

THE HIGH COURT

[2022] IEHC 211

Record No. 2019/ 2265 P

**BETWEEN**

**L.B.**

**PLAINTIFF**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY, IRELAND, THE ATTORNEY GENERAL AND P.B.  
DEFENDANTS**

**JUDGMENT of Ms. Justice Stack delivered on the 6th day of April, 2022.**

**Introduction**

1. This matter comes before me by way of two separate motions. First, there is the plaintiff's motion to amend his plenary summons and statement of claim, and secondly there is the first, second and third named defendants' ("the State Defendants") motion to dismiss the proceedings on the basis that:

- (1) They disclose no cause of action;
- (2) The issues raised herein are *res judicata*;
- (3) The proceedings are an abuse of process; and
- (4) The proceedings are frivolous and/or vexatious.

The State Defendants' notice of motion of 14 February, 2020, also seek an order striking out the within proceedings as being statute barred, which is not being pursued, and an Isaac Wunder order, precluding the plaintiff from instituting any future proceedings before any court without leave of the President of the High Court and upon such terms as may seem appropriate. Consideration of that application has been left over until the application to strike out the proceedings has been determined.

2. The plaintiff has also issued a motion for judgment in default of defence, but the list judge has already determined that this should not proceed until the State Defendant's motion has been determined. There is no point in requiring the State Defendants to deliver a defence to the proceedings if they are correct in their assertions in the motion to strike out and their motion can properly proceed before hearing the plaintiff's motion for judgment in default of defence: see *Vico Limited v. Bank of Ireland* [2016] IECA 273 at [33].

**Motion to amend**

3. Both the plaintiff and the State Defendants indicated through counsel at the commencement of the hearing that they were in a position to deal with the State Defendants' motion to strike out on the basis of the pleadings, as if the amendments sought by the plaintiff were granted. On that basis, and given the very wide jurisdiction of this Court to amend proceedings in order to do justice between the parties, it seemed to be appropriate to grant the plaintiff's application for amendment of both his plenary summons and his statement of claim, and then to proceed to hear the motion to strike out by reference to the amended pleadings.

4. I therefore granted the plaintiff the relief sought in his notice of motion to amend, which was dated 28 July, 2020, and the State Defendants' application to strike out proceeded on the basis of the plenary summons and statement of claim as so amended. Indeed, the State Defendants had drafted the written submissions, filed 4 January, 2022, on the basis of the amended statement of claim.
5. The reliefs sought in the statement of claim as so amended are as follows:
  - (a) A declaration that the Oireachtas lacked competence to enact the property provisions of the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996, having regard to the determinations of the Supreme Court in the *case In The Matter of Article 26 of the Constitution and In The Matter of The Matrimonial Home Bill, 1993* and having regard to the prohibition order of Article 15.4.1 of Bunreacht na hEireann;
  - (b) A declaration that for the reasons stated in (a) above the property provisions of the aforementioned Family Law Acts are null, void and have no effect and that in consequence thereof the Court Orders whereby the plaintiff is deprived of his property are a nullity;
  - (c) A declaration that the property provisions of the aforementioned Family Law Acts are general and indiscriminate and fail to respect the guarantees of Article 17 of the Charter of Fundamental Rights of the European Union in that they provide that the plaintiff herein be deprived of his lawfully acquired property without compensation being paid to him for his loss;
  - (d) An order for the restitution to the plaintiff of all properties and monies of which he has been deprived in consequence of the aforementioned Court Orders made pursuant to the provisions of the said Family Law Acts;
  - (e) Such further or other order as to this Honourable Court shall seem meet and just; and
  - (f) The costs of and incidental to these proceedings.

**The State Defendants' application to strike out**

6. This is moved on the four alternate bases set out at para. 1 above. However, the first one was not pursued. The remaining three bases relied upon raise, at least to some extent, overlapping issues, as will emerge from the discussion below.
7. In essence, the State Defendants rely on the fact that, in two earlier sets of proceedings, the first of which was itself consolidated from two separate sets of proceedings issued in 2004 and 2005 ("the 2004 Consolidated Proceedings"), and the second of which was instituted in 2011 ("the 2011 Proceedings"), the plaintiff has raised identical issues to those now raised in these proceedings, and therefore the issues in the amended Statement of Claim are *res judicata*. The one qualification to this is that the plaintiff now raises, for the first time, the purported application of Article 17 of the Charter of

Fundamental Rights of the European Union, which is a matter which he could have raised in the 2011 Proceedings as they were issued after the entry into force of the Charter. In relation to the point made about the Charter, therefore, the State Defendants rely on the rule in *Henderson v Henderson*.

