ISAAC WUNDER ORDERS

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I. INTRODUCTION

Isaac Wunder orders are named after the plaintiff in *Wunder v. Irish Hospitals Trust,*[1] although they predate the decision in that case, having first arisen in this jurisdiction in *Keaveney v. Geraghty*.[2] In that case, the plaintiff instituted proceedings against the defendant claiming damages for libel. The defendant then applied to have all further proceedings stayed on the grounds that they were *inter alia* frivolous, vexatious and an abuse of process of the court. In the High Court, Murnaghan J. stayed all further proceedings, whereupon the plaintiff appealed.

The Supreme Court examined its jurisdiction to control the administration of the courts, which derived from two sources, namely its inherent power and the Rules of the Superior Courts. Walsh J., with whom Haugh and O'Keeffe JJ. agreed, varied the order of the High Court to provide that no further proceedings in the action should be taken without leave of the court.

In *Wunder v. Hospitals Trust*, Mr. Wunder appealed against an order of Henchy J. that his action be dismissed on the grounds that the proceedings were frivolous and vexatious. The background to the case was that 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. In the Supreme Court, Ó Dálaigh J., having considered the background to the previous litigation between the parties and the evidence adduced by them in court, concluded that the proceedings

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1 Supreme Court, unreported, Walsh, Haugh and O'Keeffe JJ., 24 January 1967.

2 [1965] I.R. 551.

were indeed vexatious, and made an order in the form approved by the court in *Keaveney*, directing that no further proceedings in the action in the High Court be taken without leave of that court; if no leave was granted, the defendant would not be required to appear or take any steps in relation thereto and such proceedings would be treated as void and of no effect.

Steve Hedley, in a paper entitled "Frivolous or Vexatious Litigation",[3] put forward three categories of frivolous or vexatious litigants. First, litigants who lose an initial action, and respond by continuously taking the same issue back to court. Secondly, litigants who lose an initial action, and respond by broadening the range of people involved in the dispute. Thirdly, litigants who have adopted litigation as a life-style choice, and mount actions with no apparent connection between them. Hedley states that over 80% of English cases fall into the second category. He correctly points out that only the first category of vexatious litigation lends itself to easy detection. The latter categories each have the potential to involve the raising of new legal points against different defendants, and are thus more difficult for the legal system to recognise. Indeed, the apparent rareness of the latter categories may simply be attributed to the fact that, being harder to spot, they simply slip through the net of judicial supervision.

Wunder orders are similar to *Grepe v. Loam* orders. In *Grepe v. Loam*, the order was

> That the said applicants or any of them be not allowed to make further applications in these actions or either of them to this Court or to the Court below without the leave of this Court being first obtained. And if notice of any such application shall be given without such leave being obtained, the respondents shall not be

[3] Paper delivered to the Annual Conference of Supreme and High Court Judges, 26-28 May 2000.

> required to appear upon such application, and it shall be dismissed without being heard.[4]

II. Right of Access to the Courts

The undoubted jurisdiction of the courts to impose Wunder orders nevertheless means that the citizen's right of access to the courts, which is one of the personal rights of the citizen contained in Article 40.3 of the Constitution of 1937, is not an absolute right. This right first received recognition in the case of *Macauley v. Minister for Posts and Telegraphs*[5] where the plaintiff claimed that section 2(1) of the Ministers and Secretaries Act, 1924 was unconstitutional in necessitating the obtaining of the *fiat* of the Attorney General before one could sue a government minister. Kenny J., in the High Court, decided that this infringed the personal right of a citizen to have recourse to the courts, stating

> That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee of Article 40, sect. 3, seems to me to be a necessary inference from Article 34, sect. 3, sub-sect. 1°..... If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless.[6]

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[4] (1887) 37 Ch. D. 168 at 169.

[5] [1966] I.R. 345.

