



# THE COURT OF APPEAL

**UNAPPROVED**

**Record Number: 2022/24**

**High Court Record Number: 2015/2214P**

**Noonan J.**

**Neutral Citation Number [2022] IECA 230**

**Ní Raifeartaigh J.**

**Butler J.**

**BETWEEN/**

**TOM DARCY**

**PLAINTIFF/APPELLANT**

**-AND-**

**ALLIED IRISH BANKS PLC**

**FIRST NAMED DEFENDANT**

**-AND-**

**WILLIAM MURRAY**

**SECOND NAMED**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Mr. Justice Noonan delivered on the 21<sup>st</sup> day of October, 2022**

1. This appeal is brought by the appellant, Mr. Darcy, who is a litigant in person, against the dismissal of his claim by the High Court (Stack J.) by reason of delay. Before dealing

with the substance of the matter, I would like to record that fact that the Court has fully taken on board the many sad and tragic events that have befallen Mr. Darcy, which he outlined in his oral submissions with great articulacy and considerable emotion. It is striking that prior to the relevant events, Mr. Darcy appears to have been a very successful and well to do businessman who is now in very reduced circumstances. The Court accordingly has every sympathy for the predicament in which he finds himself.

2. However, the appeal must not be decided upon generalised considerations of personal sympathy, but rather as to whether the Court, having regard to the legitimate scope of review on appeal, is of the view that the High Court judge erred in the manner in which she approached the evidence and circumstances in the case having regard to the established law in this area. The facts are fully set out in the written judgment of the High Court delivered on 1<sup>st</sup> December, 2021 and a brief summary will suffice.

3. In his statement of claim, Mr. Darcy and his wife, Antionette Darcy, are described as designers and builders of luxury homes. From the facts pleaded, it would appear that Mr. Darcy and his wife borrowed various sums of money from the first defendant (“the bank”, “AIB”) in 2006 and 2007 amounting to some €14m in respect of the proposed development of a number of properties. The second defendant, and the respondent to this appeal, Mr. Murray was at the material time a planning consultant.

4. The statement of claim pleads that in March 2008, Mrs. Darcy applied on behalf of herself and her husband to Fingal County Council for planning permission for a number of houses. It is alleged that in June 2008, the Council first granted and then purported to refuse planning permission for this development on an allegedly *ultra vires* basis. Arising from this, Mrs. Darcy is said to have instructed solicitors to institute judicial review proceedings

against the Council and to lodge a formal complaint with the Irish Planning Institute concerning named planning officers.

5. The Council was notified of this by letter of the 28<sup>th</sup> August, 2009. The statement of claim continues that on the 31<sup>st</sup> August, 2009, Mr. and Mrs. Darcy were summoned by the bank to a meeting at which they were told that they must withdraw the proceedings and the complaint and if they declined, the bank would withdraw the loan facilities and repossess their home. It is pleaded that at this meeting, Mr. Darcy was informed that Mr. Murray would be taking over the developments and if they did not agree, the same consequences would ensue.

6. This is described in the statement of claim as amounting to threats and intimidation by the bank.

7. It is alleged that on the 10<sup>th</sup> September, 2009, a meeting took place at the offices of the Council attended by Mr. Darcy and Mr. Murray. At this meeting, it is alleged that Mr. Murray instructed Mr. Darcy to meet the Council representatives and indicate that he was withdrawing the proceedings and the complaint. Mr. Darcy duly did so, and, as he alleges, under duress by both the bank and Mr. Murray. He claims that thereafter both defendants assumed control of the developments but failed to progress them and they ultimately were abandoned.

8. The statement of claim makes a number of very serious allegations against Mr. Murray. It is said that Mr. Murray, as well as the bank, put Mr. Darcy under duress by threatening him with financial ruin and the loss of his home if he did not agree to the steps demanded. Mr. Murray is further accused of acts of deceit whereby he, together with the bank, deceived Mr. Darcy into ceding control of the developments by falsely representing that they intended to manage them to completion and that Mr. Murray would produce revised

plans within a week, when he had no intention of doing so. It is further said that Mr. Murray falsely represented that he had been engaged to ensure the completion of the project when this was untrue.

**9.** Matters do not end there because Mr. Murray is also accused of unjustly enriching himself by requesting and receiving money from Mr. Darcy's account without the latter's knowledge or consent. Finally, it is alleged that the activities of the bank and Mr. Murray constituted an unlawful conspiracy to place Mr. Darcy under duress for the unlawful purpose of forcing him and his wife to abandon their lawfully instituted judicial proceedings and to give up control of their properties and developments for the benefit and financial gain of both the bank and Mr. Murray.

