THE COURT OF APPEAL

Record Number: 2022/151

Ní Raifeartaigh J.
Binchy J.
Pilkington J.

Neutral Citation Number [2023] IECA 140

BETWEEN/

LB

PLAINTIFF

- AND –

THE MINISTER FOR JUSTICE and EQUALITY, IRELAND AND THE ATTORNEY GENERAL AND PB

DEFENDANTS

Ex Tempore JUDGMENT of Mr. Justice Binchy delivered on the 8th day of June 2023

1. In this appeal, the appellant appeals from the judgment of the High Court (Stack J.) of 6th April 2022 (and consequential orders made on 20th May 2022), whereby she concluded that the within proceedings should be struck out on the grounds that they are (save for one heading of claim) *res judicata*. As regards that one heading of claim, the trial judge concluded that it was barred by the rule in *Henderson v Henderson* [1843] 3 Hare 100.

2. The trial judge further concluded that the proceedings were also vexatious, and, if she were found to be wrong that the proceedings were *res judicata,* they should be struck out pursuant to the inherent jurisdiction of the Court.

3. These are the third proceedings instituted by the appellant arising out of the same facts. I will return to the other proceedings presently. In these proceedings, the appellant seeks, *inter alia*, a declaration that the Oireachtas lacked competence to enact the property provisions of the Family Law Act 1995 and the Family Law (Divorce) Act 1996 having regard to the determinations of the Supreme Court *In the matter of Article 26 of the Constitution and in the matter of the Matrimonial Home Bill 1993* [1994] 1 ILRM and having regard to the prohibition contained in Article 15.4.1 of Bunreacht na hÉireann that the Oireachtas shall not enact any law which is in any respect repugnant to the Constitution or any provision thereof. Consequent upon such declaration, the appellant also seeks a declaration that orders made in family law proceedings in which he and the fourth named defendant were involved are "a nullity" and he seeks orders for restitution of all properties and monies of which he claims to have been deprived in consequence of the aforesaid orders of the court.

4. While the fourth named defendant is named by the appellant as a party in the proceedings, she has not sought to participate in the proceedings at any time, and she did not partake in any degree either at the hearing resulting in the decision under appeal, or in this appeal.

5. These proceedings were issued by plenary summons dated 20th March 2019 and a statement of claim was delivered on the same date. On 23 January 2020 the appellant issued a motion for judgment in default of defence, returnable for 17 February 2020. On 14 February 2020, the respondents issued a motion, returnable for 9 March 2020, seeking orders striking out the proceedings on the grounds that they disclosed no cause of action, and/or on the basis that the issues raised by the proceedings are *res judicata*, and/or that the proceedings are an abuse of process and/or the proceedings are frivolous and/or vexatious. The respondents also sought an *Isaac Wunder* order against the appellant.

6. On 24 July 2020, the appellant issued a motion seeking leave to amend the general endorsement of claim of the plenary summons. For present purposes, the most significant of the amendments is the additional declaration that the property provisions of the Family Law act 1995 and the Family Law (Divorce) act 1996 (the "Acts") are general and indiscriminate and fail to respect the guarantees of Article 17 of the Charter of Fundamental Rights of the European Union (the "Charter") in that they provide that the plaintiff herein be deprived of his lawfully acquired property without compensation.

7. The motion issued by the appellant to amend the pleadings, and the motion issued by the respondents to strike out the proceedings came on for hearing before Stack J. on 1st February 2022. The motion for judgment issued by the appellant was put back, apparently by the list judge, pending the determination of the respondents' motion to strike out the proceedings. The appellants takes issue with this sequence of events and maintains that he was entitled to have his motion for judgment in default of defence dealt with first on the basis that it was first in time. As will become apparent, this issue forms one of the appellants grounds of appeal. As to the motion to amend the pleadings, the respondents consented to an order granting the amendments in the terms sought.