[6] At 358. As indicated in Kelly, *The Irish Constitution* (3rd ed., 1994), p. fn. 98, the right of access to the court guaranteed by Article 40.3

There being a right of access to the court guaranteed by the Constitution, the question arises as to whether it is constitutionally permissible to restrict that right. It seems clear that it is. In *Murray v. Ireland* Costello J. stated that

> ...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.[7]

That dictum is clearly of such breadth as to allow for the restriction of the right of access to the courts.[8] However, Casey[9] points out that in *Tuohy v. Courtney*, the Supreme Court drew a distinction between the constitutional right of access to the courts (described as "the right to sue") and the constitutional right to litigate claims, which was defined by Finlay C.J. as

> ...the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law...[10]

There the Supreme Court concluded that a statutory time limit contained in the Statute of Limitations could not be held to infringe the constitutional right of access to the courts, but rather restricted the constitutional right to litigate claims,

encompass all courts, not merely the High Court. In this regard, see the remarks of Costello J. in *The State (McEldowney) v. Kellegher* [1983] I.R. 289 at 297 in respect of the District Court and of McCarthy J. in *Fallon v. An Bord Pleanála* [1991] I.L.R.M. 799 at 811 in respect of the Supreme Court.

[7] [1985] I.R. 532, 538.

[8] Reliance was placed by Barron J. on Costello J.'s dictum in the case of *The State (M.C.) v. Eastern Health Board and B.C.* (High Court, unreported, Barron J., 29 July 1996), where he made an order preventing a wife from taking further proceedings against a husband without leave of the court where the wife had abused the barring orders procedure to deny access to the children.

[9] *Constitutional Law in Ireland*, pp. 143-144.

[10] [1994] 3 I.R. 1, 45.

insofar as it gave the defendant a right, by pleading the statute, to defeat the plaintiff's claim.

Keane C.J. in the recent Supreme Court decision in *Riordan v. An Taoiseach*[11] stated that the Supreme Court had:

> ...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.[12]

It is noteworthy that orders such as *Wunder* orders appear to be compatible with Article 6 of the European Convention on Human Rights.[13] In *Tolstoy Miloslavsky v. the United Kingdom* the European Court of Human Rights said:

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[11] Supreme Court, unreported, Keane C.J., 19 October 2001. In that case, the Court concluded that the proper administration of justice required the making of an order restricting the appellant's access to the courts. Mr. Riordan was restrained from instituting any proceedings, whether by way of appeal or otherwise, against any of the parties to the proceedings or the holders of any offices named as defendants or against the Oireachtas, the Government or any member thereof or Ireland (other than in relation to the taxation of costs), whether in the High Court or the Supreme Court, except with the prior leave of the the Supreme Court, such leave to be sought in writing addressed to the Registrar thereof.

[12] At page 10.

[13] Article 6(1) provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

> The Court reiterates that the right of access secured by Article 6(1) may be subject to limitation 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 or to such an extent that the essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[14]

Considering *Wunder* orders against this background, it would appear that they represent a restriction of the constitutional right of access to the courts, insofar as the plaintiff, if he is to vindicate his right to sue, must first obtain the leave of the court. The order does not limit his right of access to the court completely but provides that the exercise thereof is contingent upon the approval of a judge, whose task it is to ascertain whether or not the proceedings which the plaintiff proposes to institute are vexatious.

Of course, in imposing a *Wunder* order in the first place, the court is required to strike a balance between the constitutional right of the individual of access to the courts and the desire of the court to prevent vexatious litigation and litigation which is an abuse of the process of the court. That such a balancing exercise is appropriate is apparent from the judgment of Lord Bingham C.J. in *Her Majesty's Attorney General v. Oakes* where he said:

> The court is mindful that any step which restricts an individual's ordinary right of access to the court is a serious step not to be taken lightly. The court is also, however, mindful of the harassment to which others are exposed if they are sued time after time, being

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[14] (1995) 20 E.H.R.R. 442 at 475.

