

**APPROVED**  
**NO REDACTION NEEDED**



**THE COURT OF APPEAL**

**Record Number: 2023/38**

**Costello J.**

Neutral Citation Number [2023] IECA 243

**Butler J.**

**Burns J.**

**BETWEEN/**

**TOM DARCY**

**APPELLANT**

**- AND -**

**THE ATTORNEY GENERAL AND THE MINISTER FOR JUSTICE AND  
EQUALITY**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Tara Burns delivered on the 9<sup>th</sup> day of  
October, 2023**

1. This is an appeal by the appellant, who represents himself, against the decision of the High Court (Stack J.) ([2022] IEHC 673) dismissing the appellant's claim for want of prosecution and delay.

**Background**

2. On 16 April 2012, Allied Irish Banks ("AIB") obtained an order for possession in the High Court against the appellant and his wife in

respect of four properties. The appellant was refused a stay on the order and appealed both the decision and the refusal of the stay to the Supreme Court. On the 30 November 2013, the Supreme Court set aside both High Court orders; remitted the possession proceedings to a plenary hearing; and made an order for costs in favour of the appellant.

3. The appeal to the Supreme Court was successful on the basis of the decision in *Start Mortgages v. Gunn* [2011] IEHC 275, which found that the owner of a charge registered prior to the commencement date of the Land and Conveyancing Law Reform Act 2009 (“the 2009 Act”) could not apply for summary possession pursuant to s. 62(7) of the Registration of Title Act 1964 (“the 1964 Act”) unless there had been both a default and demand for payment prior to the commencement date of the Act. This was due to the fact that the 2009 Act had repealed s. 62(7) of the 1964 Act in circumstances where transitional provisions had not been enacted to preserve any right accrued.
4. A legislative lacuna thereby existed in relation to charges created prior to the commencement date of the 2009 Act in that it was not possible to recover possession on a summary basis unless there had been both default in the repayments due and a demand for possession prior to the commencement of the 2009 Act. As a result, the Land and Conveyancing Law Reform Act 2013 (“the 2013 Act”) was enacted to fill this lacuna. Section 1(2) of the 2013 Act provided that certain repealed enactments, including s. 62(7) of the 1964 Act continued to have effect as if not repealed, subject to s. 1(5) of the 2013 Act which provided that s. 1 did not apply to proceedings already in existence.

5. Arising from this enactment, AIB discontinued the possession proceedings against the appellant which had been remitted by the Supreme Court for plenary hearing and issued fresh proceedings which relied on the 2013 Act. In his defence of those proceedings, the appellant challenged the institution of the second proceedings on the basis that it was an abuse of process. This argument was rejected by both the High Court and the Court of Appeal and a well charging order was granted to AIB (*Allied Irish Banks Plc v. Darcy* [2016] 1 I.R. 588).
6. In February 2014 the appellant issued the instant proceedings which challenged the constitutionality of the 2013 Act, most particularly its retrospective application. Pleadings were closed in October 2015 when a defence was delivered. No further steps were taken in the proceedings until this motion was issued by the respondents in March 2022.
7. The reasons proffered by the appellant for the delay in prosecuting these proceedings were a number of family bereavements, personal tragedies and health issues which had befallen himself and his family. He also relied on the fact that he had not been granted civil legal aid and he was not prepared to litigate his case in person against professional lawyers.
8. In 2015, the appellant instituted a separate set of proceedings relating to other defendants and a different cause of action. These proceedings related to events which had occurred in 2008 and 2009. By 2019, no further steps had been taken in those proceedings, whereupon a motion to dismiss for want of prosecution and delay was brought by one of the defendants in those unrelated proceedings. Before the High Court (Stack J.), the same difficult personal circumstances and tragedies which had befallen the appellant, as

have been averred to in these proceedings, were proffered as reasons for excusing the delay. Before the Court of Appeal, the fact that the appellant was not afforded civil legal aid and was representing himself was also relied upon. On the 21 October 2022, the Court of Appeal delivered judgment in *Darcy v. Allied Irish Banks Plc* [2022] IECA 230 upholding the judgment of the High Court which dismissed the appellant's claim for want of prosecution. The Court of Appeal found that the High Court had been correct in finding that the personal reasons advanced by the appellant did not excuse the delay. Neither was the fact that the appellant was representing himself an excuse for the delay.

