THE HIGH COURT

2011 No. 1052 S

BETWEEN:

PROMONTORIA (ARAN) LIMITED

Plaintiff

– and –

PATRICK (OTHERWISE PADDY) O'CONNOR and DAVID O'CONNOR

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 21st December, 2017.

1. The plaintiff company seeks judgment against Mr David O'Connor (hereafter 'Mr O'Connor') on foot of a personal guarantee dated 10th February, 2005. In consideration of an advance made to Melbury Developments Ltd, a development company owned by his brother, Mr O'Connor agreed to, and did, provide a guarantee to the amount of €1.5m. He also agreed to provide a mortgage over certain lands as security for the said advance. The defence delivered by Mr O'Connor raises four issues, *viz*. (i) that his brother, acting as agent for Ulster Bank, represented that the guarantee and mortgage would be extant for 1½-2 years only, (ii) that Mr O'Connor was not aware of a second facility letter to which the guarantee purportedly extends, (iii) that Ulster Bank released its mortgages over certain properties without reducing Melbury's obligations, and (iv) that Ulster Bank was made aware that the number of units being constructed exceeded that allowed by the applicable planning permission. In 2015, the relevant loans and related security were sold by Ulster Bank to the plaintiff.

2. The proceedings commenced on 14th March, 2011, and proceeded pretty much apace until 30th June, 2015. A delay then arose until 22nd May, 2017, when successful application was made to have the plaintiff substituted as the plaintiff in the within proceedings. It appears that the reason for this hiatus was the occurrence of the loan transfer, that the 'ball' represented by the loans and security was dropped as it was passed from Ulster Bank to the plaintiff company in 2015 and was only picked up again sometime in 2017. That might be a good excuse if the 'ball' was being passed from one small entity to another. It is no excuse when one is dealing, as here, with well-resourced, well-advised financial service entities.

3. On 29th May, 2017, a notice of motion issued seeking a strike-out of the within proceedings, under O.122, r.11 of the Rules of the Superior Courts (1986), as amended, and/or pursuant to the inherent jurisdiction of the court. It is clear since at least the time of the decision in *Tesco Ireland Ltd v. McNeill* [2014] IEHC 367 that the same principles fall to be applied regardless of which of these two avenues is the approach used by the court in adjudicating on the application. There are two lines of applicable authority, the Primor line of authorities (following on *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459) and the *O'Domhnaill* line of authorities (following on *O'Domhnaill v. Merrick* [1984] I.R. 151). There is no dispute between the parties but that the *Primor* line of authorities is the correct line of authorities to apply in the context of the within application.

4. As is clear from the decision of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74, the *Primor* test requires the court to assess whether the delay presenting is inordinate, whether the delay presenting is inexcusable, and whether the balance of justice requires the dismissal of the proceedings. Cases on the inordinacy of delay, to which the court has had regard, include *NC v. PMcG* [2009] IEHC 438, *Morrissey v. Analog Devices BV* [2007] IEHC 70, *O'Connor v. John Player and Sons Ltd* [2004] 2 ILRM 321, and *Connolly's Red Mills v. Torc Grain and Feed Ltd* [2015] IECA 280. Cases on the inexcusability or otherwise of delay, to which the court has had regard, include *O'Carroll v. EBS Building Society* [2013] IEHC 30 and *Shields & Hillgrange Services Ltd v. Interlink Irl Ltd t/a Interlink Express* [2014] IEHC 74. The court considers, having had regard to the aforementioned case-law, that the delay presenting in the within case is inordinate and, for the reason identified previously above, is also inexcusable. All that remains to be decided, therefore, is whether the balance of justice requires the dismissal of the proceedings.

5. In *O'Connor v. John Player and Sons Ltd* [2004] 2 ILRM 321, 336, Quirke J., at 336, helpfully elaborated as follows upon the principles laid down by Hamilton C.J. in *Primor*, stating that the following issues fall to be addressed in assessing where the balance of justice lies:

> *"Having found, as I have, that the delay by the plaintiff in prosecuting her claim has been both inordinate and inexcusable, it is now necessary to decide whether, on the facts, the balance of justice is in favour of or against the plaintiff's case proceeding.*
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> *The determination of that issue requires consideration of the following:*
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> *(1) the conduct of the defendants since the commencement of the proceedings for the purpose of establishing, (a) whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and (b) whether the defendants were guilty of any conduct which induced the plaintiff to incur further expense in pursuing the action,*
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> *(2) whether the delay was likely to cause, or has caused, serious prejudice to the defendants, (a) of a kind that made the provision of a fair trial impossible or, (b) of a kind that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action and*
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> *(3) whether, having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against the defendants should be allowed to proceed or should be dismissed."*