Judgment of the High Court

8. In her judgment, the trial judge records, at para. 6, that, in moving their application, the respondents did not rely on the first ground referred to in their motion i.e. that the proceedings disclosed no cause of action. In para. 7 the trial judge records that in essence, the respondents rely on the fact that in two earlier sets of proceedings, one of which was itself consolidated from two separate sets of proceedings issued in 2004 and 2005, and the second of which was instituted in 2011, the appellant raised identical issues to those now raised in these proceedings, and therefore the issues in the amended statement of claim are *res judicata.* The one qualification to this is that the appellant raised for the first time, in

these proceedings, the purported application of Article 17 of the Charter. The respondents contend however that he should have raised this issue in the 2011 proceedings which were issued after the entry into force of the Charter and that he is therefore barred from raising this point now under the rule in *Henderson v. Henderson*.

9. At paras. 11-15 of her judgment, trial judge summarised the factual background to the proceedings. For present purposes, all that needs to be said is that the appellant and the fourth named defendant were married in 1964 but subsequently separated and a decree of judicial separation was granted on 15th October 1996, and a decree of divorce was granted on 10th June 2004, on the application of the appellant. On that occasion the Circuit Court made a number of orders, including a property adjustment order. The appellant appealed, and the order made by the Circuit Court was varied by the High Court by order made on 2nd December 2004. The appellant was ordered to pay maintenance to his former wife, and it was further ordered that the dwelling house comprising the family home be sold, and that the proceeds of sale thereof be divided as to 40% to the appellant and 60% to the fourth named defendant. The house had been built on lands purchased by the appellant, and the appellant claimed that he had funded both that purchase and the construction of the dwelling house. The trial judge then proceeded to analyse the 2004 and 2005 proceedings. At para. 18, she records that in the 2004 proceedings, the appellant sought a declaration that ss. 12-21 of the 1996 Act were invalid having regard to the Constitution, in that those sections permitted the delimitation of the appellant's property rights in the absence of legislation pursuant to the provisions of Article 43 of the Constitution. The appellant also claimed that the same provisions were an impermissible legislative interference with the courts in a purely judicial domain, and he further sought a declaration that the property adjustment orders made in his family law proceedings were *ultra vires* the judicial power of the State, because they constituted legislation contrary to the provisions of Article 43 of the Constitution. The trial

judge then proceeded to address the decision of the High Court in the 2004/2005 proceedings delivered by MacMenamin J. on 7th July 2006 in *LB v. Ireland* [2006] IEHC 275 [2008] 1 IR 134. MacMenamin J. had rejected the appellant's claims that the impugned provisions of the Act of 1996 were unconstitutional. At para. 33 of her judgment, the trial judge stated that:

> *"It is clear, therefore, that, in the 2004 proceedings, the plaintiff launched an attack on the compatibility of the provisions of the 1996 Act, insofar as they permitted the Circuit Court to make property adjustment orders and pension adjustment orders, and that he did so, firstly on the basis of the protection of property rights in the Constitution and, secondly on the basis of a separation of powers argument. Both of these arguments were rejected by MacMenamin J., and his judgment was upheld by the Supreme Court by order dated 28 July 2009"*

10. The trial judge then went on to analyse the 2011 proceedings issued by the appellant. At para. 34 she summarises the statement of claim in those proceedings, by which the appellant sought damages for the "expropriation" of his property, or, in the alternative orders of *certiorari* quashing the property adjustment order made in the family law proceedings "for lack of jurisdiction pursuant to the provisions of article 6, article 34, article 40.3 and article 43 of the Constitution". The appellant also sought "a declaration that the statute which gives them [the defendants in the proceedings] jurisdiction is invalid having regard to the provisions of the Constitution of Ireland, 1937, namely the provisions of article 6, article 34, article 40.3 and article 43".