9. The motion in the instant case came before the High Court for hearing on 9 November 2022. When the matter was opened, the trial judge brought the attention of the respondent to the recent judgment of the Court of Appeal in *Darcy v. Allied Irish Banks Plc* [2022] IECA 230 (it being presumed that the appellant was already aware of this decision in his other, unrelated proceedings).

### **The Relevant Principles**

10. The principles applicable in an application to dismiss for want of prosecution were set out by Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, at p. 475 of the judgment as follows:-

*"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*

*(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*

*(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*

*(d) in considering this latter obligation the court is entitled to take into consideration and have regard to*

*(i) the implied constitutional principles of basic fairness of procedures,*

*(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*

*(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,*

*(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*

*(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such*

*conduct depending upon all the circumstances of the particular case,*

*(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*

*(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.”*

### **High Court Decision**

11. Applying these principles to the instant case, the trial judge was satisfied that the delay in the prosecution of the proceedings of six and a half years was an inordinate delay. This was not seriously contested by the appellant.
12. While the appellant proffered reasons as to the cause of this delay the trial judge relied on the Court of Appeal judgment in *Darcy v. Allied Irish Banks Plc* [2022] IECA 230, where similar reasons had been proffered by the appellant relating to the delay in that case and found that the reasons relied upon by him did not excuse the inordinate delay.
13. With respect to the balance of justice, the trial judge engaged in a detailed analysis of the case law relating to a motion to dismiss for want of prosecution and the development of the *Primor* principles. She determined that the case law established that there was a requirement to establish that the delay in prosecuting the proceedings caused a defendant prejudice of a moderate nature such that the balance of

justice lay in a defendant's favor to dismiss the proceedings.

14. The trial judge found that the prejudice asserted by the respondent, namely the constitutionality of the 2013 Act being questioned, was either very slight or non-existent having regard to the evidence in the case. However, she also determined that the indication by the appellant that he did not intend to prosecute his case when he was unrepresented, was a matter which could be considered by her when determining where the balance of justice lay. The trial judge held that weighing this indication by the appellant against the slight prejudice which the respondent suffered arising from the existence of the proceedings, tipped the balance of justice in the respondent's favour such that the proceedings should be dismissed.

### **The Appeal**

15. A Notice of Appeal was lodged on the 13 February 2023, wherein the appellant set out the grounds of appeal against the High Court decision asserting, in summary, that the trial judge displayed bias against him; displayed contempt for an order of the Supreme Court; pre-determined the proceedings; and failed to ensure equality of arms by failing to assign legal representation to the appellant thereby breaching his Constitutional, European Charter and European Convention rights.

### **Bias and Pre-determination of Issue**

16. The appellant's complaint in this regard is that the trial judge wrongfully brought to the attention of counsel for the respondent the recent judgment of the Court of Appeal in *Darcy v. Allied Irish Banks Plc* [2022] IECA 230 and provided the parties time to consider the judgment. He submitted that this established bias against him on the

part of the trial judge. He also asserted that she had pre-determined the issue.

### **Discussion and determination**

17. The allegations of bias and pre-determination on the part of the trial judge are wholly inappropriate and are completely without foundation. The action by the trial judge of bringing to the attention of counsel for the respondent the recent, highly relevant Court of Appeal judgment relating to the appellant in an application of a similar nature was not inappropriate nor does it in any way establish bias, whether actual or perceived, on her part against the appellant. The submission of the appellant is contrary to the principle of precedent upon which our common law system is based, namely that courts of a lower jurisdiction are bound and required to follow the rulings of courts of a superior jurisdiction. The judgment of the Court of Appeal in *Darcy v. Allied Irish Banks Plc* [2022] IECA 230 could not have been more relevant to the motion before her. Not only did the judgment relate to the same party and to a motion where the same relief was sought, the exact same reasons were ventilated by the appellant in that earlier motion in an effort to explain why such a significant delay had occurred in progressing the underlying proceedings. As a result, the situation arose whereby the trial judge was bound to follow the determination of the Court of Appeal to the effect that the same reasons proffered did not excuse the delay. Accordingly, this was a completely appropriate and proper action for the trial judge to take with respect to the Court of Appeal decision as the issue of precedent arose.

18. Furthermore, the Irish Courts do not operate a system which permits of stealth or surprise. Fairness dictated that the respondent be made aware of the recent, relevant and binding Court of Appeal decision, especially in circumstances where the appellant was aware of the judgment but the respondent, it appeared, was not. Proper and



efficient use of court resources and judicial consistency requires that an earlier binding decision of a superior court be brought to the attention of the respondent.

