THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 288

APPEAL NO. 2016/121

2016/122

Peart J.
Irvine J.
Hedigan J.

BETWEEN:

(1) THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENTS

-V-

VINCENT KELLY

APPELLANT

[HIGH COURT RECORD NO. 2010/2242S]

(2) THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENTS

-V-

VINCENT KELLY AND CLAIRE COLLINS

APPELLANTS

[HIGH COURT RECORD NO. 2010/2248S]

(3) THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENTS

-V-

VINCENT KELLY AND CLAIRE COLLINS

APPELLANTS

[THE HIGH COURT RECORD NO. 2010/60P]

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 1ST DAY OF NOVEMBER 2017

1. In these three sets of proceedings (consolidated by order dated 7th February 2011 (O'Neill J.)) the respondent bank seeks (a) to recover judgment for significant sums of money which it loaned to the appellants (the summary summons proceedings), and (b) to obtain possession of certain property put up by way of security for those loans, so that it can sell them and apply the proceeds of sale in reduction of the amount owing (the special summons proceedings).

2. The appellants sought in the High Court to have all three proceedings dismissed for want of prosecution by the bank pursuant to Ord. 122 of the Rules of the Superior Courts, or alternatively on the grounds of inordinate and inexcusable delay/abuse of process pursuant to the inherent jurisdiction of the Court. Those applications were refused by the High Court (Kearns P.) for the reasons contained in a written judgment delivered on the 17th April 2015 [2015 IEHC 230]. The President stated that even though a delay of three years was capable of being considered inordinate, it was not on the facts of this case an inordinate delay; but that even if it was, it was nevertheless excusable. He also concluded that the appellants' had in any event not established any particular prejudice by the delay that took place. The appellants' appeal to this Court against the refusal of their application to dismiss these proceedings.

3. The first appellant ("Mr. Kelly") is not professionally represented. The second appellant ("Ms. Collins"), his wife, is represented by solicitor and counsel. Mr. Kelly informed the Court at the outset that he was content to rely upon legal submissions advanced by senior counsel for Ms. Collins, Niamh Hyland SC, subject to making a few submissions of his own thereafter. Since the facts relied upon, and the legal submissions helpfully contributed by Ms. Hyland are largely common to both appellants, I shall refer to the both appellants simply as "the appellants" without any distinction except where necessary.

4. The bank have sought to recover sums due on foot of three loan facility letters under which Vincent Kelly alone borrowed money from Bank of Ireland, and a fourth under which both he and Clare Collins (his wife) borrowed additional money. Each loan was secured on properties in County Cork. Additional details of these loans and the security given are described in the judgment of Kearns P. and it is unnecessary to do so again. The total amount claimed to be owing is in excess of €4.5 million including interest which continues to accrue.

5. Inevitably, on an application to dismiss proceedings for want of prosecution/on grounds of inordinate and inexcusable delay, the Court will look closely at the chronology of the proceedings to appreciate the progress of the proceedings, or indeed the lack of it, from the date of commencement until the date on which the motion to dismiss the proceedings was issued. In this case those details can be gleaned first of all from the grounding affidavit sworn by Mr. Kelly on his own behalf and on behalf of Ms. Collins, the bank's replying affidavits, and the pleadings themselves. Once that chronology is established, the Court can determine whether the alleged delay by the bank in progressing its proceedings to a conclusion has been inordinate, and if so whether it is inexcusable. If both of those questions are answered in the affirmative, then and only then is the Court required to determine whether the balance of justice

favours the dismissal of the proceedings or refusing the application. What I have stated are the essential elements of the well-known *Primor* principles enunciated by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and which are fully set forth in by Kearns P. in his judgment under appeal herein at pp. 7-9 thereof.

6. While the President referred to some of steps taken in the proceedings, he did not give a detailed chronology. He made a general reference to the allegations of delay which are made by the appellants. In particular on p. 8 of his judgment he refers to the appellants' submission that the delay which is relevant to the application to dismiss is a period of three years from the 12th April 2011, when the bank delivered its reply to the appellants' defence and counterclaim, to the 2nd April 2014 when the bank served a notice of intention to proceed in accordance with Ord. 122, r.11 RSC. It was shortly after receiving that notice that the appellants issued their notice of motion seeking to have the proceedings dismissed. The President took the appellants' case at his height and decided that the three year period of delay asserted by them was inordinate. However, as I have stated above, he found that in all the circumstances it was excusable.

7. The appellants have averred in their grounding affidavit that the three year delay by the bank in taking any further step to progress the proceedings to a conclusion following the delivery of their defence and counterclaim was a deliberate decision on its part. It is their belief that the bank did not want to have to deal with the issues raised by them in their counterclaim, and that it pursued a strategy designed to drag out the proceedings as much as possible. Mr. Kelly has submitted that the bank's overriding objective was to avoid litigating those issues, and that instead of progressing the cases to their conclusion the bank set about trying to pressurise the appellants into a new agreement with the bank so that it could "mend its hand" by removing the relevance of the historical issues pleaded in support of their counterclaim. He goes on to argue that in so far as the bank defends its delay by saying that it was attempting to negotiate a settlement of the proceedings, in reality the bank had no intention of entering into *bona fide* negotiations, and merely suggested that course as a means of delaying or dragging out the proceedings further so that the bank could avoid having to litigate the issues raised in the counterclaim.

