THE HIGH COURT

APPLICATION PURSUANT TO SECTION 182 OF THE NATIONAL ASSET MANAGEMENT AGENCY ACT 2009

[2023] IEHC 151

2022 No. 161 IA

BETWEEN

VINCENT BYRNE

APPLICANT

AND

NATIONAL ASSET MANAGEMENT AGENCY

RESPONDENT

<u>JUDGMENT of Ms. Justice Eileen Roberts delivered on 24 March 2023</u>

Introduction

1. This judgment relates to two separate motions heard by this Court on 14 March 2023.

2. The first motion is an application brought by the applicant in which he seeks leave in accordance with section 182 of the National Asset Management Agency Act 2009 (the "**2009 Act**") to issue these proceedings against the respondent ("**NAMA**").

3. The second motion is NAMA's motion which seeks the following reliefs: –

(1) an order pursuant to Order 19, rule 28 or this court's inherent jurisdiction dismissing or striking out the applicant's section 182 application on the grounds that the application is frivolous or vexatious and wholly misconceived;

has no reasonable prospect of success; is an abuse of process and/or is statute barred or otherwise out of time.

(2) An order that the applicant be restrained from instituting any proceedings or application against NAMA or any NAMA entity without the leave of this court being first obtained and an order that if any such proceedings be instituted without such leave or where an application for leave is issued, the defendant or defendants in such proceedings shall not be required to enter an appearance to the same, which shall stand dismissed without being heard.

(3) An order dismissing the applicant's motion for leave to issue proceedings seeking relief in judicial review against NAMA under record number 2020/125JR or, in the alternative an order that the applicant be not entitled to take any further step in relation to those proceedings without the leave of this court being first obtained.

(4) An order dismissing the proceedings between Vincent Byrne and NAMA under record number 2015/4645P, or in the alternative an order that the plaintiff in those proceedings be not entitled to take any further step in relation to same without the leave of this court being first obtained.

4. Essentially therefore there are two issues to be determined by this court being:

(a) Whether the applicant should be given leave to prosecute these proceedings. NAMA's application to strike out the leave application is related (essentially being the converse position) and both aspects can be addressed together.

(b) Whether, if the court strikes out the application for leave to issue these proceedings, the court should in addition impose a restriction on the institution or progress of both extant and any further proceedings by the applicant without leave of the court.

Background

5. There is a lengthy history of litigation between the applicant, the applicant's father and NAMA which is set out in some detail in the affidavits filed on behalf of NAMA in this matter. A summary of the background is also set out in some detail in the judgment of Noonan J on behalf of the Court of Appeal in proceedings *Vincent Byrne and Vincent Byrne Junior v National Asset Management Agency* [2020] IECA 305 at paras 2 - 12. I do not intend to repeat the detail of that history in those circumstances. I will instead highlight the most important aspects of that history insofar as relevant to the matters now before this court.

6. In July 2006 the applicant and another party secured loans from AIB for ca. €6 million for the stated purpose of property development. Security was provided by the applicant and his father, Vincent Byrne senior, over various properties and a letter of guarantee was also provided by Vincent Byrne senior. Relevant mortgages were put in place by AIB to secure the borrowings on those properties. Unfortunately, the project encountered difficulties and the development was not proceeded with. The loans fell into arrears. Ultimately on 17 December 2010 the loans were transferred to NAMA. There is evidence that the applicant was advised by a representative of AIB in a phone call some four months prior to the actual transfer to NAMA that his loans would be transferred to NAMA. In any event, the applicant and his father were formally notified in writing on 28 April 2011 that NAMA had acquired their loans.

7. Following demand, NAMA appointed receivers over the various secured properties in January and February 2014. On 20 February 2014 the applicant issued proceedings against the receivers (2014/2599P) which were served in June 2014. In November 2014 the applicant issued a motion for interim injunctive relief against the receivers. White J gave judgment on 19 December 2014 holding that the receivers had been lawfully

appointed and that they were entitled to sell the secured properties. The proceedings against the receivers were struck out by order of White J on 27 February 2015.

