THE HIGH COURT

[2023] IEHC 205

Record No. 2022/1456 P

BETWEEN

SHARON BROWNE, DAVID EGAN AND EMMANUAL LAVERY

PLAINTIFFS

AND

AN TAOISEACH, THE MINISTER FOR HEALTH AND THE HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 25th day of April, 2023

SUMMARY

1. In these proceedings, the plaintiffs make, what the defendants have described as, '*scandalous'* and *'alarmist'* claims that the HSE has been guilty of the mass killing of children in Ireland by administering the Covid-19 vaccine. The plaintiffs claim that the Covid-19 vaccine is a *'bio-weapon'* and they compare the defendants' actions in administering the Covid-19 vaccine to the actions of the Nazis during World War II. Based on these extraordinary claims, the plaintiffs issued proceedings on 11th April, 2022 seeking a court order halting the Covid-19 vaccine programme throughout Ireland for children aged 5 - 11.

2. In addition to wanting to halt the vaccine programme, the plaintiffs are also seeking other unprecedented court orders, *i.e.* the mass disinterment of the bodies of all vaccinated people under 80 who died suddenly in the past 2½ years, so that they can be subject to a specific

type of autopsy demanded by the plaintiffs. They are also seeking orders for a full public Commission of Inquiry to be set up by the State into the use of early treatments for Covid-19.

3. As well as the claims of mass killing, the plaintiffs make other breath-taking claims in *circa* 5,000 pages of affidavits and exhibits. They claim that the Covid-19 vaccine inserts nano-chips into recipients of the vaccine and that the use of the Covid-19 vaccine *'bio-weapon'* is part of a plan by Bill Gates to depopulate the world. The alleged 'evidence' for all of the plaintiffs' claims is a combination of hearsay, speculation, commentary, questions, internet sites, blogs, *YouTube* videos, *etc*.

4. While it is a fundamental right of every individual to have their rights vindicated in court, a legitimate issue for consideration is the extent to which taxpayers' money (where the other party to the litigation is a State agency) and scarce court resources (to the detriment of other litigants waiting for their cases to be heard) should be expended in dealing with scandalous allegations, which amount to an abuse of court process. This is clear from the Supreme Court decision in *Tracey t/a Engineering Design & Management v. Burton* [2016] IESC 16 at para. 45, where it was held that the use of court time is not solely a matter for litigants, as there is a strong public interest in how court time is used. Thus, while, subject to defamation laws, the plaintiffs are perfectly free to express, on the internet and elsewhere, their views on conspiracies regarding the Covid-19 vaccine, it is a separate matter whether they should be facilitated in making *those claims in court*.

5. In analysing this issue, against the backdrop of the important right of every citizen to have access to the courts, this judgment considers one of the few tools available to the courts to discourage unmeritorious litigation and the abuse of court process, *i.e. costs orders.* Discouraging such litigation is a matter of considerable significance as unmeritorious and scandalous litigation is not a cost-free exercise. Firstly, it is at a cost to the taxpayer, where a State agency has to deal with such claims, particularly where taxpayers' funds could be spent

on more worthwhile causes than on legal costs defending such litigation. This is a point of considerable practical relevance, since the State is the most frequent litigant before the courts. Secondly, such litigation is also a waste of court resources (which are also funded by the taxpayer).

6. These issues came before this Court by means of a preliminary application. This is because the plaintiffs raised, at an early stage in these proceedings, the question of who was going to pay the defendants' legal costs *if* the defendants were successful in defeating the plaintiffs' claim. Would the plaintiffs be liable for the defendants' costs, in accordance with the normal rule that 'costs follow the event' or would the State defendants (*i.e.* the taxpayer) have to pay their own costs even if the defendants won? This preliminary issue was raised by the plaintiffs because, after they issued the proceedings, but before they filed a Statement of Claim, they issued a Notice of Motion dated 14th November, 2022 seeking a '*protective costs order'*. The plaintiffs want to be 'protected' from having a costs order made against them in favour of the defendants, *if* the plaintiffs lose their case. In plain English therefore, the plaintiffs want an order from this Court that they should *be paid by the State to take an unmeritorious claim against the State*. This is because an applicant for a protective costs order is only concerned with the costs position where that applicant *loses* his/her case.

7. For the reasons set out below (including this Court's finding that the plaintiffs' claim has no prospect of success), this Court rejects the plaintiffs' application for a protective costs order. Accordingly, *if* the plaintiffs continue with this litigation, they will *not* do so 'for free' but, like practically every other litigant, they will be subject to the principle that the 'loser pays' the costs of the winning party.

Effectively discouraging scandalous litigation and the abuse of court process?

8. However, more significant perhaps, in light of the scandalous nature of the allegations being made in these proceedings, is the issue of who is going to pay for the very considerable

taxpayer funds (probably in the tens of thousands of euro) which have already *been expended to date* in dealing with this (now unsuccessful) application for a protective costs order. There is the more significant issue of the court resources and taxpayers' funds which will be *expended in the future* (possibly in the hundreds of thousands of euro) *if* the plaintiffs are not deterred from continuing with a claim that has no prospect of success and which contains scandalous allegations amounting to an abuse of court process.

9. In this regard, the Supreme Court in *Riordan v. Government of Ireland* [2009] 3 I.R. 745 at p. 765 made clear that it must be '*borne in mind'* by judges that the expense of *'groundless litigation'* (and the plaintiffs' litigation in this case is certainly groundless) *'will often fall on the taxpayer'*. The Supreme Court in *Farrell v. The Governor and Company of Bank of Ireland* [2012] IESC 42 emphasised the *'importance of costs orders in [..] discouraging parties from bringing unnecessary and unmeritorious applications'* and in ensuring that '*the court process is not abused*'**.** In this context, Simons J. in *Ryanair v An Taoiseach* [2020] IEHC 673 at para. 15 held that a court, in exercising its discretion in respect of costs, must ensure *'that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime'*. While Simons J. was dealing with a case which was merely unmeritorious (in the sense of having not succeeded on the merits), in this instance, we are dealing with allegations which could hardly be more scandalous (with baseless allegations against the defendants of mass killing comparable to Nazi Germany) and thus a clear abuse of court process. Accordingly, it is even more important in such cases that the costs regime is not *'overly indulgent'* and does not *'inadvertently encourage'* this or indeed any other similar litigation in the Irish courts.

10. For these reasons, applying the 'loser pays principle', this Courts concludes that it cannot simply make a costs order in the usual way against the plaintiffs and leave matters at that. This is because such a costs order *might not be calculated and so not paid for several*

years, or at all, by the plaintiffs. Meanwhile, the plaintiffs might continue to occupy court time and waste taxpayers' funds in pursuing claims which are scandalous and baseless, despite the Supreme Court's insistence in *Farrell* that costs orders *must be used to discourage such claims*.

11. Accordingly, this judgment considers how best to use, what the Supreme Court has described as, the '*armoury of the courts'* (costs orders), to ensure that unmeritorious litigation and abuse of process is *effectively* discouraged. In particular, consideration is given as to how best to tailor a costs order so as to ensure that the plaintiffs have a *sufficient deterrent* from pursuing a case, which has no prospect of success and amounts to an abuse of process. This is because, as noted by the UK Court of Appeal in in *R. (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 W.L.R. 2600 at para. 78, costs orders need to amount to an '*appropriate financial disincentive'*, which in this instance means disincentivising the plaintiffs from wasting further taxpayers' funds and court resources in pursuing this scandalous litigation.

12. In this regard, it seems clear that costs orders will have a greater deterrent effect if they are *calculated, enforced and paid at the earliest opportunity,* rather than being put on the 'never-never' or dealt with many years into the future. Accordingly, consideration is given, in particular, to whether to *'crystallise the sums due'* by this Court measuring legal costs at the earliest opportunity, rather than simply ordering costs, putting a stay on that order and then having them adjudicated by the Legal Costs Adjudicator some years into the future. By determining the amount in euro due from the plaintiffs, the State defendants should be in a position in the very short term *'to take the appropriate steps to enforce'* those sums (in line with the approach taken in *The Board of Management of Wilson's Hospital School v. Burke* [2023] IEHC 144 at para. 25). Taking such an approach should make clear that while the plaintiffs have, of course, a right of access to the courts, it is not cost-free. In addition, this cost is not a theoretical one, or on the 'never-never, but instead it is one which will have to be paid

by them in the very short-term. This approach also reduces the risk of the administration of justice being brought into disrepute by the court room being used (at taxpayers' expense) as a cheap way for litigants to air scandalous claims against civil/public servants and achieve publicity for conspiracy theories or other causes, as if the courts were some *'sort of debating society'* (*per* the Supreme Court judgment in *Riordan* at p. 764).

BACKGROUND

13. The first plaintiff, ("Ms. Browne") of Garryowen, County Limerick describes herself as a mother, grandmother, homeowner and seamstress. The second plaintiff, ("Mr. Egan") of Galway City describes himself as a disability rights worker and a data analyst. The third plaintiff ("Mr. Lavery") of Rear Cross, County Tipperary describes himself as a special needs assistant in a primary school in Limerick.

14. Although the plaintiffs seek to halt the vaccine programme for children aged 5 - 11, Mr. Egan makes no reference in the pleadings to having children. Ms. Browne states that she is a grandmother, but she does not claim to have children within the 5 - 11 age group. After the proceedings were issued, Mr. Lavery was added to the proceedings and he is a father of three children, aged 11, 7 and 4.

15. Mr. Lavery says he made the decision not to vaccinate his children as he has read material about the Covid-19 vaccine and as a result he believes it poses *'significant risks of death, injury, serious illness or disability to them'*. He points out that he did not get this information from the Irish government, the HSE, the CMO, NPHET, RTÉ or the mainstream press. His concern is that his wife wants to vaccinate their children and '*put their lives in danger'*. However, in this regard, it is important to note that Dr. Lucy Jessop has provided sworn evidence on behalf of the HSE that the Covid-19 vaccine '*has only ever been offered on a purely voluntary basis'*, and that:

> "Where either parent notifies the HSE that he or she is refusing consent for their child to be vaccinated, HSE policy is not to administer the vaccine even if the other parent is consenting".

