

# THE HIGH COURT

[2023] IEHC 255

Record No. 2020/215CA

**BETWEEN**

**PERMANENT TSB PLC FORMERLY IRISH LIFE AND PERMANENT PLC**

**PLAINTIFF**

**AND**

**MATTHEW FARRELLY**

**DEFENDANT**

**EX TEMPORE JUDGMENT of Ms. Justice Hyland delivered on 5 May 2023**

## **Introduction**

1. This is an appeal by the defendant against the decision of Judge Linnane of 20 November 2020 whereby she set aside the decision of the County Registrar to dismiss the within proceedings for an apparent failure to observe previous Orders of the Registrar and reconstituted the proceedings, substituting Start Mortgages Designated Activity Company for Permanent TSB. It is brought by way of Notice of Appeal dated 18 January 2021.
2. The motion to set aside and reconstitute was brought by Start Mortgages Designated Activity Company. However, the defendant did not reflect the reconstitution of proceedings ordered by Linnane J. on 20 November 2020 in his Notice of Appeal so this appeal incorrectly identifies the previous plaintiff, Permanent TSB. In fact, Permanent TSB took no part in these proceedings.

3. Turning to the history of the proceedings, Permanent TSB issued a Civil Bill on 24 January 2018 seeking possession of 16 Nutley Square, Donnybrook, Dublin 4. Permanent TSB lent the defendant the sum of €431,250 on 8 January 2009 by a facility letter of that date. The mortgage was created on 29 January 2009. On 15 December 2017 the defendant was indebted in the amount of €510,743.
4. The Civil Bill was assigned a date before the County Registrar in the ordinary way. It appeared before the County Registrar on a number of dates. Ultimately, the County Registrar made an Order on 25 October 2019. The terms of that Order are important, and so I should identify those terms at this point in time. That Order identified that:

*“Whereupon and on reading the pleadings and documents filed herein and on hearing the evidence adduced and what was offered by Counsel for the Plaintiff and Solicitor for the Defendant.*

**THE COURT DOTH ORDER:**

*(1) That the plaintiff’s civil bill hearing be and the same is hereby dismissed for want of prosecution for failure to comply with the previous court orders. The issue in this case arises with the Plaintiff (sic) compliance with the CCMA and its failure to provide all information to the Defendant.*

*(2) That the Defendant do recover from the Plaintiff the cost of the Proceedings to be taxed in default of agreement”.*

5. Permanent TSB brought a motion on 1 November 2019 seeking to set aside that Order. The application, at paragraph 1, identified that it was an Order seeking to set aside the whole of the Order of the County Registrar of 25 October 2019. Paragraph 2 sought an Order pursuant to Order 22, rule 4 of the Circuit Court Rules substituting the applicant “Start Mortgages Designated Activity Company” as

plaintiff in the within proceedings in lieu of Permanent TSB plc. formerly Irish Life and Permanent plc.

6. There were a number of outings before Judge Linnane. Ultimately, she gave her decision on 20 November 2020. She recites in the Order that:

*“On hearing counsel for the applicant and solicitor for the defendant and having refused the application by the defendant for an adjournment, the Court doth make an Order pursuant to O.22, r.4 substituting Start Mortgages Designated Company as plaintiff in lieu of Permanent TSB in the proceedings and the Court doth order that all future proceedings be carried on between Start Mortgages as plaintiff and Matthew Farrelly as defendant and the Court doth adjourn the substantive proceedings to the end of April 2022 at a date and time to be fixed by the Circuit Court office”.*

It is clear from the transcript of the proceedings which have been placed on affidavit before me that she was setting aside the Order of the County Registrar on the basis that it was disproportionate and excessive, and that the proceedings were now in a position to proceed in the normal fashion. As I have said, she also made an Order reconstituting the title of the proceedings.

**Order of Linnane J.**

7. Under s.37 of the Courts of Justice Act 1936, the High Court when hearing an appeal against a decision of the Circuit Court is acting *de novo*. This means that the High Court carries out an entirely fresh review of the decision of the County Registrar and is not reviewing the decision of the Circuit Court. The defendant has placed a great deal of emphasis on the way in which the hearings took place before Linnane J. and has made a claim of objective bias on the part of the Judge. To support that claim, the defendant has obtained the digital audio recording of the

hearings and has exhibited the transcripts of the hearings. I have read all of those transcripts carefully. There was also a detailed affidavit filed by the defendant identifying the different heads of prejudice.