8. On 5 June 2015 proceedings were issued by Vincent Byrne against NAMA under record number 2015/4645P ("**First NAMA Proceedings**"). Those proceedings have never been served. It is unclear whether the plaintiff is the applicant or his father. Those proceedings are referred to in NAMA's motion before this court.

9. On 5 August 2015 Vincent Byrne senior issued proceedings against NAMA under record number 2015/6365P ("**Second NAMA Proceedings**") claiming damages for breach of duty, breach of statutory duty and breach of constitutional rights and his rights under the "European Charter of Human Rights", which claims were later expanded to include declarations that the loans and the guarantee provided was void and requiring return to him of possession of the secured properties. An injunction was sought restraining the sale of the secured properties and NAMA issued its own motion to have the Second NAMA Proceedings struck out as being frivolous or vexatious. On 4 December 2015 O'Connor J refused the motion for injunctive relief. The secured properties were then sold and on 14 December 2015 O'Connor J struck out the Second NAMA Proceedings in their entirety with costs against Vincent Byrne senior measured at €1500 (which remains unpaid to date).

10. On 22 December 2016 the applicant and his father issued new High Court proceedings against NAMA under record number 2016/11419P ("**Third NAMA Proceedings**"). NAMA issued a motion to strike out those proceedings which was heard by MacGrath J in January 2018. On 1 May 2018 MacGrath J delivered judgment striking out paragraphs 3, 4 and 5 of the indorsement of claim in the summons but not accepting NAMA's arguments regarding the Statute of Limitations. Both parties appealed to the Court of Appeal who heard the appeal on 18 June 2020 and delivered a detailed

judgment on 11 November 2020 (*Vincent Byrne and Vincent Byrne Junior v National Asset Management Agency* [2020] IECA 305). The Court of Appeal allowed NAMA's appeal and dismissed Messrs Byrne's cross-appeal. The Supreme Court refused the applicant leave to appeal on 2 February 2021 (*Vincent Byrne and Vincent Byrne Junior v National Assets Management Agency* [2021] IESCDET 9).

11. On 17 February 2020 the applicant applied *ex parte* for leave to issue further proceedings against NAMA under record number 2020/125JR seeking relief by way of judicial review ("**Fourth NAMA Proceedings**"). The Fourth NAMA Proceedings were issued on 26 February 2020. The proceedings did not progress due to Covid-19 and were adjourned generally on 28 April 2020. The Fourth NAMA Proceedings are referred to in NAMA's motion before this court.

12. On 12 October 2022 the applicant issued the present proceedings ("**Fifth NAMA Proceedings**") and now seeks leave under section 182 of the 2009 Act to issue these proceedings against NAMA.

Should these proceedings be permitted to continue?

13. The first general issue before this court is whether the applicant should succeed in his application for leave to issue the Fifth NAMA Proceedings or whether this court should accede to NAMA's motion striking out that application.

14. The summons which the applicant proposes to issue seeks the following reliefs;

> *(1)* "*…a declaration of invalidity in relation to the NAMA Act 2009 or sections thereof which undermine and/or contradict the primary provisions of European Union law pursuant to the provisions of the Charter of Fundamental Rights and EU Directive 95/46/EC.*

(2) *…leave…to issue proceedings against the National Assets Management Agency (NAMA) for the unlawful acquisition and sale of my property assets.*

(3) *…the return of the said assets or in the alternative damages equal to the current market value of the said assets and all income generated to date.*

(4) *…damages for the development potential of the assets in line with current market values.*

(5) *…compensation for the stress and trauma caused in this intervening period to include, disruption to my family life, the loss of the family home and the loss of my livelihood*".

The applicant's arguments

15. The applicant's *ex parte* docket contains further particulars of his application. It states that the applicant seeks leave to issue proceedings against NAMA "*for the unlawful acquisition of my loan facility and securing assets*" (para 1).

16. The applicant also seeks a declaration of invalidity of the 2009 Act and he confirms at para 3 that the "*central issue*" is the failure of the 2009 Act "*to protect the fundamental rights and freedoms of individuals whose personal data was processed and used by NAMA to perfect the acquisition of their loan facilities*".

