

## THE HIGH COURT

Record No. 2004/19197P

Between:

ENDA PATRICK O'CARROLL AND TERESA HUNT

Plaintiffs

and

EBS BUILDING SOCIETY AND VINCENT HALL

Defendants

Judgment of Ms. Justice Iseult O'Malley delivered on the 1st February 2013.

**Introduction**

1. This is an application by the first named defendant for an order pursuant to Order 122 rule 11 of the Rules of the Superior Courts or in the alternative pursuant to the inherent jurisdiction of the court dismissing the plaintiffs' case on the grounds of inordinate and inexcusable delay in the commencement and/or prosecution of the proceedings.

2. The plaintiffs are the personal representatives of a lady, referred to variously as Teresa Lambiotte or Teresa Lambiotte Costello, who died on the 6th March in the year 2000. The first named plaintiff ("Mr. O'Carroll") is the principal in the firm of Wells & O'Carroll, Solicitors in Carrickmacross, County Monaghan. A grant of Probate was issued to the plaintiffs on the 18th January, 2002.

3. The second named defendant ("Mr. Hall") was at the relevant time an auctioneer. He was also an agent for the first named defendant ("EBS") in the town of Castleblaney. In that capacity he was licensed to take deposits on behalf of EBS.

4. At the time of her death the late Ms. Lambiotte Costello lived in France. However she seems to have maintained links with County Monaghan.

5. The plaintiff's case is that in late 1998 Mr. Hall received from Ms. Lambiotte Costello the sum of £IR100,000 which was intended to be lodged in a particular type of investment account in EBS. According to the plaintiffs Mr. Hall gave her false documentation purporting to confirm that the account had been opened but in fact paid the money into his own account and subsequently dissipated it.

6. When the matter was inquired into by the executors, Mr. Hall's account was that he had, with the consent of Ms. Lambiotte Costello, given the money to a named man in Northern Ireland. This man, according to Mr. Hall, was in a position to obtain a higher rate of return than that offered by EBS. Mr. Hall accepted his own responsibility to the extent of offering to return the money to the estate out of his own resources. According to a letter from its solicitor to Mr. O'Carroll, EBS accepted the veracity of this account and therefore takes the view that the transaction had nothing to do with its relationship with Mr. Hall.

7. In these proceedings the plaintiffs claim that Mr. Hall was acting within the scope of his ostensible authority as agent for the EBS. The EBS denies that he acted as its agent in respect of the matter. It is specifically pleaded that the deceased Ms. Lambiotte Costello was fully aware that Mr. Hall was acting on her behalf without reference to his agency on behalf of EBS and that any document issued by him was a sham. It is said that any claim she might have had was against him alone.

**The state of the evidence in the substantive case**

8. Acting as Ms. Lambiotte Costello's representative, Mr. O'Carroll found two documents among her papers. The first is a hand-written letter dated the 2nd December, 1998 from Mr. Hall to Ms. Lambiotte Costello. It is on EBS headed paper and states as follows:

*We acknowledge receipt of cheque value £38,000 as part investment into guarantee account. When the balance is cleared, we will issue you with formal documentation.*

9. The second is a printed EBS form headed "SureGrowth Investment Confirmation". It is addressed to Ms T. Lambiotte Costello at her French address. The various headings are filled in as follows:

*Issue Date: F 1 Day of Dec. 1998*

*Account Number: 86012606*

*Branch Issued: Castleblaney*

*We certify details of your £100,000. **Investment***

**Start Date** 1st Day of February 1999

**Term** Two years.

**Maturity Date** 1st Day of February 2001

**(Or Next Banking Day)**

**Principal** ONE HUNDRED THOUSAND POUNDS

**Gross Return**

**Gross Maturity Amount** Net return of 5.5% payable quarterly.

***(Inclusive of Interest)***

10. Beside the last three headings there is in hand-writing the date 1/5/99 and "£1,374.99 per quarter".

11. The document concludes with the words "Issued on behalf of the Society" and is signed by Mr. Hall. It is date-stamped the 12th February 1999 with the stamp of EBS Building Society Castleblaney.

12. It can be proved that the number 86012606 related to Mr. Hall's own personal account with EBS, which for some reason was operated under the name William, rather than Vincent, Hall. On the 1st December, 1998 a lodgment of £38,000 was made into this account. According to the plaintiffs the lodgement was a bank draft purchased by Ms. Lambiotte Costello in her own favour which was lodged for the credit of EBS through the AIB in Castleblaney.

