[2019] IEHC 818

THE HIGH COURT

[2012 No. 935 S.]

BETWEEN

THE GOVERNOR & COMPANY OF BANK OF IRELAND

PLAINTIFF

AND

MARK MCCRANN & LORRAINE MCCRANN

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 3rd day of December, 2019

Introduction

1. This is an application brought by the second named defendant to have the plaintiff's proceedings against her struck out on the basis of inordinate and inexcusable delay, or in the alternative pursuant to Order 122, rule 11 of the Rules of the Superior Courts, for failure on the part of the plaintiff to take any further steps in the action for a period of two years.

2. In summary, the second defendant submits that, the proceedings having been issued in 2012 and the plaintiff having unsuccessfully brought a motion seeking liberty to enter summary judgment against the defendants in July 2012, they then did nothing until they served a notice of intention to proceed in 2017. Thereafter, they further delayed for a period of approximately 14 months until they issued a second motion seeking summary judgment, this time against the second defendant alone. In response to that, the second defendant issued this motion on 1st February, 2019 seeking to have the plaintiff's action against her dismissed on grounds of delay.

3. The plaintiff's response to this application is in the following terms: while they concede that there was a period of inaction between the dismissal of the first motion seeking summary judgment in 2012 and service of the notice of intention to proceed in 2017, they submit that this delay can be excused due to the fact that the plaintiff was pursuing other securities in the form of the appointment of a receiver over certain mortgaged property and the forced sale thereof, which would have had the effect of reducing the ultimate liability of the second defendant on foot of the guarantees, which she had furnished in respect of the indebtedness of two companies of which she was a director. In addition, it was submitted that in the period 2016 – 2017, there was a significant amount of correspondence passing between solicitors acting for the plaintiff and solicitors acting for both of the defendants with a view to a possible compromise of the proceedings. In these circumstances, it was submitted that the inaction on the part of the plaintiff in progressing the proceedings in the period 2012 to 2017 was excusable.

4. Further and in the alternative, the plaintiff submitted that even if the delay was held to be both inordinate and inexcusable, the Court should take account of the fact that there would be no prejudice to the second defendant by such delay, due to the fact that this action will proceed on documentary evidence alone. Thus, there was no question of the second defendant being prejudiced due to the unavailability of witnesses, or the diminution in the memory of any witnesses. In these circumstances it was submitted that

there could be no question that the second defendant would not get a fair hearing at the trial of the substantive matter.

Chronology

5. The chronology of relevant events in this case can be stated as follows:

(1) On 11th June, 2007, the defendants executed two guarantees in favour of the plaintiff. The first was in respect of the liabilities of a company known as McCrann Roofing Limited up to a limit of €100,000 and the second was in respect of the liabilities of North Irish Powder Coating Limited, up to a limit of €120,000.

(2) On 29th May, 2008, the defendants executed a further guarantee in favour of the plaintiff in respect of the liabilities of McCrann Roofing Limited, limited to €50,000.

(3) On 13th August, 2009, McCrann Roofing Limited went into liquidation. On 6th September, 2010, North Irish Powder Coating Limited was struck off the register of companies.

(4) On 6th September, 2010, the plaintiff made demand of the defendants for payment of the sum of €75,288.40 on foot of their guarantees in respect of the liabilities of McCrann Roofing Limited. On 1st October, 2010, the plaintiff made demand of the defendants for the sum of €101,145.13 on foot of their guarantee of the liabilities of North Irish Powder Coating Limited. These demands were repeated in letters from the plaintiff's solicitor dated 14th January, 2011.

(5) When the defendants failed to make any payment on foot of the demands, the plaintiff issued the proceedings herein against the defendants on 9th March, 2012. On 11th June, 2012, an appearance was entered on behalf of the defendants by Kilraine O'Callaghan, Solicitors.

(6) On 3rd July, 2012, a notice of motion seeking liberty to enter final judgment was issued by the plaintiffs against the defendants. On 24th July, 2012, the matter was returnable before the Master of the High Court. The defendants were not represented at that hearing. The Master of the High Court dismissed the motion as he was of the opinion that the plaintiff's proofs were not in order.

(7) On 30th April, 2013, the plaintiff appointed a receiver over 33 acres at Banada, Ballaghdereen, Co. Roscommon, which it held as security for the indebtedness of the defendants. In September 2015, the property over which the receiver had been appointed, was sold and the net proceeds were applied in reduction of the indebtedness of the defendants.

