THE HIGH COURT

[2024] IEHC 525

Record No. 2024/98 CA

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF/ RESPONDENT

AND

CATHAL MALLON

DEFENDANT / APPELLANT

JUDGMENT of Ms. Justice Denise Brett delivered on the 26 day of August 2024

The Appeal:

1. The substantive proceedings, in which the plaintiff/respondent seeks an order for possession of the defendant/appellant's home in Sandymount in Dublin, are proceedings due to be heard in the Circuit Court. The claim for possession arises from monies said to be due and owing to the plaintiff/respondent as lender by the defendant/appellant as a result of the defendant's asserted failure to discharge instalments due to it on foot of a mortgage/charge against his house.

2. This matter comes before the High Court as an appeal by the defendant/appellant of an Order of the Circuit Court (O'Connor J.) made on the 17th of April 2024 refusing his application to set aside the decision of the County Registrar dated the 14th of December 2023 refusing to strike out the plaintiff/respondent's claim against him for want of prosecution on the grounds of inordinate delay. The jurisdiction of the High Court therefore is an appellate one and not original inherent jurisdiction. For ease, the parties will be referred to throughout as plaintiff and defendant.

Background, in brief:

1. The defendant was in the business of property development and had a number of investment properties. A loan was originally taken by him on 10th February, 2005, secured on his house, from Bank of Scotland (Ireland) Limited ("*BOSI*"), which was

subsequently transferred / assigned to Bank of Scotland plc ("*BoS*") in 2010, and then to Tanager Limited in July 2014, which became Tanager DAC in 2016 and hence to it ("*Tanager*"), from whom the current plaintiff is now the current successor in title, having been substituted by Order of the County Registrar on the 1st of December 2022.

2. The loan amount was for the sum of €1.15 million, interest only, for a term of 15 years (i.e. not due to expire until 2020).

3. The defendant experienced difficulties in repaying his loan in 2008. Following a Letter of Demand in April 2011, proceedings seeking an order for possession of the defendant's home were instituted on 16th July 2012 (Circuit Court Record Number 6127/2012 - "*the 2012 proceedings*"). Those proceedings were not produced to this Court.

4. According to the defendant's grounding affidavit to this motion in the Circuit Court, by agreement in the course of those 2012 proceedings, several of the defendant's investment properties were sold over 2013/2014, realising a sum of over €13m, precise details of which the defendant says he only confirmed as a result of tax inquiries made with KPMG, who had acted as receiver for those sales, in 2020. According to the defendant, as part of that settlement, upon the sale of the investment properties, the security on his house was to be discharged. No documentation evidencing that agreement was exhibited in the defendant's grounding affidavit.

5. A Notice of Discontinuance in the 2012 proceedings was served by Tanager on 19th October 2015.

6. The defendant continued to make some payments against his mortgage. however, by early 2017 he had built up significant arrears. The grounding affidavit to the proceedings in the Circuit Court, sworn on the 3rd March 2017, makes no reference to the earlier 2012 proceedings or any details of settlement thereof but focuses on the position relevant to the 2017 proceedings. It exhibits, at "AOB8", a Statement of the defendant's mortgage account from date of extraction of the loan in 2005 to January 2017, showing ongoing arrears of over €110,000 on the interest-only repayments,

together with a Statement commencing in January 2016 showing various mortgage repayments made that year, with a balance due, as of January 2017, of over €1.279m on the loan as a whole.

7. By way of Letters of Demand dated 11th January 2017 and 9th February 2017 the defendant was first called upon to repay the loan in full and then to deliver up possession of the secured property (exhibits "AOB 9" & "AOB10" of the March 2017 affidavit). Ultimately, however, these proceedings were commenced by way of a Civil Bill for Possession issued on the 20th March 2017 ("*these*" or "*the 2017 proceedings*"), seeking an Order for Possession of the defendant's house, due to alleged ongoing failure by the defendant to make the expected instalment repayments.

