

THE HIGH COURT**[1994 No. 6889 P]****BETWEEN****KATEGROVE LIMITED (IN RECEIVERSHIP, HUGO MERRY AND PETER SCHOFIELD)****PLAINTIFFS****AND
ANGLO IRISH BANK CORPORATION PLC****DEFENDANT****AND
JOHN O'BRIEN****THIRD PARTY****Judgment of Mr. Justice Clarke delivered on 5th day of July, 2006****1. Introduction**

1.1 The substantive proceedings arise out of the receivership of the first named plaintiffs ("Kategrove"). The second and third named plaintiffs are the directors and shareholders of Kategrove. The receivership arose out of a mortgage in favour of the defendant ("Anglo Irish") over a petrol filling station and other lands at Urlingford Co. Kilkenny owned by Kategrove. The mortgage was to provide security for a loan given to Kategrove by Anglo Irish. The second and third named plaintiffs guaranteed the loan. Furthermore the second plaintiff provided additional security by means of a mortgage or over a portion of his own lands at Kilshannig in Co. Cork.

1.2 On foot of arrears in relation to the loan facility, the notice party ("the receiver") was appointed as receiver and the premises were sold in August 1994 with the proceeds of sale being received and applied by the receiver. It would appear that the property was sold by Anglo Irish as mortgagee in possession but with the receiver acting as agent. The plaintiffs allege negligence and breach of duty together with breach of contract in relation to the application of the proceeds of sale of the property and also allege that representations were made which would have the effect of releasing the second named plaintiff from any liability.

1.3 In this application Anglo Irish seeks to have the plaintiff's claim dismissed for want of prosecution or on the grounds of inordinate and inexcusable delay. In that context it is therefore necessary to look at the chronology of the proceedings to date.

2. The Proceedings

2.1 The proceedings as between the plaintiffs and Anglo Irish followed the following course:-

8 November 1994	Plenary Summons issued
14 November 1994	Appearance entered
17 November 1994	Statement of Claim delivered
30 November 1994	Notice for Particulars delivered
14 February 1995	Replies to Particulars furnished
12 May 1995	Defence Delivered
6 June 1995	Notice of Trial served
2 May 1996	Letter from Plaintiff to Defendant seeking consent to Amended Statement of Claim
20 November 1996	Letter from Defendant to Plaintiff consenting to amendment to Statement of Claim
20 November 1996	Notice of Particulars arising from the Amended Statement of Claim furnished by Defendant
29 May 1997	Replies to Notice of Particulars by Plaintiff
22 January 1999	Notice of Intention to Proceed
18 February 1999	Notice of Trial Served
30 September 2005	Notice of Motion by Defendant to strike out proceedings for inordinate and inexcusable delay

2.2 As will be seen the case proceeded with reasonable expedition between the issuing of the plenary summons in November 1994 and the initial service of notice of trial in June 1995. Two complications then appear to have occurred. Firstly the plaintiffs proposed an amendment to the statement of claim which was ultimately consented to over six months later by Anglo Irish resulting in a further exchange of request for and replies to particulars which culminated on 29th May, 1997. Other than the service of a notice of intention to proceed and a subsequent notice of trial in the early part of 1999 no further formal steps occurred in relation to the case as between the plaintiffs and Anglo Irish between May 1997 and the issuing of the motion seeking to strike out the proceedings. That motion was issued at the end of September 2005. Thus a period of not far short of nine years was allowed to elapse. I will refer in due course to correspondence that passed during that period.

2.3 Secondly it is necessary to look at the parallel process which was followed in respect of the claim brought by Anglo Irish against the receiver as third party. The third party was joined to the proceedings by order of this court on 3rd July, 1995. It should be noted that that event occurred just after the original notice of trial in the substantive proceedings was served. As the existence of the third party issue is put forward, at least in part, as a cause of delay in this matter coming on for hearing, I should set out the chronology in respect of that aspect of the process.

