

THE HIGH COURT

[2007 No. 687 S.]

BETWEEN

ALLIED IRISH BANK PLC

PLAINTIFF

AND

JAMES GUERIN

DEFENDANT

JUDGMENT of Mr. Justice Eagar delivered on the 13th day of March, 2017

1. Mr. Guerin in this case ("Mr Guerin") served a notice of motion applying for an order dismissing the proceedings for want of prosecution and in the alternative, an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's ("AIB's") claim on the ground that AIB has been guilty of inordinate and inexcusable delay in prosecuting the proceedings.

2. The primary principles in relation to an application to dismiss for want of prosecution or based on inordinate and inexcusable delay are set out in the judgment of Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. At p. 475, the Chief Justice set out the principles of law relevant to the consideration of the issues:-

"(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 Mr. Guerin to allow the action to proceed and to make it just to strike out AIB's action,

(iii) any delay on the part of Mr. Guerin — because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of Mr. Guerin amounts to acquiescence on the part of Mr. Guerin in AIB's delay,

(v) the fact that conduct by Mr. Guerin which induces AIB to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing Mr. Guerin 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 Mr. Guerin,

(vii) the fact that the prejudice to Mr. Guerin 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."

3. Irvine J. delivering judgment on behalf of the Court of Appeal in *Millerick v. The Minister for Finance* [2016] IECA 206 applied the rules laid down by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley*. She recited the relevant legal principles cited in *Primor plc v. Stokes Kennedy Crowley* and says at para. 18:-

"The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, AIB's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of Mr. Guerin and the potential prejudice resulting from the delay."

4. Irvine J. also quoted the decision of Fennelly J. in *Anglo Irish Beef Processors Limited and DJS Meats Limited v. Montgomery, Hand, National Cold Storage Limited and Nordic Cold Storage Limited & ors* [2002] 3 I.R. 510, in the following terms: "he draws a distinction between culpable delay on the part of a defendant such as where they fail to comply with time limits for the delivery of pleadings, and mere inaction such as where a defendant simply does nothing to advance the claim or seek to have it dismissed. In distinguishing mere inactivity on the part of Mr. Guerin from actual delay or acquiescence he concludes that it is AIB who bears the primary responsibility for prosecuting the action expeditiously and that lesser blame should be apportioned to a defendant where they have been guilty of mere inactivity as opposed to actual delay."

5. Counsel on behalf of AIB gave a useful chronology of the events by way of timeline. The Court has adopted same and expanded on one or two issues:

- (1) On the 25th April, 2007 the summary summons was issued.
- (2) On the 8th May, 2007 the summary summons was served.
- (3) On the 22nd June, 2007 an appearance was lodged.
- (4) On the 20th July, 2007 motion for liberty to enter final judgment was issued.
- (5) On the 18th September, 2007 the motion for judgment was served, the earliest hearing date was the 30th October, 2007.
- (6) After eighteen weeks, on the 28th January, 2008, Mr. Guerin swore a replying affidavit although it appears that this affidavit was never filed by or on behalf of Mr. Guerin. Settlement negotiations were initiated between the parties in early 2008 and on the 30th April, 2008 there was a settlement agreement reached and a motion for judgment adjourned generally with liberty to re-enter on consent.
- (7) Over a year later on the 5th May, 2009 Mr. Guerin failed to comply with settlement agreement and the motion was re-entered and with a new date of the 30th July, 2009 with liberty to enter final judgment.
- (8) The motion was then adjourned for over eight months until Mr. Guerin finally filed a replying affidavit in the motion for liberty to enter final judgment on the 16th April, 2010. This was two and a half years after the motion was served on his solicitors. The Court notes that the delays up to this time were caused by Mr. Guerin's failure to file a replying affidavit apart from the period when the matter had been settled.
- (9) On the 29th April, 2010, AIB consented before the Master of the High Court to the matter going to plenary hearing and that order was made by the Master on that date.
- (10) AIB delivered its statement of claim on the 25th May, 2010 within the time agreed. The defence was therefore due by the 30th June, 2010. However, Mr. Guerin delayed in the delivery of his defence for over five months finally delivering it on the 1st December, 2010.
- (11) In 2011 there was considerable correspondence between the solicitors for both parties regarding an application by Mr. Guerin regarding his request for discovery.
- (12) On 1st February, 2012 AIB's solicitors delivered a notice for particulars.
- (13) In April, 2012 Mr. Guerin's solicitors refused to reply to a notice for particulars on the basis that AIB's solicitors had not complied with Mr. Guerin's discovery request.
- (14) On 26th June, 2012 a notice of intention to proceed was issued by AIB.
- (15) On 26th July, 2012 AIB served a notice of motion on Mr Guerin seeking replies to particulars on the 19th November, 2012 which was the return date for the motion for particulars. Mr. Guerin agreed to a reply by the 10th December, 2012.
- (16) However, Mr. Guerin's replies to particulars were only delivered on 10th January, 2013.
- (17) From then until the 4th February, 2016 the solicitors then acting for the AIB, Thomas Flaherty and Company were wound up but the firm did not pass on the file to the new solicitors, Ivor Fitzpatrick and Company.
- (18) On the 4th February, 2016 Mr. Guerin served a notice to dismiss which was returnable for the 22nd February, 2016. On the 22nd February, 2016 the motion to dismiss was adjourned by consent.
- (19) On 2nd March 2016 the affidavit of Conor McGillion was filed and served.
- (20) On 25th April, 2016 the matter was transferred to the non-jury list by consent.
- (21) On 27th April, 2016 the motion was struck out due to Mr. Guerin's failure to attend.
- (22) On 4th May, 2016 Mr. Guerin had the motion reinstated and listed for hearing without giving any notice of his application to AIB.
- (23) On 10th May, 2016 a notice of intention to proceed was served.
- (24) On 3rd November, 2016 the motion to dismiss was struck out for a second time due to the failure of Mr. Guerin to call it on, on the same date AIB received a booklet of pleadings from Mr. Guerin.
- (25) On 8th November, 2016 Mr. Guerin sent two affidavits to AIB.
- (26) On 9th November, 2016 AIB served a notice of trial and a notice to produce. Of the same date Mr. Guerin inquired by telephone whether AIB was in a position to defend the within motion the following day. It was on that date that AIB ascertained from the Courts Service website that the motion had been reinstated (without notice being given to AIB) and listed for hearing.
- (27) On the 10th November, 2016 Mr. Guerin applied to have the motion reinstated and listed for hearing and AIB objected. The motion was reinstated and listed for mention on the 30th November, 2016. On that date liberty to AIB to file an affidavit setting out the conduct of Mr. Guerin was granted as was liberty to Mr. Guerin to file two further affidavits.

(28) On the 11th November, 2016 two affidavits were filed by Mr. Guerin.

(29) On the 23rd November, 2016 a further affidavit was filed by Mr. Guerin without liberty to apply or file.

(30) On the 28th November, 2016 the affidavit of Finbarr O'Connell on behalf of AIB was filed.

(31) On the 30th November, 2016 the motion to dismiss was listed for hearing on the 6th March, 2017 by consent.

(32) On the 14th December, 2016, the action of AIB's proceedings was listed for hearing on the 3rd October, 2017 by consent.

6. Counsel on behalf of Mr. Guerin submitted that there were two periods of delay by AIB:

(1) From the date of Mr. Guerin's service of the defence on the 1st December, 2010 until the 1st February, 2012 when AIB served notices for particulars.

(2) There were fifty-one months from Mr. Guerin's replies to particulars delivered on the 10th January, 2013 to the motion to dismiss issued on the 4th February, 2016.

He submitted that the delay was inordinate and inexcusable.

