potential challenge which Mr. O’Connell might bring against it in the future (whether relating to the 2013 Safe Pass Scheme or otherwise) is necessarily bound to fail, but rather that Mr. O’Connell himself is a vexatious litigant who ought not be permitted, without leave of the court, to issue future proceedings against it, particularly in relation to the 2013 Safe Pass Scheme.
41. I will consider the application to the present case of the features identified by MacMenamin J in *McMahon* as potentially justifying or militating against the granting of an *Isaac Wunder* order.
42. The first two features relate to the habitual or persistent institution of vexatious or frivolous proceedings or of proceedings without reasonable grounds.
43. It was accepted that one could discount the 2008 and 2012 proceedings (for the reasons explained earlier). Leaving those proceedings aside, Mr. O’Connell has brought three separate sets of proceedings against SOLAS. Clearly, one could not describe the 2015 proceedings, in which Mr. O’Connell *succeeded* in obtaining the declaratory relief sought, as vexatious, frivolous or without reasonable grounds. The 2017 proceedings, which initially included a challenge to the 2013 Safe Pass Scheme were met with an objection on *Henderson v. Henderson* grounds. As a result, those proceedings were recast to omit this particular challenge. These 2017 proceedings were ultimately unsuccessful, but could not in themselves be described as vexatious, frivolous or without reasonable grounds. The 2018 proceedings, which sought to challenge the 2013 Safe Pass Scheme, were struck out as an abuse of process on *Henderson v. Henderson* grounds. In retrospect, therefore, the 2018 proceedings may fairly be described as vexatious, frivolous or without reasonable grounds. It is not clear that the prosecution of one (or even two) such

proceedings could necessarily be characterised as persistent or habitual vexatious litigation. However, when one considers Mr. O'Connell's repeated attempts to obtain interlocutory relief in respect of the Safe Pass Scheme in the context of those proceedings a different picture emerges. Mr. O'Connell appears to have made three separate applications for an injunction in respect of the 2013 Safe Pass Scheme in the 2017 proceedings and at least one further attempt to obtain the same injunctive relief in the 2018 proceedings. In addition, Mr. O'Connell also unsuccessfully sought extensions of time to appeal the orders of O'Connor J. in the 2017 and 2018 proceedings. These were refused by the Court of Appeal. He also intimated, but did not pursue, an appeal to the Supreme Court, in respect of the order of the Court of Appeal in the 2018 proceedings. Taken together, I find that the litigation history exhibits the first and second features identified by MacMenamin J. in *McMahon*.

44. The third feature identified, i.e. the bringing of actions to determine an issue already determined, certainly applies to the repeated attempts to obtain identical interlocutory relief in respect of the 2013 Safe Pass Scheme. Perhaps, the same could not be said in respect of Mr. O'Connell's substantive challenge to the 2013 Safe Pass Scheme. Contrary to SOLAS's submissions, Mr. O'Connell has not in fact litigated and relitigated this substantive point on multiple occasions. Rather, he elected not to proceed with his challenge to the 2013 Safe Pass Scheme in his 2015 proceedings and, since then, has twice been prevented from doing so on *Henderson v. Henderson* grounds. Therefore, giving Mr. O'Connell the benefit of the doubt, one could accept that, whilst this third feature could be said to apply to the interlocutory applications, it may not apply to the substantive challenge to the 2013 Safe Pass Scheme.
45. The fourth feature identified by MacMenamin J. in *McMahon* is the initiation of actions for an improper purpose including the oppression of other parties by multifarious proceedings. SOLAS suspects, perhaps not unreasonably, that Mr. O'Connell hoped to gain a competitive advantage over other construction workers by means of his challenges to the various certification schemes. In addition, Mr. O'Connell's erroneous representations to the media in the summer of 2017 that the 2013 Safe Pass Scheme had been declared invalid by the 2015 judgment are problematic. Overall, however, having considered the history of the proceedings between the parties, it seems to me that the evidence for improper purpose is not particularly strong and I have had no regard to this argument.
46. The fifth feature identified by MacMenamin J. in *McMahon* is satisfied. There has been a rolling forward of issues - namely the substantive challenge to the 2013 Safe Pass Scheme and the application for interlocutory relief in respect thereof - into subsequent actions. In addition, whilst Mr. O'Connell has not brought any proceedings against lawyers acting for SOLAS, he has on several occasions unfairly accused them of misleading the court. Nor can I ignore the fact that, in August 2018, Mr. O'Connell threatened to make serious (and unjustified) allegations of criminal wrongdoing against senior management of SOLAS, if his Safe Pass was not renewed.