8. However, this is not a judicial review where the defendant is seeking to quash the decision of Linnane J. on the basis of objective bias. If that were the case, then it would be appropriate for me to review the transcripts to adjudicate upon the claim of objective bias for the purpose of considering the legality of the decision of Linnane J. But that is not the nature of the jurisdiction conferred upon me by s.37. Rather I must consider the motion to set aside the decision of the County Registrar afresh. That this is the task before me is confirmed by the fact that the moving party in the motion is Start Mortgages who are obliged to persuade me that they are entitled to the reliefs that they seek.
9. In response to this point being raised at the hearing today, the solicitor for the defendant indicated that, because of the importance of the administration of justice, I should exercise my inherent jurisdiction and I should consider the manner in which the case was dealt with in the Circuit Court. He said that this was an end in and of itself, while conceding that it might not have any bearing on the outcome of the motion due to the limitations of s.37. I do not enjoy inherent jurisdiction in the context of this appeal, following the decision of Simons J. in *Promontoria v Mahon* [2019] IEHC 218.
10. I do of course fully accept the submission that the notion of impartial administration of justice is enormously important. I recognise that if the Circuit Court decision was relevant to my decision, then it would be necessary to adjudicate on the defendant's claim of being unfairly treated. However, I am deciding the case afresh and I am not in any way bound or circumscribed by what

was done in the Circuit Court. The defendant has had an opportunity to respond to the motion again and has had the benefit of introducing new evidence from the County Registrar in that respect, which evidence I have considered carefully. It was opened to the Court today and paragraphs were identified by the solicitor for the defendant. This is a new hearing and is not affected by either the outcome of the Circuit Court hearing or the nature of the hearing itself.

11. The defendant could have sought to judicially review the decision of Linnane J. and sought declaratory relief in that context. Sensibly, in my view, he decided to opt for an appeal whereby there would be a fresh adjudication on the decision of the County Registrar.
12. In those circumstances, I decline to adjudicate upon the claim of objective bias because any decision I would make in that regard would be outside my jurisdiction and irrelevant to my consideration of the legality of the decision of the County Registrar. It is the legality of that decision that I am concerned with and not the legality of the decision of Linnane J.

### **Jurisdiction of County Registrar**

13. Turning now to the legality of the County Registrar's decision, Start Mortgages asserts that the Registrar was not entitled to strike out or dismiss the proceedings as she did not enjoy the jurisdiction to do so. It is trite law that the Circuit Court is a court of limited and local jurisdiction and does not enjoy an inherent jurisdiction. Still less does the County Registrar enjoy any inherent jurisdiction. The jurisdiction of the County Registrar is delineated by the rules of the Circuit Court, which in turn are made by way of delegated legislation. The relevant rule covering actions for possession and well charging reliefs is Order 5B of the Rules of the Circuit Court. This was inserted by Statutory Instrument No. 264 of 2009. The Order

applies to proceedings where the plaintiff claims *inter alia* recovery of possession of any land on foot of a legal mortgage or charge. This is such a case.

14. Order 5B(4) provides that every Civil Bill to which this Order applies shall be assigned a return date before the County Registrar. Under Order 5B(5)(3), a defendant intending to defend proceedings shall enter an appearance. Both of those steps were taken in the within matter. Under Order 5B(7), the powers of the County Registrar on the return date of the Civil Bill or any adjournment from such date are set out. They are expressed as powers enjoyed by the County Registrar in addition to any other Order which the County Registrar has power to make. The plaintiff argues that the County Registrar has no additional powers to strike out proceedings or dismiss proceedings in the circumstances as there is no such power identified in Order 5B.

15. However, the defendant relies upon the power of the County Registrar under a completely different Order, being Order 18(1)(vi) of the Circuit Court Rules, which provides that the County Registrar may make an Order to dismiss an action with costs for want of prosecution or for failure to make an affidavit of discovery or to answer interrogatories. The Order of the County Registrar recites that she is dismissing the proceedings for want of prosecution, as previously identified, although the defendant in fact characterises the dismissal as being not for delay but for failure to comply with Court Orders.

