Neutral Citation: [2014] IEHC 619

THE HIGH COURT

Record No. 2012/99 SP

Between/

HALSTON STREET CREDIT UNION LIMITED

Plaintiff

AND
RAYMOND COSTELLO

Defendant

AND

In the matter of an application brought by Emberton Finance Limited pursuant to O.55, r.36 of the Rules of the Superior Courts

Judgment of Mr. Justice Max Barrett delivered on 16th December, 2014.

1. Emberton Finance Limited is seeking an order pursuant to O.55, r.36 of the Rules of the Superior Courts, 1986, as amended, giving it leave to submit a late claim to the Examiner's Office. Its claim derives ultimately from a judgment for just under €30,000 that was entered against a Mr. Costello on 26th July, 2010, and registered at the Land Registry as a judgment mortgage on 2nd December, 2010. The court considers the relevant facts in some detail below. However it turns first to a more fundamental issue, viz. the standing of Emberton to bring the within application.

Standing of Emberton Finance Limited.

2. It has always been an important limitation on the availability of remedies from the courts that such remedies are awarded only to litigants who have sufficient *locus standi* or 'standing'. The law starts from the position that remedies are correlative with rights, and that only those whose rights are at stake are eligible to be awarded remedies. In private law this principle falls to be applied with some strictness. So, does Emberton have the necessary standing to bring the within application? To answer that question it is necessary to consider certain background facts.

3. On 26th July, 2010, Friends First Finance Limited obtained judgment against a Mr. Costello for a sum of just under €30,000. This judgment was subsequently entered as a judgment mortgage against property owned by Mr. Costello in County Wexford. On 19th December, 2013, Friends First entered into a loan sale agreement with Emberton whereby Friends First agreed to assign various loan assets to Emberton. The court has not had sight of this loan sale agreement but it has seen a copy of a subsequent 'Deed of Transfer of Loan Assets' dated 3rd March, 2014, whereby Friends First transferred its rights under certain loan agreements and security documentation to Emberton. The Deed of Transfer is drafted in quite generic terms. Thus it transfers a portfolio of loans and related agreements without specific mention of Mr. Costello's debt. Emberton has not furnished to the court the suite of documentation evidencing that it is the 'successor in title' to Friends First in respect of Mr. Costello's debt. Instead it has referred the court to an order made by the High Court (Peart J.) on 24th March, 2014, whereby Emberton was substituted as a party in various proceedings that had been commenced at that time. However, the present proceedings are not among the proceedings to which that order refers. Thus the court cannot but conclude that Emberton, through its failure to produce the necessary contractual documentation and its reliance on an order that does not have the effect that Emberton purports it to have, has not established that it has the necessary standing to bring the within application.

4. A consequence of the foregoing conclusion is that the court cannot grant Emberton the remedy that it seeks at this time. There the court could end its judgment. However, that would be unsatisfactory for a number of reasons:

- first, Emberton claims to be entitled to bring its application and, looking at matters pragmatically, the court considers that an order to produce to the court the relevant contractual documentation executed between Friends First and Emberton will quickly prove Emberton's standing, if standing it has, and enable the court to proceed to grant or decline such special leave as has been sought by Emberton in the within application;

- second, if the court makes a finding as to standing only and Emberton thereafter appeals the court's decision and standing is established to the satisfaction of the appeal court, the application may well then be remitted to this Court for consideration of the substantive issues arising. That would lead to an unnecessary protraction of proceedings and increase in legal costs when matters can quickly be resolved by means of an order such as that just mentioned above. If either of the parties is dissatisfied with the court's preferred means of proceeding and/or the court's adjudication on the substantive issues arising, it is free to appeal the court's judgment, but at least that judgment will have traversed the substantive issues arising and a comprehensive and meaningful appeal can then be commenced and concluded.

