THE HIGH COURT

[2009 No. 1066 S.]

BETWEEN

ALLIED IRISH BANKS P.L.C.

PLAINTIFF

AND

MARIUSZ HYSZKO

DOROTA HYSZKO

AND MARK O'DRISCOLL

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 27th day of February, 2017

1. This is the Court's ruling on an application by the third named defendant for:—

> a. An order striking out the proceedings for want of prosecution and/or for delay in commencing proceedings pursuant to the rules of court and in particular O. 122 of the Rules of the Superior Courts.
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> b. An order striking out the within proceedings pursuant to the inherent jurisdiction of the Court.

2. This motion had been listed for hearing on 20th February, 2017. The context was that the case was for hearing by way of plenary proceedings taken by Allied Irish Banks, P.L.C. against the three defendants, which was listed for hearing on 14th February, 2017.

3. The Court has taken the view that the appropriate step to take would be to hear the motion for seeking the striking out of the proceedings first, rather than adjourn the matter to the 20th February.

4. The history of the proceedings was as follows:—

> 1. Summary summons dated 15th March, 2009. The plaintiffs in these proceedings sought the sum of €50,000 due by the defendants and each of them on foot of joint and several letters of guarantee dated 25th February, 2008 whereby the defendants and each of them guaranteed payment to the plaintiff of all and every sum or sums of money then due or thereafter to become due to the plaintiff by Marbud Construction Limited to the extent of, but not exceeding, the sum of €50,000 with interest thereon at the rates fixed by the plaintiff from time to time until repayment. Summary judgment was sought in the originating summons.
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> 2. An appearance was entered on behalf of Mark O'Driscoll, the third named defendant on 25th March, 2009.
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> 3. A notice of motion dated 23rd November, 2009 indicating that an application would be made to the Master of the High Court to enter final judgment in the sum of €50,000. At that time Mark O'Driscoll was represented by P.J. O'Driscoll Solicitors. One of the solicitors in that firm is a sister of Mark O'Driscoll.
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> 4. The next document is the grounding affidavit of the notice of motion of Margaret Mooney dated 11th November, 2009.
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> 5. Next is the replying affidavit of Mark O'Driscoll dated 9th April, 2010, and in that affidavit he said that although he is a shareholder in Marbud Construction Limited he was neither a director nor an employee of the said company and he had no executive role in the day-to-day running, organisation or management of the business. He said he had very little knowledge or experience of the construction industry and that the real person behind the company was the first named defendant who is a Polish national who had previously run his own construction company as well as working as a sole trader in the industry. Mr. O'Driscoll's role within the company was simply to assist the company in securing new contracts on foot of the local knowledge and contacts which he possessed and the first named defendant, being a foreign national, did not.

5. Mr. O'Driscoll says that a €1 million contract was secured with Coolfadds Developers Limited for Marbud Construction Limited to build houses on a site at Riverstick in Cork. Unfortunately, however, due to the delay in the completion of works, cash flow became an issue. The first named defendant was aware that the third named defendant banked with AIB in Bandon and had done so for some considerable time, since around 1994. The first named defendant asked Mr. O'Driscoll to approach the bank with a view to increasing Marbud Construction Limited's existing overdraft facilities as Mr. O'Driscoll knew that the works were progressing more slowly than anticipated. Mr. O'Driscoll doubted if the bank would make any further advances and so he expressed the view to the first named defendant that in his opinion the bank would not sanction an increase and overdraft limit, and he confirmed same with the bank.

6. On or about 14th or 15th February, 2008 the first named defendant informed Mr O'Driscoll that he had been granted an increased sanction by AIB. He said he was surprised by this. He asked the first named defendant whether there were any extra conditions or requirements insisted on by the bank and the first named defendant assured Mr. O'Driscoll that there were not. A few days following this, a female bank official contacted Mr. O'Driscoll from AIB asking him to attend the branch to sign some documents. He asked her what these documents were in relation to, but she was unable to provide any detail whatsoever. The following day he was at the bank in regard to an unrelated matter and while he was there he enquired about the phone call. While the customer service official was trying to ascertain the purpose of the phone call, Mark Flynn, whom he understood to have been the then branch manager of AIB, Bandon, whom he personally knew, appeared. He said that Mr. Flynn informed him that the bank needed him to sign documents in relation to an increased overdraft facility for Marbud Construction Limited. At this point they were joined by Sean Hearne, another bank official whom he understood to be an Assistant Manager at the time, but who was not as well known to him. Nonetheless he understood him to be the bank manager working with the first and second named defendants and Marbud Construction Limited.

