

BETWEEN

GERARD FULHAM

PLAINTIFF

AND

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL, MARY SMYTH, BARBARA PERRY, ANDREW PERRY, ANNE GRIFFIN, SHARON O'BRIEN, JOHN CAHILL, MICHAEL LANGSDORF AND BRIAN LANGSDORF

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 28th day of February, 2019

1. This is an application by the first named defendant (*"the County Council"*) seeking an Isaac Wunder order against the plaintiff restraining him from issuing further proceedings against the first named defendant without leave from the President of the High Court. The plaintiff issued the plenary summons herein on 14th August, 2017. Following the issue of the notice of motion on 14th June, 2018, by the County Council, the plaintiff delivered a statement of claim which made the first relief sought in the notice of motion – an order dismissing the claim for failure to deliver a statement of claim – somewhat redundant. However, the notice of motion also sought orders dismissing the plaintiff's claim because it was bound to fail, was frivolous and vexatious and amounted to an abuse of process. The notice of motion also sought what is commonly known as an Isaac Wunder type order.

2. The plaintiff filed a notice of discontinuance on 17th October, 2018, and submitted that this should satisfy the defendants and that he served same in order to prevent the County Council *"raking up and rolling into"* this application, previous disputes and litigation concerning his challenges to and failure to abide by an enforcement notice from the County Council in respect of a *"dormer style roof structure with attic conversion"* at his home on Nutgrove Avenue, Rathfarnham, Co. Dublin.

These proceedings

3. The said statement of claim, delivered on 28th June, 2017, refers to alleged unlawful acts by the County Council from November 2015 to July 2017, in and around an unincorporated association called Nutgrove and Loreto Community Association, and its use of a house at the rear of the old Loreto School in Rathfarnham. Suffice to say that the statement of claim shows the plaintiff's propensity to make general allegations affecting others so as to bolster his alleged grievance and perception of criminal acts which he said are matters for the Director of Public Prosecutions. Of particular note, is the naming of individuals in the title of these proceedings who are employed or engaged by County Council without particulars of the alleged wrongdoing by each of those individuals.

4. The replying affidavit of the plaintiff was sworn on 11th December, 2018, after the motion now before the Court had been listed as ready for hearing on 28th November, 2018, but was not reached due to the shortage of judges for the list that day. Barniville J., on 15th October, 2018, had directed the plaintiff to file any replying affidavit before 30th October, 2018. The plaintiff seeks to excuse his delay by relying on his disability and surgical procedures undertaken around this time in respect of which specific details were not set out in any affidavit. The plaintiff is well versed in the practice and procedure for litigation as may be gleaned from this and other litigation referred to in this judgment. Having said that, it is apparent the plaintiff requires a crutch to mobilise.

5. The plaintiff in his said replying affidavit referred to his reporting of criminal actions to An Garda Síochána. He curiously referred to a letter dated 28th November, 2018, from the gardai and in the exhibit GF1 he says that he has *"serious concerns that employees of Dun Laoghaire Rathdown Council will interfere and/or cause the said investigation to cease so copy of the response from the high ranking garda addressed to the plaintiff will be handed to your counsel at the hearing on 27th February, 2019"*. The letter handed to counsel and then to the Court yesterday at 12:47 on 27th February, 2019, was merely an acknowledgment of receipt of a letter from the plaintiff dated 4th November, 2018, with the phrase *"it is currently receiving attention"*. This style of the plaintiff tends to corroborate the suggestion made on behalf of the County Council that the plaintiff engages in subtle if not overt intimidation-type tactics to quell applications and activities of the County Council. The expression *"smoke and mirrors"* comes to mind.

6. Be that as it may, the plaintiff in his later replying affidavit also makes an uncorroborated allegation, which is strenuously denied, that the second named defendant, Ms. Smyth, is not employed by the County Council. Furthermore, he alleges *"deliberate and false information"*, misrepresentation and fraudulent claims on the part of the County Council. He objects to the same legal representation being provided for the County Council and Ms. Smyth without any good reason being offered.

7. In summary, the plaintiff having filed and served a notice of discontinuance reinvents and embellishes upon his serious claims which he said yesterday that he will not now pursue. The plaintiff's averment about the use of *"local thugs"* by the defendants to take over his association and criminal acts committed by the defendants indicate that the plaintiff has little remorse in having launched these proceedings, discontinuing them and then reigniting the serious claims in a way that may be advanced through more proceedings.

