THE HIGH COURT

COMMERCIAL

[2024] IEHC 609

Record No. 2018/5922 P

BETWEEN

ULSTER BANK DAC, PAUL MCCANN AND PATRICK DILLON

PLAINTIFFS

AND

BRIAN MCDONAGH, KENNETH MCDONAGH AND MAURICE MCDONAGH

DEFENDANTS

(No. 3)

JUDGMENT of Mr. Justice Twomey delivered on the 30th day of October, 2024.

INTRODUCTION

1. A significant and disproportionate amount of court time is taken up by a very small number of litigants. These are those serial litigants, with nothing to lose, who are relentlessly pursuing hopeless and vexatious claims. The result is that instead of the courts *administering justice*, those litigants are using the courts to *inflict injustice* on innocent parties. In this way, it seems to this Court that such litigants are making a mockery of the courts system as well as using up taxpayer funded resources.

2. The defendants in this case (the "**McDonaghs**") are an example of such litigants. They have been found to have abused court processes in *McDonagh & Anor v Fane Investments*

Limited & Ors [2024] IEHC 240 at para 34 and in *Ulster Bank & Ors v McDonagh & Ors* [2024] IEHC 36 at paras 97-110. However, they are not alone. There are numerous other examples of other individuals who have wasted huge amounts of court resources with hopeless and vexatious claims and abused court processes. For instance, see the numerous cases involving:

- Mr. Piotr Scokzylas (who was found to have abused court processes in *Dowling & Ors v Minister for Finance & Ors* [2023] IECA 93 at para 50).
- Mr. Enoch Burke (who was found to have abused court processes in *The Board of Management of Wilson's Hospital School v Burke* [2024] IEHC 453 at para 50.
- Ms. Dona Sfar (who was found to have abused court processes in *Sfar v Minister v Agriculture* [2016] IEHC 348 at para 51.
- Mr. Arnaud Gaultier (most recently his abuse of court processes were referenced in *Gaultier v Reilly* [2024] IECA 254).

While the overwhelming majority of litigants do not abuse court processes, it is the case that on a daily basis, there are examples of individual litigants, with nothing to lose, abusing court process and using the courts system to inflict injustice on other litigants.

<u>Individual litigants, with nothing to lose, making a mockery of the courts system</u>

3. One of the common denominators in nearly all of the cases involving serial litigants, who abuse court processes and/or who take hopeless and vexatious claims, is that they do not end up paying the legal costs of their opponents - whether because they do not have the funds, or because they are already so much in debt to their opponent, or because their opponents have been unable to secure payment of cost orders or court fines.

4. In this way, these abusers of the court process are able to make a mockery of the courts system by using it, not to administer justice, but to *inflict injustice* on their opponents (by inflicting irrecoverable legal costs on them). The fact that these individual litigants do not pay

their opponent's legal costs means that the *only effective disincentive* to a person taking hopeless or vexatious claims (i.e., the financial detriment of a costs order) is, in fact, absent. This means that these litigants, with nothing to lose, see no reason to stop making hopeless and vexatious claims and/or abusing court processes and/or pursuing their personal crusades for the simple reason that it costs them nothing. Yet it costs their opponents and the taxpayer dearly, as well as delaying litigants with *bona fide* claims in having their cases heard. This is a matter of concern for anyone involved in the administration of justice.

5. The primary reason these litigants have nothing to lose is that, as *individual* litigants, rather than *corporate* litigants, they are rarely, if ever, required to lodge money into court (in the form of security for costs) before they continue abusing court processes and/or making hopeless and vexatious claims. This is because the current law/practice under Order 29 of the Rules of the Superior Courts has been that for litigants, who are party to litigation with individual litigants, are not generally granted security for costs, even when those individual litigants are serial litigants, with hopeless and vexatious claims and a history of abusing court process, like the McDonaghs.

6. This in stark contrast to the position of corporate litigants, since a corporate litigant is invariably required to pay money into court before being permitted to litigate (if there is any prospect that it might not have sufficient funds to pay the costs of its opponent if it loses). It is for this reason that it is rare to see a *corporate* litigant subject to an Isaac Wunder Order or held to have abused court process.[1] Meanwhile our courts spend a huge amount of time dealing with case after case from a small number of very active *individual* litigants who have been found to have abused court process, but who never pay legal costs, fines or penalties, *and so have no incentive to stop.*

[1] Indeed, even where corporate litigants abuse court process, the winning litigant will invariably have its legal costs paid by the corporate litigant (or from the security for costs), and so will not usually suffer the 'double injustice' of having been sued unjustly, but also have to pay their own costs to have the vexatious claim dismissed.

