

THE HIGH COURT

[2015 No. 7223 P.]

BETWEEN

WILLIAM MULROONEY

PLAINTIFF

AND

CHIEF SUPERINTENDENT CATHERINE KEHOE,

GARDA COMMISSIONER, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 27th day of July, 2017

1. This is a judgment pursuant to a notice of motion issued by the defendants seeking: -

(i) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts or alternatively, pursuant to the inherent jurisdiction of the Court an order dismissing the plaintiff's claim against the defendants on the grounds that it is an abuse of process.

(ii) Further or in the alternative, an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts or alternatively pursuant to the inherent jurisdiction of this Court an order dismissing the plaintiff's claim against the defendants on the grounds that it fails to disclose any reasonable cause of action against the defendants.

(iii) Further or in the alternative, an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts or alternatively pursuant to the inherent jurisdiction of this Court an order dismissing the plaintiff's claim against the defendants on the grounds that it is frivolous and/or vexatious.

(iv) Further or in the alternative, an order pursuant to the inherent jurisdiction of this Court dismissing the plaintiff's claim against the defendants on the ground that the claim has no reasonable grounds of success or alternatively it is bound to fail.

(v) An order pursuant to the inherent jurisdiction of this Court precluding the plaintiff from commencing any further new proceedings (other than in relation to taxation of costs) directly or indirectly concerning the lease dated 1st April, 1999, made between Edward Malone, lessor and John Mulrooney, lessee against the defendants or any of them or against any other public body, public servant or office holder except with prior leave of the President of the High Court or some other judge nominated by him such leave to be sought by an application in writing to the Chief Registrar of the High Court.

2. The notice of motion was grounded on the affidavit of Thomas O'Rourke, a solicitor in the Chief State Solicitors Office, handling the proceedings on behalf of the defendants. In his affidavit, he said the plenary summons was served on the defendants on or about 7th September, 2015, that on 29th September, 2015, the Chief State Solicitor entered an appearance on behalf of the defendants and the statement of claim was served on 5th October, 2015.

3. He says that insofar as it is possible to identify from the pleadings the subject matter of the plaintiff's complaint, he appears to contend that An Garda Síochána has failed to investigate certain criminal complaints properly. In particular, he alleges that a lease dated 1st April, 1991, between Edward Malone (lessor) and John Mulrooney (lessee) whom he believes to be the late father of the plaintiff, was unlawfully altered. Mr. O'Rourke in his affidavit states that the plaintiff further contends that he complained to An Garda Síochána about these matters and alleges that the complaint was not investigated properly.

Past Litigation Concerning the Lease

4. Mr. O'Rourke states in his affidavit that Edward Malone, who is the lessor under the lease, brought proceedings against the plaintiff and his father in 2002. Mr. O'Rourke refers to the copy of the ordinary Civil Bill issued in the Circuit Court, South Eastern Circuit, County of Tipperary, bearing record number [2002 No. 1055], the proceedings being between Edward Malone (plaintiff) and John Mulrooney and William Mulrooney (defendants). Mr. Malone sought damages for breach of contract alleging that the plaintiff and his late father had terminated the lease early. The proceedings were successful and the plaintiff and his late father in this case were ordered to pay damages to Mr. Malone.

5. On 9th March, 2005, His Honour Judge O Donnabhain at Clonmel District Court ordered that the plaintiff (Edward Malone) recover from the defendants, jointly and severally, the sum of €12,276.

6. This order was appealed by the plaintiff and his late father, to the High Court, against the order of the Circuit Court dated 9th March, 2005. The appeal was settled and was struck out at Clonmel High Court, Circuit Court appeals list on 10th November, 2005, on the basis that a bank draft had been paid in favour to Edward Malone in settlement of his claim against the plaintiff and his late father.

7. In 2008, the plaintiff brought proceedings in the Circuit Court against Edward Malone who was the lessor under the lease, and against certain solicitors and auctioneers who had been involved in the transactions leading up to the lease. The defendants in the Circuit Court proceedings successfully applied to have the proceedings struck out as frivolous, and Mr. O'Rourke exhibits an order of Judge McDonough dated 11th November, 2008 from which the plaintiff's action was dismissed. These proceedings bear record no. 698 of 2008.

The Plaintiff's Criminal Complaint

8. In May 2009, Mr. O'Rourke states that the plaintiff had made numerous oral and written comments to An Garda Síochána and he referred to a copy of a formal complaint made by the plaintiff to the members of An Garda Síochána in Clonmel, Co. Tipperary on 23rd

August, 2009. The plaintiff signed the statement and it was witnessed by Detective Garda Quinlan and Detective Garda Bergin.

9. In particular, the plaintiff's complaint stated:

"I am alleging that the number five has been altered from the number three and on the second last page, I am alleging that five has been altered from three and the date of 31st March, 2004, has been altered from 2002."

10. The complaint refers to a copy of the lease and states that the term of the lease had been altered from three years to five years and the end date had been modified from 2002 to 2004.

