THE COURT OF APPEAL

CIVIL

Court of Appeal Record Number: 2024/270
High Court Record Number: 2024/698 P
Neutral Citation Number: [2025] IECA 40

Costello P.
Meenan J.
McDonald J.

BETWEEN/

YEOKSEE OOI

PLAINTIFF/APPELLANT

- AND –

IRELAND, THE ATTORNEY GENERAL, BRIAN MCDONAGH & PROMONTORIA SCARIFF DAC

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 21st day of February 2025

Background: -

1. The appellant is the partner of the third named respondent (Mr. McDonagh), a relationship that commenced some 28 years ago. There are three children from this relationship. The background to these proceedings concern the business activities of Mr. McDonagh and other members of his family, which involved borrowing substantial sums of money running to tens of millions of Euro, from Ulster Bank and First Active (predecessors of Promontoria Scariff DAC), the third named respondent (Promontoria).

2. The money borrowed by the McDonaghs was never repaid, resulting in multiple legal proceedings and subsequent judgments of this Court, the High Court and the Supreme Court. A number of these judgments have identified a complete failure on the part of Mr. McDonagh to conduct his business affairs in accordance with the most basic standards of honesty and probity. (See, in particular, *Ulster Bank v McDonagh* [2020] IEHC 185). Mr McDonagh is now the subject of an "*Isaac Wunder*" order.

3. In 2005, Mr. McDonagh purchased Dromin House, Co. Wicklow in his sole name with the benefit of a loan obtained from First Active in the amount of €3M. This loan was secured by a mortgage over Dromin House. In 2007 this loan was restructured, resulting in Mr McDonagh obtaining a loan of a sum in excess of €5M. This was secured by a second mortgage on Dromin House. In the context of this mortgage, Mr. McDonagh completed a statutory declaration under the Family Home Protection Act 1976 (the Act of 1976) to the effect that Dromin House was not a family home for the purposes of the said Act and no other person had an interest in the property. No repayments have been made in respect of this loan since 2013. As of 1 September 2022, the sum of €5,200,596.71 was owed by Mr. McDonagh, with arrears amounting to €2,144,212.36.

4. In her grounding affidavit, the appellant states that she resided at 8 Bloomfield Avenue, Portobello, Dublin 8 until 2006 and moved into Dromin House that year with Mr. McDonagh. She states that 8 Bloomfield Avenue was subsequently sold by a receiver.

Possession proceedings: -

5. Arising from the default of Mr. McDonagh in failing to repay any of the money he borrowed, Promontoria issued a Civil Bill for possession of Dromin House in 2021. Following a contested hearing in the Circuit Court on 18 January 2023, an order was made granting Promontoria possession of Dromin House with a stay of 18 months. At the hearing

the appellant was represented by solicitor and counsel. The order of the Circuit Court was appealed to the High Court.

6. The appeal to the High Court came on for hearing on 15 February 2024. Two days before the hearing, 13 February, the appellant issued the within proceedings in which she seeks, *inter alia*,: -

> *"A declaration that section 2 of the Family Home Protection Act, 1976 is repugnant to Article 40.1 Article 40.5, Article 41.1, Article 41.2 and Article 41.2.1 of the Constitution."*

7. On the morning of the hearing of the appeal, the appellant made an application to adjourn the hearing pending the determination of her constitutional challenge to s. 2 of the Act of 1976. This application was refused by the Trial Judge (Bradley J.). In the course of ruling on the adjournment, the Trial Judge referred to an earlier decision of this Court (*Ulster Bank DAC v Brian McDonagh & Ors* [2023] IECA 265) wherein it was stated that Dromin House was not a family home for the purposes of the Act of 1976.

8. The High Court dismissed the appeal and affirmed the order of the Circuit Court. The order of the High Court was perfected on 5 June 2024. An execution order for possession was made on 25 September 2024. By letter dated 14 October 2024, the appellant was informed by the Sheriff's Office, Bray, Co. Wicklow that an order for ejectment for the recovery of Dromin House had been lodged for execution. By letter dated 15 October 2024, the following day, the Sheriff informed the appellant that she must vacate the said property by 22 October 2024.