7. This means that for litigants like the McDonaghs, who are so much in debt that orders for costs are meaningless, there is no *effective* financial disincentive to stop them weaponizing the legal system. This is because they are not required to put up *even a relatively small amount* of money as security for their opponent's legal costs, and so they are able not only to pursue these hopeless and vexatious claim, but also to incessantly *inflict injustice* on their opponents. This is because their opponents are obliged to spend tens/hundreds of thousands of euro on legal costs in having those abusive/vexatious cases dismissed, without any prospect of recovering those legal costs from those individual litigants.

8. In order to improve the system for litigants, it seems to this Court that an effective disincentive should be found to disincentivise such parties from taking hopeless and vexatious claims and thereby inflicting financial loss, at will, on innocent parties. Otherwise, the courts end up being used to administer *injustice* on innocent third parties and the administration of justice is brought into disrepute.

Individual litigants, with nothing to lose, using legal system to inflict injustice

9. This case between the plaintiff ("**Ulster Bank**") and the McDonaghs vividly illustrates how, in the absence of an *effective* disincentive to hopeless and vexatious litigation by individual litigants, the courts are used by those litigants as an instrument to inflict injustice on innocent parties.

10. In particular, it highlights how the courts system and the law regarding costs appears to favour the right of an individual litigant to have access to the courts to pursue hopeless and vexatious claims *over* the property rights of his opponent, who ends up incurring irrecoverable legal costs to dismiss those claims. This is because, as noted by counsel for Ulster Bank in this case, there is no prospect of Ulster Bank recovering its legal costs in successfully dismissing

McDonaghs' application.[2] This contrasts with the position if Ulster Bank were faced with a corporate litigant with a hopeless and vexatious claim. In such a case, the 'winning' litigant invariably will have his property rights protected by having his costs paid out of the security provided by the corporate litigant.

11. The fact that the courts can be used so easily as to inflict injustice is a matter of concern to every person in the State. While the innocent party in this case is a financial institution, it could just as easily be an individual who ends up with irrecoverable legal costs (as in *Shannon v Shannon* [2024] IEHC 291, where a sister inflicted enormous financial cost on her brother) or the innocent party could be the taxpayer who ends up with irrecoverable legal costs (as in *Sfar v Minister v Agriculture* [2016] IEHC 348).

The extent of the injustice inflicted by individual litigants, with nothing to lose

12. This case also very starkly highlights the *extent of the injustice* which can be inflicted by the abuse of the courts system by an individual litigant on an innocent party. This is because even though this Court is dismissing this latest hopeless and vexatious application by the McDonaghs as abusive, the McDonaghs may be able to repeat the process and inflict *even more irrecoverable costs* on Ulster Bank by appealing the decision of this court to an appellate court, again without requiring them to provide some security for costs.

13. Yet one thing seems patently clear. It is that the pursuit of these hopeless and vexatious claims and the abuse of the courts by individual litigants, like the McDonaghs, would come to a shuddering halt if for once, they had to put up to their own money (to cover even some of the legal costs) to pursue those claims (like corporate litigants have to)[3] instead of having their

[2] Counsel for Ulster Bank noted at the hearing on 11 June that "the McDonaghs don't discharge any orders for costs" (pg 21 line 27 of Transcript).

[3] While the amount of costs put up as security by a corporate plaintiff now tends to be 100%, when security for costs is sought pursuant to Order 29 Rule 7 against individual plaintiffs *resident outside of the jurisdiction, Delaney and McGrath on Civil Procedure* (5th edn, Thompson Roundhall 2023) states at para 13-05: "As will be seen below, in the case of individual plaintiffs the amount of security fixed tends to be fixed at one third of the likely costs of the action."

opponents, in effect, pay for the dismissal of their hopeless and vexatious claims. To put the matter another way, until it costs the McDonaghs (and other individual litigants like them pursuing hopeless cases or personal agendas) money *in reality* (i.e., by the *actual* payment of their own money e.g., by providing security for costs) rather than *in theory* (i.e., an order for costs or fines against them, which are never paid), why would they not continue to inflict financial pain (in the form of irrecoverable legal costs) on the party they (wrongly) believe is responsible for their financial predicament or otherwise pursue their vendetta or crusade?