> put to the burden and expense of dismissing the same or very similar claims, compensated only by orders for costs which are not in practice enforceable. A balance has to be struck between the *prima facie* right which any person has to litigate and the reasonable protection of those who are repeatedly subject to abusive claims.[15]

It may be said that the restriction imposed by a *Wunder* order is in the public interest or, in the parlance of the Constitution of 1937, the common good. In *Attorney General v. Morriss*,[16] Smedley J. stated that:

> ...the resources of the judicial system...should be sufficient to afford justice without an unreasonable delay to those who have genuine justifiable grievances and should not be squandered on those actions which have no basis in law or have no evidential support....

III. The Test for Obtaining Leave

The circumstances in which a court will grant leave to a litigant who is the subject of an Isaac Wunder order was recently considered by Ó Caoimh J. in his innovative judgment in *Riordan v. An Taoiseach (In the Matter of an Intended Action)*.[17] Mr. Riordan was required to seek leave due to an order of O'Sullivan J. dated 25th March, 1999, made in proceedings between Mr. Riordan and the Taoiseach, the Tánaiste, the Government, the Oireachtas, Seanad Éireann, Dáil Éireann, the Attorney General and Ireland, that he be restrained from issuing proceedings against the office holders of those posts and entities without the prior leave of the court.

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[15] Queen's Bench Division, unreported, Bingham L.C.J. and Klevan J., 15 February 2000 at para. 42.

[16] Queen's Bench Division, unreported, Auld L.J. and Smedley J., 14th April, 1997.

[17] High Court, unreported, Ó Caoimh J., 11 May 2001; affirmed by the Supreme Court (Keane C.J.) on 19 October 2001.

Before a court will grant leave to institute proceedings, it must first examine the nature of the intended proceedings in order to determine whether they are vexatious. In *Keaveney*, in addressing the issue of how to determine vexatiousness, Lavery J. put forward the following test:

> [D]oes any one who has acquainted himself with the facts as alleged in the pleadings, and having regard to the opportunity given by the learned Judge to supplement these facts, think it possible that the action is maintainable?

In *Riordan*, Ó Caoimh J. stated that:

> In assessment of the question whether the proceedings are vexatious the court is entitled to look at the whole history of the matter and it is not confined to a consideration as to whether the proceedings disclose a cause of action. The court is entitled in assessment of the question whether proceedings are vexatious to consider whether they have been brought without any reasonable ground. The court has to determine whether the proceedings being brought are being brought without any reasonable ground or have been brought habitually and persistently without reasonable ground.[18]

The test is clearly objective. In *A.G. v. Morriss*[19] Auld LJ said that:

> The test is not the state of mind in which the potential subject of the order brings the proceedings, but whether the court, looking at them individually and cumlatively, [sic] bjectively [sic] regards them as begin vexatious in the sense of being brought without any reasonable ground and having

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[18] At pages 2-3.

[19] Queen's Bench Division, unreported, Auld L.J. and Smedley J., 14th April, 1997.

> been brought habitually and persistently without any reasonable ground.

Ó Caoimh J. referred to the Canadian case of *Re Lang Michener and Fabian*[20] where the following matters had been indicated as tending to show that a proceeding was vexatious:

(a) the bringing of 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 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 cost of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.[21]

IV. Conclusion

It appears from the above that relevant considerations to take into account in deciding whether or not to grant an applicant leave to pursue litigation are as follows:

First, the court should consider, on an objective analysis, whether the legal proceedings are in fact vexatious. In imposing a *Wunder* order the courts should be mindful of the applicability of the proportionality principle, particularly in view of the planned incorporation of the European Convention on Human Rights into Irish law, and should endeavour to satisfy itself that the limitations applied do not

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[20] High Court of Ontario, (1987) 37 D.L.R. (4th) 685 at 691.

[21] At page 3.

restrict or reduce the access of the individual to the court in such a way that the essence of the right is impaired. The court should endeavour to ascertain whether the restriction pursues a legitimate aim and whether there is proportionality between the means employed and the aim sought to be achieved. Where there is a possibility of review by a judge, it is submitted that the essence of the right of access to the courts remains intact.