THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 167

Record No. 2017/134

Peart J.
Irvine J.
Whelan J.

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF/

RESPONDENT

- AND -

JAMES GUERIN

DEFENDANT/

APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 12th day of June 2018

1. This is Mr. Guerin's appeal against the order of the High Court, Eager J., of the 13th March 2017. By his order, the High Court judge refused to dismiss the within proceedings for want of prosecution and/or on the basis that the respondent, Allied Irish Banks ("The Bank"), had been guilty of inordinate and inexcusable delay in the manner of its conduct of the proceedings.

2. The following is the chronology of relevant events which was before the High Court judge when he made his decision:-

25 April 2007: Summary summons issued claiming recovery of a liquidated sum.

8 May 2007: Summary summons was served.

22 June 2007: Appearance.

20 July 2007: Motion for liberty to enter final judgment issued.

18 September 2007: Motion for judgment served.

Early 2008: Settlement negotiations.

30 April 2008: Settlement agreement reached and motion for judgment adjourned generally with liberty to re-enter on consent.

5 May 2009: Defendant failed to comply with settlement agreement and motion re-entered.

30 July 2009: New return date for motion for liberty to enter final judgment

16 April 2010: Defendant filed first replying affidavit.

29 April 2010: Transferred to plenary hearing with 4 weeks statement of claim and 4 weeks for Defence, on consent.

25 May 2010: Statement of claim delivered.

1 December 2010: Defence delivered.

2011: Considerable correspondence between the solicitors regarding Defendant's request for discovery.

1 February 2012: Plaintiff's notice for particulars.

April 2012: Defendant's solicitors refused to reply to notice for particulars.

26 June 2012: Notice of intention to proceed.

26 July 2012: Notice of motion seeking replies to particulars issued.

19 November 2012: Return date for motion for particulars. Defendant consented to reply by the 10 December 2012.

10 January 2013: Defendant's replies to particulars were delivered.

2013, 2014 & 2015: Solicitors for plaintiff wound up and failed to pass on file to new solicitors.

4 February 2016: Motion to dismiss issued.

22 February 2016: Return date for motion to dismiss. Adjourned by consent.

2 March 2016: Affidavit served by plaintiff.

25 April 2016: Transferred to Non Jury list by consent.

27 April 2016: Motion struck out due to defendant's failure to attend

4 May 2016: Defendant ex parte has motion reinstated and listed for hearing without any notice given to the plaintiff. Not clear whether it was represented to the court that this was on consent or on notice, but it was neither.

10 May 2016: Notice of intention to proceed.

3 November 2016: Motion to dismiss struck out for a second time due to failure of defendant to call it on.

7 November 2016: Plaintiff received a booklet of pleadings from defendant - no explanation.

8 November 2016: Defendant sent two affidavits to plaintiff - No explanation.

9 November 2016: Plaintiff served a notice of trial and a notice to produce.

9 November 2016: Defendant enquired whether Plaintiff was in a position to defend the within motion the following day.

9 November 2016: Plaintiff ascertained from www.courts.ie that the motion had been reinstated and listed for hearing.

10 November 2016: Defendant applied to have the motion reinstated and listed for hearing and plaintiff objected.

Motion was reinstated and listed for mention on 30 November.

Liberty to plaintiff to file affidavit setting out conduct of Defendant.

Liberty to defendant to file two further affidavits served earlier that week.

11 November 2016: Two affidavits filed by defendant.

23 November 2016: Further affidavit filed by defendant, without liberty applied for or granted.

30 November 2016: Motion to dismiss listed for hearing on the 6th March 2017 on consent.

14 December 2016: Action listed for hearing on 3rd October 2017 on consent.

3. As is apparent from the aforementioned chronology, on the 30th April 2008 the parties entered into a settlement agreement pursuant to which the proceedings were adjourned generally with liberty to re-enter. Due to an alleged failure on the part of Mr. Guerin to comply with the terms of the agreement the bank successfully applied to re-instate the proceedings which were later referred to plenary hearing in April 2010.

