

THE HIGH COURT

Record Number: 3287S/2010

BETWEEN

START MORTGAGES DAC

PLAINTIFF

- AND -

JOSEPH MC NAMARA AND JOSEPH HARRIS

DEFENDANTS

JUDGMENT of Ms Justice Power delivered on the 7th day of April 2020

1. The second named defendant ('the applicant') is the moving party in this application wherein, essentially, he seeks to dismiss the proceedings for want of prosecution and on the grounds of inordinate and inexcusable delay. These proceedings began life with the plaintiff's predecessor, Irish Life and Permanent PLC T/A Permanent TSB bringing an unsuccessful claim for summary judgment against both defendants in the sum of €311,355.71. During the procedural history of the proceedings, Start Mortgages DAC was substituted as the plaintiff (see para. 4 below). Throughout this judgment, I shall refer to the plaintiff and its predecessor as 'the bank' - unless the context otherwise requires.

Background

2. The history of events which led to the application now before the Court is as follows:

- . Summary Summons issued against the defendants on 13 July 2010;
- . a return date before the Master was on 3 June 2011;
- . a further return date before the Master on 22 July 2011;
- . a further return date before the Master on 14 October 2011;
- . a further return date before the Master on 2 December 2011;
- . a further return date before the Master on 3 February 2011;
- . the matter was adjourned for plenary hearing by the Master to the Judges' List on 30 April 2012; and
- . a return date in the Common Law Motion List was given for November 2013.

The applicant contends that no further activity or proceedings of any kind, nature or description occurred after November 2013. The bank points out, however, that an Order for Discovery was made against the applicant on 11 November 2013 directing him to make discovery of certain documents within six weeks of that date. It is common case between the parties that the applicant did not comply with the Order for Discovery. In any event, no further steps were taken after November 2013 until the applicant brought the application herein.

3. By Notice of Motion dated 14 February 2019 the applicant seeks the following reliefs:

- (1) An Order dismissing the bank's claim against him for want of prosecution pursuant to Order 122, rule 11 of the Rules of the Superior Courts 1986 (as amended) and/or pursuant to the inherent jurisdiction of the Court;
 - (2) An Order dismissing the bank's claim against him on the grounds of gross, inordinate and inexcusable delay pursuant to the inherent jurisdiction of this Honourable Court; and
 - (3) An Order dismissing the bank's claim against him pursuant to Order 19, rule 28 of the Rules of the Superior Court 1986 (as amended) on the basis that the bank's claim fails to show any sustainable cause of action against him and/or is frivolous and vexatious.
 - (4) Further or other relief.
 - (5) An Order providing for the applicant's costs to be taxed in default of agreement.
4. The application is grounded upon an affidavit sworn by the applicant on 12 February 2019. Donal O'Kelly, on behalf of the bank, swore a replying affidavit on 22 March 2019. When the motion to dismiss the claim had issued, the bank, on 24 April 2019, then served a Notice of Intention to Proceed. On 27 May 2019 the title of the pleadings was amended by the High Court to reflect the fact that the interest of Irish Life and Permanent PLC T/A Permanent TSB had been transferred to Start Mortgages DAC subsequent to the commencement of the proceedings. A further affidavit was sworn by the applicant on 18 June 2019 to which the bank's deponent replied on 12 July 2019. A third affidavit was sworn by the applicant on 17 October 2019 and a third replying affidavit was sworn on behalf of the bank on 13 December 2019.

Evidence

5. In his grounding affidavit of 12 February 2019, the applicant explains that he had and continues to have a number of loan facilities with the bank all of which are serviced and up to date and, save for the loan in issue in these proceedings, the applicant is in good standing with the bank. He claims that the bank's case against him is fundamentally flawed and his explanation may be summarised as follows. Originally, a loan in the sum of €1,000,000 was given, jointly, to him and to the first named defendant by the bank on 1 June 2006. That sum was borrowed under mortgage account number 990764-98967180 ('the mortgage account'). The loan was for 20 years and was to facilitate the purchase of four properties, namely, Nos. 215, 216, 218 and 219 Coille Tire, An Fiodan, Doughiska, Galway. The two defendants were acting in partnership at the time when they entered into the loan agreement with the bank. However, subsequently, the partnership was partitioned, and the debt was severed between the defendants. The 'Dissolution of Partnership' agreement dated 20 November 2006 resulted in each partner taking the benefit of two of the four properties. Numbers 215 and 216 became the sole property of the first named defendant and Numbers 218 and 219 became the sole property of the applicant. The bank was notified of the severing of the debt and the dissolution of the partnership. The applicant had conversations with three named bank