8. Insofar as the State Defendants pursue an application to strike out on the basis that these proceedings are frivolous and/or vexatious, they rely on the indicia of vexatious proceedings as set out in the decision of the Ontario High Court in *Re Lang, Commissioner Michener and Fabian* (1987) 37 D.L.R. (4th) 685 at p. 691, which were approved by Ó Caoimh J. in *Riordan v. An Taoiseach (No. 5)* [2001] 4 I.R. 463, at p. 466. These indicia are as follows:

- (a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
- (c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
- (f) where the respondent persistently takes unsuccessful appeals from judicial decisions.

Those indicia were approved also by Irvine J. in *Behan v. McGinley* [2011] 1 I.R. 47, and I have applied them recently in *Coleman v. Ireland* [2022] IEHC 17. The State Defendants rely particularly on paras. (a) and (d).

9. As can be seen from that discussion, each of the three bases which were pursued by the State Defendants therefore require a consideration of the earlier proceedings brought by the plaintiff, and the issues determined therein, as well as a consideration of whether the plaintiff ought to have raised any issues relating to Article 17 of the Charter in the 2011 proceedings.

10. Before setting out the issues in those proceedings and the matters determined in the judgments delivered by this Court and the Supreme Court in determining them, it is first necessary to set out, in general terms, the background to these proceedings.

## **Factual background**

11. The plaintiff was married to the fourth named defendant in 1964. She has taken no part in these proceedings and the plaintiff says in his statement of claim that she has only been joined in recognition of her interest in the outcome of the action. They had five children, the youngest born in 1974. A decree of judicial separation was granted on 15 October, 1996, and a decree of divorce was granted on 10 June, 2004.
12. During the marriage, it appears that the plaintiff and his wife lived in a house built in 1965 on lands which the plaintiff bought in 1964. The house was subsequently extended and improved by the construction of an outhouse. A key part of the plaintiff's grievance is that he funded the entire purchase and construction of this home and its associated outhouses.
13. However, when the decree for judicial separation was granted on 28 July, 1998, not only was the plaintiff ordered to pay maintenance to his wife, but it was ordered that the plaintiff's dwelling house be sold and the net proceeds be divided between him and his wife on a 50/50 basis.
14. The plaintiff applied for divorce pursuant to the provisions of the Family Law (Divorce) Act, 1996, ("the 1996 Act") and this was heard in Galway Circuit Court on 10 June, 2004. The Circuit Court made a property adjustment order pursuant to the 1996 Act requiring that the plaintiff's dwelling house be sold and that the proceeds be divided on the basis of 35% to the plaintiff and 65% to his wife. A pension adjustment order was also made pursuant to the 1996 Act, which was to the effect that the plaintiff's wife should receive a 20% share of his pension.
15. The plaintiff appealed to this Court and, on 2 December, 2004, this Court (Finlay Geoghegan J.) varied the property adjustment order so as to provide that the plaintiff would receive 40% of the proceeds and his wife would receive 60%.

**The 2004 and 2005 proceedings**

16. The 2004 Consolidated Proceedings were originally issued as two separate sets of proceedings, bearing High Court Record Nos. 2004/19745P and 2005/2448P. In these, the plaintiff sued Ireland and the Attorney General, two of the State Defendants herein, and named his wife as a notice party in the 2004 proceedings and as a co-defendant in the 2005 proceedings. The plaintiff did not make any claims against his wife in either set of proceedings, and he specified in each statement of claim that she was joined solely to give her the opportunity of being heard should she so wish.
17. In the 2004 statement of claim, the plaintiff sought to impugn the constitutionality of s. 5 (1)(a) of the Family Law (Maintenance of Spouses and Children) Act, 1976, but this is not material to the application before me as the current proceedings do not make any complaint about that Act or about the fact that the plaintiff was ordered in 1992 to pay maintenance to his estranged wife.
18. However, the 2004 statement of claim also sought the following reliefs:

- (b) A declaration that ss. 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of the 1996 Act, were invalid having regard to the Constitution, in that the said sections permitted the delimitation of the plaintiff's property rights in the absence of legislation pursuant to the provisions of Article 43 of the Constitution
  - (c) A declaration that the aforementioned provisions of the 1996 Act were an impermissible legislative interference with the courts in a purely judicial domain
  - (e) A declaration of the orders made in regard to the private property of the plaintiff pursuant to the provisions of ss. 13, 14, 15, and 17 of the 1996 Act, made on 4 June, 2004 and 2 December, 2004, constituted legislation pursuant to the provisions of Article 43 of the Constitution and were *ultra vires* the judicial power of the State.
19. The plaintiff also challenged the orders made in the judicial separation proceedings as continued in the divorce proceedings, whereby he was excluded from residing in his dwelling house in reliance on Article 40.3 and Article 43 of the Constitution. He sought a declaration that orders made in the judicial separation proceedings and "*continued in force pursuant to the provisions of s. 13 of the 1996 Act*" were invalid and that they constitute legislation delimiting the exercise of the plaintiff's property rights and were *ultra vires* the judicial power, as well as orders of *certiorari* quashing all of the orders made in family law proceedings in regard to the exercise by the plaintiff of his property rights for the reason that they impinge on the property rights guaranteed to him by Article 40.3 and 43 of the Constitution.
20. Those proceedings were instituted on 14 December, 2004, shortly after the conclusion of the appeal to this Court in the divorce proceedings.
21. The 2005 statement of claim challenged the constitutionality of ss. 2 (1)(f) and 3 (1) of the Judicial Separation and Family Law Reform Act, 1989, on the basis that it was an impermissible legislative interference with the courts in a purely judicial domain, contrary to Article 6 and Article 34 of the Constitution, as well as a declaration that, by enacting those provisions the State had failed to regard with special care the institution of marriage, and in particular the marriage of the plaintiff, and to guard it against attack as it is obliged to do by Article 41.3.1<sup>o</sup> of the Constitution. He also sought a declaration that the defendant had failed in its constitutional duty to the plaintiff "*to ensure that the government of the State is carried out in accordance with the mandates of the Constitution of Ireland, 1937*" and damages.
22. The 2005 proceedings, though consolidated with the 2004 proceedings, are not in themselves particularly material to the application before me.
23. After those proceedings were consolidated, they were heard in this Court and were determined by a judgment of MacMenamin J. of 7 July, 2006: *L.B. v. Ireland* [2008] 1 I.R. 134.

24. As will be seen from the description of the 2004 Consolidated Proceedings, the claim before MacMenamin J. included a constitutional challenge to the Family Law (Maintenance of Spouses and Children) Act, 1976, as well as the challenge to the constitutionality of the 1996 Act based on the duty of the State to regard with special care the institution of marriage and protect it from attack. Neither of these is material to these proceedings, and I will therefore confine my discussion of the judgment of MacMenamin J. to those issues which are relevant to the challenge made in the proceedings before me.
25. At para. 11, MacMenamin J. stated that the essential case made by the plaintiff was that the 1976 and 1996 Acts were contrary to Articles 34, 40.3 and 43 of the Constitution of Ireland, because the orders made in the judicial separation and divorce proceedings concerning the plaintiff affected his property rights. MacMenamin J. summarised the plaintiff's argument as being that it was only the State which was entitled to make orders which delimit the property rights of the citizen, and that the powers which the State had vested in the courts to make orders as to maintenance, property and pension rights constitute "*legislation*" and consequently form an unlawful derogation of the State's powers to legislate in this area, which powers should be reserved to the legislature.
26. At the hearing before me, the plaintiff took specific objection to the use of the word "*State*" by MacMenamin J. in the last two sentences of para. 11 of his judgment, on the basis that it should be a reference to the Oireachtas. I do not think that that submission in any way takes from the fact that MacMenamin J. very clearly, in his judgment, determined the issues raised by the plaintiff on the basis of the doctrine of the separation of powers. At para. 25 of his judgment, MacMenamin J. stated that the plaintiff asserted:

*"[T]hat the doctrine of the separation of powers determines and mandates that the constitutionally embedded power of legislation may only be exercised by the Oireachtas, and that this doctrine dictates that where the Oireachtas or the Executive are found whether by act or omission to have acted in a manner which violates the Constitution, they are entitled to expect that the other responsible organs of government take such steps as are necessary to redress the wrongs in question."*

MacMenamin J. went on to refer to the plaintiff's arguments based on Article 15 and Article 15.4.1<sup>o</sup> of the Constitution, and to the fact that the plaintiff had asserted that, by virtue of Article 43.2.2<sup>o</sup> of the Constitution, the Oireachtas may not delegate its legislative function to another organ of the State, the Oireachtas therefore acted ultra vires in purporting to delegate such a power to the courts by legislation, as he asserts was done in the Family Law Acts of 1995 and 1996.