Previous litigation

8. The plaintiff's averment at para. 20 of his replying affidavit about not having instituted four sets of proceedings against the County Council continues on to aver that the defendants misdirected the judges and gave deliberately misleading information. The lack of thought and discipline on the part of the plaintiff in making general allegations in the replying affidavit does not instil confidence in this Court to trust the plaintiff now when he assures it that he respects the court process and will do so in the future.

9. The plaintiff orally represented that he will discharge the costs of all proceedings including the unappealed ruling of the Taxing Master directing him to pay €4,071.38 to the County Council. His representation was qualified by reference to his disability together with his physical and financial status. However, in a somewhat concerning manner, he averred in his replying affidavit that there was fraudulent activity on the part of a Mr. Begley, an employed law clerk of the County Council. He uses the term *"fraudulently created"* costs in para. 34 of his replying affidavit. The plaintiff on a few occasions emphasised yesterday that Mr. Begley was said in the taxation process to be a solicitor attending counsel for the County Council. The plaintiff requested me to read the transcript of the hearing before the Taxing Master on 6th July, 2015, which I did last night. A reference to Mr. Begley as a solicitor was indeed made but it is noteworthy that the plaintiff did not exhibit the ruling of the Taxing Master (exhibit DK4 to the affidavit sworn by Ms. Kennedy on 15th February, 2019) on p. 4, where he finds that all work was carried out under the supervision of the law agent. He said, what is known to anyone ever associated with the taxation of costs, that many tasks undertaken by law clerks and legal executives are included in awards for costs. The point repeatedly made about Mr. Begley being a law clerk and not a solicitor, is

ultimately of little importance. This is not the forum, in any event, for the plaintiff to take issue with the ruling of the Taxing Master. Nevertheless, the plaintiff seeks to heighten the tension between himself and employees of the County Council. In this Court's view, this amounts to vexatious and unnecessary pleading, averring and submissions on the part of the plaintiff.

10. In summary, the replying affidavit of the plaintiff underscores the submissions made by counsel for the County Council that the plaintiff is inclined towards making and repeating vexatious claims, as that term is used. The plaintiff unfortunately adopts an ill-advised stance towards findings and actions in favour of the County Council. He readily admits that he has not been successful in any action or appeal involving the County Council.

11. The plaintiff seeks to distinguish proceedings which he launched against the County Council and the proceedings which Noonan J. determined because he personally did not join the County Council in those proceedings. He does not acknowledge that he was in error in not joining the County Council in those proceedings and that he was, in fact, facilitated in his quest in those proceedings by the joining of the County Council as a necessary *legitimus contradictor*.

Judgment of Noonan J.

12. On 15th October, 2015, Noonan J. delivered an *ex tempore* judgment in an application by the County Council and two other defendants to strike out the plaintiff's claim in the case having record no. [2013/9321 P] on the grounds that the pleadings disclosed no reasonable cause of action, the pleadings were frivolous or vexatious within the meaning of Order 19(28), Rules of the Superior Courts, the claim was bound to fail and that the claim was an abuse of process. I do not propose to rehearse the details given in that judgment which spring from the controversy over the dormer roof of the plaintiff's home. It is noteworthy that at para. 7, Noonan J. refers to the order of Cooke J. on 8th July, 2013, wherein Cooke J. dismissed proceedings having record no. [2012/8857 P] as being frivolous and vexatious and bound to fail. As an aside, the plaintiff, despite the perfected order of Cooke J., insisted that it was actually McGovern J. who made that order. Nothing turns essentially on that point other than that this Court relies on the perfected order as did Noonan J. in his judgment on 15th October, 2015. The following passage from the judgment of Noonan J. resonates in these proceedings:-

"It is impossible to divine from the statement of claim what claim is being made against the first and second defendants, they being the only defendants at that stage. The defendants' solicitors understandably could make nothing of the statement of claim and corresponded with the plaintiffs inviting them to state what the defendants were alleged to have done wrong and when, where and how such wrongs were alleged to have been committed. Having got nowhere, the defendants issued a motion to strike out the proceedings which was originally returnable before the High Court on the 3rd of November, 2014. On that date, Mr. Justice Hedigan directed the plaintiff to deliver a statement of claim setting out precisely the nature of the claim within four weeks and he adjourned the hearing of the motion. This resulted in a document entitled 'Amended statement of claim' delivered on the 24th of November, 2014, consisting of four short paragraphs. In it the plaintiffs allege that the Council have a relationship with a named builder which takes priority over the interests of the plaintiffs. The Council was not a party to the proceedings at this stage..."

