THE HIGH COURT

[2022] IEHC 559

Record No. 2021 6436 P

Between

PATRICK TOWEY AND MAGDALEN TOWEY

Plaintiff

and

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL, THE MINISTER FOR JUSTICE AND EQUALITY, START MORTGAGES DAC, LAVELLE PARTNERS, THE CHIEF STATE SOLICITOR, RACHEL MEAGHER, KIERAN MADIGAN, THE COURTS SERVICE, FRANCIS COMERFORD, KAREN FERGUS, THE GARDA COMMISSIONER

Defendants

Judgment of Mr Justice Dignam delivered on the 11th day of November 2022.

Introduction

1. This judgment deals with five separate motions: three brought by the plaintiffs, one brought by the fifth and sixth-named defendants, Start Mortgages DAC and Lavelle Partners (referred to in error in the Notice of Motion as the *"fourth and fifth-named defendants*"), and one brought by all of the other defendants save for the first-named defendant.

2. In circumstances where the plaintiffs did not appear to prosecute their motions, they can be dealt with very quickly. The plaintiffs sought various reliefs including orders for "*contempt of court"* against the Chief State Solicitor who, it is claimed, is not entitled to act for the Circuit Court Judges named in the proceedings and against Start Mortgages DAC and Lavelle Solicitors, and orders *"for criminal investigation and prosecution of*

perjury by" a solicitor in the Office of the Chief State Solicitor and a solicitor in Lavelle Solicitors, and for orders for "*Investigation and Prosecution"* of treason by the Chief State Solicitor and the Government.

3. Each of these motions were expressed to be brought by the "*Plaintiff*" but the grounding affidavits are stated to be sworn by both plaintiffs so I am treating the motions as having been brought by both plaintiffs.

4. As noted above, the plaintiffs did not appear at the hearing to prosecute their motions. This was a conscious decision of the plaintiffs. They informed the defendants (Chief State Solicitor's Office) by email of the 14th April, 2022 that they would not be attending in circumstances where they had made a complaint to An Garda Síochána of fraud by members of staff in the Central Office and they would not be attending where there is an ongoing criminal investigation of these allegations. Letters were sent to each of the plaintiffs dated the 28th April 2022 by the Chief State Solicitor ("the CSSO") informing them that this email had been brought to Allen J's attention and that he had directed that the matter could proceed on the 3rd May and that should the plaintiffs wish to make submissions in respect of the motions they would have to attend on the 3rd May 2022 to do so. In circumstances where the plaintiffs chose not to attend (notwithstanding Allen J's comments) it would be appropriate to simply strike out the motions without further comment (and I will strike them out) but I think it is necessary and appropriate to note that, as is apparent from the reliefs sought, they are at least in part directed at professional legal representatives and both explicitly and implicitly make allegations of a serious nature against those legal professionals. It is utterly unacceptable to make such allegations and not either withdraw them or stand over them. Furthermore, without any further explanation (which the plaintiffs chose not to give), it is impossible to see any connection between the plaintiff's allegation of fraud against members of the Central Office and the plaintiffs' decision not to either withdraw or prosecute the allegations made against these professionals.

5. I will not make any comment in respect of the merits of the reliefs, though I will have to return to the reliefs in the context of my discussion of the Isaac Wunder orders sought by the defendants.

6. The two motions brought by the defendants are broadly similar to each other. The second, third, fourth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth-named defendants issued a motion on the 22nd February 2022. I will refer to these defendants as the "State *defendants*" as this is the description used in the grounding

affidavit on their behalf. The motion is not brought on behalf of the first-named defendant on the basis that the "*Government of Ireland*" is not a legal entity. The reliefs which are sought are:

> *"1. An Order pursuant to Order 19, rule 28 of the Rules of the Superior Courts striking out the Plaintiffs' claim against the Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defendants on the grounds that it discloses no reasonable cause of action against those defendants;*
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> *2. In the alternative, an Order pursuant to the inherent jurisdiction of this Court striking out the Plaintiffs' proceedings against the Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defendants on the grounds that the proceedings against those defendants are frivolous, vexatious, bound to fail and/or an abuse of process;*
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> *3. An Order that the Plaintiffs be restrained from instituting any further proceedings directly or indirectly concerning (i) the Order of Her Honour Judge Karen Fergus made on the 25th day of June 2019 in proceedings entitled Start Mortgages DAC v Patrick Towey and Magdalen Towey and bearing Roscommon Circuit Court record number 2018/00057 (the "Order of Judge Fergus"), or (ii) any legal proceedings issued by the Plaintiffs in which reference has been made to the Order of Judge Fergus, without the prior leave of the President of the High Court or some other Judge nominated by her, and with such application for leave being on notice to the intended defendants or respondents."*

7. The motion brought by the fifth and sixth-named defendants also seeks orders striking out the plaintiffs' claim on the grounds that it fails to disclose a reasonable cause of action, is frivolous and vexatious, bound to fail and is an abuse of process under Order 19 rule 28 of the Rules of the Superior Courts and the inherent jurisdiction of the Court and an "*Isaac Wunder Order*". This is different in its terms to the Isaac Wunder order sought at paragraph 3 of the State defendants' notice of motion. The order sought by the fifth and sixth named defendants is:

> *"An order pursuant to the Court's inherent jurisdiction restraining the Plaintiffs or either of them from instituting further proceedings as against Start Mortgages Designated Activity Company or Lavelle Partners LLP without prior leave of this Honourable Court."*

8. In addition, the fifth and sixth-named defendants seek:

> *"An order pursuant to Order 19, Rule 27 of the Rules of the Superior Courts, 1986 striking out such part of the Plaintiffs' claim as this Honourable Court deems fit on the basis that such parts are unnecessary and/or scandalous and/or tend to prejudice, and/or embarrass, and/or delay the fair trial of the action*."

9. In reality the focus at the hearing was on the three reliefs which the defendants' two motions shared in common, i.e., the reliefs striking out the plaintiffs' claim under Order 19, rule 28 or the court's inherent jurisdiction and the Isaac Wunder order. This judgment therefore focuses on those reliefs.

10. As noted above, the plaintiffs did not appear at the hearing and by email of the 14th April 2022 told the defendants that they would not be attending at the hearing while there is an ongoing criminal investigation of fraud on their court documents. Letters were sent to each of the plaintiffs dated the 28th April 2022 by the CSSO informing them that Allen J had been informed that the plaintiffs had advised in correspondence that they would not be attending on the 3rd May and that Allen J had directed that the matter could proceed on the 3rd May and that should they wish to make submissions in respect of the motions they would have to attend on the 3rd May 2022 to do so. I was told by counsel for the fifth and sixth-named defendants that in fact an email was sent by the plaintiffs to Lavelle Solicitors, solicitors for the fifth and sixth-named defendants and to the Chief State Solicitor, the solicitors for the State defendants, a number of weeks prior to the hearing indicating that the plaintiffs intended to discontinue these proceedings due to fraud but that as at the date of hearing no notice of discontinuance had been filed. I was given an email of the 30th March to the Central Office and the defendants' solicitors in which the plaintiffs stated "*Constitutional Case no 2021/6436P is WITHDRAWN due to FRAUD on Court Documents in the Central Office which is reported to Gardaí.*" There is a degree of inconsistency between this email and the plaintiffs' position stated in the email of the 14th April. That later email did not refer to the proceedings having been discontinued but rather that the plaintiffs would not attend "*while there is an ongoing criminal investigation*". This makes clear that the plaintiffs believe the proceedings are still in being. Order 26 of the Rules of the Superior Courts sets down a procedure for the discontinuance of proceedings (see *Smyth v Tunney [2009] IESC]* and in circumstances where that has not been complied with, I must treat the proceedings as still being live.

Background

11. The background to all of these motions is as follows.

12. The fifth-named defendant in these proceedings, Start Mortgages DAC ("Start"), issued Circuit Court proceedings for possession of certain of the plaintiffs' property on the 16th April 2018. These proceedings were ultimately heard on the 25th June 2019, on which date Her Honour Judge Fergus ("Judge Fergus") made an Order for possession. These current proceedings and several other sets of proceedings (set out below) follow from that order. No appeal was brought against Judge Fergus' order.