8. It is accordingly argued that these proceeding are an abuse of process in circumstances where the bank had no bona fide intention of bringing them to conclusion, and used them for the collateral motive of bringing such pressure to bear upon the appellants that they would abandon their defence and counterclaim, and capitulate. So, as far as the appellants are concerned, the application to dismiss the proceedings is not based solely on inordinate and inexcusable delay, but also on abuse of process, the latter being a matter perhaps emphasised more by Mr. Kelly than by Ms. Hyland on behalf of Ms. Collins, but nevertheless it forms part of each party's application. I am satisfied that the abuse of process jurisdiction relied upon by the appellants does not extend to the manner in which proceedings, which are not themselves an abuse of process/frivolous or vexatious, are prosecuted, or not as the case may be, by a plaintiff. The appellants, and particularly Mr. Kelly, submit that the bank had a collateral motive in bringing these proceedings and in pursuing them in the way they have. There is no evidence that the proceedings themselves constitute an abuse of process. They comprise perfectly normal summary summons proceedings to recover money borrowed, and special summons proceedings to recover possession of property put up by way of security for those loans. There is nothing abusive about a bank seeking to recover money it has lent and which has not been repaid, or in seeking to enforce its security. Neither was there anything in the nature of abuse of process arising from other proceedings brought by Bank of Ireland Mortgage Bank (BOIMB) in Cork Circuit Court, to which I refer in more detail later in this judgment, There can undoubtedly be cases where the proceedings themselves, as opposed to the manner in which they are prosecuted, may constitute an abuse of process, such as where they are commenced for some impermissible collateral purpose which does not arise in the present case. In truth, the application before the President fell to be considered and determined only on the basis of alleged inordinate and inexcusable delay by the bank. The President referred briefly to the submission made by the appellants regarding abuse of process. While he did not specifically rule that the abuse of process jurisdiction did not arise of the facts of this case, there could be no doubt that it did not and does not. For the sake of completion I would reject the ground of appeal based on any failure by the President to make any determination in relation to the abuse of process submission. It was unnecessary for the President to do so as the abuse of process jurisdiction was simply misunderstood by Mr. Kelly. It does not arise at all on the facts.

The counterclaim

9. The appellants say that in the event that the bank is found to be entitled to recover judgment in respect of the amounts claimed on foot of the loans referred to, they are entitled to an equitable set-off in respect of any award of damages made on foot of their counterclaim. The counterclaim is pleaded in the following terms:

> "The defendants repeat their defence and counterclaim as follows:–
>
> 27. For in or around the last 20 years the first defendant has banked almost exclusively with the plaintiff. Mr. Peter Walley, the first cousin of the first defendant, and the servant and/or agent of the Bank for substantial periods, managed the first defendant's accounts and at all times is and was aware of the financial position of the first defendant and of his business as a consulting engineer.
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> 28. In or around the year 2005, the first defendant sought financial and investment advice from the plaintiff which was given to the first defendant through its servants and/or agents, the said Mr. Peter Walley and Mr. Charlie Redmond. In the course of such advice the servants and/or agents of the Bank represented that the acquisition of property in the West Cork area with a view to reselling and/or development and resale was be [sic] a financially viable and profitable enterprise, and actively encouraged and supported the first defendant to engage in the said investment activity and supported him with loan facilities and further advices from time to time for that purpose.
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> 29. On foot of the said representations and advice, the first defendant purchased a number of properties which were financed by the plaintiff bank, which finances the subject of these proceedings.
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> 30. Prior to purchasing each of the said properties, the first defendant sought, obtained and relied upon the advices of the servants and/or agents of the Bank in their capacity as business and investment advisors.
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> 31. At the time the said advice was given by or on behalf of the Bank, its servants and agent new, or ought to have known, as was the fact, that the first defendant and the second defendant would and did rely on the said advice in making a decision to purchase each and all of the said properties, and in the circumstances, the bank, its servants and agents owed a duty of care to the first defendant to give such advices in a true and careful manner.
>
> 32. The advice so given by the plaintiff, its servants and/or agents was given in a manner that breached the said duty and was negligent. In particular the plaintiff, its servants or agents, failed in giving such advice to have any and/or any adequate regard to the general economic position of the first defendant and the second defendant and to the economic and property market on the whole.

33. In truth and in fact the said statements and representations were, and each of them, fall's, untrue, inaccurate and misleading and the first and second defendants have thereby suffered loss and damage.

34. Further, the said representations made were of an existing fact and were made knowingly either without belief in their truth or false, at a time when it was intended by the plaintiff that the said representations should be acted upon by the first defendant and the second defendant, and that the first defendant and the second defendant did in fact act on foot of the representations and in fact suffered damage by virtue of so acting.

PARTICULARS OF REPRESENTATION

The plaintiff, their servants and agents, including Mr. Peter Walley and Mr. Charlie Redmond recommended and advised that the first defendant and the second defendant enter into the said transactions and furthermore represented that:-

a) the property market in West Cork was in some way immune from the prevailing market conditions;

b) the purchase of property in the West Cork area for the purpose of resale would be a sustainable and viable financial enterprise;

c) the West Cork property market was a particular micro-economy;

d) they had a unique and detailed knowledge of the West Cork property market.

NEGLIGENCE AND BREACH OF DUTY

The plaintiff was negligent and in breach of duty in that they:

a) paid and/or compensated its servants and/or agents in a manner which encouraged negligent, reckless and/or irresponsible lending

b) knew or ought to have known that the banking sector in Ireland was experiencing liquidity and/or solvency difficulties.

c) Failed to issue any or any adequate warning to the first defendant and the second defendant regarding the state of the property market or the likely effect of the bank's liquidity and/or solvency difficulties.

d) Issued positive sentiments to the first defendant and the second defendant regarding the state of the property market in West Cork.

e) Failed and/or neglected to heed the rules and regulations of the Financial Regulator.

f) Failed to have any or any adequate regard to the provisions of the Consumer Protection Code.

g) Failed to act in the best interest of the first defendant and the second defendant.

h) Engaged in irresponsible lending and sanctioning of lands to the first defendant and the second defendant.

i) Issued positive indications in relation to the economy and property market when they knew or ought to have known that the banking sector was suffering likely to suffer in the short-term seriously liquidity problems and that the property market was overheated and likely to suffer from the loss of confidence and the side-effect of the loss of liquidity in the banking sector."