7. Counsel for Mr. Guerin submitted that there was no equality of arms as AIB was a company with its own in-house solicitors. He further submitted that Mr. Guerin had lost a lot of documents in a fire that had taken place after an explosion in a building in an industrial estate. Documents and notes which Mr. Guerin had in relation to these proceedings were destroyed in the building. This had taken place in December 2009.

8. Counsel further submitted that the employees of AIB who made the representations and statements to Mr. Guerin are no longer employed by AIB company. He submitted that on the balance of justice the Court should grant the motion and dismiss AIB's claim for inordinate and inexcusable delay.

9. Counsel on behalf of AIB accepted that the delay owing to the change of solicitor for three years was inordinate. She also accepted that AIB had to accept responsibility for the actions of their servants or agents, and in this case the failure on the outgoing solicitors to transfer the papers to the present solicitors.

10. She accepted that it would be open to the Court to find the delay inexcusable but she then pointed to the balance of justice. She submitted that at every stage in the proceedings Mr. Guerin sought to delay the case, for example by swearing a replying affidavit but never filing it. She submitted that having reached settlement agreement Mr. Guerin failed to comply with its terms a year later with.

11. A further delay occurred from the 30th July 2009 which was the new return date for the motion for liberty to enter final judgment with Mr. Guerin filing his first replying affidavit on the 16th April, 2010, nearly nine months later. She stated that there was considerable correspondence between the solicitors regarding Mr. Guerin's request for discovery, although no application appears to have been made to the Master of the High Court for discovery in these proceedings. She submitted that there had been a notice of motion seeking replies to particulars issued by AIB in July 2012 after Mr. Guerin's solicitors had refused to comply with the notice of particulars as they had not received discovery from AIB. Counsel accepted the period from 2013 to 2015 was delay on the part of the AIB.

12. Counsel submits that on two occasions the motion to dismiss was struck out due to Mr. Guerin's failure to appear. She further submitted that it had been reinstated on the first occasion without any notice given to AIB. The first AIB knew was about the hearing of the motion was a telephone call the day previously in which Mr. Guerin enquired as to whether AIB was in a position to defend the motion. She submitted there had been considerable delay on the part of Mr. Guerin. She further submitted that in relation to prejudice claimed by Mr. Guerin, namely, that the proceedings had caused a negative effect on his credit rating and consequently his access to funding in addition to reputational damage to him as a journalist.

13. Counsel for AIB never reported the debt the subject matter of these proceedings to any credit rating agency. Counsel also directed the Court's attention to the affidavit of Conor McGillion in which he avers that two judgment mortgages were registered over two of the properties Mr. Guerin owns with his wife. The affidavit continues that a total of five separate judgment mortgages registered were registered and further that articles were published in The Irish Times and in The Herald newspapers setting out in detail how Mr. Guerin and his wife had consented to judgment being entered against them by ACC Bank Plc. in the sum of €2,519,017.00 in July 2010. She submitted that whatever problems Mr. Guerin had with his reputation it was likely to relate to these latter judgments.

14. The Court is satisfied that there has been an inordinate and inexcusable delay on the part of AIB in relation to this case, mainly attributable to the failure on the part of AIB's previous solicitors to pass over the papers in this case to the new solicitors. AIB must to take responsibility for this failure on behalf of their agents. However, the Court also notes that there has been considerable delay on the part of Mr. Guerin. In those circumstances the Court will apply the *Primor* principles and must exercise a judgment on whether, in the Court's discretion, on the facts of the case, the balance of justice lies in favour or against the proceeding of the case.

Judgment

15. The Court notes that in *Anglo Irish Beef Processors Ltd. and others v. Derek Montgomery and Others* [2002] 3 I.R. 510, the Supreme Court in which Fennelly J. (with Keane C.J. and Murphy J.) referred to the judgment of Hamilton C.J. in *Primor*. Fennelly J. quoted as follows:-

"In such circumstances, when the court comes to strike that balance of justice in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find something weighty to cancel out the effects of the plaintiffs' behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendant, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed."

