

THE HIGH COURT

[2020] IEHC 603

[Record No. 2017/432 COS]

IN THE MATTER OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF TERENCE MCCARTHY BUILDING LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF SECTIONS 608 AND 610 OF THE COMPANIES ACT, 2014 AND SECTION 298 OF THE COMPANIES ACT, 2014

BETWEEN

JAMES J. GRANT

APPLICANT

AND

TERENCE MCCARTHY AND MARY MCCARTHY

RESPONDENTS

JUDGMENT of Ms. Justice Pilkington delivered on the 30th day of October, 2020

1. By originating notice of motion which issued on the 13th day of December, 2017, the applicant essentially seeks two reliefs in the following terms: -
 - (a) An order pursuant to ss. 608 and 610 of the Companies Act, 2014 compelling the respondents to repay the sum of €1,091,288 or restore monies or property belonging to the above-mentioned company which have been either misapplied or retained by them or for which they have become liable or accountable to the company, together with interest at such a rate as this Honourable Court thinks just.
 - (b) Further, or in the alternative, an order pursuant to s. 298 of the Companies Act, 2014 directing that the respondents contribute such sum as this Honourable Court thinks just to the above-mentioned company by way of compensation in respect of the misapplication, retainer, misfeasance and/or other breach of duty as set out above.
 - (c) Further and other order and costs.
2. The chronology of this matter is of some importance as the respondents allege, amongst other matters, that this application is statute barred and also maintain allegations of *laches* and delay which, they assert, are sufficient to disentitle the applicant to reliefs.
3. The dates themselves are not in dispute.
4. On the 23rd day of January, 2009, the applicant was appointed as voluntary liquidator of the company, Terence McCarthy Building Limited ("the company").
5. Pursuant to the applicant's statutory obligation, reports pursuant to s. 56 of the Company Law Enforcement Act 2001, were made to the Office of the Director of Corporate Enforcement ("s. 56 reports") on the 22nd day of July, 2009, the 23rd day of March, 2010, the 8th day of December, 2010, the 9th day of June, 2011 and the 8th day of

December, 2011. Accordingly, the s. 56 reports span the period July, 2009 - December, 2011.

6. It is again common case that the respondents (who are husband and wife) are or were directors of the company with the second named respondent also being the company secretary. On the 24th day of March, 2013, an originating notice of motion was issued seeking reliefs pursuant to s. 150 of the Companies Act, 1990 that both directors be restricted for a period of five years pursuant to the terms of that section.
7. By order of Finlay Geoghegan J. in proceedings (2013 No. 99 COS) on the 24th day of June, 2013, the court ordered that, pursuant to s. 50(1) of the Companies Act, 1990, the respondents "shall not for the period of five years from the date hereof be appointed or act in any way whether directly or indirectly as a director or secretary or be concerned or take part in the promotional formation of any company unless it meets the requirements set out in subs. (3) of the said section".
8. The order records that there was no appearance by or on behalf of the respondents; they took no part in the proceeding.
9. Accordingly, the five-year period, pursuant to s. 50(1) in accordance with the order above, has now expired.
10. As set out above, the present motion issued on the 13th day of December, 2017, made returnable for the 15th day of June, 2018 but was in fact heard by way of remote hearing before the court on the 3rd day of July, 2020.
11. Within these proceedings, the applicant liquidator has sworn three affidavits on the 11th day of December, 2017, the 12th day of August, 2019 and the 1st day of July, 2020 respectively. The first named respondent filed affidavits on the 22nd day of April, 2018 and the 7th day of July, 2020 and the respondents' solicitor filed an affidavit on the 30th day of June, 2020.
12. The grounding affidavit of the applicant sworn on the 11th day of December, 2017 avers:
 -
 - (a) The incorporation of the company on the 19th day of January, 1999 and its carrying on business in the south east as a construction company from premises at Dungarvan Business Park.
 - (b) On the 23rd day of January, 2009, the members passed a special resolution at an extraordinary general meeting pursuant to s. 268 of the Companies Act, 1963 that the company be wound up, that, at a subsequent meeting of creditors of the company held on the same day, the applicant was nominated to act as liquidator and consented so to do.
 - (c) He confirms by reference to a CRO search that the respondents were directors of the company at the date of the commencement of the winding up. At the date of its

winding up, the company was unable to pay its debts within the meaning of s. 570 of the Companies Act, 2014.