17. The applicant alleges at para 6 that the 2009 Act "*fails to provide any safeguards to protect fundamental rights*". Reference is made to section 96 of the 2009 Act, which places an obligation on a participating institution from which a bank asset is acquired by NAMA to "*make reasonable efforts to notify*" debtors and sureties of the acquisition. The applicant's motion states that this was "*clearly intended*" to absolve NAMA itself of any obligation to provide notification, so that NAMA was permitted to

disregard EU law and "*collect, process, disseminate and use the personal data of individuals concerned without their knowledge*" and without independent oversight.

18. The motion states that the failure to inform an individual that their personal data has been collected for processing is a violation of their fundamental rights pursuant to the provisions of Articles 7 and 8 of the Charter. Further, processing and using personal data to subject individuals to measures adversely affecting them without their knowledge violates their right to pursue legal remedies and their "*right of defence*". The applicant relies on Articles 47 and 48 of the Charter and the case of *Foshan Shunde Yongjian Housewares & Hardware v Council* (C-141/08 P) ECLI:EU:C:2009:598.

19. The applicant also relies on the decision of the European Court of Justice in case number C-362/14 *Maximilian Schrems v the Data Protection Commissioner* (C-362/14) ECLI:EU:C:2015:650 and a quotation from that judgment at para 95, namely:

> "*…legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. ...The very existence of effective judicial review designed to ensure compliance with the provisions of EU law is inherent in the existence of the rule of law...*".

20. The applicant argues that the 2009 Act fails to provide for the possibility for an individual to pursue legal remedies to gain access to and/or rectify their personal data. The complaint is that the 2009 Act "*ensures that data processing procedures are carried out without the knowledge of the individual concerned, thus, extinguishing any possibility to pursue legal remedies.*" This is said to undermine EU law and is the

"*substantive issue*" forming the basis of the proceedings the applicant now wishes to pursue against NAMA.

21. In reliance on the case *Workplace Relations Commission* (C-378/17) ECLI:EU:C:2018:979 the court is asked by the applicant to disapply those provisions of the 2009 Act that undermine or contradict EU law "*by reinstating my right to pursue legal remedies in order to vindicate my fundamental rights and damage caused by the unlawful acquisition of my properties*".

22. It is clear to this court that the applicant seeks in his intended Fifth NAMA Proceedings to raise issues regarding data protection obligations imposed by EU law as the basis of a complaint by him against NAMA with the intended consequence being to declare NAMA's acquisition and sale of his "*property assets*" as unlawful, entitling him either to the return of those assets or to damages in lieu.

NAMA's arguments

23. In its submissions, NAMA provides four reasons why leave should not be given to the applicant to prosecute these proceedings and why they should instead be struck out. The reasons advanced are as follows:-

(i) That the applicant has not satisfied the conditions of s 182 of the 2009 Act

24. First, Nama argues that the applicant (who clearly requires leave under section 182 of the 2009 Act) simply cannot satisfy the relevant conditions imposed by this section.

25. Section 182 of the 2009 Act requires a party to obtain leave if that party intends to seek relief other than damages against NAMA. It provides:

> *"(4) Leave shall not be granted… unless the Court is satisfied that the application raises a substantial issue for the Court's determination and-*

(a) the application for leave is made to the Court within 30 days after the later of -

(i) the notification by the participating institution to the relevant debtor, associated debtor, guarantor or surety under section 96, and

(ii) the accrual of the cause of action in respect of which the legal proceedings arose, or

(b) the Court is satisfied that-

(i) there are substantial reasons why the application was not made within that period, and

(ii) it is just and equitable in all the circumstances to grant leave having regard to the interests of any affected person".

26. It is clear from the summons and the *ex parte* motion that the applicant does not intend to confine his claim to one in damages and so leave is required. There does not appear to be any dispute regarding that matter as indeed the applicant himself has issued an application for leave in respect of the Fifth NAMA Proceedings.

27. Apart from the need to establish that the application raises a substantial issue for the court's determination, it is clear that section 182 requires an application for leave to be made either within time or in circumstances where the failure to make the application within time has been justified by way of "*substantial reasons*".

