Neutral Citation: [2015] IEHC 732

THE HIGH COURT

Record No. 2006 3375P

Between:

OWEN TRAYNOR

Plaintiff

– AND –
GUINNESS UDV IRELAND

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 24th November, 2015

Part 1: Overview.
1. Mr Traynor is a retired Guinness employee. He worked for 35 years with Guinness before accepting voluntary redundancy back in 2002. He has long maintained that he was given certain assurances at that time about his pension arrangements and that these have not been honoured. He has gone to a solicitor, he has engaged an actuary, he has gone to counsel. But he has been slow in coming to court. This is hardly surprising. Almost a hundred years after the opening salvoes that led to the creation of our present republic, we have now an expensive court system that remains alien to many and truly accessible to increasingly few. Mr Traynor, however, is clearly a 'fighting man'. He wants what he believes is his by right. So he has come to court despite the cost arising. But Guinness wants Mr Traynor's action struck out without the substance of his complaint being heard because, it maintains, Mr Traynor ought to have come to court sooner than he did. The court considers and applies the legal tests applicable to this form of application below, and concludes that these proceedings should be allowed to continue. But, while the parties are free to tilt where they will, the court would respectfully suggest to all sides that this is yet a matter that ought to be resolved collaboratively if possible, by mediation if not, by expert decision if necessary and, only as a very last resort, in this fearfully expensive forum.

Part 2: A Chronology of Events.
2. This matter has been a while brewing and the background details are most succinctly laid out in the form of a chronology:

7th March 1967 Mr Traynor commences employment with Guinness

25th April 2002 Mr Traynor's employment ceases after he accepts a voluntary redundancy package. He claims certain verbal assurances were offered concerning the package before he accepted it.

3rd May 2002 Guinness sends a letter identifying certain pension and other details. The terms of this letter allegedly deviate from the purported verbal assurances.

17th January 2003 Mr Traynor's solicitors liaise with Guinness in an eventually futile bid to resolve amicably the dispute concerning the package.

> *Note: It had by now been recognised that the dispute involved complex pension trust deeds dating back to 1949 and amended on various occasions since then.*

14th July 2004 Mr Traynor's solicitors engage actuaries to prepare a report on Mr Traynor's pension entitlements.

18th October 2004 Certain detail sought of Guinness by actuaries.

4th December 2004 Guinness reminded that certain detail has been sought and not received.

19th May 2005 Actuarial report completed after information sought of Guinness received.

12th December 2005 Counsel instructed to draft proceedings.

7th April 2006 Counsel reverts with draft proceedings.

4th July 2006 Draft proceedings finalised.

24th July 2006 Plenary summons issues and is served on Guinness the following day.

21st December 2006 Guinness enters an appearance.

3rd January 2007 Appearance served on Mr Traynor's solicitors.

> *At some point around this time, Senior Counsel #1 is engaged to review the complex pension documentation.*

4th July 2007 Senior Counsel #1 reverts with advices and settled Statement of Claim.

28th November 2007 Statement of Claim delivered. No Defence is forthcoming.

6th February 2008 Motion for Judgment in default of Defence issues.

3rd March 2008 Notice of Change of Solicitor for Guinness filed.

28th March 2008 Defence delivered.

18th April 2008 Notice for Particulars issues. Includes actuarial queries.

27th June 2008 Mr Traynor's solicitors turn to own actuaries regarding actuarial queries arising.

23rd September 2008 Guinness seeks further and better particulars.

17th December 2008 Guinness issues motion to compel replies.

At some point around this time, Senior Counsel #1 dies.

19th December 2008 Solicitors seek time of Guinness to engage new Senior Counsel who will need to read himself into the matter.

1st February 2009 Mr Traynor requests certain documentation of Guinness.

23rd February 2009 Guinness reverts with documentation sought.

9th April 2009 Correspondence to date leads to further consultation between solicitors for Mr Traynor and actuaries engaged for him. On the same date certain documentation is sought of Guinness.

24th April 2009 Guinness provides the documentation sought. Rejoinders served on same date.

31st May 2009 'Without prejudice' settlement discussions begin.

22nd January 2010 'Without prejudice' settlement discussions end without success.

22nd April 2010 Guinness requests voluntary discovery of documentation.