11. The trial judge, at para. 36 of her judgment, observed that the 2011 proceedings *"traverse the same ground as the issues previously determined by MacMenamin J. and upheld by the Supreme Court in 2009".* The trial judge notes that the 2011 proceedings were dismissed by Hogan J. in the High Court on the basis that the claim was doomed to fail: *LB*

v. Ireland and the Attorney General and PB [2012] IEHC 461. In the course of his judgment, Hogan J. stated that the decision of the Supreme Court in *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] 1 I.R. 305 was not authority for the proposition that any of the relevant statutory provisions which had permitted the making of the property and pension adjustment orders against the appellant in his judicial separation and divorce proceedings were unconstitutional. Hogan J. also concluded that by the 2011 proceedings, the appellant sought to relitigate matters already determined by MacMenamin J. and the Supreme Court in the 2004/2005 consolidated proceedings, and that the matters were therefore *res judicata.*

12. The appellant appealed the decision of Hogan J. to the Supreme Court, which court dismissed his appeal. Giving the judgment of the Supreme Court (*LB v. Ireland, The Attorney General and PB* [2015] IESC 1), Clarke J. (as he then was) expressed the view that the statutory provisions on foot of which property and pension adjustment orders had been made in the appellants' family law proceedings were orders mandated by the requirement in Article 41.3.2. of the Constitution, that one spouse could be required to make proper provision for the other spouse in the context of divorce. The trial judge noted that the appellant placed heavy reliance upon a passage within para.1.2 of the judgment of Clarke J in which he stated that "*There can be no doubt but that the effect of those court orders has been to deprive Mr. B of property rights which he would otherwise have had in the relevant lands and pension. Those orders were made in the context of matrimonial proceedings which were the subject of hearings both in the Circuit Court and, on appeal, the High Court. The orders were made within the jurisdiction of those courts as conferred by the Family Law (Divorce) Act, 1996*." The appellant also placed significant reliance upon this passage at the hearing of this appeal. The trial judge, however, was satisfied that this reliance was misplaced, as the quotation was taken out of context and, the trial judge said: "ignores the very clear statement of Clarke J at para.3.5 where he said "*I am far from convinced that it*

is appropriate to characterise a property transfer as an expropriation of property where it arises as a result of orders made matrimonial proceedings. Even if it were arguable to so characterise matrimonial property orders, the general requirement which would normally render the uncompensated expropriation of property unconstitutional would have to give way, in the context of divorce, to the specific constitutional entitlement of a spouse on divorce"".

13. The trial judge continued with her analysis of the decision of Clarke J in the 2011 proceedings, noting that he was satisfied that the statutory provisions on foot which property and pension adjustment orders had been made in the appellant's divorce proceedings were mandated by the requirement in article 41.3.2 of the Constitution that one spouse could be required to make "proper provision" for the other spouse in the context of divorce, and that all of the rights to property must now be seen to be qualified by the provision. The trial judge noted that, on that basis, the Supreme Court rejected the challenge made on the 2011 proceedings based on the constitutional protection of property rights. The trial judge noted that Clarke J also rejected arguments made by the appellant that the 1996 act was unconstitutional on the grounds that it violated the separation of powers-the article 15.4.1 argument. I will come back to the decision of Clarke J. in due course.

14. The trial judge then proceeded to conduct an analysis of the doctrine of *res judicata.* At para. 49 of her judgment she stated that the only real issues about the operation of *res judicata* in this case are:

> (1) Whether these proceedings raise the same issues as have already been determined; and
>
> (2) Whether any issue arises by the addition of the first named defendant as the defendant to these proceedings, as otherwise the parties to these and all earlier proceedings are the same.

15. At the hearing of his appeal, the appellant did not claim that the trial judge had erred in this analysis. In fact, as will become apparent, it is a remarkable feature of this appeal that there is no ground of appeal directed towards the conclusions of the trial judge in relation to the proceedings being *res judicata*, and nor did the appellant make any submissions under this heading. I will come back to that in due course, but for now it is helpful to quote from some of the key conclusions of the trial judge on this issue at paras.50-54 of her judgment:

> "*50, it is clear from the endorsement of claim to the amended plenary summons that the principal constitutional issue raised by the plaintiff in these proceedings is whether, having regard to the Supreme Court decision in Re matrimonial homes Bill 1993, the it can be said that the family law act 1995 and the family law (divorce) act, 1996 are constitutional having regard to article 154.1 which provides that the Oireachtas shall not enact any law which is in any respect repugnant to the Constitution or any provision thereof. That relief must be read in the light of the substantive pleas in the statement of claim in these proceedings, from which it is abundantly clear that the same factual matters are relied upon (essentially that, despite being the only person contributing financially to his family home, the plaintiff has been arbitrarily and unconstitutionally deprived of his property rights therein), and that by reason of the property adjustment orders made by the circuit court and affirmed on appeal by this Court, the plaintiff has been unlawfully deprived his property and thereby deprived of his constitutional rights.*
>
> *51. There is specific reference to the fact that the plaintiff did not receive adequate or any compensation for the loss of a substantial share of his property, and it is abundantly clear that this issue is determined not just by McMenamin J in the 2004 consolidated ceilings, but also by Hogan J and on appeal by the Supreme Court in the 2011 proceedings. Those judgements are quite clear as to the constitutionality of*

the family law act, 1995 and the family law (divorce) act, 1996, by reason of the fact that the plaintiff's property rights in this instance must give way to constitutional requirement(sic) to make proper provision for his dependent spouse on divorce.

52. The arguments made by the plaintiff at oral hearing would be familiar to any person who had read the earlier judgments of MacMenamin J., Hogan J. and Clarke J. They are manifestly the same legal point as has previously been rejected on two occasions and which, in my view, must be regarded as res judicata……."

53. At para.(d) of the amended plenary summons and amended statement of claim the plaintiff seeks restitution of all properties and monies of which he has been deprived on foot of the various orders made in the matrimonial proceedings in which he was involved. In the 2004 proceedings, the plaintiff sought "recovery and damages". In the 2011 proceedings, the same substantive complaint about the orders made in the matrimonial proceedings was pleaded, and the plaintiff then claimed various liquidated sums, general damages (a claim for which was included in almost identical terms in the statement of claim in these proceedings before it was amended), as well as orders of certiorari quashing the orders made in the matrimonial proceedings.

54. This equates to the order for restitution now sought in the amended plenary summons and amended statement of claim, because the plaintiff was seeking the money that he had lost and, possibly, the restoration to him in specie of his actual family home. There is no difference in substance between that and the order for certiorari of inter-alia the property adjustment order which was sought in 2011 proceedings, and therefore, this relief has already been refused to the plaintiff in the 2011 proceedings."

16. The trial judge proceeded to consider and reject an argument advanced by the appellant that the doctrine of *res judicata* did not apply to public law proceedings, observing that this proposition was advanced by the appellant without any authority.

17. As to the joinder of the Minister to these proceedings, the trial judge was satisfied that she was joined merely in her representative capacity, and that this did not create any difficulties in establishing the necessary identity between the parties for the purposes of *res judicata,* or the rule in *Henderson v. Henderson.*

18. The trial judge then proceeded to consider the application of the rule in *Henderson v. Henderson* to these proceedings. In this regard, the question for the trial judge was whether the introduction of the reference to Article 17 of the Charter in these proceedings might enable them to be continued as against the State defendants or whether, as those defendants contend, the introduction of this heading of claim is barred by the rule in *Henderson v. Henderson.* She noted that the Charter took effect on the entry into force of the Lisbon Treaty on 1st December 2009, and was therefore available to the appellant as a potential basis for challenge when he instituted the 2011 proceedings. She also noted that all of the orders about which the plaintiff complains in these proceedings were made in his family law proceedings long before the introduction of the Charter.

19. The trial judge continued to consider the approach to the application of the rule in *Henderson v. Henderson* in this jurisdiction, at paras 59 and following :

> *59. "The classic modern statement in this jurisdiction of the rule in Henderson v Henderson is that of Cooke J in re Vantive Holdings Ltd[2009]IEHC 408 at paras 32-33: "The rule in Henderson v Henderson is to the effect that a party to litigation must make its whole case when the matter was before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save*

for special cases, the plea of res judicata applies not only to issues actually decided but to every point which might have been brought forward in the case. In its more recent applications this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."