13. Noonan J. identified that the order of Cooke J., dismissing the plenary proceedings was not appealed. The plaintiff does not dispute these facts and repeated yesterday that those proceedings have nothing to do with the within proceedings and are being rolled unnecessarily into this application.

14. As eloquent as the plaintiff was yesterday, he conveniently ignores the sentence in para. 12 of Noonan J's judgment which reads:-

"Parties to litigation will not be permitted to make serious allegations of impropriety that are potentially very damaging to the reputation of others without those others being afforded the fullest opportunity to understand, investigate and rebut the case they have to meet."

15. Noonan J. proceeded to find that the proceedings instituted by the plaintiff and his wife constituted a clear abuse of process and had to be dismissed as against the County Council and two other named defendants.

16. In summary, the plaintiff was found by Noonan J. to have made more serious allegations of fraudulent conduct on the part of the County Council without giving the required detailed particulars. It was also found that the plaintiff had attempted to reopen earlier proceedings which had been struck out by order of Cooke J.

17. The determination of the Supreme Court, refusing the application on behalf of the plaintiff for leave to appeal the order of Noonan J. made on 22nd January, 2016, summarises the position again. Significantly, the determination reveals the plaintiff's persistence in pursuing wild-like allegations of most serious nature against the County Council, its officials, employees and agents.

The Law

18. The plaintiff acknowledges the law, and actually read aloud in Court yesterday, the oft repeated paragraph of Keane C.J. for the Supreme Court in *Riordan v. Ireland (No. 4)* [2001] 3 I.R. 365, at 370:-

"It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation."

...

This court is extremely reluctant, as the High Court has been, to restrain the access of any citizen to the courts. The stage has clearly been reached, however, where the proper administration of justice requires the making of such an order as against the applicant. Accordingly, in addition to dismissing the present motion the court will, in exercise of its inherent jurisdiction, order that the applicant be restrained from instituting any proceedings, whether by way of appeal or otherwise, against any of the parties to these proceedings ... (other than in relation to the taxation of costs), whether in the High Court or the Supreme Court, except with the prior leave of this court, such leave to be sought by application in writing addressed to the Registrar of the Supreme Court."

Decision

19. This Court is tasked with balancing the rights of frequent litigators or claimants to institute proceedings and the rights of other citizens (in this case, employees of the County Council and the County Council itself) to be free from harassment and threat whether overt or subtle. I am satisfied that the plaintiff has a tendency, if not a *modus operandi*, of seeking to thwart or delay the legitimate activities of the County Council and its employees and officers, in fulfilling their duties by threatening and/or instituting proceedings.

20. I listened attentively yesterday to the plaintiff submitting that he has done nothing wrong and that the County Council is rolling into this application, his resistance to the enforcement of the planning laws as they apply to his home. His basic complaint is that he has an attic conversion which is similar to other conversions which have been allowed in neighbouring or other properties in the vicinity. He said that he may make a third retention application for the impugned conversion. Be that as it may, the enforcement process has not ended and this Court is not asked to adjudicate upon how and when that enforcement process will be completed and executed. The plaintiff may be at risk of committal to prison according to the information which emerged in the exchange of affidavits and at the hearing which lasted all of yesterday.

21. The plaintiff issued a Civil Bill in the Dublin Circuit Court as recently as 21st February, 2019, naming the said Mr. Begley as one of the defendants. All that can be gleaned as far as Mr. Begley is concerned is that the plaintiff believes that Mr. Begley communicated with the third named defendant in those Circuit Court proceedings (the County Sheriff) about the parking of a car in the plaintiff's driveway. The plaintiff conveniently or perhaps accidentally ignores the requirement to plead with particularity when it comes to impugning the character or reputation of other citizens. The court processes are not available to be abused by one citizen so as to bring another citizen into the court process for mere embarrassment, awkwardness or vexation purposes.

22. Counsel for the County Council in these proceedings acknowledges that any order of this Court today cannot affect the issue of the Civil Bill last week and any order will not assist Mr. Begley immediately in avoiding an engagement of a legal team to defend or apply for the striking out of those Circuit Court proceedings on his behalf.