2.4 The third party proceedings were pursued as follows:-

21 September 1995	Third Party Notice Issued
21 September 1995	Appearance by Third Party
30 November 1995	Statement of Claim on behalf of Defendant as against Third Party
23 May 1996	Defence of Third Party delivered
16 May 1995	Notice of Motion by Defendants for Discovery against Third Party

27 June 1996	Order for Discovery against Third Party made by Master of this Court
22 October 1996	Notice of Motion by Defendant to strike out Defence for failure to comply with Order of Discovery
21 January 1997	Amended Defence of Third Party Issued. Order by O'Sullivan J. on 20 July 1998 granting liberty to amend such Defence
14 March 1997	Notice of Motion by Third Party for discovery against Defendant
1 July 1997	Order for Discovery against Defendant by Master of this Court
25 March 1998	Notice of Motion by Third Party seeking to strike out Defendant's Statement of Claim for failure to comply with order for Discovery
14 May 1998	Notice for Particulars by Third Party
30 October 1998	Defendant's Replies to Particulars
18 May 1999	Reply by Defendant to Amended Defence of Third Party
18 May 1999	Notice for Particulars by Defendant
26 July	1999 Order by Kelly J. directing Third Party to reply to Notice for Particulars
17 July 2000	Notice of Motion by Defendant seeking to strike out Amended Defence of Third Party for failure to comply with Order compelling Replies to Particulars
9 October 2000	Order by Barr J. striking out Amended Defence for failure to comply with Order compelling Replies to Particulars
4 December 2000	Notice of Motion by Third Party to reinstate the Amended Defence
13 December 2000	Notice for Further and Better Particulars by the Defendant
22 January 2001	Amended Defence reinstated by Carroll J.
14 February 2001	Replies to Notice for Further and Better Particulars by Third Party
13 November 2001	Notice of Motion by Third Party for Further and Better Discovery
15 February 2002	Order by O'Caoimh J. refusing application for Further and Better Discovery

2.5 It will be seen that the process as and between Anglo Irish and the receiver had a somewhat complicated history with both parties bringing, from time to time, applications seeking to have the other side's pleadings struck out for failure to comply with procedural obligations. Whatever may be the reason as to why it took so long for the third party aspect of the case to be ready for trial, it should be noted that no formal action had been taken in respect of that process for a period in excess of three and a half years prior to the issuing of the motion which I have to decide.

2.6 Finally so far as the formal process is concerned it should be noted that on the uncontested affidavit evidence of Pierce O'Donovan it would appear that the case was listed on numerous occasions between 1996 and 2000 in the uncertified Chancery List. On each such occasion there was an appearance on behalf of Anglo Irish but no appearance on behalf of the plaintiffs.

2.7 Against that background it is necessary to turn to the legal principles applicable.

3. The Law

3.1 In the recent cases of *Stephens v. Flynn* [2005] IEHC 148 and *Rogers v. Michelin Tyre plc and Another* [2005] IEHC 294, I had to consider the principles applicable to the exercise of the court's jurisdiction to strike out proceedings for inordinate and inexcusable delay. Having reviewed authorities from *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 to *Gilroy v. Flynn* (Unreported, Supreme Court, Hardiman J., 3rd December, 2004) I expressed the following view in *Stephens* at p. 7:-

"Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore:-

1. Ascertain whether the delay in question is inordinate and inexcusable; and
2. If it is so established, the court must decide where the balance of justice lies.

However it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay, are issues which need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligations of expedition and against requiring the same level of prejudice as heretofore".

3.2 On considering the matter in *Rogers* and having referred to *Stephens* I went on (at p. 6) to say the following:-

"That is not to say, however, that there has been any change in the factors which the court should properly take into account in assessing where the balance of justice lies. It is simply that the weight to be attached to such factors may need to be re-considered".