14. Since one of the roles of the courts is to seek to improve the system for litigants[4], this case therefore raises an issue of general application, namely the need for an *effective* way to prevent the abuse of our courts by the small percentage of litigants who succeed in wasting huge amounts of court time as well as inflicting massive financial loss on the innocent litigants they pursue and delaying other litigants in having their cases heard. In this regard, it is to be noted that an effective financial disincentive against hopeless and vexatious claims already exists. It is security for costs, which is routinely used against corporate litigants and is a powerful[5] disincentive to corporate litigants from making hopeless and vexatious claims and from abusing court process.

[4] Interview with Irvine P.,Irish Times, 6 August 2022 Irvine P ‘I have always seen it as my responsibility to try to make the system better for the litigant, who must always be kept front and central in the administration of justice.’

[5] While security for costs will not prevent all hopeless/vexatious/abusive claims, at least when they are brought, the winning litigant will have its legal costs paid by the corporate litigant, and so will not suffer the ‘ double injustice’ of having been sued vexatiously but also having to pay the costs of having that claim dismissed.

BACKGROUND

15. On 30 January, 2024, Quinn J made an Isaac Wunder Order[6] against the McDonaghs, restricting their right to issue further proceedings against Ulster Bank regarding the Kilpedder Site.[7]

16. This was because of their abuse of court process in their litigation with Ulster Bank (and others) over a ten-year period, during which several judges in the High Court, the Court of Appeal, and the Supreme Court have had to spend months (in hearings and writing judgments) dealing with the McDonaghs' hopeless and vexatious claims (as both plaintiffs and defendants).

17. As noted by this Court, on 25 April 2024, in its judgment in *McDonagh & Anor v Fane Investments Limited & Ors* [2024] IEHC 240 at para [30], which is yet another chapter in their dispute over the Kilpedder Site, the McDonaghs have weaponized the courts against Ulster Bank in order to inflict injustice on that bank.

The McDonaghs, subject to an Isaac Wunder Order, issue another motion

18. It might have been hoped that the Isaac Wunder Order would finally end this weaponization of the courts by the McDonaghs against Ulster Bank. However, as this latest application by the McDonaghs illustrates, the weaponization of the courts by the McDonaghs has not stopped.

19. Nonetheless, in making this latest application, the McDonaghs may have done one thing of benefit, namely to highlight, in the starkest of terms, the abuse of the courts system which can be perpetuated under our current law/practice by individual litigants, like the McDonaghs, with nothing to lose in their pursuit of hopeless/vexatious claims.

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[6] *Ulster Bank Ireland DAC & Ors v Brian McDonagh & Ors* [2024] IEHC 36.

[7] Definitions used in this judgment have the same meaning as in the *Ulster Bank Ireland DAC & Ors v McDonagh & Ors (Nos 1 and 2)* [2020] IEHC 185; 311 and *Ulster Bank Ireland DAC & Ors v Brian McDonagh & Ors* [2024] IEHC 36 judgments.

20. The McDonaghs are not alone in this regard. Hopeless/vexatious claims are pursued on a daily basis in our courts by a small proportion of individual litigants with nothing to lose (as they do not end up paying costs or fines). Sometimes it is in order to delay matters, sometimes it is to use, as a form of 'blackmail'[8], the fact that their opponent will have to incur *irrecoverable* legal costs in order to force a settlement, sometimes it is to simply inflict financial loss on their opponent because of a perceived grievance against that party and sometimes it is to waste scarce court resources in pursuit of a personal agenda or viewpoint. These cases use up a disproportionate amount of court resources and the only party at a financial loss is the party who is unfortunate enough to be on the other side of the proceedings, sometimes an individual, sometimes a private company, and more often than not, a State body (funded by the taxpayer).

21. Just a small sample of the hopeless and vexatious claims taken by individuals in recent times was listed by O'Moore J. in *O'Hara v Ireland & Ors* [2023] IEHC 268 at para [2]. In most of these cases, the individual litigant, pursuing the hopeless and vexatious claim, is unrepresented (like the McDonaghs in this application), so it costs him/her nothing[9] in legal costs, yet they are able to inflict enormous financial loss on their opponent in the form of irrecoverable legal costs. As noted below, it is telling that none of these cases, listed by O'Moore J., involved corporate litigants, but all involved individual litigants, who were not required to put up any security for their opponent's costs when they lost their hopeless and vexatious claims.[10]

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[8] Per Clarke J in *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183 at para. 4.12, "If there were not provision requiring generally for the payment of costs to the successful party then there would be a real risk that the bringing or defending of proceedings could be used as a form of unfair tactic little short, at least in some cases, of blackmail".

