

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 566
[2014 No. 521 JR]

BETWEEN

HAPPY AGAMAH

APPLICANT

AND

SOUTH DUBLIN COUNTY COUNCIL

RESPONDENT

AND

COMMISSIONER OF AN GARDA SIOCHANA

NOTICE PARTY

JUDGMENT of Mr. Justice Charles Meenan delivered on the 30th day of June, 2022

Background

1. The applicant is a German citizen of Ghanaian origin and has been resident in the State since 2005. The applicant is an engineer by profession and worked as such both in Germany and in the State. Following his redundancy in 2008, he earned a living by driving a taxi.
2. When the applicant first arrived in the State he lived in private accommodation. Subsequently, he applied to the respondent for social housing when he became unable to afford private accommodation. The applicant was allocated a one-bedroom flat at No. 7 Glenmore Green, Ballyboden, County Dublin. The applicant has stated that he suffered repeated assaults, threats, and serious racial abuse. Both his accommodation and taxi were vandalised in these very serious incidents. The applicant requested the respondent to secure alternative

accommodation for him. Following unsuccessful attempts to resolve this issue between the applicant's Solicitor and the respondent, judicial review proceedings were initiated.

Judicial Review proceedings

3. By Order of the High Court of 8 September 2014 (O'Hanlon J.) the applicant was granted leave to seek the following reliefs by way of judicial review: -

“A Declaration that the failure to provide the Applicant with alternative accommodation is a breach of the Respondent's duties under the provisions of the European Convention on Human Rights Act, 2003;

A mandatory injunction requiring the Respondent to re-accommodate the applicant in alternative safe housing;

An Order, further to the provisions of Section 3 of the European Convention on Human Rights Act, 2003, for Damages;

...”

4. Following a hearing before Kearns P., on 3 June 2015 and 17 June 2015, the Court granted the applicant an Order of *certiorari* in respect of the decision made by the respondent not to re-accommodate the applicant. The Order of Court also provided: -

“Liberty to Apply in respect of the Plaintiff's claim for damages at paragraph 3 of the said Notice.”

Paragraph 3 of the Notice of Motion provided as follows: -

“3. An Order, further to the provisions of Section 3 of the European Convention on Human Rights Act, 2003, for Damages;”

Subsequent proceedings

5. On 9 June 2016, the applicant issued a personal injuries summons in the Circuit Court claiming damages for loss, damage, inconvenience, and expense suffered as a result of the failure of the respondent to re-house him.

6. On 13 April 2017, the respondent delivered their defence, which raised a preliminary objection claiming that the personal injuries proceedings amounted to an abuse of process in circumstances where the issues raised in the personal injuries proceedings had been determined, or effectively have been so determined, by the judicial review proceedings.

7. The personal injuries action came on for hearing before the Circuit Court and, according to the applicant, was struck out on consent on the basis that the applicant would pursue the question of damages by way of re-entering the judicial review proceedings, as per the liberty to apply in the Order of Kearns P.

8. The applicant's version of events in the Circuit Court is not entirely accepted by the respondent. In an affidavit sworn by Lyndsey Noonan, Solicitor instructed by the respondent, it is stated: -

“... I say that the Circuit Court proceedings were not struck out on terms that the Respondent was consenting to the Applicant re-entering these proceedings. The Respondent simply consented to the proceedings being struck out with no order for costs.”

9. The applicant issued a Notice to Re-enter, dated 28 May 2018, in which he sought, *inter alia*: -

“1. An Order to re-enter the within matter for the purpose of determining the question of damages for negligence and breach of duty, including statutory duty and common duty of care and/or breach of contract;”

10. The response of the respondent was to issue a Motion seeking certain reliefs, which are the subject of this application. The respondent seeks to have the applicant's proceedings struck out on the basis of inordinate and inexcusable delay and/or by reason of the applicant's failure to apply per the Order of Kearns P. The respondent also seeks an order staying the applicant's claim for damages “*as an abuse of process by reason of the Applicant's failure to comply with*

the directions [...] giving him liberty to apply in respect of the claim for damages with reasonable expedition and/or before the retirement of the former President of the High Court, who heard the within proceedings”.

Submissions

11. In its written submissions, the respondent identified the following issues to be determined: -

- (i) Whether the applicant is guilty of inordinate and inexcusable delay in seeking to re-enter the proceedings to pursue a claim for damages;
- (ii) Whether it is proportionate to strike out the application to re-enter the judicial review to apply for damages if it is found that the procedural failure is sufficiently serious or persistent;
- (iii) Whether in all of the circumstances the application to re-enter the proceedings is an abuse of process by reason of the applicant’s failure to use the liberty to apply mechanism to bring the matter back before Kearns P.; and
- (iv) Whether the refusal of the Court to grant the declaration sought at para. 4 a of the Statement of Grounds must be taken as determining the claim for damages such that it would amount to an abuse of process or a breach of the *res judicata* rule to allow the applicant to pursue an order for damages under s. 3 of the European Convention on Human Rights Act, 2003 (“the Act of 2003”).

12. For his part, the applicant denies that there was any inordinate delay or that there was any abuse of process. He also refers to his affidavit where he stated that the Circuit Court proceedings were struck out on consent on the basis that the matter of damages would be re-entered, as per the Order of Kearns P.

Consideration of issues

13. The terms of the Order of Kearns P. are clear. The applicant was given liberty to apply for damages further to the provisions of s. 3 of the Act of 2003. Section 3 of this Act states: -

“3.— (1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of *subsection (1)*, may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to *subsection (3)*, in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate. ...”

