Neutral Citation [2016] IEHC 693

HIGH COURT

[2015 No. 21 CAF]

[2015 No. 9 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION OF FAMILY LAW REFORM ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

CIRCUIT COURT APPEAL No. 1982/007

BETWEEN

S.P.

APPLICANT

AND

U.G.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 10th day of June, 2016

1. The applicant in this appeal seeks an order reversing the order of the President of the Circuit Court, refusing to vacate the Isaac Wunder order granted by Her Honour Judge Heneghan in the Circuit Court on 23rd February, 2011.

Terms of the Order
2. The relevant part of the order states at para. 7 as follows:-

> "The court does make an Isaac Wunder order against the respondent that he cannot apply to make application to any court, District Court, Circuit or High without leave of the President of the Circuit Court."

Background
3. The applicant and the respondent were married to each other and have obtained a decree of judicial separation. The proceedings seeking judicial separation issued on 24th January, 2007, and as indicated by a schedule of dates of appearances prepared by the applicant at the request of the court during the course of case management of this matter and other related matters there followed between January, 2007 and July, 2014 about 96 court applications, the respondent and the applicant initiating such applications at different times. It is fair to say that the vast majority of applications related to matters of custody and access to the children of marriage who lived with the respondent after the separation especially when they moved away from the city to a rural location.

History of Isaac Wunder Order
4. The Isaac Wunder order itself has been subject to a number of applications. Suffice to say that most importantly, the High Court refused an application for *certiorari* in respect of the said Isaac Wunder order on 27th July, 2012. The said application had been made in respect of other matters arising from an order of Judge Reynolds in the Circuit Court but these matters do not concern this judgment. Of importance is the last recital in the order of the High Court (Hogan J.) dated 27th July, 2012, as follows:-

> "…an on hearing the said applicant in person and counsel for the notice party (the wife) and they indicating to the court that an application was made to the President of the Circuit Court on 25th July, 2012, seeking the lifting of the said Isaac Wunder order made in the Circuit Court and that application was refused and it appearing by reason of the existence of the Isaac Wunder order that the court has no jurisdiction in the matter where the applicant did not have leave pursuant to the terms of that order and in these circumstances it would appear that leave was improvidently granted."

5. It was ordered that the judicial review proceedings do stand dismissed as having been irregularly commenced. It appears that as a prelude to the making of the order on 27th July, 2012, Hogan J. instructed the applicant to apply to the then President of the Circuit Court, Mr. Justice Matthew Deery, for leave to bring the judicial review proceedings against the Isaac Wunder order. It appears that Deery J. took the view the Circuit Court had no jurisdiction in the matter and did not act.

6. The applicant subsequently applied to the successor of Deery J., Mr. Justice Raymond Goarke, President of the Circuit Court and he refused to grant leave. This refusal of the President of the Circuit Court for leave appears to have been made by order dated 25th July, 2012.

7. The applicant again applied to the President of the Circuit Court to have the said Isaac Wunder order vacated on 18th March, 2015, and on the same date, the said application was refused and it is in respect of that order that the instant appeal arises.

Preliminary Points
8. Counsel for the respondent raised two points which should be dealt with as preliminary points before dealing with the substance of the appeal. Firstly, he submitted that the High Court sitting as an appellate court dealing with this appeal did not have jurisdiction to vacate, reverse or in any way deal with the order of the President of the Circuit Court by reason of the fact that the President of the Circuit Court is *ex officio*, a judge of the High Court and that the order of the President of the Circuit Court is, therefore, an order of the High Court.

9. I indicated a view during the course of the hearing of the appeal that notwithstanding that the President of the Circuit Court is, in fact *ex officio* a judge of the High Court, as provided by statute, the order made by the President of the Circuit Court in this case is an order of the Circuit Court. I confirm this view. If an order of the President of the Circuit Court is to be taken as an order of the High Court then it would only be in circumstances where the President of the High Court assigned a High Court case to the President of the Circuit Court, and the President of the Circuit Court agreed to sit in his capacity as *ex officio* High Court judge to hear that case.

10. It is accepted that there was no such assignment of the case by the President of the High Court, nor could there be one as the

case had its origins in the Circuit Court, and was still pending the subject of originating application in the Circuit Court only.