8. In an affidavit of Peter Bredin, Solicitor, on behalf of the plaintiff, sworn on the 30th October 2023 to re-enter these proceedings in the Circuit Court (having been adjourned generally on the 5th March 2020 and a Notice of Intention to proceed filed on the 9th December 2022) the Circuit Court was informed that "*while efforts have been made by the parties to resolve the proceedings, those efforts did not come to fruition*" and that "*as at 27 October 2023 the arrears on [the relevant] account were [in excess of €1.3m] and that the last payment made by the defendant was on 1st October 2019 in the sum of €1,500*".

Submissions and Relevant Law:

9. In written submissions, the defendant addresses both *O'Domhnaill v Merrick [1984] IR 151* ("*O'Domhnaill*") and *Primor v Stokes Kennedy Crowley [1996] 2 IR 459* ("*Primor*") lines of jurisprudence regarding delay. The *Primor* line of jurisprudence sets out the well-established test of examining the facts to determine whether or not there is delay which is inordinate and inexcusable and where the balance of justice on the particular circumstances of the case lies by reason of that delay, if so.

10. The *O'Domhnaill* jurisprudence is concerned primarily with the overall passage of time since the cause of action accrued, such that the primary focus is on the capacity of a defendant to defend the action, where there is a real or substantial risk that a fair trial cannot take place, notwithstanding there may be no culpable delay by a plaintiff

in prosecuting proceedings. As summarised by Noonan J in the Court of Appeal decision of *Egan v Bank of Ireland [2022] IECA 294*:

a. "*Under the O'Domhnaill strand on the other hand, the court is concerned with assessing the entire period of delay spanning the time from the occurrence of the relevant event to the likely date of trial. If having made that assessment the court is of the view that a fair trial is no longer likely to be possible, it may dismiss the case, irrespective of the fact that the plaintiff... … maybe entirely blameless in relation to the delay that has occurred*".

11. In oral submission, the Counsel for the defendant indicated it had been agreed between the parties that the relevant principles for the delay asserted in this case are those deriving from *O'Domhnaill* only. While the application to adjourn generally having been made by the plaintiff some days in advance of Covid pandemic restrictions kicking in in March 2020 was highlighted by Counsel for the defendant, no serious complaint regarding the passage of time since the commencement of the proceedings was advanced and the defendant confirmed his focus of complaint was on pre-commencement delay and the overall passage of time. The appeal preceded on that basis.

12. Counsel for the defendant highlighted the first letter of demand was served as far back as April 2011, the date he argued the cause of action accrued, and the first set of proceedings had been compromised and settled. According to his written submissions, the defendant believed proceedings were concluded once the 2012 were finalised and he was surprised at the new proceedings. Given the plaintiff was seeking summary judgment, he argued that there was an increased onus on it to proceed expeditiously. The defendant concluded his written submissions by arguing:

> "…*the cause of action accrued in 2011. The plaintiff is not able to deal with the evidence presented by the defendant. Witnesses are not available. The defendant has made provision for his indebtedness*".

13. In respect of prejudice, the defendant relied heavily on the principles set out by the Court of Appeal (Collins J.) in *Cave Projects Limited v Peter Gilhooley & Ors [2022] I ECA 245* ("*Cave*") (at paragraph 26, see pages 26 to 36 of the judgment) regarding injustice, and in addition that *Cave* highlighted a Court must be "…*astute to ensure*

that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant".

14. One of the difficulties for the defendant in this argument, however, is that Collins J. in *Cave* expressly sets out, at page 28, that that "*appeal is not concerned with the O'Domhnaill v Merrick jurisprudence*". It was in its consideration of the *Primor* test applicable in that case that the Court of Appeal indicated that the consideration of prejudice in *Cave* went beyond '*fair trial prejudice*', including that the 'balance of justice' limb of the *Primor* test may allow for general prejudice arising from the passage of time or prejudice by reason of damage to a defendant's reputation.

15. In the circumstances of this case, where the appeal was run on agreed *O'Domhnaill* basis, it is necessary for the defendant to establish that, arising from the passage of time, there is a real or substantial risk of an unfair trial or a clear and patent unfairness in asking the defendant to defend the action *(Manning v Benson and Hedges Ltd [2004] IEHC 316)* to secure dismissal of the proceedings against him.

