THE HIGH COURT

[2008 No. 939 S]

BETWEEN

HAVBELL DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

MARTIN O'HANLON AND ANN O'HANLON

DEFENDANTS

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of July, 2018.

1. By notice of motion dated 11th September, 2017, the defendants bring this application for an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts dismissing the plaintiff's claim for want of prosecution. Alternatively, they seek an order pursuant to the inherent jurisdiction of the court dismissing the claim for want of prosecution on the grounds of inordinate, inexcusable, prejudicial and/or undue delay.

2. The underlying proceedings were instituted by way of summary summons dated 22nd April, 2008. The amount claimed on foot of the summons is €156,652.08 being the balance of monies allegedly due and advanced by the plaintiff to the defendants in respect of various accounts. The basis for the proceedings and this application are more fully outlined in the grounding affidavit of the first named defendant sworn on 29th August, 2017 – an affidavit which he swears on behalf of the then three defendants.

3. By order made on 12th June, 2018 the Master of the High Court gave liberty to the plaintiff to amend the title of proceedings. The interest in any loans and or these proceedings had been transferred to Havbell DAC ("*Havbell*") in 2016 by the initial plaintiff Irish Life and Permanent plc t/a Permanent TSB, being the initial plaintiff ("*Permanent TSB*"). The third named defendant was effectively excluded from the proceedings thereafter as the loans which were transferred and which are the subject of the proceedings, and do not include a sum of €25,483.91 and for which it was alleged that the third defendant had a liability.

4. Mr. O'Hanlon avers that the proceedings arise out of transactions which were entered into many years previously. The plaintiff advanced a number of mortgage loan facilities to the defendants, the last of these being advanced in or around 2003. In 2004, the defendants decided to refinance their borrowings with a mortgage loan facility from AIB plc. To this end, they instructed their former solicitors to write to Permanent TSB requesting the redemption figures for all outstanding mortgage loan facilities. Permanent TSB duly provided redemption figures on the loan accounts on 26th July, 2004. The loans appear to have been in respect of a number of properties in places such as Swords, Phibsboro, Glasnevin, North King Street, Courtown and Drumcondra. It is averred that monies were duly paid and by letters of the 26th July, 2004, the defendants received notification that the mortgages had been discharged and that no further monies were due in respect of any finance/loans for those properties. Mr. O'Hanlon avers that sometime later, in 2007, Permanent TSB asserted that a loan facility which had been advanced and secured on a property in Glasnevin had not been redeemed and sought possession of the property. As far as the defendants were concerned, all relevant mortgage loan facilities had been fully discharged. This issue was raised with Permanent TSB by the defendant's solicitors but no satisfactory response was received and indeed the defendant submitted a complaint to the Financial Services Ombudsman in July, 2007. The outcome of this complaint is not clear from the evidence before the Court.

5. In any event, on 15th August, 2007 Permanent TSB wrote to Mr. O'Hanlon's solicitors demanding repayment of the sum of €150,008.04 and warned of its intention to issue proceedings to recover the sum if such payments were not made within seven days. Thereafter these proceedings were issued by summary summons dated 22nd April, 2008 to which an appearance was entered on 28th April, 2008. No further steps were taken in the proceedings until the application to amend the title of proceedings came before the Master in June, 2018. No replying affidavit has been filed and no attempt has been made on affidavit to put forward any excuse for the delay in the prosecution of this case prior to this motion being brought by the defendants. Such reasons as are relied upon were made by counsel in argument before the Court on the hearing of this motion, and to which I will return in due course.

6. Mr. O'Hanlon also avers that the defendants instituted plenary proceedings against the plaintiff on 30th June, 2010 to ventilate their complaints regarding the plaintiff's conduct but no further steps have been taken in those proceedings and indeed an appearance has not been entered.