13. However, on the same date as Judge Fergus made her order, the plaintiffs in these proceedings issued Circuit Court defamation proceedings against Judge Fergus relating to the possession proceedings. One of the points which has been made repeatedly by the plaintiffs, i.e.. relating to the plaintiffs' immunity from court summonses and court orders, was raised in these defamation proceedings. The endorsement of claim in the Civil Bill pleaded that "*On June 25th 2019 Judge Karen Fergus at Roscommon Courthouse Roscommon Town Defamed the Plaintiffs by ignoring their Constitutional Rights under Article 40.1 of the Constitution and Supreme Court Case Law No. 334/2007 which implies that all Court Orders are invalid, knowing that the Circuit Court has no jurisdiction on Constitutional matters*" and then in a purported Statement of Claim the plaintiffs pleaded that: "*The Plaintiffs Constitutional Rights under Article 40.1 were denied on June 25th 2019 when her Honour, Judge Karen Fergus, ignored the Plaintiffs Affidavit which exposed the fact that the Plaintiffs, like the Director of Public Prosecutions, are immune to Court Orders, also, like the Justice Minister and the Attorney General, the Plaintiffs are immune to Court Summons and the case against them should have been Struck Out*."

14. A motion to dismiss those proceedings was issued on behalf of Judge Fergus on the 22nd October 2019 on the grounds that the proceedings failed to disclose a reasonable cause of action and/or that the proceedings were frivolous and vexatious. This came before His Honour Judge Comerford ("*Judge Comerford*") on the 24th November 2020. Judge Comerford made an order striking out the proceedings on that date on the grounds that the proceedings disclosed no viable cause of action. The plaintiffs did not appeal against this order.

15. Before Judge Comerford struck out the proceedings, the plaintiffs had issued High Court proceedings (Record no. 2019/5475P) by Plenary Summons on the 10th July 2019. The defendants in these High Court proceedings were Ireland, the Attorney General, the

Minister for Justice and Equality, Start, and Lavelle Solicitors (who had acted for Start in the Circuit Court possession proceedings). A fact which is worth noting in the context of the discussion below is that a "*Eugene Cafferky*" was originally named as a defendant on the face of the Summons and was struck through. An undated Statement of Claim was filed on the 8th January 2020 in which it was pleaded, inter alia:

> *"The plaintiffs are aware of and Supreme Court Case Law no. 334/2007 where the Supreme Court Validated the failure by the DPP to comply with High Court Order No.2006/1114P. Based on Article 40.1 of the Constitution, the Plaintiffs, like the DPP are immune to Court Orders.*
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> *The plaintiffs are aware of High Court Case law No. 2008/9410P where the State Solicitor failed to Enter an Appearance on behalf of the Justice Minister and the Attorney General. Ms Justice Reynolds Struck out the Plaintiff's Motion for Default of Appearance by the State along with the case against the Justice Minister and Attorney General. Like the Justice Minister and the Attorney General, based on Article 40.1 of the Constitution, the Plaintiffs are immune to Court Summons and the case against them by Start Mortgages should have been Struck Out.*
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> *The Plaintiffs Constitutional Rights to fair Procedure were denied when Judge Fergus unlawfully attempted to over rule the earlier Order made by Judge Flanagan at Roscommon Circuit Court. Judge Flanagan Ordered that the case be sent back to the County Registrar as Start Mortgages failed to provide the Plaintiffs complete Bank File and there is an ongoing Garda Investigation in relation to Start Mortgages.*
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> *Start Mortgages and their Counsel, Lavelle Solicitors, failed to inform Judge Fergus of the earlier Order made by Judge Flanagan and requested an Order for repossession which Judge Fergus unlawfully granted on June 25th 2019. That Order is Void and Judge Fergus has been sued by the Plaintiffs.*
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> *The Plaintiffs reserve the right to provide additions to this Statement of Claim when additional evidence becomes available"*

16. Thus, a core point in proceedings 2019/5475P was the claim that the plaintiffs are immune from court summonses and court orders. The plaintiffs also raised issues about

Judge Fergus' conduct of the original Circuit Court hearing (though no appeal had been brought against Judge Fergus' Order) and the conduct of Start and Lavelle Solicitors.

17. On the 9th December 2020, the plaintiffs issued a further set of High Court proceedings (Record no. 2020/8274P) against a larger number of parties but which included the State defendants from the 2019/5475P proceedings (Ireland, the Attorney General and the Minister for Justice). Judge Fergus, Judge Comerford, the Chief State Solicitor, and the State Solicitor and Counsel who acted for Judge Fergus in the defamation proceedings brought against her by the plaintiffs were also named as defendants in these proceedings. A number of claims were raised in these proceedings including that Judge Fergus had committed treason in determining Start's application for an order for possession and Judge Comerford had committed treason in striking out the defamation proceedings against Judge Fergus. It was claimed that the legal practitioners, the State Solicitor and Counsel, had compounded that treason. The plaintiffs claimed damages of €4,000,000. The proceedings again raised the point which had been raised in the Circuit Court defamation proceedings and in the High Court proceedings No. 2019/5475P (and has been raised in subsequent proceedings) in relation to the plaintiffs' alleged immunity to court summonses and court orders on foot of what occurred in other proceedings concerning the Minister for Justice, the Attorney General or the DPP.

18. The defendants in proceedings record number 2019/5475P and 2020/8274P issued motions seeking to strike out the plaintiffs' claim on the basis that the proceedings disclosed no reasonable cause of action and that they were frivolous and vexatious, bound to fail and/or an abuse of process. These motions were determined on the 12th November 2021 by Egan J who struck out the proceedings. There were no appeals against these orders.

19. The plaintiffs then issued the current proceedings by Plenary Summons dated the 25th November 2021. As is apparent from the title to the proceedings, the plaintiffs sue many of the same people and entities who were sued in the previous proceedings, including, but not limited to, the State, the Circuit Court Judges who made the previous orders, Start, the legal professionals who acted for Judge Fergus, and the solicitors who acted for Start. Given that the defendants' two motions seek to strike out these proceedings on the basis that they disclose no reasonable cause of action, are frivolous and vexatious and are an abuse of process, it is worth setting out in full the claim contained in the General Indorsement of Claim. A Statement of Claim has not yet been delivered. The General Indorsement of Claim pleads:

"The Plaintiffs seek a Declaration from the Honourable Court that their Constitutional Rights have been denied as the Plaintiffs are aware of High Court Constitutional Case Law No. 2018/9410P where the Minister for Justice, Charlie Flanagan and the Attorney General, Seamus Woulfe, failed to Enter an Appearance and that case was Struck Out.

High Court Case Law No. 2018/9410P along with Article 40.1 and Article 2 of the Treaty of Europe means that like the Justice Minister and the Attorney General, the Plaintiffs are immune to Court Summons and the case, No. 2017/57 by Start Mortgages against the Plaintiffs should have been Struck Out in Roscommon Circuit Court.

The Plaintiffs are aware that there is an investigation by the Justice Department under Reference Numbers: DJE-MO-00516-2019, DJE-MO-04404-2019 and DJE-MO-00889-2019, also, Garda Pulse No. HQCSO.1-348140/16 was issued by the Garda Commissioner in relation to this Constitutional Crisis under Article 35.4.1.

The Plaintiffs are aware of how the DPP failed to comply with the High Court Order No.2006/1114P and like the DPP, the Plaintiffs are immune to High Court ORDERS No.2019/5475P 2020/8274P and Circuit Court Order No. 2017 57 at Roscommon Circuit Court.

That Equality is Guaranteed under Article 40.1. of the Constitution and Article 2 of the Treaty of Europe.

The Plaintiffs are aware that the State has failed, since September 2019, to provide a Defence in a related Constitutional Case No. 2019/6501P which challenges all Court Summons and Orders as unconstitutional under Article 40.1 and Article 2 of the Treaty of Europe. While the case is pending ALL COURTS SHOULD BE SUSPENDED.

The Plaintiffs are aware of the pending Constitutional Case No. 2021/2308P which exposes how ex Justice Minister, Charlie Flanagan and now Supreme Court Judge, Seamus Woulfe established Constitutional Case Law which means that Court SUMMONS are UNCONSTITUTIONAL under Article 40.1 and Article 2 of the Treaty of Europe.

The Plaintiffs are aware that on November 10th in Court 24 Constitutional Cases No. 2019/578P and 2019/8124P, which relied on the same Constitutional Case Law as the Plaintiff, were ADJOURNED by Judge Butler, which exposes extreme TREASON by Judge Egan and denial of the Plaintiffs CONSTITUTIONAL RIGHTS UNDER ARTICLE 40.1 and Article 2 of the Treaty of Europe.

On November 10th in Court No.6, the Plaintiffs similar Constitutional Cases No. 2019/5475 and No. 2020/8274P were STRUCK OUT and the Plaintiffs CONSTITUTIONAL RIGHTS were described as FRIVOLOUS AND VEXATIOUS, WHICH IS EXTREME TREASON by Judge Egan who took OATH to UPHOLD the CONSTITUTION. Judge Egan MUST BE IMPEACHED as required under Article 35.4.1 of the Constitution.

The Plaintiffs will provide a detailed Statement of Claim and reserves the right to provide additional evidence as it becomes known.