- (d) It is agreed by all that one of or perhaps the only reason for the liquidation of the company was linked to the serious downturn in the construction industry in Ireland in respect of the financial crash in or about 2007/2008.
 - (e) That a receiver was appointed to the company on the 9th day of February, 2009 pursuant to a debenture entered into on the 28th day of March, 2000 between the company of the one part and the governor and Company of the Bank of Ireland ("Bank of Ireland") of the other part.
13. The financial status of the company is of some significance in this matter and it is fair to say that the applicant's perception of the role played by the respondents within the company changed over time.
14. The applicant relies heavily, at least initially, upon a document furnished by the director comprising their estimated statement of affairs as at the 23rd of January, 2009.
15. The liquidator considered that, in terms of availability of assets to the creditors of the company, the assets comprised within the statement of affairs described as "stock and work in progress" ("WIP") comprised a significant value at €1,165,640. In any event, the statement of affairs disclosed an ultimate balance of €113,664 which was deemed sufficient to pay the creditors.
16. This is in turn linked to the applicant's contemporaneous notes on the liquidation meeting (whose contents have not been contradicted) on the 26th of January, 2009. In respect of the position with regard to WIP, the following is recorded: -
- "TMc advised that four houses in Stradbally were included in WIP but they were unable to sell same (apparently the site name and two contracts are required to complete any sale i.e. build cost and site cost). He did his best to keep the ?? (assume business) but had to call a halt. Bank account money was frozen... and he could not pay anyone. He was happy debtors would be collected but would revert on makeup and retention. Also would come back to explain why deficit had fallen from €2 million in December 07 to practically nil."
17. The difficulty, if I may describe it as such, is revealed in a letter to the Office of the Director of Corporate Enforcement of the 23rd day of March, 2010. It discloses the following:
- (a) A joint and several guarantee in favour of the Bank of Ireland relating to a sum of just in excess of €3 million advanced to the company.
 - (b) A joint and several guarantee in favour of Bank of Ireland Finance Limited of which there is some €41,000 remaining as current liability.

(c) A joint and several personal guarantee with Bank of Scotland (Ireland) Limited.

18. With regard to the WIP, the report states as follows: -

"2.3 My initial investigations appear to indicate that the full nature and extent of the contractual commitments between the company and the directors appear to be in the region of €300,000. However, I have subsequently discovered that the houses at Stradbally were not in fact assets of the company which I could dispose of. The land was presently owned by the directors who had engaged the company to construct the houses albeit that (improperly in my opinion) there was no documentation to vouch the nature of the contractual relationship between the parties.

Since my last report, however, I have formed a preliminary view that the figure of €300,000 may need to be revised upwards substantially to a figure in excess of €1 million made up as follows..."

The report continues: -

"In respect of the WIP at the time of writing, no sums have been remitted to me by Mr. and Mrs. McCarthy personally and I am inclined to the view that they are indebted to the company for a sum which is anywhere between €300,000 and €1,076,288. I am presently taking legal advice in relation to same and the best means by which the company can recover these monies once the precise sum due and owing has been quantified and ascertained."

19. The report then goes on to raise certain concerns with regard to a potential conclusion with regard to the issue of misfeasance pursuant to s. 298 of the Companies Act, 1963 and again that legal advice is awaited in that regard.

20. Under the heading "Conclusion", having initially considered instituting s. 150 proceedings, it continues: -

"I am of the view that my investigations can only be completed when further information is to hand from number of company offices, promoters and agents. I have asked my legal advisor to explore the possibility of utilising s. 245 of the 1963 Act as a means of obtaining same.

In addition, I envision issuing proceedings against the directors personally in respect of the sums owing and I am currently in the process of seeking approval from the committee of inspection to pursue these matters through the appropriate legal channels."

21. From the outset, counsel for the applicant accepted that there had been considerable delay in this matter. The issue is dealt with in more detail below. The four properties that ground the applicant's complaint have long since been sold, so the possible satisfaction of any creditors is not immediately apparent.