19. Having considered the transcript of the DAR recording of the proceedings in the High Court, which I am satisfied, is a complete transcript of the hearing which took place in the High Court contrary to what was asserted by the appellant, it is readily apparent that the proceedings were conducted in a fair, appropriate and judicial manner and that no further courtesy or accommodation could have been shown to the appellant by the trial judge. The allegations made by the appellant are wholly without merit and have no basis whatsoever.

**Contempt of a Supreme Court Decision and Failing to Provide Equality of Arms by Assigning Legal Representation to the Appellant**

20. The grounds of appeal with respect to these two separate issues are misconceived and do not appropriately arise from the decision of the trial judge.

21. With respect to the assertion that the trial judge did not observe a Supreme Court decision by dismissing the appellant's claim, the appellant misunderstands that the application before the High Court was to dismiss the underlying proceedings for want of prosecution rather than determining the underlying proceedings. The merits of the underlying proceedings, or the cause of their initiation was not a matter for the trial judge, who instead was required to consider the *Primor* principles having regard to the motion to dismiss before her. Any appeal from that determination must relate to an error made by the trial judge in her consideration of the *Primor* principles rather than referencing undetermined issues in the underlying proceedings or

indeed how those proceedings came to be instituted. The relevance of the Supreme Court decision in the first proceedings to the substance of these proceedings simply did not arise for consideration on the application before the High Court.

22. The suggestion that the trial judge should have assigned legal representation to the appellant fails to comprehend the fact that the trial judge had no jurisdiction so to do. The assignment of civil legal aid is not a matter for a trial judge. It is regulated by statute and civil legal aid is exclusively within the jurisdiction of the Legal Aid Board to grant. Accordingly, no error arises by the failure of the trial judge to assign legal representation to the appellant. This is aside from the fact that the transcript reveals that such an application was never in fact made by the appellant.

### **Balance of Justice**

23. I am of the opinion that the trial judge correctly set out the general principles relating to the balance of justice test applicable in an application to dismiss for want of prosecution. She determined that a moderate degree of prejudice is required to be established by a defendant in the maintenance of the underlying proceedings. However, the real question which arises in the instant application is the significance of an indication by a plaintiff that, as matters stand, the underlying proceedings will not be prosecuted.

24. I am of the view that the trial judge was correct to decide that such an indication is an appropriate matter to have regard to when considering where the balance of justice lies. Furthermore, I am of the view that such an indication should be given very significant weight when determining where the balance of justice lies. The question of prejudice to the plaintiff in such a scenario simply does not arise. It is

for the plaintiff to prosecute his case. If it is not to be prosecuted, then no prejudice can arise by reason of the proceedings being struck out save in exceptional circumstances. There is a public interest in the extinguishment of stale claims or claims which a plaintiff will not or cannot bring to trial in any reasonable timeframe, aside altogether from whatever prejudice a defendant might suffer by the maintenance of a claim which has gone into abeyance. Accordingly, when an indication is given that a claim will not be prosecuted, it is not necessary for a defendant to establish a moderate degree of prejudice as the balance of justice lies in favour of the dismissal of the proceedings save in exceptional circumstances.

25. Having found that the respondent suffered only slight, if any, prejudice, the trial judge was correct to nonetheless dismiss the appellant's proceedings in light of his position with respect to their future prosecution.

### **Conclusion**

26. In light of the indication given by the appellant that he did not intend prosecuting the proceedings at issue, the balance of justice required the proceedings to be struck out regardless of whether any prejudice was suffered by the respondent. There was no basis for his allegation that the trial judge was biased in her conduct of the hearing, that she failed to have proper regard to a decision of the Supreme Court in earlier proceedings or that she erred in failing to assign legal counsel to represent the appellant. Accordingly, I will affirm the High Court Order dismissing the underlying proceedings for want of prosecution and delay.

27. The appellant has been unsuccessful in his appeal. Accordingly, the usual rule that costs follow the event should apply which would result

in a cost order of the appeal against him. However, if he wishes to contend otherwise, I would give him leave to file and serve a short written submission – not exceeding 1,000 words - within fourteen days of the delivery of this judgment in the event of which I would allow the respondent fourteen days to file and serve a response, similarly so limited.

28. As this judgment is being delivered electronically, Costello and Butler JJ. have authorised me to say that they agree with it.