3.3 In *Wolfe and Another v. Wolfe and Others* [2006] IEHC 106, Finlay Geoghegan J., having conducted a similar review, stated the following:-

"I respectfully agree with the view expressed by Clarke J. in *Stephens v. Paul Flynn Limited* [2005] IEHC 148 and *Rogers v. Michelin Tyres plc* [2005] IEHC 294 that the decisions since *Primor plc v. Stokes Kennedy Crowley* do not mean that there has been a change in the factors which the court should properly take into account in assessing where the balance of justice lies but rather that the weight to be attached to the various factors may need to be reconsidered.

It remains the position as set out clearly and succinctly by Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 that "each case must be judged on its own merits" (p. 520) and also at p. 518:

"It is always necessary for the defendant applicant to demonstrate, and he bears that burden, that the plaintiff has been guilty of inordinate and inexcusable delay. Subject to that, however, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interest of the parties to the litigation. The separate considerations mentioned by Hamilton CJ should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just."

The reference to "the considerations mentioned by Hamilton C.J." is a reference to *Primor*.

3.4 It is clear, therefore, that in a case where the defendant applicant satisfies the court that there is inordinate and inexcusable delay, the court should go on to consider where the balance of justice lies by reference to the factors identified in *Primor* but with a stricter approach to compliance. Those factors are not separate tests but merely matters which need to be taken into account in the overall assessment of the justice of the case.

3.5 I should finally add that it seems to me that in coming to a conclusion as to what is just, the court also needs to give consideration to whether there are any measures, short of the striking out of the entirety of the plaintiffs claim, which might meet the justice of the case. Thus, for example, in *Rogers*, I was satisfied that part of the plaintiffs claim could properly proceed, because the prejudice applicable to that aspect of the case was not sufficient to warrant it being struck out. Similarly in *Wolfe*, Finlay Geoghegan J. was satisfied that the justice of the case lay in favour of permitting the plaintiffs to proceed, but on a conditional and limited basis involving, on the facts of that case, an "unless order". Having regard to the serious consequences for any plaintiff who may find that their case be struck out otherwise than on its merits, the court should be always mindful to ascertain whether there is some lesser order which may meet the legitimate interests of the aggrieved defendant, while falling short of a striking out of the entirety of the plaintiffs claim.

3.6 Before going on to consider the application of those principles to the facts of this case I should set out the passage from the judgment of Hamilton CJ in *Primor* (at pp. 475 – 476) in which the court specified the matters that should be taken into account in determining where the balance of justice might lie on the facts of any individual case:-

"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 may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

4. Application to The Facts of this Case – Inordinate and Inexcusable delay

4.1 As appears from the above authorities the first issue which the court must consider is whether there has been inordinate delay, and if there has, whether that delay is inexcusable.

4.2 The simple fact remains that nothing, of much significance, has happened in the claim as and between the plaintiffs and Anglo Irish for a period of nine years. On any view such a delay must be regarded as inordinate.

4.3 The plaintiffs place reliance on the fact that in the intervening period there has been what is described as significant correspondence. There would appear to have been a protracted debate between the parties as to discovery in a series of correspondence since the 2nd May, 1996 when the plaintiffs solicitors wrote requesting voluntary discovery. That correspondence appears to have been let rest with a letter of 21st June, 1999. Thereafter some other correspondence relating to issues between the plaintiffs and Anglo Irish and also concerning the progress of the third party proceedings between Anglo Irish and the receiver also ensued. Two things need to be said about that latter correspondence. Firstly it would appear that it could be reasonably characterised as an attempt to narrow the issues. Secondly it appears to have ended in January 2003 and no significant steps appear to have been taken thereafter.

4.4 While the existence of a debate concerning discovery, the undoubted merits of attempting to explore, by correspondence, the precise issues which arise between the parties, and the necessity to explore any connection between issues which arise in the third party proceedings with those which arose in the substantive proceedings were, undoubtedly, matters which may provide an explanation for some of the delay, I have come to the view that an overall delay of nine years could not possibly be excused by reference to those matters. In those circumstances I am satisfied that the plaintiff is guilty of both inordinate and inexcusable delay and that it is now necessary for me to turn to the question of where, in those circumstances, the balance of justice lies.