11. The second preliminary point was that this Court is sitting as an appellate court from the Circuit Court and thus only having the jurisdiction of the Circuit Court, could not reverse or appeal the judgment of the High Court (Hogan J.) upon which the order of 27th July, 2012, in the judicial review proceedings is based.

12. Counsel for the respondent could be concerned about this aspect by reasons of the arguments of counsel for the applicant who argued that Hogan J. erred in law in instructing the parties to the judicial review to seek the liberty of the President of the Circuit Court to bring the judicial review application against the background of an existing Isaac Wunder order.

13. While I note these criticisms, it is not for this Court as an appellate court to make any determination in relation to same. It is for this Court to note that the decision of the High Court in the judicial review proceedings (however arrived at) was not to set aside the Isaac Wunder order and it is entirely within the jurisdiction of this Court to accept the Isaac Wunder order is still in existence following the judicial review proceedings and to deal with the matter on the basis that it is a subsisting order of the President of the Circuit Court. It is thus for this Court to consider the appeal on its merits on the same basis as considered by the President of the Circuit Court and to reach a judgment. Accordingly, that ground of objection is not accepted. (There were further objections which were not vigorously pursued in relation to the fact that the appeal was a long time outside the time for appealing the Isaac Wunder order. But this ground was not pursued by the respondent with any vigour.)

Submissions made on behalf of the Applicant

14. On 15th May, 2012, judicial review proceedings came before the court by way of application for judicial review of the Isaac Wunder order before Hogan J. on 27th July, 2012.

15. Submission prepared by counsel for the applicant drew attention to the court to the right of access of a litigant court being protected by the Constitution of Ireland 1937 and the European Convention on Human Rights. She referred to the judgment of Kenny J. in *McCauley v. Minister for Post and Telegraphs* [1966] IR 345 in which the right of citizens to have access and recourse to the High Court to vindicate a legal right was one of the personal rights of the citizens included in the general guarantee in Article 40.3 of the Constitution. She submitted that access to justice was the corner of a democracy as was demonstrated in the judgment of the European Court of Human Rights in *Stanev v. Bulgaria* [2012] 1 MHLR 23 where it was emphasised that any limit on the right to access to justice must be proportional. The submissions analyse the limits of the Isaac Wunder relief referring to the analysis of Keane C.J. in his judgment in *Riordan v. Ireland No. 4* [2001] 3 IR 365 the submissions made the following observations in relation to the treatment of the litigation in the *Riordan v. Ireland* [2001] 3 IR 365 case by the Supreme Court as follows:

> (i) The Supreme Court restrained the applicant from invoking the jurisdiction of the High Court in respect of which the Supreme Court had then sole appellate jurisdiction. It did not seek to restrain the applicant from issuing proceedings in other courts.
>
> (ii) The court found that the stage reached in that case was not just "repeated" litigation; but the fact that the applicant persisted in naming his defendants members of the judiciary, members of Government and other persons against whom he could not possibly obtain relief. In other words, he knew at the start of the litigation that he could not obtain the relief sought.
>
> (iii) The Supreme Court and not the High Court was the appointed arbitrary as to whether the intended litigation would be an abusive process and not the lower court.

16. She highlighted the approach of the Supreme Court in *H. v. H. and another* [2015] IESC 85 were the Supreme Court upheld an order of MacMenamin J. in the High Court that proceedings commenced in the High Court in relation to family law matters be remitted to the Circuit Court and directed that all and other proceedings in the case should be brought to the Circuit Court. She directed the attentions of the court to the judgment of the Supreme Court that:-

> "The possibility of a genuine issue arising cannot be totally ruled out. Furthermore, the right to litigate cannot be left extinguished and without the possibility of suspending such an order. Consequently, JMH made by applications grounded on full affidavits explaining the necessity for any further litigation applied to the President of the relevant court or to any judge nominated by him, for such limited relief as maybe proven on that application be necessary and previously litigated."