27. MacMenamin J. then considered the plaintiff's arguments that he alone had paid for the dwelling house and contributed to his pension, and that these were therefore his private property. The plaintiff had relied on a number of authorities including *Re the Matrimonial Home Bill, 1993* [1994] 1 I.R. 305. MacMenamin J. then considered, *inter alia*, that authority, and also the judgment of the Supreme Court in *T.F. v. Ireland* [1995] 1 I.R. 321. MacMenamin J. held that T.F. was authority for the proposition that "*any delimiting*

*of personal rights as arose in the Act of 1989 were not oppressive and bore a reasonable and proportionate relationship between the benefit which the legislation would confer on family members on the one hand and the interference with the personal rights of the citizen on the other."*

28. Of course, the 2004 Consolidated Proceedings were instituted after the plaintiff's divorce proceedings had been concluded. It is evident that, once this Court determined the appeal from the Circuit Court in the divorce proceedings, the final order in relation to the plaintiff's home was that it would be sold and divided 50/50 between the plaintiff and his wife. Accordingly, by the time of the institution of the 2004 Consolidated Proceedings it was the constitutionality of the provisions of the Family Law (Divorce) Act, 1996, which were material as it was on foot of those provisions that the subsisting order providing for the sale of the plaintiff's dwelling house and the division of the proceeds between the plaintiff and his wife were based.
29. At para. 47 et seq., MacMenamin J. turned to the plaintiff's submissions regarding the 1996 Act. MacMenamin J. found (at para. 48):

*"... [T]he plaintiff has not established any fundamental distinction between the maintenance and property rights thereby enacted and those already specified in the Act of 1989. The bases of a decree of judicial separation are therein acknowledged. The effect of the Act of 1996 is to permit divorce on certain conditions which are established by the Constitution itself. The Fifteenth Amendment to the Constitution of Ireland introduced the concept of divorce to Irish law and the provisions of Article 41 prohibiting the granting of a decree of divorce were deleted from the Constitution. In their place was inserted a provision whereby the courts were conferred with the power to grant decrees of divorce subject to the conditions set out by that constitutional amendment."*

30. MacMenamin J. then went on to note that a decree of divorce could only be granted where the court is satisfied that "*proper provision*" has been made for the spouses and children of the family. At para. 50, he stated that this appeared from the 1996 Act:

*"The Act reflects the provisions of the Fifteenth Amendment itself. Applying the principles and for the reasons identified by the Supreme Court earlier in the case of T.F.v. Ireland [1995] 1 I.R. 321, the provisions of the Act must be within the legislative authority of the Oireachtas: no distinction has been drawn between them. They must be seen therefore as having been made to provide for and to balance the interests of the family as a whole and the members of that family unit."*

31. MacMenamin J. went on to say that the relevant provisions of the 1996 Act "*must be seen therefore as having been made to provide for and to balance the interests of the family as a whole and the members of that family unit. No submission has been made herein as to any basis upon which there is a constitutional infirmity having regard to the Fifteenth Amendment. The requirement having been stipulated under the Constitution that 'proper*

*provision' be made for spouses, it was a matter for the Oireachtas to set out how that 'proper provision' was to be achieved."*

32. Rejecting the contention of the plaintiff in that case that, by reason of his direct financial contributions, he was the sole owner of the family home, MacMenamin J. cited the judgment of the Supreme Court in *D.T. v. C.T. (Divorce: Ample resources)* [2002] 3 I.R. 334, and stated (at para. 51):

*"In D.T. v. C.T. [2002] 3 I.R. 334 the Supreme Court, on appeal from the High Court had to consider whether proper provision for a spouse had been made in the particular circumstances of that case. In the course of his judgment Murray J. (as he then was) stated at pp.404 and 405:-*

*'As I have previously had occasion to state, the Constitution and, in particular, Article 41 reflects a shared value of society concerning the status of the "family" in the social order as a natural primary and fundamental unit group in society. The State is required to protect the family, inter alia, because it is indispensable to the welfare of the nation and the State. Moreover, the Constitution requires the State 'to guard with special care the institution of marriage'...*

*With these purposes in mind, the Constitution as adopted in 1937, contained a complete prohibition on the dissolution of marriage. The Fifteenth Amendment to the Constitution with which we are now dealing replaced that prohibition and, clearly, with those purposes also in mind, was placed in Article 41 and specified four pre-conditions which must be fulfilled before an order dissolving a marriage may be granted. It is in this context that the notion of proper provision for the spouses must be interpreted."*

33. It is clear, therefore, that, in the 2004 proceedings, the plaintiff launched an attack in on the compatibility of the provisions of the 1996 Act, insofar as they permitted the Circuit Court to make property adjustment orders and pension adjustment orders, and that he did so firstly, on the basis of the protection of property rights in the Constitution and, secondly on the basis of a separation of powers argument. Both of these arguments were rejected by MacMenamin J., and his judgment was upheld by the Supreme Court by order dated 28 July, 2009.