personnel. Towards the end of November 2006, the applicant entered into a re-financing arrangement with the bank - Permanent TSB Retail. The re-financing agreement enabled the applicant to draw down €3,000,000.00 on an account number that was different to the mortgage account. Condition 34 of that re-financing agreement provided for the partial redemption of €500,000.00 on the mortgage account. The applicant accepted this loan offer and conditions which had the specific object of paying off his portion of the original €1,000,000 debt with the first named defendant being responsible for dealing with his portion of the debt. When the €500,000.00 was paid, the bank deducted administration and other fees with the result that the sum of €462,547.28 was credited to the loan account. The payment of this amount is confirmed in a letter from the bank dated 5 January 2007 and refers to the payment lodged as having been transferred 'off principal'.

6. The applicant claims that when these facts emerged before the Master of the High Court, it was evident that the matter required to be sent to plenary hearing. It was also clear that the bank no longer had faith in its own case knowing that the debt had been severed and that the applicant's liability had been dealt with by way of the re-financing agreement. Thereafter, the bank never pursued its case against the applicant. The first named defendant has left the country and no longer works or resides in Ireland.
7. In addition to claiming gross inordinate and inexcusable delay in the prosecution of these proceedings, the applicant claims that the bank has no sustainable cause of action against him and proceedings ought never to have issued against him. After several years of inactivity, his solicitors wrote to the bank on 10 September 2018 calling upon it to serve a Notice of Discontinuance. He claims to have received no reply to that letter nor was any Notice of Intention to Proceed served. In these circumstances, the applicant claims that the proceedings are, effectively, dead. However, they remain extant and he wants to move on with his life without this case 'hanging over him' as matters currently stand.
8. The bank's deponent, Mr. Donal O'Kelly, solicitor, swore a replying affidavit on 22 March 2019. He referred to the Order for Discovery made on 11 November 2013 and how on 5 March 2019 (after the present application had been brought) he had written to the applicant's solicitors seeking the affidavit of discovery. Mr. O'Kelly swears that the bank has always denied that it was aware of or on notice of or accepted or acquiesced in the alleged severance of the alleged partnership between the applicant and the first named defendant.
9. The second affidavit sworn by the applicant on 18 June 2019 sets out the prejudice which he claims to have suffered as a result of the bank's delay and procrastination in the period 2013-2019 when the proceedings were never advanced. His evidence may be summarised as follows. He has always been involved in business, generally, and, more particularly, in the property business as an investor. The outstanding proceedings continue to affect his credit rating. The loan facility, the subject matter of these proceedings, features within an exhibited Report from the Irish Credit Bureau DAC dated 11 April 2019. The Code 9 refers to the fact that the facility has not been paid and/or is a

loan which has payments in arrears. This poor credit rating affected him between 2013 and 2019 and prevented him from rebuilding his business at a time when the economy had improved, particularly, from 2014 / 2015 onwards. He has been discouraged from making loan applications in circumstances where this poor record existed as it would have been pointless and a waste of time. Many business opportunities had arisen, particularly, in Galway city and the West of Ireland over the past three years. He had been unable to avail of such opportunities because he was locked out of the credit market based on the poor credit record remaining on file with the Irish Credit Bureau. He was unable to obtain credit to purchase several properties and developments which were of interest to him—all of which are listed.

10. The loan in question was taken out with another individual who has left the country. The exhibited Deed of Partition had the effect of severing the loan as between the co-borrowers and the bank agreed to this severance. As to prejudice suffered by the lapse of time, several individuals had left the bank as far back as 2012. The prejudice since then has multiplied with the passage of years and by the fact that Permanent TSB has, apparently, disposed of the alleged facility to Start Mortgages DAC. There has been no explanation for the non-progression of proceedings in the intervening years. His life has been placed on hold while everything was left in abeyance by the bank. He has suffered considerable stress over the years. His wife and family have also been affected by the proceedings 'hanging over' him and them. His sleep has been affected on a regular basis. He and his wife suffered considerable anxiety over the years wondering whether matters would 'spring back to life'. An exhibited medical report from his doctor, dated 10 June 2019, confirms that the applicant is a long-standing patient of hers and that he attended her surgery in March, April and May 2011 suffering from anxiety and depression. She prescribed medical treatment for his condition.
11. The applicant then refers to an affidavit sworn by him on 21 June 2011 which set out the evidence he had given to the High Court at that time concerning the division of the partnership and the bank's knowledge thereof. It includes the applicant's evidence concerning the history of the loan on the mortgage account wherein he claims that the balance owing on the mortgage is the exclusive responsibility of the first named defendant. His account of how he had discharged his share of the loan is set out in that affidavit, but it has already been summarised above (para. 5). In the affidavit of June 2011, the applicant had sworn that whenever he received notifications from the bank in relation to the loan account going into arrears, he always communicated to the relevant parties that the liability which the bank sought to visit upon him had already been discharged and that if any monies were due and owing to the bank, they were owed by the first named defendant.
12. The applicant claims that it is important to remember that the refinancing arrangement was granted by the same bank (Permanent TSB) that had granted the loan on the mortgage account and that its personnel well knew that his half of the McNamara/Harris borrowing had been paid off by him. He says that as far back as February 2012 he had called upon the bank to have the relevant persons who had dealt with the applicant swear