[9] Save for court filing and other fees, which are miniscule relative to lawyers' fees in High Court cases.

[10] By way of example, Mr Brian McDonagh was found to have abused court processes by Quinn J in *Ulster Bank & Ors v McDonagh & Ors* [2024] IEHC 36, and there have been 13 judgments written in respect of the circumstances surrounding the Kilpedder site; and Mr Enoch Burke was found to have abused court processes most recently in *The Board of Management of Wilson's Hospital School v Burke* [2024] IEHC 453, and those proceedings have given rise to 19 written judgments of the superior courts.

The extent of the mockery of the courts system being perpetuated by the McDonaghs

22. The extent of the mockery which the McDonaghs are making of the court system is vividly illustrated by the facts of this case. This is because this Court dealt with a key aspect of the Kilpedder Site dispute between the McDonaghs and Ulster Bank *some four years ago* (in a case which ran for 5 weeks), resulting in the judgment *Ulster Bank Ireland DAC & Ors v McDonagh & Ors* [2020] IEHC 185 (the "**Principal Judgment**").

23. Not only was the issue dealt with by the High Court four years ago, but in addition one would have thought that the Isaac Wunder Order issued in January 2024 by Quinn J would mean that this Court would not have to waste any further court time having more hearings regarding the Kilpedder Site.

24. This is particularly so when one considers that the Principal Judgment was *unsuccessfully appealed* by the McDonaghs to the Court of Appeal which affirmed[11] that decision on 6 April 2022. Then that Court of Appeal decision was *unsuccessfully appealed* by the McDonaghs to the Supreme Court which determined on 25 October 2022 that there was no basis for the Supreme Court to hear a further appeal.

25. However, on 25 March 2024, only two months after being subjected to the Isaac Wunder Order regarding their dispute with Ulster Bank over the Kilpedder Site, the McDonaghs decided to take their latest step in their court battles with Ulster Bank over the Kipledder Site.

26. Since issuing *new proceedings* regarding the Kilpedder Site would be a breach of the Isaac Wunder Order, instead the McDonaghs issued a motion in the Principal Judgment case (which had been decided *four years previously* and appealed unsuccessfully). In that motion,

[11] Save in one respect of one finding, which had no impact on the decision, see para [233] of *Ulster Bank Ireland DAC & Ors v McDonagh & Ors* [2022] IECA 187

they apply to this Court to set aside the Principal Judgment, even though this judgment had been *affirmed on appeal*.

27. The McDonaghs brought this motion in relation to the Principal Judgment on the basis, it seems, of the standard *'liberty to apply'* granted to all parties to decision when final orders are made. However, *'liberty to apply'* is intended to deal with parties coming back into court to clarify the extent or application of the court's final orders (*Donegal County Council v Balantine* [1998] IEHC 203 at p 6 per McCracken J). Clearly this application by the McDonaghs to set aside the Principal Judgment is the antithesis of an application to *clarify the extent of the application* of this Court's orders since it wants the judgment set aside. However, on 16 July 2024, this Court had to allocate a full day of scarce court resources to hear yet another application from the McDonaghs regarding the Kilpedder Site.

ANALYSIS

28. In the 10-year history of hopeless/vexatious claims by the McDonaghs regarding the Kilpedder Site, this application may be the most bizarre and unprecedented one yet. That is saying something, since many of the numerous cases over the last 10 years involving the McDonaghs, have called their credibility into question. Indeed, one English High Court judge described Mr. Brian McDonagh in the following terms:

> "I am satisfied that […] **Mr. McDonagh's evidence is not reliable**. It is clear to me that Mr. **McDonagh has reconstructed the events which occurred to produce an account which he considered would be more helpful** to his case as compared with the actual events". (Emphasis added)[12]

[12] *per* Morgan J in *Brian McDonagh v Bank of Scotland* [2018] EWHC 3262 at para 26

29. However, like all their other claims and applications in their 10-year dispute with Ulster Bank, this claim arises from the McDonaghs failure to repay a loan of €22 million from Ulster Bank for the purchase of the Kilpedder Site. That site was purchased by the McDonaghs for the development of a data centre which the McDonaghs believed would make them a multimillion euro profit. While their failure to achieve this profit was *caused by their failure to repay their loan*, they believe that this failure to achieve the profit can be blamed on Ulster Bank and other parties.