**10.** It need hardly be said that it is difficult to conceive of more serious allegations than could be made against a party, in particular acting in a professional capacity such as Mr. Murray.

**11.** Arising from these alleged events, some five and a half years later, and approximately six months before the expiry of the Statute of Limitations, Mr. Darcy issued a plenary summons on the 19<sup>th</sup> March, 2015. This was followed by a statement of claim on the 12<sup>th</sup> November, 2015 containing the pleas to which I have referred. A full defence was delivered by Mr. Murray on the 1<sup>st</sup> February, 2016 denying all the allegations against him and without prejudice to that, if there was any entitlement on the part of Mr. Darcy to succeed against him, Mr. Murray was entitled to be indemnified by the bank.

**12.** No further steps in the proceedings were taken by Mr. Darcy and some three and a half years later, on the 14<sup>th</sup> October, 2019, Mr. Murray issued a motion to dismiss the proceedings for want of prosecution, both pursuant to O. 122 of the RSC and the inherent jurisdiction of the court. At the time this motion was issued, a decade had passed since the relevant events

complained of. The motion is grounded on an affidavit sworn by Mr. Murray. In it, he describes a number of other proceedings between the bank and Mr. and Mrs. Darcy.

**13.** These include summary proceedings issued in 2010 in which the bank obtained judgment in default of appearance for over €17m against the Darcy's on the 16<sup>th</sup> February, 2011. Separately, the bank issued possession proceedings in respect of the secured properties which initially succeeded in the High Court but were overturned on appeal to the Supreme Court. This was followed by proceedings in 2014 seeking a well charging order by the bank over the properties in question and an order was granted by the High Court on the 3<sup>rd</sup> June, 2015 by which time Mr. Darcy's indebtedness exceeded €21m. This was also the subject of an appeal to the Supreme Court, this time unsuccessful.

**14.** A fourth set of proceedings relating to the proceeds of an insurance policy were also issued in 2010, again successfully defended in the Supreme Court by the Darcy's.

**15.** In the course of his affidavit, Mr. Murray avers that he has no note of having met Mr. Darcy at the offices of Fingal County Council on the 10<sup>th</sup> September, 2009, but accepts that it is possible that such a meeting occurred.

**16.** In a replying affidavit sworn on the 31<sup>st</sup> January, 2020, Mr. Darcy effectively argues the merits of his case, making further allegations against Mr. Murray. He does not however at any stage address the issue of delay or offer any explanation for why no step in the proceedings was taken by him since the delivery of the statement of claim in November 2015.

**17.** Mr. Darcy swore a supplemental affidavit on the 8<sup>th</sup> December, 2020 in which he purports to explain for the first time reasons for the delay in progressing his claim. He refers to a number of bereavements in his family and several misfortunes that befell them. He also

appears to suggest, without giving any detail, that his involvement in the four sets of proceedings to which I have referred prevented him from progressing this claim. Although not on affidavit, in his submissions in the High Court and before this Court, Mr. Darcy suggested that while negotiations with the bank in relation to these proceedings were on-going, the bank required him not to prosecute the proceedings further.

**18.** He refers to the pandemic as being a factor in the delay although he does not explain why. Most of the delay with which the court is concerned occurred between 2016 and 2019 prior to the outbreak of the pandemic. In particular he refers to the fact that he has suffered from manic depression, otherwise bipolar disorder, and refers in that regard to a report from his medical practitioner, Dr. McGlynn. What is notable about this medical report is that it is dated the 12<sup>th</sup> November, 2020 and records the fact that Mr. Darcy first attended Dr. McGlynn with symptoms of depression, treated with Lexapro, on the 2<sup>nd</sup> December, 2019, some two months after the within motion to dismiss was brought.

**19.** In her judgment, the judge set out the facts as I have outlined them above and the relevant legal principles to be applied commencing with the well-known judgment of the Supreme Court in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459. She held that the delay in this case is both inordinate and inexcusable and went on to consider where the balance of justice lay, concluding that it favoured dismissal.

**20.** In his Notice of Appeal, Mr. Darcy raises 16 grounds which I will try to summarise. First, Mr. Darcy suggests that the judge was wrong to dismiss the proceedings because this might result in prejudice to the bank, in the context of their right to serve a notice of indemnity on Mr. Murray. It is relevant in this regard to note that during the course of the High Court hearing, Mr. Darcy advised the court that he had agreed terms with the bank who are thus not a party to this appeal. It is somewhat unclear therefore how the question of

notice of indemnity might arise. However, at the hearing of the appeal, Mr Darcy's position was less clear about reaching agreement with AIB and appeared to be that negotiations terminated on the sale of his loans by the bank to Everyday DAC.

