Neutral Citation: [2015] IEHC 330

THE HIGH COURT

[2010 No. 2248S]

BETWEEN:

THE GOVENOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

VINCENT KELLY AND CLAIRE COLLINS

DEFENDANTS

AND

[2010 No. 60P]

THE GOVENOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

VINCENT KELLY AND CLAIRE COLLINS

DEFENDANTS

JUDGMENT of Kearns P. delivered on 17th day of April, 2015

By notice of motion dated the 12th May, 2014 the defendants seek an order pursuant to Order 122, rule 11 of the Rules of the Superior Courts dismissing the plaintiff's claim for want of prosecution or, in the alternative, an order pursuant to the inherent jurisdiction of the Court dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay or as an abuse of process.

BACKGROUND

The defendants in these proceedings are husband and wife. The first defendant entered into three loan agreements with the plaintiff bank in respect of two properties in Dunmanus, Co. Cork and another property in Cusheen, Co. Cork, while a fourth loan agreement, in respect of a property at Cappaghglass, Ballydehob, Co. Cork, was entered into between the plaintiff and the first and second defendants jointly.

Details of the various loan agreements are set out in the statement of claim. What is described in these proceedings as the 'first loan agreement' was made on the 11th March, 2008. Under this agreement the plaintiff agreed to lend the first named defendant the sum of €1,128,489.94 by way of a bridging loan. This loan was to be repaid in full on or before the 30th May, 2008. The second loan agreement was entered into between the plaintiff and the first defendant on the 18th December, 2006 whereby the plaintiff agreed to lend €340,000 to the first defendant by way of a bridging loan. The sums advanced were to be repaid in full within twelve months of drawdown or earlier.

By agreement dated the 15th August, 2005 the first named defendant borrowed a sum of €500,000 from the plaintiff which was to be repaid over a period of twenty years from date of drawdown. Under this third agreement the first defendant was obliged to make monthly repayments. The fourth agreement was entered into on the 31st August, 2007. Under this agreement, the first and second defendant jointly borrowed a sum of €1,600,000.00 by way of a bridging loan which was to be repaid in full within twenty four months of drawdown.

The plaintiff has issued various sets of proceedings against the defendants seeking judgment of the sums it is alleged are due and owing plus interest and an order pursuant to section 62(7) of the Registration of Title Act 1964 for possession of the premises. All sets of proceedings travelled through the Master's Court together and were consolidated by order of O'Neill J. dated the 7th February, 2011. The defendants delivered a defence and counterclaim on the 22nd March, 2011 and a reply to this issued on the 12th April, 2011. What formal steps, if any, were taken in relation to the litigation thereafter is in dispute between the parties and is considered in greater detail herein. The present motion to dismiss issued on the 12th May, 2014.

SUBMISSIONS OF THE DEFENDANTS

The second defendant's submissions

Counsel for the second defendant emphasised that the second defendant is linked to only one of the four properties the subject matter of these proceedings, namely, the property at Cappaghglass, Ballydehob, Co. Cork in respect of which the second defendant took out a loan jointly with the first defendant on 31st August, 2007. The second defendant had advanced monies towards the purchase price and was therefore on the title of the property. It is submitted that for the purposes of this transaction the first defendant negotiated with and was advised by his first cousin, who was Regional Business Manager in the bank.

Counsel for the second defendant submits that repayment of the sum borrowed was dependant entirely on the sale of the property, as set out in paragraph 1 of the 'Terms and Facilities and Repayment' section of facility letter of 31st August, 2007 as follows:–

> *"The Bridging Term Loan is to be repaid from the sale proceeds of the property at Coppaglass, Ballydehob, Co. Cork or from other sources and is to be repaid in full within 24 months of drawdown or, if earlier, the date upon which the property is sold…"*

It is submitted that the bank had within its control information directly relevant to the viability of the loan in question which they either did not understand or understood and withheld. It is contended therefore that the bank were aware, or ought to have been aware, that the defendants would not be able to repay the loan from the resale and that had the first defendant been properly advised he would not have taken out the loans in question.

In relation to the question of delay, counsel for the second defendant submits that Order 122, rule 11 gives the Court jurisdiction to dismiss an action for want of prosecution on the application of a defendant where there has been no proceeding for two years. Furthermore, as set out in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim where the interests of justice require them to do so. Counsel relies on the well established principles as set out in cases such as *O'Domhnaill v. Merrick* [1984] I.R. 151; *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135; *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140; *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561; *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

The relevant principles were summarised by Hamilton C.J. in *Primor* as follows:–

> *"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
>
> *(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
>
> *(d) in considering this latter obligation the court is entitled to take into consideration and have regard to*
>
> > *(i) the implied constitutional principles of basic fairness of procedures,*
> >
> > *(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
> >
> > *(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,*
> >
> > *(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
> >
> > *(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
> >
> > *(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*
> >
> > *(vii) the fact that the prejudice to the defendant referred to in (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."*

It is submitted that these factors are non-exhaustive and as stated in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 "*these separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests, but as related matters affecting the central question as to what is just*".