16. It is important to note that in these proceedings, the plaintiffs do not dispute that the Covid-19 vaccine is provided purely on a voluntary basis. They also do not dispute that the vaccine is not provided to a child between 5 and 11, where one parent does not consent. In their substantive proceedings, they nonetheless wish to halt the vaccine programme for all children in the State. They claim that parents have not given '*informed'* consent to the vaccine since they claim, without providing any admissible evidence, that the information on the vaccine provided by the European Medicines Agency (the EMA), the National Immunisation Advisory Committee (NIAC), the World Health Organisation (the WHO), the HSE and other international and national expert bodies which permit and/or recommend the vaccine, is untrue and that the expert analysis contained therein is wrong (see for example the Affidavits of David Egan dated 13th September, 2022 at p. 11 and dated 12th December, 2022 at p. 49).

<u>The usual rule of loser pays the costs is sought to be disapplied</u>

17. In this preliminary application for a protective costs order, the plaintiffs claim that their litigation regarding the vaccine should not be subject to the default rule regarding legal costs, which is contained in s. 169(1) of the Legal Service Regulation Act, 2015 (the "2015 Act"), which is headed '*costs to follow event'*. This default rule means that at the conclusion of the proceedings, and once it is clear who has won (*i.e.* the party who has been '*entirely successful'*), then the losing party pays the winning party all its legal costs (unless the court decides otherwise, e.g. because of the manner in which the litigation was conducted).

18. Despite this being the default position, the plaintiffs in their Notice of Motion seek a:

> "Protective costs order as this case is being take in the Public Interest and for the purpose of serving the Common Good. And that such an order will mean that the Plaintiff and Defendant will not be liable for paying the legal costs of the opposing side."

Despite the wording of this motion, it is not, in reality, an application that both parties go 'back to back' regarding costs (i.e. that both would be liable for their own legal costs, regardless of the result). This is because, although the defendants are represented and so are incurring legal costs, the plaintiffs are not represented by lawyers and so are not incurring any legal costs in this regard. For this reason, the order being sought is, in effect, an order that the plaintiffs not be liable for the defendants' costs if the plaintiffs lose the case.

A protective costs order in this instance means the taxpayer funds the plaintiffs' case

19. Since all the defendants are State agencies, it is important to note that the plaintiffs are, in effect, seeking an order from this Court that the taxpayer should subsidise them in suing the State. To put it another way, the plaintiffs want to sue the State in the High Court without being subject to the 'loser pays' principle.

A protective costs order means no incentive for a litigant to be efficient

20. If the order was to be granted it would mean that the usual 'incentive', for a litigant to *only* pursue claims that have a reasonable prospect of success, would be absent – since if she takes a case with no prospect of success, she is likely to end up having to pay the winning litigant's costs.

21. Contrast this with the situation where a protective costs order is made *before* the case concludes. In such a situation, the incentive to be efficient with court time is missing. This is because a litigant knows in advance that she will *not* have to pay the other party's costs, if she loses, regardless of how unfocused the case she makes, regardless of how unmeritorious the

claims or orders she seeks and regardless of the time she wastes on pre-trial applications and at the substantive hearing. In such a situation, the threat of an award of costs does not operate as an incentive to be efficient with court time, or as observed by the UK Court of Appeal (*R. (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 W.L.R. 2600 at para. 78) as an *'appropriate financial disincentive'* to being inefficient with court time. There Lord Phillips stated, in, a case concerning an application for a protective costs order, that an award of costs against an unsuccessful applicant is:

> "*an* ***appropriate financial disincentive*** *for those who believe that they can apply for a [protective costs order] as a matter of course*". (Emphasis added)

<u>The amount of the 'subvention' sought by the plaintiffs from the taxpayer</u>

22. It is important when considering court applications such as these to consider in real, or in 'euro' terms, the effect of the order being sought, *i.e.* the amount of money that the plaintiffs wish the taxpayer to pay on their behalf. In this regard, it is relevant to note that the application for the protective costs order was heard on the 10th March, 2023 and it has already taken a full day in the High Court. This is, in part, because the plaintiffs have produced affidavits and exhibits running to *circa*. 5,000 pages, which had to be replied to by the defendants (with *circa* 1,500 pages). As noted below, this is already four times the amount of time that the UK Court of Appeal has stated should be taken to deal with such applications.

<u>The additional material to be relied upon by the plaintiffs</u>

23. In the context of the amount of future legal costs which the plaintiffs want the taxpayer to subsidise, the plaintiffs have made it clear that their 'evidence' will expand beyond the 5,000 pages upon which they have relied to date. This is because, in their oral submissions to this

Court, the plaintiffs referred to further evidence being provided at a later date '*as evidence continues to come in regarding the large numbers of vaccinated people injured, disabled or dying'*. Indeed, even after the completion of this hearing, the plaintiffs sent 70 pages of further material to the Court, even though the time for further submissions and for evidence was over (and they also did so, without indicating whether this material was provided to the defendants).

The proceedings have been taken in the most expensive court of first instance

24. As regards the level of costs which are likely to be incurred in hearing the substantive claim, it is clear, from the length of time for the hearing of this preliminary application and the amount of material, which is set to increase, that this case could take several days in the High Court, which is the most expensive of the three courts of first instance. Costs for a hearing in the High Court are regularly tens/hundreds of thousands of euro in contrast to costs of hundreds of euro in the District Court or thousands of euro in the Circuit Court.

25. As the plaintiffs have chosen to ventilate their grievances in the High Court, they want, in effect, an order that the taxpayer should spend tens/hundreds of thousands of euro to enable them to bring an unmeritorious claim.

The number of defendants sued

26. Finally, in the context of the actual financial cost to the taxpayer of the orders being sought, it is to be noted that because the plaintiffs have chosen to sue the Minister for Health and the Taoiseach, as well as the HSE, this means that there are two sets of solicitors and barristers defending these proceedings, at the expense of the taxpayer. Accordingly, the costs subvention which is being sought by the plaintiffs from the taxpayer is much greater than if there was just one defendant and one legal team.

The extraordinary breadth of the orders sought and claims made against the State

27. Before considering the law applicable to the grant of protective costs orders, it is necessary for this Court to consider in detail the nature of the claims in this case, which the plaintiffs say are of such general public importance as to entitle them to a *carte blanche* (as regards legal costs) from the taxpayer (worth tens/hundreds of thousands of euro) to pursue these proceedings against the State. In doing so, this Court has carefully reviewed the grounds relied upon by the plaintiffs for the grant of a protective costs order in both their oral submissions and in the *circa* 5,000 pages of written material. In this regard, in reliance on *Flynn v. Breccia* [2017] IECA 74 at para. 32 and *Launceston Property Finance DAC v. Wright* [2020] IECA 146 at para. 120, this Court does not propose to set out in this judgment each and every point raised by the plaintiffs during the case, but all of those points have been carefully considered by this Court.

28. In their Plenary Summons, dated 11th April, 2022, the plaintiffs seek an injunction to halt:

> "a High Court injunction restraining the Defendants, their servants and/or agents and/or employees, from administering covid19 vaccines and boosters to children aged from 5 to 11 years old until such time as full information abouts risks, deaths, injuries, illnesses and disabilities caused by these vaccines to children is given by the government, the HSE, NPHET, RTE and the Irish press and media to parents and guardians so that the Full and Valid Informed Consent of parents and guardians can be given by them […]".

29. In their Notice of Motion, the plaintiffs are seeking an interlocutory injunction in similar terms to that contained in the Plenary Summons as well as a protective costs order. The

hearing of the interlocutory injunction was adjourned until after this Court dealt with the protective costs order.

30. The breadth of the injunction being sought by the plaintiffs is clear from the fact that as well as halting the vaccine programme, it requires persons who are not even parties to the proceedings (such as the *'Irish press and media'*, whatever legal entities this means) to give information to parents and guardians, before the vaccination programme can be resumed.

Vaccine programme not to be available even if both parents consent

31. The scale of the injunction is also clear, when one considers that the plaintiffs aim to prevent the State from administering Covid-19 vaccines to all children in the State aged from 5 to 11 years old, without any limitation. Thus, they wish to prevent the vaccine being administered to children, *even* where *both* parents of those children wish to have the vaccine administered.

Vaccine not to be available even for children with underlying conditions

32. Similarly, the terms of the injunction are such as to prevent the vaccine being administered to a child, whose parents want it and where it is strongly recommended because of the child's underlying condition. In this regard, it is relevant to note from the affidavit dated 5th December, 2022 of Louise Hendrick, Deputy Chief Medical Officer at para. 45, that the National Immunisation Advisory Committee (NIAC) has:

> *"strongly recommended Covid-19 vaccination for children aged 5-11 years (i) with underlying conditions (ii) living with a younger child with complex medical needs (iii) living with an immunocompromised adult.*"

Plaintiffs interposing themselves between vaccines and families throughout the country

33. The reach of the injunction being sought is also clear when one considers that these proceedings impact upon *every single family in the country with children in the 5 - 11 age*

range. Yet, the interests of those families are not represented in these proceedings. In this regard, it is curious to note that the plaintiffs place reliance on the rights of the *'family'* in Article 41 of the Constitution (see para. 2 of the affidavit of Mr. Egan of the 21st November, 2022) for the orders that they seek. This is ironic because Article 41 is concerned with the rights of parents and *their own* children as part of the one family, yet the plaintiffs are, in effect, seeking to interpose themselves, as strangers to those families, between every one of those families and the Covid-19 vaccine programme. Article 41 is not concerned with the rights and interests of children in Ireland generally, *as determined* by unrelated third parties (such as the plaintiffs).

34. Indeed, it is difficult to think of any instance where the Courts have ever granted an order, such as the one sought, where private citizens have imposed their own private views into the lives of many thousands of families across the country, i.e. by preventing a *voluntary* medical procedure chosen by *two* parents for their own child. For this reason, it seems most unlikely that such an injunction would ever be granted by an Irish court. This is because it would prevent parents, who are not parties to the litigation, from having access to the vaccine for their children, even for those children who been advised for medical vulnerability reasons to take the vaccine.