9. On 23 October 2024 the appellant sought the leave of the Supreme Court to appeal the order of the High Court.

10. On 18 October 2024 the appellant applied for and was granted an interim order by the High Court restraining the Sheriff from carrying out the order of execution for the eviction

of the appellant from Dromin House. By notice of motion of the same date, the appellant sought an interlocutory injunction in those terms. By an earlier notice of motion, Promontoria sought an order striking out the within proceedings on the grounds that no reasonable cause of action was disclosed and that they were bound to fail.

11. Both the appellant's application for an interlocutory injunction and Promontoria's application to strike out the proceedings came before the High Court on 25 October 2024. The High Court (Cahill J.) delivered judgment on 19 November 2024, refusing Promontoria its application to strike out and refusing the appellant's application for an interlocutory injunction.

Judgment of the High Court : -

12. Having considered the relevant authorities, Cahill J. stated that she was not satisfied that Promontoria had discharged the onus showing that the appellant's claim against it was bound to fail. The Trial Judge then went on to consider the appellant's application for an interlocutory injunction. Having referred to the principles to be applied on an application for injunctive relief as set out by O'Donnell J. (as he then was) in *Merck Sharpe and Dohme v Clonmel Healthcare* [2019] IESC 65; [2020] 2 IR 1, the Trial Judge identified six broad topics that must be assessed: -

(a) The existence of a serious issue to be tried.

(b) The availability of a permanent injunction.

(c) The assertion of delay in seeking injunctive relief.

(d) The absence of an undertaking as to damages.

(e) Allegations of material non-disclosure.

(f) Other factors in the balance of justice.

13. As the Trial Judge had refused Promontoria's application for a strike out, it followed that the appellant had reached the threshold of a serious issue to be tried for her injunction application.

14. The Trial Judge then carefully considered the issue of the balance of convenience by reference to the five remaining criteria identified in para. 12 above. On the availability of a permanent injunction, the Trial Judge noted: -

> *"171. .. It is inescapably the case that the possession order is a presumptively valid and binding determination which must weigh heavily in the balance in an application of this nature.."*

She also noted that a permanent injunction in favour of the appellant would, in effect, erase the loan and thus cancel the right of Promontoria to recover monies secured on Dromin House. The Trial Judge concluded: -

> *"176. The cumulative effect of the matters just mentioned is that there would be several hurdles to the grant of a permanent injunction in favour of Ms. Ooi. It cannot be said with any assurance whether a permanent injunction would be granted, and I make no attempt to pre-judge how a court in full possession of all relevant evidence and submissions may weigh this question, but at this preliminary stage, on the basis of the limited information before me, it seems more likely than not that a permanent injunction would be refused."*

15. The Trial Judge noted in para. 177 of her judgment that this was a factor that weighed against the appellant on the application of the test laid down in *Merck Sharp & Dohme.*

16. The Trial Judge then considered the issue of delay. Cahill J. looked at both the delay in issuing the within proceedings and seeking the interlocutory injunction. The appellant was aware since 12 March 2024 (the date of judgment of the High Court dismissing the appeal against the Circuit Court order for possession) that Promontoria were entitled to

possession but waited until 18 October 2024 to seek an injunction. The Trial Judge concluded: -

> *"184. A clear allegation is made that Ms. Ooi has been tactical in the timing of these proceedings and this injunction application and, while there is an explanation given for the timing of the issue of the proceedings (related to the delivery of the judgments in O'Meara) I accept that the overall allegation of tactical timing is well founded on the basis of the facts before me."*

17. The Trial Judge also observed in para. 185 of her judgment that the appellant offered no explanation for the delay and that the delay had caused prejudice to Promontoria, who had acted on the basis that it was entitled to possession on 7 September 2024. She then concluded, in para. 186, that delay was a further factor that weighed against the appellant in considering where the balance of convenience lay.