13. On the 5th February, 1999 the sum of £22,500 was lodged in Mr. Hall's account. Mr. O'Carroll says that he can establish that this came from Ms. Lambiotte Costello's ICS Building Society account.

14. The Plaintiffs cannot show where the balance of the £100,000 referred to in the document came from. However there were two lodgments to Mr. Hall's account, in October and November 1998, of £20,000 and £19,500 respectively. These sums, if added to the earlier ones, make up a total of £100,000.

15. Examination of Ms Lambiotte Costello's account in the Bank of Ireland, Carrickmacross shows a payment into her savings account on the 18th February of £710. This is recorded as being from "EBS". On the 30th April 1999 there is a lodgment of £1,375. On the 6th August, 1999 there is a lodgment of £1,375. This is attributed in the bank statement to "ESB" but the plaintiffs invite the court to draw the obvious conclusion.

16. It will be noted that these payments correspond closely with the figures set out in the "SureGrowth" document. In its affidavit of discovery, EBS says that it cannot now say what interest was applicable to its "SureGrowth" product at the time.

17. In his affidavit Mr. O'Carroll avers that he interviewed Mr. Hall on the 5th June, 2002 and sets out the latter's version of events. This is admissible in these proceedings, obviously, only for the purpose of proving what was said and not the truth thereof.

18. According to Mr O'Carroll, Mr. Hall said that he told Ms. Lambiotte Costello that he could get her a better rate of interest in Northern Ireland than the 5.5% offered by EBS. She was agreeable to this so he took the money and gave it to a man who was a well-known criminal in Northern Ireland. He claimed that he did not tell her the identity of the man in question but paid the interest into her account every three months. He gave Mr. O'Carroll the name of the man involved. Mr. O'Carroll asserts, without contradiction from the EBS, that this man a) was a well-known drug-trafficker and b) was murdered in 1997, before the occurrence of any of the events under consideration in these proceedings.

19. Subsequently Mr. Hall met with representatives of EBS and gave them a similar account. They say that they are satisfied that his dealings with Ms. Lambiotte Costello were, to her knowledge, not related to EBS.

20. It is not clear how Mr. Hall's connection with EBS came to an end but in September, 2002 he is referred to in correspondence as a "former agent".

21. As noted above, Mr. Hall's defence was struck out by the Master of the High Court in December, 2007. On the 23rd June, 2008, when his application to vacate and/or discharge that order came on for hearing in the High Court, he consented to judgment in the sum of €184,140.

22. Mr. Hall died on the 13th August 2012.

**History of the proceedings**

- 6th March, 2000- Death of Teresa Lambiotte Costello
- 18th January, 2002- Grant of Probate
- 28th July, 2004- Plenary Summons
- 3rd November, 2004- Statement of Claim
- 12th November, 2004 - Appearance entered by EBS
- 8th December, 2004 - Notice for Particulars
- 11th March, 2005 - Replies to Particulars
- 6th May, 2005 - Defence
- 15th March, 2006 - Plaintiffs' letter seeking voluntary discovery
- 24th July, 2006 - Plaintiffs' motion for discovery issued
- 9th November, 2006- Order for discovery made by the Master - 10 weeks allowed
- 15th January, 2007- Plaintiffs' letter seeking compliance with the discovery order
- 22nd March, 2007- Plaintiffs' letter seeking compliance with the discovery order
- 14th June, 2007- Defendant's letter saying the affidavit of discovery had been prepared and would be delivered shortly

- 20th July, 2007- Plaintiffs' 21-day letter warning the Defendant that they would seek an order striking out the defence for failure to make discovery
- 27th August, 2007- Plaintiffs' motion seeking to strike out the defence
- 14th November, 2007- Affidavit of discovery filed
- December, 2007 - Defence of Mr. Hall struck out by the Master
- 16th June, 2008 - Letter from EBS confirming that it would bear its own costs to date if a Notice of Discontinuance was served
- 23rd June, 2008 - Mr. Hall consents to judgment in the sum of €184,140
- Early 2009 - both Mr. Hall and his wife diagnosed with cancer
- 7th September, 2009 - EBS letter, referring to the letter of "the 16th June last", asking the plaintiffs to revert
- 9th September, 2009 - Plaintiffs' letter stating that arrangements with Mr. Hall had not yet been finalised "and we cannot, at this juncture, discontinue proceedings against your client"
- 16th October, 2009 - Order *feri facias* granted in the High Court against Mr. Hall
- 24th February, 2010 - Order returned marked "*Nulla Bona*"
- 22nd March, 2010 - EBS letter inviting the plaintiffs to serve a Notice of Discontinuance - "This matter has been dragging on for an inordinate amount of time and has not been progressed in any meaningful way by your office"
- 20th September, 2010 - Plaintiffs' applications for judgment mortgages against the business premises (in the sole name of Mr. Hall) and family home of Mr. Hall (in joint names)
- 1st June, 2011 - EBS Notice of Intention to Proceed and 28- day letter warning of intention to seek order dismissing for want of prosecution
- 27th January, 2012 - Motion issued
- 25th July, 2012 - Certificate of Readiness from Senior Counsel for the plaintiffs
- 13th August, 2012 - Death of Vincent Hall
- 2nd September, 2012 - Death of Mr. Hall's wife
- January, 2013 - Date of hearing of motion to dismiss