29th September 2011 Affidavit of Discovery sworn by Mr Traynor.

17th October 2011 Affidavit of Discovery served.

14th February 2012 Notice of Intention to Proceed served on Guinness.

4th May 2012 Notice of Trial served.

10th May 2012 Advices sought of Senior Counsel #2.

c.1st August 2012 Senior Counsel #2 reverts with detailed advices. Pursuant to same, Mr Traynor's solicitor seeks certain information of Guinness.

December 2012 Information requested by Mr Traynor's solicitor received from Guinness.

> *Thus far the essence of the foregoing might be summarised as follows. Between 2002 and 2009 there was a lot of 'to-ing' and 'fro-ing' between the parties, with some delay on both sides. Between May 2009 and January 2010, there was every possibility that matters might be amicably settled between them. Between January 2010 and September 2012 the parties were on a litigation footing again. From late-2012 through September 2014, the file received little or no attention from Mr Traynor's solicitors, thanks to the two principal partners becoming seriously ill at this time.*

18th September 2014 Counsel asked to draft request for voluntary discovery.

7th January 2015 Counsel reverts with draft letter.

2nd February 2015 Following consultation with Mr Traynor the request for voluntary discovery is served.

24th February 2015 Response to request received.

3rd March 2015 Guinness seeks withdrawal of proceedings, offering that each side would bear own costs.

16th November 2015 Guinness' application to strike out proceedings heard.

Part 3: Reliefs sought.
3. By notice of motion dated 20th April last, Guinness seeks (1) an order dismissing Mr Traynor's proceedings either pursuant to O.122, r.11 of the Rules of the Superior Courts 1986 (as amended) or on the grounds of inordinate and inexcusable delay in and about the prosecution of the within proceedings, (2) further, or in the alternative, an order dismissing Mr Traynor's claim in circumstances where the delay in prosecuting the within proceedings allegedly amounts to a breach of Guinness' rights pursuant to Art.6 of the European Convention on Human Rights, and (3) certain ancillary reliefs.

Part 4: Law Applicable to 'Strike Out' Applications.
4. The law applicable to 'strike out' applications has been ploughed and re-ploughed on many occasions in recent years by the superior courts. Notwithstanding that there is helpful Supreme Court case-law in this area, perhaps the most useful recent summary of the applicable precepts is set out at paras. 25 to 39 of the Court of Appeal's decision earlier this year in *Gorman v. The Minister for Justice, Equality and Law Reform and Ors* [2015] IECA41. That judgment emphasises the need for administrative efficiency, i.e. the efficient despatch of proceedings. However, it would be a mis-reading of Gorman, a mis-interpretation of the case-law to which it refers, and a mis-application of Art.6 of the European Convention on Human Rights, to conclude that our system of court-administered justice has evolved to the extent that substantive justice would ever be sacrificed on the altar of administrative efficiency. The test in applications such as that now before the court remains as it has been since at least the time of the Supreme Court's decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and that decision of course, involved both a synthesis and a development of previously established principle. Thus the court must ask if there has been inordinate delay. It must ask if there has been inexcusable delay. Then, even if there has been inordinate and inexcusable delay, it must ask where the balance of justice lies. The need for administrative efficiency may tug in one direction and the courts have been more conscious of such 'tuggings' in more recent times. Even so, this need is but one factor in the court's considerations. Among those considerations the need for substantive justice is ever present. Gorman, and other cases to which the Court of Appeal makes reference in that case, do no more than tout administrative efficiency as a significant pointer to where the balance of justice lies, but it is substantive justice that remains a constant pole star to which the courts must look when steering their actions.

Part 5: Three Questions and the Convention.