(8) In the period 13th April, 2016, to 30th May, 2017, a total of nine letters passed between the solicitors acting for the plaintiff and the solicitors acting for the second defendant concerning the indebtedness of the defendants to the plaintiff and the possible compromise thereof. Those negotiations did not result in a resolution of the matter.

(9) On 31st May, 2017, a notice of intention to proceed was issued by the plaintiff in these proceedings. On 13th July, 2018, the plaintiff issued a notice of motion seeking liberty to enter final judgment against the second defendant alone in the sum of €115,858.13.

(10) In August 2017, the plaintiff learned that the first defendant had been declared bankrupt on 31st July, 2017.

(11) On 15th October, 2018, a notice of change of solicitor was filed by the second defendant.

(12) On 16th October, 2018, 20th November, 2018, and 18th December, 2018, the plaintiff's motion seeking liberty to enter final judgment against the second defendant was adjourned by consent, at the request of the second defendant's solicitor.

(13) On 1st February, 2019, the second defendant issued the application herein to dismiss the plaintiff's action for want of prosecution.

(14) On 5th February, 2019, on the application of the second defendant, the plaintiff's motion for liberty to enter final judgment was struck out by the Master of the High Court. On 8th February, 2019, the plaintiff issued a motion to, inter alia, set aside the Order of the Master of the High Court made on 5th February, 2019.

Submissions on Behalf of the Second Defendant

6. Counsel on behalf of the second defendant, Ms. McMorrow B.L., submitted that the principles which the Court had to apply in considering the second defendant's application herein were those as set out in *Rainsford v. Limerick Cooperation* [1995] 2 I.L.R.M. 561 and *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

7. It was submitted that applying the tests laid down in those cases, it was clear that in this case, where there had been a delay and total inaction on the part of the plaintiff in the period 24th July, 2012, to 31st May, 2017, when the notice of intention to proceed was issued, along with a further delay between that time and 13th July, 2018, when the plaintiff issued its second motion seeking liberty to enter final judgment against the second defendant, the Court should hold that in these circumstances the plaintiff was guilty of both inordinate and inexcusable delay.

8. It was submitted that the fact that the plaintiff had elected to pursue other remedies after its first motion seeking liberty to enter final judgment had been dismissed by the Master in July 2012, did not excuse their inaction in relation to these proceedings against the second defendant. Counsel submitted that it was a common occurrence for a creditor to pursue multiple remedies simultaneously, such as by pursuing the principal debtor and a guarantor in respect of the principal debtor and by executing any security that it may hold over real property owned by either the principal debtor, or the guarantor.

9. Counsel accepted that even were the Court to hold that the delay was both inordinate and inexcusable, it was then obliged to consider where the balance of justice lay. In this regard, counsel referred to the judgment of Quirke J. in *O'Connor v. John Player & Sons Limited* [2004] 2 I.L.R.M. 321 and in particular to the factors set out by the learned judge at page 17 of the judgment. It was submitted that having regard to those factors; in this case the second defendant had not in any way induced or caused the plaintiff to delay in the prosecution of the within proceedings. That was a decision that was made entirely by the plaintiff. Furthermore, the second defendant had not been guilty of any delay on her part.

10. It was further submitted that the second defendant would be prejudiced as a result of the delay on the part of the plaintiff in prosecuting the within proceedings, if she were forced to defend the action at this remove. In this regard, it was noted that the first defendant had been declared bankrupt in July 2017, thereby effectively reducing or eliminating any prospect of the plaintiff obtaining payment from him on foot of the guarantees, thereby causing the second defendant to have a greater exposure on foot of the guarantees.

11. Finally, counsel referred to the dicta of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, where the learned Judge had stated that having regard to the provisions of the European Convention on Human Rights and the incorporation of that treaty into Irish Law, there was an added obligation on courts to ensure that proceedings were prosecuted without delay. Counsel submitted that this was a further factor which had to be weighed under the heading of the balance of justice and that it leaned in favour of the plaintiff's action being dismissed on grounds of delay.

12. In support of this submission, counsel referred to the judgment of Kearns J. in *Desmond v. MGN Limited* [2009] 1 I.R. 737, where he stated as follows at paragraph 28:

> *"This court agreed with the reasoning of Clarke J. in that case and 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 plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459 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."*

13. Counsel also referred to the decision of Irvine J. in *William Connolly & Sons Limited v. Torc Grain & Feed Limited* [2015] IECA 280, where she noted that the State had given a commitment to meet the rights of parties to have a hearing within a reasonable time under Article 6 of the ECHR. She further stated that if the courts were to renege on their constitutional obligations to ensure that litigation was dispatched with efficiency, given that the rules of court leave it largely to the parties themselves to progress litigation, their ability to administer justice would be cast in doubt. Counsel submitted that the present state of the law in this jurisdiction was accurately summarised by the learned authors of Delany & McGrath in *Civil Procedure*, 4th Edition, at paragraphs 15 – 71 where the learned authors gave the following opinion:

> *"In conclusion, while there is a consensus that the Rainsford/Primor principles remain applicable, some residual doubt remains about the extent to which there has been a recalibration or tightening up of the application of these principles. However, whether such an initiative can be said to derive from a greater consideration being given to constitutional imperatives or the provisions of Article 6 of the ECHR, at a general level of principle it is likely that a 'greater obligation of expedition' will be expected of a plaintiff and that the application of the established principles will 'be approached on a significantly less indulgent basis than heretofore'."*

14. In summary, counsel submitted that this was a relatively straightforward case. The second defendant, who is the wife of the first defendant, had signed guarantees in respect of her husband's companies. She was sued in respect of those guarantees in 2012. The motion for summary judgment was dismissed by the Master of the High Court in July 2012. Thereafter, the bank did nothing for five years. And even when it did issue a notice of intention to proceed in May 2017, it the delayed a further 14 months before taking any steps thereon by issuance of a second motion seeking liberty to enter final judgment against the second defendant. Having regard to the five years that had elapsed after the dismissal of the first motion for judgment in July 2012, the second defendant was entitled to presume that the proceedings were not being proceeded with against her. She had been caused great stress and upset by the reactivation of the proceedings and by the issuance of the second motion seeking summary judgment against her. In these circumstances it was submitted that the balance of justice lay in favour of dismissing the plaintiff's action against the second defendant for want of prosecution.

15. Finally, counsel submitted that the provisions of Order 122, rule 11 made it clear that where there had been no step taken in the proceedings by a party for a period of two years, the other party was entitled to seek the dismissal of the proceedings. Here there had been a far greater period of delay by the plaintiff and in considering the second defendant's application under this provision of the Rules of the Superior Courts, the Court was not obliged to look at whether the delay was inordinate or excusable.

Submissions on Behalf of the Plaintiff

16. In his responding submissions, Mr. McGuckian B.L. began by pointing out that this was not a case of a wife merely entering into a contract of guarantee in respect of the indebtedness of her husband's companies. In this case, the second defendant was at all times a director of the two companies. In these circumstances, it could not be asserted that she was not aware of the evolving financial situation subsequent to her signing the guarantees.

17. Turning to the substance of the application before the court, counsel submitted that even where there was a significant period of delay or inaction on the part of the plaintiff, which would constitute an inordinate delay, the court then had to move on to ask whether the delay was excusable. It was submitted that in this case there were factors which excused the period of inaction in the proceedings between July 2012 and May 2017. In particular, the plaintiff had taken steps to secure payment by relying on other forms of security. To

that end, it had arranged for the appointment of a receiver and through him for the sale of land in county Roscommon which took place in September 2015. It was submitted that it was reasonable for the plaintiff to hold off pursuing the second defendant while it pursued this other remedy. Any amount received as a result of the realisation of that security, accrued to the benefit of the second defendant. Counsel pointed out that the second defendant had been kept fully informed of the actions of the plaintiff in relation to the appointment of the receiver and the sale of the land.

18. Counsel further submitted that the second defendant could have no complaint in relation to any inaction on the part of the plaintiff between April 2016 and 30th May 2017, because during that period the plaintiff was in active negotiation with the solicitors acting for both defendants in relation to the matter. In that period nine letters had passed between the parties concerning a possible compromise of the matter. Due to the fact that these were without prejudice negotiations, Mr. O'Brien merely referred to the dates of the relevant letters, but did not outline the content of same. However, Mr. McDonald, the solicitor for the second defendant did not feel himself so constrained in his affidavit dated 1st April, 2019, wherein at paragraph 23 thereof, he set out a summary of the correspondence and exhibited some of the letters. Counsel submitted that it was clear from the description of the correspondence contained in that affidavit, that there were negotiations ongoing between the parties at that time. Accordingly, he submitted that it was reasonable for the plaintiff to hold off taking any steps in the proceedings, while there was a good chance that the entire action may have been settled through negotiation. Having regard to these two matters, counsel submitted that the delay could be seen as being excusable.