22. The first named respondent has filed two affidavits, the first on the 25th day of April, 2018 and the second in reply to a further affidavit of Mr. Grant sworn on the 7th day of February, 2020.
23. Mr. McCarthy takes serious issue with the delay in this matter, pointing to the second s. 56 report on the 23rd day of March, 2010, the recommendation for s. 150 proceedings on the 8th day of December, 2011 and the restriction order granted by the court on the 24th day of June, 2013.
24. In essence, he avers that the totality of the matters required for this application was known by that time (he says in his affidavit at the latest on the 8th day of December, 2011) – counsel for the respondent states that he is obliged pursuant to the terms of the case law to “pin his colours to the mast” and he nominates the earlier period of the 23rd day of January, 2009 in that regard.
25. Mr. McCarthy disputes any suggestion of duplicity and states that there was a dramatic change in the valuation of the work in progress from the s. 56 report on the 23rd day of March, 2010 compared to the initial report on the 22nd day of July, 2009. He says that the company’s records are in dispute with the liquidator’s records and sets out different calculations – the primary and most significant difference is in respect of the Stradbally properties where he says in accordance with director and company records that the WIP is at €150,000. Taking this, the properties at Stradballymore, 37 Mary Street, The Burgery and Dungarvan Business Park, he arrived at a total figure of €350,097 with regard to the proper work in progress figure and he states that the solicitors wrote to the applicant on the 12th day of March, 2010 in that regard. In my view, that letter is not entirely clear and, in any event, no documentary evidence is either exhibited or set out in support of these figures. The first named respondent indicates that his was a successful business until the downturn in the economy and I accept that. He also avers that he acted at all times on professional advice in the manner in which he organised his business in that the respondents personally owned the land and the company executed the building works or the construction work on it. That is not the point. The manner in which the respondents chose to organise their business is a matter for themselves; the issue is the degree to which that arrangement (and what flows from it particularly with regard to WIP) is properly reflected and dealt with in the company records.
26. The first named respondent goes into detail with regard to his borrowings, in particular the form of personal guarantees and upon the sale of the Stradbally houses (the four properties sold in 2012 for €622,000) the bank had control and retained those monies pursuant to the terms of the personal guarantees. Criticism appears to be attached to the liquidator by the respondents for failing to do anything with regard to this. The argument in this regard, I do not understand. The respondents chose to execute the personal guarantees in the manner that they did in respect of the interests that they held that they may or may not have been advised. What flows from that operates as a matter of law and I do not under any circumstances see how any setoff or other type argument can be advanced in that regard.

27. Again, he sets out in detail why he did not personally become involved in the 2013 proceedings. He did not do so and nothing further arises in that regard.
28. Both in submissions and within his affidavit, he states that the criteria set out within ss. 608 and 610 have not been satisfied.
29. The next affidavit of Mr. James Grant, sworn on the 10th of day of August, 2019, essentially sets out, in respect of the WIP, that the company was engaged to carry out development works in respect of properties (primarily the Stradbally properties) owned by the directors personally and that that is then monies owed by them to the company for those works and they, therefore, have a liability to the company in that regard. It is further contended that the extent of the WIP was clearly set out in the initial statement of affairs documentation and in relation to the general meeting of creditors where it was considered that they would be sufficient to meet the company's obligations in that regard. He further points to what he describes as an acknowledgement of a WIP in the sum slightly in excess of €350,000 being due and owing with regard on the basis of company and other records. Complaint is made with regard to the *lacunae* or absence of documentation or any supporting documentation in this regard.
30. Mr. McCarthy again disputes the WIP situation and reiterates his figure as set out earlier. He sets out as a relevant factor that the Bank of Ireland withheld a sum of €401,000 on foot of his personal guarantees over the debts of the company. I fail to understand this averment. The personal guarantees were executed and the Bank of Ireland dealt with that matter pursuant to its own terms and conditions which are not a factor for determination in this matter. The first named respondent finally asserts that he is 61 years of age and is now working as a labourer for his son and has no assets against which any potential judgment might be realised.
31. The respondents' solicitor, Mr. Gordon, swears an affidavit on the 30th day of June, 2020 and states that respondents will be raising issues concerning the Statute of Limitations. Quite why an instructing solicitor felt compelled to file an affidavit in those terms is not understood.
32. That affidavit in turn is replied to by Mr. Grant in dealing with the Statute of Limitations issue and that affidavit is sworn on the 1st day of July, 2020. In his view, the respondents have acknowledged their indebtedness to the company as recently as 2018, has some degree of acceptance of *laches* and acquiescence and refers to certain without prejudice exchanges in 2017.
33. He then deals with certain adjournments by agreement which, in my view, is not strictly speaking relevant to the matters I am required to adjudicate. The adjournments occurred after the issuing of proceedings and the period for determination with regard to the statute is at an earlier period of time. References (perhaps oblique given the circumstances) are made to the fact that the appellant felt compelled to instruct new solicitors and perhaps certain inferences are invited both within the affidavit and in oral submissions of counsel arising from this fact.