(i) Inordinate delay?
5. Has there been inordinate delay on the part of Mr Traynor in bringing the within proceedings? 'Inordinate' is a somewhat archaic

term, not commonly used in everyday speech, and it is useful to remind oneself of exactly what it means. A Google search of the word brings up the following definition: *"unusually or disproportionately large; excessive".* It also offers the following useful synonyms: *"excessive, undue, unreasonable, unjustifiable, unwarrantable, disproportionate, out of all proportion, unconscionable, unwarranted, unnecessary, needless, uncalled for, exorbitant, extreme, outrageous, preposterous".* When one looks to the detailed chronology above, none of these terms seems quite to fit what has happened here. Mr Traynor has been 'chugging along' at matters for a long time, it is true. But, up to 2009, matters were progressing apace despite some delay on both sides; and while these proceedings are Mr Traynor's to advance, the court cannot ignore that Guinness' actions contributed in part to such delay as arose. Between 2009 and 2010 there was a period when it looked like an amicable solution could be arrived at (a possibility the parties may wish to re-visit). Between 2010 and 2012 the proceedings were again proceeding in earnest. As for the delay between 2012 and 2014, if Guinness is seriously contending that the court ought to visit a negative repercussion on Mr Traynor because matters fell into abeyance at this time as a result ofthe two principal lawyers tasked with the management of his proceedings falling seriously ill – and it did not seem to the court that this was especially strenuously contended – then it has come to the wrong place. Between 2014 and now, the proceedings have continued at an appropriate pace. So, in all the circumstances arising, the court concludes that the delay arising on the part of Mr Traynor has not been inordinate – or indeed *"excessive, undue, unreasonable, unjustifiable, unwarrantable, disproportionate, out of all proportion, unconscionable, unwarranted, unnecessary, needless, uncalled for, exorbitant, extreme, outrageous, [or] preposterous".*

(ii) Inexcusable delay?
6. Has such delay as has arisen been *"inexcusable"*? A Google search for the word "inexcusable" brings up the definition *"too bad to be justified or tolerated"*, and such synonyms as *"indefensible, unjustifiable, unjustified, unwarrantable, unwarranted, unpardonable, unforgivable".* For much the same reasons as were given under the previous heading, the court considers that Mr Traynor's delay cannot be described as 'inexcusable' – or, indeed, as *"indefensible, unjustifiable, unjustified, unwarrantable, unwarranted, unpardonable, [or] unforgivable".*

(iii) Balance of justice?
7. As the court has concluded that the delay arising in the within proceedings is neither inordinate nor inexcusable, it is not strictly necessary for it to consider where the balance of justice lies in the within proceedings. However, for the sake of completeness it does so.

8. It may be that Mr Traynor's delay could be described as inexcusable, or that the balance of justice would be perceived as favouring Guinness in the within application if – whether as a consequence of that delay or otherwise – justice had been, to borrow the phraseology of Lord Diplock in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229, 254, 'put to the hazard'. But in fact Guinness' case in this regard is strikingly weak. A solicitor for Guinness has done her very best by her client in averring as follows in an affidavit:

> *"A full defence has been delivered to the Plaintiff's claim but a number of the individuals with whom the Plaintiff negotiated…in relation to his voluntary package have since left the employment of the Defendant and this clearly gives rise to its own difficulties with the passage of time. Furthermore, the ability of the Defendant to procure documentation in relation to the matters which are the subject of the within proceedings has been impacted by the delay…".*

9. If these proceedings had been sprung on Guinness 'out of the blue', the above-quoted text would perhaps be more persuasive. But as the above-outlined chronology shows, Guinness knew of Mr Traynor's concerns within a reasonably short time of them arising, certainly by January 2003. It defies belief, it is not even asserted, that from that moment onwards not a single person within Guinness has drafted a comprehensive memorandum about Mr Traynor's claim, not one person in or gone from its employment has committed a detailed note to file as to what this matter involves, no e-mails ever went to, say, the Head of Human Resources or the General Counsel describing the issues at play, that there has been no file opened on the matter within Guinness, and no previous assembling of relevant documentation. It is notable too that two sets of solicitors appear to have been instructed by Guinness as to what is afoot despite its purported deficiency in knowledge as to what is going on. Moreover, there is no suggestion in the above-quoted text that any of the individuals who have left are dead or otherwise unavailable, or unwilling to assist; it is not even clear that they have been contacted. And, insofar as procuring documentation from Mr Traynor is concerned, his claim is premised principally on various alleged verbal assurances by Guinness staff, with the result that it seems that it is within Guinness and among its employees, past and/or present, that the truth of matters seems most likely to be found.Thus Guinness' claims that it has been,or even that it would be, put to some disadvantage by the manner in which the within proceedings have unfolded seem to the court to be general, vague and unconvincing. The court therefore finds that the balance of justice favours allowing these proceedings to continue.

