THE HIGH COURT

[2023 IEHC 226]
[2022/6528P]

BETWEEN

EC

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

AND BY ORDER OF THE COURT

THE ATTORNEY GENERAL AND THE MENTAL HEALTH COMMISSION AND THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTIES

JUDGMENT of Ms. Justice Emily Egan delivered on the 5th of May, 2023

Introduction

1. This judgment is delivered in respect of an application by the Attorney General ("the State") to strike out plenary proceedings on the grounds that they are in breach of s. 73 ("s. 73") of the Mental Health Act, 2001 ("the 2001 Act"). Section 73 provides:

> *"73. (1) No civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be refused unless the High Court is satisfied:*
>
> *(a) that the proceedings are frivolous or vexatious, or*

(b) that there are no reasonable grounds for contending that the person against whom the proceedings are brought acted in bad faith or without reasonable care.

(2) Notice of an application for leave of the High Court under subsection (1) shall be given to the person against whom it is proposed to institute the proceedings and such person shall be entitled to be heard against the application.

(3) Where proceedings are, by leave granted in pursuance of subsection (1) of this section, instituted in respect of an act purporting to have been done in pursuance of this Act, the Court shall not determine the proceedings in favour of the plaintiff unless it is satisfied that the defendant acted in bad faith or without reasonable care."

2. At the time of the commencement of these proceedings the plaintiff, a 42-year-old man, was detained in the acute psychiatric unit of Tallaght University Hospital ("the hospital"). The plaintiff issued a plenary summons against the existing defendant, representing the interests of the hospital ("the HSE"), and his treating psychiatrist (against whom proceedings have since been discontinued) seeking various declaratory reliefs to the effect that his treatment with depot neuroleptic medication ("depot") without his consent and without a proper assessment or determination that he lacked functional capacity to consent to such treatment was unlawful, in breach of s. 57 (1) of the 2001 Act, ("s. 57 (1)") and in breach of his constitutional rights.

3. Section 57 (1) is best understood together with s. 56 of the 2001 Act which, together provide:

"56. In this Part "consent", in relation to a patient, means consent obtained freely without threats or inducements, where—

(a) the consultant psychiatrist responsible for the care and treatment of the patient is satisfied that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment; and

(b) the consultant psychiatrist has given the patient adequate information, in a form and language that the patient can understand, on the nature, purpose and likely effects of the proposed treatment."

"57. (1) The consent of a patient shall be required for treatment except where, in the opinion of the consultant psychiatrist responsible for the care and treatment of the patient, the treatment is necessary to safeguard the life of the patient, to restore his or her health, to alleviate his or her condition, or to relieve his or her suffering, and by reason of his or her mental disorder the patient concerned is incapable of giving such consent.

(2) This section shall not apply to the treatment specified in section 58, 59 or 60."

4. The plaintiff seeks a declaration that the opinion of his treating psychiatrist to the effect that he lacked functional capacity to consent to such treatment by reason of his mental disorder does not constitute a proper or lawful determination of such lack of capacity sufficient to justify his treatment without consent, and indeed despite his express refusal of treatment. The plaintiff separately seeks a declaration that his physical restraint by the HSE for the purposes of administering depot is unlawful and/or breaches the provisions of the Mental Health Commission Code of Practice on the Use of Physical Restraint in Approved Centres 2009 ("the code of practice"). A further declaration is sought that if s. 57 (1) permits the treatment given on the basis of the capacity analysis carried out by the HSE, then that section breaches the plaintiff's right under Article 40.3.1 and Article 40.3.2 of the Constitution and under various provisions of the

European Convention on Human Rights ("the Convention"). Finally, a permanent injunction is sought restraining the HSE from administering depot to the plaintiff and/or restraining the plaintiff for the purposes of administering such medication. The plenary summons also sought damages for negligence, breach of duty, trespass to the person, misfeasance in public office, the negligent infliction of emotional suffering and breach of the plaintiff's constitutional rights and Convention rights.

Scope, structure and summary of this judgment

5. This is an application by the State to strike out the proceedings as having been commenced without leave. The HSE makes no such application and took no active part in this application. This judgment is concerned solely with whether, as presently formulated, the proceedings required such leave and with whether the State is entitled to the order it seeks.

6. This judgment is not an adjudication upon an application for leave to institute proceedings pursuant to s. 73 (1). The plaintiff made no application before me for s. 73 (1) leave, and indeed positively argued that leave could not, in any case, be granted as his proceedings make no allegation that the hospital acted in bad faith or without reasonable care.

7. Nor is this judgment, in any sense, an adjudication on whether or not s. 73 is inconsistent with the Constitution in confining an intended plaintiff to proceedings arising out of the lack of *bona fides* or want of reasonable care. The plaintiff does not advance any challenge to the constitutionality of the section in the present proceedings.

8. I will commence by setting out the factual background to and course of the proceedings. I will then consider the statutory context of s. 73 before outlining the legal submissions of the plaintiff and the State. I then outline the differing approaches of the plaintiff and

the State to the requirement that s. 73, as a curtailment of the constitutional right of access to the courts, must be strictly construed. I accept that, in at least two kinds of civil proceedings- *habeas corpus* applications and constitutional challenges to the validity of s. 73 of the 2001 Act,- s. 73 (1) leave is not required prior to the initiation of the proceedings. In such cases, it is necessary to read down the broad wording of s. 73 in order to afford it a constitutionally valid interpretation. In addition, although I do not need to decide the issue, a similar approach is likely to be necessary in judicial review proceedings in respect of an "*act purporting to have been done in pursuance of"* the 2001 Act in which the plaintiff does not allege bad faith or want of care but rather a lack of *vires*. However, I cannot accept the plaintiffs' argument that the requirement to obtain leave prior to the commencement of proceedings in s. 73 (1) does not apply to plenary proceedings such as this in which a plaintiff seeks both declaratory relief and damages as against the HSE (for breach of statutory duty, trespass to the person, negligent infliction of emotional suffering and breach of constitutional and Convention rights). Although displaying certain elements of a public law claim – in the sense that the plaintiff contends that the HSE exceeded its powers in involuntarily administering depot – the plaintiff's case as against the HSE is essentially a private law claim. This particular claim is caught by the definition "*civil proceedings … in respect of an act purporting to have been done in pursuance of* [the 2001 Act]*".* I therefore conclude that the proceedings as against the HSE in respect of the plaintiff's non-consensual treatment required s. 73 (1) leave prior to commencement. However, as the State and not the HSE is the party seeking to have the proceedings struck out, it is then necessary to separately consider whether the plaintiff's case as against the State - which is a challenge to the constitutionality of s. 57 (1) of the 2001 Act - also required leave pursuant to s. 73 (1) prior to commencement. I conclude that s. 73 has no application to

a constitutional challenge to any section of the 2001 Act and that the State is therefore not entitled to an order striking out the proceedings. Finally, as this question is likely to be of relevance to the formulation of the court's orders on foot of this judgment**,** I consider whether s. 73 (1) is a jurisdictional or procedural bar and conclude that the former is the case. This means that, irrespective of the fact that the HSE has made no application to have the proceedings as against it struck out, the plaintiff may nonetheless not pursue his reliefs as against it.