16. Counsel for the plaintiff points to Order 5B(2). Order 5B(2) identifies:

*“Save where otherwise expressly provided by this Order, in the event that any conflict shall arise between the provision of any rule of this Order and any other provision of these Rules, the provision of the rule of this Order shall, in respect of any proceedings to which this Order applies, prevail”.*

17. On the other hand, the solicitor for the defendant argues that there is no conflict between the provisions of Order 5B and Order 18. I am satisfied that Order 5B and Order 18(1)(vi) do not clash, such that the Registrar has no discretion to dismiss for want of prosecution. Nor, contrary to the submission made by counsel for the plaintiff, is there any requirement that the Registrar must refer the decision in respect of dismissal to the Judge. That is a discretionary matter. In fact, it may not have been put as high as that by counsel, but certainly I think counsel felt it was a situation where the County Registrar ought to refer to the Judge. That is, as I have said, a discretionary matter.
18. Nor do I fully agree with the submission of counsel for the plaintiff that *Tracey* distinguishes between a want of prosecution jurisdiction and a failure to comply with procedural directions, such that the latter could not be considered to come under the want of prosecution jurisdiction. My reference to *Tracey* is to the Supreme Court decision of *Tracey v McDowell & Ors* [2016] IESC 44. This is a particularly important decision since it specifically deals with dismissal for failure to comply with Court Orders and therefore it is directly on point in this matter. It is a decision that I brought to the attention of the parties. The parties were given an opportunity to consider it over lunch and indeed during the course of the afternoon and were both helpfully able to make submissions on it, so the parties have had an opportunity to be heard in relation to this decision.
19. As a decision of the Supreme Court, I am bound by same. Importantly at paragraph 5.1, Clarke J. distinguishes between the want of prosecution jurisdiction and the dismissal of an Order on the basis of a failure to comply with directions. He says it is important to identify a distinction which can properly be made between a general failure of a party to progress the proceedings in a timely manner on the one hand

and the consequences which it may be appropriate to apply to specific failure on the part of a litigant to comply with the direction or Order of the Court on the other hand. He goes on to say that:

*“The former question is the subject of much of the jurisprudence of the courts...[h]owever...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.”*

20. I do not read that paragraph as meaning that they are separate jurisdictions but rather that they come under the same umbrella but there are different considerations in relation to them. Importantly, when one reads the remainder of the judgment, it is quite clear that what the Court has in mind is a failure on the part of a litigant to take a procedural step that has been expressly directed by the Court. One looks for example at paragraph 5.3 where Judge Clarke refers to the relevant procedural failure being sufficiently serious or persistent and again at paragraph 5.2 in response to the procedural failure being sufficiently serious or persistent. That is relevant to what I am about to identify next.
21. Applying those principles to the particular case, it seems to me that in principle the County Registrar enjoys a jurisdiction in an appropriate case to dismiss for want of prosecution including in a case governed by Order 5B. But those conclusions do not resolve the matter. I must consider whether the County Registrar was, in this case, exercising that power in substance. As I have identified, she characterises her Order as one for want of prosecution and she went on to identify the wrong as being for *“failure to comply with the previous court orders”*.



22. In summary, in this respect, insofar as the Court Orders are concerned, I will take the defendant's case as at its highest – although this is not borne out by the evidence on the transcripts – and therefore I will treat the case as one in which the Registrar made Orders on 31 January 2019 and 31 July 2019 requiring material to be provided by the plaintiff to the Court in respect of certain information, and on 17 October 2019 an Order extending the time for that affidavit. The affidavit in question was provided on 23 October 2019, being the supplemental affidavit of Eva McCarthy sworn on behalf of the plaintiff. That affidavit provided some information, exhibited some documents, and contested the entitlement of the defendant to other information. That affidavit was before the Court on 25 October 2019. It appears it may have been one day late in being provided to the defendant, possibly due to a difficulty in opening the electronic copy but there is no doubt that it was before the Court on 25 October.
23. There was therefore no failure to respond to Court directions or want of prosecution. Rather, the County Registrar appears to have taken the view that the affidavit did not comply with her directions in relation to the substance of what was provided. No Orders have been produced by the defendant to identify precisely the nature of the obligation imposed by the County Registrar on 31 January and 31 July 2019. The transcripts do not identify those obligations either. Indeed, the transcripts do not make any reference to an obligation in that respect on either 31 January or 31 July. But what is clear is that the County Registrar dismissed the case, not because no affidavit had been filed by the plaintiff or because the plaintiff had failed to prosecute the proceedings, but rather because the County Registrar was not satisfied with the substance of the step taken by the plaintiff.