28. In the Third NAMA Proceedings there was an argument as to when the applicant's cause of action accrued against NAMA. The Court of Appeal held that the cause of action ran from no later than the date of acquisition of the loans by NAMA on 17 December 2010. The applicant admits that on 28 April 2011 he was advised in writing that NAMA had acquired his loans and related security. That must therefore be the very latest possible date from which the relevant 30-day period specified in section 182

could run. That period has long since expired, being almost 12 years ago. It is over 12 years since the loans were acquired by NAMA.

29. As the application was not made within time, the remaining question is whether there are "*substantial reasons*" why the application was not made within time or indeed at any stage during the period of almost 12 years after the relevant time limit for seeking leave? There is no evidence before this court as to why the applicant is only now seeking to raise his arguments regarding data protection issues. These arguments could have been raised by him at any time prior to this application for leave and indeed this point is equally relevant to the question as to why these arguments were not raised expressly in any of the other previous proceedings which the applicant or his father issued against NAMA.

30. I do not believe that the applicant satisfies the requirements of section 182 of the 2009 Act. Being so clearly out of time (which is unexplained), is a sufficient basis alone to refuse the application for leave.

(ii) That the applicant's claim is statute barred

31. The second reason advanced by NAMA as to why leave should not be given to prosecute these proceedings and why they should be struck out is that the proceedings themselves are statute barred.

32. The decision of the Court of Appeal in the Third Nama Proceedings establishes that the date of accrual of the applicant's cause of action against NAMA is the date of the acquisition of the loans and related security by NAMA, namely 17 December 2010. The judgment of Noonan J in that case further confirms (at paragraph 31) that "…*the Byrnes' claim for damages in this case, whether it is couched in terms of a breach of*

constitutional rights or of European law, is one to which s. 11 (2) of the Statute of Limitations applies".

33. That relevant limitation period is six years from the date the cause of action accrued. Even if the applicant was correct in his arguments previously advanced that the cause of action did not accrue until he received notification from NAMA of the acquisition of the loans in April 2011, this would still mean that the proceedings were statute barred by a period of almost five years by the time the application for leave was issued.

34. I have therefore come to the view, similar to that outlined by the Court of Appeal in the Third NAMA Proceedings at para 42 of the judgment of Noonan J that "*…these proceedings were instituted after the expiration of the longest limitation period that could be applicable to this claim, being more than six years after 17th December, 2010. The proceedings are accordingly bound to fail*".

35. I am therefore satisfied that the Fifth NAMA Proceedings are clearly statute barred and bound to fail for that reason.

(iii) That the applicant's complaint falls under the rule in *Henderson v Henderson*

36. The third argument advanced by NAMA as to why leave should be refused to the applicant is that the proceedings are an abuse of process, having regard to the rule in *Henderson v Henderson* (1843) 3 Hare 100.

37. This rule is succinctly set out by Cooke J in *Re Vantive Holdings* [2009] IEHC 408 where he said at para 32:

> "*The rule in Henderson v Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new*

> *arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case*."

38. There is no reason advanced by the applicant as to why he did not advance in earlier proceedings (and in particular in the Third NAMA Proceedings) his complaint relating to the processing of data in connection with the acquisition of the relevant bank assets in 2010. Having failed to do so, the applicant cannot now seek to relitigate matters by including arguments and issues which could have been advanced in those earlier proceedings, but which were not. The applicant pleaded other matters of EU law in the Third NAMA Proceedings without difficulty.

39. I am satisfied therefore that to permit the Fifth NAMA Proceedings to be litigated would amount to an abuse of process and would be a clear breach of the rule in *Henderson v Henderson*.

(iv) That no principle of EU law alters or affects issues (i) to (iii) above

40. Finally, NAMA submits that the leave application should be refused as no principle of EU law affects any of the previous three reasons advanced.

41. This particular argument appears to be at the heart of the applicant's belief as to why he should be permitted to continue the Fifth NAMA Proceedings. In his oral submissions to this court the applicant stated that the Irish courts

> "*have no authority to simply disregard rules of the European Union. But this is the legislation which has authorised that, whether directly or indirectly or by design or by default, the net result is that the rights pertaining to the charter and the Data Protection Directive have been completely extinguished by the NAMA Act and that's the issue*" (at 13:02).