7. Mr. O'Driscoll says that in the light of his concerns about the company's financial position and his limited role as a shareholder within the company he told Mr Flynn that he would not get involved. In response, Mr. Flynn informed him that he himself had

previously signed a letter of guarantee for an overdraft on behalf of Marbud Construction Limited, and that this was merely an extension of the existing arrangement. Mr. O'Driscoll was extremely surprised by this as he had financial concerns about the company and was thus taken aback that he should sign such a guarantee, whatever the amount may be. However, as he had no recollection whatsoever of signing such a document he immediately professed his disbelief that he had signed a letter of guarantee on behalf of the company. Mr. Flynn and Mr. Hearne assured him that he had and that the said guarantee was in the sum of €20,000.

8. Mr. O'Driscoll said that in normal circumstances he would have insisted upon the sight of the document but because he had been banking with the branch for several years he trusted its officials, and in particular he placed trust in Mr. Flynn. He said he believed reasonably, particularly in the light of his previous phone call to Mr. Flynn on a matter, that the bank would not make such an important assertion without having previously verified that such a guarantee existed. Mr. O'Driscoll fully accepted what the bank and the first and second named defendants said, and did so in circumstances where he fully believed that they had a far greater knowledge of the company's financial dealings than he had, and in those circumstances he did not insist on seeing the previous guarantee nor was offered same.

9. Mr. O'Driscoll said and believes that he was informed that the bank would not be in a position to honour the wages for Marbud Construction Limited's employees that week unless the new overdraft facilities were put in place. That put him in a very difficult position *vis-à-vis* employees' wages and the continuation of the project. At the forefront of his mind was the belief that he had already signed a guarantee in relation to the company's overdraft facilities and he was already indebted to the bank so to speak. Therefore, if the company failed to complete the construction due to the employees terminating work on the basis of unpaid wages, he was already liable to the bank for monies which could not be paid unless this project was completed. Having been informed of this, Mr. Hearne produced letters of guarantee showing the increased overdraft limit of €40,000. He enquired as to the existing balance and any outstanding of the pending payments and from the response he received from Mark Flynn and Sean Hearne it was obvious that an increased facility of €40,000 would not permit the payment of wages, and that the €50,000 facility would be used instead. It was therefore agreed against the background circumstances that he would return to the bank and sign a letter of guarantee in relation to €50,000 overdraft limit as soon as the relevant paperwork was drawn up.

10. He said that on Monday, 25th February, 2008 he returned to the bank and was presented with a letter of guarantee and a letter waiving his rights to legal advice, and he signed both. He did so in circumstances where he fully trusted the information supplied to him and believed that he had already signed a guarantee, but he had already signed a guarantee in relation to the company's overdraft facility. He said that on a subsequent occasion during a conversation with Mark Flynn, Mark Flynn informed Mr. O'Driscoll that he had never in fact signed the first letter of guarantee from Marbud Construction Limited as previously suggested. He was completely taken aback by this, particularly given the fact that from the outset he had explicitly questioned whether he had ever signed a guarantee. He said that he was induced to enter the guarantee on foot of a false assertion made by the plaintiff upon which he relied to his obvious detriment and that he had placed considerable reliance on the plaintiff's representation because he had a longstanding relationship with the bank and indeed with the individual employees involved.

11. The next document was an order of the Master dated 4th May, 2010 ordering that the action be adjourned for plenary hearing by consent. This document was the statement of claim lodged by the plaintiff which referred to the guarantee and stated that the sum had not been discharged by any of the defendants.