Factual background and course of proceedings

9. The plaintiff who was born on 8 December 1980, has a long-standing diagnosis of schizophrenic disorder with religious delusions and has been treated with antipsychotic medication for many years. He was admitted to the acute psychiatric unit of the hospital pursuant to an admission order dated 9 December 2022. That admission order was affirmed by the Mental Health Tribunal on 21 December 2022. The period of the plaintiff's detention was extended to 29 March 2023 by a renewal order made on 23 December 2022 which was affirmed by the Mental Health Tribunal on 11 January 2023.

10. During his detention, the plaintiff refused to take oral medication save on one occasion and refused consent to the administration by injection of depot. On 15 December 2022 the plaintiff was restrained, and depot was administered by injection. The plaintiff's treating psychiatrist avers by affidavit that, prior to this, he carried out an analysis of capacity and concluded that the plaintiff did not have capacity to consent to treatment. On 22 December 2022, the plaintiff was again restrained, and a further injection of the same medication was administered. Again, the plaintiff's treating psychiatrist avers that he conducted an analysis of capacity prior to the administration of the medication. The

HSE maintains that this physical restraint was in accordance with the code of practice and with its internal policy on restraint.

11. On 21 December 2022 correspondence issued from the plaintiff's solicitors challenging the legality of the administration of the depot and of the restraint employed. The plaintiff's treating psychiatrist had intended to continue this course of treatment, but in light of the legal dispute, desisted from same.

12. The plaintiff commenced these proceedings by plenary summons on 23 December 2022. On the same day, the plaintiff's treating psychiatrist avers that he diagnosed a deterioration in the plaintiff's condition and indicated his intention to administer further medication as soon as possible and preferably within the next 48 hours. As a result, the plaintiff made an application for short service of a notice of motion seeking interlocutory relief restraining this intended administration and any restraint associated therewith.

13. On 13 January 2023, O'Moore J. granted interim relief to 4pm the following day and gave directions as to replying affidavits and submissions in respect of the interlocutory application. Hyland J. heard the interlocutory application on 14 January 2023. On the following day, Hyland J. delivered a written judgment whereby she refused the application for interlocutory relief. In so doing, Hyland J. noted that the plaintiff had not adduced any medical evidence to contest the clinical views expressed by his treating clinicians and thus did not contest that he suffered from a mental disorder within the meaning of the 2001 Act. The plaintiff did not challenge the lawfulness of his involuntary admission to hospital and/or the renewals of the admission orders and did not contest the clinical opinion that he lacked capacity. Rather, the principal detriment relied upon by the plaintiff was the alleged illegality of procedures attending the administration of depot and, in particular, the absence of independent oversight of the

decision in relation to capacity. The plaintiff did not however allege that he would be medically disadvantaged by the treatment being provided or that the independent oversight for which he contended would result in treatment being withheld. The plaintiff had put forward no medical evidence to controvert the HSE's evidence that he required the treatment to recover from the acute stage of his illness. Hyland J. noted that, for the purposes of the interlocutory application, it had been accepted that there was a fair issue to be tried. Hyland J. also found that damages would not be an adequate remedy for the plaintiff should the administration of the medication be ultimately found to be unlawful. However, Hyland J. found that the balance of convenience and the balance of justice required that she refuse the relief sought by the plaintiff for three reasons. First, because the plaintiff, who was deteriorating and would continue to deteriorate in the absence of treatment, had identified no real detriment arising from his continued treatment, whilst the HSE had identified significant corresponding detriment if it was not permitted to continue to treat the plaintiff who was acting in an aggressive and abusive manner towards patients and staff at the hospital. Second, paradoxically, by bringing the application the plaintiff had in fact ensured that there was independent oversight of the medical conclusion to the effect that he lacked capacity. Third, s. 57 (1) specifically provides for consent to be dispensed with in circumstances contended by the HSE to be present in this case. The section enjoys the presumption of constitutionality. The HSE's interpretation that the capacity assessment required under s. 57 (1) may lawfully be conducted by the treating clinicians was at least open on the wording of the section. Although the plaintiff advanced a different interpretation, the court ought to give appropriate weight to the orderly implementation of the section which was *prima facie* valid (*Okunade v. Minister for Justice* [2012] 3 IR 152). On

refusing the relief, Hyland J. made directions as to the joinder of the notice parties and the exchange of pleadings. The proceedings were adjourned to 18 January 2023.

14. On 15 January 2023, depot was administered to the plaintiff without the necessity for physical restraint.

15. On 16 January 2023 notices pursuant to O. 60 and 60A of the Rules of the Superior Court ("the Rules") were served on the State and the Irish Human Rights and Equality Commission, and the Mental Health Commission was notified of its joinder as notice party.

16. On 17 January, 2023, the plaintiff delivered a notice of discontinuance of proceedings as against his treating psychiatrist and served a statement of claim which pleads out his case more fully, abandons certain claims to damages (i.e. damages for negligence and misfeasance in public office) but maintains a claim to damages for breach of duty, trespass to the person, negligent infliction of emotional suffering and breach of constitutional and Convention rights.

17. A directions hearing took place before O'Moore J. on 18 January 2023 pursuant to which the action was fixed for hearing for three days on 15 February 2023. O'Moore J. directed the plaintiff to file (and circulate) submissions on whether leave of the court pursuant to s. 73 (1) had been required prior to the commencement of the proceedings. On 23 January, 2023 the HSE, then the sole defendant delivered a defence in which it pleaded as a preliminary issue (a) that the defence was delivered without prejudice to any ruling that may be made on the question of whether, as a matter of law, leave to issue the proceedings pursuant to s. 73 (1) had been required; (b) that for the avoidance of doubt, the HSE would not have objected to any such grant of leave if it had been sought.