42. The applicant does not agree that there is any statute of limitations applicable to challenges to EU law. He said in his oral submissions "*you simply cannot enact legislation that undermines directly applicable rules of the European union…*" (at 13:04). These arguments are advanced in more detail by the applicant in his replying affidavit sworn on 9 January 2023.

43. The applicant argues in his replying affidavit at para 1 that the NAMA motion "*is simply not permissible in the context of a declaration of invalidity. If it were, it would prevent directly applicable EU rules from having full force and effect and place national legislation above EU law.*"

44. Specifically in relation to NAMA's reliance on the Statute of Limitations the applicant states at para 6 of his replying affidavit that "*the Statute of limitations has no relevance here, the purpose of my application specifically seeks a declaration of invalidity*". He then relies on *G.D. v The Commissioner of the Garda Síochána and Others* (C-140/20) ECLI:EU:C:2022:258 (paras 115-128) as authority for the proposition that "*there is no time limit barring a declaration of invalidity, national laws that undermine EU law are invalid as and from there (sic) entry into force*".

45. The case *G.D. v The Commissioner of the Garda Síochána and Others* (C-140/20) ECLI:EU:C:2022:258 is a judgment of the Court of Justice following a request by the Irish Supreme Court for a preliminary ruling under Article 267 TFEU in the Graham Dwyer proceedings (*Dwyer v The Commissioner of an Garda Síochána* [2020] IESC 4). The relevant question raised, as set out by the Court of Justice, was

> "*whether EU law must be interpreted as meaning that a national court may limit the temporal effects of the declaration of invalidity which it is required to make, under national law, with respect to national legislation imposing on providers of*

electronic communications services the general and indiscriminate retention of traffic and location data owing to the incompatibility of that legislation with Article 15 (1) of Directive 2002/58 read in light of the Charter" (para 115).

The response provided by the Court of Justice (at para 119 of its judgment) was that

"*The primacy and uniform application of EU law would be undermined if national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily*."

It further held (at para 123) that

"*the referring court cannot limit the temporal effects of the declaration of invalidity which is bound to make under national law in respect of the national legislation at issue in the main proceedings*".

The Court of Justice further confirmed (at para 128) that

"*the admissibility of evidence obtained by means of such retention is, in accordance with the principle of procedural autonomy of the Member State, a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness*".

46. Counsel for NAMA argued that the applicant has misunderstood the Court of Justice decision outlined above. He says the case is authority for the proposition that where a national court declares a provision invalid under EU law, only the Court of Justice can limit the temporal effect of that invalidity. He says this issue is not relevant to the present case. The matter was properly before the national courts in *Dwyer* and there were no national law provisions which prevented the issues of EU law being raised. He says that the Case C-140/20 does not change the long-established position that where there is no EU prescribed procedural conditions, it is for national law to lay down the

procedural conditions pertaining to the circumstances and the conditions under which litigation may be maintained. This is subject to the limitation that national rules must not contravene the principles of equivalence or effectiveness, as indeed was referred to by the Court of Justice itself in the above decision (as set out at para 45 above).

47. NAMA relies on the decision of the CJEU in case C-2/06, *Willy Kempter KG* (C-2/06) ECLI:EU:C:2008:78 where, at paras 57 and 58 the CJEU said:

> "*It should nevertheless be pointed out that, in accordance with the settled case-law, in the absence of Community rules in the field it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)…*
> *The Court has thus recognised that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty… Such time-limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by Community law…".*

48. Therefore, where the EU legislature has not laid down its own limitation rules (as in the present case), the procedural timelines within which actions must be instituted are governed by the relevant national rules. Provided those national rules comply with the principles of equivalence and effectiveness, there is no breach of EU law by requiring parties to bring any challenges to the validity of legislation on EU grounds within the

nationally prescribed time limits. In essence, the Statute of Limitations applies to challenges based on a breach of EU law.