- third, the within proceedings arise in the debt recovery context. The court recalls in this regard the observation of Mr. Curran in his learned text, "Debt Recovery" (Round Hall, 2009), at vi, that:

> *"[A] fair but effective legal debt collection and enforcement system is vital for Irish business and it is also important for citizens. If there is no cost-efficient legal remedy for default, banks will be less willing to lend money or may pass the cost on to inefficient consumers who are not in default."*

The court cannot proceed blinkered to such public interest considerations in its consideration of the within application. Nor can it proceed oblivious to the recent more general exhortations by the superior courts as to what might loosely be called the 'need for speed' in contemporary court proceedings. See, for example, the decisions in *Talbot v. Hermitage Golf Club and Others* [2014] IESC 57 and *IBB Internet Services Limited & Ors v. Motorola Limited* [2013] IEHC 541. Those cases were respectively concerned with delay arising in the course of proceedings and delays that can arise by virtue of successive procedural applications. This Court at this juncture is focused on how, all else being equal, it can itself avoid causing unnecessary delay through the manner of its adjudication on the procedural issue as to standing that arises in the within proceedings. The court does not mean in its proposed manner of proceeding to set procedural issues at nought, or to diminish the importance that such issues can possess. However, to avoid unnecessary delay in court proceedings, the court sometimes needs to be innovative in how it approaches the resolution of such issues, such innovation being justified in this case by reference both to applicable precedent and the public interest arising.

5. In respect of all of the above points the court is buttressed in its view as to the desirability of its proposed course of action by the fact that the above-mentioned order of Peart J. substituted Emberton for Friends First in a swathe of proceedings. This, the court considers, renders it probable that an order such as that which it has mooted (as to the production of the relevant contractual

documentation by Emberton) will yield the conclusion that Emberton does in fact 'own' Mr. Costello's debt. There may be some element of circularity in the court's proposed course of action, *i.e* making an order that a party prove standing in an application in which the court has concluded that such standing has not been proved to this time. However any, if any, such circularity seems preferable to the court's creating a *Jarndyce*-like scenario of delay in which a case would proceed to appeal on what is ultimately a procedural issue and then, if that procedural issue is resolved, return perhaps to this Court for judgment on the substantive issue arising. The court therefore proceeds hereafter to identify how its judgment will fall to be exercised in the event that, pursuant to the above-proposed order of the court as to the production of contractual documentation, Emberton manages to satisfy the court that it now 'owns' Mr. Costello's debt.

Facts.

6. Returning then to a consideration of the relevant facts, on 26th July, 2010, Friends First obtained judgment against Mr. Costello in respect of a debt. On 2nd December, 2010, the liability arising therefrom was entered as a judgment mortgage against property owned by Mr. Costello in County Wexford. Emberton now claims to be the party entitled to exercise the rights of Friends First pursuant to the judgment mortgage. So where does Halston Street Credit Union come into the picture?

7. As its full name suggests, Halston Street is a credit union. It trades from offices just down the road from the courtroom in which this judgment is pronounced, serving people who live and/or work in the vicinity of its shop-front premises on Capel Street. On 15th November, 2011, Halston Street obtained judgment against Mr. Costello in the amount of just over €75,000. This was registered as a judgment mortgage against Mr. Costello's Wexford property on 20th December, 2011. Halston Street was clearly determined to recover the monies owing to it, as was its right. On 23rd February, 2012, it issued what are commonly known as 'well-charging proceedings' against Mr. Costello. In essence, these are a type of proceeding in which a party seeks a declaration that a debt has been well-charged against another party's interest in property, and a direction that the affected property be sold. The precise elements of the court order that issues pursuant to a 'well-charging' application tend to vary from case to case. Typically, however, the court will order, amongst other matters, that the Examiner of the High Court take an account of all incumbrances affecting the relevant property and make an enquiry into their respective priorities.

8. On 30th July, 2012, the High Court (Dunne J.) issued a well-charging order to Halston Street, subject to what might be described as the 'usual terms'. Subsequent to the making of this order, and pursuant to direction from the Examiner, the solicitors for Halston Street caused advertisements to be placed in the *Irish Independent* on 19th August, 2013, and the *Wexford People* on 20th August, 2013, effectively stating what was to come next in the debt recovery process. So, for example, the advertisement in the *Irish Independent* read as shown overleaf.