The Plaintiffs claim for damages is 10 million Euros."

20. On the 28th March 2022 the plaintiffs issued yet further proceedings (Record no. 2022/1194P). These are against many of the same people and entities but Ms. Justice Egan, who made the Orders of the 12th November 2021, has also been joined in these proceedings. The claims in these proceedings include the repeatedly made claim that the plaintiffs are immune to Court summonses and orders and include the claims that judges have failed to uphold constitutional rights under Article 40.1 and rights under Article 2 of the "*Treaty of Europe*" and that the government has failed in its duty by failing to impeach the judges, and that the original case by Start should have been struck out. The plaintiffs also claim damages of €10,000,000.

21. By notice of motion dated the 22nd April 2022 in these latest proceedings the plaintiffs also seek orders for investigation and prosecution, contempt and perjury by various solicitors and counsel acting on behalf of State bodies and an Order for contempt against Lavelle. That motion has not been heard and this judgment therefore does not deal with it.

Application to Strike Out – Legal Principles

22. The principles governing the exercise of the Court's jurisdiction to strike out a claim under Order 19, rule 28 of the Rules of the Superior Courts or under the Court's jurisdiction are well-established (see, for example, *Barry v Buckley [1981] IR 306, Salthill Properties Limited v Royal Bank of Scotland plc [2009] IEHC 207, Lopes v Minister for Justice, Equality and Law Reform [2014] IESC 21; [2014] 2 IR 30, Clarington Developments Limited v HCC International Insurance Company plc [2019] IEHC 630, Kearney v Bank of Scotland [2020] IECA 92*) and it is unnecessary to conduct a full review of the authorities.

23. It is well-established that there is a difference between the jurisdiction which arises under Order 19 rule 28 of the Rules and the inherent jurisdiction of the Court.

24. In an application to dismiss proceedings as disclosing no cause of action under Order 19 rule 28 the Court must accept the facts as asserted in the plaintiffs claim and if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim and should not be struck out. On an application under Order 19 rule 28 there is to be no enquiry into, or assessment of, the facts as pleaded. They must be taken as correct and the enquiry must be solely concerned with whether those facts give rise to a cause of action.

25. On an application under the Court's inherent jurisdiction, on the other hand, there may be a limited analysis of the facts. Clarke J gave the example in *Salthill*, as quoted in *Lopes*, that a plaintiff may assert that it entered into a contract with the defendant which contained certain terms. Under Order 19 rule 28 the Court would have to proceed on the basis that the assertion that the contract contained those terms was correct. Under its inherent jurisdiction, however, the Court may consider the contract document with a view to assessing whether the plaintiff has any chance of establishing that the document concerned could have the meaning contended for, i.e.., whether the plaintiff had any chance of establishing that the contract contained the pleaded terms. Furthermore m, under the inherent jurisdiction the Court can, to a very limited extent, consider whether there is any credible basis for suggesting that the facts as asserted are true and if not then the proceedings may be struck out on the basis that they are bound to fail on the merits.

26. The distinction and the limits to the respective jurisdictions were captured by Simons J in *Clarington Developments Limited v HCC International Insurance Company PLC*:

> "*24. For the reasons explained by the Supreme Court in Lopes v. Minister for Justice Equality and Law Reform [2014] IESC 21; [2014] 2 I.R. 301, [16] to [18], it is important to distinguish between the jurisdiction to strike out and/or to dismiss proceedings pursuant to (i) Order 19 of the Rules of the Superior Courts, and (ii) the court's inherent jurisdiction. An application under the Rules of the Superior Courts is designed to deal with circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings.*

25. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may to a very limited extent consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings.

26. Whereas it is correct to say that—in the context of an application made pursuant to the court's inherent jurisdiction—it is open to the court to consider the credibility of the plaintiff's case to a limited extent, the court is not entitled to determine disputed questions of fact."

27. In addition to these principles, the jurisdiction, whether under the Rules or the court's inherent jurisdiction, is subject to a number of overarching principles: first, it is a jurisdiction to be exercised sparingly, given that it relates to the constitutional right of access to the courts; second, the onus is on the moving party to establish that the pleadings do not disclose a reasonable cause of action or that the case is bound to fail or that it is an abuse of process and the threshold to be met is a high one; third, the Court must take the plaintiff's claim at its high-water mark; fourth, the Court must be satisfied not just that the plaintiff will not succeed but cannot succeed; and fifth, the Court must be satisfied that the plaintiff's case would not be improved by an appropriate amendment to the pleadings or through the utilisation of pre-trial procedures such as discovery or by the evidence at trial (see *Keary v The Property Registration Authority of Ireland [2022] IEHC*, *Scanlan v Gilligan & ors [2021] IEHC 825*, *Irish Bank Resolution Corporation v Purcell & Ors [2016]2 IR 83*).

Discussion and Conclusion re Application to Strike Out

28. In short, the plaintiffs' claim is that (i) they are immune from court summonses because, it is alleged, in a previous, unrelated case (Record no. 2018/9410P) against the

Minister for Justice and the Attorney General those parties failed to enter an appearance and the proceedings against them were struck out which, it is alleged, means those parties are immune to court summonses and on the basis of Article 40.1 of the Constitution and Article 2 of the "*Treaty of Europe"* the plaintiffs must also be immune to court summonses; (ii) they are immune to court orders because allegedly the DPP failed to comply with a High Court Order in a case bearing the record number 2006/1114P and the principle of equality under Article 40.1 of the Constitution and Article 2 of the "Treaty of Europe" means that the plaintiffs must also be immune to court orders; and (iii) all courts should be suspended because the State has failed to deliver a Defence in proceedings bearing the record number 2019/6501P which, it is pleaded, challenges all Court summonses and orders as unconstitutional under Article 40.1 and Article 2 of the "*Treaty of Europe"* and that while that case is pending all courts should be suspended.

29. I am satisfied that whether one approaches the plaintiffs' claim and the applications to strike it out under Order 19 rule 28 or under the Court's inherent jurisdiction an order should be made striking out the plaintiffs' claim.

Order 19 rule 28

30. As discussed above, when considering an application under Order 19 rule 28, the Court is required to take the facts as asserted and to assess on the basis of those facts whether the plaintiff could have a cause of action (not whether he would succeed but whether he could succeed).

31. More usually such an application would be brought after a Statement of Claim has been delivered because usually it is only then that the factual basis of the claim is pleaded. However, there does not seem to me to be a bar, in an appropriate case, to the Court examining the plaintiff's case as pleaded in the General Indorsement of Claim. This is such an appropriate case in circumstances where the General Indorsement of Claim pleads the factual basis for the plaintiffs' case.

32. The facts asserted are:

(i) in proceedings bearing record number 2018/9410P the Minister for Justice and the Attorney General failed to enter an appearance and the case was struck out;

(ii) there is an investigation by the Department of Justice and the Garda Commissioner issued a pulse number in respect of this case;

(iii) the DPP failed to comply with a High Court order in proceedings bearing record number 2006/1114P;

(iv) the State has failed, since September 2019, to provide a defence in a related constitutional case bearing record number 2019/6501P which challenges all court summonses and orders as unconstitutional under Article 40.1 of the Constitution and article 2 of the Treaty of Europe;

(v) pending constitutional case number 2021/2308P exposes how the Minister for Justice and the Attorney General established constitutional case law which means that court summonses are unconstitutional under Article 40.1 and article 2 of the Treaty of Europe;

(vi) cases bearing record numbers 2019/578P and 2019/8124P which relied on the same constitutional case law as the plaintiffs' were adjourned by Butler J;

(vii) on the 10th November 2021 the plaintiffs' similar constitutional cases number 2019/5475P and number 2020/8274P were struck out and the plaintiff's constitutional rights were described as frivolous and vexatious.

33. These are the facts that are asserted and which the court must take as being true. The plaintiffs plead certain inferences which should be drawn or certain legal conclusions which should be reached from these facts upon which they seek their relief. These are, seriatim:

(a) because case number 2018/9410P was struck out even though the Minister for Justice and the Attorney General failed to enter an appearance this means as a matter of law they (the Minister and the Attorney General) are immune to court summonses and therefore on the basis of the guarantee of equality so also are the plaintiffs; therefore the original Circuit Court possession proceedings should have been struck out.

(b) Because the DPP failed to comply with a High Court order in proceedings 2006/1114P the DPP is, as a matter of law, immune to High Court orders and the guarantee of equality means that the plaintiffs are also immune from court

orders including the orders striking out the plaintiffs' previous proceedings and the original Circuit Court order.

(c) Because the State has failed to deliver a defence in a case which challenges all court summonses and orders (Record No. 2019/6501P) all courts must be suspended.