18. On 27 January 2023, the plaintiff's renewal order was revoked, and he was discharged from the hospital. On that date, the State delivered legal submissions replying to the plaintiff's submissions. The State's submissions contend that leave of the court had been required pursuant to s. 73 (1) prior to the commencement of the proceedings and that the proceedings should be struck out.

19. The matter was mentioned before O'Moore J. on 30 January 2023 at which stage, in light of the plaintiff's discharge from hospital and the diminished urgency of the case, the directions were paused, and the proceedings listed for mention on 2 February 2023. On that date also an unconditional appearance was entered on behalf of the State.

20. On 7 February 2023, the proceedings were mentioned before O'Moore J. and the hearing dates were vacated. O'Moore J., however, ordered that a day be set aside for legal argument before this court on whether leave of the court pursuant to s. 73 (1) had been required prior to the commencement of the proceedings.

Statutory context

21. In common with the approach of Murray J. in *C v. Casey* [2022] IECA 24, it is appropriate to commence with some consideration of the historic context of s. 73. Statutory protection from civil liability for those facilitating the detention of persons pursuant to mental health legislation was first introduced in the law of England by s. 12 of the Lunacy Acts (Amendment) Act, 1889 which provision was repeated in s. 330 of the Lunacy Act, 1890. Those statutes provided for an immunity from suit for persons acting in good faith and with reasonable care. However, if a defendant wished to invoke the protection before the trial, the initiative rested with him or her. An action brought without reasonable grounds for alleging want of good faith or reasonable care would therefore proceed to trial unless a defendant applied for a stay. This was significantly

adjusted in favour of defendants to such suits by ss. 15 and 16 of the Mental Treatment Act, 1930, pursuant to which it was no longer incumbent on a defendant to seek to stay an action brought without reasonable grounds. Instead, obtaining leave of the court was to be a precondition to the bringing of the proceedings.

22. Murray J. points out that ss. 15 and 16 were in turn "*the prototype*" adopted in this jurisdiction in the drafting of s. 260 of the Mental Treatment Act, 1945 ("section 260" and "the 1945 Act" respectively), the precursor to s. 73 of the 2001 Act. Section 260 (1) introduced (a) a requirement that a plaintiff obtain leave of the High Court before instituting proceedings "*in respect of an act purporting to have been done in pursuance of*" the 1945 Act, (b) limited the causes of action that might be invoked by a plaintiff in such proceedings to those claiming that the defendant *"acted in bad faith or without reasonable care"* and (c) conditioned the grant of such leave by imposing a requirement that there be *"substantial grounds for contending"* that the defendant had thus acted. The rationale for the legislation has been described in the case law as essentially being to prevent a person who is, or is thought to be, mentally ill from mounting a vexatious action or one based on imagined complaints (per Finlay C.J. in *Murphy v. Green* [1990] 2 IR 566 at 572).

23. In *Blehein v. Minister for Health and Children* [2009] 1 IR 275, the Supreme Court confirmed an order of the High Court declaring s. 260 (1) unconstitutional on the grounds that it failed to pass the proportionality test set out by Costello P. in *Heaney v. Ireland* [1994] 3 IR 593 at p. 607. Thus, whilst the objective of the 1945 Act was legitimate and important, it was not of sufficient importance to override the constitutional rights of liberty and of access to the courts. The section, although rationally connected to that objective, was arbitrary and unfair in permitting only two possible grounds of application and in imposing a requirement of substantial grounds.

As the section did not impair the rights involved as little as possible, its effect on the intending plaintiff's rights was not proportionate to the object sought to be achieved.

24. It is interesting to note that although often seen as a legislative response to *Blehein v Minister for Health and Children,* s. 73 of the 2001 Act was actually enacted on 8 July 2001, before the decision of the High Court. Although the High Court decision in *Blehein* intervened, the section was commenced without amendment in November 2006, before the decision of the Supreme Court. This may perhaps explain why the current provision does not appear to address the basis for the finding of invalidity in *Blehein v. Minister for Health and Children,* essentially that s. 260 (1) confined an intended plaintiff to proceedings arising out of a lack of *bona fides* or a want of reasonable care.

25. Thus, rather than amending the basic trigger for proceedings, s. 73 (1) enacts two other significant changes. First s. 73 (1) reverses the default position. Whereas under the 1945 Act the plaintiff had to satisfy the court of the identified statutory criteria before being permitted to proceed with his or her action, under s. 73 (1) the court must grant leave unless satisfied of the contrary. Putting the matter another way, the onus of proving that leave ought not to be granted is now on the defendant. The reversed burden remains on the defendant throughout; and insofar as his or her evidence may operate to shift an evidential burden to the plaintiff, it is not a heavy one (see *J. O'T v. Healy & Ors* [2018] IEHC 571 at para. 64 and para. 15 of the judgment of Murray J. in *C v. Casey*). Second, whilst s. 260 (1) required the plaintiff to show substantial grounds for the contentions which underlined the proceedings, the plaintiff does now not have to establish substantial grounds for any aspect of his or her claim.

26. The relative lightness of the evidential burden placed upon the plaintiff in the court's assessment of whether there are no reasonable grounds for contending that the

defendant acted in bad faith or without reasonable care was formulated by Clarke J. (as he then was) in *AL v. the Clinical Director of St. Patricks Hospital & Anor* [2010] 3 IR 537 as follows: the enquiry is as to whether "*there is any legitimate basis on which a court might arguably conclude that a relevant intended defendant had acted without reasonable care,".* If so, *"then it follows that leave must be granted*". On the other hand, as MacMenamin J. in *MP v. Health Service Executive & Ors* [2010] IEHC 161 made clear, the court should be wary of acceding to an application for leave under s. 73 (1) if a claim is based upon no more than assertion. In assessing whether there is any legitimate basis on which the court might conclude that the defendant acted without reasonable care, the court will be guided by whether the plaintiff's intended claims are corroborated by actual or expert evidence and by an analysis of the credibility of the case itself in the light of all of the evidence.

The plaintiff's submissions

27. The plaintiff observes that s. 73 is a continuation of historical precursors to be found in statutory mental health regimes for nearly 150 years. The intention of such provisions is to protect those involved in the involuntary admission and detention of persons to approved centres from civil liability, save where they have acted in bad faith or have demonstrated a want of care in complying with the necessary procedural requirements and formalities in relation to such admission.