THE HIGH COURT

ORDER 55 RULE 26[1]

HALSTON STREET CREDIT UNION LIMITED –v– RAYMOND COSTELLO

RECORD NO. 2012/99SP

ADVERTISEMENT FOR INCUMBRANCERS

Pursuant to an order of the High Court made in the above mentioned suit all persons claiming to be incumbrancers affecting the interest of the Defendant in the property contained in Folio 39665F County Wexford being situate at Moortown Great, Tomhaggard, County Wexford are to enter their claims at the Examiner's Office, Phoenix House, 15/24 Phoenix Street North, Smithfield, Dublin 7 on or before the 20th day of September 2013 and to prove such claims by affidavit on or before the same day or in default thereof they will be peremptorily excluded from the benefit of the said order.

Each such incumbrancers holding any security is required to produce the same at the Examiner's Office on the 27th day of September 2013 at 12.00p.m. being the time appointed for adjudicating on the claims.

Dated this 15th day of August 2013.

John Glennon

Examiner

9. For some reason, the advertisements placed by Halston Street's solicitors appear to have gone unnoticed by Friends First. This was misfortunate. However, one potentially enters Lady Bracknell territory with what happened next. On 22nd August, 2013, again pursuant to direction from the Examiner, a letter issued from the solicitors for Halston Street to Friends First, the main text of which reads as follows:

> ***"Re: Halston Street Credit Union Limited –v– Raymond Costello...***
>
> *Dear Sir,*
>
> *We confirm that we act on behalf of Halston Street Credit Union Limited in respect of the above entitled proceedings.*
>
> *Friends First Finance Limited obtained Judgment against Raymond Costello in Dublin Circuit Court on the 26th of July 2010 in the sum of €28,805.12 together with costs of €644.00 which is registered as a Judgment Mortgage on Folio WX39665F.*
>
> *We confirm our attendance at the Examiner's Office on the 14th of August 2013 last in respect of this property and now enclose herewith the following:*
>
> 1. *True copy advertisement placed in the Irish Independent on the 19th of August 2013.*
> 2. *True copy advertisement placed in the Wexford People on the 20th of August 2013.*

You will note that all claims must be made to the Examiner by the 20th of September 2013 next and the next Examiner's meeting is due to take place on the 27th of September 2013 next at 12.00p.m.

We trust that you will note the position accordingly.

Yours faithfully

_____

M.D. O'Loughlin & Company"

10. Despite the issuance of this letter, the dates appointed by the Examiner came and went and no claim of any nature was submitted by Friends First, even though Friends First was in possession of all the information it needed to protect its interests in this regard. In an affidavit sworn by a solicitor for Emberton, suggestion is made that "*as the advertisements were placed in the two newspapers over the summer months, it is possible that they were simply overlooked by the predecessor in title of this debt*." The court is unpersuaded by the notion that staff within financial service companies might not read the papers in the summertime. However, even if that were so, and it is not this Court's experience that it is so, it does not explain the apparent inaction of Friends First following its receipt of the crystal-clear letter sent to it on 22nd August, 2013. It may be that there is some valid explanation, but none has been offered to the court.

11. Following the placing of the advertisements, the issuance of the above-quoted letter and the adjudication of claims by the Examiner, the solicitors for Halston Street, together with the Examiner and court conveyancing counsel attended to the prerequisites for the sale of the Wexford property such that it was ready to be auctioned in or around July 2014. On 23rd July, 2014, the solicitors for Halston Street wrote another letter to Friends First. By this time, the purported transfer of Mr. Costello's loan to Emberton had occurred. However, Halston Street and its lawyers had no reason to know this, nor, the court finds, did they know. The main text of this letter reads as follows:

"Re: Halston Street Credit Union Limited –v– Raymond Costello…

Dear Sir,

We write further to our letter to your offices dated the 22nd of August 2013, a copy of which we enclose herewith.