7. On 23rd September, 2016, Mr. O'Hanlon's solicitors received a letter from solicitors acting for Havbell Ltd. The letter asserted that the security documents associated with the loan facilities, the subject matter of the proceedings had been transferred to Havbell. On 24th February, 2017, the solicitors for the defendants wrote to Permanent TSB protesting at the delay, and sent a copy of the letter to the solicitors for Havbell. The letter, *inter alia*, stated:-

> *"In our view such a delay is clearly inordinate and inexcusable and we can conceive of no reason for the dilatory approach taken by the Permanent TSB in this matter. We believe that it is most unfair that our clients should have a claim made against them in High Court proceedings that have continued to hang over them for almost nine years since the institution of proceedings.*
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> *We advise that we have now been instructed to apply to the High Court to dismiss the said proceedings on the grounds of delay and we are now affording you an opportunity to explain the said delay and in particular to explain why no step has been taken in these summary proceedings, which ought to have been prosecuted with expedition but which appear to have remained in abeyance for almost nine years."*

The letter advised that the defendants proposed to apply to have the proceedings dismissed on the grounds of delay; and that unless a satisfactory explanation for the delay was forthcoming within fourteen days, the defendants would so apply to court. No response to this letter has been put before the Court, specifying any reason for the delay.

8. Counsel for the defendants submits that it is unfair and oppressive that the proceedings continue to hang over his clients for a period of almost ten years without any action being taken by the plaintiff (or any potential successor of the plaintiff in these proceedings) during that time.

9. Counsel relies on certain authorities dealing with the jurisdiction of the court to dismiss cases for delay and in particular relies on decisions which it is contended are particularly relevant to this type of case, where summary judgment is sought. In *Allied Irish Banks plc. v. Pierce* [2015] IECA 87, Hogan J. referred to what he described as the limited purpose of summary summons procedure namely, *"to provide for a speedy mechanism whereby a plaintiff creditor can recover a liquidated sum from a defaulting debtor"*. Counsel lays particular emphasis on the fact that these proceedings come before the court by way of summary proceedings, which in the ordinary way would be and should have been prosecuted with reasonable expedition, something which has not occurred in this case.

10. Reliance is also placed on a further decision of Hogan J. in *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11. That decision concerned an allegation that the plaintiff had suffered hearing loss. There were very significant delays both before and after the commencement of proceedings. A motion to dismiss on the grounds of delay was brought by State defendants, who had been joined in the proceedings many years after the acts alleged to have caused the injury. *Donnellan* is relied upon as authority for the proposition that a moving party in an application such as this, where there are lengthy delays, does not have to show any specific or particular prejudice, but that the court can intervene to dismiss a case for delay, a course of action which should be taken only in exceptional circumstances. The delay in *Donnellan* was of very significant magnitude – some 26 years prior to the institution of proceedings and ten years' post-proceedings delay. Hogan J. addressed the issue of prejudice to the public interest where there is such delay. He referred to *Byrne v. Minister for Defence* [2005] 1 I.R. 577 where Peart J. stated that:-

> *"…in a case where there is both inordinate and inexcusable delay in the commencement of proceedings, the court may nevertheless refuse to dismiss the case where it is satisfied that no prejudice has resulted to the defendant."*

Peart J. referred to an earlier decision of his in *J. McH. v. J.M*. [2004] 3 I.R. 385. There he observed that the case was concerned with the *Primor* principles applicable in cases of post-commencement delay. He stated that the *Primor* principles should be confined to post-commencement delay, and that a wider discretion based on general fairness regardless of whether the delay is excusable, should be confined to pre-commencement delay. Peart J. concluded that a court could strike out proceedings on the grounds of inordinate and inexcusable delay even in the absence of established prejudice to the defendants. The Court could so act on the ground of prejudice to the public interest (an interest which is independent of the parties) in not permitting claims which have not been brought in a timely fashion to take up valuable and important court time and thereby reduce the availability of that much-used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation.

11. Hogan J. also stated in *Donnellan* that the *Primor* principles are not exhaustive and all-encompassing but that the courts enjoy a separate and distinct constitutionally derived inherent jurisdiction to protect the proper administration of justice.