28. The plaintiff contends that the whole thrust of s. 73 is directed towards questions affecting the lawfulness of the admission and detention of the individual pursuant to Part II of the 2001 Act. By contrast, this case concerns acts done under Part IV of the 2001 Act, specifically s. 57 (1). In essence, the plaintiff argues that the scoping phrase in s. 73 (1), "*an act purporting to have been done in pursuance of this Act",* applies

only to acts occurring for the purposes of involuntary admission. No such act is in issue here.

29. In the alternative, the plaintiff maintains that s. 57 (1) does not authorise involuntary administration of medication but is merely an expression of the common law defence of necessity to an action seeking damages for such involuntary administration. The administration of depot to the plaintiff was not therefore *"an act purporting to have been done in pursuance"* of the 2001 Act and s. 73 has no application.

30. As a restriction on the *prima facie* right of access to the court, s. 73 has to be interpreted restrictively. The plaintiff argues that s. 73 (1) leave is not necessary for all proceedings on the civil side. For example, the case law suggests that although they constitute *"civil proceedings"* s. 73 (1) leave is not necessary for an Article 40 enquiry, for proceedings challenging the constitutional validity of the 2001 Act or for judicial review proceedings. As there is no procedural exclusivity, declaratory reliefs of a public law nature may be sought by way of plenary proceedings. The plaintiff thus submits that the words *"civil proceedings"* in s. 73 (1) are apt only to cover purely private law proceedings. The plaintiff's key argument here is that the current proceedings are public law in nature as they are directed towards the ascertainment of the limits of the defendants' powers under s. 57 (1). As such, they are not caught by the leave requirement arising from s. 73.

31. The plaintiff further argues that he could not in any event have been granted leave pursuant to s. 73 (1), even if he had sought same. This is because he does not allege that the HSE "*acted in bad faith or without reasonable care"* but rather that s. 57 (1) does not permit the administration of medication without consent in the absence of independent oversight.

32. The plaintiff also submits that s. 73 (1) is a procedural and not a jurisdictional bar and thus must be formally raised in accordance with the procedures set out in O. 137 of the Rules. O. 137 provides for an application to the court for leave pursuant to s. 73 (1) to be made by originating notice of motion to be served upon the person against whom it is proposed to institute the civil proceedings who in turn may deliver a replying affidavit. O. 137, r. 4 then provides:

> *"Where a person who has been served with an originating summons or other originating document instituting civil proceedings against him in the Court alleges that the institution of such proceedings required the leave of the Court under section 73 of the Act of 2001 and that such leave was not obtained, that person may:*
>
> *(a) indorse upon any Memorandum of Appearance required by Order 12 to be delivered a statement that such Appearance is entered solely for the purpose of contesting the right of the plaintiff or person instituting the said proceedings to institute same without the leave of the Court under section 73 of the Act of 2001 and*
>
> *(b) as soon as practicable thereafter, apply in the proceedings on notice to the plaintiff for an order striking out such proceedings for want of leave."*

33. The plaintiff observes that the HSE has not sought to have these proceedings struck out. Neither the HSE nor the State have brought the necessary application on notice for an order striking out the proceedings for want of leave. In any event the plaintiff argues that the State is debarred from so doing by the entry of an unconditional appearance.

34. Finally, the plaintiff submits that as the proceedings are at an advanced stage, it would be wasteful to strike them out.

Position of the HSE

35. In accordance with its defence, the HSE reserved its position. It made no submission to the court, save to confirm that it would not oppose an application by the plaintiff for leave pursuant to s. 73 (1) to institute broadly equivalent proceedings to those presently in being.

Submissions of the State

36. The State submits that the within proceedings constitute "*civil proceedings…instituted in respect of an act purporting to have been done in pursuance of"* the 2001 Act and fall squarely within s. 73. That the proceedings concern acts done under Part IV rather than Part II of the 2001 Act is of no relevance.

37. Although not adopting a final position on the issue, the State does not presently assert that s. 73 necessarily applies to all "*civil proceedings*". The State accepts that the requirement to obtain s. 73 (1) leave does not apply to *habeas corpus* applications but argues that this has no relevance to the present plenary proceedings. Further, although s. 73 (1) leave might well not be required for a stand-alone constitutional challenge to a provision of the 2001 Act, here the plaintiff also advances sub constitutional claims regarding his treatment and restraint which the State maintains fall squarely within s. 73. Finally, the State accepts that the requirement for leave might also not apply to applications by way of judicial review. However, as these are not judicial review proceedings, this does not avail the plaintiff and the issue of whether s. 73 applies to applications for judicial review does not fall for determination.

38. The State rejects the plaintiff's argument that the various authorities in which the courts have applied the requirement for s. 73 (1) leave (*O'Dowd v North Western Health Board* [1983] ILRM 186, *Murphy v Greene* [1990] 2 IR 566, *Bailey v Gallagher* [1996]

2 ILRM 433, *Melly v Moran,* unreported, Supreme Court, 28 May 1998, *Blehein v Murphy & Ors* [2000] 3 IR 359, *Blehein v St John of God Hospital* [2002] IESC 43, *AL v Clinical Director of St. Patrick's Hospital & anor* [2010] IEHC 62, [2010] 3 IR 537, *MP v. Health Service Executive* [2010] IEHC 161, *AM v Kennedy & Ors* [2013] IEHC 55, *JO'T v Healy & ors* [2018] IEHC 571, *C v Casey* [2022] IECA 24) can be distinguished from the present case on the basis that damages were *"at the heart"* of those proceedings. The present proceedings are also a claim to damages.

39. The requirement for leave cannot be altered by either the service of notice of discontinuance against the plaintiff's treating psychiatrist or by the abandonment of certain of the claims to damages (see paras. 2 and 16 above). The requirement or otherwise for leave falls to be determined at the time of "*the institution of the proceedings*" at which stage, the State argues, it was undoubtedly required. In any event, the plaintiff persists in claiming certain damages.

40. The State submits that s. 73 provides a jurisdictional and not merely a procedural bar to the proceedings. It is therefore no answer for the plaintiff to argue that a number of steps in the proceedings have been taken since they issued, that the HSE's defence does not expressly plead that the proceedings ought to be struck out or that the State has entered an unconditional appearance and has not issued a motion pursuant to O. 137, r. 4. It is argued that the court does not have power to waive the leave requirement and must strike out the matter of its own motion if satisfied that leave was required. Further, leave may not be granted retrospectively. It is argued that the court has no discretion in this regard.