60. *That statement was adopted by the Supreme Court on appeal: see the judgment of Murray C.J .in Re Vantive Holdings [202]2.I.R. 118,at p.124 and more recently by the Court of Appeal in Vico Ltd v Bank of Ireland [2016]IECA 273 , per Finlay-Geoghegan J. at para.26. After adopting the explanation of the rule given by Cooke J . in the High Court in Re Vantive Holdings Ltd , Finlay-Geoghegan J explained that the special cases were primarily those where the judgment was procured by fraud. There is nothing of that nature here*."

20. The trial Judge noted that Finlay-Geoghegan J. cited with approval the judgment of Lord Bingham in *Johnson v. Gore Wood & Co*. [2002] 2 A.C.at 31 where he stated:

""But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if a court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all…….It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it

in later proceedings necessarily abusive. That is to adopt too dogmatic an approach as to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before…… While the result may often be the same it is in my view preferable to ask whether in all the circumstances the party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

21. At para. 67, the trial judge concluded that the inclusion of Article 17 of the Charter in these proceedings, in 2019, almost ten years after the introduction of the Charter, for the purpose of making, what are in substance, the same arguments as those advanced in the earlier proceedings, is an attempt to sidestep the binding nature of the earlier judgments in order to advance the same arguments for a third time in the High Court.

22. Indeed, the trial judge observed that prior to the amendment of the plenary summons and the statement of claim, the reference to the Charter was to be found alongside references to Articles 41, 40.3 and 43 of the Constitution, as well as Article 1, Protocol 1 of the European Convention on Human Rights. She formed the view that the nature of the amendment made by the appellant was to remove the references to the Articles of the Constitution which had been well traversed in the judgments given both by the High Court and by the Supreme Court in earlier proceedings, and that this was done in response of the application of the State defendants to strike out the proceedings.

23. For all of these reasons, the trial judge concluded that the reliance on the Charter was an abuse of process, and was barred by the rule in *Henderson v. Henderson.*

24. Finally, the trial judge concluded that aside from the doctrine of *res judicata* and *Henderson v. Henderson*, the proceedings certainly fell within the definition of vexatious proceedings, as identified by the High Court of Ontario in *Re Lang, Commissioner Michener and Fabian* (1987) 37 DLR (4th) 685, and approved by Ó Caoimh J. in *O'Riordan v. An Taoiseach* (No.5) [2001] 4 IR 463. In *Lang* the High Court of Ontario had identified the indicia of vexatious proceedings as follows:

> (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 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 and 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.

25. In the view of the trial judge, it is clear that by these proceedings the appellant is attempting to have determined an issue which has already been determined by a court of competent jurisdiction, and the issues in these proceedings are issues rolled forward from

earlier proceedings and, in the case of the Charter, supplemented with an additional formal basis (which on its face has no application) in an attempt to give the plaintiff a "third bite of the cherry".

26. Following upon the delivery of her judgment on 6 April 2022, the proceedings were adjourned to 20 May 2022 to finalise outstanding issues, including the application of the respondents for an *Isaac Wunder* order restraining the appellant from issuing further proceedings against the respondents without the leave of the president of the High Court. On this occasion, the appellant gave oral assurances to the court that he did not intend to bring any further proceedings of any kind as plaintiff or applicant save only to the extent of appealing the decision of the trial judge. While the order of 20th May 2022 records the assurances given by the appellant to the trial judge, it does not make any reference to the exception of an appeal. However, counsel for the respondents informed the court at the hearing of this appeal that that exception was incorporated in the appellant's assurances to the Court. On that basis, the trial judge declined the application of the respondents for an *Isaac Wunder* order.

Notice of Appeal

27. In his notice of appeal, the appellant sets out five grounds of appeal. He claims that the trial judge misdirected herself and erred in holding as follows:

(1) That the proceedings herein are vexatious on the grounds of similarity of statements of claim when what was/is at issue is vindication of the same property rights guaranteed by the Constitution.

(2) That the motion to strike out should take precedence over the motion for judgment in default of defence when no evidence was advanced to support such a claim.

(3) That the vindication of constitutional rights was vitiated by legal procedures when the Supreme Court had stated that such procedures should be "outlawed" *In Re Haughey* [1971] IR 217.