17. She drew the attention of the judgment of the Supreme Court in *Gunning v. Brian Sherry Solicitors* [2015] IESC 76 were the Supreme Court approving the Isaac Wunder order at issue ordered that "Ms. Gunning be restrained from initiating any further proceedings directly or indirectly concerning the cottage without the prior leave of the President of the High Court or some other judge nominated by him" and [in the order] it was specified that the restraint only applied to new proceedings concerning possession and ownership of the cottage and the administration of the estate of Ms. Gunning's late parents and not to any existing proceedings involving Ms. Gunning or any appeal to the Supreme Court against that decision.

18. In oral submissions counsel for the applicant submitted that the Isaac Wunder order was so general in its application that it prohibited any form of litigation as for instance, that relating to injuries arising from a fall in a dangerous hole operating as a hazard for the applicant, quite apart from the obvious action in this case relating to an application for divorce, to which the applicant was entitled subject to provision being made under the Constitution as a matter of constitutional right and human right under the European Convention on Human Rights relating to family life and matters of status.

19. She also discussed with the court the relevance of the judgment of the Court of Appeal, Kelly and Hogan JJ. in *M.M v. G.M* [2015] 2 JIC 2301 were it was held that an order made by the High Court in respect of the suspension of overnight access coupled with a direction that "no further application is to be made in respect of the children either by way of enforcement or review". It could not do "what it purports to do without offending constitutional norms" and this was particularly so in the context of the welfare of children. It was submitted on behalf of the applicant that this judgment, while it set bounds on what was permissible in respect of absolute orders preventing applications being made in respect of matters affecting the welfare of children, it did not prevent Isaac Wunder orders being made, the purpose of which would not be to absolutely prevent such applications being made, but to monitor same so as to ensure that same were not vexatious in any particular case.

Respondents Submission

20. The respondent repeated the outline of objections dealt with as preliminary matters in relation to the fact that judicial determinations had been made in respect of the substance of the instant appeal to the extent that the defence *res judicata* applied, especially by reason of the fact that the High Court (Hogan J.) adjudicated and dismissed the applicant's application for judicial

review. He submitted that as a result of the foregoing the applicant had a right to appeal that decision to the Supreme Court. The applicant failed and/or neglected to exercise this said right of appeal and was now attempting to reopen the matter which was previously decided upon by the High Court by issuing a motion in the Circuit Court and thereby appealing the decision to the High Court. He also relied on the argument of saying that the appeal was futile. He submitted that the orders made by Judge Reynolds on the 14th November, 2011 and 12th January, 2012, were now futile in their substance and operation. The said orders have been superseded in their importance, priority and operation by further orders of the court, for instance, the order dated 23rd July, 2012, made by Judge Berkeley and the order dated 7th April, 2014, by Judge Heneghan. The respondents submitted that there was no benefit to quashing the order made. The orders of Judge Reynolds, insofar as they relate to the parties attending for mediation, are now spent. Furthermore, the applicant sought to appeal the decision of Judge Reynolds to Mr. Justice White on 10th February, 2012, who refused the application to extend leave to appeal.

21. In the context of this submission it is to be noted that whereas the Isaac Wunder order complained of in this case was made by Judge Heneghan and repeatedly affirmed by the President of the Circuit Court, the litigation continued on as the applicant had to respond to applications initiated by the respondent (an example whereof was the application by the respondent as directed by the High Court (White J.) when refusing the application of the applicant to extend leave to appeal on the 10th February, 2012.

Consideration of the Arguments

22. There is clear authority following the judgment in the Supreme Court in the case of *O'Riordan v. Ireland* [2001] I.R 365, and other authorities for asserting the power of the courts to make Isaac Wunder orders the purpose of which is to restrain fully or partially litigation in circumstances where the same may be vexatious and oppressive. The source of such power to make an Isaac Wunder order comes from the implied power that arises from the duty of all courts to supervise and control their own procedures so as not to be oppressive or to allow parties to be endlessly subject to vexatious applications and litigating being repeatedly brought before the courts. The usual practice is as noted in the case of *O'Riordan v Ireland* for the order to direct that no litigation is to be pursued or initiated without the leave of the President of that court or some judge appointed by the President.

