# THE HIGH COURT

**[2023] IEHC 266**

**[2022 176 P]**

**BETWEEN**

**JOSEPH LAVERY**

**PLAINTIFF**

**AND**

**RICHARD HUMPHREYS,**

**JAMES FAUGHAN,**

**JOHN FRANCIS ALYMER,**

**RORY HAYDEN,**

**JOSEPH SMITH,**

**BRIAN O'CALLAGHAN,**

**FRANCIS COMERFORD,**

**ALAN MITCHELL,**

**IRELAND, THE ATTORNEY GENERAL AND THE MINISTER FOR JUSTICE AND EQUALITY,**

**AND NORA RAFFERTY,**

**MARTIN COSGROVE,**

**CIAN O'BRIEN,**

**THE COMMISSIONER OF AN GARDA SIOCHANA,**

**THE DIRECTOR OF PUBLIC PROSECUTIONS,**

**THE COURTS SERVICE OF IRELAND,**

**START MORTGAGES DAC.**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 19th day of May 2023**

**1.** This is my judgment on motions brought by the thirteenth Defendant, the eighteenth Defendant, and the balance of the Defendants. There were three motions in total. All motions seek broadly similar reliefs. The Defendants seek orders striking out or dismissing the proceedings on the grounds that these proceedings had been issued in breach of an order of the 4th of July 2016 which prohibited the Plaintiff from bringing proceedings without leave of the court. In the alternative, the Defendants seek that the proceedings be struck out or dismissed on the grounds that they are frivolous and vexatious, or fail to disclose any legitimate cause of action, or are bound to fail.

**2.** The only pleading delivered by the Plaintiff in these proceedings was the Plenary Summons. He has not delivered any Statement of Claim.

**3.** The Plenary Summons commences: -

> "The Plaintiff seeks a Declaration from the Honourable Court that his Constitutional Rights were denied due to being the victim of unconstitutional court summonses. Like ex – Justice Minister Mr. Charlie Flanagan and ex – Attorney General, and Supreme Court Judge Mr. Seamus Woulfe, who ignored High Court summons number 2018/9410 P I too am immune to court summonses, that equality is guaranteed under Article 40.1 of the Irish Constitution and Article 2 of the Treaty of Europe.

The Plaintiff seeks a Declaration from the Honourable Court that his Constitutional Rights have been denied as the Plaintiff is aware of how the Director of Public Prosecutions failed to comply with Mr. Justice Gilligan's High Court order no. 2006/1114 P issued on 14th day of May 2007 and like the Director of Public Prosecutions, the Plaintiff is immune to court orders, particularly the following…."

**4.** A series of court orders are then listed and described. The general indorsement of claim to the Summons concludes: -

"That Equality was guaranteed under Article 40.1 of the Irish Constitution and by Article 2 of the Treaty of Europe.

The Plaintiff will provide a detailed statement of claim and reserves the right to provide additional evidence as it becomes known.

The Plaintiff's claim for damages is €2 million Euro's".

**5.** The balance of this judgment is structured under the following headings: -

1) The non – appearance by the Plaintiff at the hearing of the motion;
2) The Isaac Wunder order;
3) The legitimacy of the case made by the Plaintiff.

**The non – appearance by the Plaintiff at the hearing of the motion**

**6.** This motion was listed for hearing on the 16th day of March 2023. I was satisfied, on the affidavits of service made available to me, that the Plaintiff (Mr. Lavery) was aware of this listing. Mr. Lavery's knowledge that the motions were due to be heard on that day of March is put beyond doubt by communication received from him by way of email in advance of the hearing. That email read as follows: -

"Due to injuries, I received from a fall on 15th January I have not yet regained the use of my right hand and I have temporary limited mobility. Accordingly, I am presently unable to prepare a Counter Motion and Affidavit, filed in the Central Office of the High Court and serve them on the Defendants. I am also attaching a sick note/cert that I obtained from my physician up to 22nd March 2023, two days after I have a CT wrist RT (attached), which will determine if I need surgery to my right hand. It is not possible for me to attend the High Court on 16th March 2023.

