THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2018] IECA 31

[Appeal number 2017 227]

Ryan P.
Irvine J.
Whelan J.

BETWEEN

PATRICK BARRINGTON AND CARMEL BARRINGTON

AND ECO PLASTICS LIMITED

RESPONDENTS

AND

ACC LOAN MANAGEMENT DAC

APPELLANT

AND

DE LAGE LANDEN IRELAND COMPANY TRADING AS ACC ASSET FINANCE

SECOND DEFENDANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 7th day of February, 2018

1. This is an appeal against the *ex tempore* judgment and order of Gilligan J. in the High Court made on 27th April, 2017 and perfected on 11th May, 2017 refusing the appellant's application seeking to dismiss the within proceedings for want of prosecution. The appellant relied on O. 36, r. 12 (b) and O. 122, r. 11 of the Rules of the Superior Courts and further invoked the inherent jurisdiction of the High Court to dismiss the proceedings on the basis of the impossibility of the appellant now obtaining a fair trial by reason of the lapse of time between the alleged events the subject matter of these proceedings and the time at which the case is likely to come to trial. The appellant also invoked the principle of the balance of justice asserting prejudice arising from the delays that had occurred. It was asserted that the delays arising breached the appellant's rights pursuant to common law and its constitutional entitlement to fair procedures and a fair trial. The appellant also invoked Article 6 of the European Convention on Human Rights.

2. The High Court judge was satisfied that the delays on the part of the respondents in prosecuting the within proceedings were both inordinate and inexcusable. However, he considered that the balance of justice favoured permitting the respondents to continue with the proceedings and accordingly he dismissed the application stating:

> "17. I note what the authorities say, and I respect them as regards the level of fault that can be attached to a defendant not actually taking any active part in the proceedings, but in this case the defendants are a major financial institution and they did have an association with De Lage Landen Ireland Company. So, there is a connection there and it had to be quite clear that at some stage in any event by inference from Mr Shaw's averments he must have been in contact because he obviously came to know that the case had been settled. So, effectively, he had to be conscious at the same time of the existence of these proceedings.
>
> 18. I am quite prepared to accept that this is a marginal case. One could adopt a view, perhaps, either way but I have to be satisfied on the balance of probabilities effectively with the claim that is made on the defendant's behalf that proceedings should be brought to an end and weighing both factors up, in my view the balance of justice favours the respondents, so they should be allowed to continue with the proceedings despite the inordinate and inexcusable delay."

3. The appellants assert that the High Court judge erred in law in determining that the balance of justice favoured the plaintiff and further in failing to attach sufficient weight to the length of the delays which exceeded eight years in circumstances where no statement of claim had been delivered by the respondents prior to the issue by the appellant of the motion to dismiss.

Procedural history
4. On 26th March, 2008 the respondents issued a plenary summons. It sought damages for breach of agreements, misrepresentation, negligence, reckless infliction of financial loss, aggravated and/or exemplary damages. It also sought specific performance of the defendant's obligations on foot of agreements dated 21st April, 2006 and 31st May, 2006 in addition to or in lieu of damages (including all consequential damages).

5. On 30th April, 2008 an appearance was entered on behalf of all of the defendants. By the time the appellant came to issue a motion some eight years and three months later seeking to strike out the within proceedings by reason *inter alia* of the inordinate and inexcusable delays, the respondents had not yet delivered a statement of claim.

Matters being relied on by appellant
6. The appellant's motion to dismiss was issued on 19th July, 2016 approximately eight years and four months after the institution of the proceedings. The deponent on behalf of the appellant, Conor O'Donnell, Solicitor, deposed on 19th July, 2016 to the following matters:

(i) That the proceedings had not been progressed by the respondents in any respect since 18th September, 2008.

(ii) The continued delay on the part of the respondents in prosecuting the action was unfair and prejudicial to ACC.

(iii) That the litigation had been extant against the appellant for an inordinate period of time.

(iv) That the recollection of any witnesses would no doubt have diminished during that time.

(v) That ACC's capacity to properly defend the action had been seriously prejudiced by the conduct of the respondents.

(vi) That the appellant was unaware of any good reason for the inordinate and inexcusable delays.

7. The second named respondent in affidavits sworn on behalf of the respondents on 13th January 2017, 27th February 2017 and 21st March 2017 opposed the motion to strike out the proceedings in the manner and on the grounds hereinafter set out.