affidavits if they disputed the fact that his share of the loan had been discharged and that the refinancing arrangement was partly for that purpose. The bank has never given sworn evidence to this effect nor has it progressed the proceedings. The refinancing arrangement is fully up to date in terms of repayments. At no stage has any of the named personnel he dealt with at the time of the re-financing arrangement ever contradicted his account of what was agreed and most of them have now left the bank. The proceedings were effectively abandoned by the bank in 2013 when the evidence of his defence was set out on affidavit. However, once his motion to dismiss for want of prosecution issued, the bank sought to agitate issues concerning the Order for Discovery made in 2013. This was grossly unfair as he no longer has access to business diaries, text messages and phone numbers of that time. The firm of solicitors he engaged at the time of the dissolution of the partnership and the subsequent refinancing arrangement no longer exists and neither of the two firms of solicitors who have acted for the applicant since then, has been able to take up documents or records from them that would assist him in his defence.

13. Mr. O'Kelly swore a replying affidavit on 12 July 2019 the contents of which may be summarised thus. The sum of €1,000,000 was borrowed by the applicant and Mr. McNamara on 1 June 2006. A Mr. Kevin Brady had averred on affidavit dated 28 November 2011 that the bank was not advised of the partition agreement at the time it was made. Mr. Brady had spoken to the named personnel who, allegedly, had known about the agreement and they had denied any awareness of it. The partition agreement did not change the nature of the contract concluded between both defendants and the bank. There was no novation agreement by which the loan was separated. The bank did not agree to release the defendants from their joint and several obligations to repay the loan. As security for the €3,000,000 borrowed, the applicant agreed to grant a mortgage to the bank over two properties at Coille Tire, Doughiska, Galway. That agreement was dated and signed on the 19 December 2006. The applicant did not open separate Land Registry folios to record his ownership of the properties nor are there any purchase leases in his favour on the parent folio. Further proceedings may be necessary to address this failure to ensure that security was put in place in favour of the bank. One of the named personnel referred to by the applicant now works at the bank's head office and the other two have been contacted by the bank. The letter of 5 January 2007 recording partial redemption of the loan was sent to both borrowers. Condition 24 in the €3,000,000 loan offer of December 2006 provides for partial redemption on the mortgage account and there is nothing to suggest from the letter that the bank was releasing the applicant from his obligation to pay the loan. The applicant's presumption that the proceedings were dead is inconsistent with his averment that he suffered stress whilst they have been hanging over him.
14. The applicant swore an affidavit on 17 October 2019 wherein he referred again to the serious prejudice that had arisen by reason of the bank's delay. He failed to understand why no one with actual knowledge of the matters in question has ever sworn an affidavit on behalf of the bank. Mr. O'Kelly had averred on a number of occasions to the bank's lack of knowledge concerning the partition arrangement reached between the defendants.

However, the bank's own documents reveal its true state of knowledge. An exhibited memo dated 31 October 2013 entitled '*Recommendation for Credit Committee Review*' shows that the bank was, in fact, aware of the decision to dissolve the partnership and to partition the debt. In view of security problems that had come to light, the bank had considered instituting proceedings against the solicitors who had acted for the parties. The applicant wrote to the bank on 19 September 2013 concerning the partitioning of properties. The exhibited bank memo indicates that as of 18 November 2013, following a phone call from the applicant's solicitor on the 7 November 2013, a review was to be carried out by the bank and the memo confirmed that a Mr. Kenneth Mortimer would '*be in a position to revert by the end of November*'. No further response to his correspondence was received and the bank did nothing thereafter to process this case until the applicant brought this motion to have it struck out for delay. It was inappropriate for Mr. O'Kelly to be swearing affidavits explaining the delay when the documents exhibited indicate that the bank had specifically asked that proceedings be suspended until he, Mr O'Kelly, had carried out a full review of security issues. He appears to possess 'a monopoly of knowledge' as to why the case went dead after 2013. Although he points to people who might still be working at the bank, none of these people has come forward or shown any willingness to be involved in this case. Real and genuine prejudice has been caused due to the complete inactivity on the part of the bank.