#### **The 2011 proceedings**

34. The 2011 statement of claim claimed liquidated sums representing the value of the property which the plaintiff alleged had been "*repeatedly expropriated*" on diverse dates since 1998, and in the alternative, orders of *certiorari* quashing the property adjustment order made in the course of the plaintiff's judicial separation and divorce proceedings "*for lack of jurisdiction*" pursuant to the provisions of Article 6, Article 34, Article 40.3 and Article 43 of the Constitution, as well as a declaration that the statute 'which gives them jurisdiction', that is the statute permitting the said orders to be made, was invalid having regard to Articles 6, 34, 40.3 and 43 of the Constitution. Further monetary relief in respect of what the plaintiff claimed was rent due to him and the value of his pension



entitlements and subject to the pension adjustment order, as well as the value of the rent paid by him when he had to move out of his family home, were also claimed.

35. It should be noted that at para. 21 of the statement of claim, the plaintiff pleaded the following:

*"The Orders made by the first named defendant, his servants and agents, delimiting the property rights of the plaintiff are arbitrary and capricious. They fail to take account of the separation of the powers of government. They fail to recognise the limitations of statutory power and violate the property and other rights guaranteed to the plaintiff by the Constitution of Ireland, 1937."*

36. It will be seen, therefore, that these proceedings traverse the same ground as the issues previously determined by MacMenamin J. and upheld by the Supreme Court in 2009, notably the reliance on the plaintiff's constitutional property rights so as to attack the property and pension adjustment orders made in his judicial separation and divorce proceedings, and on the basis that the relevant statutes were unconstitutional as being in breach of the separation of powers.
37. Those proceedings were dismissed by Hogan J. on the basis that the claim was doomed to fail: *L.B. v. Ireland and the Attorney General and P.B.* [2012] IEHC 461. In so finding, Hogan J. was satisfied that the judgment of the Supreme Court in *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] 1 I.R. 305 was not authority for the proposition that any of the relevant statutory provisions which had permitted the making of the property and pension adjustment orders against the plaintiff in his judicial separation and divorce proceedings were unconstitutional.
38. Hogan J., citing from the judgment of Finlay C.J. in *Re the Matrimonial Homes Bill 1993*, stressed that portion of it where Finlay C.J. had pointed to the automatic application of the provisions of the Matrimonial Homes Bill to every family in every circumstance and said it could be distinguished from a situation where legalisation was designed to take into account the differing circumstances of the family involved. Hogan J. emphasised the following quote at p. 325 of the judgment of Finlay C.J.:

*"The interference with decisions which may have been jointly made by spouses with regard to the ownership of the matrimonial home effected by this universal application does not therefore depend in any way on instances where the decision arrived at constitutes something which is injurious to or oppressive of the interests of a spouse or of members of the family or which constitutes a failure on the part of one of the spouses to discharge what might fairly be considered as his/her family obligations."*

39. Hogan J. explained (at para. 16) that what was objectionable about the 1993 Bill was that it involved what the Supreme Court considered to be an unnecessary and disproportionate interference with family autonomy, precisely because it imposed a presumptive equal division of assets between the couple which applied to every case.

Hogan J. found, however, that the quote from the judgment of Finlay C.J. set out above pointed to the fact *"that different considerations would naturally obtain where one spouse had potentially failed to discharge his or her duties to the other."*

40. He then found that it was beside the point that the plaintiff had purchased and paid for the family home and that Article 41.3.2 not only permitted but enjoined the State to enact legislation providing for proper provision to be made for the benefit of another spouse. He stated that these obligations stem from the very nature of marriage itself and that by providing for laws of this nature, the State acted to uphold and safeguard the institution of marriage in the manner required by Article 41.3.1, he held (at para. 18):

*"In that sense, therefore, neither the 1989 Act nor the 1996 Act should be seen as involving the taking of any property of a spouse by the State inasmuch as the legislation provides for the intra-spousal transfer of capital assets. But insofar as it does, it is by definition not an unjustified interference with the property rights of the affected spouse for the purposes of Article 40.3.2 since this legislation is designed to give effect to fundamental values cherished by Article 41 and is, in any event, sanctioned by Article 41.3.2."*

41. He went on (at para. 19) to find that this was not in the least affected by the fact that no compensation was payable to the spouse as property was transferred in this fashion. Otherwise, the State would have had to take on the obligation of providing for the spouse, which would provide an incentive for spouses to default on financial obligations which they properly owe towards other family members. He held that the State had done no more than provide for an independent resolution mechanism by the courts of disputes between family members in respect of the extent of such proper financial provision. He said that there was no comparison with cases of compulsory acquisition of property or the *de facto* sequestration of assets by legislative action without compensation *"precisely because for the reasons just mentioned it does not involve the taking by the State of the plaintiff's assets."*
42. He also stated that, while he was of the view that the plaintiff's claim must eventually fail, he would, if necessary to do so, have struck out the proceedings on the grounds that they sought to relitigate matters already determined by MacMenamin J. and the Supreme Court in the 2004 Consolidated proceedings and were therefore *res judicata*.
43. The plaintiff then appealed to the Supreme Court, who dismissed his appeal. The written judgment of the Supreme Court was delivered by Clarke J.: *L.B. v. Ireland, the Attorney General and P.B.* [2015] IESC 1. In his submission in this application, the plaintiff relied heavily on the fact that at para. 1.2, contained in the introductory part of his judgment, Clarke J. stated that the effect of the court orders made in the matrimonial proceedings involving the plaintiff and his wife had been to *"deprive Mr. B. of property rights which he would otherwise have had in the relevant lands and pension."* However, I am satisfied that this reliance is misplaced as that quotation has been taken out of context and the submission of the plaintiff ignores the very clear statement of Clarke J. at para. 3.5 where he said:

*"I am far from convinced that it is appropriate to characterise a property transfer as an expropriation of property where it arises as a result of orders made in matrimonial proceedings. Even if it were arguable to so characterise matrimonial property orders, the general requirement which would normally render the uncompensated expropriation of property unconstitutional would have to give way, in the context of divorce, to the specific constitutional entitlement of a spouse on divorce."*

44. Referring to the judgments of MacMenamin J. in the 2004 Consolidated Proceedings and Hogan J. in the court below, Clarke J. was satisfied that the statutory provisions on foot of which property and pension adjustment orders had been made in the plaintiff's divorce proceedings, were ones mandated by the requirement in Article 41.3.2<sup>o</sup> that one spouse could be required to make "*proper provision*" for the other spouse in the context of divorce. As Clarke J. stated (at para. 3.6) all of the rights to property must now be seen to be qualified by that provision.
45. On that basis, the Supreme Court rejected the challenge made in the 2011 proceedings based on the constitutional protection of property rights.
46. In Section 4 of his judgment, Clarke J. turned to the separation of powers argument made by the plaintiff and considered under this heading both the argument that the Oireachtas was prohibited from enacting this legislation because it was unconstitutional (the Article 15.4.1<sup>o</sup> argument) and the argument based on the fact that only the Oireachtas has power to make law for the State. The argument that the Oireachtas had no power, by reason of Article 15.4 of the Constitution, to enact legislation providing for property adjustment orders was rejected on the basis that, in the context of divorce, the Constitution requires that proper provision would be made for dependent spouses and this was therefore a legitimate interference with the property rights of the other spouse. He also rejected the related argument that the Oireachtas was somehow interfering with the power of the courts to decide the cases before them by specifying the matters that should be taken into account, stating (at para. 4.9):

*"The suggestion that a law which narrows the scope of a court's inquiry involves an impermissible interference by the Oireachtas in the court's role is simply wrong. It is inherent in the law making power of the Oireachtas, which is expressly conferred by the Constitution, that laws will necessarily limit the scope of the court's inquiry in cases to which the law in question applies."*

#### **The doctrine of res judicata**

47. A good starting point in defining the doctrine of res judicata is given in para. 1.01 of McDermott, *Res Judicata and Double Jeopardy* (Bloomsbury Professional, 1999) where it is stated:

*"A final judicial decision pronounced by a court of competent jurisdiction, disposes once and for all of the matters decided so that they cannot afterwards be raised for relitigation between the same parties or their privies."*

48. At para. 401, the same author identifies the relevant elements of *res judicata* as follows:

*"The judgment must be given by a court of competent jurisdiction and be final and conclusive on the merits."*

49. There is no doubt but that this Court and, on appeal, the Supreme Court are courts which are competent and have jurisdiction to determine the issues raised in the 2004 Consolidated Proceedings and the 2011 Proceedings. The only real issue about the operation of *res judicata* in this case are:

- (1) whether these proceedings raise the same issues as have already been determined; and
- (2) whether any issue arises by the addition of the first named defendant as the defendant to these proceedings, as otherwise the parties to these and all earlier proceedings are the same.

50. It is clear from the endorsement of claim to the amended plenary summons that the principal constitutional issue raised by the plaintiff in these proceedings is whether, having regard to the Supreme Court decision in *Re Matrimonial Homes Bill 1993*, it can be said that the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 are constitutional having regard to Article 15.4.1 which provides that the Oireachtas shall not enact any law which is in any respect repugnant to the Constitution or any provision thereof. That relief must be read in light of the substantive pleas in the Statement of Claim in these proceedings, from which it is abundantly clear that the same factual matters are relied upon (essentially that, despite being the only person contributing financially to his family home, the plaintiff has been arbitrarily and unconstitutionally deprived of his property rights therein), and that by reason of the property adjustment orders made by the Circuit Court and affirmed on appeal by this Court, the plaintiff has been unlawfully deprived of his property and thereby deprived of his constitutional rights.