11. Mr. O'Rourke states that he believed that the claim was investigated thoroughly by An Garda Síochána and in particular the original lease was examined by handwriting expert, attached to Garda Headquarters in Dublin. A report by Detective Garda John Leonard 25301D of the document and handwriting examination section Garda Technical Bureau was compiled, titled "re complaint made by William Mulrooney member in charge of case Detective Garda Daniel Quinlan Clonmel Garda Station". The report provides as follows –

"exhibit A1 – master lease from Avonmore, Waterford (Ireland) Cooperative

Society Limited.

The purpose of the examination -

to examine the document and to establish if the number "five" on the front page along the area of the "term" years has been altered.

Examination equipment used stereo microscope

A stereo microscope is a microscope that captures two distinct images one viewed by each eye, which the brain integrates into a 3-Dimensional view of the subject.

Video spectral comparator -

The video spectral comparator is a piece of equipment incorporating various lights or sources (ultraviolet, infrared, transmitted and blue/green lighting) and filters which allow an examiner to differentiate inks and substances to visualise hidden and security features or faded writing and to reveal all alterations and a document.

Results of examination -

I examined the number "five" on the front page along the area of the "term" years on the document I found no evidence of any alteration or addition around this area. In my opinion this document had not been altered where the number "five" is displayed.

Further examination -

In my opinion this document has not been altered where the number "five" is displayed".

The 2011 Proceedings

12. The plaintiff's father took proceedings bearing Record No. 2011/386P against John Shee and Company Solicitors, Kieran Cleary, Sinead Cleary, Oliver Ryan Purcell Solicitors, Lynch and Partner Solicitors, Kieran O'Carroll, Michael O'Brien, Clionna Cleary, Randal Hill, David Humphreys, Frank Quirke, Kevin Byrne, Jack Hickey, David Kennedy, Victor Shee, David Shee, J.J. Shelly, Shee & Hawe Limited, Edward Malone, Glanbia Foods Society Limited, the Minister for Agriculture & Food, the Garda Commissioner, the Garda Bureau of Fraud Investigation and the Minister for Justice, Equality and Law Reform. These proceedings were the 2011 proceedings. The Chief State solicitor's office acted on behalf of the 21st, 22nd, 23rd and 24th named defendants, namely the Minister for Agriculture and Food, the Garda Commissioner, the Garda Bureau of Fraud Investigation and Minister for Justice and Law Reform. The statement of claim in the 2011 proceedings made certain claims against the 2011 State defendants as follows:

(a) The gardaí failed to provide a full report on the forensic tests that were carried out on the three year lease document (which he alleges had been altered to a five year lease).

(b) He says he not allowed to view the lease document prior to the document being sent to the forensic department.

(c) His forensic document expert in the UK believed the original lease document ought be inspected further.

13. The 2011 proceedings were brought in the name of John Mulrooney, the plaintiff's father, but on 17th November, 2013, it was ordered that the title of the 2011 proceedings be amended to name the plaintiff as the plaintiff herein, as the plaintiff's father had passed away.

The Chief State Solicitors office represented the 21st, 22nd, 23rd and 24th named defendants in the 2011 proceedings, namely the Minister for Agriculture and Food, the Garda Commissioner, the Garda Bureau of Fraud Investigation and Minister for Justice and Law Reform.

14. The appeal was settled and was struck out at Clonmel High Court, Circuit Court appeals list on 10th of November, 2005 by Carney J.

15. By order dated the 20th December, 2011 Charlton J. in the High Court dismissed the 2011 proceedings as against the 1st, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 18th, 19th named defendants. That order was the subject of an unsuccessful appeal to the Supreme Court. The Supreme Court gave judgment in that matter on the 9th May, 2015.

16. By order dated the 27th November, 2014 Kearns P in the High Court struck out the 2011 proceedings as against the 2011 State

defendants on consent (this Court's emphasis).

17. By order dated the 19th January, 2015 Kearns P in the High Court dismissed the 2011 proceedings as against the 2nd, 3rd and 4th named defendants. That order was appealed to the Court of Appeal but the appeal was settled (this Court's emphasis).

The Supreme Court Judgment of the 13th of May, 2013

18. The 2011 proceedings were dismissed against most of the defendants by order of the High Court dated the 20th November, 2011. The plaintiff appealed against that order. In its judgment dated the 13th May, 2015 the Supreme Court rejected the plaintiff's appeal against that order of the 20th December, 2011.

19. Mr. O'Rourke stated that the Supreme Court considered that by settling the Circuit Court appeal, the plaintiff had agreed to drop his claim that the lease had been altered. He referred to the judgment of the Supreme Court dated 30th May, 2015 where Clarke J. said:

"7.15 The time to have obtained the forensic examination which Mr. Mulrooney now seeks is when he first made the allegation of unlawful altering in the context of the Circuit Court proceedings. Having failed to do it then and having settled those proceedings, he has now lost the right to seek to re-litigate the same question of unlawful altering which he has already settled. He is, in substance, asking not to be taken at his word when he settled those proceedings. The law does not allow him to depart from his word. He is bound by the settlement. The settlement binds him not to seek to re-litigate the issues which were then before the Circuit Court. Those issues clearly included the allegation of unlawful altering. Mr. Mulrooney is precluded from now seeking to make that allegation by virtue of his previous settlement of the proceedings and the trial judge was, therefore, correct to dismiss the proceedings as being an abuse of process."