**21.** Mr. Darcy further suggests that the judge failed to consider the prejudice to both him and the bank by striking out the claim against Mr. Murray. He suggests that there was no, or no sufficient, evidence of prejudice on the part of Mr. Murray to warrant dismissal and the judge failed to adequately consider Mr. Darcy's personal circumstances. The appellant also appears to suggest that the hearing of the application commenced before Keane J. and was then impermissibly reheard by Stack J. Mr. Darcy again re-emphasises an alleged failure on the part of the trial judge to take account of his personal circumstances, both in relation to the other litigation already mentioned and the various family events that arose during the currency of these proceedings.

**22.** He makes complaint of the fact that the judge failed to take account of a freedom of information request made by him in July 2019. He refers to an alleged conflict of interest between the two defendants and suggests unethical behaviour and bad faith on the part of both defendants. He makes complaint of the fact that the bank had not discharged the costs orders made in his favour in the two Supreme Court appeals he won.

**23.** In his written submissions, Mr. Darcy contends that the trial judge failed to have regard to his social and financial position which prevented him having access to justice and was the fundamental reason why the proceedings were not prosecuted in the ordinary fashion. This argument is entirely unexplained and does not appear to have been one raised in the High Court. Further, the suggestion that Mr. Darcy was unable to progress the proceedings because he was a litigant in person would, in the normal way, provide no basis for excusing his delay in doing so. At the hearing of the appeal, Mr. Darcy complained of the fact that he

was being denied his constitutional right to access to justice because he was unable to afford legal representation. Insofar as this appears to be a complaint that legal aid was not available to him, that is not something in respect of which this Court has any power or function, nor can it be regarded as a factor capable of excusing delay. As has often been said, unrepresented parties are subject to the same legal obligations as those who are represented.

**24.** He again contends that the judge failed to take account of what Mr. Darcy describes as coercion and intimidation by Mr. Murray to pervert the course of justice by compelling Mrs. Darcy to withdraw her lawful claim against Fingal County Council, its servants or agents.

**25.** He again refers to the judge's failure to take account of the indemnity issue between the defendants which as already indicated, is not understood. A defendant is legally entitled to defend a case as against a plaintiff and seek indemnification from a co-defendant; there is nothing unusual or sinister in such a course of action. An indemnity sought in this manner in the context of litigation is of course of a different nature to one which is provided as part of an on-going contractual arrangement. Similarly opaque is the allegation that Mr. Murray's legal team acted in concert with that of the bank to disadvantage him in some unspecified way. He again says that the striking out of the proceedings against Mr. Murray is prejudicial to the bank, again an assertion that is difficult to comprehend in circumstances where Mr. Darcy may have compromised his claim against the bank. Even were there any substance in this contention, it is difficult to see how Mr. Darcy can take the benefit of any perceived prejudice to a co-defendant in the proceedings to defeat Mr. Murray's application.

**26.** In his submissions, Mr. Darcy contends that the judge misapplied the law, without explaining why and he suggests that Mr. Murray acquiesced in the delay, but again offers no basis for this submission. He complains of the fact that the trial judge failed to take account



of his GDPR application which he says produced irrefutable evidence in support of this claim. That may or may not be so, but is quite irrelevant to the issue of delay in this application. He suggests that Mr. Murray's failure to comply with his GDPR application caused the delay, something of which Mr. Murray professes no knowledge and no evidence is offered by Mr. Darcy to substantiate it. He again raises the point about Keane J. allegedly having seisin of the proceedings and complains that Keane J. failed to decide the case before it was heard before Stack J.

27. I think the first thing to be said about this appeal is that it is not simply a rehearing on the merits of the motion that was before the High Court. It is for the appellant to establish error on the part of the trial judge and the standard of review, or the burden of proof on the appeal, has been discussed in a number of judgments of this court and the Supreme Court. It was most recently considered by this court in *A.K. v U.S.* [2022] IECA 65 in which Murray J., speaking for the court, in commenting on the different standards of review applicable to different types of cases, said the following of matters heard on affidavit in the High Court:

“52. As explained in *Ryanair Limited v Billigfluege.de GmbH* [2015] IESC 11, in cases of this kind [heard on affidavit] the party appealing the decision bears the burden of demonstrating that the trial judge was incorrect in relation to the findings of fact which underpinned the decision so that ‘the appellant must establish an error in those findings that is such as to render the decision untenable’ (*per* Charleton J. at para. 5). Charleton J. explained this further in *McDonagh v Sunday Newspapers Limited* [2017] IESC 46 (at para. 163) as follows:

‘... the role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial

judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong.’ ”

**28.** It is also important to emphasize that all litigants must provide a foundation for assertions made by evidence in the normal way. In a case such as the present one, this means that affidavit evidence was required. The appellant in his oral submissions went far beyond what was contained in the evidence on affidavit (and in the exhibits) put before the High Court, and before this Court on appeal. Whilst some latitude was afforded to the appellant as a litigant in person, the Court cannot accept disputed assertions for which no supporting evidence is offered.

**29.** In the present case, the findings of the trial judge that Mr. Darcy’s delay in prosecuting these proceedings was both inordinate and inexcusable are findings of fact to which a degree of deference must be shown by this court and in respect of which the burden of proving error lies upon Mr. Darcy.

**30.** In the course of her judgment, the trial judge referred to the judgment of this court in *McGuinness v Wilkie and Flanagan* [2020] IECA 111 which bears some similarities to the present case. The plaintiff in that case, a litigant in person, sued the two partners in a firm of solicitors on foot of an alleged agreement made in September 2005 to purchase lands for development purposes. The development never proceeded for various reasons including the calling in of the loans used to finance the transaction by the relevant bank. The bank obtained a judgment against the plaintiff for more than €13.6m and he sued the defendants on the basis of various breaches of contract and negligence in their duties as solicitors. However, in addition to negligence, more serious allegations of fraud, unjust enrichment, conflicts of interest and concealment of facts, or deceit, were made against the defendants.

**31.** The contract in issue in that case was entered into in September 2005 but the proceedings were not issued until March 2011, as here, some five and a half years later. There were a number of delays in progressing the proceedings, until ultimately, two years after the last step was taken by the plaintiff, a motion to dismiss for delay was brought. The High Court dismissed the claim and the decision was upheld by this court.

**32.** Speaking for the court, I noted (at para 16):

“There is more than ample authority for the proposition that where proceedings are commenced very late in the day, as here, there is an onus on the plaintiff to prosecute them expeditiously - see for example the judgment of this Court in *William Connolly and Sons Ltd t/a Connolly’s Red Mills v Torc Grain and Feed Limited* [2015] IECA 280.”

**33.** In that judgment, I noted further the two strands of jurisprudence under *Primor* on the one hand, and *O’Domhnaill v Merrick* [1984] IR 151, on the other. Under the *Primor* strand, it was noted that moderate prejudice may be sufficient to tip the balance in favour of the defendant so as to find that the balance of justice favours dismissal. The bar is considerably higher in *O’Domhnaill v Merrick* where the defendant must establish prejudice of sufficient magnitude to render a fair trial impossible. That was a case that straddled both lines of jurisprudence and as noted at para. 22:

“If this matter proceeds to trial, each of the witnesses to these transactions and events would be asked to recollect from memory events occurring some fifteen to sixteen years in the past. I cannot see how that would amount to other than a facsimile or a parody of justice, as one judgment describes it.”

**34.** In the present case, it seems likely that a similar interval would be likely to elapse before this case could get to trial were it permitted to proceed. The case would turn on oral evidence and in particular, evidence of the alleged meeting that took place at the offices of Fingal County Council on the 10<sup>th</sup> September, 2009. Mr. Murray appears to have no particular recollection of the event although in fairness, does not deny that it may have occurred but more importantly, it seems highly probable that others present at that meeting are unlikely to have any reliable recollection of what took place some 14 to 15 years later.

**35.** In such a case, there is no onus on Mr. Murray to establish particular prejudice as general prejudice may be assumed from such a lapse of time. In addition, it is undoubtedly a specific prejudice that such serious allegations are maintained in respect of Mr. Murray's professional dealings so long after the events complained of. This is also something commented upon in *McGuinness v Wilkie and Flanagan* (at para. 26):

“A number of authorities has considered that having claims not only of negligence, but of serious wrongdoing hanging over the heads of professional persons over a protracted period of time is in itself a source of prejudice for obvious reasons.”