14. Rather than re-entering the proceedings, per the Order of Kearns P., the applicant, following an application to PIAB, issued a Circuit Court personal injuries summons. Though there is a reference in the Circuit Court proceedings at para. 6 (m) to a breach of the provisions of the Act of 2003, the substance of these proceedings is a claim for damages for personal injuries arising from the alleged negligence and breach of duty (including breach of statutory duty) and/or breach of contract.

15. The Circuit Court proceedings were struck out on consent. The applicant maintains that the consent was on the basis that he would re-enter these proceedings, as per the Order of Kearns P. As referred to above, the respondent does not accept this. This is a dispute which I cannot resolve in the context of this application. However, I believe the existence of the dispute is a factor against granting the reliefs which the respondent seeks.

16. There are two aspects of the respondent's application. The first is the submission that the applicant has been guilty of delay in prosecuting the proceedings and that they ought to be struck out based on the principles set in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R.

459. The second submission is that there was a failure on the part of the applicant to comply with the Order of Kearns P. which ought to result in the proceedings being struck out. I will deal firstly with this submission.

17. The respondent relied upon the judgment of the Supreme Court in *Tracey v. McDowell & Ors.* [2016] IESC 44. In his judgment, Clarke J. (as he then was) stated at p. 11: -

“5.1. The jurisprudence concerning the dismissal of proceedings for want of prosecution is now well settled. It does not seem to me to be necessary to add to that jurisprudence for the purposes of this judgment. However, it is, in my view, important to identify a distinction which can properly be made between a general failure of a party to progress their proceedings in a timely manner, on the one hand, and the consequences which it may be appropriate to apply to a specific failure on the part of a litigant to comply with a direction or order of the Court, on the other hand. The former question is the subject of much of the jurisprudence of the courts since at least *Lismore Homes Limited v. Bank of Ireland Finance Limited* [1999] 1. I.R. 501. However, in my view, somewhat different considerations apply where a court is concerned with a specific failure on the part of a litigant to take a step which has been expressly directed by the Court, most particularly where the failure concerned is either itself significant and highly material to the litigation or, indeed, where the relevant failure or failures are persistent.

5.2. It must, of course, be recognised that the response of a court to any procedural failure must be proportionate. Dismissing a claim or, indeed, striking out a defence or otherwise taking significant action which would diminish or extinguish the entitlement of a party to put its case forward at a full trial is a step which should not lightly be taken and should only be taken in response to procedural failure where, in all the

circumstances, that failure is sufficiently serious or persistent to justify the action concerned.

5.3. But it does have to be recognised that there will be cases where it will be proportionate to take very serious action, such as striking out a claim, if the relevant procedural failure is sufficiently serious or persistent. It is also important to understand the reason why that is so.”

18. In this case there was clearly a failure to comply with the part of the Order of Kearns P. which concerned the issue of damages. The question I have to ask is whether this failure was of such an order as would result in striking out the proceedings. This raises the issue as to the terms under which the Circuit Court proceedings were struck out on consent. As referred to earlier, there is a dispute on this so, to accede to the respondent’s application, I would have to reject what the applicant deposed to in his affidavit. I am not in a position to do so.

19. As for the issue of delay, there can be no doubt but that the applicant did delay in pursuing the issue of damages. Even if this delay was inordinate, before striking out the proceedings I would have to be satisfied that the balance of justice lay in favour of making such an order. It is incumbent on the respondent to identify some prejudice as would tilt the balance in favour of the order being sought. The closest which the respondent comes to this is a statement in the affidavit of Lyndsey Noonan to the effect that two “key officials” that were involved in the handling of the applicant’s complaint have since retired. However, it is not stated that these officials are no longer in a position to give evidence or that there is an absence of any relevant documentation.

20. The respondent submits that the application to re-enter the proceedings is an abuse of process in that Kearns P. has since retired. I do not accept this submission as I cannot see any reason why a different judge would not be in a position to assess the damages (if any) which

the applicant is entitled to (see *Mount Kennett Investment Company v. O'Meara and Ors.* [2010] IEHC 216).

21. In his Notice to Re-enter, the applicant seeks to re-enter the following: -

“An Order to re-enter the within matter for the purpose of determining the question of damages for negligence and breach of duty, including statutory duty and common duty of care and/or breach of contract;”

This is clearly not in accordance with the Order of Kearns P., which granted liberty to apply “*in respect of the Plaintiff's claim for damages at paragraph 3 of the said Notice*”. Paragraph 3 of the said Notice refers to: -

“An Order, further to the provisions of Section 3 of the European Convention on Human Rights Act, 2003, for Damages;”

This is what the applicant is entitled to re-enter. It also follows that at the hearing on the issue of damages it will be open to both the applicant and the respondent to make submissions as to the significance, if any, of Kearns P. not making the declaration sought by the applicant in the judicial review proceedings.

Conclusion

22. By reason of the foregoing, I will not make the order sought by the respondent herein.

The applicant is entitled to re-enter the following for determination: -

“An Order, further to the provisions of Section 3 of the European Convention on Human Rights Act, 2003 for Damages.”

23. As for the costs of this application, the applicant and respondent may make written submissions (no more than 1,500 words) to be filed on or before 15 July 2022. I will list the matter for mention before me on 25 July 2022 for the purpose of making final orders.