The injunction sought appears to be of indefinite duration/permanent

35. Although no Statement of Claim has been filed, the extent and nature of the reliefs which are being sought is clear from the affidavits filed by the plaintiffs. For example, the affidavits make clear that the injunction is effectively an indefinite or permanent injunction. This is because in Mr. Egan's affidavit of 27th January, 2023 at p. 146, he states:

> "The **HSE appears to be involved in a fraud**, but we are hoping they will clear up this matter and clarify the issue for the High Court and the general public, and provide

evidence of the existence of the sars-cov2 also known as 'covid19' and its full genome and a scientific trial to prove transmission of the virus between humans, which will rectify this matter for the court and the general public." (Emphasis added)

36. Then Mr. Egan goes on, in his affidavit of 12th December, 2022, to outline how he wants the Court to address the *'fraud'* which has been committed on the Irish people by the defendants. In this regard, he states that he wants the injunction, which the plaintiffs are seeking, to last:

> "**until such time as this fraud and all the other crimes and wrongdoing associated with this fraud are fully exposed** to the general public and fully prosecuted in the Irish courts, and full and valid informed consent for vaccines becomes possible throughout Ireland." (Emphasis added) (at p. 103 of 642)

The injunction sought appears to be mandatory

37. The mandatory nature of the injunction being sought is also clear from other sworn statements made by Mr. Egan. This is because in his affidavit of 27th January, 2023, he states that he has '*created a proposal for an informed consent national programme which would be effective in Ireland'*. Mr. Egan appears to be suggesting that the defendants should be required to comply with this '*Informed Consent National Program'* that he has created and set out as an exhibit (at p. 182 of his affidavit).

Court order sought for a Commission of Inquiry regarding use of vaccine

38. The extraordinary breadth of these proceedings is also clear when one considers that the plaintiffs are not simply seeking an injunction halting the Covid-19 vaccination programme for all children aged 5 - 11 in Ireland, but they are also seeking other unprecedented mandatory orders. For example, it seems clear that they are seeking an order for the establishment of a Commission of Inquiry as part of these proceedings. This is because at p. 143 of Mr. Egan's

affidavit dated 27th January, 2023 he states that five discovery orders and two *'performance'* orders will be sought. One of these performance orders is:

> "**for a full public commission of inquiry into the use of early treatments for covid 19** which was highly successful in the USA and saved many lives there but was blocked here in Ireland. And that medical doctors such as Dr. Pierre Kory and many other doctors are given an opportunity to testify as to the effectiveness of these early treatments for covid19 and that the Irish public is fully informed about this via the commission of inquiry and the press and media, and that the scientific and medical truth, facts and evidence are fully revealed to the general public." (Emphasis added)

This would be an extraordinary and unprecedented order for a court to grant, since it *prima facie* breaches the separation of powers for a court, rather than the Oireachtas, to establish a commission of investigation or inquiry (see for example *McStay v. The Minister for Health and Children* [2006] IEHC 238 and *Fox v. Minister for Justice and Equality* [2017] IEHC 817).

Claims of censorship of the media

39. It is also relevant to note that the terms of the foregoing '*performance'* order being sought by the plaintiffs require the *'press and media'* to be subject to that order. In this regard, at p. 53 of Mr. Egan's affidavit dated 27th January, 2023, he makes claims about the censorship of the Irish press and media in the following terms:

> "The London Times reported about the big rise in excess mortality in Ireland. The article was published on January 15th 2023. The title of the article was 'Ireland's excess deaths rate rivals worst of Covid pandemic' […] The mainstream Irish press and media have refused to publish articles about this and there is evidence of continuing illegal censorship of the Irish press and media." (Emphasis in original)

40. However, it should hardly need to be stated that just because an article happens to appear in one paper and not in another paper, this is not evidence of censorship by the latter paper. Otherwise, every single paper in the country would be guilty of censorship. Unsubstantiated claims of censorship such as this have no place in court proceedings.

Mass disinterment of certain vaccinated persons buried in last 2 ½ years

41. The plaintiffs are also seeking the mass disinterment of every single vaccinated person under 80 who died suddenly in the last two and a half years. This is clear because Mr. Egan claims, at p. 143 of his affidavit of 27th January 2023, that he will be seeking the following '*performance'* order:

> "to compel **all Coroners and the State Pathologists to carry out autopsies using the German pathology findings** mentioned here and in previous affidavits of all dead **covid19 vaccinated people under 80 years old who died suddenly** in 2021 and 2022 and into 2023." (Emphasis added)

42. This effectively amounts to a mandatory order requiring a mass disinterment of graves throughout every county in Ireland, without the consent of, or even any input from, their next of kin. This order would require all coroners and State pathologists to carry out autopsies using what the plaintiffs describe as German pathology findings. Of all the extraordinary and unprecedented orders sought in these proceedings, this is perhaps the most extraordinary. For this reason, it is important to now refer to the claims and 'evidence' which allegedly support the making of this and the other extraordinary orders being sought by the plaintiffs.

The defendants are accused of involvement in mass killing

43. In the *circa* 5,000 pages of affidavits and exhibits filed by the plaintiffs, there are numerous allegations made against, not just the defendants, but also persons, who are not parties to the proceedings. Of particular concern, from the perspective of abuse of court

process, is the fact that the plaintiffs rely on hearsay evidence, speculation, websites, blogs, *YouTube* videos, *etc*. to make very serious allegations against the defendants, e.g. claims of '*fraud'* and also claims that they are '*experimenting' on Irish children'* (*per* Mr. Egan's affidavit dated 13th September, 2022 at p. 7). In this regard, an extraordinary comparison is made by the plaintiffs between the current vaccination programme and experimentation on children in Nazi Germany. This is because at p. 24 of their written submissions headed 'Book of Authorities' it is stated:

> "The Doctors Trial which was part of the Nuremberg trials of 1946 to 1947 serves here as a legal precedent for our court case. […] This case set an important legal precedent internationally around informed consent and bodily integrity which is relevant today. **The hundreds of thousands of people killed by the experimental covid19 vaccines** and the millions of people suffering illnesses or disabilities from these vaccines today **present a situation quite similar to the one which led to the creation of the Doctors trial in Nuremberg from 1946 to 1947**." (Emphasis added)

These are very serious allegations against the reputations and character of the people involved in the Covid-19 vaccine programme, which are made without any credible evidence, and should not be made in an Irish court, and as such clearly amount to an abuse of process.

44. However, most serious of all is the claim in the affidavit of Ms. Browne, dated 21st November, 2022 at p. 2, that the HSE is *'colluding the crimes of murder and/ or manslaughter',* in the context of the Covid-19 vaccination programme. Mr. Egan also makes similar claims, since at p. 39 of his affidavit of 27th January, 2023, he refers to various websites in support of his claim that vaccinated children are 300 times more likely to die of Covid-19 than unvaccinated children. On this basis, he says that there is

"**mass killing of children**. This is illegal, unlawful, unethical and unconstitutional both in Britain and in Ireland. Parents and guardians should have been told about this but were not told. This is not full and valid informed consent. This is the illegally gaining of informed consent through fraud and deception. **I ask the High Court to act immediately and decisively on this**." (Emphasis added)

Similarly, in the affidavit of David Egan dated 13th September, 2022 at p. 18 it is claimed that a:

> *"considerable effort has been made by some state authorities here in Ireland and abroad to cover up [...]deaths and injuries and disabilities caused by covid19 vaccines"*.

All of these are scandalous allegations are made against public and civil servants, without any evidence that is admissible in an Irish court, but instead solely in reliance on hearsay, websites, blogs, *YouTube* videos, *etc*.

Affidavits are full of comments and questions, not facts

45. Quite apart from the fact that the plaintiffs' affidavits contain hearsay and internet speculation, rather than facts, it is also the case that much of the affidavits contain comments and questions, more appropriate to a debating society, than a court.

The covid vaccines 'come within the definition of a Bioweapon'

46. The most striking example of this is in the affidavit of Mr. Egan dated 27th January, 2023 at p. 183, where he states:

> "Finally, I say that in the interests of public safety in Ireland and other countries, and informing the general public about continuing threats to public health, **the big question to be answered is** – has the sars-cov2 virus been engineered through gain of function studies in laboratories and **does it qualify as a Bioweapon**? **Are the covid19 vaccines**

and boosters which use the spike protein which was believed to be engineered through gain of function studies, and caused mass deaths, illnesses and disabilities worldwide qualify **as a Bioweapon also**? […] So far, the scientific evidence cited below and throughout this affidavit and in previous affidavits and in our books of evidence suggest that both the virus and the vaccine and boosters **may qualify as Bioweapons**. It is important to get to the root causes and truth of the matter as the same could occur again and again causing major losses for Ireland and other countries, and indeed this has been predicted by some powerful individuals.

They come within the definition of a Bioweapon according to scientific and legal definitions internationally and have the characteristics of Bioweapons [..] and that this has criminal liability and civil liability, the latter which is being addressed in this High Court case. […]

It is now a national security matter in Ireland and other countries in addition to being a High Court matter and criminal court matter." (Emphasis added)

47. Quite apart from the fact that an affidavit is not a place for questions and speculation, it is relevant to note that one thing appears clear from this affidavit, namely that the big question, from the plaintiffs' perspective, to be addressed in these proceedings is their claim that the vaccine comes '*within the definition of a Bioweapon'* and has '*the characteristics of Bioweapons'* and the criminal and civil liability which results from this conclusion.

Bill Gates is accused of wishing to depopulate the world using the Covid-19 vaccine?

