



THE COURT OF APPEAL

**UNAPPROVED
NO REDACTION NEEDED**

**Neutral Citation Number [2021] IECA 251
Record Number: 2020/57
High Court Record Number: 2012/5471P**

Donnelly J.

Noonan J.

Binchy J.

BETWEEN/

BRENDAN KELLY

PLAINTIFF/RESPONDENT

-AND-

**IRISH BANK RESOLUTION CORPORATION LIMITED
(IN SPECIAL LIQUIDATION)**

FIRST NAMED DEFENDANT/APPELLANT

-AND-

JOHN FITZPATRICK

SECOND NAMED DEFENDANT

**Record Number: 2020/58
High Court Record Number: 2012/5470P**

BETWEEN/

ASTA O'KELLY

PLAINTIFF/RESPONDENT

-AND-

**IRISH BANK RESOLUTION CORPORATION LIMITED
(IN SPECIAL LIQUIDATION)**

FIRST NAMED DEFENDANT/APPELLANT

-AND-

JOHN FITZPATRICK

SECOND NAMED DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of October, 2021

1. These appeals were heard together in the High Court and were the subject of a single judgment of the 14th November, 2019. The appellant (“the Bank”) appeals the refusal of the High Court to dismiss the claims of the respondents (“the plaintiffs”) for want of prosecution.

Facts

2. The plaintiffs were at the relevant time the owners of a dwelling house at 4 St. Matthias Wood, Church Road, Killiney where they resided. The property was the subject of a mortgage entered into by the plaintiffs originally with Irish Nationwide Building Society, whose assets were ultimately transferred to the Bank. The plaintiffs fell into arrears and this resulted in Irish Nationwide bringing possession proceedings in the Circuit Court in 2009 on foot of an ejectment civil bill on the title. Those proceedings culminated in an order for possession being made on the 30th June, 2010. This order was made by consent of the plaintiffs who were not at that time legally represented.

3. An execution order on foot of the order for possession was issued on the 28th September, 2011 to the Sheriff for County Dublin, the second defendant herein (“the Sheriff”). The execution order, in standard format, “authorised and required” the Sheriff to take possession of the premises. On the 18th April, 2012, the Sheriff and his staff attended at the premises for the purposes of executing the order and taking possession of the premises. The plaintiffs were present at the time and alleged that they were forcefully and wrongfully removed from their home and that this constituted an assault.

4. On the 1st May, 2012, plenary summonses in the within proceedings were issued by each plaintiff claiming damages for assault and trespass to the person on the part of the defendants, their servants or agents. A statement of claim was subsequently served on the 9th November, 2012 to which I will refer further, but before that, a third set of proceedings was instituted by the plaintiff against the same defendants on the 20th July, 2012.

5. Details of the latter proceedings are to be found in the judgment of the High Court (Ryan J. as he then was) in *Kelly & Anor. v IBRC* [2012] IEHC 401. As appears from that judgment, those proceedings claimed damages for (a) slander of title to goods and property, and trespass to the mortgaged property. Claim (b), which is set out on page 2 of the judgment, was for: -

“A declaration that the order obtained by the defendant for possession of the asset which is set out in the Schedule hereto of the plaintiffs or any of them is in breach of contract and/or void and/or otherwise invalid.”

6. The asset in question was the Church Road property. I will refer to those proceedings as the slander of title proceedings and the instant proceedings as the assault proceedings, as did the High Court herein.

7. On the same day as the plaintiffs issued the slander of title proceedings, they registered a *lis pendens* against the property but did not serve the summons on the Bank or give it notice of the registration of the *lis pendens*. Following obtaining possession of the property, the Bank moved quickly to sell it and concluded an agreement with a purchaser on the 27th August, 2012. Shortly prior to that, presumably in the course of pre-contract enquiries, the Bank discovered the existence of the *lis pendens*. As a result, it brought an immediate motion seeking to have it vacated on the basis that the slander of title proceedings and associated *lis pendens* were instituted solely for the purpose of frustrating the sale and were an abuse of process.

