Neutral Citation: [2014] IEHC 541

THE HIGH COURT

[2009 No. 2430S]

BETWEEN

PERMANENT TSB FINANCE LIMITED

PLAINTIFF

AND

ORCONA LIMITED TRADING AS APPLETON MOTORS AND GERARD REID AND ANN REID AND JAMES MAGUIRE

DEFENDANTS

Judgment of Mr Justice David Keane delivered on the 14th day of November 2014

Introduction
1. This is an application to dismiss proceedings for want of prosecution on grounds of inordinate and inexcusable delay, in exercise of the inherent jurisdiction of the Court. It is brought against the plaintiff on behalf of the fourth-named defendant, by motion issued on the 28th February 2014.

Nature of the claim
2. The plaintiff seeks summary judgment against the fourth-named defendant in the sum of €44,792.89. The claim is based on a guarantee agreement that it is alleged the fourth-named defendant entered into with the plaintiff on or about the 27th February 2007 in consideration of the plaintiff advancing monies to the first-named defendant company (of which the fourth-named defendant was at the material time a director) on foot of a computer equipment lease agreement. It would appear that it is alleged that the first-named defendant defaulted on its lease payments under that agreement in or about the month of October 2008.

History of the proceedings
3. A summary summons issued on behalf of the plaintiff on the 18th June 2009. A memorandum of appearance was entered on behalf of the fourth-named defendant on the 17th November 2009. A notice of change of solicitor, dated the 17th September 2010, was subsequently filed on behalf of the plaintiff. While the plaintiff filed notices of intention to proceed, dated the 17th September 2010, the 20th October 2011 and the 23rd November 2012, no further step was taken in the proceedings against the fourth-named defendant until the plaintiff issued a motion, dated the 7th January 2014, seeking liberty from the Master of the High Court to enter final judgment against the fourth-named defendant.

Governing principles
4. The parties accept that the central test governing the determination of the present application is that summarised by Clarke J. in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148; that is, that the court should, first, ascertain whether the delay in question is inordinate and inexcusable; and, second, if satisfied that it is, the court must then decide where the balance of justice lies. As Clarke J. acknowledged in *Stephens*, referring to the judgment of Hardiman J. for the Supreme Court in *Gilroy v. Flynn (*unreported, 3rd December 2004), the developing jurisprudence of the institutions established under the European Convention on Human Rights and the applicability of that Convention to Irish domestic law by virtue of the enactment of the European Convention on Human Rights Act 2003 also serve to emphasise the obligation on the courts, derived from Article 6§1 of the Convention, to ensure the speedy resolution of matters brought before them.

The first limb of the test
5. It is common case that the plaintiff has taken no step in the proceedings against the fourth-named plaintiff between the date on which a memorandum of appearance was entered on the latter's behalf, the 17th November 2009, and the date upon which the motion for liberty to enter final judgment issued, the 7th January 2014, since it is clear that neither service of a notice of intention to proceed nor service of a notice of change of solicitor constitutes a 'step' in the proceedings; *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510 (per Fennelly J. at 517). Accordingly, the relevant period of delay is one of just over four years. At the hearing of the motion before me, Counsel for the plaintiff conceded that the relevant delay was inordinate. That is certainly my conclusion.

6. In the case of *O'Connor v John Player & Sons Ltd* [2004] 2 I.L.R.M 321, Quirke J. stated as follows (at p. 332 of the report):

> "Although the onus of establishing that the delay complained of has been inexcusable clearly rests upon the party so alleging, the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay."

7. On behalf of the fourth-named defendant it is contended that there can be no conceivable excuse for a matter commenced on a summary basis to have taken as long as it has to reach this point. In response, two separate reasons are advanced on behalf of the plaintiff to explain two separate periods of delay.

8. The first part of the plaintiff's explanation relates to the period between the commencement of the proceedings on the 18th June 2009 and the entry of judgment against the first, second and third-named defendants in the Central Office of the High Court on the 7th November 2012. On behalf of the plaintiff, it is averred that those defendants did not enter an appearance to the plaintiff's claim and that "in the normal course of events, the process of marking judgment as against the said defendants gave rise to a degree of delay which was unavoidable in the circumstances [and] is not attributable to any default on the part of the plaintiff herein." The relevant correspondence between the plaintiff's solicitors and the Central office is exhibited to an affidavit sworn on the plaintiff's behalf by its solicitor on the 18th July 2014. The plaintiff concludes that part of its explanation by submitting that it was reasonable in the circumstances to wait until judgment in default of appearance had been obtained against the first, second and third-named defendants before proceeding to seek liberty to enter final judgment against the fourth named defendant.