51. There is a specific reference to the fact that the plaintiff did not receive adequate or any compensation for the loss of a substantial share of his property, and it is abundantly clear that this issue is determined not just by MacMenamin J. in the 2004 Consolidated Proceedings but also by Hogan J. and on appeal by the Supreme Court in the 2011 Proceedings. Those judgments are quite clear as to the constitutionality of the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996, by reason of the fact that the plaintiff's property rights in this instance must give way to constitutional requirement to make proper provision for his dependant spouse on divorce.

52. The arguments made by the plaintiff at oral hearing would be familiar to any person who had read the earlier judgments of MacMenamin J., Hogan J. and Clarke J. They are manifestly the same legal point as has previously been rejected on two occasions and which, in my view, must be regarded as *res judicata*. The relief at para. (b) of the amended plenary summons and amended statement of claim is merely a consequential order seeking to link the alleged unconstitutionality of the 1995 and 1996 Acts to the

court orders made in the plaintiff's matrimonial proceedings. However, the constitutional issue underpinning this relief is the same as relates to para. (a). In this regard, it should be noted that Clarke J. expressly linked both of these arguments when he dismissed the plaintiff's appeal against the judgment of Hogan J. in the 2011 Proceedings: see para. 1.4 of his judgment. Quite clearly the same argument was made in that case and rejected. Accordingly, insofar as this relief is concerned, the matter is *res judicata*.

53. At para. (d) of the amended plenary summons and amended statement of claim the plaintiff seeks restitution of all properties and monies of which he has been deprived on foot of the various orders made in the matrimonial proceedings in which he was involved. In the 2004 Proceedings, the plaintiff sought "recovery and damages". In the 2011 Proceedings, the same substantive complaint about the orders made in the matrimonial proceedings was pleaded, and the plaintiff then claimed various liquidated sums, general damages (a claim for which was included in almost identical terms in the statement of claim in these proceedings before it was amended), as well as orders of *certiorari* quashing the orders made in the matrimonial proceedings.
54. This equates to the order for restitution now sought in the amended plenary summons and amended statement of claim, because the plaintiff was seeking the money that he has lost and, possibly, the restoration to him *in specie* of his actual family home. There is no difference in substance between that and the order for *certiorari* of *inter alia* the property adjustment order which was sought in the 2011 Proceedings, and therefore, this relief has already been refused to the plaintiff in the 2011 Proceedings.
55. The plaintiff asserted, without reference to any authority, that the doctrine of *res judicata* did not apply in public law proceedings. I am satisfied that that is not the case, given the fact that Clarke J. specifically stated, in upholding Hogan J.'s judgment delivered in the 2011 proceedings, that even if the proceedings were not being struck out as being doomed to fail, they would be barred by reason of the doctrine of *res judicata*. Evidently the Supreme Court in that case had no hesitation in applying this doctrine in a public law arena. There is some jurisprudence to suggest that the doctrine may not apply with the same force in Article 40 applications, but this does not extend to public law litigation generally, and indeed Hogan J. indicated in his judgment in the 2011 proceedings that he would have applied the doctrine to dismiss those proceedings, which were obviously public law proceedings. I therefore reject this argument.
56. Finally, though the Minister for Justice is not a party to the earlier proceedings, she is joined to these proceedings solely in her representative capacity and therefore there is no difficulty in finding the necessary identity between the parties to the earlier proceedings and the parties to these proceedings, either for the purposes of the doctrine of *res judicata* or the rule in *Henderson v. Henderson*.
57. It is my view, therefore, that the substantive arguments as to the constitutionality of the Family Law Act, 1995 and Family Law (Divorce) Act, 1996, have already been decided in both the 2004 Consolidated Proceedings and the 2011 Proceedings, and are *res judicata*.

58. The only new argument which is raised in these proceedings is the reference to Article 17 of the Charter of Fundamental Rights of the European Union, and because this was not argued in the earlier proceedings, it falls to be determined in accordance with the rule in *Henderson v. Henderson* to which I now turn.

**The rule in Henderson v. Henderson**

59. The classic modern statement in this jurisdiction of the rule in *Henderson v. Henderson* is that of Cooke J. in *Re Vantive Holdings Ltd* [2009] IEHC 408, at paras. 32-33:

*"The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but to every point which might have been brought forward in the case.*

*In its more recent applications this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."*

60. That statement was adopted by the Supreme Court on appeal: see the judgment of Murray C.J. in *Re Vantive Holdings* [2010] 2 I.R. 118, at p. 124 and more recently by the Court of Appeal in *Vico Ltd v. Bank of Ireland* [2016] IECA 273, per Finlay Geoghegan J. at para. 26. After adopting the explanation of the rule given by Cooke J. in the High Court in *Re Vantive Holdings*, Finlay-Geoghegan J. explained that the special cases were primarily those where the judgment was procured by fraud. There is nothing of that nature here.
61. Finlay-Geoghegan J. also cited with approval the judgment of Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 at 31, where he stated:

*"... But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold*

*that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus, while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."*

62. The question is whether, by the introduction of reference to Article 17 of the Charter, the plaintiff may continue his proceedings or whether, as the State defendants contend, introduction of this claim at this time is barred by the rule in *Henderson v. Henderson* as it was an argument open to the plaintiff in his 2011 Proceedings. The Charter took effect on the entry into force of the Lisbon Treaty on 1 December, 2009, and therefore was available to the plaintiff as a potential basis for challenge when he instituted the 2011 proceedings.
63. It should be noted that Article 51 of the Charter provides that its provisions are addressed to the institutions, bodies, offices and agencies of the European Union and apply to member states "*only when implementing Union law*". The scope of application of the Charter and the problem of delineating the respective competences of Union and national law has given rise to significant jurisprudence since its introduction, but it seems difficult to imagine that it could be argued that the making of property and pension adjustment orders in divorce and other family law proceedings falls within the competence of the European Union as defined in the Treaties.
64. More fundamentally, all of the orders of which the plaintiff complains were made long before the introduction of the Charter.
65. Having said that, the State Defendants rely squarely on the ruling in *Henderson v. Henderson*, and therefore I must consider the approach of Bingham J., as approved by the Court of Appeal and the Supreme Court in this jurisdiction, and must therefore take account of the public and private interests involved in this challenge and of all of the facts of the case, focussing attention on the crucial question of whether, in all the

circumstances, the plaintiff was misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before.

66. In considering this question, it must be recalled that I have already found that the balance of these proceedings seeks to relitigate matters which the plaintiff has been unsuccessfully litigating since 2004, having instituted three separate sets of proceedings, all of which were ultimately determined against him by the Supreme Court.
67. Against that background, the inclusion in proceedings in 2019, almost ten years after the introduction of the Charter, of a potential new legal basis for the making of what are, in substance, the same arguments, leads me inevitably to the conclusion that this relief has been introduced to attempt to side step the undoubtedly binding nature of the earlier judgments and to seek to advance the same arguments for a third time in this Court. Indeed, reference to the Charter in para. (c) of the plenary summons and statement of claim was originally found together with references to Article 41, Article 40.3 and Article 43 of the Constitution and Article 1, Protocol 1 of the European Convention on Human Rights. On amendment, those references to the Constitution and the Convention have been removed, and only the Charter remains. However, it is clear that substantially the same arguments are sought to be advanced, this time using the Charter as a basis.
68. Taking into account the history of the proceedings, the nature of the amendment which was to remove references to Articles of the Constitution which had been well-traversed in the judgments given by this Court and the Supreme Court in earlier proceedings brought by the plaintiff, and the fact that the motion to amend was only brought in response to the State Defendants' motion to strike out, I am of the view that reliance on the Charter in this instance is an abuse of process and is designed to avoid the enforceability of the earlier judgments and orders of this Court and of the Supreme Court .
69. It is my view, therefore, that the plaintiff is debarred by the rule in *Henderson v. Henderson* from relying on Article 17 of the Charter of Fundamental Rights.

**Whether the proceedings are frivolous and vexatious**

70. Even if the precise requirements of the doctrine of *res judicata* and the rule in *Henderson v. Henderson* were not satisfied in this case (though I believe they are), these proceedings would certainly fall within the definition of vexatious proceedings as defined by Ó Caoimh J. in *Riordan v. An Taoiseach (No. 5)* already cited above. It is clear, as submitted by the State Defendants in this application, that these proceedings attempt to determine an issue which has already been determined by a court of competent jurisdiction, and the issues in these proceedings are ones rolled forward from the earlier proceedings and repeated in these proceedings and, in the case of the Charter, supplemented with an additional formal basis (which on its face has no application) in an attempt to give the plaintiff a third bite of the cherry.
71. I would therefore, in any event, dismiss these proceedings pursuant to the inherent jurisdiction of this Court on the basis that they are vexatious.



**Conclusion**

72. In my view, the proceedings should be struck out on the basis that they are, save for the reference to the Charter of Fundamental Rights, precluded by the doctrine of *res judicata* and, insofar as the reliance on the Charter is concerned, barred by the rule in *Henderson v. Henderson* as an abuse of process.
73. If I am wrong in that, the proceedings are in any event vexatious, and should be struck out pursuant to the inherent jurisdiction of this Court.
74. I will list the matter for mention before me in early course to hear the parties on the State Defendants' application for an *Isaac Wunder* order.