Position of the respondents

8. In her first affidavit of 13th January, 2017 Carmel Barrington recounts details of a recycling plant development project operated by the first and second respondents in 2004 and 2005. She recalls the occurrence of events around the proposed establishment of a washing plant for contaminated plastics. She outlines grievances arising from the respondents' course of dealings with the defendants and each of them and the contemplated restructuring of loans in a manner and on terms that did not ultimately transpire. Briefly stated, she asserts that due to the egregious acts of the appellant and the irreparable loss and damage occasioned by their actions, the respondents have been unable to fully and properly prosecute the proceedings and she stated she was at the time of swearing of the affidavit preparing a statement of claim.

9. In his replying affidavits sworn 6th February, 2017, 10th and 23d March 2017 Paul Shaw on behalf of the appellant sets forth reasons why ACC contended that the balance of justice favoured the dismissal of the within proceedings. The central grounds being relied upon were as follows:

(i) That the respondents disclosed no reasonable explanation for the delays in prosecuting the proceedings.

(ii) That there were no genuine or real reasons for the delays nor was any additional evidence made available by way of justification.

(iii) That the non-delivery of the statement of claim visited exceptional prejudice on the appellant as it deprived ACC of any specific details or particularised information concerning the claim.

(iv) That none of the personnel who worked on the respondents' file on behalf of the bank continue now to be in its employment. In particular, none of the bank's personnel named in Carmel Barrington's affidavit as being relevant persons involved in the connection continued in the appellant's employment.

(v) The bank anticipates that it will encounter difficulty in tracing the relevant personnel to enable them to prepare a defence or to be available for trial.

(vi) That it appears from Carmel Barrington's affidavits that a substantial aspect of the claim is based on alleged conversations held with the former employees of the bank rather than documentary evidence. This results in a significant risk of prejudice being suffered by the appellant in circumstances where such witnesses may not be available or contactable to assist in the preparation of the defence or to provide testimony at trial.

(vii) That the passage of time and sheer length of delay in delivering a statement of claim favoured dismissing the action.

(viii) Since the respondents' claim was primarily based on oral testimony and recollections of conversations primarily in and around the period 2005 – 2008 vis-à-vis the appellant it was contended that this would necessarily result in severe actual prejudice being suffered in the presentation of the appellant's defence.

(ix) On the particular facts of the instant case it was further contended that the appellant established in October, 2011 that the respondents had concluded a compromise of the claim as against the second defendant. Thereafter the appellant reasonably understood that they had abandoned their claim as against them and this understanding was reinforced by the failure on the part of the respondents over the ensuing years to give any indication of an intention to pursue the proceedings.

(x) The appellant objected that significant elements of Carmel Barrington's affidavits pertained to allegations in relation to the appointment of a receiver which could not have formed the basis of a complaint resulting in the institution of the proceedings in the first place since it occurred in April, 2011, over three years after the writ had issued.

10. In her later affidavit sworn on 27th February, 2017, Carmel Barrington disputed the appellant's contentions. She deposed that in 2008, for the reasons she sets out in detail, she was anxious to protect the respondents' position and so she issued the proceedings. She confirms that a settlement agreement was concluded with the second defendant in August, 2011. She contends that the failure of the appellant to engage in the negotiations which led to that settlement with the second defendant and further its conduct in appointing a receiver "is an act of acquiescence by them in delaying the instant proceedings". She alludes to serious health issues including concerning the respondents' daughter: "We were unable to apply our minds fully to these proceedings". Subsequent to the appellant issuing the motion to dismiss a statement of claim was delivered on the 8th day of March, 2017 .

The law

11. The decision of the Supreme Court in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459 brought clarity to the principles to be applied for an application seeking to dismiss proceedings for want of prosecution. It is necessary to demonstrate that the delay had been inordinate and also inexcusable. Even where the delay had been both inordinate and inexcusable the Court is obliged to exercise a judgment on whether, in its discretion, on the facts the balance of justice was in favour of or against the case proceeding.

12. The relevant legal principles have been followed ever since, including by this Court in *Millerick v. the Minister for Finance* [2016] IECA 206 where Irvine J. succinctly outlines the procedure whereby the Court is obliged to address its mind to three issues namely whether the delay was inordinate, whether it was inexcusable and further whether the Court is satisfied that the balance of justice

favours dismissing the proceedings.

