

THE HIGH COURT

[2010 No. 4874 S.]

BETWEEN

CARRICK-ON-SHANNON DISTRICT

AND

CREDIT UNION

PLAINTIFF

AND

THOMAS CRONIN

DEFENDANT

JUDGMENT of Mr. Justice Fullam delivered on the 7th day of December, 2016**Introduction**

1. In this Notice of Motion dated 17th November, 2016, the defendant seeks the dismissal of the plaintiff's summary judgment proceedings for want of prosecution and delay pursuant to Order 122 Rules of the Superior Courts. The proceedings, issued on the 12th October, 2010, claimed judgment in the sum of €250,233 on foot of a loan agreement between the plaintiff and the defendant made on 17th December, 2008.

2. The balance currently outstanding is €65,308.01.

Factual Background

3. The loan agreement between the plaintiff and defendant was one of six such agreements arranged by the plaintiff for Mr. Paul Maye his relations and associates. Mr. Maye is the brother in law of the defendant. The primary purpose of the loans was the acquisition by Mr. Maye of licensed premises in Denver, Colorado.

4. The loans granted to the defendant, and the other participants, were arranged on behalf of the plaintiff by Mrs Ann McHugh in 2008. Messrs. Peter M. Martin Solicitors acted on behalf of Mr. Maye, the defendant and his wife, Caroline.

5. The repayments of the loans fell into arrears. As of the 22nd September, 2010, the defendant's arrears totalled €19,825.85. The plaintiff issued summary proceedings against all six participants on 12th October, 2010, followed by motions for judgment dated 15th March, 2011.

6. By agreement dated the 24th February, 2012, the six participants agreed through their solicitors Messrs. Mullaney to compromise the proceedings on the basis that \$100,000 US dollars would be transferred to the plaintiff within a week and that monthly repayments of \$25,000 US dollars would be made commencing on the 2nd March, 2012. It was agreed that the plaintiff would apportion all payments received equally between the defendants other than Mr. Maye and his wife. Clause 4 of the agreement provided:

The proceedings were adjourned generally on the 27th February, 2012. Subject to strict compliance of your client in relation the agreement as aforesaid, we hereby confirm that our client will agree to adjourn all of the above matters generally, with liberty to re-enter proceedings. However, should your client fail to make any of the aforesaid agreed repayments, then subject to seven days written notice, our client will apply to re-enter all of the high court proceedings.

Mr Brian Quigley of Mullaney's wrote to the defendant on 29th February stating:

So long as Mr Maye complies with the terms of the agreement the Credit Union will not progress the legal proceedings any further.

7. In June 2014, solicitors on behalf of the plaintiff wrote to the defendant's solicitors informing them that Mr. Maye was in breach of the agreement of 2012 in respect of repayments. Messrs. Mullaney's replied on 30th June saying that Mr. Maye was available to meet the plaintiff between the 18th and 25th July. A further settlement was reached between the plaintiff and Mr. Maye and reduced to writing on the 2nd November, 2015.

8. Mr Maye failed to comply with his obligations under this agreement.

The Defendant's Submissions

9. The defendant avers at para. 11 of his grounding affidavit that since the filing by Ms. Horan of her affidavit of 19th July, 2011, no further pleading was lodged or step taken in the matter until five years and two months later with a further affidavit of Ms. Horan being lodged in the Central Office on 4th October, 2016. Counsel for the defendant says that such a delay flies in the face of the purpose of summary proceedings. He says that the jurisprudence relating to dismissal for want of prosecution has been altered since the coming into operation of the European Convention on Human Rights Act, 2003. In simple terms courts in this jurisdiction have become less indulgent when considering delay. The defendant avers that a delay in excess of five years is inordinate. He further states that no excuse for the delay has been advanced to him. He acknowledges that the plaintiff may contend that it was attempting to compromise the proceedings but he says any such attempts or agreements were not entered into or conducted with him.

10. As regards prejudice, the defendant states that Ms. Anne McHugh, the central figure in the organisation of the loans, passed away in October, 2008 and is now no longer available to him as a witness. He further states that following the death of Ms. McHugh the issue of the restructuring of the arrangements between the plaintiff and Mr. Paul Maye became a matter of paramount importance to the plaintiff and the task of implementing these arrangements fell to Mr. Peter Maye, then chairman of the plaintiff and father of Paul Maye and the defendant's father in law. He says that Mr. Peter Maye passed away in October, 2014 and he is prejudiced by Mr.

Peter Maye not being available to confirm the background of how the alleged loans came into being.