16. In describing the jurisdiction under the *O'Domhnaill* jurisprudence as "*one which should be sparsely used and little availed of*", the Supreme Court (McKechnie J.) in *Comcast International Holdings Inc v Minister for Public Enterprise [2012] IESC 50* noted the differences between the *Primor* and *O'Domhnaill* jurisprudence and indicated the *O'Domhnaill* test "*has the distinct feature of its focus being on the defendant…the criteria essentially is defendant directed*". McKechnie J set out

> "*… the test to be applied has been described variously such as, by reason of lapse of time or delay: (i) is there a real and serious risk of an unfair trial, and/or of an unjust result; (ii) is there a clear and patent injustice in asking the defendant to defend; or (iii) does it place an inexcusable and unfair burden on such defendant to so defend*?" (at paragraph 40)

17. In *Cassidy v Provincialate [2015] IECA 74*, the Court of Appeal (Irvine J.) set out an approach for an *O'Domhnaill* consideration as:

> "*while the Primor jurisdiction is usually exercised in proceedings where there has been post commencement delay or a combination of pre and post*

commencement delay, the O'Domhnaill jurisdiction is most usually employed where, at the time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the lightly trial date that the defendant can maintain that, regardless of the absence of blame on the part of the plaintiff for that delay, it would be unjust to ask the defendant to defend the claim. The question most commonly considered by the court when exercising its O'Domhnaill jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result". (at paragraph 32)

and

"…*nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice*" (at paragraph 37)

18. This Court must therefore assess the facts as asserted to ascertain if the defendant has established such a risk.

Delay and Prejudice:

19. In his affidavit grounding this motion, sworn on the 6th July 2023, the defendant avers that the "*proceedings have been delayed since 2012*". There have been two separate sets of proceedings however, the first in 2012 and the second, these proceedings, in 2017, both grounded upon separate and contemporaneous letters of demand. Both proceedings were instituted within the currency of the loan term, based on then alleged failure by the defendant to maintain agreed repayments on his loan at the relevant time.

20. Counsel for the defendant expressly did not argue culpable delay by the plaintiff in these 2017 proceedings (the *Primor* considerations), his complaint being of pre-commencement delay and the passage of time overall. The chronology of the 2017 proceedings would appear to bear out the wisdom of such strategy. In brief, there was ongoing litigation interaction after commencement of the proceedings, between 2017 and 2020, in which adjournments were granted without objection to facilitate an Appearance, a number of affidavits being filed by both sides, and personal circumstances of the defendant. Covid interruption, which was beyond everyone's

control, then arose between 2020 and 2022 when no possession proceedings were progressed by the Circuit Court. The current plaintiff was substituted in the proceedings and a Notice of Intention to Proceed was served by the plaintiff in December 2002, whereafter the defendant's two motions to dismiss were being dealt with from 2023 to date. In addition, in the background, both sides aver to attempts being made throughout to resolve matters, albeit such attempts did not bear fruit. While it would have been preferable to have speedier progression of these proceedings, it is unlikely the defendant would have established culpable delay by the plaintiff in their prosecution.

21. Turning then to pre-commencement passage of time: according to his grounding affidavit in this motion to dismiss, the defendant's primary defence to these 2017 proceedings refers to an arrangement he says was made with BoS which led to the compromise of the 2012 proceedings in which he asserts that the security of his home was to have been removed on the successful sale of various investment properties above an agreed minimum price. The defendant avers (at paragraph 4) "… *we entered into a settlement agreement in which I agreed to a limited receivership, the receiver disposed of 12 properties for €13,243,000.00. It was a term of the agreement that the proceeds of the sale would be full and final settlement of my indebtedness and I would retain my home. The settlement was performed and [BoS] adjourned the proceedings generally*." No documentation regarding this agreement is exhibited in the grounding affidavit, as one might expect to see in respect of a settlement resolving a loan of that magnitude.

22. Thereafter, in respect of prejudice, the defendant avers, at para 18, that:

> "*I am 67 years of age. I have been placed under strain and have suffered as a result. My ability to deal with litigation and dispute about debts has been diminished by delay, illness and stress. I had two strokes the first in 2009 and was treated by a consultant until 2019. While my illness has improved, I continue to take lifelong medication*".

