THE HIGH COURT

[2010 No. 757 S.]

BETWEEN

MIDLAND ANIMAL COLLECTIONS LIMITED

PLAINTIFF

AND

MALONEY AND MATTHEWS ANIMAL COLLECTIONS LIMITED

DEFENDANT

JUDGMENT of Mr Justice Binchy delivered on the 15th day of June, 2018

1. This judgment is concerned with an application brought by the defendant to dismiss the plaintiff's claim which was initiated by way of summary summons on 18th February, 2010. In the proceedings, the plaintiff claims damages in the sum of €44,317.00 in respect of services which the plaintiff supplied to the defendant between 15th April and 25th June, 2009.

2. The summary summons sets out in detail the basis of the claim and specifies the invoices relied upon by the plaintiff. An appearance was entered to the proceedings on behalf of the defendant on 19th March, 2010.

3. Prior to the issue of the proceedings, there had been correspondence between solicitors acting on behalf of the parties, between 7th October, 2009 and 2nd December, 2009. On the latter date, solicitors acting on behalf of the defendant wrote to the solicitors for the plaintiff acknowledging that there was an amount due to the plaintiff by the defendant in the sum of €13,862.00. The letter recorded what the defendant claimed were the industry standards for payment of animals supplied by the plaintiff to the defendant at the time.

4. The defendant's solicitors letter of 2nd December, 2009 concludes with the following paragraph:-

> "In addition, our client also instructs us that there is money due to our client by your client in respect of an agreement reached with your client that our client would receive €10.00 back from your client for every animal (between the ages of six to twenty-four months) pre-April 2009. Your client has not honoured this agreement."

In each of the years 2011, 2012, 2014 and 2017, the solicitors for the plaintiff served a notice of intention to proceed on the solicitors for the defendant. On 16th November, 2017, the solicitors for the plaintiff issued a notice of motion for judgment in default of defence, which they subsequently acknowledged was procedurally incorrect and that motion was struck out on 12th February, 2018. On 21st December, 2017, the defendant issued the motion the subject of this application to dismiss the plaintiff's claim for want of prosecution and on the grounds of inordinate delay.

5. The principles governing applications of this kind are well known and were set out by the Supreme Court in the case of *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. It is abundantly clear that there has been a delay on the part of the plaintiff in the progression of these proceedings. Notwithstanding the service of four notices of intention to proceed, the plaintiff has failed to take any steps to advance the proceedings since the issue of the summary summons on 18th February, 2010, save for the procedurally incorrect step of bringing forward a motion for judgment in default of defence on 16th November, 2017. Ignoring the procedural defect in that step, there has been a delay of seven years and nine months. Such a delay is clearly inordinate, and since no excuse has been proffered, it follows that the delay is inexcusable.

6. The Court must therefore next consider whether or not the balance of justice requires that the proceedings should be struck out, having regard to the factors set out by the Supreme Court in *Primor* when considering this issue. Of those factors, the only one that is relevant in this case is whether or not the delay has caused the defendant prejudice in its defence of the proceedings, and if it has, whether or not that prejudice is 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.

7. The application of the principles in *Primor* has given rise to many decisions of this Court, particularly in the context of the consideration of the issue of prejudice. The defendant relies in particular upon the decision of Clarke J. (as he then was) in the case of *Rogers v. Michelin Tyre Plc & Anor* [2005] IEHC 294. That case arose out of the dismissal of the plaintiff by the defendant. At p. 13 Clarke J. stated:-

> "In a case where it is likely to be common case that the relevant meeting occurred and that it discussed generally the circumstances surrounding the plaintiff's potential departure from Michelin it is probable that the factual issues between the parties will be as to subtle aspects of what occurred at the meeting. In those circumstances it is frequently the case that minor aspects of the surrounding circumstances can play an important part in influencing the court's decision as to which account to accept. In those circumstances a party who is being required to give an account of events which occurred over ten years ago, which were not, at the time, apparently likely to prove controversial and where the relevant witnesses would have spent much of the intervening period under the reasonable apprehension that the proceedings had been allowed to wither will be at a significant disadvantage. If questioned as to the minutia of the meeting the witnesses are unlikely to be able to recall. If these proceedings had come on for hearing within a reasonable period of time then the relevant witnesses would have been asked to deal with the minutia of such a meeting in circumstances where each witness would, at virtually all material times since the meeting, have been aware that he was likely to have to give evidence about it. In those circumstances I am satisfied that Michelin will suffer at least a moderate degree of prejudice in defending this action insofar as it relates to the alleged representations made at the September 1995 meeting."

8. The defendant submits that this decision is apposite and that in this case the defendant will suffer at least a moderate degree of prejudice if this case is allowed to proceed. While the defendant has admitted to having a liability to the plaintiff, it is clear from the correspondence that the defendant also claims to have a counterclaim against the plaintiff and, accordingly, it is unclear as matters stand how much that counterclaim will impact upon the liability which the defendant admits that it has to the plaintiff.

9. As against all of that, the plaintiff submits that it has always been clear that these proceedings have not been allowed to wither, as is evidenced by the service of no less than four notices of intention to proceed. It is submitted that the defendant will not be prejudiced since the case was pleaded clearly from the outset and the defendant gave detailed consideration to the case. It has not been pleaded that the defendant will not have available to it the witnesses required to deal with the proceedings. In the context therefore of addressing the question as to where the balance of justice lies, it is submitted on behalf of the plaintiff that since the

defendant has not established any prejudice, it should be permitted to proceed with the case.

Conclusion

10. It is evident from the correspondence opened to the Court that the plaintiff took action soon after this dispute first arose and submitted detailed particulars of its claim to the defendant. The defendant clearly gave detailed consideration to that claim and replied, through its solicitors, in some level of detail by letter of 2nd December, 2009. This letter concluded by indicating that the defendant had a counterclaim. The counterclaim was not particularised, and instead it was indicated simply that it had previously been agreed that the defendant would receive €10.00 from the plaintiff for every animal, between the ages of six to twenty-four months, delivered by the plaintiff to the defendant before April, 2009. It does not appear that any reply issued to this letter and in particular to the allegation relating to a counterclaim, or at least if there was a reply, it was not opened to the Court.

11. It appears from the proceedings that the plaintiff's claim is based upon an agreement entered into between the parties in May, 2007, which the plaintiff claims was amended following the removal by the Department of Agriculture of certain subsidies in 2009. The plaintiff claims that amendment comprised the insertion of two additional paragraphs to the 2007 Agreement. The plaintiff refers, specifically, in the indorsement of claim to a meeting on 15th April, 2009 at which it claims the 2007 Agreement was amended. The defendant denies having agreed to the amendment or having signed the amended agreement.

12. This opens up the possibility that evidence will be given as to what occurred at a meeting in April, 2009. As far as the counterclaim is concerned, it seems very likely that evidence will be required of an earlier meeting given that this is claimed to relate to the delivery of animals prior to April, 2009. All of this opens up the possibility of the kind of moderate prejudice (to the defendant) which Clarke J. referred to in *Rogers*. There is the further additional difficulty that at this juncture the defendant could be precluded by the statute of limitations from pleading the counterclaim. For these reasons, I am satisfied that the balance of justice in this case favours granting the defendant the reliefs sought and the proceedings should be dismissed.