

THE HIGH COURT

[2011 No. 740 S]

BETWEEN

CAVE PROJECTS LIMITED

PLAINTIFF

AND

PETER GILHOOLEY, JOHN KELLY, JOHN MORONEY, RORY O'BRIEN AND JOSEPH O'HARA

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 20th day of January, 2021

Background

1. This is an application by the second named defendant to strike out the proceedings against him for want of prosecution and/or delay. The proceedings concern a claim for the recovery of a debt of €11,785,543.11 against the second and fifth named defendants. The claim was compromised as against the first, third and fourth named defendants.
2. The summary summons was issued by the then plaintiff, the Governor and Company of the Bank of Ireland, on 24 February 2011. Subsequently NALM acquired the loan, the subject matter of the proceedings, from the then plaintiff. In or about January, 2013, the above named plaintiff purchased the said loan.
3. The plaintiff alleges that the loan became repayable on 31 January 2008.

Course of Proceedings

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| 4. 24 February 2011 – | Summary summons issued. |
| 28 April 2011 – | Second named defendant enters appearance. |
| 9 September 2011 – | Then plaintiff issues motion for summary judgment. |
| 7 December 2011 – | NALM acquires the loan facility from then plaintiff. |
| January/March 2012 – | Motion for summary judgment adjourned to enable second named defendant to file replying affidavit. |
| May 2012-December 2012 – | Proceedings adjourned as NALM were engaged in selling said loan facility. |
| February 2013 – | The above named plaintiff substituted for Governor and Company of the Bank of Ireland. |
| March 2013 – | Motion adjourned to allow plaintiff file replying affidavit. |
| 27 May 2013 – | Proceedings discontinued against first, third and fourth named defendants. |
| May-June 2013 – | Adjournments to allow affidavits be filed. |

21 July 2013 – The fifth named defendant issued a motion for security for costs.

17 July 2013 – Motion for security for costs was listed for hearing on 26 July 2013. The second named defendant was given liberty to issue a similar motion but did not do so. The motion for judgment against the second named defendant was listed on 11 November 2013.

26 July 2013 – Motion for security for costs not reached in list for hearing, adjourned to 12 December 2013.

11 November 2013 – Second named defendant applies to adjourn motion until resolution of security of costs application.

2 December 2013 – Second named defendant files further affidavit raising new grounds to defend claim.

12 December 2013 – Fifth named defendant's motion for security for costs was compromised.

6 January 2014 – Second named defendant issues its own motion for security for costs.

March 2014 – Plaintiff issues separate proceedings for recovery of lands secured against the loan, the subject matter of these proceedings.

28 April 2014 – Second named defendant was refused security for costs by High Court.

14 November 2014 – Application for summary judgment heard.

14 January 2015 – Application for summary judgment was refused and matter remitted to plenary hearing.

27 March 2015 – Appeal against order refusing summary judgment was withdrawn.

29 May 2015 – Statement of Claim delivered.

3 June 2015 – Second named defendant serves a notice for particulars.

19 November 2015 – Second named defendant delivers a Defence and counterclaim.

26 October 2016 –	Plaintiff delivers a reply to the Defence and counterclaim of the fifth named defendant together with a notice for particulars.
November 2016 –	Solicitors of the second named defendant object to service of a notice of trial because of the absence of a reply to particulars and discovery. The second named defendant issued a motion to compel replies to particulars.
February 2017 –	Plaintiff seeks advice on proofs.
April 2017 –	Plaintiff advised that a number of witnesses previously employed by Bank of Ireland required. The plaintiff was unable to locate one particular witness until November 2018.
February 2018 –	Solicitor for plaintiff receives draft replies to particulars raised by second named defendant and sends them to plaintiff for review.
26 March 2018 –	Solicitor for the plaintiff serves a notice of intention to proceed.
2 November 2018 –	Solicitor for the plaintiff serves replies to particulars raised by second named defendant and also requests the second named defendant reply to the notice for particulars raised by the plaintiff.
February 2019 –	Plaintiff seeks replies to particulars from the second and fifth named defendants.
13 March 2019 –	Motion issued seeking to compel replies to particulars.
13 March 2019 –	Second named defendant issues within motion to dismiss proceedings for want of prosecution.