10. The appellants' first grounding affidavit was sworn by Mr. Kelly on the 12th May 2014. He swore it on his own behalf and on behalf of Ms. Collins. It is a lengthy document running to some 124 paragraphs over some 22 pages. In it Mr. Kelly describes the delay which occurred following the delivery of their defence and counterclaim and the lack of any meaningful progress by the bank thereafter to bring the proceedings to a conclusion. He refers to the fact that in response to a request by the appellants for discovery of documents the bank agreed to give on a voluntary basis discovery of only 10 of the 18 categories sought by the appellants, which essentially excluded documentation which the appellants were seeking for the purpose of advancing their counterclaim. The appellants could have issued a motion seeking an order for discovery of the further 8 categories of documents but did not do so.

11. In his first affidavit, Mr. Kelly sets out at great length the factual basis for the pleaded counterclaim. There is no need to set out that detail extensively as it is not directly relevant to the application to dismiss the proceedings. But Mr. Kelly avers that the manner in which the bank's representatives behaved during the period of delay complained of following the delivery of their defence and counterclaim was "bullying and aggressive" and intended to pressurise them into a renegotiation of the loans which would advantage the bank by removing the historical issues which form the backdrop of the counterclaim, and avoid having those issues aired publicly at a hearing of the proceedings, and disadvantage the appellants who, to the knowledge of the bank ,were never in a position to honour any new arrangements that the bank were trying to force them into agreeing.

12. Having elaborated at length on the bank's behaviour, as well as commenting at length on the lending policy and lending behaviour of the bank leading up to and during the financial crisis and property market collapse, Mr. Kelly states that the bank's delay in these cases has been not only inordinate and inexcusable but also deliberate in order to avoid having the issues in the counterclaim heard, and also in order to put maximum pressure on he and his wife in order to force them into a capitulation.

13. In support of these averments he refers to other proceedings for possession of property at Ballyrisode, Co. Cork, which the bank commenced in Cork Circuit Court, and which it later applied to have transferred to the High Court in July 2011 in circumstances where it could have simply sought an order for possession in the Circuit Court on that date. He goes into some detail in his affidavit about how the bank, having had those proceedings adopted into the High Court by Master's Order dated 15th November 2011 so that the mater would proceed by way of plenary hearing, later applied to have that order amended to reflect that the possession proceedings would proceed by way of special summons procedure. Much detail is then provided by Mr. Kelly about the rather unusual journey of those proceedings in and out of the Master's Court and into the Judges' list, culminating in a hearing before Gilligan J. on the 13th November 2013 when it was adjourned to a plenary hearing. Mr. Kelly makes the point that what was adjourned to plenary hearing by this circuitous route was precisely the same application for possession which had been before Cork Circuit Court by way of motion more than two years previously in July 2011. He complains about the bank's tactics and consequential delay in relation to those

proceedings. These averments are made in support of the abuse of process claim that I have already commented upon.

14. While those proceedings are separate to the within proceedings, Mr. Kelly nevertheless made the point in his affidavit that during the following two years from July 2011, the bank took no steps in the within proceedings until the night before the 13th November 2013 when the Ballyrisode matter was due before Gilligan J. in the High Court. It appears that on the 12th November 2013 at about 7.30pm while Mr. Kelly was not at home, the bank's summons server attended at his home and served a notice of motion on Ms. Collins seeking an order to compel the appellants to reply to a notice for particulars that had been served by the bank in April 2011 and to which the appellants had not responded. He alleges that the timing of the service of such a motion being the night before the Ballyrisode possession proceedings were before Gilligan J. the following morning was no coincidence and was designed again to apply pressure on the appellants. The bank, of course, has denied any such motive.

15. Mr. Kelly's affidavit also detailed the prejudice that he and his wife say has resulted from the bank's delay in pursuing these proceedings and the bank's behaviour generally. He states that they have known since 2009 that they would have to defend the bank's claims on the basis that the loans should never have been made to them, and on the basis that if they had received proper advice from the bank they would never have taken the loans. He makes the point that if they are unsuccessful in defending the claims, and in their counterclaim, they will be ruined financially, and that this worry has been prolonged by the manner in which the bank has failed to properly prosecute the proceedings. He says also that their defence will be dependent on such oral evidence as they can give, and that the quality of such evidence may be diminished by the passage of time. He believes that this additional stress on both him and his wife has been inflicted deliberately by the bank in the full knowledge that they are unable to afford to defend all the proceedings against them, and retain professional lawyers for that purpose. He states that "it seems to me that the bank took the view that its best strategy was to conduct the cases as if it were a war of attrition, and if it strung it out long enough it would break my nerve, use up any resources and force me to give up and do its bidding". Ms. Collins has submitted that she is prejudiced by the extreme stress and anxiety that the bank's delay has inflicted upon her, and also by the fact that all during the period of the bank's delay interest has continued to accrue on the sums being claimed by the bank on foot of the loan agreement to which she is a party.

16. Needless to say, the bank in its replying affidavit have strongly deniedd any suggestion that it has behaved in any way that could be characterised as an abuse of process. It denies any collateral motive as suggested by the appellants, and denies any suggestion that it has acted other than properly in all the proceedings that form the within appeal. The bank has outlined the chronology of steps taken in the proceedings, and refers to the fact that not only had the appellants not responded to a notice for particulars served in April 2011, but had also failed to follow up on their request to have discovery of some 18 categories of discovery, where the bank had indicated its willingness to provide only 10 of these categories on a voluntary basis.