18. The next issue considered by the Trial Judge was the absence of an undertaking as to damages. The Trial Judge stated: -

> *"191. While it is undoubtedly the case that an undertaking is not always necessary for the grant of an injunction, the availability or otherwise of such an undertaking is a relevant factor in the balance of justice.*
>
> *192. In this case, there has been no cross-examination of Ms. Ooi on her assertion that she lacks means to give an undertaking and no evidence has been adduced to support or contradict that assertion. I do not therefore have any basis to decide whether Ms. Ooi does or does not have means, but given her evidence has not been tested, I have no basis not to accept it (mindful of the findings of the Supreme Court in RAS Medical Limited v RCS [2019] IESC 4)*"

19. However, having considered that there was a real risk that Promontoria would suffer financial harm if the injunction was granted and Promontoria ultimately prevailed at the

hearing of the action, the Trial Judge concluded that the absence of an undertaking in damages weighed against the grant of an injunction.

20. In refusing the injunction on balance of convenience grounds, the Trial Judge also considered issues concerning allegations of material non-disclosure and the fact that the Circuit Court had granted a stay of 18 months from the order for possession. She also took into account that the property in issue is the home of the appellant but she highlighted that no payment had been made on foot of the debt secured on the property since 2013 and that the appellant had been given a stay of 18 months by the Circuit Court to allow her to make alternative arrangements.

Notice of appeal: -

21. The notice of appeal failed to set out any ground upon which this Court ought to set aside the order of the High Court. No error of law or fact has been identified by the appellant.

22. Matters were not advanced by the appellant's written submissions. In the course of those submissions there was no suggestion that the Trial Judge had failed to properly apply the relevant principles or was erroneous in the conclusions she reached. The written submissions did make reference to alleged errors on the part of Promontoria in their filings in the CRO.

Consideration of appeal :-

23. The absence of any stated material grounds of appeal and written submissions of any substance would, of themselves, be good reason to dismiss this appeal. The fact that the appellant represented herself does not excuse this failure. The appellant did make oral submissions to this Court which, to a very limited extent, attempted to identify errors in the judgment of the High Court

24. In my view, the Trial Judge was correct to hold that, although there was a serious issue to be tried, the balance of justice lay against the grant of the injunction sought. Insofar as a

serious issue is concerned, the fact that Promontoria failed in its application to strike out the appellant's proceedings inevitably meant that the serious issue hurdle had been surmounted. While Promotoria has cross-appealed on this issue, I believe the decision of the Trial Judge was correct, particularly in light of the position taken by the State defendants who, though served, did not participate in the application.

25. Insofar as the balance of convenience or justice is concerned, I believe that the factors identified by the Trial Judge as weighing against the grant of the injunction sought plainly outweighed the factors on the other side of the equation. While the property in question is the family home of the appellant, the Trial Judge was correct to identify the extent of the indebtedness secured on the property, the extent to which the debt had been left unpaid for such a substantial period of time and the also the extent of the stay that had been granted to the appellant by the Circuit Court which gave her ample time to seek to make alternative arrangements.

26. There are also a number of facors in this case which I believe should be highlighted. A person such as the appellant, in seeking an interlocutory injunction, is invoking the equitable jurisdiction of the court. There are a number of general principles which guide a court in the exercise of this jurisdiction. Many of these principles have been embodied in the *"maxims of equity"*. The maxim *"He ('She') who comes to equity must come with clean hands"* is of particular relevance here. Though the proceedings identify a serious issue to be tried, that is by no means the end of the matter. A court, as did the Trial Judge in this case, should consider the circumstances under which the proceedings were initiated, the manner in which they were prosecuted and whether any delay in seeking an injunction has a reasonable explanation.

27. The appellant was present in court and was represented by both solicitor and counsel in the possession proceedings in the Circuit Court in January 2023. At that stage she must

have been fully aware that, given the nature of her relationship with Mr. McDonagh, that she could not avail of the protection, if any, afforded by s. 2 of the Act of 1976. One would have expected that the within constitutional challenge would have been mounted in early 2023 (if not sooner) but that was not the case. The plenary summons in these proceedings was issued a year later in February 2024.

28. There has been no real explanation for the delay in the issuing of these proceedings. The appellant has stated that she will be relying on the Supreme Court decision in *O'Meara v Minister of Social Protection* [2024] IESC 1, which was a challenge to certain provisions of the Social Welfare Consolidation Act 2005 on the grounds, *inter alia*, that it infringed the constitutional right to equality. The appellant appears to be implying that it was only following the delivery of this decision in early 2024 that she believed she had grounds to challenge the constitutionality of s. 2 of the Act of 1976. This lacks credibility. Challenges to legislation on the basis of infringement of the constitutional right to equality have been a well-publicised feature of Irish law for many decades.