Differing approaches to strict construction

41. It is common case that s. 73 is a curtailment of the constitutional right of access to the courts which must therefore be strictly construed in the sense that it must not be availed

of except where essential so to do (Finlay C.J. in *Murphy v Green* at p. 572 to 573). However, the parties contend for competing approaches to this strict construction.

42. The plaintiff argues that the scope of *"civil proceedings"* to be caught by s. 73 should be strictly construed and that its remit should be limited to purely private law proceedings which advance a claim for damages on grounds akin to want of good faith or reasonable care.

43. The State interprets the scope of *"civil proceedings"* more broadly. It argues that the reach of s. 73 includes litigation with a public law element such as the present proceedings which, in addition to damages, seek declaratory reliefs together with a declaration of constitutional invalidity. On the State's approach, the requirement for strict construction is then accommodated by a broader interpretation of the two grounds upon which leave can be granted, acting with "*bad faith"* or *"without reasonable care"*.

44. It is evident that under the plaintiff's interpretation fewer proceedings will be caught by s. 73 (1) but, once caught, leave may be more difficult to obtain; whereas under the State's interpretation a wider range of proceedings will be caught by s. 73 but, once caught, establishing a reasonable basis for a contention of bad faith or want of care will be easier (at least at the leave stage). In summary, the distinction is between arguing for (a) a smaller strainer with a finer mesh or (b) a larger strainer with a looser mesh. However, it is worth emphasising that if caught by s. 73, a looser mesh at the leave stage will only provide the plaintiff with a route to relief at the ultimate trial provided bad faith or want of care can be demonstrated. If not, the case will fail. This is expressly stated in s. 73 (3) which, it will be recalled, provides that:

> *"Where proceedings are, by leave granted in pursuance of subsection (1) of this section, instituted …, the Court shall not determine the proceedings in favour*

of the plaintiff unless it is satisfied that the defendant acted in bad faith or without reasonable care."

Does s. 73 (1) apply in respect of the plaintiff's case against the HSE?

45. The plaintiff's central argument is that s. 73 is intended primarily to apply purely to private law claims for damages and does not apply to proceedings with any public law element, irrespective of whether same were commenced by way of an application for judicial review or otherwise.

46. In *O'Dowd v. North-western Health Board*, O'Higgins C.J. viewed s. 260 of the 1945 Act as effectively frontloading the plaintiff's necessary proofs. He stated: "*In suing in respect of such a tort he would have to discharge the same onus in order to succeed in his claim. This section merely requires him to do so before he can start the action. As the action deals with the mentally ill or those thought to be so it does not seem to me that this limitation is unduly restrictive or unreasonable.*"

47. This passage, which was quoted with approval by Keane C.J. in *Blehein v. Murphy (No. 2*), may suggest that s. 260 (and s. 73) apply primarily to tort actions such as claims for damages for negligence where an absence of reasonable care would in any event be necessary to succeed. By contrast, lack of good faith or lack of reasonable care are not a necessary ingredient of successful public law proceedings based on an allegation of lack of *vires* (although broadly equivalent requirements may apply insofar as damages are sought).

48. I accept that although falling within the literal interpretation of "*civil proceedings…in respect of an act purporting to have been done in pursuance of"* the 2001 Act, there are at least two kinds of public law proceedings to which s. 73 cannot apply.

49. First, the right to apply for *habeas corpus* derives directly from Article 40 and it is therefore inevitable that s. 73 could not cut across such applications.

50. Second, a challenge to the constitutionality of s. 73 would not be caught by the requirement for s. 73 (1) leave. In *Blehein v. St. John of Gods Hospital*, McGuinness J. records her agreement with the submissions of counsel for the State that leave would not be required to challenge the constitutionality of s. 260 of the 1945 Act. Indeed, McGuinness J. so finds.

51. The plaintiff argues that in addition to the two kinds of "*civil proceedings*" just identified, judicial review proceedings *"…in respect of an act purporting to have been done in pursuance of"* the 2001 Act are also not caught by s. 73. The plaintiff argues that this applies both to acts (and omissions) undertaken in the context of a patient's involuntary admission and to acts (or omissions) undertaken during such admission, such as the non-consensual administration of depot.

52. I accept that s. 73 leave is most unlikely to be a prerequisite to judicial review proceedings in respect of acts (and omissions) undertaken in the context of a patient's involuntary admission. As a matter of principle, if s. 73 cannot apply to an Article 40 inquiry, then why should it necessarily be a bar to an application for *certiorari* or a declaration in respect of the same detention?

53. Perhaps the *habeas corpus* analogy may be less compelling in so far as concerns other acts (or omissions) undertaken during such admission, such as the non-consensual administration of depot at the heart of the present proceedings.

54. On the other hand, if s. 73 were to apply to judicial review proceedings in respect of this latter category of acts (or omissions) "*purporting to have been done in pursuance of"* the 2001 Act, then public law claims based on a pure lack of *vires* in which no

allegation of bad faith or want of reasonable care is advanced, may not be justiciable at all. It is hard to see how this could be a constitutional reading of the section.

55. This point was touched upon in *Ex parte Waldron* [1986] QB 824. The Court of Appeal of England and Wales held that on a true construction of s. 139 of the Mental Health Act, 1983 (which is broadly similar to s. 73 (1)) the words *"civil proceedings"* did not in the absence of any special definition, cover judicial review. Two doctors had recommended that the applicant, who suffered from schizophrenia, be admitted to hospital for treatment under the Mental Health Act, 1983 in order that they might exercise their power under that Act to grant her conditional leave of absence from the hospital. The applicant was therefore compulsorily admitted and on the following day granted leave of absence on condition that she receive the necessary medication for her illness. The applicant, who did not allege that the doctors had acted negligently or in bad faith, applied to the High Court for leave to apply for judicial review impugning the legality of the original admission. The Court of Appeal reviewed the legislative history and considered that s. 139 was directed towards private actions founded in damages. The purpose of the section was to protect a certain class of persons, essentially treating clinicians of patients involuntarily committed, from the real risk of being unfairly harassed by litigation. The same considerations did not necessarily apply *"to proceedings the purpose of which is not to make the doctors personally liable but to ascertain the limits of their powers"*. The jurisdiction of the court to grant an order of *certiorari* could only be ousted by clear words in the statute. Therefore, the cognate section did not prevent the High Court from hearing an application for judicial review by way of *certiorari* or declaration to the effect that the respondent had exceeded the powers given to him by statute. Ackner L.J. stated,

> *"I obtain some comfort in concluding that Parliament did not intend by section 139 to bar the court's supervisory jurisdiction, because, had it done so, there would indeed have been no remedy to quash a compulsory admission to hospital made as a result of a reasonable misconstruction of a public official's powers. This would have disclosed a serious inadequacy in the powers of the courts to protect the citizen from an actual or potential loss of liberty arising out of a serious error of law."*

56. Although the facts of *Ex parte Waldron* concerned involuntary admission, the logic of the court's reasoning goes further in identifying a potentially invalid *lacuna* in the court's jurisdiction.