8. The matter came on for hearing as an urgent matter during the long vacation with Ryan J. delivering his judgment on the 26th September, 2012. As recorded at p. 4 of the judgment, Ryan J. noted that junior counsel for the plaintiffs said he was not seeking to impugn the order for possession of the Circuit Court but was relying on the unconscionable, unlawful and inequitable conduct of the Bank. Ryan J.'s conclusion on the application (at p. 5) was as follows: -

“In this case, it seems to me that everything goes back to the consent order for possession of the property that was made by the Circuit Court. I think the Bank is correct in suggesting that the plaintiffs are endeavouring to revisit and appeal, in effect, that order. The proceedings, insofar as they assert an interest in land such that would justify the registration of a *lis pendens*, constitute an abuse of process. The fact that the plaintiffs are unable, even when faced with this motion, to suggest any detail or even any basis for advancing a claim as to an interest in land, is very telling and in my view is quite fatal to their claim and confirms the absence of *bona fides* in doing so. It seems to me to be quite obvious that the claim at paragraph (b) of the

indorsement on the summons was introduced for the sole purpose of providing a colourable justification for registering a *lis pendens* in the hope of frustrating a sale of the property. The circumstances of the case point irresistibly to that conclusion and there is nothing in the materials put before the court or in any submission made by counsel Mr. Dixon to suggest any legitimate basis for registering the *lis pendens*.

It would be a clear injustice to permit the processes of the court to be employed for the purpose and only for the purpose of frustrating the exercise of legitimate rights. That would be the case here if the *lis pendens* were to be permitted to remain. I propose accordingly to order that it be vacated and that paragraph (b) be struck out.”

9. Accordingly, the effect of the judgment was not only to vacate the *lis pendens* but also to strike out the plaintiffs’ claim that the Circuit Court order for possession was invalid. The judgment was appealed to the Supreme Court and the appeal subsequently dismissed.

10. Following the judgment of Ryan J. in the slander of title proceedings, the plaintiffs delivered a statement of claim in the assault proceedings herein on the 9th November, 2012. It would appear that the only aspect of those proceedings which relates to the Bank is the plea contained at para. 7 in the following terms: -

“At a time when the plaintiff herein was not legally represented, the plaintiff was asked to consent to the order of possession. As an inducement to the plaintiff the agents or servants of the first defendant stated that they would consent to a six month stay, during which time further efforts to resolve the issues between the parties could be attempted. It was not explained to the plaintiff that a six month stay would be given in the vast majority of cases where a family home was being repossessed. Agents and servants of the first defendant drafted a note which they had signed by the plaintiff and his wife stating that they were consenting to the order being sought

with a six month stay. It was explained to the plaintiff herein that the presence of himself and his wife in court would not be necessary. Consequently, the order for possession was made in the absence of the plaintiff and the implications of agreeing to such an order were not explained to him or his wife and their consent was ill informed and of no effect in law.”

11. It must be said that the meaning of this paragraph is far from clear. On the one hand, it appears to impugn the validity of the order for possession made by the Circuit Court, despite the fact that a few weeks earlier, the High Court had struck out precisely such a claim as, in effect, constituting a collateral attack on the Circuit Court order. Furthermore, counsel for the plaintiffs informed Ryan J. that they were not seeking to impugn the order of the Circuit Court, a submission somewhat difficult to reconcile with para. (b) of the prayer for relief in the slander of title proceedings and para. 7 of the within proceedings. This submission was repeated by counsel for the plaintiffs in this court who said that the plaintiffs were not challenging the validity of the Circuit Court order.

12. It is not easy to see how that concession is compatible with the plea in para. 7, constituting as it does the only claim against the Bank, and apparently there for the purpose of underpinning the subsequent claim in para. 10 of the statement of claim for assault against the Sheriff, premised on the plea that he entered the plaintiffs’ dwelling without permission:

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“10. On the 18th day of April 2012 the second defendant, his agents and servants, attended at the property and unlawfully, forcibly entered the dwelling without the permission of the plaintiff and by use of unlawful force removed the plaintiff from the property. The plaintiff was subject to the unlawful use of force by the servants

and agents of the second defendant which involved being manhandled and pushed from the property.”

