Neutral Citation Number: [2009] IEHC 176

THE HIGH COURT

2001 5907 P

BETWEEN

AETAB RAZAQ

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND MOHAMMED ASLAM

DEFENDANTS

JUDGMENT of Mr. Justice Herbert delivered on the 6th day of March 2009

The events which give rise to the proceedings in this case occurred, - and there does not appear to be any contention between the parties as to this, - on 23rd November, 1994, and 28th May, 1996, respectively. On the former date a sum of £31,000 (former currency) was withdrawn from the account of the plaintiff at the first named defendant. On the latter date a sum of £19,016.60 (former currency) was withdrawn from the same account.

The plaintiff claims that the second named defendant fraudulently withdrew these sums. He claims that the withdrawals were concealed from him by the fraud of the second named defendant. The plaintiff asserts that even by the exercise of all due diligence he could not have become aware of these withdrawals until the 23rd July, 2000. On that date he claims that he attended at the Castle Street, Tralee, branch of the first named defendant and made enquires concerning his account. The plaintiff claims that the first named defendant was guilty of negligence and additionally or alternatively of breach of contract in permitting these sums to be withdrawn from his account. Without prejudice to the remainder of its defence, the first named defendant pleads that the plaintiff's cause of action in respect of the withdrawal on the 23rd November, 1994, is barred by the provisions of s. 11(1) of the Statute of Limitations 1957, and, in respect of the withdrawal on the 28th May, 1996, by the doctrine of laches. In his defence the second named defendant claims, *inter alia*, that the plaintiff's cause of action in respect of both withdrawals is barred by the provisions of the Statute of Limitations 1957.

A plenary summons was issued on behalf of the plaintiff on the 25th April, 2001. An appearance was entered on behalf of the first named defendant on the 30th May, 2001, and on behalf of the second named defendant on the 12th June, 2001. The Statement of Claim was delivered on behalf of the plaintiff on the 4th July, 2001. The first named defendant delivered a Defence on the 8th October, 2001. By an Order of this Court the second named defendant was given a period of three weeks from the 4th February, 2002, within which to deliver a defence. This was not done. By a notice dated the 6th November, 2002, the plaintiff sought particulars in respect of matters pleaded in the defence of the first named defendant and, on the same date delivered a Reply to that defence. Replies to this request for particulars were received on the 3rd January, 2003. On the 7th January, 2003, a defence was delivered on behalf of the second named defendant.

A period of 1 year 8 months and 13 days had now elapsed since the commencement of the proceedings. There had been a delay of 10 months and 13 days on the part of the second named defendant in delivering a defence. Despite this delay, the plaintiff had not, between the 26th February, 2002, and the 7th January, 2003, brought another motion for judgment in default of defence against the second named defendant. The onus is on the plaintiff to initiate and thereafter to prosecute proceedings with all practicable dispatch. The first named defendant did not move to strike out the plaintiff's claim as vexatious or as an abuse of the process of the Court. This inaction on the part of the first named defendant is difficult to disregard, because, apart from the issue of laches and the Statue of Limitations, it is a fact that though the Statement of Claim contained numerous specific assertions of negligence and a breach of duty on the part of the first named defendant, including a paragraph setting out particulars of negligence, no claim whatever for any relief against the first named defendant is made in the Statement of Claim and the sole claim for relief is against the second named defendant. At para. 6 of its defence delivered on the 8th October, 2001, the first named defendant specifically asserted this fact.

It was not until the 6th November, 2002, that the solicitors for the plaintiff wrote to solicitors for the first named defendant in the following terms:-

> "Please note that in fact paragraph 10(c) of the Statement of Claim should read 'Damages for breach of contract and/or negligence as against the Defendant or each of them.' You might note that the typographical error in this regard and that at the trial of this action we intend to apply to amend paragraph 10(c) of the Statement of Claim herein so that the claim for damages for breach of contract and/or negligence is as against both Defendants. This letter will be used in evidence as proof of this indication to you unless we hear from you to the contrary we will take it that you have no objection to this application."

By letter dated the 23rd December, 2002, stated to have been received on the 3rd January, 2003, the solicitors for the first named defendant replied as follows:-

> "We note your request to amend the Plaintiff's Statement of Claim. We have no difficulty with the proposed amendment, provided that an Amended Statement of Claim is delivered and that our client is afforded an opportunity to deliver an Amended Defence thereto. In this regard, if you wish to apply to the Court for leave to amend your client's pleadings, we will consent to an amendment in the terms of your letter."