(iv) European Convention on Human Rights.
10. Given (i) all of the circumstances arising, (ii) that delays have arisen on both sides in the within proceedings (albeit that the proceedings fall to Mr Traynor to progress), (iii) that there is nothing in the facts that comes as a surprise to Guinness, (iv) that Mr Traynor's initial Senior Counsel died and the two senior solicitors who had carriage of his cause became not just un-well but seriously ill, (v) that there was the better part of a year between 2009 and 2010 in which attempts were made to settle matters amicably, and (vi) that Guinness is unable to point to any real disadvantage that it would suffer if these proceedings were now to continue, the court, having regard to the text of Art.6(1) of the European Convention on Human Rights does not consider that Guinness will be unable to secure a fair trial, or that the timeframe of these proceedings is unreasonable. (Obviously no issue arises as to the availability of a public hearing before an independent and impartial tribunal, nor has this even been contended). By way of aside, the court cannot but note in passing that while international conglomerates undoubtedly enjoy an abundance of legal rights, and properly so, it nonetheless seems somewhat odd, albeit not legally wrong,that a convention on human rights would in any event be sought to be prayed in aid by a member of such a conglomerate against a 72-year old man who just thinks he is not being paid the, doubtless moderate, pension that he believes himself to have been promised.

Part 6: Order 122, rule 11.
11. Order 122, rule 11 of the Rules of the Superior Courts provides, inter alia, as follows:

> *"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the court to dismiss the same for want of prosecution, and on the hearing of such application the court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the court may seem just."*

12. This is a jurisdiction that sits separately to a general application to dismiss an action for want of prosecution, though when an application under O.122, r.11 is made in the context of a general application to dismiss for want of prosecution, it is difficult to

conceive of circumstances in which the court would refuse relief on the general ground but nonetheless dismiss the proceedings under O.122, r.11.

13. In the within proceedings, counsel for Guinness has invoked O.122, r.11 in light of the fact that no Notice of Intention to Proceed issued before these proceedings were 're-booted' earlier this year. The Rules of the Superior Courts ought generally to be obeyed; breaches are to be deprecated. Even so, they can be forgiven by the court, especially where – as here – nothing of consequence appears to flow there from. That these proceedings took a new lease of life earlier this year may have come as a surprise to Guinness. However, the substance of the proceedings has not taken Guinness by surprise. Nor does the court perceive any prejudice to arise. And the Notice of Intention to Proceed has now belatedly (albeit, by the time of service, somewhat pointlessly) been served.

14. For the reasons just stated, and for the reasons stated elsewhere above as to why the court considers (a) the delay arising in this case to be neither inordinate nor inexcusable, and (b) the balance of justice to favour the continuation of the proceedings, the court declines to dismiss the within proceedings pursuant to O.122, r.11. No other form of relief has been sought pursuant to O.122, r.11, other than dismissal.

Part 7: Estoppel?

15. Despite the fact that the solicitors for Guinness issued the notice of motion for the within application on 20th April last, in perhaps an abundance of exuberance they also issued to Mr Traynor's solicitors, on 20th July, a detailed four-page letter seeking further and better discovery of certain documentation. Counsel for Mr Traynor contended at the hearing of the within application that Guinness is estopped from seeking a 'strike-out' of proceedings when Guinness is patently continuing with those proceedings. It certainly sends an interesting message to the judge tasked with hearing a 'strike out' application that the solicitors for the party bringing that application are separately ploughing ahead with the 'nitty-gritty' of the proceedings –and for that, if no other reason, lawyers for an applicant ought perhaps ever to be guarded in actions done within the penumbra of pending 'strike-out' applications. But, as Justice Frankfurter noted in *Indianapolis v. Chase Nat'l Bank* 314 U.S. 63 (1941), 69, *"Litigation is the pursuit of practical ends, not a game of chess"*. In a novel, the fact that a letter such as that of 20th July issued might perhaps yield a climactic finale. In life, one possibly exuberant move in the course of litigation need not scupper the bringing of a later application, and here has not, albeit that the within application has, for the other reasons stated above, proved unsuccessful.

Part 8: Conclusion

16. For the reasons stated over the course of Parts 1 to 6 above, the court declines to grant Guinness any of the reliefs sought by it in the within application.