48. Another example of the comments, questions and unsubstantiated claims in the affidavits is provided at p. 184 of the same affidavit, where Mr. Egan makes various claims about Mr. Bill Gates, who is not a party to the proceedings:

"How many Bioweapon Pandemics are being planned for the future or could occur or will occur through laboratory leaks? According to Mr Bill Gates in his public statements more such pandemics are on the way, **how did he know this and what exactly is meant by this**? […] **He seems to have unusual prediction abilities or prophecy abilities.** He has recently carried out a Catastrophic Contagion conference in Belgium in 2022 and this pandemic is predicted to occur in 2025. **This will lead to large scale deaths worldwide.** Bill Gates and his foundation is the biggest funder of the World Health Organisation (WHO) and he has a high degree of influence and power over it. This is important and relevant here as the WHO has the power to declare pandemics. Bill Gates and his foundation have massive investments in vaccine companies and Big Pharma, and indeed pandemics are highly profitable for them. […] **Bill Gates in his public statements online and offline and at conferences has promoted Global Depopulation. He wants to see a large and drastic reduction in the world population.** Depopulation on a large scale would involve many people dying off. **He claims to be working for this depopulation objective.** Is this desire of his related in any way to the invention of the sars-cov2 virus and gain of function studies in a laboratory, the covid19 pandemic and covid19 vaccine pandemic which led to a big rise in excess mortality in many countries. **And is it related to the covid19 vaccines and the excess mortality witnessed after mass covid19 vaccinations worldwide**? […] Do the other people referenced in this affidavit who know Bill Gates and have worked with him including Tony Fauci, Francis Collins, Peter Daszak, Dr. Ralph Baric, the executives in the WHO, GAVI and CEPI and the UN, the leaders of the WEF, the top executives and biggest investors in Pfizer, Moderna, Johnson and Johnson and AstraZeneca share his views and objective?" (Emphasis added)

49. Unfortunately, this is representative of the numerous other unsubstantiated claims/comments/speculation which the plaintiffs are relying upon to support the orders they seek against the State defendants.

Does the vaccine contain nano-chips injected into recipients of the vaccine

50. Some of the other 'evidence' relied upon by the plaintiffs to support their claims that the Covid-19 vaccine programme for children should be halted is a series of websites claiming the insertion of:

> *"nanochips and nano networks and transmitters in the covid vaccines and bodies of vaccinated people"* (see p. 50 of Mr. Egan's document headed '*More Corroborating Evidence of contamination of covid19 vaccines and undisclosed ingredients and dangers to the general public'* at p. 190 of 1233).

There is further reference to the presence of nano-chips in Covid-19 vaccines contained in Mr. Egan's affidavit, dated 13th September, 2022, listed under a section headed '*Factors involved in the blocking or prevention of Informed Consent by parents/ guardians',* where it is alleged parents could not have given their informed consent to the administration of the vaccine as they have not been provided with:

> "knowledge of the dangerous ingredients and toxins and non-chips and nano-transmitters found in these vaccines and boosters by scientists and medical doctors".

51. However, the website 'evidence' which Mr. Egan provides to support these claims consists of a series of website links. It should not need to be stated that the provision of website links in an affidavit, even if they did function (many are broken) and even if the linked websites were in English (many are in a foreign language), does not amount to acceptable, cogent or admissible 'evidence' to support claims made and orders sought before an Irish court.

<u>Loss of State sovereignty, hospital overcrowding and bailing out of speculators</u>

52. The breadth of the claims (for which the plaintiffs seek funding from the taxpayer in the form of a protective costs order) is further illustrated by the fact that the plaintiffs do not restrict themselves to health matters relating to the Covid-19 vaccine in their affidavits. This is because Mr. Egan also makes claims which are more appropriate to a political chamber or a debating society, than a court, since he makes generalised claims about Irish politicians relating to hospital overcrowding and the economic crash in 2008. At p. 62 of his affidavit of 27th January, 2023, he states:

> "**The Irish politicians and political parties do NOT care about this**. They have **neglected the hospital overcrowding** and lack of funding and resources problem for over 20 years. It's not a priority for them. They have **wasted many billions of euros giving tax breaks to speculators** to create massive speculative bubbles in the early 2000's and then **wasted many more billions of euros bailing out the speculators** and their bankers and bondholders after the crash in 2008, and then implementing vicious cutbacks in hospitals and healthcare spending.[…] **One senior Irish politician, an elected TD and Minister, recently admitted that Irish national sovereignty does not exist.** He rejected the Irish Constitution of 1937 and rejected the Irish nation as an independent entity. **This is the low quality of person who presumes to represent the Irish people and their interests**. The damage to the Irish people and nation caused by these politicians and health officials is horrendous and shocking, and amounts to them 'stepping over the dead bodies and disabled bodies of many Irish people' and is truly criminal, and will need to be rectified in court cases and tribunals." (Emphasis added)

53. It is relevant, at this juncture to refer to the Supreme Court judgment in *Riordan v. The Government of Ireland* [2009] 3 I.R. 745 at p. 764 where Murray C.J. noted that:

> "All citizens have a right of access to the courts which, in other cases, the courts have been sedulous in protecting. But this right of access is for the purpose of resolving justiciable issues and **not for the purpose of constituting the courts as a sort of debating society or deliberative assembly for the discussion of abstract issues**." (Emphasis added)

However, when one considers much of the foregoing 'evidence' which the plaintiffs have sought to rely on in this case to support their injunction, this appears, to this Court, to be just the type of case that Murray C.J. had in mind. This is because, rather than providing facts, the plaintiffs have produced hearsay, commentary, questions and speculation, more suited to a debating society than a court. All of this material from Mr. Egan regarding bioweapons, Bill Gates, unnamed politicians, *etc*. may be very interesting and relevant to some people (in debating societies or otherwise), but it has no place in an affidavit, which should only contain admissible and relevant facts to support the orders being sought.

General observations on the nature of the claims made by the plaintiffs

54. A number of general observations can be made at this stage regarding the nature of the proceedings issued by the plaintiffs.

The plaintiffs are not represented by lawyers

55. The first is that the plaintiffs have either chosen not to engage lawyers (for financial or other reasons) or they could not find lawyers who saw sufficient merit in the case to pursue it on their behalf (whether on a '*no foal no fee'* basis or otherwise). In this regard, the comments of Butler J. *in Keary v. Property Registration Authority of Ireland* [2022] IEHC 28 at para. 39 are particularly relevant:

> "There are many reasons why a litigant might not have legal representation, including, unfortunately, the cost of securing the services of lawyers and the lack of a

> comprehensive legal aid scheme to assist litigants who cannot afford to pay for legal services. In other instances, a person may choose to act on their own behalf and whilst judges and lawyers might question the wisdom of such a choice, it is a choice the litigant is entitled to make. A court must be careful not to assume that the personal litigant's case is unmeritorious simply because it is being presented without legal assistance. That said, the skills a legal practitioner brings to bear on litigation are not confined to the drafting of pleadings and the presentation of legal argument**. A key part of the legal practitioner's function is to assess the merits of a situation and to advise their client as to whether a stateable cause of action arises, whether the pursuit of that cause of action is legally and economically justified and whether it is likely to produce a result of benefit to the client. A litigant-in-person, lacking the benefit of such an objective assessment, is far more likely to institute proceedings without there being a stateable cause of action, the pursuit of which is unjustified and which is unlikely to produce any real benefit.**" (Emphasis added)

This is clearly a case where the litigants have not sought even the most cursory legal advice, since this Court has had to highlight fundamental problems with the orders the plaintiffs seek, the claims they make and the alleged evidence they seek to rely upon. It seems clear that if this case had been conducted by a legal practitioner, who is an officer of the court, orders of this nature would not have been sought, scandalous claims would not have been made and alleged 'evidence' of the nature described would not have been relied upon.

Not a cost-free, or victim-less, exercise

56. It is also relevant at this juncture to bear in mind that dealing with all of these unprecedented claims and unprecedented orders being sought, based *not* on admissible and relevant facts, but on blogs, internet videos, *etc*., is not a cost-free exercise for the defendants. They have had to engage, at no doubt considerable cost to the taxpayer, lawyers to review and

answer the various claims and 'evidence' contained in the *circa*, 5,000 pages provided by the plaintiffs.

57. In addition, this is not a victim-less exercise from the perspective of court resources, which are also funded by the taxpayer. This is because the time taken for this court to deal with these issues to date will delay other litigants in having their cases heard.

LAW RELATING TO PROTECTIVE COSTS ORDERS

58. Having considered the background to the plaintiffs' application for the taxpayer to subsidise their proceedings, it is now necessary to consider the law relating to such orders, before then applying that law to the facts of this case.

59. While protective costs orders are sometimes granted in environmental litigation because of the statutory provisions in s. 50B of the Planning and Development Act, 2000, as amended (the "2000 Act"), applications for protective costs orders in other proceedings are rarely sought.

Consideration of protective costs orders by the High Court

60. The first decision by an Irish court on protective costs orders in non-environmental litigation was some 23 years ago and was a decision of Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála and McDonalds* [2000] 4 I.R. 321. She relied on the English High Court decision in *Reg. v. Lord Chancellor. Ex p. C.P.A.G.* [1999] 1 W.L.R. 347 to establish the jurisdiction of the Irish courts to make such orders, *albeit* that she refused the application in that case.

Status of protective costs orders since the 2015 Act?

61. Since the *Village Residents* case, the power of the court to make costs orders generally has been codified as a result of the enactment of the 2015 Act. There is however no reference

to the power of a court to make protective costs orders in that act. In this regard, in *Tearfund Ireland Limited v. Commissioner of Valuation (No. 1)* [2020] IEHC 621, O'Connor J., in refusing the application for a protective costs order, expressed the view, *obiter*, that it could be the case that the 2015 Act might have removed the jurisdiction of a court to grant a protective costs order.

62. This is because, as noted by O'Connor J., the wording of s. 168 of the 2015 Act, now dealing with costs orders, restricts itself to providing for an '*order that a party to the proceedings **pay** the costs….*', whereas the old Order 99(5) of the Rules of the Superior Courts was broader, since it provided that '*costs may be **dealt with** by the courts'*. Thus, as noted by O'Connor J., under the terms of s. 168, a court is restricted to ordering that a party *pay* the costs of another (as distinct from ordering that a party will not be liable for another party's costs even if she loses). However, the defendants in this case did not seek to argue that this Court no longer has the jurisdiction to make protective costs orders (outside of the terms of the 2000 Act dealing with environmental litigation).

63. While this point is certainly arguable, it should also be noted that Humphreys J. in *Enniskerry Alliance & Anor v. An Bord Pleanála & Ors, Protect East Meath Ltd v. An Bord Pleanála & Ors* [2022] IEHC 6 at para. 74, expressed doubts, *obiter*, as to whether O'Connor J.'s questioning of the continued existence of the jurisdiction was justified. Similarly, in *Ryanair DAC v. An Taoiseach, Ireland and the Attorney General* [2020] IEHC 673, Simons J. stated at para. 11 that:

> "There is nothing in the statutory language of the LSRA 2015 which suggests that the discretion previously enjoyed by the courts under the pre-2019 version of Order 99 of the Rules of the Superior Courts has been removed. Rather, it seems to me that the type of considerations identified in the case law discussed under the next heading below - such as, for example, whether the proceedings raise issues of general importance which

transcend the facts of the case and which are novel - continue to inform the exercise of the costs jurisdiction."