(d) The adjournment by Butler J of two cases which relied on the same constitutional case law as the plaintiff relies upon exposes extreme treason by Egan J and denial of the plaintiffs' constitutional rights by her.

(e) The striking out of the plaintiff's proceedings record number 2019/5475P and 2020/8274P by Egan J and the description of the plaintiff's constitutional rights as frivolous and vexatious (which for present purposes I am taking as true) is extreme treason and Egan J must be impeached.

34. In my view, the asserted facts simply do not and cannot give rise to the inferences and legal conclusions upon which the plaintiff's claim is based. Even if the Minister for Justice and the Attorney General failed to enter an appearance in an individual case and the case was struck out (2018/9410P) and the DPP failed to comply with an order (2006/1114P) in another individual case it does not and cannot follow that the Minister, the Attorney General or DPP are immune to summonses and orders respectively. Thus, there is no basis whatsoever for the claim in the facts pleaded that the plaintiffs are entitled in accordance with the principle of equality to immunity from court summonses or court orders. Notwithstanding the correctness (for present purposes) of the facts as asserted there is simply no foundation in those facts for the claim made by the plaintiffs. Butler J had to consider similar (in some respects identical) claims in *Keary v The Property Registration Authority*. I refer to Butler J's judgment in greater detail below. She said at paragraph 41:

> "*Moving then to look at the applications made by the defendants as regards each set of proceedings, the starting point must be that I have found the plaintiff's central and overarching contention in each of the three cases to be unstateable. That is the proposition that somehow the constitutional guarantee of equality means that the plaintiff (and indeed all citizens) are "immune" from court orders. That proposition is based on an assertion, which is fundamentally misconceived, that in unrelated proceedings to which the plaintiff was not a party, the Supreme Court sanctioned a contempt of court by the DPP. Even if*

this assertion were to be treated as a factual one which had to be accepted for the purpose of the court's analysis under O.19, r.28 (and I do not think that such characterisation is warranted – it is a legal conclusion which the plaintiff seeks to draw from facts which do not support such a conclusion), the proposition itself is wholly without legal merit and does not constitute a reasonable cause of action. Thus, all proceedings based on this proposition can and should be struck out under O.19, r.28."

35. Similarly, even if the State has failed to deliver a Defence in a case which challenges all court summonses and orders (which I am taking to be correct for present purposes) there is no basis in these facts upon which to reach the conclusion that all courts must be suspended.

36. Nor is there any basis whatsoever for the claim that the adjournment by Butler J of two cases means that Egan J is guilty of extreme treason or denial of the plaintiff's constitutional rights.

37. Finally, there is no basis whatsoever for the claim that the striking out of the plaintiff's earlier claims was extreme treason. It is a judge's function to determine applications which come before them according to legal principles and the court's judgment. A party can be of the opinion that the judge erred. Indeed, the judge may have erred. There is an appeal from the decision. That is precisely why we have appeals. The judge performing the function of determining an application which comes before them, even if they reach the wrong decision, and even if they improperly or incorrectly describe an individual's constitutional rights, has not, on the basis of those facts, committed treason. There is no basis pleaded upon which that conclusion could be reached.

38. In all of the circumstances, I would strike out the plaintiff's claim under Order 19 rule 28. However, even if I am wrong in this, I would strike out the claim under the Court's inherent jurisdiction.

Inherent Jurisdiction

39. It is unnecessary to go any further than to state that the plaintiffs' claims are fundamentally misconceived. In fact, some of the same points were raised before Butler

J in *Keary v The Property Registration Authority* where she said "*The illogicality of the proposition is so obvious that it makes the task of rejecting it simultaneously both easy and complex.*" As discussed in greater detail above, the plaintiffs' claims are grounded squarely on the premise that the Minister for Justice and the Attorney General are immune to court summonses and the DPP is immune to Court Orders. That is simply misconceived and wrong in law and, therefore, the very basis for the plaintiffs' claim of immunity is wrong. There is no foundation to it whatsoever. Even the most cursory review of the court lists or of the judgments on the Courts Service website will show the sheer volume of cases involving State bodies, including the Minister for Justice, the Attorney General and the DPP, and the number of cases in which Orders are made against such parties.

40. In fact the same type of claims (at least insofar as the claim of immunity to court orders is concerned) have previously been considered by Simons J in *Fennell v Collins [2019] IEHC 572* and Butler J in *Keary v The Property Registration Authority of Ireland*. The proceedings referred to in the plaintiffs' General Indorsement of Claim bearing record numbers 2006/1114P and 2019/6501P were, it seems, brought by a Mr. Eugene Cafferky. As will be recalled, the Plenary Summons in the proceedings issued by the plaintiffs under record number 2019/5475P initially had Mr. Cafferky named as a defendant and his name was struck through on the face of the summons. In *Fennell v Collins [2019] IEHC 572* Simons J said:

> "*16. The argument is predicated on the procedural history of an entirely unrelated set of proceedings entitled 'Eugene Cafferkey, Plaintiff, and the Director of Public Prosecutions, Defendant' and bearing the High Court Record Number 2006 No. 1114P. I will refer to those proceedings as 'the Cafferkey proceedings'.*
>
> *17. The argument based on the Cafferkey proceedings appears to run as follows: (i) it is alleged that the Director of Public Prosecutions failed to comply with an order made in those proceedings directing the delivery of a defence; (ii) it is next alleged that the failure to punish the then Director for contempt of court indicates that he was being treated as immune from having to comply with court orders; and (iii) it is said to follow that, if the Director is immune, then all citizens are immune from having to comply with court orders on the basis of the guarantee of equality under Article 40.1 of the Constitution of Ireland.*
>
> *18. The argument is summarised as follows in Mr Collins's affidavit sworn on 17 May 2019.*

> *'I say that Supreme Court Case Law No. 334/2007* [the appeal from the High Court judgment in 2006/1114P]*, combined with Article 40.1 of the Constitution, implies that every citizen is immune to any Court Order. Under Article 40.1 of the Constitution, every Citizen is Guaranteed Equality with the DPP who ignored High Court Order No. 2006/1114P Exhibit 1.'*

19. This argument is simply preposterous. First, the allegation that the Director was treated as immune from court orders in the Cafferkey proceedings is not borne out by the orders exhibited by Mr Collins in his two affidavits. Rather, what emerges is that the proceedings taken by Mr Cafferkey in 2006 were dismissed on the grounds that they disclosed no reasonable cause of action. The order of the High Court (Lavan J.) of 13 November 2007 dismissing the proceedings was subsequently upheld by the Supreme Court by order dated 28 October 2011 (Supreme Court Appeal No. 334/07). In circumstances where the proceedings were dismissed, there could have been no obligation on the Director to deliver a defence in the proceedings.

20. Secondly, there is no suggestion that any complaint of an alleged contempt was ever made against the Director of Public Prosecutions in respect of the proceedings by Mr Cafferkey, still less that the Director was found to have been in contempt of court.

21. Thirdly, and perhaps more importantly, even if it had been demonstrated that the Director had breached a procedural order in a single case some twelve years ago—and I repeat that this has not been demonstrated—this could not conceivably give rise to the collapse of the entire court system as contended for by Mr Collins, whereby all individuals would thereafter be immune from ever complying with court orders. The argument is based on a hopeless misconception of the meaning and effect of the guarantee of equality under Article 40.1 of the Constitution of Ireland. There is no comparison between Mr Collins" position and the position of then Director of Public Prosecutions in the Cafferkey proceedings. Mr Collins has expressly invoked the jurisdiction of the High Court in his own proceedings, and seeks orders restraining his uncle and all third parties with notice of those orders from dealing with the mortgaged lands. Yet when called upon to account for his failure to progress his own proceedings, Mr Collins—without any sense of irony—baldly asserts that all citizens are immune from court orders. Mr Collins thus seeks to approbate and reprobate the High Court's jurisdiction. This inconsistency of approach highlights the outlandish nature of the argument put forward by Mr Collins. The true legal position is, of course, that just

as Mr Collins is entitled to invoke the High Court's jurisdiction against other individuals, so too is Mr Collins amenable to the court's jurisdiction himself.

