Neutral Citation Number: [2011] IEHC 242

THE HIGH COURT

2005 4153 P

BETWEEN

KANES MOTORS LIMITED

PLAINTIFF

AND

OPEL IRELAND LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered the 21st day of February 2011

1. The application in context

1.1 On this application the defendant seeks an order striking out and/or dismissing the plaintiff's claim for want of prosecution and/or inordinate and inexcusable delay.

1.2 The procedural chronology which gives rise to the application is as follows:

7th December, 2005:	*Plenary summons issued.*
22nd December, 2005:	*Appearance entered on behalf of the defendant.*
25th January, 2009:	*Notice of intention to proceed served by the plaintiff.*
27th March, 2009:	*Notice of change of solicitor served on behalf of the defendant.*
11th November, 2009:	*Statement of claim delivered on behalf of the plaintiff.*
4th February, 2010:	*Motion for judgment in default of defence issued on behalf of the plaintiff returnable for the 12th April, 2010.*
9th April, 2010:	*This application initiated by the defendant by notice of motion returnable for the 26th April, 2010.*

1.3 The factual background to the proceedings is that, by virtue of a number of agreements between the defendant and the plaintiff, for over four decades prior to 13th November, 2003 the plaintiff had a dealership in relation to the Opel motor vehicles and Opel parts. The final agreement (the Dealership Agreement) was dated 1st January, 1997. Clause 6 thereof provided that the agreement commenced on the date thereof and would continue thereafter and until terminated in accordance with Article 6 of the additional provisions. Article 6 of the additional provisions provided that the plaintiff or the defendant might terminate the agreement without cause by notice and stipulated that termination would be effective on the date specified in the notice, which date would not be less than two years after receipt of the notice. By letter dated 13th November, 2001, which was executed on behalf of the defendant by Iede Aukema, the plaintiff was informed that the Dealership Agreement between the defendant and the plaintiff would be "terminated effective two years and one day from receipt of this notice", that is to say, on 14th November, 2001, Article 6 being specifically invoked.

1.4 On the basis of the evidence before the Court the interaction between the plaintiff and the defendant following receipt of the notice of 13th November, 2001 and before the plenary summons issued appears to have been as follows:

- On 17th May, 2002, the plaintiff sought a copy of the Dealership Agreement from the defendant and issued a reminder on 10th July, 2002. A copy of the Dealership Agreement was furnished by the defendant to the plaintiff on 10th July, 2002.

- In the interim, according to a letter of 27th May, 2002 from the defendant to the plaintiff and signed by James Brooks, there had been a meeting between representatives of the parties, including Mr. Brooks on behalf of the defendant, at which the replacement strategy of the defendant had been explained.

- While the correspondence exhibited illustrates that there was certain interaction between the parties from January 2003 onwards, the next communication of significance was a letter of 29th September, 2003 from the defendant to the plaintiff and signed by Mr. Brooks in which, having referred to the fact that the termination letter of 13th November, 2001 provided a termination period that would end on 14th November, 2003, the plaintiff was informed that from 1st October 2003 a new European Regulation (Commission Regulation (EC) No. 1400/2002 – commonly known in the motor industry as the Block Exemption Regulation or BER) would be fully applicable to the contractual relationship of the parties.

- The first threat of legal proceedings by the plaintiff against the defendant was contained in a letter dated 10th

October, 2003 from the plaintiff's solicitors to the defendant. In that letter, it was alleged that the defendant had been in default of the Dealership Agreement in that it had failed to honour the entitlement of the plaintiff to "the benefits of the sales and service agreement until the date of termination", in consequence of which the plaintiff had suffered loss. Unless an undertaking in writing was given by the defendant to compensate the plaintiff within seven days, legal proceedings were threatened against the defendant without further notice.

• On the day of the expiration of the termination notice, 14th November, 2003, the defendant called on the plaintiff to pay for its stock of Opel parts, specialised tools, showrooms signs, new cars, a van and a second hand car. It would appear that there was no response from the defendant.