19. Counsel further submitted that even if the court held against him in relation to the issue of the delay being excusable, the Court was then obliged to go on and consider where the balance of justice lay. In this regard, Counsel submitted that the balance was clearly in favour of allowing the action to proceed. This was due to the fact that the case was going to turn almost entirely on documentary evidence. Thus, it was not a case where the second defendant would find herself at a disadvantage due to the lapse of time. There was no question of any witness dying or otherwise becoming unavailable, nor any question of the memory of relevant witnesses fading over time. He submitted that this case was going to turn entirely on the documents, including the guarantees signed by the second defendant, the level of indebtedness incurred by the companies to the plaintiff and the making of demands by the plaintiff of the defendants on foot of the guarantees. It was submitted that in these circumstances, there was no prejudice to the second defendant in having to meet the claim at this remove. Nor was there any question that she would not get a fair trial at the hearing of the action.

20. Counsel accepted that the relevant principles to be applied in this case were those set out in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *O'Connor v. John Player & Sons Limited* [2004] IEHC 99. He also referred to the decision in *Truck & Machinery Sales Limited v. General Accident, Fire and Life Assurance Corporation plc* [1999] IEHC 201, where the Court held that in

considering the excusability of a delay all the surrounding circumstances of the case should be taken into account, including excuses based on extraneous activities. Counsel submitted that when one considered the factors outlined above in the light of the principles set out in the cases cited to the Court, the balance of justice came down in favour of allowing the action to proceed.

Conclusions

21. The principles which the Court must apply in deciding this application are well known. The parties were agreed that the relevant principles are those as set down by Hamilton C.J. in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, where the Chief Justice summarised the principles at page 475:

> *"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
>
> *(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
>
> *(d) in considering the latter obligation the court is entitled to take into consideration and have regard to*
>
> *(i) the implied constitutional principles of basic fairness of procedures,*
>
> *(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
>
> *(iii) any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,*
>
> *(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
>
> *(v) the fact that conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
>
> *(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*

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

22. The principles which the Court must apply when considering where the balance of justice lies were set out by Quirke J. in *O'Connor v. John Player & Sons Limited* [2004] 2 I.L.R.M. 321, at page 17 of the judgment as follows:

"(1) the conduct of the defendants since the commencement of the proceedings for the purpose of establishing, (a) whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and (b) whether the defendants were guilty of any conduct which induced the plaintiff to incur further expense in pursuing the action,

(2) whether the delay was likely to cause, or has caused, serious prejudice to the defendants, (a) of a kind that made the provision of a fair trial impossible or, (b) of a kind that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action and

(3) whether, having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against the defendants should be allowed to proceed or should be dismissed."

23. The Court is also of the view that in looking at the excusability of the delay in any particular case, the Court is entitled to take into account not just factors relating to the particular proceedings or any difficulties that may have arisen therein, but it can also look at surrounding circumstances in order to see where the balance of justice lies when considering whether justice requires that the action be struck out, or allowed to proceed: see *Truck & Machinery Sales Limited v. General Accident Fire and Life Assurance Corporation plc.* [1999] IEHC 201.

24. Applying those principles to the facts of this case, the Court is satisfied that the delay of five years between 24th July, 2012 when the first motion seeking summary judgment was dismissed by the Master of the High Court and 21st May, 2017 when a notice of intention to proceed was issued, was certainly an inordinate delay. The next question which arises is whether that delay was excusable in all the circumstances of the case.

25. In considering the excusability of the delay the Court is entitled to have regard to the surrounding circumstances. In this regard, the Court is satisfied that when the plaintiff elected to pursue recovery of the debt by relying on other forms of security held by it, the second defendant was kept informed of that. That involved the appointment of a receiver and the sale of land in county Roscommon. The receiver was appointed in 2013 and the land was sold in September 2015. The proceeds thereof would have reduced the overall indebtedness of the second defendant to the plaintiff on foot of the contract of guarantee.

26. The Court must also have regard to the fact that in the period 13th April, 2016 to 30th May 2017, there were nine letters passing between the parties in relation to a possible compromise of the proceedings. Some of those letters were simply chasing up further responses, or noting that there was no response to a previous letter. Nevertheless, I am satisfied from the description of that correspondence given in Mr. McDonald's affidavit and from the exhibits thereto, that there were *bona fide* steps being taken to see if a compromise could be reached between the parties. The second defendant was participating through her solicitor in those negotiations. It is not at all uncommon for plaintiffs to hold off taking further steps in proceedings while negotiations are ongoing. Indeed, that is almost universally the case.

27. In these circumstances, the Court is of the view that while a five-year period was certainly very lengthy, there was no question but that the second defendant was aware that the proceedings were still extant against her. She was not deceived into thinking that the proceedings had been abandoned by the plaintiff. She had participated to some extent in negotiations between the parties in an effort to resolve the matter. In these circumstances the Court is of the view that the delay was excusable.