23. At paragraph 22, that the proceedings have been '*hanging over*' him since the first letter of demand for possession was issued in April 2011, over 12 years ago, and that:

"*Since then I have cooperated with in turn, the original lender, the Plaintiff and their predecessors in title to help them recover €13,243,000.00. The Plaintiff's predecessor agreed to release the security on my home once the investment properties were sold. I worked for years to complete properties so that they could be sold to repay the loans*".

24. And at paragraph 23, that:

"*I am prejudiced by the passage of time. Since the second set of proceedings were adjourned generally, I believed that the issue had been resolved. I am faced with the prospect of a possession application when nothing has been done for so long. I still believe that I have a very good defence to the plaintiffs' claim. However, whilst I never relished the prospect of a plenary hearing, I would have preferred to have the matter resolved one way or another at an earlier time in my life when I would have been better able to cope with the stress of such litigation and, if it transpired that way, any negative result. It would also have meant that less interest would have accrued to the plaintiff in that event*".

25. The defendant's main defence to the current proceedings therefore lies in the detail of the claimed agreement reached in September 2012, a term of which included "*that the properties would be sold within 18 months and the proceeds be applied to settle [the defendant's] indebtedness and release the security on [his] home*". Counsel for the defendant says this requires oral evidence on the defendant's part and that it is well accepted that memory diminishes with the passage of time, causing prejudice for necessary oral evidence. In addition, he relies upon a past medical condition for which he continues to take medication and the stress of litigation as prejudice arising. He relies upon the principles in *Cave* to argue that general or modest prejudice is sufficient.

26. In response, the plaintiff's replying affidavit of Peter Bredin, Solicitor, sworn in this motion in the Circuit Court on the 26th October 2023 avers that no actual prejudice by reason of the passage of time was identified by the defendant, merely "*bald and general claims*" had been made. While acknowledging the stress caused by litigation, the plaintiff asserts this is no more than the stress common to all litigation and is

relieved somewhat by the benefit of the defendant having the assistance of legal advice. The plaintiff asserts that "*these proceedings are based on documents and a purported issue about witness recollection is not applicable or relevant*", and that, not only has the defendant not suffered actual prejudice but, on the contrary, has benefited from ongoing occupation of his home throughout the time, "*notwithstanding the last repayment was made on the 30th of September 2019*".

27. The plaintiff does not expressly deny the averments of the defendant regarding any past agreement relating to the security on his home nor does it exhibit relevant documentation of the time. Instead, Mr Bredin avers, at paragraph 4 of his replying affidavit on behalf of the plaintiff:

> "*I say that a number of the averments made by [the defendant] in his grounding affidavit are irrelevant to the within motion and/or constitute legal submissions under more appropriately addressed by way of responding submission by counsel for the plaintiff at the hearing of this matter. Accordingly, any omission by me to reply to each and every environment made by the defendant is not to be taken as an admission of any such averment*".

Thereafter the affidavit sets out a detailed chronology of the 2017 proceedings and replies to the defendant's allegation of prejudice and delay, as set out above.

28. Counsel for the plaintiff submitted a more comprehensive book of these 2017 Circuit Court proceedings to the Court for the purposes of demonstrating the detailed affidavits filed by the defendant in the proceedings as evidence of his recall of events and dispelling any assertion of memory lapse as prejudice. These affidavits were not relied upon by the defendant in this appeal and are not a matter for this judgment, their substantive averments being for determination by the Circuit Court in whatever hearing it may direct in due course. The defendant believes he has a very good defence to these proceedings. He is the main witness able to give oral testimony to establish the terms of any agreement he says was made with the plaintiff's predecessors in title and/or their agents concerning his home as security for the loan in this regard. In so far as the defendant expressed concern at the absence of factual witnesses to such agreement on behalf of the plaintiff, this seems to me, if anything to be an advantage for the defendant, but in any event, is entirely a matter for the plaintiff.

29. Counsel for the plaintiff drew the Court's attention to some elements of these substantive affidavits and it does appear to me, on brief perusal, that the plaintiff's assertion that the passage of time has not caused any memory difficulties for the defendant needed for oral testimony is well made.