We note that no claim was entered by Friends First Finance Limited on foot of the advertisement for incumbrancers placed in two newspapers in August 2013 despite the fact that your Judgment against Raymond Costello obtained in Dublin Circuit Court on the 26th of July 2010 in the sum of €28,805.12 together with costs of €644.00 is registered as a Judgment Mortgage on Folio WX39665F.

We confirm that the property contained in Folio WX39665F is now moving to auction. In the event that you have a claim against the property, an application must be made by way of Motion grounded on Affidavit to Court seeking consent to the late submission of a claim. In the event that the aforesaid application is not made, your Judgment Mortgage will be cleared from the title.

We trust that you will note the position accordingly.

Yours faithfully,

_____

M.D. O'Loughlin & Company"

12. On 31st October, 2014, just over three months after the above letter was sent, the solicitors for Halston Street received a letter from the solicitors for Emberton, enclosing, *inter alia*, the motion papers for the within proceedings. Having corresponded with Friends First thus far, the arrival of Emberton en scène was an unexpected surprise for Halston Street and its solicitors. Within a week, in a letter of 6th November, 2014, the solicitors for Halston Street sought various details of Emberton, not least of which was how Emberton could purport to benefit from a judgment mortgage registered by a different company some three years before Emberton's apparent date of incorporation. No response was received to this letter of enquiry. Instead, on 10th November, 2014, Emberton sought to proceed with its motion before this Court. However, the court adjourned the proceedings to 1st December, 2014, to allow the filing of an affidavit by the solicitors for Halston Street.

13. In the hearing of the application on 1st December, Halston Street contended, *inter alia*, that Emberton has no standing to bring the within application and that it has in any event been guilty of inordinate and inexcusable delay in bringing it. Halston Street also made application under O.31, r.18 of the Rules of the Superior Courts for an order for inspection of certain documentation.

14. The issue of standing has already been considered above. The contention regarding inordinate and inexcusable delay and the separate application made under O.31, r.18 are considered further below. However, the court turns at this point to consider the application brought by Emberton.

Application under O.55, r.36 of the Rules of the Superior Courts

15. Order 55 of the Rules of the Superior Courts, 1986, as amended, is concerned with the powers of the Examiner of the High Court. Rule 36 makes provision in respect of late applications to the Examiner. It provides that:

"No claim shall be received after the time fixed by the [in this case, newspaper] advertisement except by special leave of the court. Application for such leave shall be made by motion on notice and it may be granted upon such terms and conditions as the court shall direct."

16. It seems to the court that in adjudicating upon an application for special leave, the court (a) must have regard to the purpose of 'well charging' orders in the context of judgment mortgages, (b) can usefully have regard to the principles that apply when a party seeks to have a judgment that was obtained in default of defence set aside for surprise, and (c) ought to consider whether there are any special circumstances arising in the particular case presenting that are pertinent to the determination of the application. The

court notes in passing that these three factors would also seem of relevance to any application made under O.55, rr.48-50 (inclusive).