### Submissions

23. There is no substantive allegation of delay prior to the commencement of the proceedings. However, EBS submits that as far as it is concerned nothing has happened in the case since the end of 2007. It says that this amounts to inordinate and inexcusable delay. In the grounding affidavit for the motion it is stated further, without particularisation, that it is prejudiced by that delay. That claim has now become more specific since the intervening death of Mr. Hall. EBS argues that it cannot now cross-examine Mr. Hall with a view to establishing that he did not act as its agent in this matter. In the alternative it argues that if the case were to proceed now and the plaintiffs were to succeed, it cannot now get an order over against him. It says that if the case had run at an earlier stage, it might have obtained and processed judgment mortgages more efficiently than the plaintiffs have.

24. It is argued that the plaintiffs made a conscious choice to pursue Mr. Hall rather than EBS, with the proceedings against the latter being in effect abandoned. That choice, described as highly unusual, having been made, the plaintiffs should not be allowed to "re-animate" their claim against EBS. It is further argued that the correspondence makes it clear that EBS never acquiesced in the delay.

25. The plaintiffs accept that there has been delay in progressing the case but deny that it is either inordinate or inexcusable. They say that at all times EBS was aware of their efforts to obtain satisfaction from Mr. Hall, who had after all admitted personal responsibility at an early stage and had offered to make good the loss himself. It was to the advantage of EBS to await the outcome of those efforts, since the plaintiffs intended to discontinue proceedings against it if the money was recovered from Mr. Hall. They submit that the correspondence makes it clear that they had not abandoned their claim against EBS.

26. The plaintiffs deny that prejudice has accrued to EBS arising from the death of Mr. Hall. They argue that they, the plaintiffs, would not have called him and therefore the possibility of cross-examination by EBS would not have arisen. He would only have given evidence if called by EBS. Having regard to the demonstrably false account given by him in the course of investigations, he was a man of no credibility.

27. It is further argued that EBS, as a defendant, also had choices to make. It could have attempted to progress the case but chose not to. It did not serve a Notice of Indemnity and Contribution on Mr. Hall, which casts doubt on its assertion that it could have acted more efficiently against him.

### Law relating to delay

28. The classic statements on this issue are found in the judgments of the High Court in *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 (*Rainsford*) and the Supreme Court in *Primor pic v Stokes Kennedy Crowley* [1996] 2 IR 459 (*Primor*).

29. In *Rainsford*, Finlay Pat p. 567 set out the law as follows:

.. [I]t is possible to elucidate certain broad principles which are material to the facts of this case and would appear to

constitute the legal principles underlying this problem of the dismissal of an action for want of prosecution or the permitting by the extension of time for pleading of it to continue in this country at present.

(1) Inquiry should be made as to whether the delay on the part of the person seeking to proceed has been firstly inordinate and even if inordinate has it been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable would appear to lie upon the party seeking a dismissal and opposing a continuance of the proceedings.

(2) Where a delay has not been both inordinate and inexcusable it would appear that there are no real grounds for dismissing the proceedings.

(3) Even where the delay has been both inordinate and inexcusable the court must further proceed to exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of or against the proceeding of the case. Delay on the part of a defendant seeking a dismissal of the action, and to some extent a failure on his part to exercise his right to apply at any given time for the dismissal of an action for want of prosecution, may be an ingredient in the exercise by the court of its discretion.

(4) Whilst the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the court's discretion.

30. In *Primor*, Hamilton C.J at p. 475 summarised the relevant principles of law as follows:

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures, (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action, (iii) any delay on the part of the defendant—because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.