11. Counsel for the defendant says it is permissible to look at the underlying proceedings in taking the balance of justice into account. In this regard it is the defendant's case that he received no funds, and no evidence has been adduced that he did receive any funds. The plaintiff could have produced copies of any electronic funds transfers (EFTs) or other vouching documentation. The defendant avers that at all times it was effectively understood that Mr. Paul Maye was the borrower and that he was merely a nominee for the purpose of complying with credit union regulations.

The Plaintiff's Submissions

12. Mr. Newman for the plaintiff submitted that the chronology of the events showed an entirely different reality than that portrayed by the defendant's counsel. The defendant and his wife had solicitors acting for him in advance of the Credit Agreement of 17th December, 2008. Counsel points to letter dated the 1st July, 2008, from Peter M. Martin Solicitors on behalf of the defendant to Mrs. Collette Brennan Financial Controller of the plaintiff setting out the basis of Mr. and Mrs. Cronin's involvement in the transaction. The basis of their involvement in the transaction was that they would receive part of the equity in two licensed premises, Dunne's Bar, Main Street, Carrick on Shannon, of which Mr. Maye was registered owner, and The Cavern Bar, Main Street, Letterkenny, owned by Northwest Bars Ltd in which Mr Maye was the sole shareholder. A loan application form in the sum of €450,000 was submitted on behalf of the defendant.

13. Mrs. McHugh died in October, 2008. The defendant executed the loan agreement on the 17th December, 2008. In the plaintiff's motion for summary judgment against the defendant, Mr. Maye provided a supporting affidavit dated 15th March, 2011, for the defendant. Mr. Maye avers at para. 9 that the arrangement could not be put in place until January, 2009 because of the death of Mrs. McHugh. Counsel submits that all the agreements were put in place after the death of Mrs. McHugh.

14. Counsel referred to a series of letters from the plaintiff to the defendant between the 9th July, 2009, and the 22nd September, 2010, dealing with the accumulating arrears on the defendant's account. The first of the letters refers to a cheque for \$5,000 US dollars received from the defendant. In the period following the motion for judgment, the plaintiff credited the defendant's shares in the sum of €86,000 against his indebtedness on 30th September, 2011.

15. The summary judgment motion was settled on the 24th February, 2012. By fax sent at 14.26 on that date, the plaintiff's solicitors wrote to Mullaney's solicitors, acting on behalf of all the participants, setting out the terms of agreement. The import of the agreement was that the defendants would transfer the sum of \$100,000 US dollars to the plaintiff within a week and that Mr. Maye henceforward would make monthly repayments of \$25,000 commencing at the same time. It was agreed that the plaintiff would apportion all subsequent payments from Mr. Maye between the other defendants equally. Paragraph 4 of the letter stated:

4. Subject to the strict compliance of your client in relation to the agreements as aforesaid, we hereby confirm that our client will agree to adjourn all of the above matters generally, with liberty to re-enter proceedings. However, should your client fail to make any of the aforesaid agreed repayments, then subject to seven days written notice, our client will apply to re-enter all of the High Court proceedings.

The letter concluded:

We confirm that Counsel for the plaintiff will make the application before the judge of the High Court on February the 27th next in accordance with the terms agreed between the parties.

We await hearing from you by return.

Mullaney's made two minor handwritten amendments in respect of payment dates and returned the fax at 15.13.

16. Counsel for the plaintiff asks how it can be maintained by the defendant, after instructing his solicitors to conclude that agreement, that there has been inordinate and inexcusable delay since the 27th February, 2012. He submits that the letter dated 29th February from Messrs. Mullaney's to the defendant confirming the agreement and the adjournment of all proceedings generally corroborates the plaintiff's contention that the defendant not only knew about the arrangements but was actively involved. The writer, Mr. Michael Quigley said:

"We write to confirm that after a lengthy battle, the Credit Union have finally agreed to adjourn the proceedings generally. The net effect is that the legal proceedings against you are at an end as Paul Maye on your behalf has entered into an arrangement with the Credit Union. So long as Mr. Maye complies with the terms of the agreement the Credit Union will not progress the legal proceedings any further.

Furthermore we are delighted to have negotiated an agreement whereby the Credit Union shall not seek their legal costs to date from you."

Mr. Maye failed to pay the full amount of the repayments due under the settlement agreement. Mr. Maye and his wife Anne- Marie executed a further Settlement Agreement in respect of his indebtedness on the 2nd November, 2015.

Under the agreement Mr. Maye was required, inter alia, to repay the sum of \$117,000 US dollars per week for 78 weeks together with a lump sum of €325,000 at the end of the 78 weeks and to grant a charge over land in County Leitrim to the plaintiff. It was provided that if the requirements of the agreement were complied with within the time frame set out the proceedings against all defendants, including Mr. Cronin, would be struck out with no order as to costs. Default in respect of any of the requirements would result in the settlement agreement being deemed to be at an end and Mr. Maye was precluded from swearing any affidavit or intermeddling in any way with the proceedings against the other defendants.