An analysis of the foregoing shows certain lengthy periods of inactivity: -

- (i) November 2015 – October 2016;
- (ii) April 2017 – February 2018; and, to a lesser extent
- (iii) November 2018 – February 2019.

Principles to be Applied

5. There are numerous authorities on the principles that a court should apply to an application to dismiss for want of prosecution. In my view, this application may be

determined by applying the oft cited principles set out in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The Court has to consider whether: -

- (i) There has been inordinate delay;
- (ii) If there has been inordinate delay, whether such delay is inexcusable; and
- (iii) If the delay has been inordinate and inexcusable, whether, on the balance of justice, the proceedings ought to be dismissed.

On the matter of the balance of justice, Hamilton C.J. stated: -

- “(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 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 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 merely caused by the delay, including damage to a defendant’s reputation and business.”

6. In considering the balance of justice, the following passage from Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 I.R. 510 is of particular relevance: -

“... It is always necessary for the defendant applicant to demonstrate, and he bears that burden, that the plaintiff has been guilty of inordinate and inexcusable delay. Subject to that, however, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation. The separate considerations mentioned by Hamilton C.J. should not be treated as distinct

cumulative tests but as related matters affecting the central decision as to what is just.”

Application of Principles

7. These proceedings concern loans which the plaintiff alleges became repayable on 31 January 2008. The proceedings were issued on 24 February 2011, thus, well within the period provided for in the Statute of Limitations Act 1957 (as amended). In the course of the proceedings, NALM acquired the loan facility from the then plaintiff. Subsequently, the facility was acquired by the above named plaintiff. This required the then plaintiff to be substituted. These applications were made expeditiously.
8. In the course of 2013, the fifth named defendant issued a motion for security for costs. The second named defendant was given liberty to issue such a motion but did not do so. It was only after the fifth named defendant’s motion for security for costs was compromised that the second named defendant issued its own motion, which was in January, 2014. In April, 2014, the second named defendant’s application was refused. In November, 2014, an application for summary judgment was heard and was determined in January, 2015 against the plaintiff (as per Noonan J.). The matter was remitted to plenary hearing. Through the remainder of 2015, pleadings were exchanged between the parties. There was then a period between November, 2015 and October, 2016 where no further steps appear to have been taken in the proceedings. This was a period of some eleven months.
9. The period of eleven months in proceedings such as this amounts to a delay. No obvious explanation has been given for this. However, from October, 2016 to the end of that year, further steps were taken in the proceedings. During that period the second named defendant issued a motion to compel replies to particulars, thus, incurring the plaintiff further expense in pursuing the action (see (v) in *Primor Plc v. Stokes Kennedy Crowley*).
10. In February, 2017, the plaintiff sought advice on proofs and was advised that a number of witnesses previously employed by the Bank of Ireland would be required to give evidence. In a replying affidavit Mr. Thomas Kelly, Solicitor, instructed by the plaintiff, states that he had difficulty in securing the details and confirming the attendance of one particular witness, who had retired from the Bank of Ireland, and did not manage to confirm his attendance until November, 2018. As far as the proceedings were concerned, the next step was on 26 March 2018 when the plaintiff served a notice of intention to proceed. Meanwhile, the second named defendant had still not replied to the plaintiff’s notice for particulars. By letter, dated 2 November 2018, the Solicitors for the plaintiff informed the Solicitors for the second named defendant that it was their intention to call this case on for hearing and that a certificate of readiness had been requested. The letter also referred to Practice Direction HC 75 and gave one month’s notice of intention to seek a hearing date. By letter of same date, the plaintiff sought replies to particulars which was served arising from the Defence and counterclaim. The Solicitors for the second named defendant replied to the effect that they had now briefed senior counsel to advise on proofs and that they anticipated that advices would be received to the effect that discovery should be sought, both from the plaintiff and the other defendants. In these

circumstances, the plaintiff was requested not to take any steps to apply for a hearing date until the matter of discovery had been addressed. Four days later, on 16 November 2018, the Solicitors for the second named defendant informed the plaintiff that arising from alleged delay in the prosecution of the proceedings, an application would be made to have the proceedings struck out. No such motion was issued until 13 March 2019 after the plaintiff had issued a motion seeking to compel replies to particulars against the second named defendant.