In any case, this is an argument for another day, as the argument, which was run by the defendants, was that the plaintiffs did not satisfy the criteria for the grant of a protective costs order (assuming such a jurisdiction continues to exist, after the enactment of the 2015 Act).

Principles applicable to an application for a protective costs order

64. Returning therefore to the jurisdiction to grant protective costs orders, the next judgment to consider is that of Kelly J. in *Friends of the Curragh Environment Ltd. v. An Bord Pleanála* [2009] 4 I.R. 451. There, he referenced the UK Court of Appeal decision in *Corner House*, which was delivered after *Reg. v. Lord Chancellor*. In reliance on that case, at p. 461, he quoted the principles, which apply to protective costs orders, as follows:

"(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

(i) The issues raised are of general public importance;

(ii) The public interest requires that those issued should be resolved;

(iii) The applicant has no private interest in the outcome of the case;

(iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and

(v) If the order is not made the applicant will probably discontinues the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a protective costs order.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

Orders only granted in the most exceptional circumstances

65. In addition, it is relevant to note that, at p. 461, Kelly J. stated that

> "An order of the type sought will only fall to be made in the **most exceptional circumstances** and where the interest of justice require such a course to be taken". (Emphasis added)

There must be a point of law of general public importance

66. In *Village Residents*, Laffoy J. observed at p. 328 that Dyson J. had stated that the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the '*most exceptional circumstances'*. In support of this proposition, she quoted with approval Dyson J.'s understanding of the concept of the *'public interest challenge'*, such as to justify a protective costs order, which was as follows:

> "The essential characteristics of a public law challenge are that it raises **public law issues** which are of general importance". (Emphasis added) (at p. 353)

In this regard, it is to be noted that in dismissing the application for a protective costs order in *Curragh*, Kelly J. stated at p. 468 that:

> "I cannot identify **any point of law, still less a point of law of general public importance**, which would justify the making of a protective costs order …" (Emphasis added)

67. The case law therefore very clearly emphasises that for a protective costs order to be granted, the proceedings should raise a point of law of general public importance.

An appreciation of the merits v. a real prospect of success?

68. At p. 460 of his judgment in *Curragh*, Kelly J. observed that subsequent to the High Court decision in *Reg. v. Lord Chancellor*, the UK Court of Appeal in *Corner House* undertook a comprehensive review of the case law on protective costs orders. In its judgment, at para. 73, the UK Court of Appeal took the view that one of the factors in considering whether to grant a protective costs order was whether the application had a '*real prospect of success'*. In contrast, Dyson J. had stated in *Reg.* v. *Lord Chancellor* at p. 358 that the court must have:

> "**a sufficient appreciation of the merits of the claim** that it can conclude that it is in the public interest to make the order. **Unless the court can be so satisfied by short argument**, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead, in effect, to dress rehearsals of the substantive applications, which in my view would be undesirable." (Emphasis added)

69. When comparing these two tests, it seems to this Court that on one interpretation, a court could have an *appreciation,* in the sense of an understanding, of the merits of a claim, even where that claim is totally without merit. Since it could not be the case, that a claim, which is without merit, would be entitled to a protective costs order, this Court believes that the UK Court of Appeal test is to be preferred to Dyson J.'s test, as it is less open to interpretation. Accordingly, it seems to this Court that the correct test for the grant of a protective costs order is that the underlying proceedings, the subject of the application for a protective costs order, must have a real prospect of success.

Real prospect of success should be clear after 'short argument'

70. The UK Court of Appeal in *Corner House* expressly chose not to adopt the requirement set down by Dyson J. in *Reg. v. Lord Chancellor* that the prospects of success should be clear after '*short argument'*. It did so on the basis that taking this approach might '*preclude the*

making of a [protective costs order] in a case of any complexity' (at para. 71). However, it is also clear that in setting out its *'guidance'* on the making of protective costs orders, the Court of Appeal felt that in *'normal circumstances'* (at para. 76 *et seq*) one hour was sufficient time for a court to determine whether the application had a real prospect of success.

71. This Court agrees that in normal circumstances, it should be clear within an hour whether an application for a protective costs order has a real prospect of success. Furthermore, adopting this approach means that one reduces the risk of an inefficient use of court resources, which risk was identified by Dyson J., *i.e.* the risk that the same arguments end up being run in their totality by the parties during the application for the protective costs order *and* during the substantive hearing. In this case, this was certainly the case, where four hours were spent dealing with the substantive claim in a level of detail which was not necessary to address the question of whether the substantive claim had a real prospect of success (and the other issues to be considered to determine the application).

<u>Supreme Court's approach to exempting litigants from costs in public interest cases</u>

72. The only judgments to date, which have been handed down in this jurisdiction in relation to protective costs orders, have been from the High Court. For this reason, it is important to consider the attitude of the Supreme Court to costs in public interest cases as well as the role of costs generally.

73. As regards costs in public interest cases, the case of *Dunne v. Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775 is instructive. This is because it sets out the Supreme Court's attitude to a claim that because a case is in the public interest, there should be no order as to costs against the losing litigant. In that case, the losing litigant claimed that his proceedings concerned matters of general public importance (i.e. a challenge to the constitutionality of s. 8 of the National Monuments (Amendment) Act, 2004). At p. 785, Murray C.J. rejected this argument and he stated:

> "Accepting that the plaintiff brought proceedings in the interests of promoting compliance with the law and without any private interest in the matter, **I do not consider that the issues raised in the proceedings were of such special and general importance as to warrant a departure from the general rule** [i.e. that costs follow the event]. Undoubtedly, it could be said that issues concerning subject matters such as the environment or national monuments have an **importance in the public mind**, **but a further factor for the court is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance**. In this case nothing exceptional was raised in **the issues of law** which were before the court so as to warrant a departure from the general rule." (Emphasis added)

It seems clear to this Court that when a court is considering whether a claim raises issues of general public importance (such as to justify the granting of a protective costs order *before* the hearing), it is relevant to consider the Supreme Court's analysis of this issue (even though it arose in the context of an application for costs *after* the hearing). In *Dunne*, the Supreme Court held that the condition that the legal issues be of '*special and general public importance'* is not satisfied merely because the issue has an importance in the public mind.

74. This Court can see no reason why this is not equally applicable to protective costs orders. Indeed, if this were *not* the case, then it seems clear that the *subject matter* of a myriad of cases in our courts on a daily basis, involving taxation, social welfare, education, health, *etc*., would be amenable to a protective costs order, since these clearly have an importance in the public mind. Yet, the case law on protective costs orders makes clear that such orders are only granted in the most exceptional of cases and so 'something more' is required. Based on *Dunne*, it seems clear to this Court that the 'something more' is that the proceedings must involve *issues of law*, which are of special and general public importance. Thus, for a protective

costs order to be granted, the *legal issues* raised by the case, and not merely the subject matter of the case, must be of special and general public importance.

Supreme Court's view of the role of costs in litigation

75. Since protective costs orders are just one of the many types of costs orders that can be made by a court, it is also important to consider the Supreme Court's views on the function of costs orders generally. After all, if a court grants a protective costs order it is, in effect, simply making a costs order in which it is refusing one party its costs if it wins (*albeit* in advance). Accordingly, if a court is faced with an application for a protective costs order, it should bear in mind what the Supreme Court has said about the important role that costs generally play in litigation.

76. In this regard, in *Permanent TSB v. Skoczylas* [2021] IESC 10, the Supreme Court of O'Donnell, McKechnie and Charleton JJ. in a joint judgment stated at para. 12:

> "Part of the **function of the court's jurisdiction to award costs is to encourage a responsible and efficient approach to litigation**. A party who has a good cause of action, but proceeds in the face of a lodgement, or a Calderbank offer (derived from the English case of *Calderbank v. Calderbank* [1976] Fam. 93), and fails to secure a higher award may find themselves penalised on costs even though they have succeeded. A party who brings a claim in the High Court, but who could have brought the claim in a lower court, may again be penalised when it comes to the award of costs. As Fennelly J. observed in *Ryanair v. Aer Rianta* [2003] 4 I.R. 264, the public interest in the administration of justice is not confined to the relentless search for perfect truth – **the just and proper conduct of litigation also encompasses the objectives of expedition and economy**." (Emphasis added)

77. Another Supreme Court case on the role of costs in litigation is *Farrell v. The Governor and Company of Bank of Ireland* [2012] IESC 42, where, at para. 12, Clarke J. stated

> "It is also important to recall the **importance of costs orders in our legal system**. It might be said that costs orders play two roles. First it may be said that **a successful party** (a plaintiff who has to come to court to establish rights and/or entitlements not conceded or a defendant who successfully sees off a claim) **should not be at a loss in having to bring or defend the proceedings in question**. I am not here concerned with how the costs which might legitimately be recovered are to be quantified. Leaving that question aside it seems to me that the ordinary position that costs follow the event is a recognition that it is unjust to impose on a plaintiff, who is required to come to court to obtain his legal rights, the financial burden of establishing those rights most particularly where the plaintiff concerned would not have to have come to court if the claim was conceded or not opposed. Likewise **it is unfair that a defendant should have to bear the costs of defending a claim which the court finds to be unmeritorious**. Thus the **first underlying rationale behind the award of costs is that justice requires that a successful party not be penalised** in having to bear the reasonable costs of court proceedings.
>
> […] Furthermore the courts have become more prepared, in recent times, not least because of changes in the Rules of Court, to look at individual elements of the **conduct of proceedings** to ascertain whether parties have acted in such a way as has, irrespective of the ultimate outcome of the case, **led to additional and unnecessary costs being incurred**. Apart from the undoubted justice of that approach same has the added advantage of **discouraging parties from bringing unnecessary and unmeritorious applications**, resisting appropriate applications or **adding unnecessarily and**

inappropriately to the complexity (and thus the cost) of proceedings by adding a multiplicity of claims or a multiplicity of defences.