57. From a practical perspective, there is also some merit in the argument that judicial review proceedings generally are not caught by the requirement for leave under s. 73 (1) . I understand that as a matter of practice, it is not routine to seek leave pursuant to s. 73 (1) (on notice or otherwise) before seeking leave to apply for judicial review *"in respect of an act purporting to have been done in pursuance of"* the 2001 Act.

58. It is notable that in *Blehein v Minister for Health and Children,* Carroll J. records that, in seeking to uphold the constitutionality of the prior iteration of s. 73, s. 260 of the 1945 Act, the State submitted that the section did not apply to *habeas corpus* or judicial review applications. Although the issue was not decided, neither the High Court per Carroll J. nor the Supreme Court per Denham J. demurred from this proposition. Nor does the State demur from this proposition in the present proceedings. Instead, it observes that this issue does not fall for determination as this plaintiff has not proceeded by way of judicial review.

59. Ultimately, I am of the view that the State is correct in this latter submission and that the court ought not decide whether proceedings brought by way of judicial review "*in*

respect of an act purporting to have been done in pursuance of" the 2001 Act are caught by s. 73. I have not heard full argument on the issue and any decision on this important point should await an appropriate case in which proceedings are in fact brought by way of judicial review.

60. The present proceedings are not judicial review proceedings. The plaintiff argues that it matters little that he has proceeded by way of plenary proceedings rather than by way of judicial review. He states that the Irish courts have rejected the principle of procedural exclusivity and the rigid distinction between public law and private law proceedings endorsed by the House of Lords in *O'Reilly v. Mackman* [1983] 2 AC 237. As public law proceedings need not always be brought by way of an application for judicial review pursuant to O. 84 of the Rules, it is open to an individual to proceed by way of plenary proceedings.

61. This is correct in so far as it goes, albeit that the procedural safeguards provided under O. 84, such as for example the requirement for leave (which this plaintiff has not sought) may apply by analogy to plenary actions (see *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 and *Shell E&P Ireland Ltd v. McGrath* [2013] 1 IR 247).

62. However, it is not legitimate for the plaintiff to argue that merely because his proceedings have a public law flavour (such that they could – in part at least - have been brought by way of judicial review), they necessarily must be treated in an equivalent manner to judicial review proceedings and thereby escape the requirement for leave for leave under s. 73 (1). Even assuming that judicial review proceedings are not caught by s. 73, this submission cannot succeed because it mischaracterises the present proceedings.

63. Ultimately, I am of the view that the plaintiff's claim as against the HSE is essentially a private law claim to damages. Although the plaintiff seeks certain declaratory reliefs in relation to the actions of the HSE, these are advanced as a route to the claim to damages. As such, I do not accept the plaintiff's characterisation of these proceedings as akin to those under discussion in *Ex parte Waldron.* The plaintiff's pleas as against the HSE, are not merely to ascertain the limits of the HSE's powers but to lay the foundations for an award of damages. Merely because some of the pleas advanced could also potentially have been advanced by way of an application for judicial review does not deprive the present proceedings as against the HSE of their inherently private law nature.

64. In *C. v. Casey*. At p. 6 *et seq*. of his judgment, Murray J. outlines the features of the s. 73 jurisdiction to include the following:

> *"The <u>only</u> causes of action that may be maintained by a person in respect of an act purporting to have been done in pursuance of the 2001 Act are those which involve a defendant acting in bad faith or without reasonable care. This follows from the second ground for refusing leave, and is underscored by s. 73(3) …"*

65. A similar point is made at p. 8:

> *"A plaintiff can only succeed in his or her claim if …bad faith or lack or reasonable care is established. A claim which does not incorporate one of these elements is a cause of action in respect of which a plaintiff may not as a matter of law be granted leave."*

66. At p. 9 of the judgment Murray J. stated:

> *"…the court should keep firmly in sight the purpose and limits of the legislation. It is, I think, hard to improve on the summary in the judgment of Vaughan Williams LJ. in* Shackleton v. Swift *[1913] 2 KB 304, at p. 316: s. 330 of the*

> *1890 Act, he said* 'gives special protection to those officers and others acting under the powers of this Act in cases where, although they may have misconstrued the Act and although they may have done things which there was no jurisdiction to do, they have acted in good faith and in a reasonable manner'. *"*

67. A private law claim to damages such as the present is in my view a "*civil claim"* within the meaning of s. 73 (1). Although it is necessary to read down the broad language of s. 73 (1) to permit applications for *habeas corpus* and constitutional challenges (and potentially judicial review proceedings) to proceed without the requirement for leave under the section, I do not think that the same considerations necessarily apply to a private law claim for damages such as the present. I note that the plaintiff does not argue that his right of access to the courts requires this court to conclude that s. 73 (1) leave is not required in the present proceedings. Indeed, it seems to me that arguments based on the plaintiff's right of access to the courts do not yet squarely arise in this case. The decision for this court is only whether s. 73 (1) leave is required for the proceedings as presently drafted. Holding that s. 73 (1) leave is required does not represent a denial of access to the courts.

68. In so far as concerns a private law claim to damages, I also cannot accept the applicant's argument that the phrase "*in respect of an act purporting to have been done in pursuance of this Act*" applies only to acts done in the context of involuntary admission, as opposed to acts done or purporting to be done during the period of involuntary admission (or otherwise in pursuance of the 2001 Act). The wording of s. 73 does not appear to differentiate between civil claims in respect of acts purporting to have been done under Part II of the Act on the one hand and Part IV of the Act on the other.

69. In support of his contention that s. 73 does not apply to the present proceedings, the plaintiff argues that he could not in any event advance his present proceedings on foot of s. 73 because he does not allege a lack of good faith or want of reasonable care.