4. In 2011 there was significant correspondence concerning discovery. Thereafter, particulars were sought by the bank in February 2012. When replies were not forthcoming three reminder letters were sent by the bank's solicitors, Thomas Flaherty & Company. In June 2012 the bank issued a notice of intention to proceed and one month later served a motion seeking an order of the court directing Mr. Guerin to reply to its notice for particulars. These particulars were ultimately delivered in January 2013.

5. It is readily accepted by the bank that it took no steps to advance the proceedings between January 2013 and February 2016, at which stage Mr. Guerin served his motion to have the proceedings dismissed for want of prosecution and/or on the grounds of inordinate and inexcusable delay. The reason provided for this inaction is that the bank's solicitor, Mr. Thomas Flaherty, was winding down his practice and the bank did not realise that the proceedings were not being progressed. Quite properly, in my view, the bank has at all times accepted that it is culpable in respect of this period of culpable delay on the part of its servant or agent.

6. Mr. Guerin's application to dismiss the bank's proceedings was not heard until the 6th March 2017. This was due, *inter alia*, to the fact that the application was twice struck out for non-attendance on the part of Mr. Guerin's legal advisers over an eight month period.

Judgment of the High Court Judge

7. In his judgment, the High Court judge did not accept the submission made by Mr. Guerin that the bank was guilty of any culpable delay prior to the 10th January 2013 in circumstances where there had been significant correspondence inter parties concerning particulars and discovery during the period the 1st December 2010 to the 1st February 2012. He nonetheless found the bank guilty of inordinate and inexcusable delay from the 10th January 2013, that being the date upon which Mr. Guerin replied to the bank's letter seeking particulars, until the 4th February 2016 when he issued his motion to dismiss the proceedings.

8. Having concluded that the bank was guilty of inordinate and inexcusable delay the High Court judge proceeded to consider where the balance of justice lay having regard to all of the circumstances of the case and the principles routinely deployed on such an application. In this regard he relied upon many of the most often cited authorities including *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, *Anglo Irish Beef Processors Limited & Ors. v. Montgomery & Ors.* [2002] 3 I.R. 510 and *Millerick v. The Minister for Finance* [2016] IECA 206.

9. In reaching his conclusion that, having regard to the balance of justice, the proceedings should not be dismissed, the High Court judge considered, insofar as relevant to the facts of the present case, the factors advised by Hamilton C. J. at para 475 of his

judgment in *Primor*. In looking at the conduct of the parties the trial judge had regard to the significant delay that had been caused by Mr. Guerin's failure to meet time limits prescribed by the rules of the court, and in particular his delay in filing a replying affidavit to the summary summons and in replying to the bank's letter seeking particulars. He also had regard to the delay occasioned by his failure to comply with the terms of settlement that had been agreed in 2008. He also relied upon the conduct of Mr. Guerin and his advisors in relation to his motion to dismiss the proceedings on the grounds of inordinate and inexcusable delay. Likewise, the High Court judge had regard to the delay on the part of the bank caused by its inactivity between January 2013 and February 2016.

10. The High Court judge also considered in detail the prejudice asserted by Mr. Guerin to arise from the bank's delay. He rejected his assertion that the proceedings could have adversely affected his credit rating and reputation. He referred to the bank's uncontroverted evidence that it had never reported the existence of the within proceedings to any third party. The High Court judge further had regard to the bank's evidence concerning a report to the effect that Mr. Guerin and his wife had consented to a judgment in favour of ACC for a sum of approximately €2.5m in 2010 and that five judgment mortgages had been registered against their properties. If Mr. Guerin's credit rating had been interfered with, he considered it more likely to have been the result of the aforementioned matters rather than any conduct on the part of the Bank in the within proceedings.

11. As for Mr. Guerin's assertion that he would be prejudiced by reason of the fact that certain banking documentation had been lost in a fire in 2008/2009, the High Court judge relied upon the willingness of the bank to make discovery of all documents material to the lending the subject matter of these proceedings. In such circumstances he was satisfied that Mr. Guerin would not be prejudiced by the fact that he did not have possession of such documents himself.