5. The Balance of Justice

5.1 In *Stephens* I considered a number of factors as being relevant to the exercise of the courts discretion. Such factors are not, of course, exhaustive and the court must take into account any particular matters which arise on the facts of the individual case.

However those factors form a useful starting point. The factors are to be found between pp. 12 and 14 of the judgment. I propose considering those factors in relation to the facts of this case.

5.2 (a) The Degree of Delay

For the reasons which I have set out above a delay of nine years between the closing of the pleadings and the application to dismiss must be regarded as very significant indeed. Even if allowance is made for the protracted correspondence concerning discovery, it should be noted that discovery remains unagreed and the plaintiff has not chosen to bring a motion for discovery, so as to have any outstanding questions of discovery resolved. The degree of delay above and beyond that which might be described as inordinate is, therefore, a factor to be properly taken into account and weighs significantly against the plaintiff on the facts of this case.

5.3 (b) The Excuse Tendered

I am satisfied that the excuse tendered provides a partial explanation for some of the delay but that if falls, by a significant margin, short of providing an acceptable reason for the very long delay indeed which has occurred in this case. This is factor which also weighs, albeit less heavily, against the plaintiff in this case.

5.4 (c) Prejudice

In all of the cases a significant weight has to be attributed to the question of whether the defendant has suffered any prejudice by reason of delay. On the facts of this case it seems to me to be likely that different considerations arise under this heading in respect of different aspects of the case. In this respect it is difficult to be precise, having regard to the fact that there has been a certain degree of fluidity concerning the pleadings with a significant difference between the formal pleadings as filed in court and matters which the parties have agreed can form the basis of the pleadings that will ultimately go to trial if the court permits that eventuality to occur. However in general terms the claim as originally pleaded consists of an allegation that, in certain specified respects, the proceeds of sale of the property were not applied in accordance with law to the detriment of both Kategrove and the second and third named plaintiffs as guarantors of Kategrove's liability.

5.5 To a very large extent those issues would seem to me to be ones which would turn on legal questions together with facts (such as how the moneys were actually applied) which would be well documented and easy to demonstrate. So far as that aspect of the claim is concerned it does not seem to me that Anglo Irish would suffer any significant prejudice in being able to defend the proceedings at this stage.

5.6 However, regard also has to be had to the proposed amendment which seeks to suggest that certain representations were given on behalf of Anglo Irish on 18th April, 1994. As a result of affidavits sworn in injunction proceedings in early 1995 it would appear that it is contended that the relevant representations were made by a Peter O'Donoghue, an employee of Anglo Irish, Grattan Roberts, a solicitor acting on behalf of the receiver and the also the receiver himself. While it is accepted that there is an amount of correspondence evidencing the contact between those parties and the plaintiffs at the relevant time, I am satisfied that there is a significant risk that the issues arising under the proposed misrepresentation leg of the plaintiff's claim would turn on the recollections of the individuals involved. It is clear, therefore, that even should these proceedings come to hearing in the very near future, that aspect of the case could turn upon the courts view in relation to competing recollections of events that occurred 12 or 13 years earlier. There can be no doubt that a significant prejudice would arise in those circumstances. For reasons on which I elaborated in Rogers, contested factual issues such as those likely to arise here, can turn on the courts view of the recollection of the witnesses concerned even in relation to detail. After 10 years or more it will always be difficult to recollect the precise content of meetings with any detail.

5.7 (d) Inaction of the Defendant

It is not clear to me that there has been any significant delay on the part of Anglo Irish. If the plaintiff was not satisfied with the discovery process, then it was open to the plaintiff to bring an appropriate application before the court. If any of the other issues canvassed in correspondence could provide a legitimate basis for the case not being ready for hearing, then it was, of course, open to the plaintiffs to take whatever procedural course was available to them to remedy that matter.