That analysis is designed to show that the power of the court to **award costs is a very important aspect of the armoury of the courts designed to ensure that parties are treated justly and that the court process is not abused** […]

But the analysis in which I have just engaged does suggest that an **inability or difficulty in recovering costs can give rise to an injustice. If justice required the award of costs in the first place then it follows that a party not actually recovering costs properly awarded must be said to have suffered an injustice**." (Emphasis added)

78. It is clear from these cases that, in considering whether to grant a protective costs order, it is important for this Court to bear in mind the injustice to a party (whether a State agency or a private litigant) of successfully defending a claim, but not recovering its costs. It is also important for this Court to bear in mind the crucial role costs play in ensuring that parties conduct their litigation in a responsible and efficient manner and in discouraging parties from bringing unmeritorious applications.

<u>No record of a protective costs order ever having been granted</u>

79. The final point to note from the case law is that applications for protective costs orders are rarely made. In *Curragh* at p. 453, Kelly J. noted that it is '*rare to deal with the topic [of costs] at the beginning rather than the end of litigation'*. The only cases opened to this Court in which applications were made for protective costs orders were *Village Residents*, *Curragh*, *Tearfund* and *J.S v. Minister for Education* [2023] IEHC 80. In each of these cases, the applications were rejected. Thus, the parties were unable to highlight even one instance in the past 23 years (i.e. since the jurisdiction was first recognised by Laffoy J.) where a protective costs order was granted (in non-environmental litigation).

80. This is not surprising when one bears in mind the stark difference (to which reference has already been made), between the incentive, for litigants to be efficient in how they run their cases, where a protective costs order is granted, compared to a situation where it is not granted, where there is no financial disincentive to waste court time.

Summary of the conditions to be satisfied for the grant of a protective costs orders

81. The foregoing case law leads this Court to conclude that, subject to what is said above regarding the *obiter* views of O'Connor J. in *Tearfund,* the following principles apply to all applications for a protective costs order. For a protective costs order to be granted, each of the following seven conditions must be met:

i. The court should be satisfied, after argument lasting one hour in normal circumstances, that the application has a real prospect of success;
ii. The proceedings must raise a point of law of special and general public importance;
iii. The public interest must require that this point of law should be resolved;
iv. The applicant must have no private interest in the outcome of the case;
v. It must be fair and just to make the order having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved;
vi. The applicant will probably discontinue the proceedings, if the order is not made and will be acting reasonably in so doing.
vii. If all six of these conditions are satisfied and if it is fair and just for the court to exercise its discretion to make such an order, it will do so, bearing in mind:
    - that these orders are only made in the most exceptional of circumstances;
    - the important role played by the awarding of costs, at the completion of a case, in ensuring that, during the case, the court process is not abused and unmeritorious applications are not pursued;

- that there is an unfairness to a litigant having to bear the cost of defeating an unmeritorious claim or pursuing a justified claim (whether that litigant is the State/taxpayer or a private party).

APPLICATION OF THESE PRINCIPLES TO THE PLAINTIFFS' CASE

82. For the purposes of determining whether the plaintiffs have a real prospect of success, this Court has referred to unsubstantiated and scandalous allegations of mass murder, comparisons to Nazi Germany and the fact that the plaintiffs are seeking the mass disinterment of bodies throughout the country. Although these are allegations which should not have been made and the plaintiffs seek orders, for which there is no precedent, it is nonetheless important to state that the plaintiffs appear to be motivated not by *male fides*, but by a genuine belief in the claims that they are making and the orders they seek, even if they are misguided in the orders which a court can grant, the claims which it is appropriate to make and the 'evidence' upon which they can rely.

83. The plaintiffs appear to genuinely believe that they are acting in the public interest, rather than their own interests, in *'[defending] the lives of Irish children and future generations'* (to quote their oral submissions). They also appear to be completely convinced of the claims they make regarding mass killing and the need for a national disinterment of bodies. While they may be misguided in issuing these proceedings for the reasons set out above, it is important nonetheless to distinguish their claims from claims in other cases where the courts have held the litigants to be motivated by *male fides* or personal gain.

84. However, this is not enough to be granted a protective costs order, since most litigants are motivated by *bona fide* reasons, yet they will not be entitled to have taxpayer funds diverted for their purposes, rather than other causes. Nor does the fact that a litigant is *bona fide* mean

that she can avoid paying legal costs if she loses a case. Similarly, just because litigants have *bona fide* reasons for litigating is not enough for a court to allow its processes to be abused or for unsubstantiated or scandalous claims to be made.

85. With this in mind, the first question for this Court is whether the plaintiffs satisfy the very restrictive criteria for them to be granted a protective costs order, which will be considered next.

(i) Was the Court satisfied within one hour that application has real prospect of success?

86. The plaintiffs' application:

- seeks orders which are exceptionally broad in nature (against persons who are not even parties to proceedings),
- makes allegations of a most serious nature (such as mass killing) on the basis of hearsay and evidence on the internet,
- seeks unprecedented and wide-ranging relief (*i.e.* the establishment of Commissions of Inquiry and orders for coroners to undertake autopsies requiring the disinterment of bodies),
- relies on alleged 'evidence' consisting of websites, blogs, *YouTube* videos, broken website links, foreign language websites, *etc*., and
- runs to several thousands of pages with more expected.

Against the backdrop of the Supreme Court's observations on the role of costs, the most striking thing about this application, when so summarised, is *not* that it is an application that might benefit from a protective costs order. Rather it is that it is precisely the type of case for which the threat of a costs orders is designed, in order to ensure that the '*court process is not abused*' and to discourage '*parties from bringing unnecessary and unmeritorious applications.*'

87. For this reason, it is ironic that it should be in a case such as this that the plaintiffs are *seeking to remove that threat* of a costs order, which the Supreme Court has described as an important part of a court's armoury in order to ensure that the court process is not abused.

88. While the plaintiffs have of course a right of access to the courts, they do not have a right to pursue the most extraordinarily broad and scandalous claims based on internet speculation. Furthermore, they do not have a right to pursue such litigation, at the cost of the taxpayer. If they genuinely believe that they have a prospect of having a court accepting the extraordinary claims they make, then the litigation system in Ireland is based on them being prepared *to back their belief with their own money* and not at the expense of a defendant or the taxpayer. That means pursuing the litigation in the knowledge that if they lose they will be liable for the defendants' costs. Thus, if the plaintiffs wish to pursue their claims in the courts, whether for publicity or other reasons (and the court they have chosen is the most expensive of the courts of first instance), then the taxpayer should not be required to fund their claims.

89. For all the reasons set out in this judgment, this is the type of case where the threat of a costs order should *not be removed*, to be replaced by a *carte blanche* for the plaintiffs regarding legal costs, at the expense of the taxpayer. On the contrary, this is the type of case where *it is imperative* that there is a threat of a costs order, so as to ensure that court resources and taxpayers' funds are not further wasted. Indeed, as noted by the HSE in its written submissions, the *'extreme nature'* of the baseless allegations that are made by the plaintiffs (and therefore which were aired in open court) are such that they might merit a costs sanction against the plaintiffs, *irrespective* of the final outcome of the case (*i.e.* even if they were to be successful on any point in the proceedings).

90. Accordingly, in relation to this first condition, to be satisfied for a protective costs order to be granted, it should be clear that this Court was not satisfied, within one hour (or indeed

within four hours), that the plaintiffs' substantive claim has *any,* let alone a real, prospect of success.

91. For the sake of completeness, this Court will consider whether the plaintiffs satisfy any of the remaining conditions which have to be met for the grant of a protective costs order.

(ii) Is it '*fair and just'* to grant a protective costs order?

92. A key condition to be satisfied for the grant of a protective costs order is that it would be '*fair and just'* to grant such an order. This is not satisfied in this case. This is because it would not be fair and just that plaintiffs seeking such extraordinarily broad orders, grounded in claims that that are based on hearsay, speculation, questions, commentary, websites, *YouTube* videos, blogs, *etc*., would have the taxpayer fund such litigation, particularly in the High Court, the most expensive of the three courts of first instance.

93. On the contrary, if the plaintiffs wish to pursue this case, *it is only fair and just* that, like every other plaintiff, they should be exposed to the risk of being personally out of pocket if they lose. Otherwise, the plaintiffs will not have the financial incentive to *only* make those claims which they are likely to win, to *only* rely on evidence, which is admissible and relevant, and *only* seek orders which a court has jurisdiction to, or is likely to, make against persons, who are parties to the proceedings.

94. As the plaintiffs have decided to ventilate their views regarding the Covid-19 vaccine in court, rather than in some other forum, and then *chosen* to do so in the High Court, it is only fair and just that they will be out of pocket in the sum of tens/hundreds of thousands of euro (rather than say hundreds of euro, if it were the District Court) *if* they continue with these proceedings in the High Court, as this Court has determined that they have no prospect of success.

95. In addition, it is fair and just that the longer and more complex the case that they make, the greater the costs bill that they will face, *if* they lose the action. This is the very reason why

costs operate as such an important tool in the courts' armoury, i.e. to ensure that claims are *pleaded* in an efficient manner and then *run* in an efficient manner. Indeed, it is one of the few tools that courts have to ensure that taxpayer funded court resources are not wasted.

(iii) Do the proceedings raise a point of law of special and general public importance?

96. It seems clear that the subject matter of the proceedings, namely the administration of the Covid-19 vaccine programme to children aged 5 - 11 is something, which has an '*importance in the public mind'*. However, as noted above, this is not sufficient to satisfy this condition for the grant of a protective costs order. The proceedings must raise *a point of law* of special and general public importance.

97. The law applicable to the plaintiffs' claim for an injunction against the defendants is very straight forward and well-established, *i.e.* certain conditions have to be satisfied to obtain an interlocutory injunction in a case, such as this one, where an interlocutory injunction is sought to prevent a *prima facie* valid action by the State (here a vaccination programme). This law was set out by the Supreme Court in *Okunade v. Minister for Justice* [2012] 3 I.R. 152. Accordingly, this case involves a very straight forward application of the principles set out in that case and so does not raise a point of law of special and general public importance.

(iv) Does the public interest require that this point of law should be resolved?

98. Since there is no point of law of special and general importance at issue in these proceedings, the question of there being a public interest in such a point of law being resolved does not arise.