Loan repayments continued to be made on the defendant's account up to the 20th May, 2016. By letter dated the 22nd June, 2016, Mullaney's informed the defendant that the matter had been re-entered. Counsel for the plaintiff submits that in the circumstances there was no delay. Mr. Cronin's account with the plaintiff shows regular payments for the entire period of the two settlement agreements. Counsel suggests that the defendant's emphasis on the assertion that he didn't get any benefit from the monies advanced and perhaps some irregularity (on the part of the plaintiff) is clearly wrong. First, his involvement in the arrangements was predicated on him getting equity in two licensed premises. Second, there is nothing unusual in a third party closely connected with a borrower agreeing to underwrite the indebtedness of that borrower, for example a guarantor. It is submitted that the defendant always knew he was going to be liable on the basis of getting equity in the bars. The defendant went so far as to get his solicitor to obtain an undertaking from Mr. Maye in relation to the two licensed premises.

17. It is further submitted that the only alleged prejudice by counsel for the defendant was the passing of Ms. Ann McHugh. It is submitted that any prejudice must be caused by the delay. As Ms. McHugh passed away before the loan was advanced no prejudice arose from her passing.

18. Mr. Newman submits that the second prejudice contended for namely that because of the recession the defendant doesn't have the resources he had in 2008 to discharge the alleged indebtedness, does not hold up. It is submitted that if he had the financial resources then he didn't need to borrow from the plaintiff.

Defendant's Replying Submission

19. Mr. O'Floinn submitted that counsel for the plaintiff did not address the central point to the cases namely that the defendant did not get the monies. There was a very simple way of proving that he did and that was to produce an electronic transfer of funds. That was not done.

20. Counsel submitted if it was being seriously contended that Mr. Cronin had an interest in the bars then he should have been joined to the settlement.

21. Counsel submitted that a five year delay was inordinate and inexcusable. Counsel submits that in considering the balance of justice, the court should look at the central point of the defence, to the underlying proceedings and to the fact that the impact of delay could have been dealt with by remitting the matter to plenary hearing. In the circumstances, the appropriate course was to grant the defendants application.

Discussion

The principles to be applied by the court in considering an application to dismiss proceedings for want of prosecution were set by Hamilton CJ in *Primor v Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pages 475-476. Essentially a party seeking dismissal must first establish inordinate and inexcusable delay. If such be the case, then the court in the exercise of its discretion must make a judgment as to whether on the facts the balance of justice is in favour of or against the proceeding of the case. The learned Chief Justice listed seven factors which the court is entitled to have regard in considering the balance of justice. These include delay and consequent prejudice on the special facts of the case which make it unfair to the defendant to allow the action to proceed.

In relation to developments since the *Primor* decision, the authors of Civil Procedure in the Superior Courts state at paragraph 15-09;

"The so-called Primor principles have been approved in numerous decisions and it is interesting to note that, despite recent developments including the enactment of the European Convention on Human Rights Act 2003, it has been acknowledged in a number of cases that the basic questions which the court has to address in such cases remain the same, i.e. whether there has been inordinate and inexcusable delay and if so where does the balance of justice lie. However considerable doubt surrounds the question of whether the weight to be attached to the factors relevant in determining where the balance of convenience (sic) lies must now be reassessed...."

It is not necessary in this case to consider the balance of justice unless the defendant first establishes inordinate and inexcusable delay.

The defendant contends that there been a delay of over 5 years since the last pleading in the summary proceedings prior to Ms Horan's affidavit lodged on 4th October, 2015. While this view may be literally correct it ignores the essential facts of the case, in particular the fact that motions seeking summary judgment against six defendants including Mr. Cronin, were adjourned generally on 27th February, 2012, pursuant to a settlement agreement negotiated by solicitors instructed on behalf of the defendants. The defendant knew from Mr. Quigley's letter of 29th February, 2012, that the fate of the proceedings depended on Mr. Maye complying with obligations under agreement. Ultimately, Mr. Maye didn't meet his obligations and the proceedings were re-entered in June of this year. Given the full facts of the case, which have been set out in the plaintiff's evidence, the defendant's averment that he was shocked to hear from his solicitor of the re-entry of the proceedings is not credible

There has been no inordinate delay on the part of the plaintiff in this case. That marks the end of the defendant's motion.

For completeness I would add as far as the balance is concerned, the defendant has not suffered any prejudice by virtue of the passing of Mrs Mc Hugh; her death preceded the execution of the loan agreement on which the summary proceedings are based.

Decision

I will refuse the application.