Sections 608 and 610 of the Companies Act, 2014

34. Section 608 headed "Power of the court to order return of assets which have been improperly transferred" gives the court power upon an application of a liquidator where it can be shown to the satisfaction of the court that: -

- "(a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and
- (b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members..."

35. Section 610 is headed "Civil liability for fraudulent or reckless trading of company" and states: -

- "(1) If in the course of the winding up of a company or in the course of proceedings under Part 10 in relation to a company, it appears that—
 - (a) any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner, or
 - (b) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose,the court, on the application of the liquidator or examiner of the company, a receiver of property of the company or any creditor or contributory of it, has the following power.
- (2) That power of the court is to declare, if it thinks it proper to do so, that the person first-mentioned in paragraph (a) or (b) of subsection (1) shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct."

36. To have knowingly carried on a business in a reckless manner is defined in circumstances where: -

- "(a) the person was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company, or any of them, or
- (b) the person was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities)."

37. The two documents that the applicant refers to and which are very clear in their terms are those presented at the creditors meeting which very clearly disclose a specific and precise figure for WIP. No explanation or, in my view, no satisfactory explanation has been furnished by the respondents as to why that figure is incorrect. It was one produced by the respondents and not the applicant. It shows a certain figure for WIP recoverable by the company from the two respondents. That, in my view, could well be argued was by act or omission in its presentation of its affairs, from which the respondents now seek to resile.
38. However, before examining that position in great detail, the respondents point to two matters: -
- (a) Recoverability by virtue of the Statute of Limitations; and
 - (b) The related issue of *laches* and delay. The applicant accepts there has been delay but not to the extent that would disentitle relief.

The Statute of Limitations Act, 1957

39. The section relied upon is s. 11(1) of the 1957 Act which states that no action shall be brought after the expiration of six years from the date on which certain causes of action accrued. S. 11(1)(e) relates to actions to recover any sum recoverable by virtue of an enactment.
40. In *Southern Mineral Oil Limited (In Liquidation) v. Cooney* [1987] 3 IR ("Cooney"), the Supreme Court accepted the submissions of the parties that that the operable section were reliefs are sought pursuant to s. 297 of the Companies Act 1963 (being the precursor to s. 610) is governed by s. 11(1)(e) of the Statute, being a six-year time period. As stated by Keane J;
- '....I approach the case on the basis that, if there was any limitation period applicable, it was the period of six years running from the date of the presentation of the petition for the winding up of the company...'. In this case that date is the 23rd day of January 2009.
41. Within *Cooney No 2*. [1999] 2 IR 237, Shanley J. dealing with the same case held, in respect of s. 297 that: -

"It is the director's conduct which causes the discretion of the Court to be exercised. If as a result of the exercise of that discretion a sum of money becomes payable by the director, the cause of action is not founded upon the declaration, but rather upon the conduct which gives rise to the declaration in the first place."

The court continued: -

"Thus, if I am correct in the view that the cause of action is not founded upon the declaration made pursuant to s. 297 of the Act of 1963 but rather upon the conduct

which gives rise to the declaration in the first place, then the cause of action in the instant case accrued in 1988, prior to the winding-up of each of these companies.”

42. The respondent points to the appointment of the applicant on the 23rd of day of January, 2009 and the proceedings instituted on the 13th day of December, 2017, which it is contended are outside the six-year statutory period within s.11(1)(e).
43. In respect of the issue of delay, it is argued to be both inordinate and inexcusable on the basis that the facts relied upon to ground this application were known to the applicant as far back as the 22nd day of January, 2010 when the solicitors indicated that they had instructions to issue proceedings to recover the sums ultimately sought. They further point to the s. 56 report of the 23rd day of March, 2010 where the facts and figures now relied upon are again set out. All of the facts were known at the time of the restriction proceedings. Whilst there is no obligation to bring all proceedings together, the respondents question why that was not entertained on the facts of this case.
44. The starting point in any case on delay is the Supreme Court decision in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR where the well-known principles of law relevant to the consideration of the issues are clearly set out.