No application was made to amend the Statement of Claim until the 2nd July, 2007, after the Master of the High Court had on the 21st June, 2007, refused to make an Order for Discovery of Documents on Oath against the first named defendant by reason of the fact that the Statement of Claim contained no claim whatever against the first named defendant. On the 3rd October, 2007, the first named defendant issued a Motion on Notice seeking to dismiss the plaintiff's claim for inordinate and inexcusable delay. The explanation offered on behalf of the plaintiff for failing to amend the Statement of Claim is, that having regard to the terms of the letter of the 23rd December, 2002, from the solicitors for the first named defendant it was considered that an application to Court would only cause additional and, until the decision of the Master of the High Court, unnecessary costs.

In my judgment, as of 7th January, 2003, the delay of 1 year 18 months and 13 days from the initiation of the proceedings, could not be said to be inordinate and inexcusable. A part of this delay, a period of 10 months and 13 days was due to the failure of the second named defendant to deliver a Defence within the time specified by the Rules of the Superior Courts or within the additional period permitted by the Order of this Court made on the 4th February, 2002. While the delay on the part of the plaintiff in failing to progress his action is of far greater import than the delay on the part of the second named defendant in delivering a defence, nonetheless, it would be incorrect for the Court to entirely disregard the fact of this delay on the part of the second named defendant. It would also, in my judgment, be incorrect to overlook the inaction on the part of the first named defendant, especially given that more than 8 years and more than 6½ years had elapsed since the sums of money had been withdrawn from the plaintiff's account and the fact that the first named defendant had pleaded in its Defence that no claim was made against it in the Statement of Claim and that any claim against it arising from these withdrawals was barred by the doctrine of laches and by the provisions of s. 11(1) of the Statute of Limitations 1957. However, in this regard one must also be mindful of the provisions of O. 122, r. 11 of the Rules of the Superior Courts which refers to 2 years from the last proceeding had, which would have been the Motion on Notice dated the 31st October, 2001, seeking judgment in default of defence against the second named defendant, on foot of which the Order of the 4th February, 2002, was made.

One must therefore examine what next occurred. On the 30th January, 2003, the plaintiff delivered a Reply to the defence of the second named defendant and, on the same date, a Notice for Particulars. By a letter dated the 30th January, 2003, the solicitors for the plaintiff advised the solicitors for the first named defendant that they would apply at the trial of the action to amend the Reply dated the 6th November, 2002, to the Defence of the first named defendant dated the 8th October, 2001, by pleading that the provisions of the Statute of Limitations 1957, did not apply as alleged or at all and, stating that unless they heard to the contrary they would assume that the first named defendant had no objection to this course. On the 10th April, 2003, the second named defendant furnished replies to the plaintiff's Notice for Particulars dated the 30th January, 2003.

There then followed a period of 1 year 7 months and 8 days in which no step was taken by the plaintiff to further the proceedings. On the 16th November, 2004, the plaintiff served a Notice of Intention to proceed after the expiry of one month. However, nothing whatever was done on foot of this Notice and a further period of 2 years and 24 days then elapsed until the 9th February, 2007, when the plaintiff served a further Notice of Intention to Proceed. Despite this extraordinary additional delay, solely attributable to the plaintiff, of 3 years and 8 months, - making a total delay of 5 years 8 months and 14 days from the commencement of the proceedings, - despite the provisions of O. 122, r. 11 of the Rules of the Superior Courts, despite the fact that 11 years 9½ months had now expired since the first alleged unauthorised withdrawal of money from the plaintiff's account and 10 years and almost 3½ months from the date of the second unauthorised withdrawal, despite both defendants pleading that the plaintiff's claim was barred and, despite the additional pleading by the first named defendant that no claim was made against it in the Statement of Claim, no action was taken by either defendant.

I am satisfied that at this point on the 9th February, 2007, there was inordinate delay on the part of the plaintiff in prosecuting his action.