49. The same principle applies in relation to other national procedural rules such as *res judicata.* In the case of *Cronin v Dublin City Sheriff and Tanager DAC* [2017] IEHC 685, [2018] 3 IR 191, the plaintiff sought to restrain the repossession of his family home based upon points of EU law. The relevant points had not been advanced in previous proceedings between the parties. The plaintiff argued that there had been an obligation upon the court in those previous proceedings to consider the EU law arguments on the court's own motion, even if the parties had not raised them. The plaintiff argued that the normal domestic law principles as to the finality of judgments and *res judicata* did not apply in those circumstances.

50. Ní Raifeartaigh J cited with approval (at paragraph 11 of her judgment) in *Cronin* the following extract from the ECJ judgment in *Kapferer v. Schlank and Schick GmbH* (Case C-234/04) ECLI:EU:C:2006:178:

> "*Community law does not require a national court to disapply domestic rules of procedures conferring finality on a decision, even if to do so would enable it to remedy an infringement of community law by the decision at issue*".

51. She also noted (at para 33) that in *Asturcom Telecomunicaciones* (Case C-40/8) [2009] ECR I-9579, ECLI:EU:C:1975:174, the European Court of Justice held that a two month time limit within which a consumer could challenge an arbitration award made under a mobile phone contract did not breach the principle of "effectiveness" as it was not likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derived from EU law. In the present case the relevant time limit is a significantly more generous six years within which the applicant could have made his

arguments which he now, belatedly, seeks to advance. The Court of Appeal concluded in *Cronin* that the matters sought to be raised could have been but were not raised in earlier proceedings and accordingly, the principle in *Henderson v Henderson* applied.

52. In the present case, the limitation period under the Statute of Limitations, is a domestic procedural rule which satisfies the requirements of equivalence and effectiveness and so there is no breach of EU law by requiring parties to bring any challenge to the validity of legislation on EU grounds within those nationally prescribed time limits. The same applies to other domestic procedural rules such as *res judicata* (including the rule in *Henderson v Henderson*). There is no suggestion that the applicant did not raise the present points of EU law earlier because it was impossible or excessively difficult for him to do so.

53. I find therefore that the applicant could in earlier proceedings have raised the points of EU law he now seeks to advance. He did not do so. Nor did he at any time within the relevant limitation period raise such points. This means that it is now too late for him to advance these points both having regard to the principle in *Henderson v Henderson* and also, on a stand-alone basis, because he is now out of time under national law to do so. There is no impediment under EU law to these domestic procedural rules being applied.

Should the court impose a restriction on the issue of further proceedings by requiring leave for the applicant or related parties to do so?

54. The second general relief sought in NAMA's motion is an order restraining the applicant from instituting any further proceedings against NAMA or any NAMA group entity without first obtaining leave of this court to do so.

55. There is a well-established jurisdiction that where the court is satisfied that a person has persistently instituted vexatious or frivolous civil proceedings, the court may restrain

that person from instituting any further proceedings against the parties to those earlier proceedings without first obtaining leave of the court. Such an order is commonly referred to as an *Isaac Wunder* order deriving its name from the decisions of the Supreme Court in *Wunder v Irish Hospitals Trust (1940) Ltd* (Supreme Court, 24 January 1967 and 22 February 1972).

56. The purpose of making orders of this nature was outlined by Keane CJ in *Riordon v Ireland (No.4)* [2001] 3 IR 365 (page 370) in the following terms:

> *"… 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."*

57. In *Kearney v Bank of Scotland* [2020] IECA 92 Whelan J noted (at para 131) that such orders may extend to existing proceedings and to new proceedings and may include an order restraining the institution of proceedings against present, former or anticipated legal representatives of parties to the litigation.

58. These orders should only be made in rare circumstances. Some guidance as to the relevant issues a court should consider are set out in *Kearney* including the following which are relevant to the present proceedings:

"*… the history of litigation between the parties or other parties connected with them in relation to common issues"* [and]

"Regard may be had to the issue of costs and the conduct of the litigant in question with regard to the payment and discharge of costs orders incurred up to the date of the making of the order by defendants and indeed by past defendants in applications connected with the issues the subject matter of the litigation".