12. The next document was the defence lodged on 9th August, 2010 by P.J. O'Driscoll Solicitors and the main issue in the defence was that it was denied that the guarantee was valid and enforceable insofar as it related to the third named defendant by reason of the fact that he was induced to enter into the guarantee on foot of misrepresentation by the servants or agents of the plaintiff. The third named defendant refers to the issue of the letter of guarantee in the sum of €20,000 referred to by Mr. O'Driscoll in his affidavit. On 14th March, 2011 there was a reply to the defence of the third named defendant by the plaintiff and the plaintiff denied that there was any misrepresentation, and that the plaintiff did not make the representation in relation to the €20,000 and further that the relationship between the third named defendant and the plaintiff was of banker and customer only. On 12th June, 2014 a notice of change of solicitors was filed by the plaintiff and on 21st July, 2014 a notice of intention to proceed was filed by the plaintiff. On 6th June, 2016 a further notice of intention to proceed was filed by the plaintiff and on 12th August, 2016 a notice of change of solicitors was filed by Messrs. W.B. Gavin & Co. on behalf of Mark O'Driscoll.

The applicable law

13. The judgment of the Supreme Court in *Primor p.l.c. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 sets out:—

> i. The starting point in considering the jurisdiction of the Court to dismiss proceedings for want of prosecution is the decision in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 where Finlay P. laid down a number of general principles have been quoted with approval in numerous subsequent cases.
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> ii. He stated that it should first be established that the delay complained of has been inordinate and inexcusable and that the onus in this regard lies on the party seeking the dismissal of the proceedings.
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> iii. He then went on to say that even where the delay had been inordinate and inexcusable the Court is required to exercise its discretion to decide whether the balance of justice is in favour or against the case proceeding. Finlay P. added that while a party must, to an extent, be vicariously liable for the inactivity of his solicitor, the litigant's own personal blameworthiness is material to the exercise of the Court's discretion.

14. Those principles were approved and expanded upon by the Supreme Court in *Primor p.l.c. v. Stokes Kennedy & Crowley* [1996] 2 I.R. 459. There, having reviewed the relevant authorities, Hamilton C.J. summarised the principles to be applied as follows:

> a. The courts has an inherent jurisdiction to control their own procedures and to dismiss a claim when the interests of justice require them to do so;
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> 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;
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> 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 or against the proceedings of the case;
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> 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 defendants 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 amounted 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 it 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 and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action,

vii. Whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or it is likely to cause or have caused serious prejudice to the defendant,

viii. The fact that the prejudice to the defendant referred to in (vi) may arise in many ways and other than that merely caused by the delay, including damage to a defendant's reputation and business.

15. In a minority decision of the Supreme Court in *Desmond v. MGM Limited* [2008] IESC 56 Kearns J. noted:—

> *"Of some considerable significance in this context is the fact that the legal landscape with regard to delay has undoubtedly altered following the coming into operation of the European Convention on Human Rights Act, 2003. Section 4 of that Act requires that judicial notice be taken of the Convention provisions. Article 6(1) of the Convention for the Protection of Human Rights & Fundamental Freedoms provides that:-*
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> > *'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'*
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> *Neither party to this appeal has sought to argue that the Convention, even in the form in which it has been incorporated into Irish domestic law, provides horizontal enforceable rights as between private litigants. Both parties, however, accepted that when exercising its discretion, the Court must remain mindful of obligations imposed on it by the Convention given that these obligations exist quite independently of the action or inaction of the parties to the litigation. This point was stressed by Hardiman J. in Gilroy v. Flynn [2005] 1 ILRM 290 when in the course of his judgment he stated at pp. 293 and 294:-*
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> > *'… 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 … following such cases as McMullen v. Ireland ECHR 422 97/98, July 29, 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 insure that rights and liabilities, civil or criminal, are determined within a reasonable time…'*
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> *I therefore am of the view that the requirements of the Convention add a further consideration to the list of factors which were enumerated in Primor as factors to which the courts should have regard when deciding an issue of this nature. Furthermore, it is a consideration which operates regardless of the wishes or intentions of one or both parties to the litigation."*

16. In *Stephens v. Paul Flynn Limited* [2005] IEHC 148, Clarke J. stated the following:-

> *"However it seems to me that for the reasons set out by the Supreme Court in Gilroy the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."*

17. The basic question which the Court has to address in this case remains the same: whether there has been inordinate and inexcusable delay and if so where does the balance of justice lie.