On the 22nd February, 2007, the plaintiff served Interrogatories on the second named defendant, asking did he not withdraw the two sums from the plaintiff's account at the Tralee branch of the first named defendant on the 23rd November, 1994 and 28th May, 1996. On the same day the plaintiff served a Notice for Further and Better Particulars on the second named defendant arsing out of his defence delivered on the 7th January, 2003, - approximately 4 years 1½ months earlier. Also, on the same day and within the notice period of one month mandated by the Notice of Intention to proceed, the plaintiff delivered, or purported to deliver, an Amended Reply to the Defence of the second named defendant, raising for the first time the allegation that the withdrawal of the money by the second named defendant was fraudulent, that the second named defendant had concealed the fraud from the plaintiff and that the plaintiff did not discover and could not with reasonable diligence have discovered the fraud of the second named defendant until the 23rd July, 2000, so that the time limit fixed by the Statute of Limitations did not commence to run until the 23rd July, 2000. On the same date, - 22nd February, 2007, - the plaintiff requested that the first named defendant furnish voluntary Discovery of Documents on Oath.

On the 11th June, 2007, by Order of this Court, the second named defendant was given four weeks within which to reply to the plaintiff's request for Further and Better Particulars. By Order of the Master of the High Court made on the 21st June, 2007, the plaintiff's application for Discovery against the first named defendant was dismissed on the ground that the Statement of Claim contained no claim for relief against the first named defendant. On the 21st June, 2007, the Master of the High Court directed that the second named defendant make discovery of documents on oath in relation to the pleading in his defence that without prejudice to the denial that he had withdrawn either of the sums, he was the beneficial owner of the money in the account and would have been entitled to make the withdrawals in any event. On the 21st June, 2007, the Master of the High Court refused the plaintiff's application for leave to administer Interrogatories to the second named defendant. By a Motion on Notice dated the 2nd July, 2007, the plaintiff now seeks leave of this Court to amend the Statement of Claim delivered on the 4th July, 2001, - almost 6 years ago, - in accordance with the terms of the letter of the 6th November, 2002. By Motion on Notice dated the 3rd October, 2007, the first named defendant now seeks an Order of this Court dismissing the plaintiff's claim herein for inordinate and inexcusable delay. On the 14th November, 2007, the second named defendant furnished Replies to the plaintiff's Notice for Further and Better particulars. On the 19th November, 2007, the second named defendant filed an affidavit stating that he had no documents in relation to the matters indicated in the Order of the Master of the High Court made on the 21st June, 2007. Finally, on the 19th November, 2007, this Court made an Order striking out a Motion dated the 26th September, 2007 and, awarding costs to the plaintiff against the second named defendant.

In an affidavit sworn on the 20th October, 2008, Eileen Hayes, Solicitor in the firm of Solicitors on the Court Record

representing the plaintiff and, significantly not the plaintiff himself, while accepting that there had been delay in moving the proceedings to trial, states that this was due to outside factors over which the plaintiff had no control. She then identified these factors as follows:-

> (1) The plaintiff resides in Pakistan for much of his time and is not readily contactable in order to obtain instructions because he does not have access to Email there.
>
> (2) The plaintiff was involved in an action in which the second named defendant in the instant case was the other party and this action was heard by the Circuit Court on the 6th December, 2007, and the 20th December, 2007. The proceedings in that action commenced in the Circuit Court, on the application of the second named defendant in the instant case, were transferred to the High Court which, reversed the decision and re-transferred the proceedings back to the Circuit Court. During this time the proceedings in the instant case could not be progressed.
>
> (3) The plaintiff was involved in proceedings in the Cork Circuit Court taken by a nephew of the plaintiff against the second named defendant in the instant case in relation to some properties in Cork. This action was heard by the Circuit Court on the 18th July, 2006. The proceedings in the instant case were put on hold to a certain extent in order to deal with this action.
>
> (4) After the 20th December, 2007, there had been correspondence between the plaintiff and the first named defendant to see if the proceedings in the instant case could be compromised. This had not happened. As it was not feasible for the plaintiff to leave Pakistan at this time, an uncle of his, acting under a Power of Attorney attended settlement negotiations with the first named defendant on behalf of the plaintiff.

In addition to the foregoing, Eileen Hayes asserts, that there had also been delay on the part of the second named defendant and, that the defendants were not prejudiced in any way by the passage of time. In my judgment, these purported explanations for the inordinate delay on the part of the plaintiff in prosecuting these proceedings are utterly implausible. Ignoring the fact that they are entirely hearsay, they do not in any meaningful way address the major period of delay between the 7th January, 2003, and the 9th February, 2007, are entirely lacking in detail and, are unsupported by any documentary or other supportive evidence. I find that no objectively acceptable explanation and excuse have been demonstrated by the plaintiff to account for the inordinate delay on his part in prosecuting the proceedings in the instant case. I therefore find that the delay on the part of the plaintiff in prosecuting these proceedings is both inordinate and inexcusable.

