[2020] IEHC 203

THE HIGH COURT
JUDICIAL REVIEW

[JR 844/2018]

BETWEEN

S. L.

APPLICANT

AND

M. L.

RESPONDENT

Ex-Tempore JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 13th day of February, 2020

1. The application before me is for an Isaac Wunder Order. The Applicant herein had applied for judicial review and the Respondent applied for the said order in response. The application for the Isaac Wunder Order is the only matter considered by the Court in this judgment, hence the Respondent is the party who seeks the relief. An Isaac Wunder Order is not an order to be granted lightly, as it greatly restricts access to justice in that the prospective litigant cannot take action in respect of a defined issue, or as against specific parties, without court permission being granted *before* proceedings commence, if such an order is granted.

2. The law is as set out in *The Irish Aviation Authority v. Monks* [2019] IECA 309, a decision from last December in the Court of Appeal. Here, Mr. Justice Haughton quotes from *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463 – and I note the title; it was the 5th such action by Mr. Riordan;

"There is no doubt that the jurisdiction to grant an Isaac Wunder order should be exercised sparingly. In *McMahon v. WJ Law & Co. LLP* [2007] IEHC 51 at para 20, MacMenamin J. identified the principles applicable: -

> *'Among features identified by Ó Caoimh J. in Riordan v. Ireland (No. 5) [2001] 4 I.R. 463 as justifying such an order, or militating against the vacating of such an order already granted are: - The habitual or persistent institution of vexatious or frivolous proceedings against parties to earlier proceedings.*
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> *The earlier history of the matter, including whether proceedings have been brought without any reasonable ground, or have been brought habitually and persistently without reasonable ground.*
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> *The bringing up of actions to determine an issue already determined by a court of competent jurisdiction, when it is obvious that such action cannot succeed, and where such action would lead to no possible good or where no reasonable person could expect to obtain relief.*
>
> *The initiation of an action for an improper purpose including the oppression of other parties by multifarious proceedings brought for the purposes other than the assertion of legitimate rights.*

The rolling forward of issues into a subsequent action and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings.

A failure on the part of a person instituting legal proceedings to pay the costs of successful proceedings in the context of unsuccessful appeals from judicial decisions.'"

3. Mr. Justice Haughton continued;

"In his concurring judgment in the present case, which I have read in draft, Collins J emphasises the exceptional nature of the Isaac Wunder jurisdiction and the care that needs to be taken to ensure that such orders are made only where the court called upon to make such an order is satisfied that it is proportionate and necessary. They are not to be made simply because a proceeding has issued that is bound to fail…".

This is relevant to the Judicial Review proceedings that had been brought in tandem with this motion, even though now they are not before this court. These, above, are the factors which justify the order.

4. The unusual features of this case, as regards an Isaac Wunder application, are all too familiar in family law proceedings; there have been allegations and counter-allegations, many of them very serious. One of the first issues for this Court was to decide if the case could be fairly considered without hearing evidence in circumstances where many of the serious allegations made are contested. Given that the order sought is one that can only rest on a foundation of habitual court applications which are vexatious or without grounds, this Court can proceed to rule on the matter without deciding the issues of fact raised.

5. The Applicant bears the burden of proving habitual unreasonable and or vexatious applications. Here, it is common case that both parties have made multiple applications. To some extent, it is clear that many of these are not necessary – or at least are not wise. The difficulty here is that, because both parties have asserted their rights repeatedly before different courts, there is no obvious pattern (bearing in mind the onus is on the Applicant), and no proof of an obvious pattern of the Respondent being the main instigator of the court hearings or even most of the court hearings. No doubt he has brought many applications, but I do not have evidence of the numbers, other than a general number of 70, which is a high number by any standards, but not all were his applications. Of concern to me is that, access having been granted, the Applicant who seeks to stop this Respondent from doing likewise, sought to vary that access and reduced it on more than one occasion. While this is her right, he points out that this factual position is not clear from her affidavit.

6. This Court cannot assess the reasonableness of previous orders. Just as the Court would not act on the written note from Judge McNulty, despite holding him and his office in high

regard, so I will not decide the case based on what various eminent judges have ordered. Their view of the facts in this family law case has relatively little bearing on what I have to decide. But I note that at least one judge chose to direct that *neither* party return to court for a specific period. This is not a lawful order and this legal point will be revisited. It does concern the Court on a factual level, however, as it points to a certain level of litigiousness on both sides. Counsel has fairly acknowledged that there has been fault on both sides and it may be that the fault lies predominantly on the side of the Respondent in terms of how many applications were made.

7. However, that is not the point of the application. It is impossible for this Court, on the evidence before me, to decide as a matter of fact that there is no real intention by the Respondent to maintain contact with his son. That is not the impression created by the serial litigation. Even the main point made by the Applicant, namely that the judicial review application was frivolous or vexatious, is contested here today. There appears to be a genuine grievance in respect of the section 47 report. However, all litigation is focused on one aim; to increase access. Again I cannot make that decision as a matter of fact because I haven't heard evidence, it's been contested but it hasn't been opened fully before me, so I can't make that decision. Despite arguments based on the credibility of the Respondent, there is insufficient information for a court to find as a fact that he is so lacking in credibility that his sworn affidavit can be discounted. The Court has insufficient information to do so and will not do so.