17. The bank also referred to the fact that in April 2012 the appellants' then solicitors issued a notice of motion seeking to come off record. That motion was heard and granted on the 18th June 2012. It says that it was after it was notified that the order had been made allowing the solicitors to come off record that efforts were made by the bank to engage directly with the appellants to see if there was any possibility that some compromise could be reached before the bank incurred further legal costs. It describes meetings which took place with Mr. Kelly in February 2013 and again in July 2013, but which were unsuccessful. I should point out that insofar as the bank seeks to rely upon these attempts to enter into negotiations in order to excuse any delay that might be considered to be inordinate, Ms. Hyland for Ms. Collins has stressed that while such activity might be relevant to Mr. Kelly's application to dismiss the proceedings, it cannot avail the bank in respect of her client's application as she did not engage with the bank in relation to such efforts, and did not meet with the bank.

18. The bank has averred that it was only in the light of the unsuccessful attempts at a negotiated settlement of the proceedings that the bank considered that it should press on with them. It wrote to the appellants on the 9th September 2013 warning that it would bring a motion to compel them to reply to the notice for particulars served in April 2011 . Not having received such replies following its warning letter, the bank on the 1st November 2013 issued and served a notice of motion on the appellants seeking such an order. That motion was returnable before the High Court on the 9th December 2013.

19. However, under Ord. 122, r.11 RSC a party wishing to take a step in proceedings must serve one month's notice of intention to proceed on the other party where more than one year has elapsed since the last step taken in the proceedings by either party. The bank had overlooked this rule when it issued and served its notice of motion on the 1st December 2013 without having first served such a notice under Ord. 122, r.11 RSC. The appellants were quick to point out this error to the bank's solicitors by letters dated 3rd December 2012, and requested that the bank's motion be struck out on its return date. The bank wrote on the 6th December 2013 agreeing to that course. It was not until the 2nd April 2014 that the bank served the required notice of intention to proceed. That delay is not explained.

20. On the 12th May 2014, following the expiration of one month from the date of service of the bank's notice of intention to proceed, the appellants issued their motion seeking to have these three sets of proceedings dismissed for want of prosecution and/or on the basis of delay or as an abuse of process.

21. The bank has stated in its replying affidavit to the motion accepts that it was reluctant to press on with the proceedings because it was uncertain about the prospects of recovering anything on foot of the money judgments it was seeking, and because it was conscious of the substantial legal costs that it would incur without any real prospect of recovering these from the appellants should the bank be successful. It did not however write to the appellants and inform them that this was the reason that they were not pressing on with the proceedings.

22. The bank refers also to the fact that the appellants failed to provide replies to the particulars of their counterclaim which the bank had requested in April 2011, and failed also to respond to letters seeking such replies which were written to them in both May 2012 and again in September 2012. The bank further relies on the appellants' failure to respond in any way to the bank's letter in September 2013 when it indicated its agreement to give only 10 of the 18 categories of documents being sought by way of discovery. In answer to the criticism that it did not set down the actions for hearing and serve notice of trial, the bank says that it could not have done so as the case was not ready to be heard in the absence of the appellants' replies to the notice for particulars and without knowing the appellants' intentions in relation to the discovery that the bank was unwilling to provide. Furthermore, until these replies to particulars were received, the bank would not be in apposition to know what discovery it should seek from the appellants.

23. Finally, the bank stated that the appellants have not established that they have been prejudiced by any delay in these proceedings. It refers to the nature of the defence and the counterclaim, and suggests that these issues will be based upon their own oral testimony, and that the contents of the affidavit sworn by Mr. Kelly suggests that he has a clear memory of matters to which he would refer in his evidence, and that accordingly he will be in a good position to argue their defence and the counterclaim. As far as prejudice to Ms. Collins is concerned, she relies upon the general prejudice caused by the extreme stress and anxiety which

has been caused to her by the bank, and the fact that interest has continued to accrue on the loan in respect of which she was a co-borrower with Mr. Kelly.

24. In relation to the other possession proceedings which were commenced in Cork Circuit Court and to which reference has been made earlier herein, the bank points out that those proceedings do not involve the respondent bank, but rather an entirely separate legal entity, namely Bank of Ireland Mortgage Bank (BOIMB). The point is made that the respondent bank has no authority or power to direct or control the prosecution of proceedings by BOIMB, and did not in any event do so in this case.

25. It is evident that there was no culpable delay by either side following the commencement of the three sets of proceedings up to the delivery by the appellants of their defence and counterclaim on the 12th April 2011. The bank no doubt will have wanted to deliver a reply and defence to counterclaim thereafter, and understandably in advance of so doing it served a notice for further particulars of the defence and counterclaim.

26. The passage of time about which the appellants complain and which they characterise as culpable delay on the part of the bank, commences from the 12th April 2011 (despite the fact that they have never provided those further particulars of defence and counterclaim sought by the bank, and in spite of reminders in that regard), and ends some three years later on the 12th May 2014 when the appellants issued their motion to have all the proceedings dismissed.

27. A useful chronology of events is contained in the bank's written submissions on this appeal. The appellants also provided a chronology, but it does not contain some activity that the bank relies upon, and it is only for that reason that I choose to avail of the bank's chronology, as it contains all the events and steps identified by the appellants in their own chronology, as well as certain additional activity. I should add that the appellants have submitted that this additional activity relied upon by the bank in its submissions is not such as to excuse the delay by the bank, such as correspondence between the parties, and meetings between the bank and Mr. Kelly in February and July 2013, but I will address those concerns in due course.