(4) That the protection of statutory provisions is of greater importance than the protection of constitutionally guaranteed rights contrary to the decision of the Supreme Court in *The Educational Co. v. Fitzpatrick & Ors.* [1961] IR 345, 380 and

(5) That arbitrary judge-made law is superior to the guarantees of the Constitution.

Cross Appeal

28. The respondents have cross appealed against the decision of the trial judge to refuse the application for an *Isaac Wunder* order.

Discussion and Decision

29. At the outset, I will address an argument raised by the appellant for the first time at the hearing of this appeal. This is an argument grounded upon the well-known decision of the Supreme Court in *Buckley and others v Attorney General [1947] IR 679* (The Sinn Féin Funds Case). The appellant relies upon the following passage on page 83 of the judgment: *"Where is alleged that a law is repugnant to the Constitution, the jurisdiction and duty to determine such question is expressly conferred on the High Court by Article 34.3.2, with appeal in all such cases to this court (Art.34.4.4) . This is a duty of fundamental importance which must be discharged every case where such a question arises, however onerous that duty may be*."

30. In effect, the appellant is relying on this passage to assert that it is not open to a court to dismiss proceedings on grounds of *res judicata* where the matter at issue in the proceedings is a challenge to a law on the grounds that it is unconstitutional. The appellant

cited no authority for such a proposition other than the passage just quoted which obviously does not address this issue. The submission fails to address the fact that where *res judicata* has been established, the constitutionality of the impugned statute has already been determined, and it clearly could not be the case that Courts could be required to determine again and again the constitutional validity of a statute which is repeatedly challenged on the same grounds. If authority is needed for this proposition, then one need look no further than the decision of Clarke J in the Supreme Court in the 2011 proceedings wherein he stated, at paras.4.10 -4.13:

" *4.10 I then turned to the specific provisions of the 1996 Act which were relied on to make the property and pension adjustment orders in Mr B's case. I have already dealt with what those provisions say and why same do not, in any way, interfere with the court's proper role in divorce proceedings under article 41.*

4.11 Finally, it should be noted that Mr B made significant submissions and the extent to which the rule of res judicata applied to this case in the light of the fact that both MacMenamin J. and this court on appeal, have upheld the constitutionality of the relevant provisions of the 1996 act. It is unnecessary to go into the precise issues which were raised by Mr B concerning the question as to whether the rule of stare decisis or the principle of res judicata applies fully in the constitutional context. As this appeal arises out of a motion to dismiss on the basis of being bound to fail, I am prepared to accept as arguable the proposition that a court may be invited to consider a previous decision to the effect that legislation is constitutional. However, on any view, a party seeking, within a relatively short period of time, to rerun the constitutional case again on the same grounds as that party itself had recently argued and failed, could only be permitted to do so, if at all, in the most extraordinary of circumstances.

4.12 To rule otherwise would be to countenance a situation where parties could simply litigate and relitigate the same points ad infinitum. Such a situation would not be consistent with any principles of reasonable constitutional certainty. It must be recalled that the constitutionality of the 1996 Act was upheld, in a case brought by Mr B himself, in proceedings which were finally determined by this court just over two years before these proceedings were commenced. No legitimate basis, let alone extraordinary circumstances, has been put forward to suggest that will be appropriate permissible to allow the same issue to be relitigate again.

4.13 For those reasons I am satisfied that Hogan J was correct in adding to his judgment an addendum to the effect that he would also have been prepared to dismiss the proceedings as being in breach of the principle of res judicata if that were necessary. The substance of Mr B's case is that his Constitutional property rights were interfered with by property adjustment orders under the 1996 Act. He has already tried, and failed, to challenge the constitutionality of the 1996 Act on precisely the grounds that it failed to vindicate his property rights. The case which he now makes can only be distinguished from the case which he made in those previous proceedings (?) if article 41 of the Constitution were to be interpreted as meaning the state was to bear the burden of making proper provision for spouses in the context of divorce. That proposition is unsustainable."

31. I have quoted extensively from the decision of Clarke J. in the 2011 proceedings because I think that not only does it address and emphatically reject any suggestion that the courts could be required to address the same constitutional arguments over and over, but also because, it seems to me, it is of equal application to the issues raised by the appellant in these proceedings.