8. I fully appreciate that the Applicant suspects the Respondent is simply playing the system, as he suspects she is. The difficulty for both parties is that they are both frequent visitors to court and this is in spite of the fact that previous courts have ruled that neither of them should be there – for any reason. Their continuing failure to work together on any aspect of the child's welfare is deeply disturbing but not something I can change, even if I was sitting in the family law courts hearing yet another access application, which I am not.

9. To resolve the access is beyond this Court's powers in this motion but it strikes me as unusual that there would be no access. Right or wrong, is not for me to say, but I have great respect for his honour Judge O'Brien and it does not surprise me that he attempted to put in place a regime whereby access would be increased.

10. However, the current order is one which prevents the Respondent from direct access to his son indefinitely. I am not inclined to make an order preventing him from making another application for access without court permission (and my order alone would tend to mitigate against a later court allowing such an application). It is not proportionate in this case.

11 Many of the complaints about the Respondent are personal to the family relationships and relate to matters which occurred outside of the context of bringing court proceedings. It is not contested that the relationship between child and father has broken down.

12. Two cases were relied upon by the Applicant; G [2019] EWCA Civ 548 and M (M) v M (G) [2015] IECA 29 . In making my decision, I have considered the UK case G [2019] EWCA Civ 548. Similar allegations were made in that case, but a statutory order was issued preventing further litigation, because the father in that case had engaged in serial litigation against various independent persons such as at least one of the guardians appointed by a local authority.

13. There were two full hearings in that case. Paragraphs 33 and 37 set out the level of interaction between the parties in the G case and the burden on the parties in the case. These read:

> *"33. [The Court] reviewed the "exceptional" history and noted that the children "have been involved in acrimonious proceedings for some five years, have had no less than four guardians or case workers, and have been seen by professionals on countless occasions." Whilst he accepted that not all of the delay could be laid at the father's door, he noted that there had been no fewer than twenty-seven interlocutory hearings since the Court of Appeal decision and that a number of the father's applications demonstrated that his "almost immediate response to any grievance or concern is to issue a [court] application… [and] unless restrained, father will maintain that approach with application after application." In conclusion, he found the order sought by the mother and the Guardian necessary though draconian and concluded that three years was a proportionate duration. He also dismissed three further applications issued by the father since the April 2018 hearing…*
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> *37. This abbreviated summary of the history is sufficient for the purposes of the appeal, but it comes nowhere near to conveying the incessant level of attrition that has characterised this case. Since the appeal in July 2015, the father has issued some fifty-six applications and Judge Handley has made approximately fifty orders. For example, since [a social worker] was appointed in November 2015, the father has made eleven applications to discharge the Guardian or to remove [the social worker] and four applications for Judge Handley to recuse himself. There have been about thirty hearings across forty days. The strain of such bitter and incessant proceedings on the parents and children has been huge."*

While the case is comparable, I'm going to stop there as the G case relates to a statutory procedure which is not place in this jurisdiction and is not part of the application before this court. The effect is similar to an Isaac Wunder order, hence the Applicant relied on the case.

14. Here, while I note that there have been full hearings, what has not been demonstrated in this court is the habitual challenge to the actions of the legal personnel and the authors of the reports. That doesn't arise in this case. There has been a Judicial review of the cross-examination of one expert. But it is the habitual nature of the litigation which must be proven. There is not enough before me in relation to the most recent Judicial Review that I could go so far as to say it is vexatious

15. Finally, and importantly, I have now read *M (M) v M (G)* [2015] IECA 29, which was also referred to by the Applicant. There, a ruling of the Circuit Court was upheld in every particular except the last – that no further court applications were to be made for a period. The judgment of Kelly J, as he then was, reads as follows, at para 45:

> *"If this part of the order is read literally it constitutes a denial of access to the courts on a most important question, namely, infant welfare. Such denial is not in conformity with constitutional norms."*

The context is that the Circuit Court Judge, having heard days of evidence on the issues between the parties, made it part of his Court Order that the parties would not come back to court for a defined period and it was this aspect of his Order that was overturned by the superior court on the basis that it would be to unfairly restrict the access of the parties to the courts on a matter of infant welfare.

15. I am mindful of the fact that there is no jurisdiction in any court to make such an order in this jurisdiction. There is no jurisdiction, comparable to that in the UK, to make an order that parties in a family law case cannot come back into court. I note that the Applicant here chooses to seek an Isaac Wunder order. While there may be grounds, if the Respondent challenges a future author of a section 47 report, or a second judge's ruling, for reasons that are clearly vexatious or indeed in a hearing where a notice is served to cross examine on affidavits, this Respondent may become the subject of such an order. But not until then. There isn't sufficient evidence to justify the making of such a serious order in terms of its restriction of access to justice. I cannot make the order on the evidence before me.

16. I am making no order as to costs in the circumstances.