20. Mr. O'Rourke in his affidavit said the plaintiff had agreed to withdraw his claim against the 2011 state defendants and it is an abuse of the process of the Court to bring the same allegations again.

Further Proceedings against John Shee

21. Mr. O'Rourke in his affidavit asserts that the plaintiff has issued further proceedings bearing record no. 2015/7224P against John Shee and Company solicitors. In those proceedings, the plaintiff seeks damages from John Shee and Company solicitors and also an order of detinue seeking the return of the lease. John Shee and Company issued a motion in the above proceedings seeking to have those proceedings dismissed as failing to disclose a cause of action or alternatively to be dismissed as frivolous and vexatious. John Shee and Company have also sought an Issac Wunder Order in the above proceedings precluding the plaintiff from bringing further actions in connection with the lease.

22. On the 30th October, 2015 the plaintiff brought a motion seeking judgment in default of defence. This led to correspondence between the parties in which the defendants pointed out that when this motion was issued, the time granted under the Rules of the Superior Courts for filing a defence had not yet elapsed. The defendants also sought particulars of the plaintiff's claims. The motion was struck out, consent with no order as to costs on 23rd November, 2015. The plaintiff provided further particulars in a reply dated the 23rd November, 2015.

23. By letter dated the 11th December, 2015 the Chief State solicitor wrote to the plaintiff in these proceedings. That letter set out the procedural background and made the following points in particular. First, the letter stated that the defendants do not have the original lease, so it is pointless to seek an order of the court requiring them to provide the original lease. Secondly, although the defendants did not accept that he had any legal right to it, the letter provided the plaintiff with a copy of a further forensic report carried out by An Garda Síochána dated the 23rd March, 2015 which concluded that the dates in the lease had not been altered. This is headed "Additional report of Detective Garda John Leonard of the document and handwriting examination section Garda Technical Bureau Re: complaint made by William Mulrooney, member in charge of the case Inspector Paul O'Driscoll, Clonmel garda station". The report stated that the following document was received at the Document and Handwriting Examination Section for examination from Inspector Paul O'Driscoll, Clonmel Garda Station.

"Exhibit A1- Master lease from Avonmore Waterford (Ireland) Cooperative Society Ltd.

Purpose of Examination

To examine the document and establish if there was any alteration of the following pages:

- was there any evidence of alteration or addition on page 1 to the number "5" around the area of the "term years"
- was there any evidence of alteration or addition on page three to the number "5" under the heading "Term"
- was there any evidence of alteration or addition on page thirteen to the number "5" to the date March "2004" in the middle paragraph of that page."

[...]

I examined this document and found it to be a sixteen page document and to be printed using mainly a toner based printer. The last two pages are photocopies and do not contain original handwriting. Page 1 contains a wet ink stamp impression dated the 26th May, 1999 and two other wet ink stamps impressions both dated the 27th May, 1999. Pages 1, 10 and 13 contain correction fluid on some entries. Using transmitted light I am able to establish what the original entries were.

Result of Examination

I examined the number "5" and the word "five" along the area of the "term years" on page 1. I found no evidence of any alteration around this area. In my opinion this page has not been altered where the number "5" and the word "five" along the area of the "term years" is displayed.

I examined the number "5" underneath the term "Term" on page 3. I found no evidence of any alteration around this area. In my opinion this page has not been altered where the number "5" underneath the heading "Term" is displayed.

I examined the number "5" and the date "March 2004" in the middle of paragraph of page thirteen. I found no evidence of any alteration around this area. In my opinion this page has not been altered where the number "5" and the date "March 2004" is displayed.

Conclusion

(1) In my opinion page 1 has not been altered where the number "5" and the word "five" along the area of "term years" is displayed.

(2) In my opinion page 3 has not been altered where the number "5" underneath the heading "Term" is displayed.

(3) In my opinion page 13 has not been altered where the number "5" and the date "March 2004" is displayed."

24. The letter cited the Supreme Court judgment of the 13th May, 2015 and stated that it would be an abuse of process for the plaintiff to relitigate matters which had been determined by the courts. The letter concluded as follows:

"As a result, we suggest that your action cannot succeed and can only cause unnecessary costs if it is pursued. However, we will not seek an order of costs against you if,

(a) consent to an order dismissing the action; and

(b) undertake in writing not to bring any further action against the defendants or any other public body, public servant or office holder seeking to relitigate the matters covered by these proceedings or the 2011 proceedings (Record No. 2011/386P). In particular, this would preclude you from any future litigation against any public body alleging

(1) That the lease of the 1st April, 1999 was unlawfully altered; or

(2) That the criminal complaints made to An Garda Síochána in connection with the lease were insufficiently investigated.