23. In some cases Isaac Wunder orders have been made restricting litigation being pursued or initiated without the prior leave of that judge itself. While that power would seem also to be implied in the same way, its exercise may not be as transparent and is likely to afford the same objectivity as the usual reference to the leave of the President of the court. An Isaac Wunder order is not to be an absolute bar to litigation, but rather a controlling device whereby genuine litigation maybe permitted upon the applicant showing *ex parte* that there is a merit in such course but at the same time restraining unmeritorious or vexatious legislation and the huge costs necessitated thereby, without the necessity of a full action and the cost thereof being mounted on notice to the party who is to be protected by the Isaac Wunder order.

24. Sometimes the language used in the very important judgments in this jurisdiction dealing with the power to make an Isaac Wunder order refers to the power as an inherent power. In many contexts the word inherent is to be equated with "implied", but on an increasing basis the word inherent is associated with the inherent powers arising under the Constitution of Ireland 1937, which only the High Court or its appellate courts may exercise. It is unquestionably the case that all courts have accepted that the exercise of the power is not dependent on the court making the order having an inherent jurisdiction arising purely from its constitutional remit.

25. I accepted the submissions of the respondent that the Isaac Wunder order should always be drafted so as to clearly identify the litigation or stages in litigation which are prohibited or restrained and also the person or persons against whom such litigation must not be pursued. The approach taken in *Mullen v. O'Sullivan* [2015] IEHC 72 and *Gunning v. Brian Sherry Solicitors* [2015] IESC illustrates the careful approach which should be taken relation to the making an Isaac Wunder order.

26. The task of this Court in determining the appeal is not to enter upon the question as to whether the Isaac Wunder order was or was not properly made or whether the order of Hogan J. on judicial review was appropriate. Rather it is the duty of the court to examine whether it was appropriate for the President of the Circuit Court to refuse to vacate the same either partially or fully on the application of the applicant herein.

27. On the basis that the current application before the court is a rehearing of the review which the President of the Circuit Court was invited to make, it is open to the court to vacate such parts of the order or restrict the scope of same so as to ensure fairness between the parties. As indicated to the parties at the end of the hearing hereof the court will take a staged view in respect of such process. In the first stage it is blatantly obvious that the Isaac Wunder order should be vacated to the extent that divorce proceedings are permitted to proceed. As these proceedings are new proceedings, the courts could not possibly have a mandate to prohibit same, as they have constitutional and statutory problems which supersedes any power of the court to control it's procedure, arising from the type of repeated applications which unfortunately tended to mar the litigation history of and relations between the parties in this case.

28. As there has been such as profusion of applications and litigation relating to many aspects of the relations between the parties to this appeal, I invited counsel for the parties to address me in relation to any litigation that may fairly and meaningfully continue in relation to matters affecting the interests of the child now under eighteen as may be considered proper in accordance with the provisions of s. 5(2) of the Family Law (Divorce) Act 1996, which allows the court upon the grant of a decree of divorce where appropriate to give directions under the Guardianship of Infants Act 1964 (as now amended) to the extent that the parties agree that there exists some viable litigation which should be allowed to continue. In that regard, I would propose to vary the order of the President of the Circuit Court accordingly and in the event of disagreement between the parties I shall determine that issue.

29. Having engaged in the foregoing procedure this Court will finally make an order allowing the appeal to the extent that some litigation may proceed, but leaving the Isaac Wunder order untouched save that it is clear that the same may never be viewed as an absolute prohibition on litigation outside of the family law litigation, which regrettably has so exercised the parties hereto.

30. In taking this approach I am strengthened by the view taken by Kelly J. of the order made in *MM. v.G.M.* [2015] IECA 29where he stated at para. 48:

> "I have no doubt, but if an urgent matter pertaining to the welfare of the children arose, no judge would construe the order literally. Rather it would be construed in accordance with constitutional norms and thus would be ignored."

I would not go so far as to say that in this case, as Kelly J. stated that the order "really serves no purpose". It remains to be seen whether the order as interpreted by this Court would indeed serve some purpose to continue to protect the respondent against a repeat of the excesses of litigation which occurred in this case from time to time. This effect may be refined when the interactive processes suggested by the court to the parties are complete and the court makes a final decision.

31. This Court therefore does not propose to set aside the Isaac Wunder order in principle in it’s entirety without further consideration.