22. Finally, for the sake of completeness, it should be recorded that there is no question of the Director of Public Prosecutions being treated as immune from court orders. By way of example only, a survey of the Judicial Review List indicates that the Director is often named as a respondent to proceedings, and orders are regularly made against the Director in judicial review proceedings and are complied with. "

41. Butler J in *Keary v The Property Registration Authority of Ireland* also had to consider similar arguments based on the *Cafferky* proceedings. In light of the fact that the plaintiffs in this case did not place any evidence before the Court in respect of the various proceedings referred to in their General Indorsement of Claim, it is worth quoting Butler J at length because she refers to the procedural history of the *Cafferky* proceedings. She said:

"3. … the plaintiff's belief that he is "immune" from court orders is central to his claims both in the substantive litigation and in his response to these applications. The court has had some difficulty in understanding the basis of this claim. It appears to derive from the plaintiff's interpretation of the significance of orders made in unrelated proceedings in which the plaintiff was not involved. These proceedings are cited in the plaintiff's pleadings by reference to their case numbers being High Court No. 2006/1114P and Supreme Court No. 334/2007 being an appeal in that High Court case. These numbers refer to proceedings entitled Eugene Cafferky v. Director of Public Prosecutions. In his pleadings the plaintiff claims that the Supreme Court decision in that case "validated" a contempt of court by the DPP in respect of an order made by the High Court earlier in the same case. Consequently, the plaintiff argues that as Article 40.1 of the Constitution contains a guarantee of equality, citizens, including himself, are also immune from court orders and that the "victims" of such orders can sue the State for damages, as he purports to do in the proceedings he describes as his constitutional case …

4. When asked by the court for some more information as to the nature of the Cafferky case and of the order of which the plaintiff alleges the DPP to have been in contempt, the plaintiff was unable to provide the court with any additional information. He does however complain that the Supreme Court decision in case 334/2007 is not on the Courts service website as a result of

which he has been unable to access it. This would seem to be because no written judgment was issued in the case, the Supreme Court having dismissed Mr Cafferky's appeal on an ex tempore basis and without reserving judgement. In circumstances where the plaintiff was unable to provide the court with any assistance as regard the authority which is central to his contentions, I asked the solicitor acting on behalf of the defendants to see if she could procure copies of all relevant judgments and orders over the lunch break. On the resumption of the hearing at 2pm a bundle comprising copies of five orders were handed into court. The Supreme Court order made on 28th of October, 2011 records the dismissal of Mr Cafferky's appeal against an order of the High Court (Lavan J) dated 13th November, 2007 which in turn dismissed his claim on the grounds that it disclosed no reasonable cause of action. The High Court order of 13th November, 2007 simply records the dismissal of the claim on those grounds.

5. There are then three additional interlocutory orders made by the High Court. One of these is made by the Master of the High Court on 5th October, 2006 and refused Mr Cafferky leave to join additional parties to his proceedings, leave to make consequential amendments to the statement of claim and discovery. It seems that the plaintiff's arguments are based on one or both of the other two orders. The earlier of these (McKechnie J 22nd May, 2006) gives the defendant, the DPP, an extension of two weeks to file an appearance in response to a motion for judgment in default of appearance. The second (made by Gilligan J on 14th May, 2007) gives the DPP a further extension of one week to file an appearance. Obviously, an inference can be drawn that the DPP did not file an appearance within the two-week period allowed by McKechnie J in May 2006. The May 2007 order does not record the nature of the motion brought by Mr Cafferky on that occasion and, in particular, whether it was a further motion for judgment in default or, alternatively, a motion for contempt on the basis of the DPP's non-compliance with the order of May 2006. It may even be that the contempt of which the plaintiff now complains was a further delay in complying with the order of 14th May, 2007. As the plaintiff was completely unable to explain the basis for his assertion that the DPP was in contempt of a High Court order the court is left to speculate as to what his rationale might be.

6. It is certainly unusual for there to be a delay of a year in filing an appearance subsequent to a motion having been brought seeking judgment in default of appearance. However, it is not entirely unheard of and the dates of the various orders suggest that the DPP issued the motion seeking to strike out the proceedings either with or very shortly after filing an appearance. The

Supreme Court order refers only to Mr Cafferky's appeal from the order made on 13th November, 2007 dismissing his claim. Therefore, it does not seem that Mr Cafferky took an appeal from either of the orders which allowed the DPP extensions of time for the filing of an appearance. He may have relied on the failure to file an appearance within the time prescribed by the rules or as allowed by the order of 22nd May, 2006 as part of his defence to the application to strike out his claim but the plaintiff was unable to shed any light on the extent to which this remained an issue after the appeal was filed. In my view the Supreme Court's dismissal of Mr Cafferky's appeal cannot be regarded as validating a contempt of court which does not appear to have been in issue before the Supreme Court on the appeal.

7. Either way it does not really benefit this plaintiff. The Rules of the Superior Courts prescribe many time limits for the taking of various steps in proceedings, especially as regard the filing of pleadings at an early stage in the process. The rules do not impose any automatic consequence for non-compliance with these time limits. Instead, where a party is in default the other party may seek to have the proceedings, or the defence as the case may be, struck out as a result of that default. Such applications are routinely brought but rarely result in proceedings being struck out. Rather their purpose is to prompt the party in default to take the requisite steps so that the proceedings can progress. In practice such applications are usually resolved either prior to the issuing of or prior to the hearing of the motion by the moving party pragmatically agreeing an extension of time for the taking of the step with the defaulting party. The penalty, if any, lies in the defaulting party being made liable for the costs incurred by the moving party in bringing the motion.

…

11. In any event even if it were established through a finding properly made by the High Court that the DPP had been in contempt of court, there is no legal basis for the consequential assertion made by the plaintiff that the constitutional guarantee of equality must mean that all citizens are to be regarded as "immune" from court orders. The illogicality of the proposition is so obvious that it makes the task of rejecting it simultaneously both easy and complex. Whilst courts will invariably take a dim view of a party who has been found to be in contempt of court (which I reiterate was not the case in Cafferky v. DPP), it does not follow that where a party is held to be in contempt of an interlocutory order that that party will necessarily lose the substantive proceedings. The purpose of a contempt application is to secure compliance with the order and,

once compliance is achieved, the defaulter is no longer in contempt. The substantive proceedings must then be judged according to their merits. The behaviour of the party previously in contempt may influence the subsequent exercise of discretion by the court in those proceedings, but it cannot alter the legal merits of the case. Therefore, even if the DPP had been found to be in contempt of an order extending time to file an appearance, once an appearance had been filed that finding would not have impacted on the separate question of whether Mr. Cafferky's proceedings disclosed reasonable cause of action. That was the issue determined by Judge Lavan in November 2007 whose decision was upheld by the Supreme Court in October 2011.

12. The notion that the plaintiff must be regarded as being immune from court orders because a party in other proceedings whom the plaintiff asserts was in contempt of a court order nonetheless succeeded in overall terms in those proceedings is fundamentally misconceived. The Constitution has entrusted the exercise of judicial power to the courts. Citizens have a right of access to the courts because the courts provide the constitutionally sanctioned mechanism through which disputes between citizens or commercial entities and disputes between citizens and public authorities can be resolved. It is inherent in the exercise of judicial power and indeed an indicator that the power being exercised is judicial in nature, that the decision made by the courts is both binding and enforceable. The contention that all citizens are immune from court orders is incompatible with the essential nature of the judicial power itself. Contrary to the plaintiff's view, this does not give rise to a constitutional crisis, it simply means that the plaintiff's argument is devoid of any legal merit whatsoever.

13. The plaintiff's claim is based on a right to equality under Article 40.1 of the Constitution. Obviously, Article 40.1 does guarantee citizens (interpreted in certain contexts as including non-legal persons and persons who are not citizens) a right to equality before the law. The plaintiff's emphasis on this right being "untouchable" is, in my view, misplaced. As a matter of basic principle personal rights guaranteed by the Constitution are generally not absolute but may be proportionately restricted if necessary to serve another, legitimate, purpose. Even in its terms the guarantee of equality under Article 40.1 allows for differentiation, albeit by the State in its enactments, on the basis of physical and moral capacity and of social function. The reliance placed by the plaintiff on the right to equality to surmise that because another party in other proceedings

may have been in contempt of court, court orders have no application to him is completely misconceived. There is simply no connection between the right to equality before the law, the proceedings the plaintiff seeks to bring and the details of orders that may or may not have been complied with in other unrelated proceedings between other unrelated parties.

14. As will be apparent from this analysis, the core argument made by the plaintiff is one which is entirely without merit and thus cannot provide a sound legal basis upon which the plaintiff can maintain and the defendants should be required to defend legal proceedings. Although this argument is central to each of the plaintiff's three cases other issues are also raised. Therefore, I propose to look at each of the three cases before considering whether the applications made by the defendants should be allowed in all or any of them."