24. The defendant has asked that I listen to the DAR so as to consider whether there were omissions in the typed transcripts and so that I could understand the nature of the Orders that, on his case, were made in January and July 2019. I have already indicated that for the purposes of this hearing, I am accepting that there were Orders made by the County Registrar in this respect despite their absence from the transcripts. There is no reason for me to listen to the DAR. I am accepting for the defendant's benefit, that Orders were made. But that does not absolve the County Registrar of the obligation to identify with precision the nature of the Orders that were breached and the dates of those Orders. Where a judicial officer decides to dismiss proceedings for an alleged breach of Orders or as she put it "*the failure to comply with the previous court orders*", there is an absolute obligation to identify with particularity the date of the Order and the nature of the Order, the precise terms, and the failure of the person bound by the Order. None of that may be discerned from either the transcript of the hearing of 25 October 2019 or from the Order of the same day that I have already read out. All courts and adjudicative bodies are obliged to make the basis for their decisions absolutely clear. There is an obligation to provide reasons. Indeed, the failure here goes beyond a failure to provide reasons and rather is a failure to identify the basis of the Order. The Order simply makes reference to what I described as "*previous court orders*" without specifying them and then moves to the substantive aspects of non-compliance.
25. This seems to me to go far beyond the jurisdiction identified in Order 18(1)(vi) i.e. to dismiss for want of prosecution. Dismissal for want of prosecution involves a court considering whether a party is guilty of inordinate and inexcusable delay and whether the balance of justice favours dismissal. I have said already that Clarke J. makes it clear that a Court can also, under the umbrella of that heading, be

concerned with whether there has been a breach of a procedural Order. But what it certainly is not concerned with is the breach of a substantive obligation as identified by the Registrar here i.e. the plaintiff's compliance with the CCMA. That is an issue that will be an issue in the proceedings, and it is certainly not a procedural issue. It is a substantive issue. Similarly, the question of the failure to provide information to the defendant in circumstances where an affidavit was filed by the plaintiff in that respect is no longer a procedural matter, where the import of the Order is that the County Registrar did not agree with the approach of the plaintiff in this respect. It has moved into the substantive realm.

26. In those circumstances I conclude that the County Registrar was not exercising, in substance, her jurisdiction to dismiss for want of prosecution despite the reference on the face of the Order to a dismissal for want of prosecution. Both the transcript of 25 October 2019 and the remainder of the Order demonstrate that she was dismissing the matter because the plaintiff's affidavit did not contain the material that she considered it ought to contain. In so doing she exceeded any jurisdiction she enjoyed under Order 18, rule 1(vi).

**Failure to exercise her jurisdiction correctly**

27. However, in case I am incorrect about the existence of the County Registrar's jurisdiction, and for the sake of completeness, I will proceed to consider whether she acted lawfully in dismissing the proceedings, assuming she did enjoy jurisdiction. In this respect, the fact that she dismissed the proceedings rather than striking them out is crucial.
28. A dismissal by a court follows a substantive engagement and adjudication on the merits of the case by the Court. It means that the proceedings are at an end and may not be brought again given the rule of *res judicata*.

29. On the other hand, where a case is struck out, then provided the matter is not statute barred or more correctly the defendants do not raise the issue of statute barring, proceedings can potentially be issued again. The solicitor for the defendant squarely accepts that the County Registrar Order, if upheld, would end the proceedings in their entirety for the plaintiff. This would have the effect that the defendant would receive an extraordinary windfall in that he would have no obligation to repay the very significant sum he borrowed, or the interest that has accumulated on same, given that there have been no repayments on the loan since 2013. The amount due and owing was at the last calculation, in excess of €580,000 and it is likely significantly more at this point given the elapse of time. This would mean that his property is effectively and in substance mortgage free. The prejudice to the plaintiff of such an outcome is so significant that it would have to be very carefully considered by a court in making any dismissal Order.
30. In the case of *Tracey*, Clarke J. set out the steps that would have to be taken by a court deciding to make any such Order and I will come to those shortly. However, it seems to me that even before one gets to those steps, any such dismissal would have to be founded upon a motion brought by the defendant seeking to dismiss the proceedings. This is necessary to ensure fair procedures so that the plaintiff would understand that the risk in the defendant succeeding would be that its proceedings would be completely at an end. No such motion was brought. Rather, what happened was that the defendant, in two of its affidavits prior to the matter coming before the County Registrar, sought in the last paragraph of each a dismissal of the proceedings. This is not the equivalent of a motion.
31. Second, the defendant would have to identify with particularity in the motion the Orders that had been breached, the dates of those Orders and the terms of those