11. There is no doubt but that the prosecution of these proceedings has been punctuated by various periods of delay, which I have referred to. Some periods of delay are excusable, for example, the period between April, 2017 and November, 2018 wherein the plaintiff has stated on affidavit that it was experiencing difficulties in locating and securing the attendance of a particular witness who they were advised to have available. As regards other periods of delay, steps were taken by the plaintiff to advance the proceedings. It was not until 16 November 2018 that the second named defendant sought to rely on what he termed "*inordinate delay*". In any event, no such motion was issued for a further four months and appears to have been in response to a motion issued by the plaintiff to compel replies to particulars against the second named defendant.
12. In my view, the delay in prosecuting these proceedings was inordinate but, for the reasons stated, was either excusable or acquiesced in by the second named defendant. However, if I am incorrect in this conclusion, and the delay was both inordinate and inexcusable, I propose now to look at where the "*balance of justice*" lies.

Balance of Justice

13. In the course of his grounding affidavit, the second named defendant deposed as follows:

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"It appears that my co-defendants (and in particular the First, Third and Fourth-named Defendants) have been offered settlement terms. What these terms are, I am not in a position to say at the time of swearing. I have never been told the terms and have not been offered any explanation as to why matters were settled with them without any like offer being made either to myself or the Fifth-named Defendant. Prior to this settlement, the co-defendants would have had to give evidence and be available for cross-examination. That is no longer the case since, if the co-defendants are to give evidence, I will at the very least have to call them and forfeit the right to cross-examine them."

The import of this paragraph is: -

- (i) That the first, third and fourth named defendants have been offered, and apparently agreed, settlement terms that the second named defendant was unaware of; and
- (ii) Given this settlement, the co-defendants will not be giving evidence and so are not available to be cross-examined by the second named defendant, the implication

being that the second named defendant has now been prejudiced in his defence of the proceedings.

14. In an earlier affidavit sworn by the said Thomas Kelly in support of the motion for summary judgment brought by the plaintiff, Mr. Kelly deposed: -

"13. I further say with regard to the settlement with Mr. Gilhooley, Mr. O'Brien, and Mr. Moroney that Cave Projects Limited settled with them for a monetary payment of €100,000 each. I say as part of the settlement these Borrowers also agreed to transfer their interest in the following lands into the name of Cave Projects Limited:-

[Mr. Kelly refers to ten folios of land]

I say that as part of the agreement to discontinue proceedings against these three Borrowers Cave Projects Limited reserved Its right to continue proceedings against the other two Borrowers. I beg to refer to the settlement agreements upon which marked with the letter 'K1' I have endorsed by named prior to the swearing hereof."

The documents exhibited at "K1" set out terms of the settlement agreement entered into by the first named defendant, the third named defendant and the fourth named defendant. This affidavit, and exhibits, was served on the second named defendant.

15. In light of the information which the second named defendant clearly had, his statement in his grounding affidavit before this Court, to the effect that he was unaware as to the terms on which the first named defendant, third named defendant and fourth named defendant settled with the plaintiff, is untruthful.
16. The second named defendant was present in court during the hearing of this application. When the issue as to the truthfulness of his affidavit emerged, I directed that he be called to give evidence to give an explanation for this. Having been advised as to his rights concerning self-incrimination, the second named defendant told the Court, by way of explanation, that he had thought very carefully concerning the settlement and that he was "*still confused*" as to the overall settlement. He maintained that as land values fluctuate, he did not know the value of the assets that were part of the settlement. Given the clear terms of his affidavit to the effect that he did not know the terms of the settlement, I find this explanation falls well short of being credible. In the circumstances, I can only conclude that the second named defendant was untruthful in his affidavit grounding this application. In these circumstances, the balance of justice cannot lie in favour of granting the reliefs sought.

Conclusion

17. By reasons of the foregoing, I refuse the reliefs sought herein.