The court must now consider whether on the facts, the balance of justice is in favour of or against the action continuing. The court must consider whether prejudice consequent upon the delay, would on the special facts of this case, make it unfair to the first named defendant to allow the action to proceed and, would make it just to strike out the plaintiff's action. In the case of *Mark John Gilroy v. Mary Flynn* [2005] 1 I.L.R.M. 290, Hardiman J. (Denham and Fennelly J.J. concurring) held as follows:-

> "Secondly, the Courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, 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 the comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."

This decision was followed in Gerald J.P. *Stephens v. Paul Flynn Limited* [2008] I.E.S.C. 4, a judgment of the Supreme Court delivered by Kearns J. (Macken and Finnegan J.J. concurring). However, in *Desmond v. M.G.N. Limited* [2008] I.E.S.C. 56, two out of the three Members of the Supreme Court, namely Geoghegan J. and Mackin J. expressed what appears to be a more conservative and traditional viewpoint in the matter. At p. 57 of the judgment, Geoghegan J. in the course of his judgment held as follows:-

> "The second matter on which I wish to comment relates to the views expressed by Kearns J. in his judgment that the jurisprudence well established by two Supreme Court decisions in relation to when an action should be struck out for delay have somehow now to be modified having regard to the European Convention on Human Rights incorporated into domestic law by the 2003 Act. This view which has been expressed in one or two other judgments exclusively derives, as far as I am aware, from the dicta of Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 as set out in the judgment of Kearns J. On my reading of that case, these dicta can be regarded as *obiter dicta*. Macken J. in her judgment, expresses the view with which I fully agree that the basic principles as set out in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, remain substantially unaltered. I do not think that the case law of the Court of Human Rights relating to delay justifies reconsideration of those principles or in any way modifies those principles. I do not know of any relevant case of the Court of Human Rights dealing with when an action should be struck out for delay.
>
> The dicta of Hardiman J. to which I have already referred indicate that his view is that application of those principles should now change or indeed that the principles themselves might have to be 'revisited'. I am not convinced that that would be either necessary or desirable. It would seem to me that those principles have served us well. Unless and until they are altered in an appropriate case by this court, I think that they should still be treated as representing good law and in this respect, I entirely agree with Macken J."

The relevant portion of the judgment of Macken J. is to be found at p. 61 of the judgment where that learned judge stated as follows:-

> "Quite apart from the specific requirement of a plaintiff in a libel action to progress his claim with real diligence, there are also, as is recalled by the applicant, obligations to progress proceedings, which may be traced to the provisions of the European Convention on Human Rights and to certain jurisprudence of the European Court of Human Rights. While accepting that is undoubtedly so, I do not think it necessary for the resolution of this appeal to invoke that jurisprudence, there being ample extant Irish jurisprudence on the matter without doing so. The extent to which that jurisprudence of the European Court of Human Rights supports an automatic striking out of proceedings due to delay is not, in my view, yet established. Nor am I aware of any jurisprudence of that court which suggests that where inexcusable delay is found, the balancing exercise established in Irish jurisprudence is inappropriate. I am satisfied that the tests mentioned by Clarke. J. in *Stephens v Flynn Limited,* (Unreported, High Court 28th April, 2005) remain those applicable, namely:
>
> 1. Ascertain whether the delay in question is inordinate and inexcusable; and
>
> 2. If it is so established the court must decide where the balance of justice lies.
>
> . . . . .
>
> <u>As to the Balance to be Struck Between the Competing Interests</u>:
>
> In light of my finding that the delay was both inordinate and inexcusable, the case law compels me to have regard nevertheless to the appropriate balance to be struck, having regard to the effect of that delay on, and likely prejudice to a defendant who seeks to strike out proceedings, and the prejudice which would arise in the case of a plaintiff being precluded from proceeding further with his claim. I refer in that regard to the long standing jurisprudence enunciated in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and as further developed in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and adopted in several cases since.
>
> In the decision of this court in the case of *Primor*, supra., Hamilton, C.J. stated:
>
> > 'The principles of law relevant to the consideration of the issues raised in this appeal may be summarised 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 of the defendant referred to in (vi) may arise in many ways and be other than merely caused by the delay, including damage to the defendant's reputation and business.'
>
> While certain, and even more recent, case law is also referred to by both parties, the above basic principles appear to me to remain substantially unaltered."