It is also imperative before this case proceeds in the High Court that I be permitted time to make **sworn criminal complaints** to the Gardai in relation to perjury in the affidavit of Martin Cosgrove sworn on the 16th of January 2023, perjury in the affidavit of Peter Clifford sworn on the 27th February 2023, and of perjury in the affidavit of Aidan McCarthy sworn on 9th March 2023, all related to this case.

I believe that it is also of interest that I originally served the plenary summons of Martin Cosgrove, A.B. O'Reilly Dolan & Co. at 27 Bridge Street, Cootehill, Co. Cavan at 12:53 p.m. on 20th of January 2022 and service of the summons was accepted by Anne Cooney. Mr. Cosgrove has since attempted to frustrate proceedings, now he has resorted to perjury.

The High Court has already ruled in favour of the Plaintiff in Constitutional case number 2021/2308 P which relies on the same Case Law as my High Court Constitutional case no. 2022/176 P. This means that my identical constitutional case no. 2022/176 P is won also".

**7.** A "sick cert" was enclosed which stated that Mr. Lavery was "unfit for work". It does not say that he was unable to attend court. On the basis of the injuries described by Mr. Lavery in his email of the 14th of March 2023, it is difficult to see why he was unable to

attend either physically or remotely for the purpose of moving his application for an adjournment. Had he done so, he would of course have been subject to some questioning by the court and the basis for the adjournment would have been probed further. It is not a satisfactory alternative to attending (either remotely or physically) in a courtroom to move an adjournment application that a party instead merely sends an email stating that the motions cannot proceed on the listed day.

**8.** Mr. Lavery, in his email, relied upon three other reasons as to why the motions should be adjourned indefinitely. The first was that he had been unable to prepare "a counter motion and affidavit", file them in the Central Office and serve them on the Defendants. He gives no indication as to what the counter motion was to seek to achieve. An inability to file a "counter motion" does not excuse Mr. Lavery from dealing with the actual motion properly filed and served by the Defendants and listed for hearing. It is also not clear what Mr. Lavery wished to say in any affidavit that he wished to swear and deliver; indeed, it is uncertain as to whether that affidavit was to be in support of the counter motion, or in defence of the three motions brought by the Defendants. On the basis of the sick cert made available to the court, the contention by Mr. Lavery that he was unable to prepare any affidavit in response to the motions issued by the Defendants (if that indeed is what he is saying) is unsupported by the medical evidence. It is also worth noting, but by no means conclusive, that Mr. Lavery, notwithstanding his injuries, appears to have been able to type out an email and send it to the Chancery Registrar for the purpose of putting off the motions which he wished to see adjourned. Nowhere does Mr. Lavery suggest that he has had assistance in putting the email together or in typing it out. Even if he had, there is no reason to believe that similar supports would not have been available to him to type out any replying affidavit to the motions should

he wish to forward their contents to the court for the purpose of seeking an adjournment of the hearing.

**9.** The second further reason relied upon by Mr. Lavery is that the motions could not be heard until there was an investigation into alleged perjury on the part of the persons swearing the affidavits in support of the motions. There is no indication whatsoever given by Mr. Lavery as to what that perjury is or could be. There is no reason, on consideration of the affidavits, to believe that any of the deponents have perjured themselves. To take one example, the affidavit sworn by Eva McCarthy (a litigation manager employed by the 18th Defendant, Start Mortgages) sets out her means of knowledge, indicates the purpose of the affidavit, exhibits the plenary summons, refers to the appearance of the solicitors instructed by Start Mortgages in these proceedings, exhibits correspondence, expresses the view that no cause of action against Start Mortgages is described in the plenary summons, gives evidence about the Isaac Wunder order of the 4th of July 2016, and avers that the proceedings have been issued by Mr. Lavery "as an attack against the 18th named Defendant for the purpose of embarrassing or frustrating the 18th named Defendant and are absent of any merit whatsoever".