17. *(a) Purpose of 'well charging' orders and the succeeding process.* As touched upon above, in the context of judgment mortgages a 'well charging' order involves what is in effect a declaration by the court that a person's judgment mortgage stands 'well charged' over the interest of another in certain lands or premises. The issuance of a 'well charging' order is a condition precedent to the court's ordering a subsequent sale of those lands or premises. As part of the post-order process, newspaper advertisements are typically placed advising incumbrancers of the need to enter and prove their claims in the prescribed form before the Examiner of the High Court. Such advertisements are not placed because of some bizarre desire on the part of the State to enrich newspaper proprietors. They are placed so as to put the world on notice that a significant event is about to transpire that could seriously prejudice the interests of, for example, certain creditors or mortgagees. To the extent that particular persons are identified whose interests may be prejudiced by that event, the Examiner will typically require that there be direct correspondence with same, such as the letter of 22nd August, 2013, that the Examiner directed was to issue from Halston Street to Friends First. The 'significant event' arising is that, following the Examiner's adjudication on such claims as are entered, the Examiner will issue a certificate identifying persons entitled to the proceeds of sale from the property to which the 'well charging' order relates. A creditor or mortgagee or person who otherwise purports to be entitled to monies and who/that is not identified in the certificate at this stage of the process likely will not get paid at the end of the process. O.55, r.36 is entirely clear in this regard. It provides that "*No claim shall be received after the time fixed by the advertisement except by special leave of the court*." So the standard situation is that no claim gets in after the prescribed time; the exceptional situation is that such a claim may be entered with the special leave of the court. The court considers hereafter the principles that might usefully inform, and the special circumstances that it considers ought to pertain before any exercise of, the court's discretion to grant special leave. Suffice it at this point to note by way of general remark that it appears to the court that there is good reason why r.36 has been drafted as it has and why "*special leave*" ought not to become the routine. The reason is this: a too-liberal exercise of the discretion afforded to the court under r.36 would displace the efficacy of debt recovery proceedings and that would not be in the interests of business or, even more importantly, in the interests of consumers who would quickly find that general price increases are the inexorable consequence of effectively irrecoverable debt. The court will and must in any one application made under r.36 have regard to the requirements of justice as well as any special circumstances arising in the context of that particular application. However, it is not the intention of r.36 that a lackadaisical creditor, or a sophisticated financial entity that acquires some or all of that creditor's debt portfolio in a transaction which is subject to the precept of *caveat emptor* (on which see further below), must be granted every indulgence as against the rest of the world. Nor is it generally correct to suggest that the answer to any potential unfairness that may arise as a result of the court acceding to an application for special leave is to require that all the costs of the creditor who was successful in the 'well charging' application be borne by the beneficiary of the special leave granted. That balm will not cover the wasted time of the disappointed creditor; systemically applied it would be but a Band-Aid which concealed the wound being inflicted on that general efficacy of the debt recovery process in which there is a very real public interest.

18. *(b) Applicable principles.* It seems to the court that the principles which apply when a party seeks to have a judgment that was obtained in default of defence set aside for surprise can usefully be applied by way of analogy to an application made under O.55, r.36. The court recently considered those principles in *Monaghan v. United Drug Public Limited Company* [2014] IEHC 183. That was a case in which United Drug applied but failed to have a judgment that was obtained in default of defence set aside in circumstances where every rule of procedure had been observed by its opponent while United Drug repeatedly dallied in the proceedings and ultimately lost papers that were served on it. In the course of its judgment, the court identified the principles applicable to that application in the following terms:

> *"4. The discretion of the court to set aside a regular judgment obtained in default of defence appears to derive ultimately from the principle identified by Lord Atkin in Evans v. Bartlam [1937] A.C. 473 at 480, a case which concerned a judgment obtained following the non-payment of certain betting debts, that :-*
>
> > *"[U]nless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."*
>
> *…5. In Fox v. Taher (Unreported, High Court, January 24th, 1996), Costello P. was confronted with a case in which there had been mistake on the part of the defendants, rather than surprise. Costello P. noted that:-*
>
> > *"I do not think it matters very much whether I come to the view that the judgment was obtained by mistake or by surprise because the court has to do justice in this situation."*
>
> *The need to do justice to the parties on the particular facts of each case was also emphasised by Murray J in the decision of the Supreme Court in McGuinn v. The Commissioner of An Garda Siochana [2011] IESC 33 at 10, albeit coupled with the statement that the courts in the interests of justice generally lean in favour of a determination of litigation on the merits of the issues…*
>
> *7. In Allied Irish Banks plc v. Lyons [2004] IEHC 129…a case concerning a mistake by a solicitor rather than surprise, Peart J. concluded that the interests of justice required that a summary judgment against the solicitor's client ought to be set aside, rather than leaving the client to a possible remedy against her solicitor in negligence."*