59. In the present case there is a lengthy history of litigation between the parties and other parties connected with them, most notably Vincent Byrne senior. The present proceedings (if one includes the proceedings taken by Mr Byrne against the receiver) are the sixth set of proceedings which have been issued by the applicant or his father regarding the acquisition of their loans by NAMA. Furthermore, the evidence before this court is that no costs have been discharged by any plaintiff in any of those proceedings despite a limited costs order in one case and a full costs order in another case having been made against them. Conversely, the evidence is that NAMA has had to incur legal fees in the region of €230,000 in defending these various proceedings (excluding the receivership proceedings). The payment of such costs by NAMA represents a significant expenditure of public resources which should not have to continue in order to fund further similar litigation.

60. The applicant has not indicated that he will not issue further similar proceedings. Nor is there any evidence before the court of the applicant's or his father's intentions regarding the judicial review proceedings (which have been adjourned) or proceedings record number 2015/4645P which though issued, have not been served.

61. Although section 182 of the 2009 Act provides a screening procedure before proceedings can issue against NAMA for claims that go beyond relief by way of damages, there nevertheless remains a difficulty that, as the present case shows, NAMA

may have to engage in a significant exercise in seeking to have such applications explained to the court dealing with the request for leave. As Whelan J acknowledged in *Kearney*, the fact of an *Isaac Wunder* order being made has a certain declaratory significance, distinct from the requirement to obtain leave.

62. I have considered whether it would be premature to make an *Isaac Wunder* order in this case. I do not believe it would be premature in circumstances where there has been so much litigation between the applicant/related parties and NAMA or NAMA appointed receivers on the same issues, where those issues have been finally determined by the Court of Appeal and where any further claim that the applicant or his father could bring under Irish or EU law would be statute barred and bound to fail for that reason.

63. The effect of making an *Isaac Wunder* order will be to require the applicant to seek leave of the court before he is permitted to institute proceedings against NAMA or any NAMA group entity. That application for leave is separate to any leave application under section 182 of the 2009 Act.

64. In relation to the request by NAMA to dismiss the judicial review proceedings (record number 2020/125JR) and the unserved plenary proceedings (2015/4645P), I will not strike out those proceedings as they are not properly before me. It appears that there would be significant impediments to the applicant in advancing either of those proceedings at this remove given non-compliance with various time limits. I will however direct that the terms of the *Isaac Wunder* order should extend not only to the issue of any new proceedings by the applicant but also to the taking of any further steps in either the identified judicial review or the unserved plenary proceedings should the applicant make any attempt to reactivate either of them.

Conclusion

65. For the reasons set out in detail in this judgment I refuse the applicant's request for leave to issue proceedings against NAMA which he advanced by way of motion dated 10 November 2022. I find that the application pursuant to section 182 of the 2009 Act is out of time and that there are no substantial reasons to otherwise justify granting leave as the intended proceedings are statute barred and bound to fail and would, if advanced, be vexatious and an abuse of process.

66. For the reasons set out in detail in this judgment I will make an order in favour of NAMA in the terms of paragraphs 1 and 2 of their notice of motion dated 12 December 2022.

67. I will make an order in the terms of paragraphs 3 and 4 of NAMA's notice of motion in the following terms, namely:

3. "*An order that the applicant be not entitled to take any further step in relation to proceedings seeking relief in judicial review as against the respondent bearing record number 2020/125JR, without the leave of this Honourable Court being first obtained*" and
4. "*An order that the plaintiff in proceedings between Vincent Byrne and National Asset Management Agency under record number 2015/4645P be not entitled to take any further step in relation to the same without leave of this Honourable Court being first obtained*".

68. As to costs, my provisional view is that the defendant, having succeeded in full in its motion against the plaintiff, is entitled to recover its costs of that motion as against the plaintiff as well as any additional costs that were incurred by the defendant as a consequence of it being put on notice of the plaintiff's motion. If the parties wish to

contend for a different form of costs order they should file and serve any written legal submissions on that point by Tuesday 18 April. I will list this matter for mention on Wednesday 19 April at 10.45am for the purpose of hearing the parties in respect of legal costs, the form of order, and any further issues which may arise from this judgment.