“The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:—

1. the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
2. it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
3. even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
4. in considering this latter obligation the court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,
 - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the 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."

45. Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98 also points to the European Convention on Human Rights requirement that any action must be determined within a reasonable time.

46. In *Stephens v. Paul Flynn Limited* [2008] IESC 4, Kearns J. stated: -

"In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the defendant in exercising his right to apply for the dismissal of the action for want of prosecution."

47. In the same case, Clarke J. recited with approval the *dicta* of Lord Diplock in *Birkett v. James* [1977] 2 AC 297 in the following terms: -

"A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

48. After cited that phrase, Clarke J. continues: -

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

49. I accept the submissions of the respondent that I must consider whether the delay is (a) inordinate and (b) inexcusable, and if both, I must then consider the question of the balance of justice.

50. Here on the facts of this case, there was a clear delay in instituting proceedings – they were threatened as far back as January, 2010 and not issued until the 13th day of December, 2017. All of the matters complained of occurred prior to January, 2009 (perhaps as far back as 2003). It is also submitted that there has been additional delay since proceedings were instituted. There is of course against the background of the well-known requirement that where there has been a delay prior to the start of the proceedings then the speed with which those proceedings are dealt with must be accelerated commensurately. That does not appear to have occurred here although that period would, in my view, be insufficient to ground an application for the strike out of these proceedings.
51. In my view the period of delay that is of particular concern is that from the s.56 report dated the 23rd day of March 2010 where the precise features of the directors conduct of which the plaintiff complains are clearly and comprehensively set out, up to the initiation of proceedings in December 2017. In my view there has been no adequate explanation of the failure to institute proceedings (if they were to be instituted) until 2017. All of the relevant facts were known much earlier and even allowing for a period of time to take legal advice, the delay has not been properly explained. The last s.56 report is also outside of the six year limitation period and in my view matters had crystallised before then as the reports themselves demonstrate.
52. If the time for considering the six-year statutory time limit pursuant to s.11(1) (e) is either the appointment of the plaintiff (*Cooney*) or when he was in a position to properly assess matters, which in my view was in March 2010. Accordingly, the strictures that might otherwise apply in any assessment of delay within the appropriate limitation period do not apply on the facts of this case. But I note that it appears that these proceedings were brought outside of the statutory time limit and in my view that is an issue in determining any issue or question of delay.
53. On the basis of the matters extensively set out within the affidavits in my view the delay in this matter has been both inordinate and separately, without any proper reasons advanced for it, inexcusable. This applicant appreciated the true position at an early stage in what appears to have been a relatively straightforward liquidation yet did not take this action against the former directors until 2017. Whilst of course any determination as to whether the delay has been inordinate and thereafter inexcusable is a mixed question of law and fact, on the facts of this case it is also drawn from the consideration of the totality of the material placed before the court.
54. A court must also consider, in determining whether the delay was inordinate and inexcusable, the question of the balance of justice. The respondents are now 61 and 62 years of age. There is the undoubted pressure that dealing with this litigation will exert upon them. It appears common case that this building company (now in liquidation), like many others, did not survive the last recession. It is clear that the position with regard to the four Stradbally properties was not as originally contended by the respondents. However, the position was properly determined by the applicant at an early stage; the

lands were owned by the respondents who required the company (now in liquidation) to carry out the works and payment for those works remains outstanding. All are now sold. If it was a ruse it was not a sophisticated one and was readily apparent to the applicant at an early stage. The respondents have served their period of restriction as directors and the first named respondent has averred that he had no contact with the applicant from the time of disqualification until sometime prior to the issue of proceedings in 2017. The applicant refers to certain without prejudice discussions but only in 2017.

55. In my view, for the reasons set out above the delay in this case has been both inordinate and inexcusable and these factors, coupled with my consideration of the balance of justice requires that this application be struck out.
56. I will hear the parties in respect of any additional orders that may be required including any as to costs.