13. How it is said therefore that the Sheriff unlawfully entered the property can only be explained by the order for possession being invalid, an assertion repeatedly disavowed before the High Court and this court. It is also of significance to note that the statement of claim does not allege that the Sheriff, in entering the plaintiffs’ property and removing them from it, did so in his capacity as servant or agent of the Bank, nor could it do so in circumstances where the Sheriff, as an independent officer, was acting on foot of an order of the court. Equally, there is no suggestion that any employee of the Bank was present at the plaintiffs’ property on the 18th April, 2012.

14. Following the delivery of the statement of claim, a notice for particulars was served by the Bank on the 18th December, 2012 which was replied to on the 28th January, 2013. A few days later, pursuant to the provisions of the Irish Bank Resolution Corporation Act, 2013, a special liquidation order in respect of the Bank was made by the Minister for Finance pursuant to s. 4 and the order came into effect on the 7th February, 2013. The effect of the order was, pursuant to s. 6(2), to place an immediate stay on all proceedings against the Bank.

15. Whilst this resulted in an automatic stay of the plaintiffs’ claim against the Bank, their claim against the Sheriff remained unaffected. Similarly, the plaintiffs’ claim against the Bank in the slander of title proceedings was stayed. In the following month, the High Court gave judgment on the 15th March, 2013 in *Quinn v IBRC* [2013] 1 IR 393 which held that the stay imposed by s. 6(2)(a) was not a permanent one but one which was capable of being lifted by order of the court. This judgment was clearly of considerable significance in the context of the many proceedings then pending against the Bank.

16. Counsel for the plaintiffs at the hearing of this appeal sought to suggest that the High Court's ruling in *Quinn* was of limited value to the extent that the lifting of the stay was the subject of consent between the parties. However, despite that agreement between the parties, the High Court (Ryan J. as he then was) was of the view that he was obliged to consider whether the court had, as a matter of law, jurisdiction to lift the stay and he concluded that it did. In spite of the consent element therefore, that judgment in the intervening eight years has not been doubted and has been applied in many cases. From the date of that judgment, the plaintiffs herein were aware or deemed to be aware of the fact that it was open to them to apply to have the stay lifted.

17. However, the plaintiffs took no steps in that regard and the proceedings, as against the Bank, remained in abeyance for some years. The proceedings against the Sheriff continued however, with the Sheriff delivering a defence on the 8th February, 2013 which was followed by a notice for particulars and replies in April. A motion for better particulars was brought by the plaintiffs and refused in July 2013.

18. The Sheriff brought a further motion which came before the court on the 11th November, 2013 seeking leave to deliver an amended defence and also permitting the plaintiffs' claim against him to proceed to be heard separately from the claim against the Bank. The application to amend was consented to by the plaintiffs but the application to proceed separately was successfully opposed by the plaintiffs. Thereafter a reply to the defences was delivered by the plaintiffs on the 2nd December, 2013.

19. Matters then remained in abeyance for some three years until the Sheriff served a notice of intention to proceed on the 29th November, 2016 followed by a motion to dismiss for want of prosecution on the 1st March, 2017. That motion came before the Master of the

High Court on the 9th May, 2017 when the plaintiffs consented to their action being dismissed against the Sheriff on the basis that the Sheriff would not seek costs against them.

20. Following the dismissal of the claim against the Sheriff, the Bank in turn served a notice of intention to proceed on the 31st May, 2017 followed by a motion to dismiss for want of prosecution on the 15th December, 2017, being the motion the subject matter of this appeal.

21. The motion in both cases is identical and is grounded on the affidavit of the Bank's solicitor, Eve Mulconry, who sets out the above background. She notes that the plaintiffs have done nothing to progress their claim against the Bank for over four years, that the delay is both inordinate and inexcusable and that the balance of justice lies in favour of dismissing the plaintiffs' claim. The plaintiffs swore no replying affidavit.