70. Although the proceedings do not expressly allege want of good faith or reasonable care, I am not at all convinced that the proceedings as against the HSE cannot be characterised, or if necessary reformulated, in such a manner as to permit a grant of s. 73 (1) leave. Indeed, this appears to be the view of the HSE as evidenced by its agreement not to oppose s. 73 (1) leave should same be sought in similarly drafted proceedings by the plaintiff.

71. In *AL v. the Clinical Director of St. Patricks Hospital*, Clarke J. granted the plaintiff s. 73 (1) leave. In so doing, Clarke J. held that the term "*without reasonable care*" in s. 73 should be interpreted as applying not just to the absence of proper medical care but also to an obligation to use care in ensuring that persons were not in unlawful custody. It is therefore open to a plaintiff to allege breach of duty of care on the part of a doctor or hospital arising out of the procedures followed or not followed in the course of putting into place the necessary measures required to procure his or her detention. In the case of this plaintiff, it may equally be open to him to allege breach of duty of care on the part of the HSE arising out of the procedures followed or not followed in the course of the non-consensual administration of medication.

72. Likewise, in *C v. Casey* the plaintiff successfully appealed against a High Court order refusing him leave to commence proceedings pursuant to s. 73 (1). The core complaint of the plaintiff was that the defendant had failed to follow the required procedures or to establish the relevant statutory prerequisites before wrongly being induced by the Gardaí to sign the necessary form. The Court of Appeal, per Pilkington J. and Murray J., held that this claim by definition involved allegations of both lack of good faith and

want of care and was not therefore excluded by s. 73 (1). Leave to commence proceedings was granted accordingly.

73. These and similar cases illustrate the tendency of the courts to frame a defendant's failure to adhere to the requisite procedures in relation to involuntary admission as also potentially comprising a lack of good faith and/or a want of reasonable care and as therefore *ipso facto* falling within the scope of s. 73 (1). Although it would be premature to speculate on this further, it is quite possible therefore that the plaintiff could present the HSE's alleged failure to adhere to the requisite procedures in relation to the non-consensual administration of medication as comprising a lack of good faith and/or a want of reasonable care and thereby obtain s. 73 (1) leave for his proceedings as against that body.

74. If this approach facilitated the grant of leave to commence proceedings pursuant to s. 73 (1), it would be hard to argue that the plaintiff's right of recourse to the courts has been inhibited. In fact, proceeding by plenary action pursuant to s. 73 may well involve a more in depth and searching review of the HSE's conduct than would ever be permitted in proceedings brought by way of judicial review which are not of course concerned with the merits of the underlying decision.

75. If, contrary to the above, the plaintiff is refused leave for the case which he wishes to advance then and only then could it be said that the requirement for s. 73 (1) leave prior to commencement impacts upon his right of access to the courts. In *Blehein v. St. John of Gods Hospital & Ors*, McGuinness J., at pp. 26 and 27, emphasised that in order for an intending plaintiff to challenge the constitutionality of a statutory provision (in particular s. 260), it would be necessary first that the applicant in question has been denied or refused leave in order to grant him *locus standi*. In that respect, McGuinness J. stated:-

> *"With regard to the question of locus standi, if the Applicant's substantive appeal (against the refusal of leave) is dismissed in this Court he will have been refused leave, under the terms of Section 260, to bring proceedings against the Respondent hospital. In his previous proceedings he has been refused leave to bring proceedings against the relevant medical practitioners and others. He is therefore a person whose prima facie right of access to the Courts has been affected by the operation of the section and is in a position to argue that he has locus standi to maintain his constitutional proceedings…*
>
> *His correct course would be to commence new proceedings by plenary summons in order to challenge the constitutionality of the section.* [sic]*"*

76. In other words, arguments based on the plaintiff's right of access to the courts are best deployed when a concrete case of denial of access is said to arise.

Decision in respect of the plaintiff's case against the HSE

77. In summary therefore, I find that insofar as the present proceedings seek declaratory relief and damages as against the HSE for the non-consensual treatment of the plaintiff on grounds that same is unlawful as being in breach of s. 57 (1) of the Act or is otherwise in breach of the plaintiff's constitutional or Convention rights, they required leave of the High Court pursuant to s. 73 (1) prior to their institution. If the requirement for s. 73 (1) leave ultimately prevents the plaintiff from pursuing the case he wishes to advance as against the HSE, then his remedy, if any lies in differently formulated proceedings. The present proceedings involve no challenge to the constitutionality of s. 73. Rather, the plaintiff challenges the constitutionality of s. 57 (1) of the 2001 Act to which challenge I now turn.

Does s. 73 apply in respect of the plaintiff's case against the State?

78. The plaintiff's case against the State is a challenge to the constitutionality of s. 57 (1). The statement of claim pleads that notwithstanding his status as a detained involuntary patient, the plaintiff is entitled to the presumption of capacity at common law, to vindication of his capacity rights and to a proper determination of functional capacity specific to treatment decisions accompanied by appropriate procedural safeguards. The plaintiff pleads that if the capacity assessment by the HSE is sufficient to justify non-consensual treatment for the purposes of s. 57 (1), then that section fails to vindicate and protect his constitutional and Convention rights.

79. The plaintiff thus squarely challenges the constitutionality of s. 57 (1) and to that end has served O. 60 and O. 60A notices on the State.

80. The plaintiff maintains that leave is not necessary for proceedings challenging the validity of legislation. The State accepts that a standalone challenge to the constitutionality of s. 73 would not be caught by s. 73. For the following reasons, the same logic must apply to a constitutional challenge to s. 57 (1) (or any provision of the 2001 Act).

81. Assume that s. 73 (1) leave was granted in these proceedings on a non-contested basis. Assume also, purely for the sake of argument, that the court were to ultimately take the view that s. 57 (1) does not require that the assessment of decisional capacity is supported by the contended for procedural safeguards and that the HSE has acted in good faith, with reasonable care and within the four corners of the section. Assume further, however that the court accepted the plaintiff's argument that the section was unconstitutional for failing to include some or all of these contended for procedural safeguards. In such circumstances, s. 73 (3) would nonetheless mean that the trial court could not "*determine the proceedings in favour of the plaintiff*". Applying s. 73 to a

constitutional challenge would therefore have the inevitable result that the plaintiff's constitutional challenge could not be determined in his favour. Thus, by enacting s. 73 the legislature would be immunising itself against constitutional challenge to the Act of 2001. This the legislature clearly could not do. This court is therefore required to interpret s. 73 as not imposing a requirement of s. 73 (1) leave for such constitutional challenge.