If you do not agree to this proposal within 7 days of this letter, we will consider that you have rejected it and act accordingly. If the action proceeds, this letter will be produced in court in the matter of costs.

As set out in previous correspondence, we reserve the right to bring applications (in addition or as an alternative to filing a defence) to have your proceedings struck out as disclosing no cause of action, as an abuse of process or in such other grounds as may be specified.

Finally, if you decline to give the undertaking requested above as regards future litigation, we reserve the right to issue an Isaac Wunder order precluding you from bringing the same claims against the defendant in future without the leave of the court."

25. Mr. O'Rourke swears that by letter dated the 16th December, 2015, the 20th January, 2016 the plaintiff stated that he was considering the defendant's letter of the 11th December, 2015. He also indicated that he was still awaiting final reports from his UK experts. By letter dated the 22nd February, 2016 the Chief State solicitors wrote to the plaintiff warning the plaintiff that the defendant intended to bring a motion to dismiss the proceedings. The plaintiff in further correspondence made the following points:

(a) He contended that his independent expert has advised him that the report of Detective Garda Leonard is wholly deficient regarding the methodology used to examine the documents.

(b) He sought the original documents examined by Detective Garda Leonard to be made available for examination by his expert. He denied that the within proceedings were an attempt to relitigate the matters claiming that the within proceedings instead concerned allegations of negligence since the 5th February, 2015.

(c) The plaintiff sought an apology from the defendant.

(d) The plaintiff stated that he would seek discovery.

(e) He denied that the within proceedings overlapped with the proceedings brought against John Shee and Company on the basis that the within proceedings concerned negligence.

He considered his letter as a substantive response to the defendant's letter of the 11th December, 2015. Mr. O'Rourke concluded stating that the proceedings are an abuse of process if the plaintiff repeats the claims which he had made in the 2011 proceedings, and which he had agreed to withdraw as against the 2011 State defendants, as reflected in the order of this honourable court dated the 27th November, 2014.

26. The plaintiff's letter of the 23rd February, 2016 claims that the within proceedings are not an attempt to relitigate matters.

27. Mr O'Rourke states that the plaintiff has declined to give an indication as to whether he would undertake not to bring similar proceedings in the letter of the 23rd February, 2016. The plaintiff makes it clear that he intends to persist with this litigation and takes steps (such as seeking discovery), which can only impose further costs on the defendants and the defendants therefore ask this Court to make an Isaac Wunder order in the circumstances.

Legal Submissions on behalf of the Defendants

28. Counsel submitted that the plaintiff has continued to litigate this same claim dating from the Circuit Court proceedings in 2005 in a variety of actions against a large number of defendants. The 2011 proceedings were brought against 24 separate persons including the plaintiff's own lawyers and lawyers representing the code for previous litigation. In light of the Supreme Court judgment of 2013, it might have been thought that the plaintiff would cease with litigation. However, despite having settled his past claims against the State defendants in 2014, the plaintiff has resumed litigation against the gardaí.

29. Counsel submitted that the plaintiff's continued litigation completes many of the criteria identified by O'Cuiv J. in *Riordan v. Ireland* (No. 5) [2001] 4 I.R. 463:-

“(a) The bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;

(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.”

30. Finally, counsel submitted that the courts do not issue an Isaac Wunder order lightly, nevertheless this step has already been taken as regards to the plaintiff by the order of the 8th of July, 2016, which prevents the plaintiff from bringing actions against John Shee and Company. The defendants submit that it is appropriate to issue a similar order preventing the plaintiff from bringing similar actions against public bodies concerning the lease. His order would mean that the plaintiff would be required to obtain prior leave from the President of the High Court if he were to bring further actions.

Submissions on Behalf of the Plaintiff

31. The submissions of the plaintiff were as follows:

Summary

(1) The plaintiff complained of an inadequate investigation of the lease of the 16th of April, 1994 between Edward Malone and John Mulrooney. Had he been furnished with the report when he was before Charlton J., he could have raised the issues as to the adequacy of the investigation. He complains that the gardaí did not conduct an ESDA test on the lease.

(2) He denies that he is merely repeating claims that were previously made.

(3) He denies that he is abusing the process of the court.

(4) He submitted that no court has determined whether the second report on the lease was adequate or not.

Steps to date in these proceedings

He referred to the offer that the defendants made. He stated that the offer was to include an undertaking not to relitigate in respect of any “public bodies” and the plaintiff submitted that this was too broad a requirement.

Background facts

(1) The plaintiff complains of the auctioneer’s diary being missing.

(2) He refers to the proceedings brought by Dolf McGrath, the solicitor for the plaintiff Edward Malone in his Circuit Court proceedings against John Mulrooney and William Mulrooney. He said that it emerged that the necessary consent pursuant to s. 12 of the Lend Act 1965 and as required by s. 14 of the European Communities Regulations 2000 was not obtained until the 14th of March, 2005 which was after the decision of the Circuit Court being the 9th of March, 2005.