• After the termination of the Dealership Agreement the plaintiff applied to become an Authorised Repairer of Opel vehicles. Initially, the interaction in relation to that matter was directly between the plaintiff and the defendant, correspondence to the defendant being addressed to Mr. Brooks. However, by letter dated 21st May, 2004, the plaintiff's solicitors alleged discrimination against the plaintiff in the failure of the defendant to accede to the application and threatened proceedings without further notice absent confirmation within seven days that the defendant would enter into a service agreement with the plaintiff. It would appear that there was no response to that letter and a further letter was sent by the plaintiff's solicitors on 1st November, 2004, alleging breach of EU Regulations by the defendant in failing to furnish the plaintiff with "the parts and service contract". Again, it would appear that there was no response from the defendant. Just over six months later, on 3rd May, 2005, the plaintiff's solicitors sought a copy of the Dealership Agreement as signed by the defendant.

• It would appear that, notwithstanding the intervention of the plaintiff's solicitors, the direct interaction between the plaintiff and the defendant, in the guise of GM Ireland, continued. The correspondence centred on the plaintiff's application for an Authorised Repairer agreement. By letter dated 4th May, 2005, the plaintiff was informed that its application for the agreement was incomplete and that, on the information furnished, the plaintiff did not meet the defendant's financial standards. By letter the 19th September, 2005, the defendant queried whether the plaintiff wished to continue with the application for the agreement.

• On the second anniversary of the termination of the Dealership Agreement, 14th November, 2005, the plaintiff's solicitors wrote to the defendant setting out, in a comprehensive manner, the plaintiff's complaints against the defendant. The three primary matters which from the plaintiff's perspective were in issue were outlined in detail. These are the matters which ultimately form the basis of the plaintiff's statement of claim delivered just over four years later. Proceedings in this Court were threatened. The response, which was dated 25th November, 2005, and which was from GM Ireland Limited, was a holding letter.

1.5 The gravamen of the plaintiff's case against the defendant as pleaded in the statement of claim is that during the two year termination notice period the defendant sought to undermine the plaintiff's dealership and, in effect, to treat it at an end despite the termination notice not having expired. The claim, as particularised, encompassed the three matters outlined in the plaintiff's solicitors' letter of 14th November, 2005, namely:

(a) that the defendant with the benefit, and by means, of customer information supplied by the plaintiff pursuant to the Dealership Agreement had corresponded directly with customers within the plaintiff's "area of primary responsibility" for the purpose of soliciting Opel business on behalf of other Opel dealerships;

(b) that the defendant failed to supply the plaintiff adequately or at all with Opel motor vehicles during the notice period so as to enable it to perform its part of the Dealership Agreement and benefit therefrom; and

(c) that it was imperative that, in accordance with law, the plaintiff would continue to operate as an "Approved Repairer" of Opel motor vehicles upon the termination of the dealership, but despite substantial investment in equipment and staff training during the dealership and despite fully complying with the required standards for such approval, the defendant failed to appoint the plaintiff as an "Approved Repairer" and, in support of that ground, the plaintiff pleaded that it was entitled to be appointed by the defendant as an "Approved Repairer" of Opel motor vehicles pursuant to the BER.

1.6 The reliefs which the plaintiff seeks in the statement of claim, which replicate the reliefs sought in the plenary summons, are:

(i) damages (to include aggravated, exemplary and punitive damages) for breach of contract, breach of duty, breach of fiduciary duty, breach of trust and wrongful interference with business relations;

(ii) a declaration that the plaintiff is entitled to be appointed as an Authorised Repairer of Opel vehicles pursuant to the dealership agreement or pursuant to the BER; and

(iii) a mandatory injunction directing the defendant to appoint the plaintiff as an Authorised Repairer.