42. I respectfully adopt the reasoning of Simons J and Butler J in those two cases and it seems to me that it applies directly to this case. Of course, both of those cases were only concerned with the point based on the *Cafferky* proceedings. The Court was fortunate to be able to rely on the procedural history of those proceedings given in *Fennell* and *Keary*. The Court was not given any evidence in relation to the other proceedings referred to in the plaintiffs' General Indorsement of Claim. I am therefore very reluctant to conclude that what the plaintiffs assert about what occurred in those cases is wrong. However, I have no hesitation in finding that the same reasoning as is contained in *Fennell* and *Keary* applies to the other points raised in the current proceedings (see in particular paragraphs 21 and 22 of *Fennell* and paragraphs 11-14 of *Keary*). Even if it was demonstrated that the Minister for Justice and Attorney General failed to enter an appearance or to deliver a defence in single cases this could not give rise to the conclusion which the plaintiffs contend for, that the Minister or Attorney General are immune from court summonses or that the entire court system must be suspended and thus the whole premise upon which the plaintiffs' claim such immunity for themselves falls away.

43. I am also of the opinion that the pleaded case discloses no reasonable cause of action in respect of the complaints made against Egan J. The claims are, to borrow Simons J's language, preposterous. It is a judge's function to determine applications which come before them according to legal principles and the court's judgment. The judge may indeed have erred. There is an appeal from the decision. The judge performing the function of determining an application, even if they reach the wrong

decision, and even if they improperly or incorrectly describe an individual's constitutional rights, has not, on the basis of those facts, committed treason. Central to my finding in relation to this is the fact that the plaintiffs chose not to appeal against any of the orders. If the plaintiffs are of the view that Egan J was so fundamentally in error an appeal was the appropriate remedy.

44. Furthermore, it seems to me that there is no credible basis for the allegation that Egan J described the plaintiff's constitutional rights as frivolous and vexatious. The motion that Egan J was asked to determine in the exercise of her constitutional function was an application to strike out the proceedings bearing record numbers 2019/5475P and 2020/8274P on the grounds, inter alia, that they were frivolous and vexatious and she held that they were. Determining that the proceedings were frivolous and vexatious is fundamentally different from suggesting that the plaintiff's constitutional rights were frivolous and vexatious. The plaintiffs have chosen not to put in an affidavit setting out exactly what Egan J is alleged to have said but it lacks all credibility that she, when determining an application that proceedings were frivolous and vexatious, would have described constitutional rights as being frivolous and vexatious rather than addressing the application itself. That the plaintiffs' claim in this regard is misconceived and lacks credibility is supported by their own motion against the solicitor for Start. It is also alleged against her that she "*describes the Constitution and Article 2 of the Treaty of Europe as 'Frivolous and Vexatious'*". This allegation is based on the solicitor's grounding affidavit for the fifth and sixth-named defendants' motion seeking to have the proceedings struck out on the grounds that the proceedings were frivolous and vexatious. Ms. Towey states in her affidavit that the solicitor commits perjury in her grounding affidavit to this motion "*when she describes the CONSTITUTION and Article 2 of the Treaty of Europe as Frivolous and Vexatious…*". The solicitor does not do so. She in fact states that she had instructions to "*bring an application to strike out the proceedings on the basis that they were an abuse or process, frivolous, vexatious and bound to fail.*" She also says "*I say and believe that the Plaintiffs have engaged in a history of frivolous and vexatious litigation as against the Fourth and Fifth Named Defendants which amount to an abuse of process*". It is the proceedings which are asserted to be frivolous and vexatious, not the underlying rights. It seems, in the absence of the plaintiffs' putting in any credible evidence, that the allegations that Egan J described the plaintiffs' constitutional rights as '*frivolous and vexatious'* was based on the same misconception.

45. In addition, it seems to me that I must strike out these proceedings in the exercise of the court's inherent jurisdiction on the basis that the proceedings amount to a collateral attack on the earlier orders of Judge Fergus, Judge Comerford and Egan J against which no appeals were brought and the same or very similar claims were made in earlier proceedings which have been struck out (and, again, no appeal was brought against those orders).

46. It seems to me that none of these issues can be addressed by an amendment of the pleadings or by any interlocutory steps such as the raising of interrogatories or discovery.

47. In all those circumstances, I will strike out the plaintiffs' claim under Order 19 rule 28 and under the Court's inherent jurisdiction on the grounds that the plaintiffs' claim discloses no reasonable cause of action against these defendants and the proceedings are frivolous and vexatious, bound to fail and are an abuse of process.

Isaac Wunder Order

48. The principles governing applications for what have become known as "*Isaac Wunder Orders*" are also well-established and well-known. It suffices to refer to a small number of recent judgments of the Court of Appeal.

49. In *Údarás Eitlíochta na hÉireann & DAA Public Limited Company v Monks [2019]* IECA 309 Haughton J referred to the judgment of MacMenamin J in *McMahon v WJ Law & Co LLP [2007] IEHC 51* in which MacMenamin J had set out the "*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…: -*

> *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 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."

50. The concurring judgment of Collins J referred to by Haughton J was given by Collins J "*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.*" He emphasised that "*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 must be framed as narrowly as possible (consistent with achieving the order's objective.)*"

51. In *Kearney v Bank of Scotland [2020] IECA 92*, Whelan J stated:

> "132*. Isaac Wunder orders now form part of the panoply of the courts' inherent powers to regulate their own process. In light of the constitutional protection of the right of access to the courts, such orders should be deployed sparingly and only be made where a clear case has been made out that demonstrates the necessity of the making of the orders in the circumstances:*
>
> *i. Regard can be had by the court to the history of litigation between the parties or other parties connected with them in relation to common issues.*
>
> *ii. Regard can be had also to the nature of allegations advanced and in particular where scurrilous or outrageous statements are asserted including fraud against a party to litigation or their legal representatives or other professionals connected with the other party to the litigation.*
>
> *iii. The court ought to be satisfied that there are good grounds for believing that there will be further proceedings instituted by a claimant before an Isaac Wunder type order restraining the prosecution of litigation or the institution of fresh litigation is made.*
>
> *iv. 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.*
>
> *v. The balancing exercise between the competing rights of the parties is to be carried out with due regard to the constitutional rights of a litigant and in general no legitimate claim brought by a plaintiff ought to be precluded from being heard and determined in a court of competent jurisdiction save in exceptional circumstances.*
>
> *vi. It is not the function of the courts to protect a litigant from his own insatiable appetite for litigation and an Isaac Wunder type order is intended to operate preferably as an early stage compulsory filter, necessitated by the interests of the common good and the need to ensure that limited court*

resources are available to those who require same most and not dissipated and for the purposes of saving money and time for all parties and for the court.

vii. Such orders should provide a delimitation on access to the court only to the extent necessitated in the interests of the common good.

viii. Regard should be had to the fact that the right of access to the courts to determine a genuine and serious dispute about the existence of a right or interest, subject to limitations clearly defined in the jurisprudence and by statute, is constitutionally protected, was enshrined in clause 40 of Magna Carta of 1215 and is incorporated into the European Convention on Human Rights by article 6, to which the courts have regard in the administration of justice in this jurisdiction since the coming into operation of the European Convention on Human Rights Act 2003.

ix. The courts should be vigilant in regard to making such orders in circumstances where a litigant is unrepresented and may not be in a position to properly articulate his interests in maintaining access to the courts. Where possible the litigant ought to be forewarned of an intended application for an Isaac Wunder type order. In the instant case it is noteworthy that the trial judge afforded the appellant the option of giving an undertaking to refrain from taking further proceedings which he declined.

x. Any power which a court may have to prevent, restrain or delimit a party from commencing or pursuing legal proceedings must be regarded as exceptional. It appears that inferior courts do not have such inherent power to prevent a party from initiating or pursuing proceedings at any level.

xi. An Isaac Wunder order may have serious implications for the party against whom it is made. It potentially stigmatises such a litigant by branding her or him as, in effect, "vexatious" and this may present a risk of inherent bias in the event that a fresh application is made for leave to institute proceedings in respect of the subject matter of the order or to set aside a stay granted in litigation.

xii. Where a strike out order can be made or an order dismissing litigation whether as an abuse of process or pursuant to the inherent jurisdiction of the court or pursuant to the provisions of O. 19, r. 28, same is to be preferred and a

clear and compelling case must be identified as to why, in addition, an Isaac Wunder type order is necessitated by the party seeking it."

52. An Isaac Wunder Order is an interference with the constitutional right of access to the courts and, as such, is of an exceptional nature and should only be made when proportionate and necessary; the terms of any such order should themselves be proportionate; and the party against whom an order may be made must be given an opportunity to respond to the application. It will be noted that the factors set out by Whelan J and those set out in *Riordan* are different (possibly because the factors in *Riordan* were originally given as factors which tend to show that a proceeding is vexatious rather than as the basis upon which an Isaac Wunder order may be granted), though there is considerable overlap between them. They, of course, are not prescribed as simple checklists but as frameworks containing a non-exhaustive list of relevant factors within which a court may consider the proper balance between the rights of the person who may be the subject of the order, persons who may be defendants in proceedings and the interests of the common good. I am satisfied that whether one approaches the matter on the basis of Whelan J's formulation or Ó Caoimh J's formulation it is appropriate to make an Isaac Wunder order in this case. I return to the precise terms of any such order below.