(3) He also complains about how John Shee and Company solicitors have frustrated his attempt to have the lease examined properly.

(4) He states that the fact that the gardaí agreed to conduct a second examination of the lease was an admission by the gardaí that the first report by Detective Garda Leonard was inadequate.

(5) He complains that he did not see a copy of the second report until he had issued these proceedings and thus he submits he was justified in bringing these proceedings.

(6) The plaintiff also claims that the judgment of Noonan J.’s decision of the 8th of July establishes there is a relationship between Mr. McGrath and the gardaí, that enabled him to see a copy of the first report before the plaintiff.

(7) He complains about the affidavit of Dolf McGrath which he says is being used against him. Mr. McGrath had sued the plaintiff in respect of defamation proceedings before the Circuit Court in Clonmel. It was listed to be heard on the 18th of January, 2007 but the hearing date was vacated by consent by both parties, as the plaintiff is in the process of bringing a motion to amend his defence and he detailed the amendments which were sought to be put.

Overview of past litigation

The Supreme Court was in error as was Charleton J., because they were misled as to the extent of the investigation of the lease by the letter dated the 8th of July, 2010 from Superintendent Courtney on behalf of the gardaí. The Supreme Court was in error when it relied upon the determination by Charleton J. that there had been an inadequate investigation of the lease, when any reading of the first report reveals there was not. He says that Noonan J.’s order of the 8th of July, 2016 is under appeal to the Court of Appeal.

The relief sought by the defendants

(1) This area of law is evolving, due to the impact of the European Convention of Human Rights.

(2) An application pursuant to O. 19, r. 28 will fail regardless of the evidence of the plaintiff’s prospects, if the ingredients

of a good cause of action are pleaded. He submitted that the ingredients of a good cause of action are present in the plaintiff's statement of claim.

(3) He says that if the pleadings in question are capable of amendment, then that will remedy the deficiency of the case as pleaded and an application to strike out will not succeed.

(4) He submits that the proceedings in question can be saved by an amendment that includes "misfeasance in public office" and to reflect the breach of the plaintiff's rights under the European Convention of Human Rights by the defendant. He quoted from a number of cases in relation to striking out, albeit the facts of each case were not set out.

(5) He also quotes from Clarke J. in *Salthill Properties v. Royal Bank of Scotland plc.* [2009] IEHC 207 where Clarke J. said:-

"It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail."

Relief seeking the dismissal of the plaintiff's action

No real submission was made in this regard.

Abuse of process

(1) The Circuit Court was misled in 2005 and the lease was void.

(2) He claims that he is not seeking substantially the same relief.

(3) The plaintiff submits that the Supreme Court's decision was based upon the acceptance by the Circuit Court that the lease was a valid and legal lease for a period of 5 years and that this decision was obtained by fraud.

(4) In relation to a decision of the Circuit Court being obtained by fraud Clarke J. said:

"If there was now a different allegation of fraud which is said to have induced the settlement of the Circuit Court proceedings then the situation might be different."

It is submitted that the decision of the Circuit Court was obtained by fraud as the lease was void against the then defendants (including the plaintiff). This undermines the legal basis of the decision of the Supreme Court.

(5) He submits that the party that he settled with are not entitled to limit his rights from the settlement as obtained.

No reasonable cause of action/frivolous or vexatious

(1) He said that the submissions of the defendants ignored the decisions of the courts that have held that a case may be saved, by an amendment to the proceedings.

No reasonable grounds of success – jurisdiction

(1) The plaintiff believes the defendant accepted that the first report in respect of the lease was inadequate, by commissioning of the second report.

(2) It is curious that the defendants have criticised the plaintiff for referring to past events, in that they now go over past events, in an attempt to establish that the investigation was proper.

(3) The plaintiff submits that this investigation was inadequate; it did not seek to examine the lease for alterations through the ESDA test. He submitted that Charlton J. was in error when he refers to an ESDA test having been carried out on the lease, and that the Supreme Court in relying upon this determination by Charlton J. is in error. It was submitted that there was malice on the part of the gardaí in respect of how the investigation was carried out since the 6th of February, 2015.

(4) He submitted that these proceedings are capable of being saved. He referred to a decision of Gillen J. in *C. v. the Chief Constable of the PSNI* [2014] NIQB 63 in that Gillen J. stated:

"The [...] convergence of the law of negligence with human rights law under the Convention [...] human rights and negligence perform different functions within our legal order [...] the norms of human rights are not more fundamental than the norms encapsulated in negligence law."

(5) The plaintiff submits that his rights under the European Convention of Human Rights are affected and refers to Article 6 'right to a fair trial', Article 8 'right to respect for private life and family life', and to Article 13 'right to an effective remedy'.

32. Counsel for the plaintiff states that an Isaac Wunder order does not properly arise in relation to the present defendants, as they were not party to the previous proceedings.