Fennelly J. then quoted from Ó Dálaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 at p. 41, in further stating:-

"In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something "akin to acquiescence" as indicated in the judgment of Henchy J. [in *O'Domhmaill v. Merrick* [1984] I.R. 151]."

The Court is satisfied that in this case, Mr. Guerin did not sit and await developments by action by AIB, but actively engaged in the proceedings.

16. The Court notes that AIB complained that when the matter was struck out (on analysis of the time line) showed that the first and substantial delay was from the 25th April, 2007 when the summary summons was issued to 28th January, 2008 when Mr. Guerin swore a replying affidavit to the 1st December, 2010 when Mr. Guerin delivered its defence on the 1st December, 2010. The Court appreciates that certain settlement negotiations had taken place and that on the 30th April, 2008 there was a settlement agreement reached and the motion for judgment was adjourned generally with liberty to re-enter on consent. However, the Court further notes that Mr. Guerin failed to comply with the settlement agreement and the motion was re-entered with a new date of the 30th July, 2009 with liberty to enter final judgment. It was eighteen months later that Mr. Guerin delivered his defence.

17. The Court must exercise a judgment on whether in its discretion, on the facts of the case, that the balance of justice lies in favour or against the proceedings of the case. The Court must have regard to the implied constitutional principles of fairness of procedures and whether the delay and consequential prejudice in addition to the special facts of the case as such as to make it unfair to Mr. Guerin to allow the action to proceed and strike out AIB's action.

18. In this case, Mr. Guerin pointed to specific prejudice insofar as the proceedings had caused great practical and reputational difficulties for him. Mr. Guerin states that his credit rating had been specifically affected by records of these proceedings on central registers. This prejudice has limited his access to funding from lending organisations preventing him conducting his business and personal financial affairs effectively. The Court notes the sworn and unchallenged affidavit of Conor McGillion that AIB never reported the debt or the existence of these proceedings to any credit rating agency. The Court is also aware that Mr. McGillion also pointed to the amount of debt to other lending institutions that Mr. Guerin has amassed over the years which has given rise to orders for judgment being made against him and two articles which were being published in *The Irish Times* and *The Herald* newspapers setting out in detail how Mr. Guerin and his wife had consented to judgment being entered against them by ACC Bank Plc. in the sum of €2,519,000.00 in July 2010. The Court accepts that Mr. Guerin's reputation would largely be affected by such publicity but the Court noted that no evidence of any publicity in relation to this case was produced to the Court.

19. Mr. Guerin also alleges prejudice because the business premises which he was occupying were destroyed including his banking records. Mr. McGillion in his affidavit said that all the original records of Mr. Guerin's business with AIB are retained by AIB and copies of them are available to Mr. Guerin by way of a data access request. This could be completed within forty days. Furthermore, Mr. Guerin could make a reasonable request for discovery within these proceedings which Mr. McGillion averred would be complied with.

20. The Court also pointed out there has been substantial delay on the part of Mr. Guerin. This delay, coupled with his conduct amounts to an acquiescence on the part of Mr. Guerin in the delay of the proceedings, albeit not AIB's delay.

21. The Court is also cognisant of the neglect of Mr. Guerin in relation to the notice to dismiss AIB's claim. On two occasions the motion was struck out because of the failure of Mr. Guerin or his legal representatives to attend. The Court also notes AIB's averments that they were not informed of the first application to reinstate the motion resulting in them receiving a telephone call from Mr. Guerin's solicitors indicating that the motion was to be heard the following day. Then, there was a second failure to appear at the motion. The motion to dismiss was struck out for a second time due to the failure of Mr. Guerin to call it on. This was not known by AIB and when on the 10th November Mr. Guerin applied to have the motion reinstated, AIB objected but the motion was reinstated and listed for the 30th November, 2016.

22. In all the circumstances of this case the Court refuses the relief sought in Mr. Guerin's notice of motion dated the 22nd February, 2016 and directs that the matter proceed by way of plenary hearing on the date fixed by this Court on the 13th October, 2017.