12. Whilst there were other matters referred to by the High Court judge in the course of his judgment, it was principally the aforementioned matters which appear to have informed his conclusion that the balance of justice favoured permitting the action proceed to trial.

The Appeal

The Appellant's Submissions
13. Counsel on behalf of Mr. Guerin submits that the High Court judge erred in the manner in which he exercised his discretion. He submits that on a proper application of the principles in *Primor* and a proper consideration of Art. 6 of the European Convention on Human Rights, the trial judge ought more properly to have concluded that the balance of justice favoured dismissing the proceedings.

14. Given that the High Court judge did not mention the European Convention on Human Rights Act 2003 in his judgment, counsel for Mr. Guerin asks the court to infer that he failed to have regard to what he maintained were the court's obligation arising from the Convention when considering the action or inaction of the parties on an application such as the present one.

15. Counsel also submits that the High Court judge erred in law when considering the issue of the balance of justice in that he failed to have regard to the inequality of arms of the respective parties. The bank had formidable resources when compared to those of Mr. Guerin, a factor which was material to the exercise of his discretion. In this regard counsel relied upon the decision of Clarke J. in *Comcast International Holdings Incorporated & Ors. v. Minister for Public Enterprise and Ors* [2012] IESC 50.

16. Finally, counsel on behalf of Mr. Guerin submits that the trial judge, in considering the balance of justice, failed to pay sufficient regard to the fact that Mr. Guerin's delays were of a very minor nature when compared with the substantial period of culpable delay on the part of the bank.

The Respondent's Submissions
17. Counsel for the bank submits that given that the order under appeal was made by the High Court judge in the exercise of his discretion, this court should not readily interfere with it unless satisfied that he erred in principle or that such an approach was warranted to avoid a real injustice.

18. Counsel submits that the High Court judge's conclusion that the balance of justice favoured permitting the action to proceed was an appropriate exercise of his discretion and cannot be viewed as unreasonable in light of the following factors:-

- The overall delay in the proceedings caused by Mr. Guerin's default was approximately fifty three months as opposed to thirty six months on the part of the bank.

- Mr. Guerin's motion to dismiss the proceedings was spectacularly mismanaged. It was struck out twice. It was reinstated once without notice. The proceedings were delayed for a very significant period as a result.

- Mr. Guerin had misrepresented the factual situation to the court in a number of material respects. In particular, it was not true that nothing had happened between the 1st December 2010 and the 1st February 2012. There had been considerable correspondence concerning discovery and particulars.

- The claim regarding prejudice was unfounded. The damage to Mr. Guerin's credit rating did not withstand scrutiny on the facts. As to the documents allegedly lost in a fire, the same occurred prior to any period of delay and in any event the bank had advised that it could furnish copies of all such documents as were material to the matters in issue to Mr. Guerin. The fact that employees who allegedly made representations to Mr. Guerin were no longer working with the bank would be far more prejudicial to the bank than to Mr. Guerin.

- If the claim was struck out the bank could not recommence proceedings as they would be statute barred.

19. Counsel on behalf of the bank further submits that there was no need for the High Court judge to specifically address Art. 6 of the European Convention on Human Rights. The Convention does not alter the jurisprudence of the court to be applied on an application to dismiss a claim for inordinate and inexcusable.

20. Finally, insofar as Mr. Guerin maintains that the High Court judge erred in the manner in which he exercised his discretion by his failure to take account of the inequality of resources between the parties, there was no evidence that Mr. Guerin's solicitors were financially constrained in any way such as would warrant the court attaching lesser weight to his own delay in the conduct of the proceedings.

Decision
21. In a lengthy section of its judgment in *Collins v. The Minister for Justice, Equality and Law Reform & Ors.* [2015] IECA 27 this

court considered the scope of any appeal from a decision of a High Court judge made in the exercise of his or her discretion. See paras 45-78.

22. Whilst an appellate court, in an appeal such as the present one, is undoubtedly in as good a position as the court of trial to arrive at an appropriate conclusion itself on the evidence, the views of the trial judge should carry great weight with the result that the decision of the High Court judge, made in the exercise of his or her discretion, should only be set aside if such an approach is necessary to ensure the proper administration of justice. If the appellate court was to ignore the High Court judgement and in effect afford the appellant a rehearing of his motion, that would negate the important discretion vested in the High Court judge.