Orders, again so that the plaintiff would understand the case being made against it. Again, no such step was taken. Then, as *Tracey* identifies, the Court would have to consider the nature of the procedural failure. The County Registrar failed to do that by not specifying the dates and terms of the Orders alleged to have been breached. This failure was particularly stark in circumstances where the plaintiff had filed the affidavit of Eva McCarthy. The Court would be required to consider whether the procedural failure was persistent, was highly material to the litigation, and was serious or significant. As identified at paragraph 5.7, at that point the Court should consider what sanction or consequence would be proportionate. The Court would have to identify any excuse that was being provided by the plaintiff in this respect. At paragraph 7.7 Clarke J. identifies that the Court should also consider whether a dismissal of the proceedings was appropriate rather than some lesser measure. This is a particularly important step where the consequences of a dismissal are so draconian. Collins J. in a recent decision of the Court of Appeal, *Cave Projects Ltd v Kelly* [2022] IECA 245, in relation to dismissal for want of prosecution, identifies that where a person is successful in striking out a case for want of prosecution, the plaintiff suffers what he described as “*terminal prejudice*”. Given the severity of the remedy, Clarke J. focussed on the question of whether a dismissal of the proceedings rather than some lesser measure was within the range of proportionate responses which it was open to the Court to take in all of the circumstances of the case. Very importantly, he identifies that in all such cases the Court is required to determine where the balance of justice lies. At paragraph 7.9, he identified that in that particular case, given the circumstances of the case, a dismissal of the proceedings was a disproportionate sanction to impose for the undoubted

procedural failure present. So, the mere fact of a procedural failure cannot amount to a point where a dismissal is automatic or anything like it.

32. In summary, any exercise by the County Registrar of her jurisdiction in this respect would have to be carefully exercised, with the ultimate determining factors being the balance of justice and proportionality. Because of the failure to take the above steps, in my view the County Registrar failed entirely to consider balance of justice and proportionality.
33. It was not proportionate to dismiss these proceedings. As identified in my previous section, at its height that jurisdiction could only be exercised in respect of a procedural failure. By 25 October 2019, the plaintiff had filed the supplemental affidavit of Ms. McCarthy. That affidavit exhibited the response to the defendant's solicitor's letter of 8 July 2019 and had engaged with the question of additional documents. It identified that the defendant's solicitor had been advised that, in relation to ancillary documents, a data subject access request was identified as the appropriate mechanism through which to obtain the documents and had explained why the standard financial statement ("SFS") had been assessed and deemed unsuitable. Ms. McCarthy avers that the plaintiff assessed the SFS in line with the requirements of the CCMA (Code of Conduct on Mortgage Arrears). She identified that the plaintiff is entitled to the Order for possession.
34. The County Registrar may have taken the view that this was not substantively a response that she agreed with, but as identified above, in doing so she went well beyond considerations of compliance with procedure and was moving into the substantive realm.
35. In short, I am satisfied that in circumstances where the plaintiff set out its position in this replying affidavit, it was no longer in breach of its procedural obligations

(assuming for the purpose of this case that it had previously been in breach) and that therefore there was no basis to dismiss the proceedings. Nor from a proportionality point of view was it appropriate to dismiss the proceedings. From the balance of justice point of view, again it seems to me that it was quite inappropriate to dismiss the proceedings.

36. In those circumstances I will set aside the Order of the County Registrar and I direct that the substantive proceedings be remitted to the Circuit Court Office. This matter should go into the Circuit Court list and not back to the County Registrar. Counsel might assist me in the correct form of words in that respect.
37. Before doing so I should just identify that, in relation to the reconstitution application that the plaintiff has brought, there is no objection by the defendant. I therefore make an Order that all future proceedings be carried on between Start Mortgages Designated Activity Company as plaintiff and Matthew Farrelly as defendant.