There was only minimal delay on the part of the first named defendant in delivering its own pleadings in the instant case.

However, as I have already indicated, there was undoubted inactivity on the part of the first named defendant in failing to seek to dismiss the plaintiff's case for want of prosecution. The fact that the first named defendant might have moved to dismiss the plaintiff's action on other grounds, - that no claim was made against the first named defendant in the

Statement of Claim or that the plaintiff's claim was barred by reason of the doctrine of laches and the provisions of s. 11(1) of the Statute of Limitations 1957, - is not in my judgment a relevant consideration in this application. Order 122, r. 11 of the Rules of the Superior Courts provides that:-

> "In any cause or matter in which there has been no proceeding for 2 years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution."

Though three separate periods of delay on the part of the plaintiff, 1 year 18 months and 13 days, 1 year 7 months and 18 days and 2 years and 24 days are identifiable, the latter period ending with the service by the plaintiff of the second Notice of Intention to Proceed on the 9th February, 2007, it was only at this time that the first named defendant was in a position to avail of the provisions of O. 122, r. 11 and, did so by the Motion on Notice dated 3rd October, 2007.

I do not consider that this period, of just short of 8 months, of inactivity on the part of the first named defendant could reasonably be considered to amount to acquiescence on the part of the first named defendant in the inordinate delay on the part of the plaintiff in prosecuting the action. This inactivity on the part of the first named defendant, which was not accompanied by anything which might have encouraged the plaintiff to continue with his action, is just as consistent with an attitude that no claim was made by the plaintiff against the defendant in the Statement of Claim. The first named defendant did nothing to encourage the plaintiff to persist in his action. The first named defendant declined to make voluntary discovery of documents on oath and when an Order for discovery was sought by the plaintiff this was opposed by the first named defendant and on the 21st June, 2007, the Master of the High Court dismissed the application on the ground that the Statement of Claim made no claim against the first named defendant.

In my judgment, the sole consideration now is whether the inordinate delay on the part of the plaintiff gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the first named defendant. The material facts are set out in the two affidavits of Kieran Desmond Kiernan sworn on the 3rd October, 2007, and the 10th December, 2007, and, in the affidavit of John O'Donoghue sworn on the 5th December, 2008, which I permitted the first named defendant to file during the hearing of the application.

The affidavit of the 3rd October, 2007, by Mr. Kiernan, Solicitor for the first named defendant, exhibits what is stated to be a true copy of a letter from the solicitors for the plaintiff to the manager of the Tralee branch of the first named defendant at 1-3 Castle Street, Tralee, dated the 13th September, 2000. This letter states as follows:-

> "RE: Our Client: Aetab Razaq
>
> Account 1/R/14261/01
>
> Dear Sirs,
>
> We confirm that we act on behalf of the above named Mr. Aetab Razaq. He has instructed us, in relation to the above account. He has furnished us with the statement dated 10th July, 2000, a copy of which is enclosed.
>
> This statement records two large withdrawals. The first was for £31,000 on the 23rd November, 1994 and the second withdrawal on the 28th May, 1996, for a sum of £18,986.37 cleared the account.
>
> He instructs, that he did not make nor authorise these withdrawals.
>
> It appears that you have furnished him with a copy of a withdrawal slip for the £31,000. The copy of this is enclosed. He instructs us, that this is not his signature. This withdrawal slip seems to refer to an account No. 99944673. You might confirm how this relates to the account number quoted in the statement of 1/R/14261/017.
>
> We understand, that you have informed Mr. Razaq that you are trying to locate the withdrawal slip for the second withdrawal of the 28th May, 1996. We would now ask you, to do same immediately as this matter is now extremely urgent.
>
> You might also indicate exactly what happened to the funds withdrawn from this account. We understand that you have already given certain details to Mr. Razaq as to the account in which the withdrawal of £31,000 was lodged.
>
> Once again this matter is extremely urgent and you might please revert to us by return.
>
> Yours faithfully."