23. Nonetheless, counsel for Mr Guerin is correct in his submission that it is not essential for an appellant to establish some identifiable error in principle in order that a decision made by a High Court judge in the exercise of his or her discretion might be set aside, although to be able to do so clearly affords them a much greater chance of success on appeal. It is sufficient to demonstrate that the justice of the case requires such intervention. See, for example, the decision in *Collins*. That said, it is important that parties who appeal a discretionary order understand that the role of the appellate court is not to afford them a rehearing. The court's focus will be on the decision made by the High Court judge and whether the appellant can establish that there was no reasonable basis for the manner in which the discretion was exercised, and that the interests of justice warrant interference with his or her decision.

24. Having considered the submissions of the parties and all of the evidence that was before the High Court, I am fully satisfied that the interests of justice do not require this Court to reach a different conclusion to that reached by the High Court judge. For the reasons which he identified in this judgment, I am of the view that it was reasonable for him to conclude that the balance of justice favoured allowing this action to proceed to trial.

25. In my view, having regard to the chronology earlier referred to, the High Court judge was entitled to take the view which he did concerning the delay in the proceedings by both parties. In addressing the first and second limbs of the *Primor* test he correctly concluded that the bank had been guilty of inordinate and inexcusable delay. That said, the appellant takes no issue with that aspect of the trial judge's judgment. His focus is on the trial judge's treatment of whether the balance of justice favoured or was against the dismissal of the proceedings.

26. In relation to the trial judge's conclusion that the balance of justice favoured permitting the action proceed to trial, I cannot fault his approach to the determination of that issue. He clearly had regard to all of the factors advised by Hamilton J. in *Primor* insofar as they were material to the circumstances of this case.

27. It is clear from his judgment that the trial judge factored into his consideration the very significant delays on the part of Mr. Guerin either side of the period of culpable delay on the part of the bank i.e. the10th January 2013 to February 2016.

28. The High Court judge was also entitled, and indeed required, under the principles outlined in *Primor,* to consider the conduct of both parties. He was entitled to have regard and attach weight to the fact that (i) Mr. Guerin had delayed in the delivery of his replying affidavit to the affidavit grounding the claim for summary judgment; (ii) had delayed in the delivery of his replies to the bank's letter seeking particulars and (iii) had managed and prosecuted his motion to dismiss the claim for inordinate and inexcusable delay in an unacceptable manner. In particular, he was entitled to factor into his consideration the manner in which Mr. Guerin's motion had been struck out and reinstated on one occasion without the consent of the bank and to the fact that the motion was not ultimately heard until the 6th March 2017.

29. In my view, the High Court judge was entitled to attach very significant weight to the fact that Mr. Guerin had not established any specific prejudice arising from the bank's delay. Such documents as Mr. Guerin maintained had been burned in a fire on his premises in 2008/2009 had been destroyed prior to any delay on the part of the bank and would not have been available for the hearing even if the bank's action had proceeded to trial with great expedition. Further, Mr. Guerin did not contest the fact that the bank could provide him with copies of all such documents as were material to the proceedings which may have been lost in that fire.

30. Insofar as Mr. Guerin sought to rely upon prejudice arising from the fact that representatives of the bank, who he maintains made material representations to him, were no longer employed by the bank, it is difficult to comprehend how these circumstances could prejudice him in his defence of the claim. Mr. Guerin will presumably give evidence as to the nature and extent of any representations upon which he wishes to rely. He does not need the bank's witnesses for that purpose. It will then be for the bank to locate the witnesses concerned, if it wishes to contest that evidence. Thus, any prejudice likely to arise by reason of the fact that certain employees, who were with the bank at the time Mr. Guerin secured his loan facility, are no longer employed there will likely only result in prejudice to the bank.

31. It is also clear that the case which Mr. Guerin advanced to the effect that his credit rating and reputation had been negatively affected by these proceedings was correctly rejected by the High Court judge in light of the bank's evidence concerning the judgment granted in favour of ACC to the tune of €2.5m allied to the fact that a number of judgment mortgages had been registered against Mr. Guerin's properties.