1.7 The factual basis on which the defendant contends that these proceedings should be struck out is set out in the grounding affidavit of John Young, who is described as Aftersales Director of General Motors UK and Ireland. He has averred to a number of specific factors which it is contended prejudice the defendant in defending the proceedings at this remove. First, a number of key personnel no longer work for the defendant, referring in particular to the following personnel: Iede Aukema, the signatory on the termination notice and subsequent correspondence and the defendant's former Managing Director, who left the employment of the defendant in November 2002; James Brooks, who is described as the Dealer Network and Customer Development Director who, from the correspondence, would appear to be the person with whom the defendant's representatives had contact through 2002 and 2003, who left in April 2005; and John Doody, the Franchise Director, who left in 2007. Moreover, the Sales Director is deceased. Of the two Sales District Managers who would have dealt with the plaintiff, one has retired and the other is no longer employed by the defendant, nor is the Aftersales Manager who would have dealt with the defendant in 2004. Secondly, it has been averred that it has become difficult to reconstitute proper files in relation to the matters both due to the lapse of time and the change in personnel. Thirdly, it is impossible for the defendant to properly quantify the plaintiff's claim for special damages.

1.8 The claim for special damages as particularised in the statement of claim is as follows:

Refusal/failure to adequately supply vehicles (estimated):	*€500,000*
Damage due to loss of service contract – to be ascertained	*€*
Failure to honour manufacturer's warranties:	*€100,000*

Value of stock parts and materials refused to be accepted for return	*€500,000*

In relation to that claim, Mr Young has averred that the commercial value of the stock parts will now be non-existent and it will be extremely difficult to assess their value at the time of the alleged breach of contract, the stock parts will not be capable of use, and there will be difficulty in proving whether the parts were purchased from the defendant or other parties. In the replying affidavit sworn on behalf of the plaintiff by Alex Kane, it is acknowledged that it has proved to be difficult to quantify the level of loss suffered by the plaintiff as a result of the alleged breach of contract by the defendant. In particular, it is averred that the plaintiff found it difficult to obtain information and documentation for its accountant in view of the fact that all of the information had been lost due to the computer information and satellite connection between the plaintiff and the defendant having been discontinued by the defendant, which has made it impossible for the plaintiff or its accountants to accurately quantify the extent of the plaintiff's claim. As Mr. Young has averred in a subsequent affidavit, it is extremely difficult for the defendant to conduct any adequate analysis of the plaintiff's claim in circumstances where the plaintiff itself finds it difficult to quantify its claim. Counsel for the defendant pointed out that the loss of the computer information and satellite connection was not adverted to in the correspondence between the parties. It only became an issue in 2010.

1.9 A new allegation by the plaintiff against the defendant has emerged in Mr. Kane's replying affidavit in that he alleges that the termination of the Dealership Agreement was motivated by a desire to fix the price of motor vehicles in the midlands area of Ireland. That allegation has been denied by the defendant and it is pointed out that it was not raised in the correspondence or in the proceedings. While it was asserted in the letter of 14th November, 2005 from the plaintiff's solicitors that it would appear that the object of the service of the termination notice was anti-competitive, that assertion is not reflected in the statement of claim. Mr. Young has contended, on behalf of the defendant, that the making of fresh allegations against the defendant illustrates the real difficulties that the defendant faces in dealing with proceedings as old as these.

1.10 Finally, insofar as the plaintiff has advanced an explanation for the delay in prosecuting the proceedings, in my view, it is very limp. Mr. Kane has averred in his replying affidavit that the plaintiff always believed that the defendant would take account of the longstanding and profitable relationship between the plaintiff and defendant to reinstate the Dealership Agreement. The plaintiff was not anxious to continue legal proceedings against the defendant in the hope that a compromise would be reached between the plaintiff and the defendant in relation to the matter and there had been ongoing discussions with representatives of the defendant which led the plaintiff to believe that there would be an agreement between the parties. It would appear from the location of that averment in the replying affidavit that Mr. Kane was referring to whatever interaction there was between the parties before the proceedings were served on the defendant in December 2005. No evidence whatsoever has been adduced in support of the existence of any discussions, whether open or without prejudice, thereafter. Having deposed to the difficulty in quantifying the loss, Mr. Kane averred that in January 2009 the plaintiff instructed its solicitors to continue with the legal proceedings.