9. Having carefully considered the matter, I do not accept either of the propositions by reference to which the plaintiff attempts to

excuse the relevant period of delay. As regards the first proposition, the course of correspondence between the plaintiff's solicitor and the Central Office demonstrates that the latter took the view that the papers lodged by the former were not in order. While there may be room for some debate concerning the precise nature and ambit of the papers that must be lodged under the relevant rule of court, it is the responsibility of the legal representatives of the party concerned to lodge the required papers in the appropriate form and to ensure that any perceived deficiency is promptly rectified or explained, as may be necessary. I cannot and do not accept as a proposition of fact that the delay in this instance – of approximately three years – can simply be dismissed as an "inevitable delay", "unavoidable in the circumstances" and "not attributable to any default on the part of the plaintiff", absent some persuasive argument that the requirements of the Central Office were unreasonable or misconceived. No such argument has been advanced.

10. In respect of the plaintiff's second contention, that it was moreover reasonable in all of the circumstances to wait until judgment in default of appearance had been obtained against the other defendants before proceeding against the fourth named defendant, no fact or argument has been set out in support of it. Order 13, rule 8 of the Rules of the Superior Courts provides that:

> "Where an originating summons (whether plenary or summary) is indorsed with a claim for a liquidated demand and there are several defendants, of whom one or more appear, to the summons, and another or others of them fail to appear, the plaintiff may enter final judgment as in rule 3 mentioned against such as have not appeared, and may issue execution upon such judgment, *without prejudice to his right to proceed against such of the defendants as have appeared*." (emphasis supplied)

11. Accordingly, it is clear that the plaintiff was entitled at all material times to proceed against the fourth-named defendant. I am satisfied that the plaintiff should have done so, at the very latest once it became apparent that there was going to be some delay in entering judgment against the other defendants.

12. For these reasons, I conclude that a significant portion of the period between the entry of a memorandum of appearance on behalf of the plaintiff (on the 17th November 2009) and the entry of judgment against the first, second and third-named defendants in the Central Office of the High Court on the 7th November 2012 amounted to a delay in the prosecution of the plaintiff's claim against the fourth-named defendant that was both inordinate and inexcusable.

13. The plaintiff has put forward a separate justification or excuse for the period of delay after final judgment was entered against the other defendants on the 7th November 2012 and prior to the issue of the plaintiff's motion seeking liberty to enter final judgment against the fourth-named defendant on the 7th January 2014. Through its solicitor, the plaintiff has exhibited the *inter partes* correspondence exchanged during that period, commencing with the 21 day warning letter that it sent to the fourth-named defendant's solicitors on the 22nd November 2012. That letter elicited a holding reply from the fourth-named defendant's solicitors, dated the 21st December 2012. In the absence of any substantive response, the plaintiff's solicitors wrote again on the 18th October 2013, warning that they would have to proceed to issue a motion for judgment. That letter elicited a reply from the fourth-named defendant's solicitor, stating that Counsel retained by them had advised that the proceedings against their client were misconceived, before concluding "we would ask that you hold off from issuing any motion."

14. I accept the plaintiff's argument that the relevant period of delay is excusable in that the fourth-named defendant's solicitors had actively sought the plaintiff's forbearance during that time, first, by stating that they would provide a substantive reply to the plaintiff's correspondence (without doing so) and, second, by specifically requesting that the plaintiff hold off from issuing a motion. In the circumstances, the fourth-named defendant cannot be heard to argue that the plaintiff's failure to motion him for judgment during that period is "inexcusable".

15. Even if the fourth-named defendant were somehow entitled to make the argument that the relevant period of delay is, on its face, inexcusable, he would still have to meet the argument, considered further below, that delay on the part of a defendant in seeking the dismissal of an 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; see, *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561.

The second limb of the test

16. Insofar as I have concluded that the period of delay between the 17th November 2009 and the 7th November 2012 was both inordinate and inexcusable, it is necessary to consider whether, on the facts presented, the balance of justice lies in favour of, or against, permitting the action to continue.

17. In submitting that the balance of balance of justice lies in favour of the dismissal of the action, the fourth-named defendant relies upon both specific and general prejudice.

18. Counsel for the fourth-named defendant at the hearing of the motion pointed to what he described as two points of specific prejudice.

19. First, reliance is placed on the averment that the fourth-named defendant's health has deteriorated significantly during the pendency of these proceedings, such that he is now in receipt of a disability pension. Medical records are exhibited, confirming that he had cardiac surgery in March 2013 and was scheduled for further cardiac surgery in June 2014. However, there is no suggestion in the evidence that has been placed before the court on the fourth-named defendant's behalf that his condition is likely to impair, much less preclude, his defence of these proceedings.