19. It appears to the court that at least three points can be made in light of the above precedents:

> - first, as to the observation made by Lord Atkin in Evans, the court notes that there has been no procedural lapse that has resulted in improper advantage in the present case;
>
> - second, as regards the decision in Fox, in that case Costello P. was satisfied that at all times the defendants had wished to contest the jurisdiction of the Irish courts in the matter arising; he was therefore of the view that the defendants should be allowed to make their case. In this case, by contrast, it is not apparent that Friends First ever took any steps following the issuance of the well-charging order on 30th July, 2012, to protect its own interests. The only sign of movement that one can detect on the part of Friends First in all that occurred is that it must have communicated its receipt of the letter of 23rd July, 2014, to Emberton. The court notes further that although the only inaction that can be detected in all that transpired is the apparent inaction of Friends First, it does not follow that a supposedly 'blameless' Emberton should in justice receive the special leave that it now seeks. The court does not know if Emberton conducted a 'due diligence' exercise before it acquired the portfolio of debt from Friends First. Whether it did or not, its dealings with

Friends First as regards the acquisition of the latter's loan assets were dealings between two sophisticated commercial traders in which only commercial interests arose, and hence were clearly dealings to which the precept of *caveat emptor* ('let the buyer beware') applied. The principle of *caveat emptor* has the effect that one party is not bound to disclose to the other all the material facts or circumstances which might affect a bargain and which are known only to the non-disclosing party. Even if the non-disclosing party knows that the other is contracting under a misapprehension about the applicable facts, the general rule in transactions between sophisticated commercial entities is that the non-disclosing party has no duty to disillusion the other. Of course the law may require disclosure, even in commercial transactions between commercial traders, as for example in instances where a duty of utmost good faith arises or there is a fiduciary or significantly unequal relationship between them. Active concealment too may constitute misrepresentation. Save in these instances, however, each party to dealings between sophisticated commercial traders must protect itself from the consequences of its own mistakes. There is, of course, a distinction to be drawn between a mistake about the terms of a contract and a mistake about the facts or circumstances surrounding the formation of a contract. The consideration of that distinction is, however, for another judgment. In the present context what is of particular interest is the policy that informs the principle of *caveat emptor*. Clearly this policy is that in entering into a contract with each other, sophisticated commercial traders must generally use their own judgment and/or take care to ensure that the terms of the applicable contract secure to them what they want. If, as appears to be the case, Emberton now finds that an element of the portfolio of debt that it acquired from Friends First is tainted to some extent by deficiency, it may be that the liability for such deficiency can be litigated between Emberton and Friends First. However, it does not appear to the court that justice requires that a failure by Emberton, in the course of a transaction governed by the precept of *caveat emptor*, to discover the deficiency arising in respect of Mr. Costello's debt, must now be visited on Halston Street. That would allow Emberton to benefit despite its own failings, as against a party that has done everything right, and that smacks of injustice. Save as is otherwise provided in the loan sale agreement, it appears to the court that Emberton must take the loan portfolio it acquired subject to whatever deficiencies arise in same. Here the deficiency is that the non-presentation by Friends First of its secured debt to the Examiner in September 2013 has the result that Emberton cannot now lay claim to same.

- third, having regard to the decision in *Lyons*, the court has considered whether the interests of justice demand that Emberton should not suffer for the actions of Friends First. However, for the reasons already stated above, it seems to the court that if there is to be a victim of any inaction by Friends First, or a victim of any deficiency arising in the portfolio of loans that Emberton acquired subject to the precept of *caveat emptor*, it ought, as between Emberton and Halston Street, to be the former, Halston Street being the innocent party in all that has transpired. Emberton must look to Friends First for relief, if relief is there to be had.

20. *(c) Special circumstances.* Counsel for Halston Street argued that in determining whether or not to grant special leave, it is appropriate that the court consider whether there are special circumstances that would justify the granting of same. In truth this is perhaps but another aspect of, if not merely a different means of expressing, the obligation referred to, for example, in *Fox*, whereby the court must strive to do justice in the circumstances arising for its consideration. Be that as it may, the types of circumstance that this Court considers would justify the issuance of special leave are circumstances in which the failure to prove a debt to the Examiner by the appointed date is due to a disablement or event that is beyond the control of the party required to so prove. No such special circumstance has been identified to the court in this case, nor does it appear to the court from its consideration of the facts that any such circumstance arises.