The bizarre application brought by the McDonaghs

30. However, the bizarre application which has now been brought by the McDonaghs is one asking this Court to set-aside the Principal Judgment from four years ago even though the McDonaghs *unsuccessfully appealed* that decision to the Court of Appeal (Murray, Collins, Pilkington JJ) which affirmed this Court's decision, *and* even though their appeal of that Court of Appeal decision was also *unsuccessfully appealed* to the Supreme Court, which refused to hear the appeal. In its determination on that application (*Ulster Bank & Ors v McDonagh & Ors* [2023] IESCDET 82), the Supreme Court refused to hear an appeal on the grounds, *inter alia*, that it was not merited in the interests of justice.

31. It is to be noted that, as well as the McDonaghs appealing the substantive findings in the Principal Judgment to the Court of Appeal, Mr. Brian McDonagh separately appealed the decision of this Court to use the slip rule to change the title of the plaintiff from Ulster Bank DAC to Ulster Bank Ireland DAC. The Court of Appeal (Whelan, Noonan, Faherty JJ) refused this application on 8 November 2021. Mr. McDonagh then appealed to the Supreme Court which refused to hear his appeal and saw what this futile application was really about, namely an attempt to delay the enforcement of the Principal Judgment against the McDonaghs. The Supreme Court therefore also refused to hear that appeal in *Ulster Bank & Ors v McDonagh & Ors* [2022] IESCDET 116 and at para 9 it stated that:

> "It is in no way evident that any matter of general public importance is raised in the application, nor in the content of the judgments of the court below, which applied well-established legal principles and case law in determining the appeal. It is not in the interests of justice either that Mr McDonagh **can delay the enforcement of the judgment against him by litigating issues** which are not based on the evidence and which do not raise any legal questions requiring resolution or clarification."
> (Emphasis added)

While those two attempts to appeal the Principal Judgment were unsuccessful (both on the substantive issue on the procedural 'slip rule' issue), the McDonaghs have now brought this latest application to set aside the Principal Judgment some four years after it was delivered.

<u>The reasons the McDonaghs give for the bizarre application</u>

32. The McDonaghs initially claimed to this Court that the Principal Judgment should be set aside because new evidence came to light that that had been suppressed by *the fraud of the lawyers* acting for Ulster Bank (including a person who was appointed Attorney General), even though the McDonaghs had no evidence to support such a scurrilous claim.

33. This became clear because the McDonaghs were briefly advised by lawyers in relation to this current application, before resuming as lay litigants. During the period when they received legal advice, the McDonaghs withdrew the allegation of fraud against the lawyers. At that stage, Mr. Maurice McDonagh stated on affidavit that:

> "I have been advised that I do not have evidence that would be sufficient to establish a claim of fraud as against the legal advisors of the Plaintiff, and [Mr. Brian McDonagh] and I are not now making that allegation in the within motion".

34. As a result, their application for the Principal Judgment to be set aside rests primarily on their claim, in effect, that this Court might have reached a different conclusion if certain

evidence, which was not before this Court, had been before it. Some of that new evidence is additional documents that were not before the trial, and some of this new evidence is certain parts of documents which were before this Court but were redacted.

35. Thus, in summary, the McDonaghs are saying that this Court's Principal Judgment, which has been affirmed on appeal, should be set aside because if there was different evidence before this Court at the trial the McDonaghs would have won, rather than lost. As a general proposition, it could be said that every case might reach a different outcome if different evidence was before the trial judge. However, it should be obvious that this is not the basis for a judgment of a trial court, particularly one which has been affirmed on appeal, to be set aside.

The effect of the order being sought by the McDonaghs

36. The potential consequences and wide-ranging effect of the set-aside order that the McDonaghs are seeking is perhaps only fully appreciated if it is described in more general terms. Consider therefore the following situation: a litigant loses his case in the High Court, he appeals and loses in the Court of Appeal, which affirms the High Court decision. Then he appeals to the Supreme Court which refuses to hear the appeal and so, in effect, affirms the Court of Appeal decision, and also, in effect, affirms the High Court decision. Thus, the litigant has reached the end of the road in his dispute with his opponent.

37. What does such a litigant do, if he feels hard done by (as most losing litigants no doubt feel)?

The unsuccessful appellant asks the High Court to, in effect, reverse the Court of Appeal

38. According to the McDonaghs, the litigant goes back to the High Court and asks it to set aside its judgment from four years previously, a judgment which has been affirmed by the Court of Appeal and where an appeal of that decision was denied by the Supreme Court.