28. **Chronology:**

DATE EVENT

29 January 2010 Proceedings Record No. 2010/60Sp issued

12 May 2010 Proceedings Record No. 2010/2242S issued

12 May 2010 Proceedings Record No. 2010/2248S issued

28 May 2010 All three sets of proceedings served

8 June 2010 Appearance entered on behalf of Defendants by Noonan Linehan Carroll Coffey

3 November 2010 Motions for judgment in summary proceedings returnable before the Master of the High Court

Between 3 November 2010

and 7 February 2011 An exchange of Affidavits took place between the Plaintiff and the Defendants

7 February 2011 Motion for judgment in both summary proceedings High Court adjourned all proceedings for plenary hearing and on consent of the parties consolidated the proceedings

28 February 2011 Statement of Claim delivered

22 March 2011 Defence and Counterclaim delivered

12 April 2011 Reply to Defence to Counterclaim delivered

12 April 2011 Plaintiff raises a Notice for Further Particulars of the Defence and Counterclaim

5 May 2011 Request for Voluntary Discovery from Defendants

3 April 2012 Defendants' solicitor issue a Notice of Motion to come off record which was served on 12 April

25 May 2012 Plaintiff's solicitors write to Defendants' solicitors and to Defendants personally seeking reply to the Notice for Particulars of 12 April 2011

18 June 2012 Noonan Linehan Carroll Coffey write to Plaintiff's solicitors informing them that the Court has granted their application to come off record

10 December 2012 Plaintiff writes directly to the Defendants inviting them to meet in an attempt to compromise the proceedings

February 2013 Following from Plaintiff's offer to compromise the proceedings a meeting was held in February 2013

6 March 2013 Defendants indicate (by letter) that they do not wish to engage with the Bank

14 March 2013 By email, Ciaran Coveney of the Bank expresses disappointment at the Defendants' position, states that the Bank will have to progress matters, but states: "You always have an option however to initiate further engagement with the Bank"

23 July 2013 A meeting was held between the Plaintiff and the first named Defendant at his request.

The meeting does not lead to a positive resolution.

9 September 2013 Plaintiff's solicitors write to the Defendants personally noting that Noonan Linehan Carroll Coffey had been permitted to come off record and confirming that the Plaintiff will make voluntary discovery of categories 1 to 10 of the 18 categories sought by the Defendants

9 September 2013 Plaintiff's solicitors warn Defendants that a Motion to compel Replies to Particulars will issue arising from their failure to reply to the Notice for Particulars of 11 April of 2011

18 September 2013 The Defendant sends a registered letter to the Plaintiff making allegations about the Bank's behaviour

27 September 2013 The Plaintiff replies denying the allegations and expressing disappointment that the Plaintiff's attempts to encourage the Defendants to engage constructively have come to nothing

1 November 2013 The Plaintiff issues a Motion to compel Replies for Particulars, returnable on the 9 December 2013

3 December 2013 Defendants write complaining that a Motion to compel Replies to Particulars has issued without a Notice of Intention to Proceed having issued

6 December 2013 Plaintiff's solicitors reply agreeing to strike out the Motion with no Order for costs to enable a filing of a formal Notice of Intention to Proceed

7 April 2014 Notice of Intention to Proceed served on Defendants

12 May 2014 Defendants issue the within Motion

9 June 2014 Plaintiffs request voluntary discovery from the Defendants

13 June 2014 Plaintiff serves Affidavit of discovery on Defendants

24 October 2014 Plaintiff issues Motion to compel Replies to Particulars and for Discovery.

Motions stand adjourned to 17 July 2017

29. There is undoubtedly a period of 12 months after April 2011 when no step is taken by the bank until 25th May 2012 when it wrote to the appellants' solicitors, and directly to the appellants, seeking replies to its notice for further particulars in circumstances where it had been served with a copy of the appellants' then solicitors motion seeking an order to come off record for the appellants in these proceedings. There was no response to that letter.

30. On the 18th June 2012 the bank was informed that an order had been made permitting the appellants' solicitors to come off record. The bank relies upon the activity on its part between December 2012 and December 2013 during which it invited the appellants to meet with the bank to try and resolve the proceedings, had two such meetings in February 2013 and July 2013 which came to nothing by the end of July 2013, and thereafter in September 2013 agreed to make discovery of 10 of the 18 categories of documents sought by the appellants, and also warn the appellants that if they continue to fail to deliver replies to the notice for particulars dated 12th April 2011 a motion will be issued to compel such replies. There was no response to that warning letter.

31. On the other hand the appellants submit that the motion by their solicitors to come off record and the time that took to be determined cannot avail the bank in excusing its own delay, and neither can its invitations to meetings and the two unsuccessful meetings in February and July 2013, since these are not steps in the proceedings as such. They submit also that the bank may not rely on the correspondence in September 2013 nor the motion which it had to have struck out for failure to have served a notice of intention to proceed. The appellants say that the bank's delay for the purposes of their application to dismiss continued right down to 12th May 2014 when the appellants issued their motion to dismiss following the service of the bank's notice of intention to proceed.

The President's judgment

32. Having set forth the background to the proceedings, the parties' submissions and having set forth the principles in *Primor*, and having referred to other relevant authorities such as *Gilroy v. Flynn* [2005] I.L.R.M. 290 (Hardiman J.) and *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50 (Clarke J.) on the question of delay, the President expressed his overall conclusions as follows:

> "The principles in relation to delay and applications to strike out for want of prosecution are well-established and need not be reiterated in any detail. The Court must first consider whether or not the alleged period of delay is inordinate. Taking the defendants' case at its height, the period in question is approximately three years. While there is no fixed rule as to precisely when a delay becomes 'inordinate', it is possible that a three year period would fall into this category where, for example, there has been no activity in relation to the proceedings. However, the Court accepts the submissions made on behalf of the plaintiff that a number of steps were taken during the relevant time such that the period of delay, even if it was held to be inordinate, which the Court does not find on the facts of the present case, is excusable.
>
> It is clear that the plaintiff took some steps in relation to the proceedings during the relevant time including the issue of a request for particulars. It is clear also that the defendants at times failed to comply with their own procedural requirements and that their solicitor experienced substantial difficulties in obtaining valid instructions which undoubtedly hindered the progress of the proceedings and limited the steps that could be taken by the plaintiff at that time. Ultimately, the defendants' solicitor applied to come off record owing to an inability to obtain instructions following extensive efforts to do so.
>
> The Court is also satisfied that genuine efforts were made by the plaintiff to compromise the proceedings during this time. Such an approach is to be encouraged. A country situation whereby financial service providers aggressively pursue distressed borrowers and rapidly progress litigation without any genuine efforts to resolve the difficulty or to compromise the proceedings would be most unsatisfactory. Litigation is expensive and extremely stressful for many people and recourse to the courts should not be seen as a first port of call. It is entirely legitimate that the plaintiff in these proceedings sought to exhaust the possibility of negotiation and compromise before intensifying its efforts to resolve the matter in court.
>
> That is not to say that financial service providers are permitted to initiate litigation and then take no further steps so that

the proceedings are left hanging over the borrower for an indeterminate period. However, it is clear that such a situation did not arise in the present case and the bank took reasonable steps to progress matters while also leaving the option of a compromise open to the defendants. The Court is also satisfied that the first defendant acted on behalf of and with the permission of the second defendant in his dealings with the plaintiff bank.