**36.** With regard first to whether the delay is inordinate, this has to be viewed through the prism of the very late start in this case. I agree with the trial judge that the most pertinent period of delay is the period between the delivery of the defence and the bringing of the motion to dismiss, over three and a half years because it seems to me that in fairness to Mr. Darcy, delays after the bringing of the motion and having the matter disposed of in the High Court should not be necessarily laid at his door. However, I cannot conceive of any circumstance in which a delay of three and a half years in proceedings that have themselves been commenced five and a half years after the event could be viewed as other than inordinate. I am therefore satisfied that Mr. Darcy has not discharged the burden of showing

that the trial judge's conclusion on this point was incorrect, and in fairness to Mr. Darcy, at the hearing of the appeal, he conceded as much.

**37.** Turning then to the issue of whether the delay was excusable, the various points advanced by Mr. Darcy are carefully analysed by the trial judge. She notes, correctly, that Mr. Darcy's first affidavit in substance does not address the delay at all and it was necessary for Keane J. to adjourn the proceedings in September 2020 to enable Mr. Darcy to put in a supplemental affidavit which addressed the delay. The first issue considered by the trial judge under the heading of excusability was the four other sets of proceedings involving Mr. Darcy and the bank.

**38.** The first point she notes is that they were all resolved by the end of 2016 and accordingly, any subsequent delay cannot be attributed to those proceedings, noting that most of the delay occurred after this time. In any event, these proceedings have nothing to do with Mr. Murray as the judge noted. One issue that was canvassed in particular by Mr. Darcy at the hearing of the appeal was that he was unable to progress the proceedings because as part of his discussions with AIB, the bank required him to cease progressing this action, something commented upon by the trial judge at para. 19 of her judgment. However, there was no evidence before the High Court concerning any alleged agreement with the bank, whether there was in fact a final settlement of Mr. Darcy's claim against the bank and if so, when it was made or what its terms were. What is clear however is that Mr. Murray was not a party to it and says on affidavit he is unaware of its terms. No evidence to the contrary has been adduced on behalf of the appellant.

**39.** It seems to me that, as submitted by counsel for Mr. Murray, if this were to provide a basis for excusing the admitted inordinate delay on the part of Mr. Darcy in progressing the case, the authorities show that at the very least, Mr. Darcy would have had to advise Mr.

Murray of those facts before any question of acquiescence on his part could arise and there is no evidence or suggestion that he did. As noted by Clarke J. (as he then was) in *Comcast International Holdings Inc. & Ors v Minister for Public Enterprise & Ors* [2012] IESC 50 at para 5.8-5.9:

“...it seems to me that a party, who wishes to adopt what might, in ordinary circumstances, be considered to be an unorthodox approach to litigation (such as by putting the proceedings on hold pending some event), is required to, at a minimum, place on record with all other parties to the litigation, that that course of action is being adopted...”

Unorthodox action signalled contemporaneously and not contested at the time is likely to be more readily accepted by the court as providing an excuse than the same action taken unilaterally and only referred to after the event as retrospectively providing an explanation.”

**40.** See also in this regard the observations of the High Court (Sanfey J.) in *Pugh & Anor v PGM Financial Services Ltd. & Ors* [2020] IEHC 49 at para. 46.

**41.** With regard to the suggestion that Mr. Darcy’s personal and family circumstances ought to be viewed as an exculpatory factor in the context of delay, the judge referred to the decision of Baker J., then in the High Court, in *O’Leary v Turner* [2018] IEHC 7 where such personal factors were found not to be capable of excusing otherwise unexplained delay. It should also be noted that many of the events relied upon by Mr. Darcy predate the institution of these proceedings, and in particular the relevant period of delay between 2016 and 2019. Beyond arguing that this conclusion was wrong, it seems to me that Mr. Darcy advances no reason why this court should conclude that the trial judge’s conclusion in this regard was arrived at erroneously.

42. Turning finally to the balance of justice, the judge identified the various factors to which I have already alluded and in fact went further in saying (at para. 30) that there is a significant risk that a fair trial is no longer possible, perhaps an oblique reference to *O'Domhnaill v Merrick*.

43. Taking all the prejudicial factors to Mr. Murray into account, the judge concluded that the balance of justice favoured the dismissal of the proceedings. Again, it seems to me that Mr. Darcy has really advanced no cogent or convincing reason why this conclusion was wrong. It is also relevant to note that under O. 112 r. 11, a two year delay gives rise to a right to apply to have the proceedings dismissed for want of prosecution, and while there is no express requirement under O. 112 to demonstrate prejudice of any kind, the court is conferred with a broad discretion to make such order as to the court may seem just.

44. For all these reasons therefore, I am satisfied that Mr. Darcy has demonstrated no error in the judgment of the High Court and I would accordingly dismiss this appeal.