32. In his submissions, the appellant says that by these proceedings he seeks to challenge the validity of the statute (the Act of 1996) pursuant to which he was "arbitrarily" deprived of his Constitutional property rights. He says that it cannot be any surprise therefore that there is any similarity in the various statements of claim. Indeed he says: *"Rather, I submit, it would be very strange if that similarity did not exist as all cases arise from being deprived of my lawfully acquired property by arbitrary means under the guise of statutory power. If there be vexation it must surely be the failure of the State, both by its enactments and through the courts, to respect my constitutionally guaranteed property rights."*

33. This statement makes it very clear that the appellant is seeking, by these proceedings, to achieve that which he has failed to achieve in earlier proceedings, and on substantially the same grounds. At the hearing of this appeal, the appellant made it very clear that his central grievance, in respect of which he seeks relief in the proceedings, is that he has been deprived of his property without compensation; that the court order made at the conclusion of his family law proceedings was arbitrary and made without lawful authority, and amounts to a punishment, and that the 1996 Act is incompatible with the Constitution. Far from that being the case, McMenamin J held in the 2004 proceedings (LB v Ireland 7 ORS [2008] 1 IR 134) that "*not only are the provisions of the act of 1996 not unconstitutional but they are in fact mandated by the constitution itself*") at p. 150 this view was approved on appeal by Clarke J in the Supreme Court at para.3.7 where he stated; "*As noted by MacMenamin J. in Mr. B's previous proceedings, and as reiterated by the trial judge in this case, the requirement for proper provision is not merely permitted by the constitution but is required by the constitution*."

34. While the appellant cites a number of well-established and uncontroversial constitutional principles derived from authorities such as *Meskell v. CIE , Educational Co. v. Fitzpatrick* and *in Re Haughey,* nowhere at all in either his written submissions or in his

oral submissions to this Court does he engage with the conclusions of the trial judge that the issues raised by these proceedings are *res judicata,* and, so far as Article 17 of the Charter is concerned, are precluded from being raised again by *Henderson v. Henderson.* This is so notwithstanding that he was given several opportunities at the hearing of this appeal to do so. The appellant was specifically asked by the Court what was his response to the conclusion of the trial judge that these issues had already been decided in the 2004/2005 proceedings and 2011 proceedings and, his reply appeared to be that the case made by him in those proceedings was "not answered". The appellant also argued that this is a "special case" involving deprivation of his property rights. While I am not entirely sure, I think that this argument was directed towards the rare exception (of special circumstances) to the application of *res judicata*, that has been referred to in several of the cases referred to including by Cooke J. in *Vantive Holdings*, by Lord Bingham J. in *Johnson v Gore Wood* and by Clarke J. in the 2011 proceedings. This argument appears to acknowledge implicitly that the issues raised by these proceedings have indeed been decided by the earlier proceedings. While the decision of Clarke in the 2011 proceedings clearly envisages that there may be circumstances - "the most extraordinary circumstances" - in which a court may entertain a case involving issues that are *res judicata*, Clarke J expressly stated that no such circumstances arose in the case of the appellant, and there is nothing to indicate that there has been any change in the appellant's circumstances such as to merit a different view now. In discussions with the Court, the appellant placed some reliance on what was said by Finlay-Geoghegan J. in *Vico Ltd v Bank of Ireland*, i.e. that special cases were primarily those involving fraud, and he went so far as to suggest that the orders made in his family law proceedings directing proper provision to be made by him for his former spouse could be regarded as akin to fraud, since they had the effect of depriving him of property without

compensation. It hardly needs to be said that this proposition is absurd and should be rejected without further discussion.