(v) Do the applicants have no private interest in the outcome of the case?

99. It seems clear that Mr. Egan does not have a private interest in the outcome of the case, as he does not have any children and so will not be directly affected by stopping the vaccination

programme for 5 - 11 year olds. In that sense, he could be said to be acting solely in the interests of the public, rather than out of a private interest.

100. Ms. Browne does not have any children in the 5 - 11 age group. However, she does have grandchildren and it is arguable, that she has a private interest in the outcome of the case. However, as she does not meet any of the other conditions for the grant of a protective costs order, this point does not need to be decided.

101. Mr. Lavery has children within the 5 - 11 age group and so it seems clear that he has a private interest in halting the vaccination programme, particularly as he fears that his wife wants to vaccinate his children.

102. Hence this condition appears to be satisfied by Mr. Egan, but not by Mr. Lavery, and it is arguable that it is satisfied by Ms. Browne.

(vi) Are the relative financial resources of the plaintiffs such as to justify the order?

103. The plaintiffs chose not to provide any information to the Court regarding their financial resources. Accordingly, this Court is not in a position to say whether the financial resources of the plaintiffs, relative to the State defendants, is such as to justify the grant of a protective costs order. Hence this condition is also not satisfied by all the plaintiffs.

(vii) If no order is made will the applicant probably discontinue the proceedings?

104. Again, the plaintiffs chose to adduce no evidence regarding the requirement that they would discontinue the proceedings if they failed to get a protective costs order. In fact, the contrary appears to be the case, since submissions were made on behalf of the defendants that the plaintiffs would continue with the proceedings in the absence of a protective costs order. The plaintiffs chose not to contradict those submissions, even though they had no hesitation in contradicting/challenging other submissions made by the defendants.

<u>Do the plaintiffs comply with all the conditions for the grant of a protective costs order?</u>

105. With the exception of one condition (*i.e.* the plaintiffs not having a personal interest in the proceedings), each of the seven conditions, which have to be satisfied for the grant of a protective costs order, have *not* been satisfied by *any* of the plaintiffs. Accordingly, there can be no question of the plaintiffs being granted a protective costs order in this case.

106. Indeed, while the plaintiffs in their submissions spent a considerable amount of valuable court time making submissions on the origins and the principles of natural law, if they had addressed their mind, in even a cursory fashion, to the onerous conditions which have to be satisfied for the grant of a protective costs order they would have appreciated:

(i) why so few such applications have been made in the past 23 years,

(ii) why no protective costs orders have ever been granted to date in non-environmental litigation, and

(iii) that they did not satisfy all the conditions and so their application was doomed from the start and therefore it was a waste of court resources and taxpayers' funds in this Court having to deal with this application and the State defendants having to defend it.

<u>Are the plaintiffs environmental litigants?</u>

107. Finally, it is necessary to deal with the claim by the plaintiffs that their attempt to halt the Covid-19 vaccine programme for 5 – 11 year olds, constitutes environmental litigation for the purposes of s. 50B of the Planning and Development Act, 2000 on the basis of '*risks to the environment and humans living in it'* (*per* the plaintiffs' motion seeking the protective costs order).

108. Section 50B of the 2000 Act does not however assist the plaintiffs in their claim (even in the unlikely event of the 'environment' or related terms in that section being interpreted as including the humans living in it). This is because that section specifically refers only to

'proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review' (s. 50B (1)(a)). As these proceedings are not judicial review proceedings, s. 50B is of no assistance to the plaintiffs.

109. The plaintiffs also claim that the Aarhus Convention entitles them to a protective costs order. Mr. Egan states at para. 4 of his affidavit of 21st November, 2022 that:

> "The Aarhus Convention bans prohibitive costs and has been used in the Irish courts and European courts to apply for and grant Protective Costs Orders in respect of threats to the environment.
>
> […]
>
> This **legal case addresses a serious threat to the environment in terms of killing, injuring or disabling children** who are the future of Ireland, and also adults living in the environment and creating a more dangerous environment to live in." (Emphasis added)

110. The Aarhus Convention governs access to information, public participation in decision-making, and access to justice in environmental matters. '*Environmental matters*' is not defined in the Convention, however in Article 2(3) of the Convention, the definition of environmental information and its relationship to human health is given strictly in the terms of a physical environment. It is not given a wider meaning that it relates to the humans living in the environment, as suggested by the plaintiffs. The only reference to humans is to human health, but this reference is only to human health, insofar as it is affected by the environment:

> "Environmental information" means any information in written, visual, aural, electronic or any other material form on:
>
> (a) The state of elements of the **environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components**, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or **likely to affect the elements of the environment** within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as **they are or may be affected by the state of the elements of the environment** or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above." (Emphasis added)

It seems clear therefore that 'environment' in this context means the air, atmosphere, land, *etc.* and not human beings living in that environment.

111. In relation to costs, the Aarhus Convention states under the heading 'Access to Justice' at Article 9 (1) that:

"Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her **request for information** under article 4 [Access to Environmental Information] has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to **a review procedure before a court of law or another independent and impartial body established by law.**

In the circumstances where a Party **provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive** for reconsideration by a public authority or review by an independent and impartial body other than a court of law." (Emphasis added)

In this regard, as the plaintiffs' case does not involve a request to have access to environmental information, the Aarhus Convention has no application.

112. It is also provided at Article 9(4) that remedies for breaches of '*procedures'* should not be *'prohibitively expensive'*. However, these procedures are limited to those regarding access to information, public participation in decision-making and where acts or omissions by public bodies or private persons '*contravene provisions of its national law relating to the environment*' (at Article 9 (3)). As the plaintiffs have not pointed to any piece of national law relating to the environment breached by the defendants in these proceedings, their claim does not fall under this aspect of the Aarhus Convention either.

113. It is very clear to this Court that the plaintiffs' attempt to halt the Covid-19 vaccine programme is not litigation which is concerned with the protection of the environment, simply because the plaintiffs believe that the vaccine (allegedly) creates a *'more dangerous environment to live in*'. If it were this easy for a claim to constitute environmental litigation for the purposes of protective costs orders, then every claim, that a given act or omission is detrimental to a human being, would amount to environmental litigation. It would mean, for example, that a claim against a social media company regarding its failure to control hate speech or conspiracies being disseminated on its platform, amounts to an 'environmental' challenge as it creates '*a more dangerous environment to live in'*. Accordingly, this Court has little hesitation in rejecting the plaintiffs' claim that their case concerns a *'serious threat to the environment'*.

SUMMARY OF THE COURT'S FINDINGS

114. Since the plaintiffs have, by a long way, failed to comply with the several conditions which have to be satisfied for the grant of a protective costs order, no such order will be granted.

115. Ironically, rather than this being a case where the plaintiffs might be granted a *carte blanche* as regards legal costs, this is the type of case where having a threat of a negative costs order is *imperative*, in order to ensure that litigants do not waste court resources and waste the opposing party's funds (whether a private party or a taxpayer funded entity).

116. Accordingly, if the plaintiffs continue with this case, and if they lose the substantive action, then on the basis of 'the loser pays' principle, they are *likely* to be personally liable for the costs of the defendants, in dealing with thousands of pages of wide-ranging, scandalous, unprecedented and unsubstantiated claims, orders and 'evidence' which form part of their case. However, this will be a matter for the trial judge, should the plaintiffs continue with their action.

Costs of this unsuccessful application for a protective costs order

117. However, there is second important aspect to this case. This is because, having determined that the plaintiffs' case does not have any prospect of success, this means that this Court has concluded that the plaintiffs have wasted taxpayers' funds and court resources in bringing this application. Accordingly, it is important to consider whether this Court should simply make the usual costs order against the losing party, which might not be enforced for many years to come, or at all, while the plaintiffs continue with these proceedings (which have no prospect of success). However, taking such an approach risks 'encouraging' the further waste of taxpayers' funds and court resources on a case which this Court has determined, not only has no prospect of success, but is an abuse of process (with its baseless claims of mass killing and comparisons to Nazi Germany).

118. Instead, it seems to this Court that it is obliged by the Supreme Court in *Farrell*, *Skoczylas* and *Riordan* not to make the usual costs order, but instead to use the *'armoury'* of legal costs as a means of seeking to '*discourage'* the progressing of this unmeritorious claim by the plaintiffs and thereby preventing any further abuse of court process and wastes of taxpayers' funds.

119. This is because, in this case, the application for a protective costs order was not simply an unmeritorious claim (in the sense that this Court held against the plaintiffs), but it was a claim which *never* had any prospect of being successful for the myriad of reasons set out in this judgment. In addition, the substantive claim contains the most scandalous and groundless allegations against the defendants.

120. Thus, in considering first whether costs should be awarded against the plaintiffs, on the basis of the 'loser pays' principle, it is to be noted that, in bringing this application, the plaintiffs have inflicted a considerable financial obligation on the taxpayer, who is funding the defendants' legal team. In addition, this application has led to a waste of court resources, in having to allocate a full day to hearing the matter, which resources are also funded by the taxpayer. Furthermore, as required by the Supreme Court in *Farrell*, this Court has to bear in mind that there is a fundamental unfairness if a party, who is sued on the basis of an unmeritorious claim, has to *expend its own money* in defending that claim (whether that party is a State litigant or a private litigant).

121. Thus, there are compelling reasons for costs to be awarded against the plaintiffs.

122. However, it is relevant to consider whether there is any reason why, in the case of a unsuccessful protective costs application, the normal rule of 'costs following the event' should not apply. In this regard, it is important to note that, under s. 169 of the 2015 Act, the 'costs follow the event' principle applies to all '*civil proceedings'* brought by a litigant and no exception is made for an unsuccessful application for protective costs orders. This is entirely logical since to the winning party it is at a financial loss in having to defeat a claim, regardless of the nature of the defeated claim. Accordingly, the 'unfairness' of the winning litigant having to spend her own money defending a claim, which should not have been brought, is the same, whether it is a claim for an injunction or for a protective costs order. Similarly, for the court, it

is the same court resources which are wasted, regardless of the type of unmeritorious claim/application which is pursued by the litigant.