Inordinate and inexcusable delay.
21. Among the contentions made by Halston Street at the hearing of the within application was that Emberton has been guilty of inordinate and inexcusable delay in bringing its application. It is perhaps in the nature of court proceedings that a party will hurl every missile that it can at its opponent. However, this particular missile, the court considers, does not hit home. There are two key lines of authority governing inordinate and inexcusable delay. They arise respectively from the Supreme Court decisions in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *Ó'Dómhnaill v. Merrick* [1984] I.R. 151. In essence, the *Primor* case establishes a three-prong test to be applied in cases of delay. Is the delay inordinate? Is the delay inexcusable? Even if inordinate and inexcusable, is the balance of justice in favour of or against a case proceeding? In *Ó'Dómhnaill v. Merrick*, Henchy J. stated, at p.157, that the court needs "*to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend*". Given that Emberton only arrived *en scène* in December 2013 and moved centre-stage the following March, it seems early days yet to be alleging inordinate and inexcusable delay in its commencement of the within application. Moreover, following receipt of the letter of 23rd July, 2014, Emberton appears to have commenced these proceedings as soon as possible. It does not, therefore, appear to the court that Emberton is guilty of any substantive delay, let alone inordinate and inexcusable delay, in bringing the within proceedings. Even if it were guilty of such delay, the court ultimately must look, *inter alia*, to the justice of a case in deciding whether or not to hear a particular matter. In this case the court considers that there can be no doubt but that justice does and did require that the application of Emberton proceed to hearing and adjudication.

Application for inspection of certain documentation.
22. On 21st November, 2014, the solicitors for Halston Street served on the solicitors for Emberton a notice to produce certain documentation referred to in the grounding affidavit sworn by the solicitors for Emberton as part of the within application. It is alleged by Halston Street, and it does not appear to be denied, that Emberton has not produced the relevant documentation. In consequence, Halston Street has applied for an order under O.31, r.18 of the Rules of the Superior Courts for inspection by Halston Street of the documentation of which production was sought. It appears to the court that the order that the court proposes to make consequent upon its conclusion that Emberton has not proved its standing in the within application (*i.e.* an order to produce such documentation to the court as would prove Emberton's standing to bring the within application) renders moot the order for inspection that Halston Street has sought. Consequently the court shall exercise its discretion under O.31, r.18(2) not to make the order sought, on the basis that the said order is no longer necessary for disposing fairly of the matter arising between the parties and would engender unnecessary cost if made.

Conclusion.
22. For the reasons stated above: (1) the court finds that Emberton has not established that it has the necessary standing to bring the within proceedings; (2) the court shall order that Emberton produce to the court such contractual or other documentation as will prove Emberton's standing to bring the within proceedings; and (3) subject to the court being satisfied as to the adequacy of the documentation referred to in (2), the court shall decline to grant the special leave being sought by Emberton pursuant to O.55, r.36 of the Rules of the Superior Courts. As an alternative to Emberton's incurring any additional cost pursuant to the order referred to at (2), the court is satisfied, by way of alternative, for Emberton to elect in its absolute discretion to abandon its pursuit of the debt that underpins the within proceedings. Emberton of course retains the right to appeal against this judgment and any order that the court may make pursuant hereto.

[1]. O.55, r.26 provides that "Advertisements for creditors and other claimants shall fix a time within which each claimant, not being a creditor, is to come in and prove his claim, and within which each creditor is to send to the executor or administrator of the deceased, or to such other party as may be directed or to his solicitor, to be named and described in the advertisement, the name and address of such creditor and the full particulars of his claim, and the statement of his account and the nature of the security (if any) held by him…. At the time of directing such advertisement a time shall be fixed for adjudicating on his claims…".