Inordinate and inexcusable delay
13. In the instant case there has been no cross-appeal by the respondents against the trial judge's determination that the delays on their part were both inordinate and inexcusable. Any such appeal would have been unstateable.

The balance of justice
14. In the *Millerick* decision of this Court Irvine J. stated in relation to the balance of justice:

> "In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on the part of the defendant and the potential prejudice resulting from the delay."

The balance of justice in the instant case
15. The assessment of the balance of justice in a given case calls for the calibration of a range of material factors which will vary from to case to case depending on the facts and conduct of the parties. In the instant case the key material factors include the following :

(i) Equitable relief

16. In the plenary summons, which issued over eight years prior to the motion to dismiss, a key relief being sought is specific performance of two agreements dated 21st April, 2006 and 31st May, 2006. It is well established that where a plaintiff seeks equitable relief and in particular specific performance he is required to act expeditiously; Spry *"The Principles of Equitable Remedies"* (5th Ed.),. 1997, pp. 227-8 states:

> "The general rule is that in order to establish that the delay of the plaintiff has been excessive it must appear that, in all the material circumstances, a reasonably assiduous person would have proceeded with substantially greater speed or diligence."

In the case *Guerin v. Heffernan* [1925] 1 IR 57 O'Connor J. stated that where a plaintiff intends to seek relief in the form of specific performance he is bound to proceed without delay, concluding:

> "A man who sleeps on his rights does not find favour in a court of equity."

Hilary Biehler in the text *"Equity and the Law of Trusts in Ireland"*, sixth edition, 2016 states: "It is difficult to lay down reliable guidelines about the length of delay which may disentitle a plaintiff to relief as the question is often governed by other factors such as the conduct of the parties. However, *Spry* has stated that "the general rule is that in order to establish that the delay of the Plaintiff has been excessive it must appear that, in all the material circumstances, a reasonable assiduous person would have proceeded with substantially greater speed or diligence."

17. The other important ingredient in *laches* is that circumstances must exist which would make it inequitable to permit the respondents to seek to enforce their claim. The sustained inertia on the part of these respondents in prosecuting their claims do amount in the instant case to *laches*. It appears that the third plaintiff was dissolved on or about 25th February, 2011. In August of that year the respondents compromised their claims with the second named defendant and thereafter took no step whatsoever to prosecute their claims against the appellant.

(ii) no statement of claim delivered prior to issue of motion

18. The failure to serve a statement of claim which would enable the plaintiff to ascertain what precisely was being alleged against it and the material facts which the respondents were purporting to rely upon and the specific reliefs or remedies which they were claiming for such an appreciable number of years is a material factor favouring the appellant in the calibration of the balance of justice.

19. The delivery of the statement of claim in a timely manner would have enabled the appellant to identify the nature of the cause of action claimed and to preserve evidence, interview witnesses, particularly staff and employees and to assemble data, information and records pertinent to establishing the actual facts and relevant to the delivery of a defence. As with many lending institutions it is clear that the appellant underwent significant upheavals during the great economic crisis including downsizing, changes in personnel and employees. The affidavits sworn by the second-named respondent advance no cogent reason why the statement of claim ultimately proffered in March 2017 could not have been delivered years before.

(iii) Delays of over 8 years

20. From a perusal of the statement of claim it appears that it was readily within the remit of the respondents to deliver same at any time after the plenary summons issued. In fact they seek specific performance in the statement of claim of unspecified obligations pleaded as arising on foot of agreements dated the 21st April, 2006 and 31st May, 2006. This demonstrates that the events in issue reached back to almost two years prior to the institution of the proceedings.

21. In evaluating the balance of justice, regard must be had to the duration of the delay. The only step taken by the respondents in these proceedings prior to the issuing by the Respondent of its motion to dismiss was the issuance of the plenary summons in March 2008. The existence of a writ against any defendant for such an extensive period without any meaningful step being taken at all to prosecute the claim calls for a coherent explanation from the delaying party that extends to all aspects of the period of time in question.

(iv) Explanations

22. In the instant case, whilst illness of a family member of the appellants is alluded to, no medical reports are exhibited and no explanation offered as to why on a sustained basis from March 2008 onward family illnesses or other exigencies presented an ongoing insuperable obstacle to the delivery of a statement of claim. Sustained inertia for such a excessive period of time during which a defendant is deprived of even the basic information that would enable it to know the essential substance of the claim being made against it calls for cogent explanation. The respondents were deprived of reasonable and timely opportunity to go about procuring

witness statements, assembling and preserving evidence, and this , on the facts of this case, must be viewed as a significant element in the calibration of the weight to be attached to the sundry factors when the Court is carrying out an assessment of the balance of justice.