Discussion

33. The unanimous decision of the Supreme Court constituting the Chief Justice Denham CJ., Hardiman J. and Clarke J. held that Charleton J. was correct in dismissing Mr. Mulrooney's proceedings as being an abuse of process:-

"For those reasons I am, therefore, satisfied that the trial judge was correct in dismissing Mr. Mulrooney's proceedings as being an abuse of process. Mr. Mulrooney is seeking, in these proceedings, to relitigate an issue and a cause of action which he has already settled. The question of unlawful altering was put before the Circuit Court by Mr. Mulrooney and

was alive at the time when he settled both the third party issue against Shee and Hawe and the claim brought against him by Mr. Malone. The question of the legal advice given to him which led to that settlement is a matter between him and his then lawyers and is not a matter which can affect the rights of the continuing defendants. While Mr. Mulrooney seeks to make, in these proceedings, an allegation of fraud, it was that very same allegation of fraud by virtue of unlawful altering of the lease that was before the Circuit Court and which he settled. He has, therefore, settled the allegation of fraud and cannot bring it again."

It is quite clear that despite the legal submissions on behalf of the plaintiff, this is exactly the case – these proceedings raise the same issue.

34. In the initial Circuit Court proceedings Record No. 105/2002, the lessor Mr. Malone sued both the plaintiff and his father. On the application of the Mulrooney's former solicitors, a third party being Shee & Hawe auctioneers were joined in these proceedings.

35. When the matter came to trial the order of the Circuit Court records that the third party issues between the Mulrooney's on the one hand and Shee & Hawe on the other had been settled so that no order was required. The substantive proceedings between the Malone and the Mulrooney's went ahead and the circuit judge determined that the lease was for a period of five years. The plaintiff and his father appealed that decision. Proceedings were settled on the 5th of November, 2005 for slightly more than the Circuit Court had awarded (€12,436.82). In the settlement the figure was €13,500.00 inclusive of costs. This sum was actually paid to Mr. Malone.

36. In 2008 the plaintiff in this case brought proceedings in the Circuit Court arising out of much the same matters. These proceedings were dismissed by order of the Circuit Court on 11th of November, 2008 on the basis that the civil bill failed to disclose a cause of action and that the proceedings were found to be frivolous and vexatious. In 2008, Judge McDonagh of the Circuit Court had already identified that proceedings in relation to this matter were frivolous and vexatious.

37. In 2011, the father of the plaintiff issued proceedings against the following persons:-

- (1) John Shee & Company Solicitors;
- (2) Kieran Cleary;
- (3) Sinead Cleary;
- (4) Oliver Ryan Purcell Solicitors;
- (5) Lynch and Partner Solicitors;
- (6) Kieran O'Carroll;
- (7) Michael O'Brien;
- (8) Clionna Cleary;
- (9) Randal Hill;
- (10) David Humphreys;
- (11) Frank Quirke;
- (12) Kevin Byrne;
- (13) Jack Hickey;
- (14) David Kennedy;
- (15) Victor Shee;
- (16) David Shee;
- (17) J.J. Shelly;
- (18) Shee & Hawe Limited;
- (19) Edward Malone;
- (20) Glanbia Foods Society Limited;
- (21) the Minister for Agriculture & Food;
- (22) the Garda Commissioner;
- (23) the Garda Bureau Fraud Investigation; and
- (24) the Minister for Justice, Equality and Law Reform.

38. In an affidavit seeking discovery against John Shee and Company, the plaintiff makes reference to the fact that he had appointed a forensic document expert in the United Kingdom as he had been dissatisfied with the previous forensic investigations carried out by An Garda Síochána. The Master refused to grant discovery and Mr. Mulrooney brought the matter before the High Court by motion returnable on the 30th of May, 2011.

39. It appears that the Master had refused an order of discovery because the Master took the view that these proceedings could not be maintained as a result of the settlement of the previous proceedings in the Circuit Court (this Court's emphasis).

40. In his ground affidavit in respect of the appeal from the Master's refusal to order discovery, Mr. Mulrooney stated that he knew "that any case can be reopened on the production of new evidence which is also supported by confirmation from Revenue that my allegations, including that of fraud where the lease document was altered, are correct".

41. Motions to dismiss proceedings were brought by various defendants. One such motion was brought by John Shee and Company, Victor Shee, David Shee, Shee & Hawe and Mr. Malone. That application was successful, in that the proceedings against those five named defendants were struck out. A separate but similar motion was brought on behalf of other defendants, and that motion was also successful but has not been appealed.

42. The Supreme Court was then left with the appeal relating to the three defendants in respect of whom this appeal lies. The court had to assess whether the trial judge was correct in dismissing Mr. Mulrooney's claim.

43. Clarke J. stated in summary

(1) The Mulrooneys allege that any lease entered into by either of them was for a period of three years;

(2) The auctioneers Shee & Hawe unilaterally, wrongfully and unlawfully altered the term of the said lease from a period of three years to five years without the defendant's knowledge or consent.

Clarke J. continued:

"3.2. It is clear, therefore, beyond any dispute that the question of the lease having been wrongfully altered from three to five years was squarely before the Circuit Court at the time when the Circuit proceedings were coming to trial. An order joining Shee and Hawe had been made and the issue of Shee and Hawe and/or others acting in conjunction with them, having unlawfully altered the lease document was squarely before the court.