82. A standalone challenge to the constitutionality of s. 57 (1) is not therefore caught by s. 73. Further, insofar as concerns the *lis* as between the plaintiff and the State, I can see no distinction in principle to be made by reason of the fact that the constitutional challenge is not stand alone but is linked to the plaintiff's challenge to the underlying medical treatment. The State is respondent only to such part of the claim as comprises the constitutional challenge and is not interested in the sub-constitutional claim against the HSE. Further, there is always a necessity to set out the bed of facts on foot of which the determination of constitutionality of the legislation will be made; those parts of the case that set out the factual matrix ought not to be excluded by the leave requirement.

Decision in respect of the plaintiff's case against the State

83. Leave pursuant to s. 73 (1) is not required for the claim which the plaintiff wishes to advance as against the State.

Is s. 73 a jurisdictional or procedural bar?

84. As I find that the proceedings against the State are not caught by s. 73, it is not strictly speaking necessary to decide whether the State was correct in contending that s. 73 operates as a jurisdictional and not a procedural bar. However, as this question is likely to be of relevance to the formulation of orders to be made on foot of this judgment -

upon which I will require submissions from all parties, including the HSE - I will consider it briefly.

85. If the plaintiff is correct in contending that s. 73 operates as a procedural bar only, then it would have been incumbent upon the HSE or the State to apply for an order striking out the proceedings for want of leave in accordance with O. 137. This, they did not do. Further, if the section provides a procedural bar only, then the entry of an unconditional appearance by the State could provide an additional basis for rejecting its application.

86. In *Clarke v. O'Gorman* [2014] 3 IR 340, the Supreme Court considered the scope of s. 12 of the Personal Injuries Assessment Board Act 2003 ("the 2003 Act") which provides that *"Unless and until an application is made to the Board… in relation to the relevant claim and then only when the bringing of those proceedings is authorised… no proceedings may be brought in respect of that claim"*. O'Donnell J. (as he then was) held that s. 12 of the 2003 Act did not operate as a jurisdictional bar. As such, in order to rely on the plaintiff's non-compliance with the section, the defendant must plead non-compliance in his defence.

87. The plaintiff places reliance upon *Clarke v. O'Gorman* and observes that there is no distinction, in principle, between the phrase *"no proceedings may be brought"* and "*no civil proceedings shall be instituted*". However, it seems to me that O'Donnell J. was influenced greatly by the particular verb "*brought"* used in both the Statute of Limitations and s. 12 of the 2003 Act. The use of the same verb, in circumstances where the provisions of the Statute of Limitations had operated to bar the remedy and not the right for over a century reflected a deliberate choice by the legislature to effectively place the initiative on the defendant to plead the relevant non-compliance. The legislature's choice of language in s. 73 could not be said to elicit the same pavlovian response in lawyers.

88. O'Donnell J. also observed that while s. 12 was significant and imposed a legal prohibition upon proceedings, that prohibition was directed, not towards the court but towards the parties and, in particular, the plaintiff. By contrast, it seems to me that s. 73 (1) can be said to be directed to the court. Although a plaintiff may proceed if permitted to issue a plenary summons out of the Central Office, it is the court who is required to consider and adjudicate upon the granting or withholding of leave.

89. Furthermore, I note that in *Clarke v. O'Gorman*, O'Donnell J. held that the interpretation of s. 12, as procedural rather than jurisdictional, did not undermine the scheme of the 2003 Act. In the present case, the legislature has deliberately chosen a legislative scheme which, unlike previous iterations of the section, does not place the obligation to take the initiative on the defendant. This suggests that the court is required, if necessary, of its own motion, to strike out proceedings for want of leave.

90. Section 73 does not merely set out a particular procedure which must be followed by the plaintiffs. It is in the nature of a partial statutory immunity against all actions bar those permitted. This is, in my view, a provision which is very much directed to the court.

91. The proposition that s. 73 operates as a merely procedural bar does not appear consistent with the manner in which cases such as this have been managed in the past. In *MP v. Health Service Executive & Ors*, the court ruled that it did not have power to waive the leave requirement in either the original or the intended action and consequently would strike out (but not dismiss) both actions against the defendant. MacMenamin J. observed that the 2001 Act prohibits the institution of proceedings without leave of the courts and commented that there is no variation or waiver provision. This observation was referred to with approval by Pilkington J. in *C v. Casey.*

92. It must further be borne in mind that s. 73 is a statutory restriction on the right of access to the courts. In the case of such statutory restrictions, it has invariably been held that same will be strictly enforced (see in this respect s. 50 of the Planning and Development Act, 2000 and s. 5 of the Illegal Immigrants (Trafficking) Act 2000). In cases concerning these provisions, the courts have invariably held that challenges not strictly in accordance with the relevant statutory provisions will not be permitted to proceed.

93. I fully accept that O. 137, r. 4 appears to place the defendant (or notice parties) at their election as to whether to submit to proceedings brought without s. 73 (1) leave. I agree with the plaintiff that this is resonant of a procedural rather than a jurisdictional bar. However, I cannot read the Rules as cutting across the statutory prohibition in s. 73 (1). To the extent that there is a conflict between s. 73, on the one hand, and O. 137, on the other, this Court is bound to apply the provisions of the statute in preference to those set out in the Rules. O. 137 appears to be permissive rather than mandatory in providing a specific mechanism which may be invoked by defendants in the context of s. 73. It does not lay out an exclusive procedural requirement for the determination of issues such as those arising in the present application.

94. In any event, it appears that in this particular case, the specific procedures envisaged in O. 137 have been somewhat subsumed into and supervened by the prior orders of the court in the course of the proceedings. It would be unduly restrictive and formalistic to hold that the HSE must be debarred from protection under s. 73 by reason of its failure to bring a motion to strike out pursuant to O. 137, r. 4 (b) or that the State is similarly debarred by either its failure to bring a motion or by its unconditional appearance.

Summary of findings

95. In summary, I find that the plaintiff may not, in the current proceedings, pursue the relief he seeks against the HSE. On the other hand, I find that there is no good reason why the plaintiff may not pursue his claim to a declaration of constitutional invalidity as against the State in the current proceedings. It follows that I must refuse the State's application for the dismissal of such part of the proceedings as applies to it.

96. I will list this matter for mention only at 11 am on 19th May to fix a time for this court to hear submissions on what orders this court ought to make in these proceedings.