(v) Prejudice to this particular defendant

23. Deponents on behalf of the appellant have outlined in significant detail the obstacles and challenges that the conduct of the respondents has brought about vis-à-vis witnesses and evidence. It has been acknowledged by the courts on a number of occasions that the effluxion of time in and of itself inevitably diminishes memory and recollection which must in turn lead to significant risks of prejudice in a case where it is clear that the claim is framed and will be pursued based on oral testimony and the recollection and rendition of conversations and encounters that will have occurred at least a decade before the action could come to trial.

24. The Supreme Court in *Gilroy v. Flynn* [2004] IESC 98 emphasised that there have been significant developments in the jurisprudence since the decision of the High Court in Rainsfort and in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459:

> ". . . 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."

The judgement continues:

> "Following such cases as *McMullen v. Ireland* [ECHR 422 97/98 29 July, 2004] and to 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 comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end."

(vi) European Convention on Human Rights

25. The appellant asserts rights pursuant to article 6 of the European Convention on Human Rights. Article 6 provides, so far as relevant, as follows:

> "In the determination of his civil rights and obligations . . . everyone is entitled to a . . . hearing within a reasonable time by [a] tribunal . . ."

26. Ireland has a dualist system under which international agreements, to which Ireland becomes a party, are not automatically incorporated into domestic law. Article 29.3 of the Constitution provides that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States". Further, Article 29.6 of the Constitution states that "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas".

27. It is clear from the terms of the European Convention on Human Rights Act, 2005 and the jurisprudence of the Supreme Court that the Convention does not have direct effect in Irish domestic law: see, e.g., *McD v. L.* [2009] IESC 81, [2010] 2 I.R. 199, *MD v. Ireland* [2012] IESC 10, [2012] 1 I.R. 167. Section 4 of the 2003 Act requires the courts to take "due account of the principles laid down by these….judgments" of the European Court of Human Rights. Judgments of the ECtHR do not bind domestic courts.

28. The Strasbourg jurisprudence including the case of Price & Lowe v. UK (43185-98) suggests that the reasonableness of the length of proceedings must be evaluated in the light of the circumstances of the case and that it is incumbent upon the State to ensure that the article 6 rights of litigants are protected and vindicated. The European Court of Human Rights has reiterated that the reasonableness of the length of the proceedings must be addressed in the light of all of the material circumstances of the case including, *inter alia*;-

> (i) the complexity of the action;
>
> (ii) the conduct of the applicant;
>
> (iii) the conduct of the relevant authorities; and
>
> (iv) the importance of what is at stake for the applicant in the litigation.

29. The entitlement of litigants to seek relief pursuant O. 36, r. 12 (b) and O. 122, r. 11 of the Rules of the Superior Courts and to invoked the inherent jurisdiction of the High Court provides an effective domestic remedy for any litigant who asserts prejudice by reason of unreasonable delay.

(vii). Risk to a fair trial

30. The practical application of the balance of justice principle in an application to dismiss for delay was described by Laffoy J. in *Dunne v. ESB* [1999] IEHC 199 at p. 16 as follows:

> "Essentially, in applying the criteria identified by Hamilton C.J. by reference to which the Court should exercise its discretion, two questions arise in this case, namely, whether the defendant is prejudiced by the delay and, in particular, whether there is a substantial risk that it is not possible to have a fair trial because of the delay, and whether there was anything in the conduct of the defendant which militates against granting the relief sought."

31. As was stated by the Supreme Court in *Comcast International Holdings Inc. & Ors. v. Minister for Enterprise & Ors.: Persona Digital Telephony Limited & Anor. v. Minister for Public Enterprise & Ors.* [2012] IESC 50, the primary relevant law continues to be that set forth in the Primor decision.