3.3. It is against that background that the fact that the third party proceedings involving Shee and Hawe were ultimately settled must be judged (this Court's emphasis). It is also against that background that the proceedings between Mr. Malone and the Mulrooneys were settled after the Mulrooneys had lost in the Circuit Court, but while their appeal was pending."

44. Clarke J. then looked at the attempts made by the plaintiff to have the lease documents in question forensically examined. The original document was made available to An Garda Síochána and the evidence would appear to suggest that An Garda Síochána found no evidence of fraud. This is true not only for the first examination by Garda John Leonard but for the second examination.

45. The original lease document was also made available to Brian Craythorne, a known document examiner at the Forensic Science Laboratory in Northern Ireland. Mr. Craythorne said that:-

"All the evidence supports the proposition that the figure 5's and the figure 2004 have not been altered and thus that the term was originally for 5 years and the end year was 2004."

Mr. Mulrooney was dissatisfied with the results of these reports and instructed Margaret Webb and Michael Ansell from the United Kingdom. Their reports canvassed the possibility that there might have been changes made in the relevant portion of the lease but quite understandably, both reports make it clear that it would be necessary to have an opportunity to examine the original lease before reaching a definite conclusion.

46. Charleton J. on the 20th of December, 2011 considered the lease document at the core of the dispute, and the various examinations which were conducted on this document for evidence of forgery. Charleton J. concluded that An Garda Síochána and Mr. Craythorne "examined this original lease not just on the basis of what they could see with the naked eye but with microscope side light and also examined the indentation in the pages underneath; something that is known as ESDA examination and the basis of the resulting conclusion is very strong".

47. Counsel on behalf of the plaintiff says that Charleton J. was incorrect in describing this as an ESDA test, although he did not indicate in his submissions how exactly his description of an ESDA test would disagree with that of Charleton J. He dismissed the pleadings against the defendants on the basis that it did not disclose any cause of action.

48. Clarke J. said in relation to the oral hearing:-

"However, it does not, of course, follow that those Circuit Court proceedings were irrelevant to the issues which this Court now has to decide. The fact remains that Mr. Mulrooney was a party to proceedings in the Circuit Court in which the question of whether the lease had been unlawfully altered was specifically raised by him. Counsel for the continuing defendants did make the point in the course of the hearing that an attempt to go behind the settlement of the earlier Circuit Court proceedings was impermissible. That point, although not touched on by the trial judge in his judgment, was raised in the documents filed on behalf of the continuing defendants in their application to dismiss in the High Court."

In his submissions to the Supreme Court, Mr. Mulrooney believed that he had been badly served by his then legal representatives.

49. Clarke J. continued:

"7.3 The basic position is, therefore, clear. Where a party settles proceedings then whatever cause of action was raised in those proceedings can no longer be the subject of litigation. A party has, by entering into an agreement to settle, given up their right to whatever claim might have been made in the proceedings in question.

7.4 It should be recalled that there were, in fact, two separate settlements which led to the ultimate disposal of the previous Circuit Court proceedings. The third party claim brought by the Mulrooney's against Shee and Hawe was, as the Circuit Court order noted, settled so that the claims arising in that third party issue were struck out. In the context of that third party issue, a specific claim had been made by the Mulrooneys to the effect that the lease had been unlawfully altered. Therefore, at the time settlement was reached, the allegation of unlawful altering of the document in question was already alive and before the court. Equally, if such unlawful altering could have been established, it would obviously have provided the Mulrooney's with a defence to the action brought against them by Mr. Malone, for in those circumstances the Mulrooney's could not be held to be bound by a document which they had signed in one form and

which had been unlawfully altered.”

7.5 Thus, the claim of unlawful altering was alive in the Circuit Court proceedings and would have been available, had it been established, both as against Shee and Hawe, as third parties, and against Mr. Malone as plaintiff.”

50. In relation to the reasons put forward by Mr. Mulrooney for seeking to go back on his settlement Clarke J. said:-

“7.8 It would, in that context, be wholly wrong for this Court to express any view on the allegations which Mr. Mulrooney makes to the effect that he was not well advised. The fact remains that Mr. Mulrooney had the benefit of legal advice at the time of the relevant settlements and those with whom he was settling were entitled to assume that he was properly advised. ... The fact remains that Mr. Mulrooney obtained advice and acted on it in settling the case. If he has any complaint arising out of the advice which he was given (and I would wish to make it clear that no such finding is made), then that is a complaint which he has against his own lawyers and it does not afford him any legitimate basis for seeking to reopen legal issues which he has previously settled. The parties with whom he settled are entitled to take him at his word that the proceedings are settled and are not to be reopened.”

51. In relation to the issue of fraud, the same fraud which he alleges now was alleged in the Circuit Proceedings. Clarke J. said:-

“If there was now a different allegation of fraud which was said to have induced the settlement of the Circuit Court proceedings then the situation might be different.”