18. Counsel on behalf of the plaintiff acknowledged that there had been inordinate delay.

19. Counsel for the third named defendant indicated that there were a number of significant prejudices: the fact that Sean Hearne no longer works for the plaintiff company and cannot be located; the change of economic circumstances of the plaintiff and; the loss of his previous solicitor. He also spoke about the increased possibility of injustice which attached to allowing an action dependent on witness testimony to proceed, a considerable time after the cause of the action accrued.

20. Council for the third named defendant cited the case of *Millerick v. the Minister for Finance* [2016] IECA 206 by Irvine J. In that case Mr. Millerick sustained serious injuries to his legs as a result of road traffic accident on the 28th March 2007. There was a delay in that case from the reply to the Minister's note for further and better particulars dated 18th January 2011, to the Minister issuing a motion to dismiss the claim for abuse of process and delay on the 4th March 2015. Irvine J. said in the course of discussing the relevant legal principle and she said:

> *"18. … If, on the other hand the court considers the delay inordinate it must then decide whether that delay can be*

excused. If the delay can be excused, once again the application must fail. Should the court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. 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 part of the defendant and the potential prejudice resulting from the delay."

In her decision she stated that a claim in respect of a road traffic accident was relatively straight forward and one which once placed in the hands of a solicitor ought to be cable of being advanced in relatively short order. She also stated at para. 28:

"As was advised by Fennelly J. in Anglo Irish Beef Processors Limited v. Montgomery [2002] 3 I.R. 510, where delay has been found to be inordinate and inexcusable the author of that delay will not be absolved of fault unless they can point to some countervailing circumstances as may be considered sufficient to cancel out the effect of such behaviour."

At para. 32 she said:

"It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings."

And at para. 33 she said:

"In distinguishing mere inactivity on the part of a defendant from actual delay or acquiescence he concludes that it is the plaintiff who bears the primary responsibility for prosecuting the action expeditiously and that lesser blame should be apportioned to a defendant where they have been guilty of mere inactivity as opposed to actual delay."

And at para. 37 she states:

"In my view, the Minister in the present case cannot be deemed culpable for mere inactivity. After all, it is the plaintiff who commences legal proceedings and draws the defendant into the legal process. No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise."

At para. 38 she said:

"Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded?"

21. Counsel on behalf of the plaintiff pointed to the timing of the application to strike out the proceedings, and stated that his client had accepted that there was inordinate delay, but stated that first of all his client had served a certificate of readiness in September, 2016 and a notice of trial served returnable for the 13th February 2016. He said that it was a much later response by the defendant to seek to strict out the proceedings. He further said that the witness Sean Ahern was in court and therefore the defendant did not suffer any prejudice in that regard.

Applying the law principles applicable to this case

22. The plaintiff accepts that the delay is inordinate and has not given any explanation for the delay in pursuing the case after the pleading were closed with the delivery of a reply to defence on the 14th March 2011.

23. A period of five years had elapsed before the next movement on behalf of the plaintiff. This Court adopts the reasoning of Irvine J. in the two Court of Appeal decisions and in particular in her decision in Millerick mere silence or inactivity on behalf of the defendant is not to be taken into account.

24. The court is also conscious of the fact that although the principal evidence on which the plaintiff relies is the document of guarantee, nevertheless there are issues raised by the third named defendant in relation to the discussions with the bank officials (which the plaintiff was as described by the third named defendant), however, there is a requirement for oral evidence seven years after these issues arose. In all of the circumstances the court is of the view that the balance of justice favours the striking out of the proceedings for want of prosecution and the court so orders.