32. In *Stevens v. Paul Flynn Limited* [2008] IESC 4 the Supreme Court confirmed that where a judge of the High Court makes a discretionary order a court on appeal should not interfere with such order unless it is clear that the discretion has not been exercised within the parameters of a reasonable exercise of that discretion. In reaching that conclusion, the Supreme Court approved the views

of Lynch J. in *Martin v. Moy Contractors* (unreported, Supreme Court, 11 February 1999) where it was held:

> "The High Court has a measure of discretion in these applications to dismiss actions for want of prosecution. Provided that the High Court decision is within the limits of reasonable discretion this court should not interfere with it. In this case the learned President gave a reasoned judgment and his reasoning is clearly valid. His decision naturally follows from such reasoning and is also therefore clearly valid. There is, accordingly, no basis on which this court should interfere with the judgment of the learned President save that I would order that the plaintiff's action against G. . . should be dismissed for want of prosecution and not merely struck out."

(viii). Factors specific to this case

33. Elements considered relevant by the trial judge in tipping the balance of justice against making the order to dismiss the proceedings in this case included that;

> - the first defendant was "a major financial institution"
>
> -that "the plaintiffs effectively have brought a serious claim for damages that amounts to a very substantial sum of money"

However, there was uncontroverted evidence before the Court that most, if not all, of the employees of the appellant who had dealt with the respondents had left its employment and further that ACC had outsourced all loan management to Capita Asset Services (Ireland) Limited and it had by 2017 significantly fewer employees than at any other point during the existence of the proceedings.

34. In the instant case the appellant is demonstrably wholly blameless with regard to these delays which the respondents do not contest to be both inordinate and inexcusable. An appearance was entered on 30th April, 2008 just over four weeks after the plenary summons had issued. In the context of the circumstances of this case it is apparent having regard to the nature of the claim that the appellant is significantly prejudiced by the delays that have occurred heretofore. Whilst the adjudication by the trial judge on the question of the balance of justice involves a broad assessment of all the material circumstances of the case under consideration to determine where the interests on the balance of justice lies, it follows that an appellate court is equally well positioned to review the decision of the trial judge to determine whether the conclusion arrived at falls within the ambit of conclusions available having due regard to the jurisprudence when applied to the facts so as to sustain the conclusions reached.

35. Having regard to the material elements outlined above, in the instant case I am satisfied that the following factors when considered cumulatively call for a recalibration of the trial judges conclusions and tip the balance of justice decisively in favour of the appellant;

> (a) The sustained failure over the years from 26th March, 2008 to deliver a statement of claim.
>
> (b) The omission to take any or any reasonable step on the part of the plaintiff to communicate with appropriate particularity to the appellant the specific parameters of the orders for specific performance that were being sought by the plaintiff.
>
> (c) The very significant restructuring that has occurred within the appellant including the loss of a significant number of employees including, it would appear, all the key employees who were involved in dealing with the respondents in connection with the matters at issue.
>
> (d) The fact that in large measure the claims appeared to pertain to representations and statements that occurred at meetings and in encounters between former personnel of the bank and the respondents.
>
> (e) The respondents have failed to offer any cogent reason why for a sustained period of time in excess of eight years they failed to deliver a statement of claim.
>
> (f) There was no obvious reason why the proceedings once issued could not have been prosecuted by the respondents, particularly in light of the fact that it appears a compromise was achieved with the second named defendant in relation to aspects of the litigation as long ago as July or August of 2011.

36. I am satisfied on the facts that the appellant is significantly prejudiced by this want of prosecution of the proceedings on the part of the respondents. Litigation is not intended to be a prolonged test of endurance. Where a plaintiff's key tactic in pursuance of justice before the courts amounts to a quasi-sempiternal "wait-and–see" approach, the constitutional obligation to ensure fairness as between the parties to litigation requires the courts to be solicitous that a stratagem of almost total impassivity is to be actively discouraged. No adequate countervailing factors have been advanced by the respondents to negative the appellant's contentions as set out in detail in the affidavits sworn on its behalf that the prejudice which will be suffered by it if the litigation is allowed to proceed at this stage will in effect be irredeemable. In all the circumstances and having due regard to the constitutional principles of justice which have been expressly invoked by the appellant to be afforded fair procedures and a fair trial the balance of justice warrants that the within proceedings be dismissed for want of prosecution.

37. At no time did the appellant acquiesce in the delay and the respondents at no time from the summer of 2011 onward took any step whatsoever to disabuse the appellant of its reasonable understanding that the compromise of the plaintiffs' action with the second defendant had resulted in effect in the abandonment of their action against the appellant.

38. Accordingly, for the reasons outlined above I would allow this appeal and dismiss the within proceedings for want of prosecution.