39. It is crucial to note that this means that the litigant is asking the High Court judge, who is *functus officio*, and *who is bound by* the Court of Appeal decision, to, in effect, *overturn* the decision of the Court of Appeal and implicitly also overturn, or at least compromise, the Supreme Court's decision that there was no merit in the McDonaghs' appeal.

40. If the matter were not so serious, it would be funny that anyone could think that this is a reasonable course of action. However, as already noted, it is very serious and far from funny, for the other party to the litigation, in this case, Ulster Bank. This is because the bringing of this hopeless and vexatious application by the McDonaghs involves the infliction of irrecoverable legal costs on Ulster Bank by the McDonaghs once again and also involves a waste of taxpayers' funded court resources, by this Court having to hear this application.

The High Court does not have power to reverse a Court of Appeal decision

41. It should be clear to everyone, including the McDonaghs, that this Court, as a trial court, has no power to, in effect, reverse a decision of an appellate court. Similarly, it should be obvious that this Court does not have the power to effectively reverse, or at a minimum compromise, a determination of the Supreme Court that it would not disturb the Court of Appeal's affirmation of the High Court decision.

42. It should also be clear to anyone that if a trial court could effectively reverse an appellate court decision, the system would be in chaos. One could never have certainty in a legal outcome, even after the last appeal. Yet this is the effect of the McDonaghs' application.

There could be set-aside applications, after every appeal is lost

43. The system would be in chaos because every dissatisfied litigant (and most losing litigants are likely to be dissatisfied) after exhausting all their appeals could simply start the whole process again by going back to the trial court and asking that court to set aside its decision, e.g., because of new evidence.

44. Of course, if that trial judge refused to set aside his/her decision, that litigant could appeal that refusal to the Court of Appeal, and if it affirmed the trial court's refusal to set aside, he could appeal that refusal to the Supreme Court, to inflict further financial harm on his opponent (in the form of irrecoverable legal costs) and in the words of the Supreme Court about Mr. McDonagh *'delay the enforcement of the judgment against him by litigating issues'*.

An endless circle of set-aside applications and appeals

45. Indeed, if there was such a jurisdiction, that the McDonaghs claim there is, for a trial court to set aside its decision (after it was affirmed by an appellate court), a litigant who fails in setting aside the trial court judgment the *first time*, could try a *second time* with another reason (e.g., *further* new evidence).

46. If the trial judge refuses that *second* set-aside application, he could appeal that refusal to the Court of Appeal, and if that appeal was refused, he could appeal to the Supreme Court, before starting again with another set aside application (based on further new evidence) in an endless loop.

47. In light of the foregoing, it should be patently clear that this Court has no jurisdiction to entertain this unprecedented and bizarre application by the McDonaghs to overturn a High Court decision that has been affirmed by the Court of Appeal. For this reason, this Court rejects this application.

The McDonaghs are 'successful' in inflicting financial loss on Ulster Bank

48. Once again therefore, in this 10-year saga of litigation, Ulster Bank is successful as it has succeeded in having the McDonaghs' claims dismissed as not just hopeless and vexatious, but also as bizarre and unprecedented.

49. However, while it might be said that Ulster Bank has achieved 'justice' on a superficial level, it is clear that it has not received 'true' justice. This is because in reality it is the

McDonaghs who are successful since they have succeeded in delaying once again Ulster Bank in enforcing the judgment granted against them (i.e., the Principal Judgment) by making this hopeless/vexatious application. They have done so, even though, as noted above, the Supreme Court has observed that it *'is not in the interests of justice either that Mr McDonagh can delay the enforcement of the judgment against him by litigating issues.'* In addition, by forcing Ulster Bank to defend this futile application, the McDonaghs have also succeeded in inflicting even further financial cost on Ulster Bank in the form of legal costs which are unlikely ever to be recovered.

The McDonaghs may appeal this decision and so inflict further financial loss

50. Based on their approach to date, it is likely that the McDonaghs will seek *to inflict even further loss on* Ulster Bank, by appealing this decision to the Court of Appeal, and then that court's decision (if they are unsuccessful) to the Supreme Court.

51. Yet the Supreme Court has observed that the *'interests of justice*' are at stake when litigation is used by the McDonaghs to delay enforcement of the Principal Judgment against them. Despite this, and the fact the McDonaghs' application is futile and that they now have inflicted further irrecoverable costs on Ulster Bank, they may be entitled to appeal this Court's decision *without having any requirement to provide security* for Ulster Bank's costs of that appeal, and so inflict even more financial loss on Ulster Bank.