32. Insofar as counsel for the appellant has sought to rely upon an alleged inequality of arms between the bank and Mr. Guerin for the purposes of urging this Court to reverse the High Court decision, I must reject his submission. First, insofar as inequality of arms between the parties may be relevant, in my view this is a factor which is of much greater significance to the court's consideration of the first and second limbs of the *Primor* test, namely, whether the plaintiff should be considered guilty of inordinate and inexcusable delay. It is not a factor, in my view, of any real significance when it comes to a consideration of the balance of justice. Clearly, when a court comes to consider whether a plaintiff's delay should or should not be excused under the second limb of the *Primor* test, the fact that a litigant may be unrepresented or may be unable to fully fund their solicitor is a material consideration. However, in the present case the court concluded that the bank's delay was inexcusable and thus I fail to see the relevance of this argument. Further, Mr. Guerin put no evidence before the Court to suggest that any culpable delay on his part was due to his inability to properly fund the defence of the proceedings.

33. Finally, insofar as the European Convention on Human Rights Act 2003 is concerned, I disagree that the decision of the High Court judge should be set aside simply because the trial judge failed to refer to this aspect of Mr. Guerin's submissions. It would be wrong to assume or infer that the High Court judge failed to have regard to the guidance provided by Art. 6 of the ECHR merely because he does not specifically mention it in his judgment. Judges cannot be expected to address each and every point or submission made by a party on an application such as the present one. It is sufficient for a judge to identify the principal factors upon which he or she relied in coming to their conclusion so that the litigant may know and understand why it was they won or lost their case/application:- see *Doyle v. Banville* [2012] IEHC 25. However, even if there was such an obligation on the trial judge, and even if he did overlook the ECHR when reaching his conclusions, I am fully satisfied that his consideration of Art. 6 could not have affected his conclusions which

were, in my view, fully in accordance with the prevailing jurisprudence and in line with the guidance provided by Art. 6. Thus, I will do no more than make a number of brief observations concerning this aspect of the appeal.

34. First, the judgment upon which Mr. Guerin relies is the dissenting judgment in Desmond *v. MGN* [2009] 1 I.R. 737. Second, insofar as the 2003 Act is concerned, the obligations thereunder apply only to organs of the State and, as defined in s. 2 of the Act of 2003 "organ of the State" does not include a court. Nonetheless, s. 4 of the Act provides that a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by [inter alia the decisions of the European Court of Human Rights]. To that extent notice should be had to the case law of that court in relation to the right to a hearing within a reasonable time, and should guide the court in making its assessment as to where the balance of justice is to be found in any case involving inexcusable delay. However, the failure of the judge concerned to mention Art. 6 does not provide a proper basis to the appellant to seek to set aside the judgment of a High Court judge unless he can show that the prevailing principles earlier referred to in this judgment were either not applied or were applied inappropriately having regard to all of the relevant circumstances.

35. Finally, whilst counsel for the bank has sought to rely upon the fact that the bank would be prejudiced if the proceedings were dismissed because its claim would be statue-barred and it could not therefore commence fresh proceedings against Mr Guerin, that it not, in my view, a factor to which weight should be attached when it comes to the court's assessment as to where the balance of justice is to be found under the third limb of the *Primor* test.

36. One of the characteristics of claims that are dismissed for inordinate and inexcusable delay is that they will, as a result, become statute-barred. It is precisely because the plaintiff's right of action will likely be lost for all time, should the proceedings be dismissed, that the court must, even if satisfied that there was inordinate and inexcusable delay, ultimately resolve the issue based upon its consideration of the balance of justice. However, the fact that the claim will become statute barred if the action as dismissed is not really a factor to be weighed in the balance when it comes to that assessment. If it was it would have the potential to trump all other factors which might otherwise favour the dismissal of the claim.

37. For all of the aforementioned reasons, I would dismiss the appeal. I am satisfied that the High Court judge properly exercised his discretion in all of the circumstances of this case.