53. I propose to first consider the matter by reference to the factors identified by Whelan J. I have considered all of the factors but it is not necessary to specifically address each point as there is a degree of overlap between them.

54. It seems to me that the following factors lead to the conclusion that such an order is appropriate.

55. As set out above, there is a considerable history of litigation between the parties connected with the same issues. The plaintiffs have now issued five sets of proceedings. Of course, not all of the proceedings are identical but there is a large degree of overlap and commonality between them. They all stem from the hearing before Judge Fergus on the 25th June 2019 and the order made by her on that date and they all raise claims in relation to the plaintiffs' alleged immunity from court summonses and orders. The parties are not identical in all of the proceedings but nonetheless there is a very considerable cross-over: for example, Judge Fergus has been a defendant in all but one of the proceedings and Judge Comerford has been a defendant in three of the proceedings; the Minister for Justice, Ireland and the Attorney General have been defendants in all but the defamation proceedings; Start and Lavelle Solicitors have been

defendants in three sets of the proceedings; and the Chief State Solicitor and the State Solicitor and Counsel who acted for Judge Fergus and Judge Egan are defendants in three of the proceedings.

56. The proceedings contain outrageous allegations. They include claims that judges of the Circuit Court and the High Court have committed treason without pleading any factual basis whatsoever for such allegations other than pointing to decisions or alleged statements that the judges made with which the plaintiffs take issue. Of course, relevant in this context is the fact that the plaintiffs have not appealed against any of these judgments or orders.

57. In addition to the claims against the judges, the plaintiffs make claims which can only be described as outrageous against the legal representatives of various parties. The right to and ability to avail of legal representation is a corner-stone of any system based on the rule of law. The right and ability to access expert, independent advocates ensures protection for the interests and rights of the individual in all areas of their lives and is essential to the administration of justice. Obstacles to effective advocacy are inimical to the interests of justice and to the rule of law. Counsel and Solicitor who acted for Judge Fergus in the action brought by the plaintiffs against Judge Fergus are joined as defendants simply because they provided representation to the judge in defence of an action which had been brought by the plaintiffs. There is no allegation of wrongdoing against them other than that they provided legal representation when the plaintiffs say the judge should not have been represented by them. It seems to me that not only is there is no cause of action disclosed by this but the allegation is outrageous.

58. The complaints against the legal practitioners go further than the fact that they represented Judge Fergus.

59. While I am by and large confined to examining the pleadings when exercising the jurisdiction to strike out the plaintiffs' proceedings, I am entitled to look at the various steps taken by the plaintiffs within the proceedings when considering whether an Isaac Wunder order should be made and in this instance, as noted above, the plaintiffs have issued motions within the current proceedings in which they seek reliefs based on allegations of perjury, treason and contempt of court on the part of the legal representatives. The plaintiffs did not attend to prosecute their motions but the allegations against the practitioners seem to arise from the bringing of what appear to be lawful motions by the defendants against the plaintiffs either in these proceedings or in the earlier proceedings.There is no evidence before the Court that the steps taken by

the legal representatives were anything other than proper procedural steps within court proceedings. For example, in one of the motions the plaintiffs seek an "*Order for Contempt*" against Start and Lavelle Partners for sending a "*threatening letter demanding they withdraw their Constitutional Case*". This seems to be a warning letter in advance of the defendants bringing a motion to strike out the proceedings. Irrespective of the merits of a proposed application (which will ultimately be determined by a court) the sending of a warning letter in advance of issuing such a motion is an entirely normal and appropriate step for a legal practitioner to take on behalf of their client. Indeed, the Rules of the Superior Courts require a warning letter to be sent in respect of some motions. A defendant is entitled to bring a motion, for example, to strike out proceedings as being an abuse of process. The Court will determine that motion and if it is found to have had no merit there will, in general, be consequences in costs. That is the legal system in operation and it is only if such steps become abusive or are grounded on untruths that they may be seen as wrongful in some sense. A legal practitioner who issues such a motion on instructions and, more on point in the case of the example above, who issues a warning letter in advance of issuing such a motion is acting entirely properly. Thus, the allegations against the legal representatives are outrageous.

60. The third factor identified by Whelan J is whether there are good grounds for believing that there will be further proceedings instituted by the plaintiff. Of course, this is a central consideration given the nature of an Isaac Wunder order because if there are no good grounds for believing that the plaintiff will bring further proceedings then there could be no good grounds for making an order limiting their ability to do so. It is always difficult to predict what an individual may do in the future but it seems to me that there are entirely good grounds for believing that these plaintiffs will bring further proceedings arising from the same issues. The plaintiffs have already issued five sets of proceedings. The current proceedings were issued after the other two were struck out. Most telling is the fact that the plaintiffs issued yet a further set of proceedings on the 28th March 2022 after the current motions had issued. The 2022 proceedings once again raise the same issues.

61. In relation to the discharge of any previous costs orders, I have no evidence as to whether such orders have been complied with or not and I therefore place no weight on this factor.

62. Any consideration of whether to make an Isaac Wunder order must be fundamentally focused on balancing the competing rights of the litigants. It must, of

course, be recalled that in addition to the plaintiffs' rights the defendants must also have rights. As Collins J said in *Houston v Doyle [2020] IECA 289*:

> "*64. Courts are, rightly, reluctant to make such orders and the circumstances in which it is appropriate to do so will be "very rare", given the important constitutional value attaching to the right of access to the courts. But that right is not absolute and other rights and interests are also engaged in this context, including the right of citizens "to be protected from unnecessary harassment and expense." Apart from the stress of being sued, defendants may incur significant costs in defending themselves against even unmeritorious claims. As Keane CJ observed in* Riordan v Ireland (No 4) *courts would be failing in their duty if they allowed their processes "to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation." As I observed in* Irish Aviation Authority v Monks*, in addition to the private rights of persons to be protected from vexatious claims, there is an important public interest in avoiding limited court resources being taken up in dealing with such claims. Finality of litigation is another important public interest in this context."*

63. It seems to me that a well-directed and focused Isaac Wunder order which limits the interference with the rights of the plaintiffs to the minimum extent would ensure a proper balance between the rights of the plaintiffs and the defendants. Significant in this consideration is, of course, the fact that an Isaac Wunder order does not necessarily prevent the plaintiffs from litigating. As Butler J puts it in *Scanlan v Gilligan & Ors*: "*the requirement to obtain the leave of the High Court in advance of proceedings being instituted acts as a filter to ensure that unmeritorious proceedings cannot be instituted by a litigant against parties whom or concerning subject matter about which that litigant has already engaged in litigation, usually unsuccessfully…. The making of such an order ensures that the opposing party is not subjected to an endless stream of litigation from the same litigant unless the court has determined that there is some objective merit to the proposed proceedings…*".

64. As touched upon in the previous paragraph, any order must only interfere with the plaintiffs' right of access to the courts, or as Whelan J puts it "*should provide a delimitation on access to the court*", to the minimum extent necessary for the interests of the common good. This, of course, is required by the doctrine of proportionality. I address the terms of the Isaac Wunder order below.

65. Whelan J at point (ix) warns of the necessity to ensure that a plaintiff is given sufficient forewarning of an intended application for an Isaac Wunder order. This point was also made by Collins J in *Houston v Doyle* where he stated:

> "*66. Before an Isaac Wunder order is made, the subject of the intended order must be given an opportunity to be heard. In Sfar, the appellant was on notice of the application and had made submissions. Subsequently, however, the High Court judge had, without affording any further hearing to the appellant, decided to make an order in terms which, in this Court's view, were materially wider than the form of order sought by the defendants. This Court characterised the making of such an order in such circumstances as "a fundamental denial of constitutional justice". The Court held that the judge was wrong to widen the scope of the order so without hearing both parties and, if necessary, listing the matter for further hearing for that purpose.*
>
> *67. It follows from Sfar that, in principle, it will be a breach of constitutional justice to make an Isaac Wunder order without affording the affected person a right to be heard in relation to the proposed order."*

66. I am fully satisfied that the plaintiffs have been forewarned of the defendants' intention to apply for Isaac Wunder orders. The Chief State Solicitor's Office wrote to the plaintiffs by letter of the 28th January 2022 (in advance of issuing the motion). The letter first referred to the previous sets of proceedings, then made the point that they all stemmed from the Order for Possession made by Judge Fergus on the 25th June 2019, that the current proceedings are another attempt to re-litigate matters forming part of those Possession proceedings, the Defamation proceedings, the 2019 and 2020 High Court proceedings and constitute a collateral attack on the previous orders made and then went on to say:

> "*In light of all of the foregoing it is apparent that the within proceedings are also frivolous, vexatious and an abuse of process. Accordingly, we call upon you to discontinue the proceedings within a period of 14 days from the date hereof. Should you fail to serve a Notice of Discontinuance within 14 days the State Defendants will issue a Notice of Motion without further notice to you seeking to have the within proceedings struck out.*
>
> *Please note further that on this occasion the above-mentioned defendants will also seek an additional relief against you from the Court, which is known as an*

Isaac Wunder Order. The effect of an Isaac Wunder Order, if granted in the terms which will be sought by the State Defendants should you fail to serve a Notice of Discontinuance within 14 days of the date hereof, would be that you be restrained from instituting any further proceedings as against the state (to include Ireland and the Attorney General, any ministry or department of government, and a member of the judiciary, the Chief State Solicitor and Garda Siochána), the Courts Service, and any lawyer who has acted on the instructions of any of the aforementioned parties against you in any and all of the Circuit Court Possession Proceedings, the Circuit Court Defamation Proceedings, 2019 Proceedings, 2020 Proceedings and the within proceedings without first obtaining the leave of the High Court, and with such application for leave being on notice to the intended defendants or respondents."

67. The solicitors for the fifth and sixth-named defendants wrote to the plaintiffs by letters dated the 12th January 2022 stating, inter alia:

"*We are surprised that you have issued further court proceedings against this firm and our client, Start Mortgages DAC, in nearly identical terms as the proceedings titled Patrick Towey and Magdalen Towey v Ireland and the Attorney General & Ors Record No 2019/5475P which were struck out by the court on 12 November 2021. We specifically noted that, once again, rather than taking any steps to appeal the decision of the Court, you have instituted fresh proceedings.*

It is clear from the new proceedings, as was the case in the previous proceedings, that you have no cause of action against Lavelle Partners or Start Mortgages DAC.

Please confirm within seven days that you will file a notice of discontinuance as against Lavelle Partners and Start Mortgages DAC.

Should we fail to hear from you within seven days we will be left with no alternative but to enter an appearance to the proceedings and bring a motion to have the Plaintiffs' claims as against Lavelle Partners and Start Mortgages DAC dismissed, on the basis, inter alia, that the proceedings are an abuse of process and frivolous, vexatious and/or bound to fail. We also hold instructions to apply for an Isaac Wunder order, requiring you to obtain the leave of the High Court to bring any further proceedings in respect of the matters complained. In pursuance of the foregoing orders we will also seek an order for the costs of such applications, against you."

68. Letters in similar terms were also sent on the 25th January 2022.

69. I am satisfied that the plaintiffs are fully aware of the defendants' applications for Isaac Wunder orders and have had ample opportunity to address the applications.

70. I will not be making an order in the terms sought by the fifth and sixth-named defendants, essentially because those terms are too broad and go further than is appropriate or warranted. However, I do propose to make an order in narrower terms than those sought, essentially in the same terms as the order sought by the State defendants. The fifth and sixth-named defendants accepted at the hearing that the order sought by them was too broad but the plaintiffs are not, of course, due to their decision not to attend at the hearing, aware of same. However, it seems to me that where the proposed order is narrower in its terms and is essentially the same as the order sought by the other defendants, there is no prejudice to the plaintiffs or absence of fair procedures. However, in order to ensure that the plaintiffs have every opportunity to make such submissions as they wish about the terms of the order (though not about the making of an order) I will be directing the fifth and sixth-named defendants to write to the plaintiffs informing them that I propose to make an order in specified terms and providing them with an opportunity to make submissions in respect of same.

71. Whelan J in her final point refers to the possibility of the court striking out future proceedings rather than making an Isaac Wunder order. That, of course, is an option but it seems to me that given the history of the interactions and litigation between the parties, it would not be an appropriate balance of the respective rights for the defendants to be forced to have to apply to strike out future proceedings. I should also say that the Isaac Wunder order which I am making will not apply to the 2022 proceedings as they have already been issued.

72. Turning to the formulation given by Ó Caoimh J in *Riordan*.

73. In circumstances where three sets of proceedings against either the same parties or many of the same parties have already been found to disclose no reasonable cause of action or to be frivolous and vexatious and where I have found that these current proceedings are also frivolous and vexatious it seems to me that I can only conclude that there has been "*habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings*" and that they have been brought "*without reasonable ground*".

74. As is clear from the "*Background*" section above, these proceedings, and more importantly, the 2022 proceedings, bring up issues which have already been determined by a court of competent jurisdiction in that the proceedings in which they were raised have been held to be frivolous and vexatious and as disclosing no reasonable cause of action. Similarly, the proceedings involve the "*rolling forward"* of issues in a subsequent action and involve actions brought against the lawyers who have acted for or against the defendants in the earlier proceedings.

75. It seems to me that I can not have any regard to point 4 or 6 in *Riordan*. I have no evidence that the actions have been initiated for an improper purpose including the oppression of the other parties by multifarious proceedings and therefore have not had regard to this factor. Nor have I any evidence as to the situation in relation to the costs of earlier proceedings so I have not had regard to point 6.

76. It seems to me that in all of those circumstances, having had regard to the exceptional nature of the relief and the care with which the decision whether to grant that relief must be approached for the reasons explained above, it is appropriate to make an order in the terms sought by the State defendants with one amendment, i.e. that the plaintiffs be restrained from instituting proceedings against any of the defendants in the proceedings bearing record numbers 2019/00090, 2019/5475P, 2020/8274P, 2022/1194P or these proceedings (2021/6436P) in addition to some related parties set out in the draft order immediately below, other than Start and Lavelle Solicitors (who will be dealt with by separate order). It seems to me that *at this stage*, having regard to the necessity for the order to be proportionate, that is the appropriate form of the order. It is also consistent with the warning letter sent on behalf of the State defendants on the 28th January 2022 (I will, therefore make an order in the following terms:

> "*An Order that the Plaintiffs be restrained from instituting any further proceedings against any of Ireland, the Attorney General, the Minister for Justice, the Chief State Solicitor or any solicitor employed in the Office of the Chief State Solicitor, Rachel Meagher, Kieran Madigan or any State Solicitor, the Courts Service or any person employed by the Courts Service, Francis Comerford, Karen Fergus, the Commissioner of An Garda Síochána, Emily Egan, or Gráinne O'Loghlen directly or indirectly concerning (i) the Order of Her Honour Judge Karen Fergus made on the 25th day of June 2019 in proceedings entitled Start Mortgages DAC v Patrick Towey and Magdalen Towey and bearing Roscommon Circuit Court record number 2018/00057 (the "Order of Judge Fergus"), or (ii) any legal proceedings issued by the Plaintiffs in which reference has been made to the Order of Judge Fergus,*

without the prior leave of the President of the High Court or some other Judge nominated by her, and with such application for leave being on notice to the intended defendants or respondents."

77. As discussed above, the order sought by the fifth and sixth-named defendants is too broad. Indeed, that much was effectively conceded on behalf of those defendants at the hearing. It does seem to me that the grounds for making an order requiring the plaintiffs to obtain the leave of the court to institute further proceedings are made out provided that order is properly limited and focused. I therefore propose to make an order in the following terms:

> "*An Order that the Plaintiffs be restrained from instituting any further proceedings against the fifth and sixth named defendants, Start Mortgages DAC and Lavelle Lavelle Partners LLP directly or indirectly concerning (i) the Order of Her Honour Judge Karen Fergus made on the 25th day of June 2019 in proceedings entitled Start Mortgages DAC v Patrick Towey and Magdalen Towey and bearing Roscommon Circuit Court record number 2018/00057 (the "Order of Judge Fergus"), or (ii) any legal proceedings issued by the Plaintiffs in which reference has been made to the Order of Judge Fergus, without the prior leave of the President of the High Court or some other Judge nominated by her, and with such application for leave being on notice to the intended defendants or respondents."*

78. I am satisfied, as discussed above, that I could safely and properly make that order without hearing from the plaintiffs. However, I will provide an opportunity for them to make submissions to the Court in relation to the proposed terms of the Order before I make a final decision to do so. I will direct the solicitors for the fifth and sixth-named defendants to write to each of the plaintiffs within 3 days of delivery of this judgment to inform them of the Court's proposal to make an order in those terms subject to any submissions they may wish to make in relation to those terms and I will list the matter for mention before me seven days after delivery of the judgment for the parties to indicate whether any such submissions will be made and I will then list it for hearing, if necessary.