Bound to Fail

23. The plaintiff did not make any submission to challenge the view taken by the County Council that these proceedings were bound to fail, as against some, if not all, of the defendants at least. He has, in fact, served a notice of discontinuance and is liable for the defendant's costs up to that date. Applying the meaning of "*vexatious*" used in this type of application, I find that these proceedings were commenced and continued to be vexatious. The plaintiff acts with effective impunity given his impecuniosity. His history of seeking to niggle if not embarrass and intimidate employees, officials and agents of the County Council by threatening and initiating unsuccessful proceedings is evident. A citizen does, indeed, have a right of access to the courts but that right of access may be controlled in such a way as to protect the rights of other citizens and the integrity of the judicial process. Moreover, the burden in costs on other citizens does not appear in the plaintiff's reckoning.

24. Counsel for the County Council referred to three categories of frivolous or vexatious litigants as mentioned in a paper delivered to the annual conference of Supreme and High Court Judges in May 2000 [Anthony Moore, 'Isaac Wunder Orders' (2001) *Judicial Studies Institute Journal* 137 at 138]:-

- (i) litigants who lose an initial action, and respond by continuously taking the same issue back to court;
- (ii) litigants who lose an initial action and respond by broadening the range of people involved in the dispute; and
- (iii) litigants who have adopted litigation as a lifestyle choice and mount actions with no apparent connection with them.

25. Most cases fall into the second category. In these proceedings, the plaintiff has again shown that he is prepared to include in the list of defendants, individuals who do not need to be named in the litigation. Here he broadened his claim involving his unincorporated association to name the County Council and some of its employees and agents without any good reason.

26. This litigation was frivolous and vexatious as those terms are used in an application to strike out. The fact that the plaintiff served a notice of discontinuance before the motion was heard does not prevent the County Council from seeking the orders sought now or this Court from exercising its inherent jurisdiction to apply and determine the application of the Isaac Wunder type jurisprudence.

Right of access to the courts

27. It is important to note that the plaintiff's right of access to the courts and justice is not sought to be prevented – the Court in exercising its jurisdiction acts in a proportionate and reasoned manner. The County Council has submitted with support by referring to the previous conduct exhibited in correspondence and litigation commenced by the plaintiff, that he is prepared to make very serious allegations concerning the County Council and individual officers, employees and agents of the County Council without conforming to the rules for particularity in pleadings as is required in such cases. The Court guards its processes, procedures, rules and practice directions for the efficient and cost effective administration of justice. It is inefficient and not in any way cost effective to allow a serial infringer of procedures, rules and practice directions to institute proceedings where previous proceedings have invariably lead to successful applications to strike out for vexation or abuse of process. It causes unnecessary costs and personal aggravation to parties such as the County Council and its employees to review, with the assistance of qualified lawyers, the consequences of the plaintiff's repeated inability to plead properly.

28. In the circumstances, I make the following orders and declaration pursuant to the jurisdiction of the Court having regard to the reasons outlined and applying the principles of proportionality and fairness:

- (i) Order restraining the plaintiff from instituting proceedings in any court (save for those applications necessary for the taxation of costs) against Dún Laoghaire Rathdown County Council ("*DLRC*"), its officers, servants or agents who have been at any stage an officer, servant or agent of DLRC from March 2006 ("*those named parties*") to the vacating of this order without:

- a. Applying in writing addressed to the Chief Registrar at the High Court for a date to apply to the President of the High Court for leave to institute proceedings against any of the named parties; and

b. Applying at the time and date allocated for the leave application pursuant to a notice of motion grounded upon an affidavit with exhibited intended proceedings (including summons, and a statement of claim or a statement of grounds if same could be requested by an intended defendant or respondent) together with a verifying affidavit for the intended summons and statement of claim, or judicial review application;

(ii) A declaration that those named parties are not required to appear or take any step in relation to proceedings which are instituted by the plaintiff that do not comply with paragraphs (a) and (b) of part (i) of this order;

(iii) An order giving the plaintiff liberty to apply by way of notice of motion (grounded upon an affidavit of the plaintiff) to be heard by the President of the High Court or a judge assigned by the President of the High Court upon 28 days' notice to DLRC following the later of:

a. The discharge of all costs due by the plaintiff to the defendants in relation to these proceedings;

b. 6 years from the date of perfection of this order

to vacate paragraphs (i) and (ii) of this order;

(iv) An order directing the taxation of the costs of the defendants in respect of these proceedings up to the date of service of the notice of discontinuance unless the plaintiff and DLRC agree the total of those costs in writing.

I will hear the parties with regard to costs of this motion and the costs incurred from the date of notice of discontinuance to today's date.