15. Mr. O'Kelly swore a third affidavit on behalf of the bank on 13 December 2019 which was filed on 19 December 2019. It may be summarised thus. His earlier sworn testimony was based on Mr. Brady's affidavit of 28 November 2011. He is constrained in what he can say in relation to the memo entitled '*Recommendation for Credit Committee Review*' now exhibited by the applicant. He had never seen it before. It appears to be based upon information provided by a Mr. Kenneth Mortimer. It records that the defendants did not seek formal consent from the bank to discharge their joint liability, separately. It asserts the bank's knowledge of the partition agreement. Mr. Kevin Brady's affidavit of November 2011 is more likely to be reliable than this internal unsworn memorandum. Much of it concerns the first defendant's sole borrowings. The purpose of the document was to recommend these proceedings be paused subject to the results of a review of the bank's legal securities department by his (Mr O'Kelly's) firm of solicitors. He does not know whether the bank's Credit Committee decided to pause the proceedings or to instruct him to advise on steps to rectify the security position. He is, however, sure, that he was not instructed by the bank to take any steps in the proceedings or to advise on the security problem. He was instructed to seek compliance in December 2013 with the Order for Discovery that had been made. He sees no conflict of interest or any conflict between his position and the bank's arising from the recommendation that proceedings be paused pending a security review by him. Demand for repayment of the defendants' borrowings was made on 21 May 2010. The effect of s. 36 of the Statute of Limitations 1957 (hereinafter 'the Statute') would allow the bank to bring proceedings to recover the principal sum due at any point before June 2022. If proceedings are dismissed the bank will not be precluded from issuing fresh proceedings. It would be wasteful and disproportionate to dismiss the proceedings.

Legal Principles

16. The principles applicable to an application to dismiss for want of prosecution due to inordinate and inexcusable delay are well settled. The seminal judgment of Hamilton C.J. in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 offers guidance concerning the approach to be adopted when considering such an application. The *Primor* test was summarised succinctly by Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206 wherein she stated:

"18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. 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."*

The Balance of Justice

17. As noted above, the Court must not dismiss the proceedings unless it is satisfied that the balance of justice would so require. A non-exhaustive list of factors that the Court is entitled to take into consideration and to which it may have regard when weighing up the balance of justice was set out in the *Primor* judgment. These include:

- (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 that merely caused by the delay, including damage to a defendant's reputation and business.*
18. These factors to which the Court is entitled to have regard when considering where the balance of justice lies are not to be treated as '*distinct cumulative tests*' but rather as '*related matters affecting the central decision as to what is just*' (see *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510). The *Primor* principles have been considered and applied in numerous cases since they were first articulated, including, in *O'Connor v. John Player & Son Limited* [2004] IEHC 99, *Gilroy v. Flynn* [2004] IESC 98, *Manning v. Benson Hedges Ltd* [2004] 3 I.R. 556, *Stephens v. Paul Flynn Limited* [2005] IEHC 148, *Stephens v. Flynn* [2008] 4 I.R. 31, *Quinn v. Faulkner t/a Faulkner's Garage & anor* [2011] IEHC 103, and *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50.
19. In *Stephens v. Flynn* [2008] 4 I.R. 31 Kearns J. considered that even partial prejudice could justify the dismissal of proceedings when considering the balance of justice in any given case. The public interest in the timely administration of justice under Article 34.1 of the Constitution and the fact that there should no longer be an endless indulgence on the part of the Courts in delay was recognised by Hogan J. in *Quinn v. Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103.
20. A separate and distinct basis for the Court to exercise its inherent jurisdiction is to be found in a line of jurisprudence that places the emphasis more on the idea of unfairness to the defendant rather than the 'balance of justice' (see, for example, *O'Domhnaill v. Merrick* [1984] I.R. 151; *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135; and *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140). This line of authority has been described by Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27 as '*an important and partly overlapping jurisprudence.*'
21. A succinct synopsis of the general jurisprudence on delay and dismissal for want of prosecution was outlined by O'Regan J. in *Gannon v. Brown* [2019] IEHC 799 where she noted the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98 to the effect that the Courts have a heightened consciousness of the possibility of unfairness accruing where an action may be allowed to proceed, in circumstances where witness testimony is depended on and where the cause of action arose a considerable period ago (at p. 3). Article 6.1 of the European Convention on Human Rights ('the Convention') requires that proceedings be prosecuted within a reasonable time. What is reasonable requires, *inter alia*, a consideration of the circumstances of the case and the conduct of the plaintiffs (*McMullen v. Ireland* App. No. 42297/98, ECHR, 29 July 2004).
22. The Court of Appeal has also considered and confirmed the principles governing applications to dismiss for want of prosecution. In *Gorman v. Minister for Justice*,