In Mr. Kiernan's affidavit of the 10th December, 2007, there is exhibited a true copy of a letter dated the 20th October, 2000, from the Assistant Manager of the Tralee Branch of the first named defendant to the solicitors for the plaintiff. This states as follows:-

> "Dear Sirs,
>
> I refer to your correspondence resting with your letter of the 29th September.
>
> With regard to the withdrawal slip for £31,000 we agree that on closer examination there appears to be some slight difference in the signature here. With regard to the numbers quoted, the number 99944673 is an internal reference number with account No. 1/R/14261/017 being the actual account number.
>
> In relation to the second withdrawal of £19,016.60 made on the 28th May, 1996, we regret to advise that this withdrawal is unsigned and we are unable to trace the draft forms which went against this item.
>
> Please let me know if I can be of further assistance to you.

Yours faithfully."

In its defence the first named defendant claims that it made the payments on foot of the withdrawals in good faith and without negligence and, denies that the second named defendant made the withdrawals. In its Replies to Particulars, the first named defendant states that Statements of Account on this account were sent to the plaintiff on a monthly basis and gives particulars of negligence alleged by it against the plaintiff as follows:-

"3. The particulars of the plaintiff's negligence are as follows:-

(i) Failing to notify the first Defendant as soon as it became aware of the fact and/or the probability that forgery and/or fraud had occurred and/or was likely to occur in respect of the account which is the subject of these proceedings.

(ii) Failing to notify the first defendant that the second defendant was no longer acting as the partner and/or agent of the plaintiff.

(iii) Failing to monitor the operation of the said account in a manner consistent with prudent commercial practice.

(iv) Such further matters as are within the knowledge of the plaintiff and as may emerge either prior to or at the trial of this action."

Contrary to what is stated in the penultimate paragraph of the letter of the 20th October, 2000, above referred to, as appears from the affidavit of John O'Donoghue, Manager of the branch of the first named defendant at Castle Street, Tralee, since that date documents were found relating to the withdrawal of the £19,016.60 from the plaintiff's account. In his affidavit he exhibits a true copy of an unsigned Withdrawal Docket and a true copy of an Irish Pound Term Deposit Maturity Instruction Form dated the 28th May, 1998. It is not stated when these documents were discovered but it is clear that so far as documents are concerned the first named defendant has now more documents concerning these two withdrawals than it did when the plenary summons was issued on the 25th April, 2001.

Mr. O'Donoghue, at para. 6 of his affidavit avers that the withdrawal of the sum of £19,016.60 was, "a transaction of a very peculiar nature". He states that the plaintiff maintained an account with the first named defendant at its branch at Castle Street, Tralee, and also operated a Term Deposit Account with the first named defendant at its Retail Deposit Centre in Sandyford in Dublin. Having exhibited the two documents relating to the withdrawal of the sum of £19,016.60 Mr. O'Donoghue in his affidavit then continues as follows:-

"8. I say and believe that the monies withdrawn from the plaintiff's Term Deposit Account as aforesaid were ultimately transferred to a suspense account in the first named defendant's Branch at Castle Street, Tralee to be held to the plaintiff's instructions.

9. I say and believe that I have managed to identify two Bank Officials involved in the transaction comprising the alleged withdrawal of £19,016.60, the subject matter of these proceedings, namely Mr. Ger O'Sullivan and Mr. Donal Clifford. I say that so much time has passed since the impugned transaction that Mr. Donal Clifford is no longer in the employment of the first named defendant.

10. I say and believe that Ger O'Sullivan is the Bank Official whom it appears processed the request to withdraw the sum of £19,016.60 from the plaintiff's Term Deposit Account a/c 1/R/14261/01 in the first named defendant's Deposit Centre in Sandyford, Dublin. Mr. O'Sullivan whose signature appears on the document at 'J O'D 2' above, has advised me that he has no recollection of the identity of the individual who instructed him to effect the withdrawal over 12 years ago and he has no memory of the transaction.

11. I say and believe that Donal Clifford is the former Bank Official who dealt with the plaintiff on behalf of the first named defendant at around the time of the impugned transaction. Mr. Clifford has advised me that he has no recollection of the transaction the subject matter of these proceedings and he is not in a position to give evidence as to whether he received instructions from the Plaintiff to effect the transaction as aforesaid. I say and believe that the inability of Mr. Clifford to give evidence on behalf of the first named defendant in this regard is particularly prejudicial, since Mr. Clifford has confirmed that at about the time of the impugned transaction, the accepted work practices in the first named defendant's branch at Tralee where funds were being retrieved from the first named defendant's Deposit Centre in Sandyford in Dublin would have allowed for an impersonal account docket to have been processed on foot of a customer's verbal instructions without the same having to be signed by a customer.