22. At the hearing of the appeal, our attention was drawn by counsel for the Bank to an affidavit sworn in support of the Sheriff's application for a dismissal by his solicitor, Gavin Carty, on the 24th February, 2017. Again, in the Sheriff's application, no replying affidavits were sworn by the plaintiffs. Mr. McCarthy avers that the Sheriff was at all times acting lawfully and for the purpose of executing an order for possession pursuant to a court order. He places emphasis on the importance of the plaintiffs' claim for the Sheriff, and indeed Sheriffs generally, in that it amounted to a challenge to the exercise by a Sheriff, acting pursuant to a court order, to their ability to carry out their duties in that role. The delay in the proceedings was therefore having a potentially systemic impact on the work of Sheriffs.

23. In addition, Mr. Carty averred that the passage of time may have dimmed the recollection of witnesses, some of whom may no longer be available and of course, these would be the same witnesses upon whom the Bank would have to rely herein. He also notes

that the plaintiffs had strongly opposed the Sheriff's application to have his claim heard separately and having successfully done so, did nothing to pursue the claim against the Bank.

Judgment of the High Court

24. It is important to note that the judgment of the High Court herein dealt not only with the two assault claims but also with a similar motion brought by the Bank in the slander of title proceedings. The Bank succeeded in that motion before the High Court and no appeal has been brought in that respect. The trial judge set out the background, as I have done, and also considered the relevant legal principles, including the leading authority *Primor Plc. v Stokes Kennedy Crowley* [1996] IR 459 and some of the many cases that have considered that judgment.

25. She went on to consider the application of those principles to the facts and was satisfied that the delay in each of the three cases was inordinate. She referred to the judgment of Ryan J. in *Quinn v IBRC* and noted as follows (at para. 55): -

“... Given what is set out in *Quinn*, the Bank argues that there is no basis upon which the plaintiffs are entitled to sit back and rely on the stay and then, when met with an application to strike out their proceedings on the grounds of delay, merely rely on the fact of a stay. I agree with the Bank's argument.”

26. She therefore rejected the contention that the plaintiffs could rely on the stay and apply to lift it whenever they decided and that time would only begin to run at that point. She felt this contention had little merit and noted that the plaintiffs had not laid out any factual basis for this submission by way of affidavit. Given in particular that failure, the judge was satisfied that the delay was inexcusable.

27. She then turned to the balance of justice. She noted that although the plaintiffs initially suggested that the court could not hear the motions in the absence of the Bank applying to have the statutory stay lifted, she noted (at para. 61) that counsel for the plaintiffs conceded in written submissions that the court, using its inherent jurisdiction, may intervene without a formal application and lift the stay and the court was satisfied to do so for the purpose of adjudicating on these motions.

28. The court felt that a relevant consideration to the balance of justice was the fact that neither the Bank nor the plaintiffs applied to have the stay lifted prior to the issuing of the motions. Dealing first with the slander of title proceedings, the judge was of the view that, in the light of the findings of Ryan J. which were critical of the plaintiffs, coupled with their inaction since December 2012, their failure to serve a statement of claim or to apply to lift the stay, the balance of justice favoured the dismissal of the slander of title proceedings.

29. She accepted that although no specific prejudice was advanced by the Bank in its grounding affidavit, general prejudice may suffice to swing the balance in favour of a defendant. Having said that, she does appear to have given significant weight to the fact that the stay was imposed on the proceedings through no fault of the plaintiffs and this was a countervailing circumstance to which the court could have regard, also bearing in mind that the Bank could apply to lift the stay. She was clearly of the view that this latter consideration was an important one and concluded that those factors taken together tilted the balance in favour of allowing the assault proceedings to go ahead.

Discussion

30. The events with which these proceedings are concerned occurred over nine years ago. Although the proceedings were initially promptly issued and pursued, they languished for a period of almost five years before the Bank moved to dismiss them. During that period, the

main, and arguably only, plank of the plaintiffs' claim disappeared with the removal of the Sheriff from the equation, to which the plaintiffs consented.