Equality and Law Reform & ors [2015] IECA 41, even in the absence of specific prejudice against the defendant, a twelve-year delay between the relevant events and the trial of the action was held to warrant the dismissal of the pleadings. In *Cassidy v. The Provincialate* [2015] IECA 74, the test set by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151 was noted (at p. 158) namely, that a case might be dismissed if there was a real or substantial risk of an unfair trial or where defending a case would entail an inexcusable and unfair burden. When considering a defendant's role in delay when determining where the balance of justice was to be found, Irvine J., in *Millerick v. Minister for Finance* [2016] IECA 206, distinguished between culpable delay and mere inaction of the part of a defendant. She also considered (at para. 32) that where the delay was inordinate and inexcusable, even marginal prejudice may justify a dismissal. However, the absence of proof of prejudice does not necessarily mean there should not be a dismissal of inexcusably delayed proceedings. The onus rests upon the plaintiff to identify countervailing circumstances that might cancel the effect of the delay.

The Parties' Submissions

23. At the hearing, counsel for the applicant submitted that there had been a delay of over 5 years since any step had been taken in these proceedings prior to the making the application herein. The Order for Discovery had been made in November 2013 and nothing had occurred since then until the motion had issued in February 2019. At the date of the hearing, over 6 years had elapsed. Whilst the action commenced by way of Summary Summons issued in 2010, the proceedings were remitted to plenary hearing once the applicant's defence was outlined. That defence was that the proceedings as against the applicant were misdirected as he had already discharged his half of the debt when the loan was severed. The bank had either known of or acquiesced in the severance, and his share of the debt was discharged when the bank provided a refinancing arrangement to the applicant alone—a condition of which was that €500,000 be paid against the debt in question. The delay in prosecuting the proceedings had caused difficulties and prejudice to the applicant. Firstly, it has had an adverse effect upon his health. He has suffered significant stress with the proceedings left hanging over him and his family. He attended a medical practitioner and received treatment to help cope with the stress. The delay had also impacted, adversely, upon his business interests. Whilst all his loan facilities were fully serviced and up to date, his credit rating was, nevertheless, damaged as a result of the delay, particularly, from 2013 and 2019 when the economy had improved. Serious business opportunities had presented themselves but based on a poor credit rating arising only in respect of this disputed loan, he was unable to build and develop his business. Furthermore, there were serious evidential difficulties for the applicant given the inordinate lapse of time as a number of the bank's personnel who were aware of the partnership partition and severance of the loan, no longer worked in the bank and, clearly, had not come forward to swear affidavits contesting his account of what had transpired. Evidence to be found in diaries, text messages and other documentation from that time was no longer available.
24. Counsel for the bank submitted that the application should be dismissed. He accepted that the delay was inordinate and that there was no excuse of substance available to the

bank. However, he argued that the balance of justice would lie in allowing the proceedings to continue. He relied on the affidavit evidence of Mr. O’Kelly in response to the applicant’s evidence. Much of his submission at oral hearing, focused on the fact that the bank would be entitled to bring fresh proceedings even if the present case were to be dismissed because its claim against the defendants is not statute-barred. Referring to s. 36 of the Statute, he claimed that a 12-year limitation period applies to the recovery of any principal sum secured by a mortgage or by a charge over land. In written legal submissions this point was repeated. Citing the comments of Lord Diplock in the House of Lords decision in *Birkett v. James* [1978] AC 297 (at p. 322), the bank submitted that the power to dismiss proceeding (save for ‘contumelious conduct’ on the part of the plaintiff) should not be issued within the limitation period where it is likely that fresh proceedings will be issued. This principle, it was argued, was endorsed by the Irish Courts in *Stephens v. Flynn* [2008] 4 I.R. 31. The Irish Courts have not addressed the question of whether a delay motion should be refused where the limitation period has not yet expired, and there is no reason why a court could not or should not place weight on that factor. The Court should infer that the bank is likely to reissue proceedings should this action be dismissed. On this basis it would be wasteful to dismiss.

