

THE HIGH COURT

2005 No. 839P

BETWEEN

EBS BUILDING SOCIETY

PLAINTIFF

AND

JAMES HEALY AND MARGARET HEALY

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 27th of June, 2007.**1. Introduction**

1.1 On the 27th June, 2007, I gave an ex-tempore ruling in which I indicated that it was my intention to make an order dismissing these proceedings for want of prosecution. In the course of that ex-tempore ruling I set out, in very brief terms, the conclusions which I had reached and my reasoning for making the order sought. I further indicated that I would, subsequently, set out in more detail those reasons. This judgment sets out those detailed reasons.

1.2 The principles applicable to the jurisdiction of the court to dismiss proceedings for want of prosecution have been considered in a number of recent cases and it is not necessary, in the context of this case, to revisit those general principles. See for example *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and *Gilroy v. Flynn* [2005] 1 ILRM 290. There is, however, one unusual feature of this case in that there has been previous Circuit Court proceedings in relation to more or less the same matter, which proceedings were previously dismissed for want of prosecution. The particular legal issue which arose in this application was, therefore, as to the proper approach of the court in circumstances where previous proceedings had already been dismissed for want of prosecution and where it was alleged that subsequent proceedings were, themselves, not prosecuted in a timely fashion.

1.3 Against that background it is clear that the procedural history of both these proceedings and, indeed, the previous Circuit Court proceedings is highly material to the issues which I have to decide and I, therefore, turn first to that procedural history.

2. The Procedural History

2.1 The original Circuit Court proceedings were brought by the plaintiff ("EBS") originally against the first named defendant ("Mr. Healy") and bore record number 398/98 for the Eastern Circuit, County of Wicklow. The proceedings were commenced on the 24th June, 1998. The second named defendant ("Ms. Healy") was joined in those proceedings as a co-defendant by an order of the court made on the 30th May, 2001. However, by a further order of the Circuit Court on the 6th November, 2003, the claim, in those proceedings, brought by the EBS as against Ms. Healy was struck out for want of prosecution.

2.2 Thereafter, EBS brought an application before the relevant County Registrar in which EBS sought an order extending the time for the service of a notice of appeal against the order made by the Circuit Court dismissing the proceedings as against Ms. Healy for want of prosecution. That application was returnable before the County Registrar on the 17th February, 2004. The application was, of course, misconceived as the Circuit Court has no jurisdiction to extend time for such an appeal. In those circumstances the application was withdrawn by EBS. Thereafter, EBS made an application to the Master of this Court on the 26th March, 2004. On that date the Master extended time for the filing of a notice of appeal. However, no such notice of appeal was ever, in fact, filed. The position is, therefore, that the Circuit Court proceedings as against Ms. Healy are and remain struck out and there is, in practice, no longer any reality to any reactivation of those proceedings.

2.3 The proceedings in this Court were commenced by plenary summons on the 4th March, 2005, some fifteen months after the original proceedings had been dismissed, as against Ms. Healy, for want of prosecution. It was necessary for the EBS to bring a motion for judgment in default of appearance (in July, 2005) prior to the filing of the statement of claim and also for judgment in default of defence (in December, 2005), which gave rise to the filing of a defence on behalf of Ms. Healy in January, 2006, and by the first named defendant ("Mr. Healy") on the 20th March, 2006.

2.4 As and between the parties to these proceedings, no further steps were taken prior to the bringing of the application to dismiss which was brought just over a year later being returnable for the 16th April, 2007. However, in the intervening period the question of the possible liability of a third party arose. In order to understand that issue and indeed the issues which arise generally between the parties, it is necessary to refer to the issues both in this case and in the earlier Circuit Court proceedings to which I will shortly turn.

2.5 As pointed out earlier it was the proceedings as against Ms. Healy in the Circuit Court which were dismissed for want of prosecution. The proceedings as against Mr. Healy remain, at least theoretically, in being. However, it would appear that as a result of arrangements deriving from the separation of Mr. and Ms. Healy, it is Ms. Healy who is entitled to possession of the property which is the subject of the mortgage (at least insofar as the respective interests of Mr. Healy and Ms. Healy are concerned). It should also be noted that Mr. Healy brought a separate application to dismiss for want of prosecution. It was, of course, the case that the proceedings as against Mr. Healy had not been dismissed for want of prosecution in the Circuit Court. However, it was agreed by counsel on behalf of EBS that in the event that, contrary to his submissions, I was persuaded that the proceedings as against Ms. Healy should be dismissed for want of prosecution, it followed that, in practical terms, the proceedings as against Mr. Healy should be likewise dismissed. On the basis of that agreement, the only application which proceeded to full hearing was that involving the application on behalf of Ms. Healy to dismiss for want of prosecution, it being agreed that the result of that application would, in practice, govern the application brought by Mr. Healy.