29. These proceedings were issued within a day or so of the date fixed for the hearing in the High Court of the appeal of the Circuit Court order for possession. The appellant sought to adjourn the hearing of the appeal on the basis that it should not proceed until her constitutional challenge had been determined. The application for an adjournment was made on the first day of the hearing of the appeal. The adjournment was refused. The appellant delivered a statement of claim some months later in May 2024 but does not appear to have taken any further step to prosecute these proceedings.

30. By order of the High Court on 29 May 2024, the appeal was dismissed and the Circuit Court order for possession affirmed. The appellant took no further steps to seek an injunction restraining repossession until 18 October 2024, some five months later and four days before she was required by the Sheriff to vacate Dromin House.

31. The Trial Judge found that the appellant had been "*tactical"* in the timing of the within proceedings and the application for an injunction. I agree but would go further. In my view, the timing of the issue of these proceedings and the inexcusable delay in applying for an injunction indicate a clear and deliberate attempt on the part of the appellant to delay and frustrate Promontoria in exercising its legal entitlements. For this reason alone, the application for the injunction ought to be refused.

32. The Trial Judge was correct in concluding that *"there would be several hurdles"* to the granting of a permanent injunction to the appellant for the hearing of the action. There is a final and conclusive order for possession notwithstanding the appellant's application for leave to appeal to the Supreme Court. A permanent injunction would, in effect, erase the loan secured by Dromin House. As stated earlier, no repayments have been made since 2013 in respect of the outstanding loan. While that is of course the responsibility of Mr McDonagh, the appellant has undoubtedly benefited in that she has resided in the house for 13 years without paying anything towards the outstanding secured debt.

33. The Trial Judge held that the absence of an undertaking as to damages weighed against the granting of the injunction sought. In reaching this conclusion, the Trial Judge referred to no evidence being adduced to support or contradict the appellant's assertion that she lacked the means to give an undertaking and the absence of any cross-examination. The Trial Judge stated: -

> *"I do not therefore have any basis to decide whether Ms. Ooi does or does not have means, but given her evidence has not been tested, I have no basis not to accept it .."*

Though I agree with the Trial Judge's conclusion, I do not agree with the reasoning.

34. In her grounding affidavit the appellant deposes to the following concerning her means: -

"3. ... I am unable to afford representation as I no longer practice in my profession. I say this is due to my duties as a mother and carer in looking after my three children. I say the eldest has special needs."

And

"24. I say I am unable to give an undertaking in damages in this application. I say it would be worthless and therefore disingenuous to do so. .."

It is clear from the foregoing that, other than a general assertion, the appellant gave no evidence whatsoever concerning her lack of means to give an undertaking as to damages. In the absence of any evidence, cross-examination did not arise. A litigant who is maintaining that he/she cannot give an undertaking as to damages due to lack of means is obliged to put before the court evidence of this, not merely an assertion. Apart altogether from the absence of any evidence, the Trial Judge, in my view, gave too little weight to the failure of the appellant to give any undertaking as to damages. It is an essential quid pro quo for the grant of an injunction, even if the applicant for the injunction may not in reality be able to make good their undertaking. The stance taken by the appellant in effect invites the Court to waive the undertaking as to damages on the bare assertion that the litigant will not be able to meet any award of damages on foot of the undertaking. To accede to the submission would be to drive a coach and horses through this ancient and vitally important requirement and I would therefore disagree to that extent with the careful judgment of the High Court.

35. In conclusion, I am satisfied that the Trial Judge was correct in refusing the injunction sought. I would therefore dismiss the appeal.

36. As Promontoria have been "wholly successful" in opposing this appeal, the provisional view of the Court is that it is entitled to its costs. Should the appellant wish to contest this, she may do so by delivering written submissions (not more than 1,000 words) within 14 days

of the date of the delivery of this judgment and in reply, Promontoria may deliver written submissions (again not more than 1,000 words) within 14 days thereafter.

37. As the judgment is being delivered electronically, Costello P. and McDonald J. have authorised me to state that they agree with it.