Discussion

25. There can be little doubt but that a failure, since November 2013, to take any step whatsoever in proceedings that are, on their face, relatively straightforward and non-complex is inordinate by any standards. In circumstances where no reason whatsoever was offered by the bank for its failure to prosecute the action, it is also inexcusable. In applying the appropriate legal test to the facts of this case, the Court is assisted by the fact that both parties agree that the delay in question is both inordinate and inexcusable. The only contested issue, therefore, in this application is whether the balance of justice justifies the dismissal of the proceedings.
26. The starting point, per *Primor*, is that the Court must not dismiss the proceedings unless it is satisfied that the balance of justice would so require. In coming to a determination as to where that balance lies, regard must be had to the constitutional principles of basic fairness of procedures. I recognise that any prejudice suffered by the applicant by reason of the delay in prosecuting this claim, must be balanced against the plaintiff’s constitutional right of access to the Court (see *Cavanagh & anor v. Spring Homes Developments Limited & anor* [2019] IEHC 496).
27. The unfairness asserted by the applicant is threefold—personal, professional and procedural. Litigation, even where prosecuted promptly, is undoubtedly stressful for parties involved but where it is protracted, unnecessarily, that stress can only be augmented. Uncertainties as to the ultimate outcome are compounded by ongoing concerns about potential financial exposure. In considering whether the delay has caused prejudice to the applicant, there is uncontroverted evidence before the Court that he has suffered adverse consequences to his health and wellbeing by reason of the delay in prosecuting these proceedings. He has also undertaken a prescribed course of medical treatment to help him deal with those consequences. In addition, it is self-evident that

as the applicant is in the business of property development, he cannot but have found himself constrained in expanding his business by reason of a poor credit rating arising solely as a result of the loan facility in issue in these proceedings. This professional constraint is all the more unfair in circumstances where all his other borrowings, including, the €3,000,000 refinancing arrangement with the bank, are fully serviced and up to date. Had this case been advanced and resolved a number of years ago, the applicant could have moved on and built up a positive credit rating. Furthermore, it is probable that by reason of the passage of time at least some of the records that could be supportive of the applicant's defence in this case are no longer available at this remove. Whilst the bank claims that persons involved in the refinancing arrangements are available to dispute the applicant's account of the severance of the loan, it is striking that it has not produced any sworn evidence in this application from any such person of an intention to be available and willing to contradict the applicant's version of events at the trial of this action. This is so, notwithstanding repeated requests by the applicant so to do. In the light of the foregoing, I am satisfied that the inordinate and inexcusable delay in this case has caused significant prejudice to the applicant on a number of fronts.

28. However, since litigation is a two-way process, the applicant's contribution, if any, to the delay in question requires to be considered. In opposing the application, the bank has pointed to the fact that the applicant failed to comply with the Order for Discovery that was made in November 2013. The applicant submitted that in the absence of compliance with that order, it behoved the bank to move more swiftly, it having at its disposal an 'arsenal of weapons' which might have been utilised. To my mind, the applicant's inactivity after the making of the Order for Discovery must be seen in its proper context. Some weeks beforehand, on 19 September 2013, he had written to the bank setting out his account of how he had, in fact, discharged his portion of the loan, the subject matter of these proceedings. His solicitor followed up with a telephone call on 7 November 2013 (see para. 14 above). The documents opened to the Court indicate that as of 18 November 2013, the bank was considering the applicant's correspondence and had confirmed to him that it was likely that it would be *'in a position to revert by the end of November'*. These communications were taking place before and after the Order for Discovery was made. The bank, in fact, never got back to the applicant. The documents exhibited support the view that at some point in late 2013 the bank decided to pause these proceedings pending a review of the file by its deponent (Mr. O'Kelly) without informing the applicant. In these circumstances, I am satisfied that whilst the applicant did not comply with the Order for Discovery, his stance was more one of understandable inactivity as he awaited a considered response from the bank rather than one of culpable acquiescence in the delay that ensued. As Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510 recalled *'it is the plaintiff who bears the primary responsibility for prosecuting the action expeditiously and the lesser blame should be apportioned to a defendant where they have been guilty of mere inactivity as opposed to actual delay.'* To my mind, the applicant cannot be said to have contributed to the inexcusable delay in this case. His inactivity when seen in context, is understandable and insufficient, in itself, to give rise to any culpability on his part (see *Millerick*, para. 36). As the Court of Appeal observed in *Tanner v. O'Donovan* [2019] IECA 24, the fact that a

defendant has been inactive '*does not excuse a plaintiff from prosecuting proceedings with the appropriate degree of expedition and vigour*'.