2.6 Finally, it should be noted that there were a number of other applications before the court involving the possible consolidation of these proceedings with other proceedings. However, it was, quite properly, agreed by counsel on both sides that such applications should await a determination of the application to dismiss for want of prosecution on the basis that there would be little point in dealing with those applications in the event that the proceedings were dismissed. It follows that none of the other applications became relevant by reason of my decision to dismiss the proceedings as against Ms. Healy for want of prosecution. It also follows that, in furtherance of the agreement which I have just noted, the proceedings as against Mr. Healy were also dismissed for want of prosecution as a knock-on effect from the dismissal of the proceedings as against Ms. Healy on the same basis. I now turn to the issues which arose in the substantive proceedings.

3. The Issues in the Substantive Proceedings

3.1 It has been clear for almost a decade that the real issue which arises between the parties concerns a purported consent given by Ms. Healy to the mortgage which is at the heart of these proceedings, so as to conform with the provisions of the Family Home Protection Act 1976. It would appear that there is a document in existence which purports to be such a consent and, which further

purports to have been executed in circumstances where it is said Ms. Healy received appropriate legal advice. The document concerned appears to have been witnessed by a solicitor. However, for some considerable period of time (backed up by affidavit evidence sworn in 2000, in the earlier Circuit Court proceedings), Ms. Healy has asserted that she never met the solicitor in question, never received the relevant advice, and that any purported consent which she may have given under the Family Home Protection Act 1976, is, therefore, void.

3.2 This issue was at the heart of the Circuit Court proceedings which have already been dismissed for want of prosecution as against Ms. Healy. This issue is at the heart of the defence put forward in these proceedings and also forms the basis of a counterclaim maintained in these proceedings on behalf of Ms. Healy.

3.3 In that context it would appear that EBS issued proceedings against a firm of solicitors on the 28th June, 2004, which proceedings appear to be based on a contention that, if the assertions made by Ms. Healy in these proceedings are correct, those solicitors failed in their obligations to the EBS concerning the completion of the mortgage arrangements which are the subject of these proceedings and in particular, concerning compliance with the requirements of the Family Home Protection Act 1976. However, it does not appear that the representatives of Ms. Healy were made aware of the existence of those proceedings until a replying affidavit was filed in this application to dismiss for want of prosecution.

3.4 Finally, it should be noted that while there was a difference in form between the Circuit Court proceedings and the proceedings with which I am concerned, the substance of the claim made by the EBS is the same in both. That is to say both proceedings are designed to procure the enforcement of what are said to be the rights of the EBS under the relevant mortgage. The defence (and where relevant, the counterclaim) is also the same in both proceedings. Reliance is placed on the contended for failure to comply with the provisions of the Family Home Protection Act 1976, so that, it is said, reliance can no longer be placed on the mortgage concerned.

3.5 While there are, therefore, differences in form between the respective proceedings, the substance of the issues which arise in both are identical. The only real issue is as to the status of the mortgage concerned in the light of the contended for failure to obtain a valid consent under the Family Home Protection Act 1976.

4. This Application

4.1 It is unnecessary to set out the principles which must normally be applied in an application such as this in any detail as same have already been the subject of significant recent authority, some of which I have earlier referred to. It was, correctly in my view, accepted by counsel on behalf of Ms. Healy that, looked at in isolation, the delay on the part of EBS in prosecuting these proceedings would not warrant their dismissal. However, it was said that the court must pay particular regard to the fact that proceedings which are identical in substance had already been dismissed as against Ms. Healy. In my view that point was well made.

4.2 The fact is that there has already been a judicial determination by McCartan J. in the Circuit Court, to the effect that the test for dismissal for want of prosecution of the Circuit Court proceedings had been met. Despite the rather curious history of the attempt to appeal that judgment, no appeal is any longer possible and, it seems to me, it follows that the parties are bound by the findings of McCartan J. It, therefore, follows that I am bound to accept that EBS were guilty of inordinate delay in the prosecution of the Circuit Court proceedings, that that delay was inexcusable, and that the balance of justice, applying the criteria set out in the authorities which I have cited, required the dismissal of those proceedings.