20. Second, the fourth-named defendant's solicitor avers that there is specific prejudice in allowing the action to proceed because the fourth-named defendant's finances (as well as his health) are now "at their lowest ebb." However, no evidence concerning the fourth-defendant's finances has been put before the court.

21. Even if these specific points of asserted prejudice were properly based on evidence placed before the court, it would still be necessary to consider as a further factor whether the delay concerned is responsible for the prejudice alleged (see *Jackson v. MJELR & Ors* [2010] IEHC 194; 20th May 2010, Dunne J.). This is not a case where the relevant defendant has lost a vital witness or an essential piece of evidence because of the death of that witness or the loss or destruction of that evidence during a lengthy period of delay prior to trial. On the evidence before the court, the plaintiff's unfortunate ill health and any financial reversal he may have suffered are nothing to do with the delay in the prosecution of the present action.

22. In the circumstances, I conclude that the fourth-named defendant has failed to make out any specific prejudice to his defence of these proceedings arising from the period of inordinate and inexcusable delay in the prosecution of the plaintiff's claim against him.

23. I turn now to consider the issue of general prejudice. In support of this aspect of his submission, Counsel for the fourth-named defendant relies on the statement of O'Flaherty J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 (at p. 521 of the report) that "once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably."

24. I accept that some prejudice is likely to follow almost inexorably from any significant delay in proceedings. It is certainly a matter that I am required to take into account. However, each case must turn on its own particular facts. In this case, there are a number of other relevant factors.

25. First, although the plaintiff has issued and served the relevant motion papers in respect of its application for liberty to enter final judgment in respect of the claim set out in the summary summons issued on its behalf, the fourth-named defendant has yet to join issue with any aspect of the plaintiff's claim, much less has he attempted to outline any matters of fact or issues of law capable of establishing that he has a fair or reasonable probability of having a real or *bona fide* defence. Perhaps he proposes to do so in due course. Nevertheless, as matters stand, the Court is deprived of the opportunity to consider the scope and ambit of any defence that might be relied upon by the fourth-named defendant as an element to be taken into account in the Court's assessment of the degree of general prejudice that arises in this case; see *Desmond v. M.G.N. Ltd.* [2009] 1 I.R. 737 (Macken J) (at 764).

26. Second, both the summary nature of the plaintiff's claim and the documentation exhibited in support of it (comprising, amongst other material, the relevant loan agreement, statements of account and guarantee agreement) strongly suggest, in the words of Geoghegan J. in *Truck & Machinery Sales Ltd. v. General Accident Fire and Life Assurance* [1999] IEHC 201 (12th November, 1999), that "[t]he issue will largely be determined on documentary evidence and there is no real suggestion and still less has it been established as a matter of probability that the Defendant could not properly defend the case."

27. Third, the fourth-named defendant is unable to point to any delay on the part of the plaintiff in this case prior to the commencement of proceedings. Although it is clear that such delay is not, in itself, a factor to be considered it may colour what happens later. In this case, the absence of such delay reduces (or, at the very least, in no way increases) the significance of the period of inordinate an inexcusable delay subsequent to the commencement of these proceedings that I have already identified.

28. In the circumstances, while it is obviously appropriate to acknowledge that some prejudice might follow inexorably from the relevant period of inordinate and inexcusable delay in the prosecution of the plaintiff's claim, it is not possible to quantify the level of that prejudice as significant, or even as moderate (as Clarke J. assessed the level of prejudice that arose in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148 (28th April 2005).

29. It is also necessary in this context to consider the fourth-named defendant's acquiescence in the second period of delay between the 7th November 2012 and 7th January 2014, during which period the fourth-named defendant gave the plaintiff to understand that a substantive response to its claim would issue and, latterly, expressly requested the plaintiff's forbearance. The fourth named defendant's inaction (or positive discouragement of action) during this period must be given some weight also, though less weight than the plaintiff's earlier delay.

Conclusion

30. In all of the above circumstances, I am satisfied that the weight to be attributed to the period of inordinate and inexcusable delay in the prosecution of the plaintiff's claim against the fourth-named defendant that I have found to have occurred during a significant portion of the time between the entry of a memorandum of appearance on behalf of the plaintiff (on the 17th November 2009) and the entry of judgment against the first, second and third-named defendants in the Central Office of the High Court on the 7th November 2012, coupled with the limited degree of general prejudice and the limited period of inaction on the part of the fourth-named defendant are such that the balance of justice favours permitting the proceedings to continue. I will therefore refuse the application for an order dismissing the proceedings at this time.