31. In more recent times the view has been put forward in some cases that the classic test may have to be, if not amended, "recalibrated" to reflect the interest of the justice system in progressing litigation efficiently. This view finds expression in particular in the judgments of Hardiman J in *Gilroy v Flynn* [2005] 1 ILRM 290, Keams P in *W v W* [2011] IEHC 201, Clarke J in *Stephens v Paul Flynn Limited* [2005] IEHC 148 (Stephens) and Hogan J in *Donnellan v Westport Textiles, Minister for Defence and Others* [2011] IEHC 11 and *Quinn v Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103.

32. The most recent authoritative examination of the area is in the Supreme Court judgments in the case of *Comcast International Holdings Incorporated & Ors v Minister for Public Enterprise & Ors* [2012] IESC 50.

33. The recalibration argument does not appear to have found favour with the Supreme Court. The Chief Justice applied the traditional *Primor* test without reservation. Hardiman J stated that the facts in this case were so unique that it would not be helpful to engage in an analysis of the case law in relation to delay. Fennelly J in a short judgment, referred to *Desmond v MGN Ltd* [2009] 1 IR 737 as endorsing the conventional test. McKechnie J, in a thorough treatment of the topic, saw nothing wrong with the approach in *Primor* and *Rainsford*. Referring to the judgment of Geoghegan J in *McBrearty v North Western Health Board & Ors* [2007] IEHC 431 he agreed that they had "stood the test of time" and he expressed concern with the concept of "recalibration". Clarke J adhered to his own view as expressed in *Stephens* which led him to a partial dissent in relation to the outcome of the case.

34. It seems to me therefore, that I am bound to apply what has always been regarded as the classic test, which involves asking in the first instance whether there has been delay and if there has been delay, was it inordinate? If the delay was inordinate, is it excusable? If the delay is both inordinate and inexcusable then the balance of justice falls to be considered.

## Conclusions

35. I find that there has been delay in this case and that by the ordinary standards of litigation it has been inordinate. In this regard I base my finding on the four-year period between the making of discovery by EBS and the bringing of this motion.

36. However I do not find the delay to be inexcusable. While it may be unusual to pursue one defendant while letting matters lie in respect of another, this is a case where one defendant had, at a relatively early stage, admitted liability and consented to judgment.

If the plaintiffs' claim could be satisfied by him it would clearly be in everyone's interest not to engage in superfluous litigation. EBS was fully aware of the course being taken by the plaintiffs and, while not formally acquiescing in it, did not seek to force the case on. The plaintiffs never abandoned their case against EBS, making it clear at all times that they would discontinue proceedings only when matters were fully resolved with Mr. Hall.

37. In my view, delay which is largely attributable to a course of action taken by the plaintiff, to the knowledge of the defendant, which would if successful be to the benefit of the defendant, is not inexcusable. It might be otherwise if the defendant has specifically taken objection to the course of action.

38. If I am wrong about the foregoing and it is necessary to decide whether the balance of justice requires the dismissal of the proceedings, on the basis of the defendants' claim of prejudice, I would nonetheless hold in favour of the plaintiffs.

39. EBS argues that it is prejudiced by the absence through death of Mr. Hall because, primarily, it cannot now establish by means of cross-examination that he did not act as its agent in relation to these matters.

40. The plaintiffs' claim always rested primarily on the documentation in the case. Such documents as were found by them in Ms. Lambiotte Costello's papers or in the discovery process are still available.

41. The question then is - if the plaintiffs had moved their action on against the EBS between the end of 2007 and the date when Mr. Hall died, would EBS have been able to benefit from his evidence?

42. Mr. Hall consented to judgment in June 2008, so would not have given evidence in his own defence. EBS certainly could not have been remotely confident that the plaintiffs would have called him. They could of course have subpoenaed him themselves but in that case would have been bound by his answers in evidence in chief and would also have been exposed to the inevitable attacks on his credibility by the plaintiffs.

43. It seems to me that the claim that an earlier hearing would have enabled EBS to cross-examine Mr. Hall and thereby establish through his evidence that Ms. Lambiotte Costello knew that he was not acting as its agent in his dealings with her is both speculative and unrealistic.

44. Finally, I do not consider that the untestable proposition that EBS would have enforced any order over against Mr. Hall with greater efficiency and vigour than the plaintiffs did their order, is sufficient to justify a dismissal in the circumstances.

45. I therefore refuse the relief sought.