35. While the appellant refers to various authorities regarding the constitutional protection of property rights and other authorities concerning the separation of powers, none of the principles upon which he relies have anything to do with the decision of the trial judge. These authorities go to the substance of the proceedings that the appellant wishes to have determined, rather than the decision of the trial judge on whether the substantive proceedings should be allowed to continue, and indeed at the hearing of this appeal it is clear that the appellant's central complaint with the decision of the trial judge was that she did not address the substantive issues raised by the proceedings. Regrettably, what the appellant fails to understand, it appears, is that he has already, in two separate sets of proceedings each of which has been seen through to conclusion in the Supreme Court, litigated the very issues that he now wishes to litigate for a third time in these proceedings. The only exception to this is the issue that he now raises about the possible violation of Article 17 of the Charter, but this is an issue that could and should have been raised in the 2011 proceedings and the appellant is precluded from raising it in fresh proceedings by reason of the rule in *Henderson v Henderson.*

36. In my view, there can be no doubt but that the issues which the plaintiff wishes to raise in these proceedings have already been raised and adjudicated upon, not once, but twice previously and the trial judge was correct in each of the conclusions that she reached that these proceedings are, *res judicata,* frivolous and vexatious (in the legal meaning of the term "vexatious", which is not intended to be pejorative, as the appellant understandably apprehends), and that the pleading based upon Article 17 of the Charter is precluded by *Henderson v. Henderson.*

37. Moreover, the trial judge was also correct to deal with the motions before her in the sequence that she did. It would make absolutely no sense for the High Court to hear a motion for judgment in default of defence in advance of hearing a motion to strike out proceedings, since it is obvious that the former can only be relevant in the event that the latter motion is dismissed.

38. I am satisfied beyond any doubt that the appellant has not established any basis at all for this appeal, and that it must be dismissed.

Cross Appeal - Application for *Isaac Wunder* Order

39. At the hearing of this appeal, the appellant renewed his assurances that, if unsuccessful in this appeal, he would not institute any further proceedings in the future, save only that he would wish to consider an appeal to the Supreme Court and take such an appeal if he considered it appropriate. The respondents expressed concern that it remains the case that the appellant is unwilling to accept the decisions already handed down by the courts in the matters the subject of these proceedings, and that, notwithstanding his assurances to the Court, he may issue further proceedings regarding the matters the subject of these proceedings. The respondents made it clear that they were not suggesting that the appellant lacks *bona fides*, but that at a human level, it is clear that he has difficulty letting go of issues that have been the subject of so much litigation over the years. The respondents also submitted that an *Isaac Wunder* order is a recognised procedural tool, while there would be some uncertainty as to how to enforce the assurances now given by the appellant to the court. In these circumstances, the respondents submitted, an *Isaac Wunder* order is both appropriate and necessary.

40. In response to the submissions of the respondents, the appellant said that he did not wish to have attached to him what he described as the stigma of an *Isaac Wunder* order, and he reiterated his undertaking to the court as described above. While the concerns of the

respondents are understandable, I have no reason to doubt that the appellant would honour his assurances to the Court. I am not aware of anything concerning his previous conduct which would justify calling those assurances into question or doubting the appellant's word. In the circumstances I am prepared to accept the assurances of the appellant, which I take to mean that he will not institute any further proceedings connected in any way with his previous family law proceedings or the outcome of those proceedings or any of the matters the subject of these proceedings or the 2004, 2005 and 2011 proceedings, but this does not preclude him for seeking leave to appeal to the Supreme Court from this decision, or prosecuting such appeal if leave is granted by the Supreme Court. I would therefore dismiss the cross-appeal.

41. As the respondents have been entirely successful in this appeal, my provisional view is that they are entitled to an order for their costs. If the appellant wishes to contend for a different order, then he may, within 14 days from the date of delivery of this judgment, apply to the Court of Appeal office for a short supplemental hearing on the issue of costs. If such hearing is requested and results in the order proposed herein, then the appellant may additionally be held liable for the costs of such supplemental hearing.

42. As the appellant has been entirely successful in the cross-appeal, my provisional view is that he should be entitled to an order for payment of such expenses as he has incurred in relation to that issue only. If the respondents wish to contend for a different order, then they may likewise apply for a short supplemental hearing on that issue on the same terms as indicated above apply to the appellant in the main appeal.

43. Since this judgment is being delivered electronically, Ní Raifeartaigh J. and Pilkington J. have authorised me to indicate their agreement with it.