The second defendant further submits that the obligation under Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms to ensure a hearing "within a reasonable time" imposes an obligation to apply the *Primor* principles with less indulgence than might previously have been tolerated. In this regard, counsel refers the Court to the decision of Hardiman J. in *Gilroy v. Flynn* [2005] I.L.R.M. 290 wherein it was stated that:–

> *"…following such cases as McMullen v. Ireland [ECHR 422 97/98. 29th July, 2004] and the European Convention on Human Rights Act, 2003 the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.*
>
> *These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end."*

It is submitted by counsel for the second defendant that in calculating the relevant time period for the purposes of Order 122, rule 11, steps in the process such as pleadings and court orders may be taken into account but correspondence may not. On that basis, it is submitted that no steps were taken by the plaintiff from the 12th April, 2011 until the 2nd April, 2014 when a Notice of Intention to Proceed was served and that this three year period of delay is inordinate.

The second named defendant relies on the case of *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50 as authority for the proposition that a period of three years can be held to be inordinate. In *Comcast* it was held that:–

> *"…even in complicated cases, where the formulation of a detailed statement of claim would undoubtedly take some time, delays of a fraction of five years have been considered inordinate."*

As to whether or not the delay is excusable, counsel refers the Court to the decision of Finnegan J. in *Silverdale and Hewetts Travel Agencies v. Italiatour* [2001] 1 I.L.R.M. 464 as authority for the proposition that commercial enterprises such as the plaintiff are expected to pursue litigation with reasonable expedition.

It is submitted that in considering whether the delay is excusable, the Court must look at the totality of the delay. While the plaintiff contends that it was attempting to compromise the proceedings, it is submitted that the second defendant never met with any agent of the bank either before or after the granting of these loans and had no discussions whatsoever with any agents of the bank. It is submitted that, in relation to the second named defendant, any attempts which were made to compromise the proceedings with the first defendant are not relevant.

The second defendant contends that in considering where the balance of justice lies, the test set out by Finlay Geoghegan J. in *Manning v. Benson & Hedges* [2004] 3 I.R. 556 was that the Court must have regard to the prejudice suffered by the second defendant. In the present case interest has continued to mount on the debt while the bank has taken no step in the proceedings. Furthermore, oral evidence will be required at trial which, if it proceeds, is likely to be in excess of eight years since the loans were taken out and witness evidence is likely to be compromised. The second defendant submits that the way in which the litigation has dragged on has destroyed her family life and continues to cause further damage.

It is further submitted that while the plaintiff took no steps in relation to these proceedings, at the same time it was actively taking steps in relation to other proceedings and attempting to put pressure on the first defendant. It is submitted that this amounts to an abuse of process and the plaintiff's claim should be dismissed as a result.

In all the circumstances, counsel for the second defendant submits that the delay is inordinate, inexcusable, deeply prejudicial, and the balance of justice lies in favour striking out the plaintiff's claim.

Submissions of first defendant

The first defendant appeared as a litigant in person and indicated that, save for making some brief submissions, he was content to adopt the submissions made by counsel for the second defendant in relation to the legal principles surrounding cases of alleged inordinate and inexcusable delay.

The first defendant submits that the plaintiff bank has adopted a stop-go approach to these proceedings and is deliberately stalling due to a reluctance to litigate because of an apprehension in relation to certain matters which would come to light in the discovery process. It is submitted that the bank knew or ought to have known that the defendants would never be able to repay the relevant loans as the bank was overexposed at the time the agreements were entered into.

It is further submitted that the first defendant was willing to negotiate and attempt to compromise the proceedings but that the bank was not genuinely committed to these efforts. The first defendant states that he had agreed to undergo a mediation process but the bank cancelled it on the day it was due to take place.

The first defendant submits that the delay is both inordinate and inexcusable and that, owing to an 'inequality of arms', the lapse in time, and the interest which has accrued on the loans, the balance of justice requires dismissing the plaintiffs claim.

The first defendant referred the Court to the case of *Grovit v. Doctor* [1997] 2 AER 417 where the House of Lords held that it was an abuse of process for a litigant to commence and continue proceedings which he has no intention of bringing to a conclusion.

SUBMISSIONS OF THE PLAINTIFF

Counsel for the plaintiff submits that the principles in relation to delay and applications to strike out for want of prosecution are well established. Applying the *Primor* principles, it is submitted that the Court must first consider whether or not the alleged period of delay was inordinate. It is submitted that the three year period referred to by the defendants was not without activity and that a number of steps were taken by the plaintiffs during this time which were ignored by the defendants.