123. Accordingly, this Court's provisional view is that it can see no basis for not applying the 'loser pays' principle to the case of a failed application for a protective costs order. Indeed, this was the approach taken by the UK Court of Appeal in *Corner House* at para. 78. There, Lord Phillips stated that an applicant, who fails in his application for a protective costs order, will '*be liable for the defendant's costs incurred in a successful resistance to an application for a [protective costs order]'*. Consistent with the Supreme Court's comments on the role of costs (referenced above), the UK Court of Appeal stated that the reason costs are awarded against an unsuccessful applicant for a protective costs order is to '*provide an appropriate financial disincentive'* to those who believe that they are entitled to apply for any order they wish '*as a matter of course'*.

124. For all these reasons, litigants who decide to apply for a protective costs order should not be under any illusion that, simply because the order which they seek is a protective costs order, different rules apply. This is not the case and such applicants do not have a 'free go' in expending court resources and the funds of the other party to the litigation (whether taxpayers' funds or the funds of a private litigant).

125. Thus, applying the default rule that the loser pays/costs follow the event, it seems clear that the State defendants have been '*entirely successful'* (pursuant to s. 169 of the 2015 Act) and so this Court's provisional view is that they should be awarded their costs against the three plaintiffs.

Award of costs will discourage unmeritorious applications and abuse of court process

126. This Court's provisional view that costs should be awarded against the plaintiffs is also consistent with the Supreme Court's view in *Farrell*, that this Court should use costs orders to '*discourag[e] parties from bringing unnecessary and unmeritorious applications'* and to

ensure that the *'court process is not abused'*. This is because if costs are awarded against the plaintiffs in this case, the plaintiffs should, not only be *discouraged*, from taking any more unmeritorious applications in this case, but also from pursuing their substantive claim (which this Court has found to have no prospect of success).

127. If they are not discouraged, they will, at least, be aware of the likely financial consequences of their continuing with the action. Thus, not only will they be liable for the costs to date (if this Court makes an order in line with its provisional view), but they are likely to be liable for future costs which are likely to be very significant (since one is dealing with High Court costs).

Ensuring that the 'financial disincentive' to abuse court process is real and not theoretical

128. However, awarding costs against an unsuccessful litigant is but the first step in the process of ensuring, as required by the Supreme Court, that costs orders are used to decrease the amount of unmeritorious litigation and reduce the abuse of court process.

129. To ensure that the Supreme Court's objective is achieved, it is important that any costs order operates as a *genuine,* as distinct from a theoretical, deterrent. It seems to this Court that for a costs order to operate as a genuine '*financial disincentive'*, then the closer the enforcement of that financial penalty, to the acts which are sought to be disincentivised, the more effective it will be as a disincentive. This is because if costs are not calculated (in relation to an unmeritorious preliminary application) until *after* the completion of proceedings including any appeal (which could be several years hence), and so not enforced until then, or not at all, then they will not operate as *effective* a deterrent as if they were calculated and paid immediately after the action, which is sought to be discouraged.

Importance of the calculation and enforcement of the costs as soon as possible

130. For this reason, it seems to this Court that for costs orders to operate as *an effective deterrent* to claims such as these, the costs should be *calculated* at the earliest opportunity and

enforced at the earliest opportunity and so actually *paid* by the losing party. In this way, the party, whose behaviour, a court is hoping to influence, feels the financial effect of the costs order before it is too late (*i.e.* before the litigation is complete, by which time there may have been more unmeritorious/scandalous applications made). Indeed, it is arguably also in the interest of the person who is subject to a costs order to learn of the precise financial consequences, in euros, of his/her actions at the earliest opportunity, in order to ensure that he/she does not repeat those actions, in ignorance of the true financial cost. This is particularly so for individuals, whether lay litigants or not, who may not be persons of very significant means. This is because while instituting proceedings is very easy, many individuals undertaking High Court litigation for the first time, particularly as lay litigants, may not appreciate that High Court litigation can be *the most expensive financial obligation taken on in a person's lifetime,* sometimes even more costly than the purchase of their home. Therefore, the sooner such litigants appreciate the precise financial cost of the actions they are undertaking the better.

131. In this case therefore, it is in all parties' interests that firstly the plaintiffs are made aware, as soon as possible, that when they pursue claims, which they lose, it is not a cost-free exercise – someone has to pay. Secondly, they should be made aware, also at the earliest opportunity, and not in several years' time, of the *actual cost* in euros of their actions to the defendants (in having to defend unmeritorious claims) and consequently the cost to the plaintiffs as the losing party (in having to pay the defendants' legal costs).

<u>The abuse of court process is at the expense of the taxpayer</u>

132. In these proceedings, there is an added reason for ensuring that costs orders have a genuine deterrent effect. This is the fact that, as the litigation in this case is not against a private individual, but against the State, it is taxpayers' funds which are being wasted, when the State is being sued in unmeritorious claims, such as this one. This is relevant because in *Riordan* at

p. 765 (*per* Murray C.J.), the Supreme Court made clear that the interests of the taxpayer had to be *'borne in mind'* by the courts in reaching its decision in that case, which was, like this one, a case involving the pursuit of groundless litigation by Mr. Riordan against the State:

> **"It must also be borne in mind** that all litigation, even groundless litigation, causes expense to the individuals or entities impleaded in it and that this **expense will often fall on the taxpayer**". (Emphasis added)

Since the State is the most frequent litigant before the courts (see '*The Role and Responsibility of the State in Litigation'* [2020] *Irish Judicial Studies Journal* Vol 4(1) 77 (Murphy J.) at p. 79), it is a point of considerable practical significance that courts need to consider the interests of the taxpayer, when dealing with groundless litigation.

133. It seems to this Court that, if this Court keeps in mind, as it is required to do, that the plaintiffs' groundless litigation is at the cost of the taxpayer, this is yet another reason why this Court should provide a genuine (as distinct from a theoretical) deterrent to the plaintiffs from forcing the defendants to expend further taxpayers' funds (in defending a claim with no prospect of success) and a genuine deterrent to the plaintiffs from wasting court resources (funded by the State).

<u>The importance of the payment of the costs order if costs are to act as a genuine deterrent</u>

134. In order to ensure that the costs order operates as a *genuine* deterrent, it seems clear that the party who is subject to the financial consequences must actually pay the amount in question (as a result of a court order against future income/payments, against assets or otherwise). This is because if a party feels that there are never any real financial consequences to their actions, then they are unlikely to change approach.

135. A similar point was made by O'Moore J. in *The Board of Management of Wilson's Hospital School v. Burke* [2023] IEHC 144 at para. 25, where he dealt with the importance of

ensuring that financial penalties are not merely theoretical, but effective in practice, if one wants court processes not to be abused. In that case, O'Moore J. had to give consideration to the form and type of penalty which was most likely to ensure that court processes would not be abused. At issue there was compliance with a court order by Mr. Burke:

> "Taking a proportionate approach to the measures to be invoked in order to secure Mr. Burke's compliance with an Order found to be lawful and constitutional both by the High Court and the Court of Appeal, the correct option is not to increase the daily fine (at least at this stage) but to **crystallise the sums due as of the 1st of March 2023, to have the Order perfected, and thereby permit the school to take the appropriate steps to enforce the fines**. There are clear and obvious steps which can be taken, including **the sequestration of Mr. Burke's assets**. The earlier application for sequestration as a coercive measure was refused. However, sequestration of Mr. Burke's assets in order to enable collection of his fines is a different proposition. In any event, as and from 4 pm on the 23rd of March **the school is at large as to what steps it wishes to take to enforce the fines** and **Mr. Burke will be at risk** of such measures for as long as it takes for the fines to be paid." (Emphasis added)

136. Similarly, in this case, it seems to this Court that, in order to ensure that a costs order against the plaintiffs would be a practical, rather than a theoretical, deterrent it is crucial to *'crystallise'* the costs which have to be paid by the plaintiffs (assuming this Court makes a final order of costs against the plaintiffs). In this way, the costs orders will be capable of being enforced against the cash/assets and/or income of the three plaintiffs at the earliest opportunity, which should bring home the reality to the plaintiffs of what they have cost the taxpayer initially (and ultimately what it will cost the plaintiffs) of taking proceedings, which are without any merit as well as being scandalous and an abuse of court process.

Only one set of costs for the two legal teams acting for the defendants

137. While this Court is of the provisional view that it should award costs to the defendants, this Court is also of the provisional view that it should not award two sets of costs to the defendants. This is because, as noted by the UK Court of Appeal at para. 80 in *Corner House,* in the context of unsuccessful protective costs applications:

> "The judge should not normally allow more than one set of additional costs because he will expect different interested parties to make common cause on this issue."

138. And so it is in this case, the interests of the two sets of defendants were completely aligned and so while the contributions of both teams were of value to the Court, the losing plaintiffs should not be burdened with effectively having to pay on the double for losing its application.

CONCLUSION

139. It is important to emphasise that while the Court's decision to refuse the plaintiffs a protective costs order is final, this Court's conclusions regarding the costs of that failed application are provisional and subject to hearing submissions from the parties.

140. In reaching its provisional view regarding those costs, this Court recognises the plaintiffs' right of access to the courts to vindicate what they believe are their rights. However, this Court's decision makes clear that the plaintiffs must do as at their own cost (and not at the taxpayers' cost). In addition, as required by the Supreme Court, this Court is proposing to use the costs of these proceedings to date, to discourage, in the strongest manner possible, any further abuse of court process by the plaintiffs. Accordingly, it is this Court's provisional view that:

- costs should be awarded against the plaintiffs in favour of the defendants for this unsuccessful application for a protective costs order,
- those costs should be measured by this Court, rather than having them adjudicated by the Office of the Legal Costs Adjudicators (as costs adjudication might lead to a considerable delay) and this Court will hear from the parties regarding the appropriate sum to be so measured,
- only one set of costs should be awarded to the defendants,
- no stay should be put on the costs, in order to enable the defendants '*to take the appropriate steps to enforce'* the payment, as soon as possible, and
- the manner and timing of any enforcement of those costs by the defendants against the plaintiffs is a matter for further submission.

As this amounts to this Court's provisional view, this Court would ask for submissions from the parties on all of these issues before finalising the terms of any final orders. If the parties wish to make submissions, then this Court will hear from them on Tuesday 2 May at 10.00 am and it will also deal with any other outstanding matters at that time.