12. Counsel also relies on the decision of Clarke J. in *Rodenhuis & Verloop BV v. HDS Energy Ltd* [2011] 1 I.R. 611. The plaintiff in those proceedings commenced the claim by way of summary summons in 2000. An appearance was entered and eighteen months later a motion for judgment was brought without explanation being given for the delay. Three months after the issuing of the motion, the defendant filed a replying affidavit and the case was adjourned to plenary hearing. The statement of claim was delivered in February, 2002 and the plaintiff brought a motion for judgment in default of defence. Six months later a defence was filed. The case did not progress between 2003 and 2010 although Clarke J. noted that this was caused in part by the progress of a motion for discovery made by the defendant. Two witnesses had died in the period between the inception of the proceedings and 2010. The defendants sought dismissal of the proceedings for want of prosecution. The plaintiff countered the motion, arguing that the delay was the partial responsibility of the defendant. Clarke J. dismissed the proceedings. It is to be noted, that there was a specific prejudice to the defendant in those proceedings, but counsel argues that the court must consider dicta of Clarke J. to the effect that the court has jurisdiction to dismiss a case where there may be general prejudice. In this regard, at para. 5 of his judgment, Clarke J. stated:-

> *"For the reasons set out by me in my judgment in Stephens v. Paul Flynn Ltd. [2005] IEHC 148 (Unreported, High Court, Clarke J., 28th April 2005), I had come to the view that, while the tests to be applied by the court remain the same as set out in the long standing jurisprudence contained in cases such as* Primor *plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459, the weight to be attached to factors properly taken into account in applying that test needed to be recalibrated in favour of a greater strictness of approach. In so doing I had regard, amongst other things, to the judgment of Hardiman J. in another Supreme Court case, Gilroy v. Flynn [2004] IESC 98, [2005] 1 I.L.R.M. 290, and, in particular, the references by Hardiman J. in that case to the effect of the jurisprudence of the European Court of Human Rights."*

Noting, that at that time, there appeared to be differences of approach between individual judges of the Supreme Court (and differently constituted divisions of that court) to the relevance of the case law of the European Court of Human Rights, nevertheless Clarke J. came to the conclusion that the law in this area should, where possible, be interpreted in a manner so as to bring it into conformity with European Convention of Human Rights so that the interpretation is compatible with the State's obligations under the Convention. He observed (at paras. 8 and 9):-

> *"The obligation on a State which subscribes to the European Convention on Human Rights is to provide for a timely disposition of court proceedings. The Convention does not of itself, therefore, necessarily require that proceedings be struck out for delay as such.*
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> *9. However, it does seem to me that the European Convention on Human Rights is of some relevance in this area. The relevant obligation is one of the member state. It is clear from the jurisprudence of the European Court of Human Rights that the fact that, in some jurisdictions, the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the relevant state from complying with the requirement to ensure that cases be dealt with in a reasonable time."*

13. Counsel for the defendant emphasises that these are summary proceedings, that the delay is significant and inordinate and that in assessing where the balance of justice lies, he submits that there is a general prejudice that the defendants must suffer where a stale claim such as this is brought against them. He also lays emphasis on the fact that this loan had been called in approximately eleven years ago and that the loan has now been transferred to a fund. He submits that when this loan was purchased by Havbell, it must have known that the loan had been called in almost eleven years previously, that proceedings had been instituted and that nothing had been done to prosecute those proceedings within that time. Counsel submits that these factors point strongly in favour of the Court exercising its inherent jurisdiction to dismiss the case for want of prosecution.

14. He also urges that if the case is to proceed, his defence will be that all monies which were owed and due were in fact repaid, something which was made clear to Permanent TSB from the outset.

15. The plaintiff has not filed an affidavit in response. However, in argument before the Court, counsel for the plaintiff did not dispute the facts or indeed the applicable law. While he accepted that there was inordinate delay on the part of the plaintiff, he urged that it

was excusable in the context of the involvement of the substituted plaintiff, Havbell. He submits that in 2016 the defendants were informed that the loan had been acquired by Havbell and that for the first time in 2017 the defendant raised the issue of delay. He seeks to lay blame at the door of the defendant for taking no action during this period.