**10.** It is impossible to see how any of these averments constitute perjury on the part of Ms. McCarthy. Equally, having considered the affidavits of the other two deponents accused of perjury by Mr. Lavery, it is impossible to see how any such charge could be sustained. In any event, it was open to Mr. Lavery to attend at the hearing (if needs be, remotely) and explain why he felt not only that one or other of these deponents had perjured themselves, but also explain why the hearing of the motions could not proceed until a Garda inquiry into such allegations of perjury.

**11.** The third supplemental point relied upon by Mr. Lavery is that his case is in fact "won also" because of a decision in another set of proceedings. If it were as simple as that, Mr. Lavery could have participated in the motions and explained why the current action is certain to succeed. He has chosen not to do so.

**12.** It is simply not appropriate that a litigant (whether represented or otherwise) can make an application for an order in proceedings (in this case an order adjourning the hearing of the motions) without troubling themselves to attend before the court for the purpose of moving such an application. Seeking court orders by email (unless on consent) is simply unacceptable. That is true in a general sense. It is particularly true when sulphurous allegations are made against named individuals accusing them of criminal offences.

**13.** Even if one was to leave aside the way in which the application for the adjournment of the motions was made, the substantive reasons put forward by Mr. Lavery for the adjournment of the motions just do not hold water. They are profoundly unconvincing. On the basis of what is set out by Mr. Lavery in his communications with the court, there was no reason to adjourn the three motions and they proceeded to hearing on the 16th of March 2023.

**The Isaac Wunder Order**

**14.** By order of the 4th of July 2016, Humphreys J. (one of the Defendants to these proceedings) made the following order against Mr. Lavery: -

> "1. That the applicant herein being Joseph Lavery be restrained from instituting any High Court proceedings and be further restrained from issuing and serving any notice

of motion on any person or party whatsoever without the leave of a Judge of the High Court".

**15.** The respondent to those proceedings, the Director of Public Prosecutions, was awarded costs against Mr. Lavery. Mr. Lavery had liberty to apply on 48 hours' notice to the Director in respect of the order made against him. Mr. Lavery did not appear at the hearing before Humphreys J.

**16.** There is no reason to believe that this order was set aside or varied in any way. It is broad in its terms, and clearly prohibits Mr. Lavery (without leave of this Court) from issuing the present proceedings. There is no evidence whatsoever that Mr. Lavery obtained the leave of any judge of this Court permitting him to institute these proceedings. On the contrary, the evidence before me suggested that no leave had been sought, let alone granted, in respect of the current action. In an email of the 7th February 2023, from a senior official of the Courts Service, the following was stated: -

> "On my own behalf, and on behalf of the Courts Service, I would like to apologise for the oversight in issuing these proceedings for Mr. Lavery. Unfortunately, our system picks up almost all litigants against whom Isaac Wunder orders are in place but unfortunately, we did not spot Mr. Lavery's latest papers. I am sorry for any inconvenience caused".

**17.** The failure to ensure that these proceedings were not issued is regrettable. The cost and effort on the part of the Defendants which have resulted from these proceedings would have been avoided completely had Mr. Lavery been told, when he sought to issue the current writ, that he could not do so without leave of the court. However, it must be recognised that

the person primarily for this cost and effort is, of course, Mr. Lavery, and not the Courts Service.

**18.** Given that these proceedings were issued in breach of an order of this Court, the dismissal of the proceedings would be justified by that reason alone. However, I have been invited to consider the approach by Clarke J. (as he then was) in Kenny v. Trinity College Dublin [2008] IEHC 320. In those proceedings, the Plaintiff was subject to an Isaac Wunder order of a more limited nature than that which applies to Mr. Lavery. At para. 1.3 of the judgment, Clarke J. summarised the position: -

> "Mr. Kenny, in the mistaken belief that these proceedings were not caught by the relevant order, issued a plenary summons. It will be necessary to refer to that summons in more detail in due course. Mr. Kenny had sought an interlocutory injunction which led to the proceedings coming before the court on his application. When the matter was first before the court in July, I ruled that these proceedings were, in fact, caught by the order of March 2006. Strictly speaking it would have been open to me at that stage to have struck out the proceedings and invited Mr. Kenny, if he wished, to apply for leave to issue fresh proceedings. However, that seemed to me to be an unnecessarily cumbersome way of dealing with the issue. I, therefore, decided to hear the matter as a leave application".