2. Submissions on the law and its application

2.1 Counsel for the plaintiff predictably relied on the following authorities: the decision of the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and, in particular, the statement of the principles of law relevant to the consideration of the issues on an application to dismiss on the grounds of delay set out by Hamilton C.J. at p. 475 *et seq.*; the decision of the Supreme Court in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510, in which the *Primor* principles were applied; and the decision of the Supreme Court in *Desmond v. MGN Ltd*. [2009] 1 I.R. 737, in which it was made clear (at p. 762) that the basic principles set out in *Primor* remain substantially unaltered.

2.2 Counsel for the defendant also referred to the decision of the Supreme Court in *Ewins v. Independent Newspapers (Ireland) Ltd*. [2003] 1 I.R. 583, in which *Primor* was also followed. The particular passage relied on by the defendant is to be found in the judgment of Keane C.J. (at p. 589), wherein, having pointed out that, because of the death of a witness whose evidence would have been of critical importance, there was undoubtedly a substantial risk of an unfair trial, Keane C.J. stated:

> "It arises in circumstances for which the defendants cannot be held to be responsible and, so far as any delay on the part of the defendants is concerned, the courts in dealing with these matters have never gone so far as to say that a defendant, in every case where he fails to bring a motion to dismiss at an earlier stage, must be held to have been guilty of conduct, whether by way of delay or acquiescence, which is such as to permit an action to proceed when it would be unjust to allow it to proceed. I am satisfied that this is such a case, where the fact that the defendants did not decide to bring the motion to dismiss until the stage at which the plaintiff belatedly served the statement of claim, would not be of itself a sufficient ground for refusing the relief they now claim."

There the plaintiff sought damages for a libel arising from an article published in April 1995. The proceedings were initiated in December 1995, the crucial witness was murdered in January 1999, notice of intention to proceed was served in November 2000 and the statement of claim was delivered in February 2001. The Supreme Court struck out the proceedings. There were particular circumstances in that case which were pointed out by the Supreme Court: that in defamation proceedings there is a particular onus to institute *bona fide* proceedings without delay to restore the damage to the plaintiff's reputation caused by the offending publication; and other proceedings were in being arising from publication of defamatory material of a similar nature in which the plaintiff would be afforded a remedy against the defendants in those proceedings, if he proved that he was in fact defamed. Counsel for the defendant, while acknowledging that an order to strike out proceedings on the grounds of delay is not lightly made, submitted that, as with defamation claims and claims for professional negligence where there is damage to reputation, such orders are frequently made in commercial cases.

2.3 Having regard to the principles set out by Hamilton C.J. in the *Primor* case, in order to succeed on this application, the defendant must establish that the delay on the part of the plaintiff was "inordinate and inexcusable" and, even if that is established, 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. In considering where the balance of justice lies, the Court must consider, *inter alia*, whether –

> (a) 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,
>
> (b) there has been any delay on the part of the defendant and, if so, whether such delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay, and
>
> (c) 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.

2.4 While counsel for the plaintiff admitted that there had been delay on the part of the plaintiff, there was no concession that there had been inordinate delay, and further it was submitted that the delay was not inexcusable. In that connection, counsel for the plaintiff referred to the decision of the High Court (Peart J.) in J. *McH v. J.M.* [2004] 3 I.R. 385. In that case, the plaintiff sought damages for personal injuries sustained in the 1940s as a result of alleged acts of sexual abuse perpetrated by the first defendant while the plaintiff was a pupil at a national school. The proceedings were initiated in June 2001, fifty seven years after the last alleged incident of abuse. Having regard to the evidence which was before the Court, including medical evidence which is summarised in paragraph 36 of the judgment, it was held that, while the delay on the part of the plaintiff was inordinate, it was not inexcusable and that, in any event, the prejudice to the third defendant, who was sued in his capacity as a trustee of the school and who was the applicant on the motion to dismiss the proceedings, if any, did not outweigh the prejudice to the plaintiff in the event of her claim being dismissed on the grounds of delay. Quite frankly, the facts of this case are so distinguishable from the facts under consideration by Peart J. that I cannot see any relevance in that decision to this application.