12. In addition to the foregoing I say and believe that the withdrawal docket exhibited at 'J O'D 1' above appears to contain an authorising initial. This deponent believes that the authorising initial is that of Neil Dempsey. Mr. Dempsey retired as a Bank Official approximately four year ago. This deponent has shown Mr. Dempsey a copy of the withdrawal document and Mr. Dempsey has had an opportunity to examine the initial, however, he cannot positively confirm that the initial is his and he has indicated that he has no recollection of the transaction. In the circumstances this deponent cannot establish at this remove of time who the author of the initial actual is.

13. For the sake of completeness I say and believe that a search of the first named defendant's records at its branch at Tralee has failed to disclose any of the supporting documentation which would normally have accompanied this transaction – comprising the original draft and counterfoil of the draft and in the circumstances there is no documentary evidence available to the first named defendant to deal with the shortcomings in the evidence which would be available from witnesses who have been identified above."

With regard to the withdrawal of the sum of £31,000 (former currency) on the 23rd November, 1994, the extant document authorising that withdrawal bears what purports to be the authorising signature of the plaintiff. However, the plaintiff claims that this is a forgery. In the letter of the 20th October, 2000, from Mr. Pat McTigue, Assistant Manager of the Castle Street, Tralee branch of the first named defendant in October 2000, he agrees that, "on closer examination

there appears to be some slight difference in the signature". In para. 6 of his affidavit sworn on the 5th December, 2008, Mr. John O'Donoghue, the current Manager of the Castle Street, Tralee branch of the first named defendant, states that, "the withdrawal of £19,016.60 (former currency) . . . . is a transaction of a very peculiar nature". Both of these are hindsight opinions. None of the three Bank Officials found to have been involved in the withdrawal of the £19,016.60 has any recollection whatsoever of the transaction in question. This is scarcely surprising after almost 13 years. Mr. Clifford is no longer in the employment of the first named defendant and Mr. Dempsey retired from the employment of the first named defendant in about 2004. In my judgment, the first named defendant is very significantly prejudiced in being unable at this remove, to establish any details of the history, background and circumstances surrounding either of the withdrawals.

Mr. Clifford can recall that it was accepted practice at the Castle Street, Tralee branch of the first named defendant at the time, to retrieve funds from the Sandyford Deposit Centre on verbal instructions from a customer. However, he has no recollection of who may have given him the instruction in the instant case. Even if this should be found to be an unusual banking practice, that is not in itself, any more than is a slight variation in the signature "on closer examination" absolutely determinative of the issue. Whether the Officials of the first named defendant acted on each occasion as reasonably prudent and careful bankers is a question of fact to be decided on the evidence. By reason of the inordinate delay in this case, essential aspects of that evidence are no longer available to the first named defendant because of the entirely understandable lapse of memory on the part of the still available Bank Officials.

In *Barclays Bank plc v. Quincecare Limited and Another* [1992] 4 A.E.R. 363, Steyn J. (as he then was) held at p. 376a-h as follows:-

> "Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. *Ex hypothesi* one is considering a case where the bank received a valid and proper order which it is *prima facie* bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? If the bank executes the order knowing it be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises; the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquires as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of business unnecessarily. On the other hand the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for so long as the banker is "put on inquiry" in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company (see proposition (3) in *Lipkin Gorman v. Karpnale Limited* (1986) [1992] 4 A.E.R. 313 at 349, [1987] 1 W.L.R. 987 at 1006). And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment it is not too high a standard. Indeed, the evidence of Mr. Redhead, a most experienced banker, showed that the principle which I have stated is the very criterion usually applied by bankers. He used the language of a banker being put on inquiry."

Any attempt to apply these principles in the instant case will rapidly and convincingly demonstrate the extent, the very significant extent, to which the first named defendant would be prejudiced should this action be permitted to proceed against it. For this reason I am satisfied that the prejudice consequent upon the delay would, on the special facts of this case, make it unfair to the first named defendant to allow the action to proceed and make it just and appropriate to strike out the plaintiff's action against the first named defendant.