**19.** The Kenny case is distinguishable from the current case on a number of grounds. Firstly, the Isaac Wunder order in Kenny (as already mentioned) was of a less general nature than the Isaac Wunder order which applies to Mr. Lavery. Secondly, there is no suggestion on the part of Mr. Lavery that he misunderstood the scope of the original Isaac Wunder order, or that he has a genuine belief that the current proceedings were not caught by the order of

Humphreys J. Thirdly, there is no indication that Mr. Lavery has any interest in applying for leave to bring these proceedings.

**20.** For all of these reasons, it seems to be more appropriate in this case than it may have been in Kenny, for me to strike out the proceedings or dismiss them on the grounds that Mr. Lavery has been in breach of the Isaac Wunder Order made in July 2016. Mr. Lavery has not denied the making of the Order, has never claimed that he was unaware of the Order at the time the current proceedings were issued, and has in no way sought to suggest that the current proceedings are not caught by the Isaac Wunder order.

**21.** However, notwithstanding all of these factors, I have decided nonetheless to consider whether or not leave to bring these proceedings might be granted. In doing so, I must consider whether or not the claim is one which is frivolous or vexatious; see O'Caoimh J. in Riordan v. Ireland (no. 5) [2001] 4 IR 463, as endorsed by Clarke J. in Kenny. As it happens, the proposition that the proceedings are frivolous and vexatious is already ventilated in the motions brought by the three sets of Defendants, and it is to that proposition I now turn.

**The legitimacy of the case made by the Plaintiff**

**22.** The essence of the claim made in these proceedings by Mr. Lavery is that he is "immune to court summonses" and "immune to court orders". The idea that Mr. Lavery is immune to court orders and court summonses would be a striking and unlikely proposition. However, the basis upon which this proposition is advanced makes it even more far reaching. It is that Mr. Lavery is immune to court orders and court summonses because the equality provisions of domestic and European law, which apply because everybody is immune from

court orders and court summonses. This extraordinary scenario, to the effect that there is no such thing as a valid summons and no such thing as a valid court order, is singularly unlikely. It is also ironic that Mr. Lavery is seeking to assert this position by issuing a summons (which presumably is of itself not binding on the Defendants) with a view to procuring a court order (ditto).

**23.** As it happens, the proposition underpinning these proceedings has been considered and rejected in a number of judgments of this Court. These are: -

(i) Fennell v Collins [2019] IEHC 572;

(ii) Keary v PRA [2022] IEHC 28

(iii) Towey v Government of Ireland [2022] IEHC 559

(iv) Mullaney v Danske Bank [2023] IEHC 62

(v) Brennan v Ireland [2023] IEHC 107

(vi) Mullins v Ireland [2022] 2022 IEHC 296

(vii) O'Hara v Ireland (delivered today)

**24.** In each of these judgments, a similar rationale is applied in finding that these sort of proceedings are simply unstateable. Actions such as these are bound to fail; they are frivolous and vexatious.

**25.** On the basis of these authorities, and the analysis contained in each of them, I find that the current proceedings cannot succeed, and for that reason, must be struck out. I also find that leave to issue these proceedings would not have been granted had Mr. Lavery sought such a court order, as he was obliged to do on foot of the order of Humphries J. of July 2016.

**26.** I therefore dismiss these proceedings on the grounds that they were issued in breach of an Isaac Wunder order made against Mr. Lavery. I also dismiss the proceedings on the basis that they constitute an abuse of process of the court in that they are bound to fail, disclose no legitimate cause of action, and are frivolous and vexatious.

**27.** I will list this action for mention only on the 21st day of June 2023 at 10:15 am for the purpose of dealing with any outstanding matters, including the costs of these motions and of these proceedings.