In relation to any prejudice which might have been suffered by the defendants that would warrant the proceedings being dismissed on the balance of justice, I am satisfied that no such prejudice has occurred. No evidence has been introduced which suggests that any relevant witness may be compromised due to the lapse in time and the defendants have at all times had the benefit of the relevant properties.

Decision:

For these reasons outlined above the defendants' motion is refused."

Inordinate delay

33. Ms. Hyland and Mr. Kelly submit that the President erred in concluding that on the facts of this case the delay of three years (taking the appellants' case at its height) was not inordinate, even though on other facts such a period might be considered to be inordinate. I agree with that submission. The date on which the clock started against the bank for the purpose of calculating the period of culpable delay is in my view the date by which the appellants were called upon it by the bank's notice for particulars to furnish their replies. The bank can reasonably be expected to need those replies before finalising its reply and defence to counterclaim. The absence of those replies to particulars was preventing the bank from serving notice of trial which was a necessary step to be taken by the bank in order to get these proceedings heard and determined. According to the bank's own chronology above, no activity of any kind upon which it might seek to rely took place between April 2011 and 1st November 2013 when it issues a notice of motion seeking replies to particulars. Even though that motion had to be struck out on the 9th December 2013 because the motion had not been preceded by the service of one month's notice of intention to proceed under Ord.122 RSC, I would consider the issuing of that notice of motion to be sufficient to stop the clock from running against the bank. The activity upon which the bank relies between April 2012 and the issuing of that motion on the 1st November 2013 more properly falls to be considered in relation to the second limb of the *Primor* test, namely whether it excuses an inordinate delay.

34. The delay by the bank from April 2011 until November 2013 covers a period of two years and six months. That is a period during which the bank took no step to advance these proceedings. It ought to have been putting pressure on the appellants from some date in May 2011 to furnish the particulars that it required in order to prepare and deliver its reply and defence to counterclaim. It failed to do so – perhaps, I accept, for the understandable reason that it feared that by bringing these proceedings to a conclusion it would incur substantial further legal costs and with little hope of recovering these even from the proceeds of sale of the secured properties. Nevertheless it is the bank who commenced the proceedings, and has carriage of them. It is obliged therefore to take such steps as it may under the rules of court to bring them to a conclusion within a reasonable timeframe. The onus in that regard is upon the bank, and not on the appellants.

35. A delay is inordinate where it is excessive or out of the ordinary. There is inevitably in any litigation a time that it takes, even with great diligence and efficiency, to get things done. While the rules of the superior courts provide for times within which particular steps are to be taken, such as that a statement of claim is to be delivered within 28 days from the date upon which a defendant enters an appearance to the originating summons, these must be seen as directory with the aim of facilitating the timely progression of the proceedings from commencement to finality. The fact that a particular step is not taken by a plaintiff within the time prescribed under the rules does not invalidate the proceedings, or mean even that the defendant can obtain an order dismissing the proceedings. Some reasonable latitude as to these time limits is dictated not only by necessary commonsense and reasonableness, but by the rules themselves which provide the courts with a power to extend the time provided for the taking of any step in the proceedings.

36. Nevertheless for the purposes of determining on an application to dismiss a claim for want of prosecution on the ground of delay whether a delay has been inordinate the court must look at the date from which time the plaintiff could reasonably have been expected to take the next step to progress the proceedings.

37. By any measure I consider a period of two years and six months from the date on which the bank in this case ought to, and could have, taken its next step by pursuing replies to its notice for particulars, to be unusual, out of the ordinary, and excessive, and therefore within the meaning of inordinate for the purpose of the first limb of the Primor test. To that extent I respectfully disagree with the President's conclusion that what he took to be a three year delay was not inordinate. It seems to me that the President may have elided the question of whether the delay was inordinate with whether it was excusable. The two and a half year delay to which I have referred is in my view a period of delay that requires explanation and justification under the *Primor* principles. In other words, it needs to be excusable under the second limb of the test. A period that is not inordinate does not need to be excused.

Is the inordinate delay excusable?

38. Under this second limb the court goes on to consider the reasons offered by the plaintiff for the inordinate delay in order to determine whether those reasons and explanations are sufficient to excuse the delay. To simply explain why the delay occurred or the circumstances in which it occurred will not in every case suffice to excuse the delay. What is offered by way of explanation may go towards explaining some of the delay that has occurred but not all of it. If there is a significant period of delay that is not excused despite the explanations offered, the Court proceeds to the third limb of *Primor* and must decide if the balance of justice of justice is in favour of or against dismissing the proceedings, taking into account all the circumstances of the case, including perhaps any delay, acquiescence or other conduct of the part of the defendants.

39. In the present case the bank relies upon the failure of the appellants to furnish replies to its notice particulars which it delivered on the 11th April 2011 in order to excuse its delay in progressing the proceedings. While it is undoubtedly true that the appellants failed to furnish replies, no step was taken by the bank to address that default by using the procedures available under the rules, the most obvious being to bring a motion to compel them to furnish replies. An entire year and one month seems to have passed from the 11th April 2011 until the bank's solicitors wrote to the appellants directly on the 25th May 2012 seeking replies to particulars. While the appellants' default in this regard may come back into play under the third limb of *Primor*, it does not in my view excuse, in the sense of justify, the failure by the bank to progress its proceedings during those first 13 months of delay.