52. In this regard, counsel for the plaintiff raised the issue of consent pursuant to s. 12 of the Land Act. This appears not to have been obtained until the 14th of March, 2005 which is after the decision of the Circuit Court of the 9th of March, 2005. However, it is quite clear that this is a matter which could have been raised on the appeal from the Circuit Court. These proceedings were settled by the plaintiff and his father.

Decision

53. The Court has considered in detail the plenary summons and the relief sought by the plaintiff. These proceedings relate to the same issues raised by the plaintiff in previous proceedings issued in the Circuit Court.

54. The plaintiff seeks to question the finality of the Supreme Court’s judgment by suggesting he could amend his pleadings to include misfeasance.

55. The Court is satisfied that the manner in which the plaintiff has pleaded his claim in these proceedings constitutes frivolous and vexatious proceedings. The Court has no hesitation in dismissing the plaintiff’s claim against the defendants on the grounds that it is an abuse of process, on the grounds that it fails to disclose any reasonable cause of action, and that it is frivolous and vexatious.

56. The Court is further satisfied that the claim has no reasonable grounds of success or alternatively it is bound to fail.

Isaac Wunder Order

57. The defendants in their notice of motion seek an Isaac Wunder order against the plaintiff restraining him from issuing further proceedings without the leave of the court, in relation to the issue of the terms of the lease, and the allegation of fraud suggested by the plaintiff.

58. In *Wunder v. Irish Hospital Trust* (Unreported, Supreme Court, Walshe J and O’Keeffe J, 24th of January, 1967). Mr. Wunder appealed against an order of Henchy J. that his actions be dismissed on the grounds that the proceedings were frivolous and vexatious. Mr. Wunder had taken several claims against the defendants claiming prizes in respect of tickets purchased by him in their sweepstakes. At trial and on appeal to the Supreme Court these claims were held to be groundless, and the Supreme Court made an order directing that no further proceedings in the action in the High Court be taken without the leave of that court. If no leave was granted, the defendant would not require to appear or take any steps in relation thereto and such proceedings would be treated as void and of no effect.

59. The jurisdiction of the courts to impose Wunder orders implies that the citizen’s rights of access to the courts, one of personal rights of the citizen contained in Article 40.3 of the Constitution of 1937, is not an absolute right.

60. The question arises as to whether it is constitutionally permissible to restrict that right. In *Murray v. Ireland* [1991] 1 IRLM 465, Costello J. stated:-

“The power of the State, to delimit the exercise of constitutionally protected rights, is expressly given in some Articles and not referred to at all in others, but this cannot mean that, where absent, the power does not exist.”

61. Keane CJ. in *Riordan v. An Taoiseach* [2001] IESC 83 referred to:-

“... 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. The 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.”

62. Orders such as Wunder orders appear to this Court to be compatible with Article 6 of the European Convention on Human Rights. In *Tolstoy Miloslavsky v. the United Kingdom* [1995] 20 EHRR 442 (Application No. 18139/91) the European Court of Human Rights said:-

“The court reiterates that the right of access to the courts is secured by Article 6(1). Article 6(1) maybe subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way to an extent that the very essence of the right is impaired. Secondly, a restriction must issue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aims sought to be achieved.”

63. In imposing a Wunder order the Court is required to strike a balance between the constitutional right of the individual of access to the courts and the onus on the Court to prevent vexatious litigation and litigation which is an abuse of process. Mr. Mulrooney has sought to relitigate matters which have already been litigated and settled by him and his father. The Court considers that these legal proceedings are vexatious and the Court proposes to make a Wunder order in the following terms:-

It is ordered that the plaintiff be restrained from the institution of any proceedings whatsoever, whether by summons or notice of motion or by application to the Court against the defendants in this case, or any other defendants against whom the plaintiff has previously initiated pleadings, in relation to the alleged amending of the lease by way of fraud, the subject matter of the proceedings.

For clarity, this Court includes in this Wunder order the names of the defendants in this case, these being Chief Superintendent Catherine Keogh, the Garda Commissioner, Ireland and the Attorney General. Further, this Court states that the plaintiff is precluded from bringing proceedings on this subject matter, in relation to the alleged amending of the lease by way of fraud against: John Shee and Company solicitors; Kiearan Cleary; Sinead Cleary; Oliver Ryan Purcell Solicitors; Lynch and Partner Solicitors; Kieran O'Carroll; Michael O'Brien; Clionna Cleary; Randal Hill; David Humphreys; Frank Quirke; Kevin Byrne; Jack Hickey; David Kennedy; Victor Shee; David Shee; J.J. Shelly; Shee & Hawe Limited; Edward Malone; Glanbia Foods Society Limited; the Minister for Agriculture & Food; the Garda Commissioner; the Garda Bureau of Fraud Investigation; the Minister for Justice and Law Reform, and any other public bodies including the Courts Service.

64. The Court notes that the plaintiff has not exhausted his domestic remedies as he is entitled to appeal this judgment to the Court of Appeal.