47. The sixth feature identified by MacMenamin J. in *McMahon* is also satisfied. It is clear that there has been a total failure on Mr. O'Connell's part to pay either legal costs awarded against him or, as I understand it, to discharge the costs of his own legal representation.
48. Overall, several of the features identified by MacMenamin J. in *McMahon* are present here. Notwithstanding, granting a general *Isaac Wunder* order restraining Mr. O'Connell from instituting any further proceedings whatsoever against SOLAS would be a disproportionate interference with his right of access to the courts. Such a wide order is neither merited nor necessary. Rather, it is sufficient to order that Mr. O'Connell afford SOLAS fourteen days' notice in writing of his intention to institute any legal proceedings against it.
49. Should a more limited order be made restraining only a challenge to the 2013 and/or 2019 Safe Pass Schemes? The 2019 Scheme has been in existence for a considerable time and Mr. O'Connell has not at any stage intimated an intention to challenge it. That remains his position. There is no necessity to make any specific order in this regard.
50. This leaves the issue of whether or not an order ought be made restraining Mr. O'Connell from instituting proceedings challenging the 2013 Safe Pass Scheme without leave of the court.
51. SOLAS argued that one cannot assume that the challenge Mr. O'Connell wishes to pursue in relation to the 2013 Safe Pass Scheme would necessarily be successful on the merits merely, because he had successfully challenged the CSCS and QSCS Schemes in the 2015 proceedings. I entirely agree that one cannot necessarily read across the logic of the 2015 judgment to the 2013 Safe Pass Scheme. There are clearly practical distinctions between the QSCS/CSCS Schemes and the 2013 Safe Pass Scheme. The CSCS/QSCS Schemes appear to be "skills based" certifications in respect of which Humphreys J. found that once an applicant had the relevant FETAC qualification, the registration card ought be issued. The Safe Pass Scheme, on the other hand, is not concerned with qualifications but with safety awareness, and is designed as both an introductory and refresher course. The Safe Pass Scheme is an "awareness" course as opposed to a "skills based" once and for all qualification.
52. Whether these practical distinctions are legally sufficient to distinguish the 2013 Safe Pass Scheme from the grounds of invalidity found to apply to the CSCS/QSCS Schemes is not for this court to decide. SOLAS very properly conceded that one could certainly not assume that a substantive challenge to the 2013 Regulations/Safe Pass Scheme, if permitted to proceed, would necessarily be dismissed in *limine* as bound to fail.
53. This concession was, in my view, well-made, particularly in the light of the following: in early 2020, Mr. O'Connell received copies of documentation from SOLAS pursuant to requests made under the Freedom of Information Act 2014. The documentation includes an email of 29th September, 2017 in which there is discussion of a legal opinion obtained by SOLAS on the legal consequences of the 2015 judgment. It is somewhat difficult to interpret this email. However, it appears to suggest that SOLAS was advised at that time

that there was some doubt as to the legal validity of the Safe Pass Scheme renewal requirements. Mr. O'Connell placed great emphasis upon this email at the hearing of the application. In reality, it is likely to be of limited substantive impact, as it does no more than express a legal opinion. On the other hand, as the email was not available on any of the prior occasions when Mr. O'Connell sought to challenge the 2013 Safe Pass Scheme, its impact was not then considered by the court.