28. Even if I am wrong in that finding, if I were to find that the delay were inexcusable, I would then have to go on and consider the balance of justice. In that regard, I am of the view that the submissions made by Mr. McGuckian B.L. on behalf of the plaintiff are compelling. This is a case which will turn almost exclusively on documentary evidence. The plaintiff will have to prove the following: that the second defendant entered into the alleged contracts of guarantee; that the companies in respect of which the guarantees were given became indebted to the plaintiff; that the plaintiff made valid demands of the second defendant for payment on foot of the contracts of guarantee and that the second defendant failed to make any, or any sufficient payment on foot of such demands. All of that will turn on documentary evidence. The second defendant has not established that she will be in any way prejudiced by the fact that the action would continue at this remove, notwithstanding the delays that have ensued in the case. This is not a case where critical witnesses have died or become unavailable in the intervening period, nor is it a case where the memory of witnesses may have faded over time. In such circumstances I am satisfied that there is no prejudice to the second defendant by requiring her to defend the plaintiff's action herein.

29. While the fact that the first defendant was adjudicated a bankrupt in July 2017 may have limited the extent of the plaintiff's right of recovery against that defendant, the happening of that event did not affect either the plaintiff's right of recovery against the second defendant, nor her ability to defend herself in whatever way she thought fit. Accordingly, the happening of that event does not tip the balance of justice in favour of dismissing the plaintiff's action.

30. While it was urged on the Court that in considering the issue of delay and whether the Court should tolerate periods of delay that might have been tolerated in previous years, the Court should have regard to the provisions of the European Convention on Human

Rights and in particular to the dicta of Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, as approved of in the dicta of Kearns J. in *Desmond v. MGN Limited* [2009] 1 I.R. 737 at page 749 – 750. Irvine J. expressed similar views in *William Connolly & Sons Limited v. Torc Grain & Feed Limited* [2015] IECA 280.

31. However, Geoghegan J. when delivering a majority judgment along with Macken J. in *Desmond v. MGN Limited*, doubted whether the dicta of Hardiman J. in *Gilroy v. Flynn* constituted a departure from the existing principles as set out in Rainsford and Primor. He stated as follows:

> *"I do not think that the case law of the Court of Human Rights relating to delay justifies reconsideration of those principles or in any way modifies those principles. I do not know of any relevant case of the Court of Human Rights dealing with when an action should be struck out for delay.*
>
> The dicta of Hardiman J. to which I have already referred indicate that his view is that application of those principles should now change or indeed that the principles themselves might have to be 'revisited'. I am not convinced that that would be either necessary or desirable. It would seem to me that those principles have served us well. Unless and until they are altered in an appropriate case by this Court, I think that they should still be treated as representing good law and in that respect, I entirely agree with Macken J."

32. Geoghegan J. reiterated his views that the well establish jurisprudence deriving from *Rainsford and Primor* remained the law in his judgment in *McBrearty v. North Western Health Board* [2010] IESC 27.

33. In Comcast International Holdings IMC v. Minister for Public Enterprise [2012] IESC 50, the Supreme Court expressed views in a number of judgments that while the approach of the courts to delay on the part of a plaintiff would be looked at in less indulgent terms than heretofore, there did not appear to be a need to effect any fundamental change to the established principles laid down in the case law. Thus, this Court is of the view that the principles laid down in *Rainsford, Primor and O'Connor* continue to be the applicable principles. For the reasons set out herein, the Court is satisfied that the delay in this case was excusable, or if it was not excusable, then due to the fact that there was no discernible prejudice caused to the plaintiff by virtue of the delay, the balance of justice is in favour of allowing the action to proceed.

34. Finally, while there was a period of delay between the issuance of the notice of intention to proceed in May 2017 and the issuing of the second motion seeking liberty to enter final judgment on 13th July, 2018, together with further delays thereafter when the application was adjourned on three occasions at the request of the second defendant's solicitor, the Court does not view the initial 14 month delay as being sufficiently long to cause the plaintiff to have suffered any appreciable prejudice. Thereafter, any further delay was due to the fact that the second defendant's new solicitor was having trouble taking up copies of the file and obtaining further information on the matter.

35. Accordingly, for the reasons stated herein, the Court refuses the application on behalf of the second defendant to dismiss the plaintiff's action on foot of the inherent jurisdiction of the Court to dismiss an action on grounds of delay. The Court also refuses the relief sought pursuant to Order 122, rule 11, on the basis that the delay was excusable and/or due to the fact that there was no prejudice caused to the second defendant by such delay.