31. What remained thereafter by way of a claim against the Bank, if anything, is difficult to comprehend. It has never been explained either in the High Court or in this court on appeal what cause of action subsists against the Bank, or indeed ever existed in the first place. Counsel for the plaintiffs appeared quite unable to explain what the cause of action is other than by making vague suggestions that amendments to the pleadings may be required in due course although, with a view to what, is again unexplained.

32. The jurisprudence arising from the *Primor* principles is by now so well-known that little is to be gained by restating it in this judgment. The High Court judge helpfully set out in some detail the relevant case law about which there is really no dispute. Delays of the magnitude that have occurred in this case give rise to inferred prejudice. If this matter were now to proceed, at least a decade will have passed between the relevant events and the trial.

33. Where the delay has been found to be both inordinate and inexcusable, as here, there is an onus on the plaintiff to advance what have been described as countervailing circumstances which would render it unjust to dismiss the claim – see *Carroll v Seamus Kerrigan Limited & Anor* [2017] IECA 66. Recent authorities demonstrate an increasingly limited tolerance by courts of a culture of delay.

34. All of this makes it the more surprising that when confronted with the delays in this case and an application to dismiss, the plaintiffs did not even trouble to put in a replying affidavit. Their counsel sought to excuse this on the basis that he was entitled to advance argument as distinct from evidence to the court and there would be no point in putting in an affidavit to simply recite legal advice. That of course is true up to a point but still leaves the court entirely in the dark as to the reasons for the delay.

35. At the end of the day, the sole factor relied upon by the plaintiffs is the statutory stay and the so-called failure of the Bank to apply to lift it. In the course of argument, when this court asked counsel for the plaintiffs whether this meant that they were perfectly entitled to sit on their hands indefinitely, it was conceded that that was not so, but they could not be criticised for not moving within the statutory limitation period, as they had up until then, in any event, to institute proceedings.

36. I cannot accept that proposition. A party who institutes litigation has a duty to prosecute it with reasonable diligence and the court also has a duty, by virtue of both the Constitution and Article 6 of the European Convention on Human Rights, to ensure that trials are heard within a reasonable time. The common law traditionally left it to the parties to progress the litigation at their own pace. That is becoming less and less the case. Many areas of civil law, both public and private, such as judicial review and commercial litigation, automatically trigger early judicial engagement and case management once the proceedings are initiated.

37. Areas where case progression is left to the parties are likely to become fewer and disappear altogether in the future. Until that happens, in cases such as the present, judicial intervention only occurs as a result of an application by a party to litigation, but once it does, an obligation is placed on the court to ensure the timely and fair disposal of the case. Even where such intervention does not automatically occur, the State is not absolved from its ECHR obligations as the European Court of Human Rights found in *O'Reilly & Ors. v Ireland* [2005] 40 EHRR 40 where it said (at para. 32): -

“... [T]he court recalls that States are obliged to organise their legal systems so as to allow the courts to comply with the reasonable time requirement of Article 6 so that

even a principle of domestic law or practice requiring the parties to take initiatives to advance the proceedings does not dispense the State from this obligation.”

38. In my judgment, the plaintiffs in this application face a significant difficulty. They cannot dispute that their delay has been inordinate, nor in my view can they contend that it is inexcusable when they have chosen not to offer any excuse or explanation. Any excuse based on a suggestion that the statutory stay effectively stopped the proceedings in their tracks became devoid of any validity following upon the decision in *Quinn v IBRC*, delivered scarcely a month after the imposition of the stay.

39. Remaining silent in the face of a motion of this nature was the subject of strong criticism by the Supreme Court in *Anglo Irish Beef Processors Limited & Anor. v Montgomery & Ors.* [2002] I.R. 510 where Fennelly J. observed (at 518): -

“[The plaintiffs’] stark failure to proffer even the vestige of an explanation for the delay is a circumstance which should not be overlooked. It looks like mute, not to say insolent, indifference, when a litigant, positioned as the plaintiffs are in this case, evince no consciousness of the need to explain their long and egregious periods of silence. The courts are entitled to expect something more from parties who crave its indulgence.”