30. The grounding affidavit to these proceedings, sworn on the 3rd March 2017, makes no reference to the earlier 2012 proceedings or any details of settlement thereof but focuses on the position relevant to the 2017 proceedings. The Statement of the defendant's mortgage account exhibited therein, from the date of extraction of the loan in 2005 to January 2017, when the fresh letter of demand issued, shows ongoing arrears of over €110,000 on the interest-only repayments, together with a Statement commencing in January 2016 showing the mortgage repayments made that year, with a balance due of over €1.279m on the loan as a whole.

31. The defendant's replying affidavit of 3rd October 2018, over 18 months later, makes no reference to those 2012 proceedings either or to any settlement term regarding the discharge of his home as security. The defendant avers in 2018 only that he was surprised at plaintiff seeking an order for possession in the 2017 proceedings "*in circumstances where there is an ongoing process by which the plaintiff and I are attempting to reach a settlement and, the plaintiff is in breach of the terms and conditions of our agreement by seeking an order for possession before the resolution process is complete. This process is ongoing and will take more than two months to complete*." He further averred that he:

> "*8. ..engaged with the plaintiff's agent to resolve the matter. Throughout my engagement which began in August 2016, I have made monthly repayments of €2000 and I continue to make these payments.*
>
> *9. My engagement with the plaintiff comprises of two strands; the first is that I make monthly payments and the second is that I engage to resolve the overall indebtedness and arrears. <u>It is my intention to repay the arrears and balance of the loan in full by either refinancing the loan or in the event that it is not agreeable or possible, by the sale of the secured property; my home</u>. The engagement to resolve the matter is done through an Alternative Repayment*

Arrangement which the plaintiff has designed and the terms and conditions of this process now form part of the loan agreement." (emphasis added)

The Alternative Repayment Arrangement is not exhibited.

32. The plaintiff's averments in this affidavit do not, on their face, seem compatible with a belief in 2018 that the sale of the properties subject to the limited receivership agreed in September 2012 was intended to discharge the security on his home. Rather the opposite appears to be the case, that the plaintiff was aware he had an ongoing indebtedness to the plaintiff on his mortgage account, which he was trying to resolve, at least from 2016. While the defendant complains he was "*inundated with phone calls, emails, statements and letters threatening more legal action*", such documentation was not exhibited in support of that averment. In any event, his recall of detail does not appear to be dimmed.

33. In any event, and not unsurprisingly as it was not set out in the defendant's replying affidavit, in the subsequent affidavits on behalf of the plaintiff, any term regarding removal of the security on his home is not addressed, albeit the existence of an alternative payment arrangement is strongly contradicted.

34. Later affidavits of the defendant refer to 'matters moving on' but relevant documents referred to are not exhibited, at least in not affidavits presented to the Court (in his affidavit of 5th July 2019, the defendant refers to a letter of 10th February 2019 exhibited at "CMA" in his 'last affidavit' but the only previous affidavit seen was his replying of the October 2018, where exhibit "CMA" is a general document setting out the plaintiff's complaints and appeals process).

35. The first time that a reference to an agreed term of removing the defendant's house as security for the loan in any of the defendant's affidavit before the Court appears in his affidavits grounding the two motions to dismiss. The detail is vague, amounting only to his bald (albeit consistent) averment as to the existence of that claimed term. The defendant avers he was told (at some unspecified time) by the plaintiff's then agent that "*his investment portfolio did not sell under the limited receivership settlement undertaken by KPMG in 2012*" and only paid such monies "*due to having been given that incorrect information*".

36. The defendant avers he only discovered the plaintiff's realisation of the sum of over €13m in the receivership following property register searches and a tax query with KPMG in 2020. However, the defendant gives no explanation of his actions in the intervening time or why such investigations were not conducted by him sooner, particularly in 2015, when he was notified of the discontinuance of the 2012 proceedings, if there was any doubt. I do not accept that it was reasonable for the defendant to have done nothing to investigate the position regarding those properties until 2020, several years later, given the import of the effect he alleges their sale ought to have had on his obligation to pay anything at all from 2014 (i.e. the expected 18 months after the agreement is said to have occurred) or any reasonable date thereafter, particularly given he avers to much interaction with the plaintiff's agents over this time. If any prejudice arises due to the passage of these years, a significant contribution therefor must lie at the defendant's door.