29. For the avoidance of doubt and insofar as it is a factor required to be considered in an application of this kind, it has not been established nor even alleged that the applicant's conduct, in any way, caused or induced the bank to incur further expense in pursuing the action.
30. In terms of any risk to the fairness of the trial arising from the prejudice to the applicant caused by the delay, I have already noted that by the passage of time at least some of the records that could be corroborative of the applicant's defence in this case are likely to be no longer available. I am also satisfied that he is likely to encounter difficulties in securing the evidence of a number of relevant witnesses, including, his former solicitors and some of the bank personnel who were involved with the applicant around the time of the refinancing arrangement. Additionally, it appears that his former business partner, the first named defendant, has left the jurisdiction and in circumstances where the bank has already obtained summary judgment against him in these proceedings, it is unlikely that he will be available to give evidence should this case proceed to trial. In these circumstances, the potential impact which the absence of corroborative records and relevant witnesses may have upon the fairness of the trial should this case be allowed to proceed is not to be understated. The reality of obtaining oral and documentary evidence for a trial some 14 years after the facts in issue, is a matter which carries significant weight in assessing where the balance of justice lies.
31. The bank urges this Court not to dismiss these proceedings because if it does so, it is likely that fresh proceedings will be instituted. Considerable emphasis was placed by the bank, both in oral and written submissions, on the assertion that the claim is not statute-barred. Reliance was placed on s. 36(1)(a) of the Statute—albeit notably late in these proceedings—to argue for the existence of a twelve-year limitation period. The likelihood of fresh proceedings, it claims, is a factor which should weigh heavily in the assessment of where the balance of justice lies. To dismiss the proceedings in such circumstances, it claims, would be wasteful of court resources.
32. Counsel for the applicant disputes this assertion and points to *Promontoria (Arrow) Ltd v. Burke* [2018] IEHC 773 in support of its contention that, in this regard, the bank is skating on thin ice. In that case, Barniville J. was satisfied that an arguable case had been raised in relation to the bank's entitlement to rely on that provision and he was not persuaded that it was '*very clear*' that the defendants would fail on their arguments in relation to the non-applicability of s. 36(1)(a) of the Statute in that case.
33. It was argued by counsel for the bank that the judgment in *Promontoria* must be seen in context and read in the light of an earlier judgment of Laffoy J. in *ACC v. Malocco* [2000] 3 I.R. 191. In *Malocco*, the High Court rejected the argument that the bank's proceedings were statute-barred and held that the limitation period in respect of the principal sum was 12 years from the date of demand. The applicant replies that, arguably, a 12-year limitation period applies to a loan secured by a mortgage but in this case the bank itself

had noted its own difficulties in relation to security for the loan. Indeed, so significant were its concerns in this regard that it was thinking about suing the solicitors who had acted for the borrowers and the bank for breaches of undertakings and negligence (see para. 13 above).

34. Suffice it is to say that there is disagreement between the parties on the question of the Statute and, indeed, on the related issue of whether the loan in question one was secured by a mortgage. The reality is that none of these issues fall for determination by this Court on this application. If this case were to proceed to trial, the applicable limitation period would, indeed, be a matter for the trial judge to determine. In coming to a view on that issue, she or he may well decide to hear and assess the evidence in relation to securities. None of this, however, is determinative of the question to be answered in this application. This Court is not required to decide a point which is, clearly, a matter for defence at the plenary hearing nor has it to rule on issues of evidence. These are matters reserved for a trial judge. This Court is obliged only to focus its attention on where the balance of justice lies—now—at this stage of the proceedings. To the extent that the matters raised in relation to the Statute have any relevance in this application, they form part of the overall circumstances of the case. The particular weight, if any, to be attributed to these unsettled issues is a matter for the Court in assessing where the balance of justice lies.
35. I do not accept the bank's submission that the Court should not, in principle, dismiss proceedings for want of prosecution where a plaintiff's claim remains within the statutory period of limitation. The function of the Court is to administer justice. Permitting a plaintiff who has instituted proceedings to stall them, without cause, for years on end, solely on the ground that the Statute has not expired, does not have the appearance of justice. Nor do I accept that Lord Diplock's statement in *Birkett v. James* [1978] A.C. 297 at p. 322 (which was quoted in the bank's written submissions) can only be construed as meaning that it will rarely be appropriate to dismiss proceedings for delay where the plaintiff is still within time to commence fresh proceedings in respect of the same cause of action. The sentence referred to, specifically, by the bank states merely that '*time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay.*' That is to make no observation let alone a finding in respect any period of time that elapses *after* the institution of proceedings. Indeed, Lord Diplock, in the passage cited by the bank, went on to state: '*To justify dismissal of an action for want of prosecution the delay relied upon must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued.*' (Emphasis added.) It is precisely the time which the bank allowed to lapse *after* these proceedings were issued that is the focus of this Court's consideration in this case.
36. The bank has offered no explanation for its failure to prosecute its claim *after* it instituted proceedings. Such evidence as has been exhibited in this application, points to what is the most likely reason for the bank's inertia, namely, the substantive issue that had been raised by the applicant in his correspondence. That correspondence triggered the pausing of the proceedings in 2013. The legal proceedings into which the applicant had been