6. As regards point (1) made by Quirke J., the plaintiff bears the responsibility for the prosecution of its case. Although litigation is a two-party operation and the conduct of both parties requires to be looked at (see *Dowd v. Kerry County Council* [1970] I.R. 27 *and Lismore Builders Ltd (in receivership) v. Bank of Ireland Finance Ltd and ors* [2013] IESC 6), and although the court can have regard to whether a defendant has been culpable as regards any delay (see *Rogers v. Michelin Tyre plc and anor* [2005] IEHC 294) or even guilty of acquiescence (see *Muchwood Management Limited v. McGuinness* [2010] IEHC 185), in the within case the fault for the two-year delay between June 2015 and May 2017 lies exclusively with the plaintiff. The defendant is guilty of no wrong; nor is it obliged to jig the plaintiff into action; nor is there anything untoward in the fact that Mr O'Connor proceeded after two years to bring the within application, an application which he is perfectly entitled to bring.

7. As regards point (2) made by Quirke J., two key points were made by Mr O'Connor in this regard, both of which go to the prejudice that he claims justifies the within proceedings now being dismissed: (i) that the circumstances in which the guarantee issued are now receding into the long-distant past and that, as a consequence of this, the frailties of human memory are to an ever greater extent coming into play; and (ii) that as a consequence of the transfer of loans, *etc*. from Ulster Bank to the plaintiff he may or will now have to seek non-party discovery against Ulster Bank, for which discovery he will have to give an undertaking as to costs. To these points the court would respond as follows:

> – as regards (i), the within case has not, to use a colloquialism, come 'out of the blue' as, *e.g.*, can occur in child sexual abuse cases when an adult victim of such abuse overcomes to some extent whatever further vicissitudes s/he may have encountered, often as a direct consequence of such abuse, and eventually plucks up the courage to point an accusing finger at someone who was a presence in a sometimes long-ago childhood. Here, the guarantee was given in February 2005 and the within proceedings commenced in March 2011. From that time, Mr O'Connor had to address his mind to the circumstances in which that guarantee issued and those circumstances have remained a live issue ever since. So this is not a case where Mr O'Connor is being asked for the first time, and after a long time, to recall long-ago events to which he has never previously had to address his mind in the years since they occurred. Moreover, the court is not especially convinced that any gentleman, of whatever means, would quickly forget the details of a couple of conversations in which he was asked and agreed to provide a secured guarantee for a sum as great as €1.5m.
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> – as regards (ii), had Ulster Bank deliberately contrived to create a situation in which Mr O'Connor, in the event of his being sued, would be required to seek non-party discovery instead of discovery against the plaintiff that is now party to the within proceedings, that would be one thing. However, the court is presented with a situation in which Ulster Bank decided for good commercial reason to transfer its loan-book to another party for good consideration. A consequence of that transfer, it seems an unwitting consequence, is that a party sued by the transferee of those loans, *etc*. may now have to seek non-party discovery against the transferor. That is perhaps a matter that might conceivably have been addressed, pre-transfer, by the regulator of Ulster Bank's affairs, if deemed appropriate. But it appears not to have been so addressed, and it was not otherwise required as a matter of law to be addressed by the transferor or transferee in the circumstances presenting. So if Mr O'Connor wishes to seek non-party discovery, he may do so, but he must do so on the same basis as everyone else. That is an unfortunate state of affairs, and he does have the sympathy of the court that matters should be so, but, as a matter of law, matters are so.

8. As regards point (3) made by Quirke J., it seems to the court to follow inexorably from the court's conclusions as to prejudice that this is not a case where "*having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against* [Mr O'Connor]…*should be dismissed*". That said, the court does consider that, to borrow from the wording of Hogan J. in *Casserly v. O'Connell* [2013] IEHC 391, as later deployed in *Sugg v. Ireland* [2017] IEHC 109, the plaintiff in the within proceedings is in 'yellow card' territory. How then are matters to be addressed? The court considers that the prospect of further delay can be allayed by vigorous case management of the within proceedings. Additionally, the plaintiff all but conceded at hearing that, in light of the delay presenting, the costs of the within application might be visited upon it notwithstanding the fact that the plaintiff might fail (and it has failed) in the within application. The court will order costs accordingly. It will discuss the further management of the proceedings with the parties.