40. Fennelly J. went on to say that while the defendant always bears the burden of showing that the delay is inordinate and inexcusable, the court should aim at a global appreciation of the interests of justice, balancing all the considerations as they emerge from the conduct and the interests of all the parties to the litigation. The matters mentioned by Hamilton CJ. in *Primor* are not to be considered as cumulative but rather related to the central decision as to what is just in the particular case.

41. In the present instance, the trial judge appears to have been unduly influenced by the failure of the Bank to make an application to lift the stay prior to issuing the within motions and this should be considered a relevant consideration in the context of the *Primor* test. She held this to be a countervailing circumstance in favour of the plaintiffs, but in the absence of any affidavit from the plaintiffs confirming that this was or was not the reason for the failure to move, it seems to me that this conclusion was one not supported by the evidence.

42. I would respectfully take a different view from the trial judge who felt that the fact that the stay was imposed in ease of the Bank weighed more heavily than the fact that the plaintiffs could have applied to lift it. I think that perhaps overlooks the fact that precisely the same factor resulted in the opposite conclusion in the slander of title proceedings, but possibly more importantly, it does not take account of the fact that a significant change in the assault proceedings had been brought about by the removal of the Sheriff.

43. As I have pointed out already, this left what remained nebulous at best, and unstateable at worst. As in any other delay case, the onus of moving the case forward always remained with the plaintiffs and on one view, the imposition of the statutory stay was no more than an additional procedural layer to be dealt with by the plaintiffs in order to progress their claim. The fact that the stay could be viewed as being in ease of the Bank should not be seen as a countervailing factor in my opinion. I therefore cannot agree with the conclusion of the trial judge that this factor tipped the balance of justice in favour of allowing the case to proceed.

44. Counsel for the plaintiffs urged on the court that despite any perceived weakness in the claim, this was not a factor that could be added into the mix, as it were, in an application to dismiss for delay. There was no application based on the separate ground that the claim was bound to fail or the pleadings disclosed no reasonable cause of action. It was said that

the court could not simply conclude that the case should be dismissed for delay because it was likely to fail anyway.

45. That of course is absolutely correct and I accept entirely that the court, in dealing with an application to dismiss for want of prosecution, cannot embark on a weighing of the respective merits of each side's case and what is likely to happen at trial. However, as Fennelly J. points out, the court is concerned at the end of the day with doing justice between the parties and not with applying rules in a formulaic manner.

46. It is therefore not at least without some relevance to the issue of prejudice that the plaintiff has so far, despite opportunity in both the High Court and in this court, entirely failed to explain any rational basis for its surviving claim against the Bank. That must, in my view, be a factor to be weighed in the balance in deciding where the justice of the case lies.

Conclusion

47. I am satisfied that the High Court was in error in attributing the weight it did to the fact that the Bank did not apply to lift the stay and further, by not advertng to the position of the Sheriff, whose removal as I have said changed the entire complexion of the case.

48. The judge also considered that the six month delay between serving the notice of intention to proceed on the 31st May, 2017 and issuing the motion in December 2017 should be regarded as a countervailing factor. However, I think this overlooks the fact that the Bank had delivered its notice of intention to proceed in the slander of title proceedings on the 18th October, 2017 and had to wait a month before issuing the motion in those proceedings which appropriately was done in tandem with the motion in these proceedings.

49. For these reasons I would allow the appeal and dismiss the plaintiffs' claim.

50. As the Bank has been entirely successful in this appeal, my provisional view is that it is entitled to its costs both in this court and the court below. If the plaintiffs wish to contend for an alternative form of order, they will have liberty to apply to the Court of Appeal Office within 14 days of the date of this judgment for a short supplemental hearing on the issue of costs. If such application is made and results in the order proposed herein, the plaintiffs may be additionally liable for the costs of such supplemental hearing.

51. As this judgment is delivered electronically, Donnelly and Binchy JJ. have indicated their agreement with it.