52. Yet, if this were to happen, how could this be described as 'justice' for Ulster Bank, which, after all, is what the courts are supposed to be administering? In this Court's view, the fact that Ulster Bank could be forced by the McDonaghs to spend more irrecoverable legal costs on dealing, on appeal, with this hopeless and vexatious claim, without the McDonaghs putting up even one euro in security for costs, does not amount to true justice for a litigant such as Ulster Bank (or any litigant faced with an individual serial litigant pursuing hopeless and vexatious claims).

53. This begs the question of whether there is anything which can be done to prevent and/or reduce the number of individual litigants, like the McDonaghs, with nothing to lose, taking hopeless and vexatious claims (and subsequent appeals), and thereby imposing huge financial loss on defendants (in the form of irrecoverable legal costs) and also putting a huge drain on taxpayer funded court resources?

Requiring security for costs against individuals in certain cases

54. One way to improve the situation for such litigants is for security for costs (even at a nominal or relatively low level) to be ordered against not just corporate litigants, but also against individual litigants, particularly against serial litigants who pursue hopeless or vexatious cases or otherwise abuse court processes and thereby use up a disproportionate amount of taxpayer-funded court resources, to the detriment of *bona fide* litigants waiting for their cases to be heard.

55. This is because it seems clear to this Court that if individual litigants, like the McDonaghs, had to provide at least some security for costs, they would, for once, have something to lose, and therefore, for once, have a financial incentive not to take hopeless/vexatious cases designed to inflict loss on their opponent, or *'delay the enforcement of the judgment'* or to act as a form of blackmail to force a settlement of a speculative case. In this way, the playing field, *which is currently not level*, when a litigant is faced with an individual litigant who will never be paying legal costs, could be made at least a little bit more level. After all, security for costs does not prevent the taking of a claim, it simply levels the playing field, so that if the claim is dismissed, the winning litigant does not suffer the injustice of having to pay its own legal costs.

56. To put the matter another way, should a winning litigant's property rights not be protected when faced with an individual litigant (particularly one who is a serial litigant abusing court process and/or pursuing hopeless and vexatious claims) in the same way as it is

protected when that winning litigant is faced with a corporate litigant? Yet that does not appear to be the position under our current laws/practices, as starkly highlighted by this case. Instead, it seems that under our current laws/practice, the 'winning litigant' (and the taxpayer) must simply grin and bear it and face yet another round of financial loss inflicted on him/her by the abusive and serial litigant. For this reason, it is arguable that as matters currently stand, the right of access to the courts, of a claimant with a hopeless/vexatious claim takes precedence over the property rights of his opponent.

Most effective deterrent against vexatious litigation is security for costs

57. Yet it seems clear to this Court that the most effective deterrent against hopeless and vexatious claims by individual litigants is not a *court order* for costs after the claim is dismissed that will/may never be paid. Instead, it seems to this Court that the most effective deterrent against hopeless and vexatious claims is the *actual* payment, upfront in security for costs, even of a relatively minor amount of money, before they can proceed with the litigation. This is much more likely to operate as an effective deterrent against individual litigants, like the McDonaghs, bringing years of costly hopeless and vexatious claims.

Fewer instances of abuse of by corporate litigants because of security for costs

58. The fact that an order for security for costs is an *effective* deterrent to the abuse of court processes is evidenced by the fact that it is very rare for findings of abuse of court process to be made against corporate litigants (against whom security for costs orders are routinely made). In contrast, findings of abuse of court of process (and the making of Isaac Wunder Orders[13]) are made, almost exclusively, against individual litigants (against whom security for costs orders are *not* made). Thus, for example, the cases listed by O'Moore J in the *O'Hara* case, as

[13] Of course, when an Isaac Wunder Order is made against an abusive litigant, it is already too late for the other party to the litigation. This is because that party will already have been subject to the injustice of having suffered enormous financial loss as a result of dealing with years of hopeless and vexatious claims and irrecoverable legal costs (to justify the grant of an Isaac Wunder Order in the first place).

instances of vexatious/hopeless litigation,[14] *all* involve individual plaintiffs. The reason for this seems clear. Basic self-interest means that no corporate litigant is going to pay tens/hundreds of thousands of euros into court as security for its opponent's costs, which it is guaranteed to lose, by pursuing a hopeless/vexatious claim.

59. The fact that it is so rare to come across abuse of court processes by corporate plaintiffs (or Isaac Wunder Orders against corporate entities), yet a small number of individual litigants are abusing court processes on a daily basis, highlights the powerful deterrent effect of security for costs. Yet this deterrent effect is not currently being used to prevent individual litigants, like the McDonaghs, from pursuing their crusades at no real financial cost to themselves, but with the infliction of *enormous injustice* on their opponents and a huge drain on court resources.