5.8 Whatever may be said about the totality of the correspondence between the solicitors acting on behalf of the plaintiffs and Anglo Irish, it does not seem to me that the correspondence can be reasonably characterised as one where Anglo Irish was being obstructive of matters which might lead to an expeditious hearing or, alternatively, might be said to have induced the plaintiffs into a reasonable belief that no objection would be taken to the delay. This is particularly so when one has regard to the fact that there does not appear to have been any correspondence of significance for over two and a half years prior to the issuing of the motion to dismiss. In the light of the length of time which had already elapsed when that correspondence came to an end, that further delay is difficult to understand and in that context it is difficult to place any significant blame on Anglo Irish for the delay which has occurred.

6. Conclusions on Prejudice

6.1 In summary, therefore, many of the factors weigh significantly against the plaintiffs. The delay has been very long indeed. While it is fair to say that it may, to a limited extent, be excusable, it is impossible to place even a remotely corresponding degree of blame on Anglo Irish.

6.2 In those circumstances it is only the absence of significant prejudice in relation to the claim as originally put forward, that leads me to the view that these proceedings should not be dismissed in their entirety. However it does seem to me that, when coupled with the above factors, the potential prejudice of exposing Anglo Irish to a significant issue which may turn upon the recollection of individuals as to what occurred at meetings 12 years ago, leads to the inescapable conclusion that the plaintiffs ought not be entitled to proceed with the issues specified in the proposed amended statement of claim.

6.3 Furthermore it seems to me that, even so far as the other issues are concerned, the plaintiffs should only be entitled to proceed provided that a strict timetable for bringing the case to trial is adhered to.

6.4 In that context I note that at paragraph 28 of the replying affidavit the plaintiff's solicitor accepts that a number of issues remained outstanding before the action is ready for trial. They were stated to be:-

(a) discovery from the defendant;

(b) discovery from the plaintiff;

(c) any amended defence that the defendant wishes to deliver to the amended statement of claim;

(d) clarification of the amount or amounts that the defendant has received from any other party in reduction of its losses arising out of the course of the receivership and the actions of those parties.

6.5 In the light of my indication that I would not be prepared to allow that aspect of the claim which was to be introduced by means of the amended statement of claim to proceed, then item (c) does not arise.

It is for the plaintiff to ensure, by means of appropriate procedural steps if necessary, that each of the other matters are attended to in early course.

7. Conclusions

7.1 In those circumstances I would propose refusing to dismiss the proceedings on the following conditions:-

1. That the statement of claim is not amended in the manner proposed and proceeds on the basis of the issues raised in the original statement of claim;
2. That the plaintiff takes all necessary procedural steps to ensure that the three remaining matters identified in their solicitors affidavit and referred to above are disposed of not later than the 30th October, 2006. If it becomes necessary, in order that any such matters be resolved, to bring applications before the court then such applications can be made returnable before me on any Monday when I am sitting, on four days notice.
3. The deadline of 30th October, 2006 will only be extended to the extent that it can be demonstrated that there was delay on the part of Anglo Irish in complying with any of its obligations necessary to ensuring that the case is ready for hearing.
4. In the event that the plaintiffs feel that blame for any such delay can be attributed to Anglo Irish, then an application may be made, again returnable before me on the same basis, for an extension of time.
5. Unless the case is certified as ready for hearing not later than 30th October, 2006 (or such extended period as may be provided for on foot of such an application), the entire proceedings will stand dismissed.
6. For the avoidance of doubt it should be clear to the plaintiffs that in the event that they wish to make the case that the deadline cannot be met by virtue of delay on the part of Anglo Irish, then it is incumbent upon the plaintiffs to bring an application for an extension of time in advance of the expiry of the deadline. Should the deadline not be extended, then the proceedings will stand dismissed as of the expiry of that period and no retrospective application relying on the blameworthiness of Anglo Irish, will be entertained.

7.2 On the basis of those conditions I propose dismissing the application. I also propose giving liberty to apply to either party within the terms which I have outlined.