37. Additionally, in respect of the defendant's ability to remember detail for the purposes of oral testimony, in both his October 2018 and July 2023 affidavits, he recites other meetings on specific dates, going back to 2012 with some detail. He sets out proposals he made over time in respect of his indebtedness, again in more detail, and he exhibits some relevant documentation he says evidences his relevant actions during this time.

Conclusion:

38. Over 10 years had passed since the alleged agreement in September 2012 before the first motion to dismiss was brought in 2023 (in respect of these second proceedings). This is a significant amount of time. The prejudice asserted by the defendant is the general effect of time on memory for oral testimony, coupled with the stress of litigation and some ongoing medical effects due to having suffered two strokes over time.

39. However, two separate sets of proceedings based upon ongoing default arose over that time. The first set of proceedings were concluded by the service of the Notice of Discontinuance in 2015. The second were commenced based on claimed ongoing, recent default in 2017, as evidenced by the Statement of account. The absence of detail in respect of the terms of the agreement at the heart of the defendant's asserted defence to the second proceedings makes its assessment as a realistic defence difficult

for the Court. Most importantly however, in light of the detail evident in the defendant's affidavits overall, I do not see that his memory of events to date, and in particular his proposed defence to the proceedings concerning an agreement with the plaintiff's predecessors, has been adversely affected in any meaningful way, and certainly not to the extent that there is a real risk of an unfair trial in these proceedings and/or of an unjust result. On the contrary, he has been quite vocal on affidavit in his recollections for these proceedings to date. There does not seem to me to be a clear and patent injustice in asking the defendant to defend the proceedings nor does it place an inexcusable or unfair burden on him to so defend (per *Comcast*), notwithstanding there is a level of stress in litigation.

40. As regards ill health – while the defendant attributes his ill health to pressure and stress by the lender (the plaintiff and its predecessors in title) and the litigation, no medical evidence was put before the court one way or the other. Other than the defendant's bald assertion, there is no correlation between his ill-health and the litigation. It is noted that the defendant first suffered a stroke in 2009, in advance of any proceedings, at a time when he was encountering significant difficulties with his business. The defendant avers he has now recovered and is disease free. At all times he has remained in his home, albeit he remains on medication and complains of his ability to deal with litigation and disputes on his debts is diminished by his illness and stress. That is a difficulty with which I would have sympathy. Litigation is not easy for any litigant, in any circumstances and generates stress most litigants would prefer to be without. However, the defendant has the assistance of both his legal representation and his doctors to manage litigation-related stress or any illness.

41. Medical difficulties are not sufficient to warrant the draconian step of dismissal of proceedings, at least in the absence of more fulsome medical evidence directly addressing the core issues for consideration. Counsel for the defendant wisely did not push this ground too strongly, albeit he argued, in all the circumstances, the medical averment was capable of amounting to 'moderate prejudice' relevant to a consideration of the balance of justice, as arose in *Cave*. Again however, *Cave* was an appeal concerning the *Primor* jurisprudence and not the *O'Domhnaill* considerations. Insofar as the defendant complains of increasing interest accumulating in the interim, this is a matter which can be dealt with in the course of the hearing, as relevant.

42. For the reasons set out above, I would dismiss this appeal and affirm the order of the Circuit Court of 17th April, 2024. The substantive proceedings should now be brought on for hearing with urgent expedition before the Circuit Court.

43. As this judgment has been delivered electronically, I propose to make a similar order in respect of costs as was made by the Circuit Court, i.e., costs of the appeal to the plaintiff, having been successful in defending the appeal, to be taxed in default of agreement, with a stay pending conclusion of the proceedings. I will grant liberty to either side to file brief written submissions on costs, of no longer than 2500 words, on or before 23rd September 2024, in respect of such proposed Order, if either party wishes to be heard in respect of such proposal.