The plaintiff contends that a Notice for Particulars was raised which the defendants simply ignored. It is submitted that correspondence in relation to this issued in May 2012 and again in September 2013 when the plaintiff threatened to issue a motion unless a reply was received. As no reply was received, a motion did issue in December 2013 but was ultimately struck out. It is further submitted that during this period the plaintiff consented to make discovery of ten categories sought by the defendants. An affidavit of discovery was prepared and delivered to the defendants.

Counsel for the plaintiff submits that during this period of alleged delay there was a hiatus in the proceedings between April 2012 and June 2012 when the defendants' solicitors successfully applied to come off record. It is submitted that the documentation available from that application shows that the defendants' solicitor had been corresponding with the defendants between July 2011 and April 2012 but did not receive any response. It is submitted that the plaintiff was effectively precluded from taking any meaningful action while the defendants' solicitor was unsuccessfully seeking to obtain instructions and subsequently applying to come off record.

The plaintiff further contends that during this period attempts were made to negotiate with the defendants with a view to compromising the proceedings. An invitation to negotiate was sent in December 2012. A meeting occurred in February 2013 and further correspondence issued in March 2013 which kept the invitation to negotiate open. It is submitted that another meeting took place in July 2013 when the defendants indicated an unwillingness to engage with the bank.

It is submitted that while there is no 'hard and fast rule' as to what precisely amounts to delay, the time period in question in the present case coupled with the activity which occurred during this period can not be said to be inordinate. Counsel referred the Court to a number of delay cases which it is submitted are instructive in terms of gauging the attitude of the courts in relation to different periods of delay. For example, in *Carroll Shipping Limited v. Matthews Mulcahy & Sutherland* [1996] IEHC 46 a fifteen year period of delay was held to be inordinate. In *Byrne v. ITGWU* (Unreported, High Court, 30th November 1995) a delay of four years following the issuing of a plenary summons was held to be inordinate. It is submitted that there is no reported decision where a three year period of delay was held to be inordinate with the exception of a decision of Laffoy J. in *Corcoran v. McArdle* [2009] IEHC 265 where the cause of action had accrued in 1990 and proceedings were only instituted in 1999.

In any event, it is submitted that any period of delay is excusable given that the defendants were not legally represented and the plaintiff was seeking to engage in an effort to compromise the proceedings. A further consideration which the plaintiff submits it was entitled to have regard to was whether or not it made economic sense to pursue the proceedings in circumstances where extensive discovery may be required and where the defendants might ultimately be unable to meet any judgment that might be obtained.

Insofar as the second defendant seeks to draw a distinction between her involvement and that of the first named defendant, it is submitted by the plaintiff that the defendants have always represented to the bank that the first named defendant was acting on behalf of and with the consent of the second defendant. Both defendants were jointly represented by the same solicitor and counsel until July 2012. The second defendant has only sworn one affidavit to date and that is in relation to the present application. A previous affidavit of the first defendant states that:–

> *"Your deponent is married to the second named Defendant. I make this affidavit on her behalf and with her authority. At*

all material times I did all the dealings with the Bank on her behalf."

It is further submitted that the affidavit grounding the present motion to dismiss is sworn by the first defendant, although it relates to both defendants. The first defendant once again avers that he makes the affidavit on his own behalf "*and on behalf of the second named defendant*".

In relation to the suggestion that prejudice has been suffered by the defendants which would warrant the proceedings being dismissed on the balance of justice test, it is submitted that the defendants have had the benefit of the relevant properties at all times despite making no payments whatsoever with the exception of one loan on which the last payment was made in 2008. It is further submitted that no key issues have been identified in respect of which oral evidence may be compromised by a lapse in time and that, in any event, the bank make a claim on foot of legal documents which they will not seek to introduce oral evidence in relation to.

The plaintiff also contends that delay on the part of the defendants themselves must also be considered and an affidavit of their own solicitor, Mr. Joe Noonan, dated 30th March, 2012 in his motion to come of record outlines the difficulties he faced in obtaining adequate instructions. Furthermore, the plaintiff contends that the defendants failed to respond to a request for particulars from the plaintiff. By failing to comply with their procedural obligations and by failing to provide instructions to their own solicitors the defendants contributed themselves to any alleged period of delay.

In light of the above, counsel for the plaintiff submits that the delay in question was not inordinate, is excusable, and, in considering the balance of justice, no prejudice has been suffered by the defendants and the plaintiff's claim must be allowed to proceed.

DISCUSSION

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 was 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 issuing 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 own 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 contrary 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 dangling 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 the reasons outlined above the defendants' motion is refused.