54. Undoubtedly, a further challenge to the 2013 Safe Pass Scheme may be vulnerable on grounds of mootness in the light of the fact that the 2008-2013 Regulations have now been replaced by the 2019 Regulations. However, such proceedings would not inevitably be moot, particularly in circumstances where Mr. O'Connell may maintain that he was unable to work for a period of time prior to the promulgation of the new Regulations in 2019.
55. Any new challenge to the 2008-2013 Regulations would also face a charge of time bar or delay. I agree with SOLAS that there is a reasonable argument to be made that any challenge to the Safe Pass Regulations (or to the non-renewal of Mr. O'Connell's Safe Pass card on foot thereof) should be made by way of judicial review within the appropriate time period, which has long since expired. Further, whilst the Order 84 procedure is not exclusive, at least in the absence of a statutory provision mandating its use, its time limits are likely to apply by analogy to a challenge such as this.
56. Most importantly, a future challenge to the 2013 Safe Pass Scheme would certainly be vulnerable on *Henderson v. Henderson* grounds. Having said that, *Henderson v. Henderson* must not be applied in a rigid or mechanical manner so as to deprive the court of any discretion and the rule should not be blindly or invariably applied, particularly where there are special circumstances in the case which would suggest that its application would be either unfair, excessive or disproportionate. It is not impossible that a court might take the view that the email referred to at paragraph 52 above (which only became available to Mr. O'Connell in 2020) constitutes a change of circumstances such as to allow such a challenge notwithstanding that Mr. O'Connell did not proceed with his prior challenge in 2015. I also note that the plaintiff did not have the benefit of legal advice in either the 2017 or 2018 proceedings at the time the *Henderson v. Henderson* objection was successfully made by SOLAS.
57. In summary, it is abundantly clear that future proceedings challenging the 2013 Safe Pass Scheme commenced without leave of the court would be highly vulnerable to being struck out on grounds of mootness, inappropriate procedure (plenary summons as opposed to judicial review), time bar, delay or most compellingly on *Henderson v. Henderson* grounds. Mr O'Connell may very well face insuperable difficulties in bringing forward such a challenge should he even wish to do so. Equally though, on the substantive merits, one cannot say that a future challenge to the 2013 Safe Pass Scheme would necessarily be without reasonable grounds or bound to fail. Indeed, SOLAS does not so contend. Rather their contention is that Mr. O'Connell is a vexatious litigant and that any proceedings he

may take against it, both in general and in relation to the Safe Pass Scheme, are an abuse of process.

58. In all of the circumstances, I am satisfied that an *Isaac Wunder* order limited to a future challenge to the 2013 Safe Pass Scheme is appropriate. I do not make this order simply because previous proceedings have issued which are bound to fail, or because considerations of *res judicata* or the rule in *Henderson v. Henderson* apply. Rather, I am of the view that, on this particular issue, Mr. O'Connell has acted as a vexatious litigant and that, absent leave of the court, further litigation in respect of the 2013 Safe Pass Scheme would be an abuse of process. Leave of the court would provide a fair filtering mechanism to future proceedings in respect of the 2013 Safe Pass Scheme. In my view, it is not unfair, excessive or disproportionate to require Mr. O'Connell to seek leave of the court prior to commencing proceedings in respect of the 2013 Safe Pass Scheme.
59. I am of the view that an order in the following terms is appropriate, proportionate and just:
1. An order pursuant to the inherent jurisdiction of the court restraining Mr. O'Connell from instituting any further proceedings against SOLAS, its servants, agents, officials or employees in respect of the 2013 Safe Pass Scheme without first obtaining leave of the court.
 2. An order pursuant to the inherent jurisdiction of the court restraining Mr. O'Connell from instituting any other proceedings against SOLAS, its servants, agents, officials or employees without first affording SOLAS fourteen days' notice in writing of his intention to institute such proceedings.
 3. An order pursuant to the inherent jurisdiction of the court that, if further proceedings are initiated otherwise than in compliance with this order, SOLAS is not required to appear or to take any steps in relation to those proceedings which are to be treated as void and of no effect.

I will hear the parties in relation to any matters arising from the court's proposed order and in relation to costs.