drawn—with all the attendant personal, professional and reputational anxieties caused thereby—were left looming in abeyance for over five years.

37. In *Comcast International Holdings Inc. v. Minister for Public Enterprise & ors* [2012] IESC 50, McKechnie J. emphasised that in looking at a period of delay, a subjective approach is required because different treatment may be warranted for the same period of delay in different cases, and the Court should react to the given facts of a particular case. The given facts of this case are particularly stark. The proceedings were issued in 2010. The applicant put forward a stateable defence—the details of which he provided by way of sworn evidence. That defence was explained to the bank both in written correspondence from the applicant and in his pleadings in these proceedings. Having received that explanation, the bank, it would appear, decided to pause these proceedings in or about November 2013. The applicant was never informed. That decision was recorded in writing. Significant as it was, it was not brought to the Court's attention when the bank filed its replying affidavit opposing the applicant's motion. This apparent want of candour on the part of the bank tends to exacerbate an already unacceptable situation which it had allowed to develop through delay in the course of its dealings with the applicant in these proceedings. Furthermore, the bank's response to its own document is perplexing. Through its deponent, it gives its sworn testimony and he testifies that he had never seen it before. He is the voice of the bank in this application and his position is that he does not know why the bank has not proceeded with its claim. What he is sure of is that he was not instructed after 2013 to take any further action to progress these proceedings (see para. 15 above).
38. In *Millerick Irvine J.* observed that even marginal prejudice caused to the defendant by reason of the delay may justify the dismissal of the proceedings. Referring to *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510 she was satisfied that '*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*'. The bank in this case has pointed to no countervailing circumstances to cancel out the effect of its behaviour upon the applicant.
39. I have considered but do not attribute considerable weight to the bank's argument that it may re-issue proceedings should this application succeed. I accept the applicant's submission that this Court cannot determine the application on the basis of some hypothetical claim that might be brought in the future. The bank must accept the observations of Kearns J. that the legal landscape in this jurisdiction with regard to delay has undoubtedly changed in the light of the enactment of the European Convention on Human Rights Act 2003 (see *Desmond v. MGN Limited* [2009] 1 I.R. 737). Hardiman J. had also recognised this altered landscape and stressed in *Gilroy v. Flynn* (at p. 3) that:

"[T]he 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. [...] [F]ollowing such cases as McMullen v. Ireland [ECHR 422

97/98. 29 July 2004] and the European Convention on Human Rights Act, the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."

Clarke J. (as he then was), in *Stephens v. Paul Flynn Limited* [2005] IEHC 148 had also recognised that the calibration of the weight to be attached to various factors in the assessment of the balance of justice may need to be re-assessed and adjusted in the light of prevailing conditions. *'The balance of justice'*, he stated, *'may be tilted in favour of imposing a greater obligation of expedition and against requiring the same level of prejudice as heretofore'* (at p. 8). If this Court were to tolerate a system wherein proceedings against an individual can lie dormant without any action whatsoever being taken for in excess of five years, then, in my view, such tolerance could not constitute anything other than a violation of the right to trial within a reasonable time.

40. There is also, as Irvine J. in *Millerick* observed, a constitutional imperative to bring to an end *'the all too long-standing culture of delays in litigation'* so as to ensure the effective administration of justice and basic fairness of procedures. This constitutional obligation presupposes that the Court itself will strive to ensure that litigation is conducted in a timely fashion.
41. Having regard to the parties' constitutional rights of access to justice and to fair procedures and applying the relevant principles emanating from the case law on the issue of delay and want of prosecution, I have reached a considered view on this application. The given facts of this case lead me to conclude the delay in question has caused serious prejudice to the applicant and gives rise to a substantial risk of unfairness should this matter go to trial. I am satisfied that the balance of justice requires that these proceedings be dismissed for want of prosecution and on the grounds of inordinate and inexcusable delay.
42. Accordingly, the relief sought by the applicant is granted and these proceedings are dismissed.