40. The bank also relies upon the fact that on the 3rd April 2012 the appellants' solicitors brought a motion seeking to come off record. That order was granted on the 9th June 2012. I am satisfied that inaction by the bank during the two months which it took

for that order to be made is excusable. The bank was entitled to consider that to proceed further with the proceedings against the appellants in the knowledge that there was a pending application by their solicitors to come off record was inappropriate, and to await the outcome.

41. However, the bank was informed by letter dated 18th June 2012 that an order had been granted permitting the appellants' solicitors to come off record. Yet, according to the bank's own chronology, there was further inactivity on its part until it wrote to the appellants directly on the 10th December 2012 inviting them to meet with the bank in an effort to reach some compromise. That further six months of delay by the bank is not explained and must be seen therefore as inexcusable. If it was in the mind of the bank (and they have not said that it was) that the bank wanted to give the appellants some reasonable opportunity to engage other legal representation it ought to have written to the appellants in those terms. If that had happened, the bank's forbearance would have excused a reasonable period thereafter.

42. The bank also seeks to excuse a period of delay between its letter of 12th December 2012 and September 2013 on the basis that there was engagement between Mr. Kelly and the bank which led to two meetings with him, albeit that neither led to a resolution of the proceedings. The first such meeting was in February 2013. On the 6th March 2013 the bank received a letter from the defendants indicating that they did not wish to engage further with the bank. The bank responded with an email stating that the bank would therefore have to progress the proceedings, but at the same time indicating that the appellants could at any time again engage with the bank. A further meeting between Mr. Kelly and the bank took place on the 23rd July 2013, so it can I think be presumed that prior to that date there had been further contact by Mr. Kelly – at least for the purpose of arranging that meeting. Again, that meeting did not produce any positive results. Mr. Kelly has his own view about the bank's *bona fides* in relation to those meetings. He has strongly expressed the view both in his affidavits and in his oral submissions that the bank was not serious about trying to negotiate, and simply used the opportunity to try and bully him into submission – something categorically denied by the bank.

43. However, certainly as far as Mr. Kelly is concerned, I would find that the period of delay in the proceedings between December 2012 and September 2013 is a period of excusable delay on the part of the bank, notwithstanding that there were just two meetings during the period, and engagement such as it was might have been sporadic. I agree with the President's statement in his judgment that such efforts by the bank to try and compromise the proceedings are to be encouraged, and that it was legitimate for the bank to pursue that course.

44. Ms. Hyland for Ms. Collins has emphasised that those engagements with Mr. Kelly do not excuse the bank's delay in proceedings against her. She had no involvement in such meetings and never indicated to the bank that she would participate in any such meetings. However, I consider that the President was correct to form the view that Mr. Kelly "acted on behalf of and with the permission of the second defendant in his dealings with the plaintiff bank". They are married to each other. Ms. Collins is a co-borrower with Mr. Kelly on the fourth loan. They were represented by the same firm of solicitors. Mr. Kelly swore affidavits on behalf of himself and his wife. They delivered a joint defence. Ms. Collins at no stage ever wrote to the bank to make clear that her interests was not aligned with his, and that he did not speak for her. In her affidavit filed on this application she has not specifically averred that Mr. Kelly was no representing her interests also at these meetings and during this engagement with the bank. In my view, the period of engagement, though sporadic, is such as to excuse the bank's delay in progressing the proceedings against Ms. Collins also.

45. By September 2013 efforts to try and reach some sort of compromise have come to nothing and have ceased. The bank wrote to the appellants warning that a motion to compel replies to particulars would issue if they again failed to furnish such replies. That letter was met with a letter dated 18th September 2013 from the appellants making allegations about the bank's behaviour. The requested particulars were not furnished. On the 1st November 2013 the bank issues a notice of motion seeking replies to particulars, returnable for the 9th December 2013 but, as I have already explained, that motion had to be struck out because the bank had overlooked serving one month's notice of its intention to proceed before issuing same.

46. The appellants submit the bank's further delay from September 2013 to December 2013 cannot be excused on the basis of that notice of motion since it was irregularly issued and had to be struck out. I do not agree. The issue of that notice of motion was an attempt by the bank to progress matters. Even though irregular it brought to the appellants' attention that the bank was seeking to progress matters. Also, it was a step made necessary by the appellants' own default in not furnishing the particulars that the bank was entitled to request. I would excuse the delay between September 2013 to the 9th December 2013 when the motion was struck out.

47. What ought to have happened is that when the bank was informed that a notice of intention to proceed should have been filed and served before that motion was issued, it should have immediately filed and served such a notice so that at the expiration of one month it could issue a fresh notice of motion. Instead, the bank simply waited until the return date of the irregular motion and then had it struck out. It need not have waited until that motion was struck out. But worse still, no notice of intention to proceed was filed and served until a further four months elapsed. The bank served a notice of intention to proceed on the 4th April 2014. The bank's delay of four months in so doing is not explained, and in my view must be seen as inexcusable.

48. The appellants issued and served their motion to dismiss these proceedings for delay on the 12th May 2014.

49. While there is undoubtedly a period of three years from April 2011 until May 2014 where these proceedings failed to progress in any meaningful way towards a hearing and determination following the delivery of the appellants' defence and counterclaim, some of that period is explained in a way that I find excuses it. I disagree with the President, however, that the entire period is excusable. I have gone to considerable lengths to identify periods that are excusable and those which are in my view inexcusable, for reasons that I have explained. I find some 23 months remain inexcusable, and that it is necessary to move to the third limb of *Primor* in such circumstances.

Is the balance of justice in favour of or against the dismissal of the proceedings?