60. It seems clear to this Court that if a person obtained security for costs from *individual* litigants, like they do against corporate litigants, then such litigants, would be most unlikely to pursue hopeless and vexatious claims. This is for the simple reason that individuals rarely act contrary to their own financial interests and so are unlikely to pursue hopeless and vexatious litigation if they will suffer financially (even if not to the full extent of the costs incurred by their opponent). This should then lead to less cases of 'injustice' where winning litigants end up having to pay their own legal costs even though they have had the vexatious/hopeless claims dismissed and also lead to less waste of taxpayer-funded court resources.

<u>CONCLUSION</u>

61. This Court rejects the McDonaghs' bizarre application for this Court to set aside a judgment of this Court, which has been *affirmed* by the Court of Appeal and which the Supreme Court has determined did not merit any further appeal.

[14] O'Moore J described the various proceedings as *"frivolous and vexatious, bound to fail, and an abuse of process"*.

62. The unsustainable nature of the application is clear when one considers that if this court set aside the Principal Judgment, as suggested by the McDonaghs, it would involve:

- the High Court, in effect, reversing a decision of a higher court (the Court of Appeal); and
- the High Court, in effect, reversing a determination of the highest court in the State, the Supreme Court.

However, this bizarre application, which is one of many by the McDonaghs during this 10-year saga of litigation, highlights a bigger issue, namely the injustice which is caused as a result of the current law/practice where security for costs is not generally obtained against individual litigants like the McDonaghs who pursue hopeless and vexatious claims, and so without those litigants ever paying the legal costs of their opponent.

63. This is because on the one hand the imposition of costs on a losing litigant is the *only way* to ensure that litigants do not bring hopeless/vexatious litigation. Yet on the other hand, orders for costs are completely *ineffective* where losing litigants, like the McDonaghs, do not have the funds to pay or otherwise do not end up paying costs. This means therefore that such litigants have *no disincentive* to bringing hopeless/vexatious litigation.

64. It is for this reason that it seems to this Court that requiring such litigants to put up at least some money as security for costs, before being allowed to litigate, is the only *effective* way to prevent *injustice.* The injustice in question is the imposition of huge amount of legal costs which innocent parties (the subject of the hopeless/vexatious claims) have to spend to have those claims dismissed, but which they never recover.

65. The fact that security for costs is effective at preventing hopeless and vexatious claims and the abuse of court process is clear since such abuses and claims are practically non-existent in relation to corporate litigants (for the simple reason that corporate litigants *are* subject to security for costs). In contrast, these abuses and claims and resulting injustice are almost

exclusively the preserve of individual litigants (since individual litigants are generally not subject to security for costs).

66. It seems to this Court that unless the law/practice is amended so that individual litigants pursing vexatious/hopeless litigation have 'something to lose', there will continue to be no *effective* deterrent to these types of claims and no end to the injustice meted out to Ulster Bank and other litigants, including ordinary citizens (e.g. Mr. Shannon in *Shannon v Shannon* [2024] IEHC 291).

67. Indeed, the starkest illustration of the *extent* of this injustice is the fact that the financial loss which has been inflicted on Ulster Bank by the McDonaghs (in having to incur irrecoverable legal costs in dismissing the McDonaghs' application) is likely to be repeated. This is because, if the McDonaghs continue their never-ending litigation by appealing this Court's decision, then Ulster Bank will have to pay further irrecoverable legal costs to dismiss that appeal. The only way to prevent this *further* abuse of the court system by litigants like the McDonaghs and to prevent the infliction of *further* injustice on innocent third parties is by requiring individual litigants to put up security for costs. This would mean that the McDonaghs would be required to put up security for costs before being permitted to pursue an appeal. In this way, Ulster Bank might still suffer one injustice, of a further delay in the enforcement of the judgment until the appeal is dismissed, but at least they would not suffer a second injustice, and so a *double injustice*, of spending their own money to have, what this Court regards as, a hopeless/vexatious appeal dismissed. Of course, if this Court is wrong and the McDonaghs were successful on the appeal, they would recover the money they paid as security for costs, so they would not be out of pocket.

68. This case will be provisionally put in for mention, at 10.30 a week from its delivery, to deal with any final orders and costs (with liberty to the parties to notify the Registrar, if

such a listing proves to be unnecessary, in the event of the parties agreeing all outstanding matters).