4.3 This case raises the question, therefore, of what is to happen if a second set of proceedings are then commenced by a plaintiff whose claim has been dismissed on such a basis. It was not argued on behalf of Ms. Healy that there was any barrier to the commencement of a second set of proceedings, where an original set which was in substance the same, had been dismissed for want of prosecution at a time when, having regard to relevant limitation periods, laches or the like, a second set of proceedings were still capable of being maintained. I would leave to a case where the issue, therefore, arose, any question of whether there may be circumstances where it may not be permissible to bring a second set of proceedings in such circumstances even though such proceedings, may not, in themselves, be statute barred.

4.4 However, it seems to me that where a second set of proceedings have been commenced subsequent to the dismissal of a first set for want of prosecution, there is a particular heavy onus on the plaintiff concerned to progress such second set of proceedings with a high level of expedition. That this is so stems from the fact that the plaintiff concerned has already been found guilty of inordinate and inexcusable delay, such that in all the circumstances of the case justice required the dismissal of the earlier claim. It has been held in *Stephens v. Flynn* [2005] IEHC 148 (applying *Birkett v. James* [1977] 2 All E.R. 801), that a party who waits until almost the end of a relevant limitation period before commencing proceedings, has a particular obligation of expedition in progressing those proceedings. It seems to me that that point applies with even greater force where a party has not merely waited to commence proceedings but has, in fact, commenced proceedings but progressed them in such a fashion as to warrant their being dismissed for want of prosecution.

4.5 In those circumstances I was satisfied that a very high degree of expedition indeed is required of a plaintiff who maintains a second set of proceedings subsequent to the dismissal of an earlier set for want of prosecution.

4.6 It is true to say that some of the earlier delay in the prosecution of these proceedings can be put down to inaction on the part of the defendants, including Ms. Healy. If this were a straightforward case, then such inaction would, almost certainly, render it impossible to conclude that the proceedings should be dismissed for want of prosecution. However, nothing occurred, so far as Ms. Healy's representatives were concerned, subsequent to the filing of her defence for a period of almost a year. During that period threatening letters were written indicating that an application to dismiss for want of prosecution would be brought in the event that a notice of trial was not served immediately. It was said, on behalf of EBS, that problems, encountered in considering the position relating to the firm of solicitors who acted at the time of mortgage, prevented them from being in a position to bring these proceedings forward to trial. However, at the relevant time (that is when the correspondence to which I referred was written) no such excuse was tendered to the representatives of Ms. Healy. Furthermore, EBS have been aware of the underlying issue in relation to the alleged invalidity of the consent under the provisions of the Family Home Protection Act 1976, for almost a decade. In those circumstances an explanation which relies upon the need to finalise a claim in respect of any such solicitors is of only very limited relevance.

4.7 I was, therefore, satisfied that, having regard to the high degree of expedition which could reasonably be expected of plaintiffs in a position such as EBS, in the light of the fact that previous proceedings which were identical in substance had been dismissed for want of prosecution, the progression of these proceedings from the closing of the pleadings to the bringing of the application to dismiss with which I am concerned, is one where it can properly be said that EBS were guilty of inordinate delay. While the fact that EBS may have wished to consider its position *viz a viz* the firm of solicitors to whom I have referred, may provide some limited

explanation for that delay, it does not seem to me that that explanation provides an adequate excuse, particularly having regard to the long period of time during which EBS have been aware of the issue concerning the validity of the relevant consent and the inadequacy of the replies to the correspondence during that period to which I have referred.

4.8 I was, therefore, satisfied that EBS were guilty of inordinate and inexcusable delay.

4.9 As I have already indicated I am bound by the view of McCartan J. to the effect that there was already a balance of justice in favour of the dismissal of these proceedings when he had to consider the matter in 2003. The issue is a factual one. Whatever difficulties might have been encountered as of 2003/2004 in dealing with those factual issues, they are more than compounded by now. There were little or no other factors which, at this stage, could be said to render the balance of justice any more in favour of allowing the proceedings to continue, than they were as of 2003. The only additional factor which is in any way favourable to EBS is the fact that some of the early delay in these proceedings is attributable to Ms. Healy and her advisers. However, taking all factors into account, it seemed to me that the balance of justice had, if anything, tilted even further in favour of Ms. Healy as of this stage, than it did when the matter came to be considered by McCartan J. In the circumstances, I was satisfied that the application of the appropriate principles led to the conclusion that the balance of justice favoured the dismissal of the proceedings. For the reasons already noted it was agreed that, in that eventuality, a similar order should be made in the case of Mr. Healy. It followed that the proceedings against both defendants were dismissed for want of prosecution.