16. Counsel also pointed out that the summary summons was issued in respect of two separate loans only one of which was taken over by Havbell. The summons refers to two particular accounts, one in respect of an advance made on 24th August, 1999 and the balance due in respect of that on 11th April, 2008 was €131,168.17. The second was in respect of an advance on 23rd July, 2002. The balance in respect of that loan as of 21st April, 2008, was €25,483.91. Counsel noted that Havbell took over the first loan only and to that extent, the defendants have been essentially relieved of their obligation, if any, to repay the sum €25,483.91 in respect of the second loan as this was a loan owned by another party.

17. Having obtained the order on 12th June, 2018 amending the title of proceedings, counsel states that it is the intention of the new plaintiff to bring a motion for judgment. He submits that the Court must take into account the position adopted by the defendant that he has a full defence, is therefore not prejudiced and there must be some direction in which general prejudice falls. Initially, counsel submitted that the delay was excusable because in the period before Havbell took over the loans, both parties sat on their hands and there has been no delay since that time. Counsel nevertheless accepted that when his clients took over the loan and subsequently took over the proceedings, that not alone was it taking over all rights of the initial plaintiffs in the litigation but also the obligations. The principal ground upon which counsel for the plaintiff sought to excuse the delay was that since Havbell took over the loan, there had been no delay and matters were activated as and from that time.

18. Given that this is a case of post-commencement of proceedings delay, the principles outlined in *Primor*, although not exhaustive, are applicable bearing in mind that each case must turn on its own facts. The approach of the courts was recently summarised by Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206 as follows:-

> *"18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach."*

Irvine J. reiterated that in considering where the balance of justice lies, a court is entitled to have regard to all relevant circumstances including matters such as delay or acquiescence on the part of the defendant and potential prejudice resulting from the delay. She relied on dicta of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 as supporting the proposition that the author of delay will not be absolved of fault unless it can point to some countervailing circumstance as may be considered sufficient to cancel out the effect of such behaviour. She also referred to her decision in *Cassidy v. The Provincialate* [2015] IECA 74, that in the presence of inordinate and inexcusable delay, even marginal prejudice may justify the dismissal of proceedings but that it is not to say that in the absence of proof of prejudice the proceedings will not be dismissed. So far as it is contended that the delay of a defendant should be taken into account, or indeed any acquiescence arising from such delay, Irvine J. observed:-

> *"38. Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?"*

19. I think it is fair to summarise the position of the parties as accepting that there is delay and that it is inordinate. Counsel for the plaintiff argues that the most recent intervention of Havbell provides an excuse or perhaps even a partial excuse for the delay with these proceedings. In my view, this cannot be an excuse for extent of the delay in the course of these proceedings. It seems to me that when one party takes over a loan and the litigation arising from such loan, not alone must he accept the rights in the litigation and the rights of the litigating party but must also assume any obligations which that party may have had and any obligation which he may have failed to fulfil including the requirement to process the case with all due expedition.

20. I must also take into account the nature of these proceedings. They are summary proceedings. Such proceedings should be expedited with all due dispatch. That has not occurred in this case and in my view no reasonable explanation, satisfactory or otherwise has been advanced by the plaintiff for this. I have little doubt but that the defendants have suffered a general prejudice which is that if they are required to answer these proceedings at such remove they will have had to endure unnecessary oppressiveness of proceedings hanging over them for in excess of eleven years, something which in my view they should not have or had to endure. Further, it seems to me that in the context of the nature and extent of this delay, it would be inequitable and against the balance of justice to require the defendants to defend this case at such remove. To do so, in my view, might also be said to run contrary to any obligations or commitments on the part of the State pursuant to the Convention in a case of this nature, to ensure the expeditious progress and conclusion of proceedings.

21. In the circumstances, therefore, I must accede to the application of the defendants and dismiss the proceedings on the grounds of excessive, inordinate and inexcusable delay and in the interests of justice.