2.5 As regards the conduct of the defendant, the Court was urged by counsel for the plaintiff, by reference to the decision of the High Court (Murphy J.) in *Hogan v. Jones* [1994] 1 ILRM 512, that the Court should have regard to the failure of the defendant to seek a dismissal for want of prosecution at an earlier stage. On the issue of the failure of the defendant to move sooner to have the proceedings dismissed, counsel for the plaintiff also relied on the oft quoted passage from the judgment of Ó Dálaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 in which it was stated (at p. 41):

> "… in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution…. The adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will 'get by' without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at."

That passage was considered in *Anglo Irish Beef Processors Ltd. v. Montgomery*. It was quoted in the judgment of Fennelly J. at p. 519, but was preceded by the observation that, when considering any allegation of delay or acquiescence by the defendant, the Court will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiff's claim dismissed. Following the quotation, Fennelly J. stated:

> "In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something 'akin to acquiescence' as indicated in the judgment of Henchy J., cited above".

The judgment of Henchy J. referred to is to be found in *O'Domhnaill v. Merrick* [1984] I.R. 151.

3. Conclusions on the application of the law to the facts

3.1 The first question which the Court has to consider is whether it has been established by the defendant that there was both inordinate and inexcusable delay on the part of the plaintiff. As I have already indicated, the plaintiff concedes that there has been delay, but not that it has been inordinate. Counsel for the defendant identified three periods of delay: from April 2002, the time from which it is alleged that the defendant began contacting the plaintiff's customers, to December 2005, when the plenary summons was issued; from December 2005 to January 2009, when notice of intention to proceed was served; and from January 2009 to November 2009, when the statement of claim was delivered. Having regard to the three components of the allegations of wrongdoing which are covered in the statement of claim, it seems to me that on the plaintiff's case as pleaded its cause of action arose in November 2001 on the service of the notice of termination. Notwithstanding that proceedings by the plaintiff against the defendant had been mooted in October 2003, it was not until receipt of the plaintiff's solicitors' letter of 14th November, 2005 that the defendant was informed of the nature of the plaintiff's claim in any meaningful way. The plenary summons, which was served just a month later, should have given the defendant a clear insight into the nature of the plaintiff's claim and the reliefs the plaintiff was seeking when read in conjunction with that letter. The proceedings were initiated within the limitation period and, on its own, I would not regard the delay in initiating the proceedings to be inordinate. However, the delay from the initiation of the proceedings to the delivery of the statement of claim, which was four years, was inordinate.

3.2 I have already commented that the explanation given by the plaintiff for the delay is limp. While the plaintiff has sought to rely on the difficulty encountered in quantifying the losses occasioned by the defendant's alleged wrongdoing, and the impact of the loss of the computer and satellite link, it is absolutely extraordinary that the plaintiff did not raise the latter difficulty with the defendant until 2010. The only reasonable inference which can be drawn from the evidence before the Court is that the officers of the plaintiff made a deliberate decision in December 2005 not to proceed with the action and they only reversed that decision over three years later at the beginning of 2009. No reasonable explanation for allowing the proceedings to lie wholly dormant for three years has been advanced and, accordingly, the Court must conclude that the delay on the part of the plaintiff in prosecuting these proceedings is inexcusable.

3.3 Lest I am wrong in that conclusion and the delay on the part of the plaintiff is excusable, it is necessary to consider where, on the facts, the balance of justice lies in relation to the continuance or discontinuance of the proceedings. In determining that, in my view, the crucial question is whether the defendant has been caused serious prejudice by the delay so that there is a substantial risk that it is not possible to have a fair trial. I do not accept the contention of the plaintiff that the difficulties outlined by Mr. Young in his affidavit do not amount to such a degree of prejudice that there is a substantial risk of an unfair trial. On the contrary, I am of the view that those difficulties may render it impossible for the defendant to properly defend the action, with the result of an unfair trial. Taking each of them in turn, the following observations are apt:

> (a) I do not accept the contention of the plaintiff that the fact that the former employees have left the defendant's employment may be offset by the fact that there are other people still in the employ of the defendant who can testify in relation to the issues raised in the proceedings. The reality is that the complaints in this case relate to the period from November 2001 and the crucial period is the first two years, and to a lesser extent, the third and fourth years thereafter. Counsel for the plaintiff made the point that there is no evidence that the witnesses who have left are not compellable. On that point, the Court was informed, although this was not in evidence, that Mr. Aukema has left the State and is in the Netherlands. In my view, the reality of the situation is that, given that the key employees and, in particular, Mr. Aukema and Mr. Brooks, left the employment of the defendant respectively seven years and four and a half years before the statement of claim was delivered, there is a strong probability the defendant will have difficulty in properly defending the proceedings.

(b) As to the difficulty in relation to documentation, while the defendant has not ruled out the possibility of being able to reconstitute the files, the possibility of prejudice in this regard to the defendant cannot be ruled out.

(c) There is a certain incongruity about the plaintiff putting forward its difficulties in relation to quantifying its losses alleged to be attributable to wrongdoing on the part of the defendant in answer to this application. In relation to the specific matters put forward by Mr. Young, counsel for the defendant submitted that, as regards the assessment of the value of the stock, it is possible to do that by reference to the list prices at the relevant time, the stock is still in the possession of the defendant and the Opel parts can be identified. I do not accept that those arguments are an answer to the view expressed by Mr. Young that it would be extremely difficult to address the quantification of the plaintiff's loss. The particulars of special damage, as set out in the statement of claim four years after the plenary summons was issued, insofar as they are given, are specified in such round terms that one would be forgiven for questioning whether the figures are in fact based on any real assessment. They have the appearance of "off the top of the head" figures.

Accordingly, I have come to the conclusion that there is a substantial risk that it is not possible for the defendant to properly defend the proceedings so that the continuance of the proceedings is likely to cause serious prejudice to the defendant resulting in an unfair trial.

3.4 I am satisfied on the facts that the conduct of the defendant in relation to these proceedings has not been such as to be akin to acquiescence in the plaintiff's delay prior to the delivery of the statement of claim. The proceedings were wholly dormant for over three years after they were initiated. The necessary procedural step of service of notice of intention to proceed was not followed up on by delivery of the statement of claim until four years after the proceedings were initiated. Having regard to the history of the matter, in my view, the balance of justice is not tilted against the defendant by reason of its failure to bring a motion to strike out the proceedings prior to the delivery of the statement of claim.

3.5 Even if it is reasonable to infer that the defendant's motion to strike out could be seen as a reaction to the plaintiff's motion for judgment in default, I am satisfied that following delivery of the statement of claim there was not such a delay on the part of the defendant in bringing the application to strike out to the prejudice of the plaintiff as would counterbalance the prejudice caused to the defendant by the delay on the part of the plaintiff in delivering the statement of claim. On an objective appraisal, the only expense incurred by the plaintiff in the prosecution of these proceedings which it could be contended was induced by inaction on the part of the defendant is the costs of the motion for judgment in default. As it is not clear that the full range of correspondence between the parties' solicitors following the delivery of the statement of claim is before the Court, it would be inappropriate to express a view on where those costs should lie. Counsel for the plaintiff made the point that, in a letter dated 11th February, 2010, which predated the service of the notice of motion on the defendant's solicitors, the defendant's solicitors called on the plaintiff to discontinue the proceedings on threat of a motion to strike out. Any unfairness to the plaintiff by reason of the plaintiff having brought its motion for judgment in default prior to the initiation of this application can be dealt with by the Court when the issue of costs is being addressed.

3.6 Having regard to all of the matters which the Court has to address in the exercise of its discretion, I am satisfied that the proper course is to accede to the defendant's application to dismiss the proceedings.

4. Order

4.1 There will be an order dismissing the plaintiff's claim.

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