50. Under this limb of the test the respective interests of the parties and the potential prejudice to each party must be carefully balanced. The Court's overriding duty is to dismiss proceedings when the interests of justice require that this be done. The jurisdiction arises only where delay has been found to be both inordinate and inexcusable. The onus of proof in those two respects is on the party who brings the application to dismiss. In this case I am satisfied that the President was incorrect to conclude that the delay involved was not inordinate, but that even if it was it was excusable. In the final paragraph of his judgment he stated that no prejudice to the appellants had occurred as a result of the delay and it can be inferred from his concluding remarks that he was satisfied that the balance of justice was against the dismissal of the proceedings, even though that conclusion was not one that he was required to reach given his conclusion that the delay was not inordinate, and that even if it was it was excusable, which explains why the President dealt with the balance of justice limb very briefly.

51. In *Primor*, Hamilton C.J set forth a number of factors that the Court should take into consideration and have regard to when

considering where the balance of justice lies in applications of this kind. These are:

> "(i) the implied constitutional principles of basic fairness of procedures, 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 claim,
>
> (ii) any delay on the part of the defendant – because litigation is a two-way party operation, the conduct of both parties should be looked at,
>
> (iii) whether any delay or conduct of the d
>
> (iv) 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,
>
> (v) 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,
>
> (vi) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

52. It must be said at the outset that the purpose of the jurisdiction which the Court has to strike out proceedings on the grounds of delay exists in order to prevent injustice in the form of an unfair trial arising from culpable and unexcused delay by the plaintiff, and as a deterrent to culpable delay by a plaintiff leading to injustice to the defendant. The matters referred to at (i) and (ii) make this clear. The jurisdiction does not exist so that some form of punishment can be inflicted upon a dilatory plaintiff as a mark of the Court's displeasure. In an ideal world no time limit prescribed by the rules of court for the taking of a step in proceedings by either a defendant or a plaintiff would be exceeded. Sadly the ideal world is not the real world, and neither the most enthusiastic and energetic plaintiff nor the most resolute and determined defendant will for many reasons be able to adhere strictly to the prescribed periods. The flexibility with which the Courts will extend time upon being satisfied that there are good reasons for having filed to take a step within the permitted time ensures that a rigid application of such time limits as are prescribed do not themselves lead to injustice.

53. In relation to (ii) above, I am satisfied that the President was correct to conclude that the appellants have failed to identify any particular prejudice which either of them have suffered which would render it unfair for the action to proceed. Neither appellant has even attempted to say that there is evidence that they would have wished to call that is no longer available. Neither appellant has stated, other than in a very general and unspecific way, that their memory of relevant events and conversations is so impaired that they will be at that disadvantage.

54. Ms. Collins has referred to the stress and anxiety that the proceedings have caused her, and has stated that this has been exacerbated by the delay in having the proceedings determined. Stress and anxiety is sadly a feature of most litigation, especially for individual parties as opposed to corporations. But it is an entirely different matter to establish that this has been caused by the plaintiff's delay. No evidence beyond mere assertion has been advanced in relation to such stress and anxiety. There is a complete absence of any correspondence by or on behalf of either appellant complaining about the bank's delay, and urging greater expedition in having the proceedings determined. T hat is perhaps understandable given that the appellants' themselves have even to this day failed to provide the bank with replies to the notice for particulars which they received some six years ago, despite reminders and warning letters, all of which were simply ignored. While there is no obligation upon them to do so, the appellants themselves could have served notice of trial where the plaintiff had failed to do so, even if the bank might have responded with a motion to set aside the notice of trial or a motion to compel them to furnish the replies to particulars which the bank required in order to know more about the case being made against it by the counterclaim.

55. The appellants' conduct is something to be put in the balance when deciding where the balance of justice lies. I would not characterise the appellants' conduct in these proceedings as acquiescence for the purpose of (iii) above, but it is conduct that is relevant, and in my view tilts the balance of justice very much in the bank's favour. While I accept that the bank could have driven these proceedings along very much more expeditiously than they did, there is no doubt in my mind that the appellants have deliberately, consciously and steadfastly refused to furnish particulars of their counterclaim, and do so to this day. Neither did they engage in a timely fashion to the bank's letter in September 2013 agreeing to make voluntary discovery of 10 of the 18 categories of documents being sought by the appellants. In circumstances where particulars of the counterclaim were being withheld by the appellants, the refusal to provide the remaining 8 categories of documents was not unreasonable. It is quite possible that if replies were furnished as requested the bank might consider the additional categories of discovery to be relevant and necessary and may have agreed to provide them.

56. But criticism of the appellants' conduct must be considered also in light of the fact that in reality the defence to the bank's claims in these proceedings consists of a defence by way of equitable set off. The real issues to be determined at hearing will not be in relation to the loans themselves and the amounts due, but rather whether because of the issues raised in the counterclaim, the appellants are entitled to damages which in turn can be set off against the amounts claimed by the bank to be due. The action by the appellants in failing for so long to provide particulars of the counterclaim is particularly relevant and egregious when seen against that background. Their inaction was unjustifiable, and had the effect of preventing these proceedings being heard until those outstanding matters had been dealt with. It is of course true that the bank should have done more to force the appellants to provide the particulars sought. But there was no need for the appellants to await motions to force their hand. They could have and ought to have provided the particulars. Where they did not do so, and as yet have still not done so, they ought not to gain the benefit of a dismissal of the bank's proceedings which would see them liberated from enforcement action against them by the bank, and would see the bank being unable to pursue them for judgment and unable to recover possession of the secured properties. That in my view would be an injustice to the bank in all the circumstances, despite the fact that it ought to have, and could have, taken steps to get these proceedings listed for hearing sooner than will now happen. There is no injustice in my view to the appellants in allowing the cases to be heard.

57. Applying the *Primor* principles, I am satisfied that these three appeals should be dismissed.