THE HIGH COURT

[2022] IEHC 653

[2014 2507 P]

BETWEEN

JULIE SHANLEY

PLAINTIFF

AND

ACC LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 28th day of November, 2022

Background

1. The plaintiff in these proceedings is a qualified solicitor.

2. In or about 2005 the defendant (the bank) lent money to a client of Anthony Barry & Co. Solicitor's; a firm based in Athlone. Later that year, Anthony Barry sold the practice to the plaintiff and Orla Cummins. Further loans were given by the bank to the particular client which were subject to undertakings given by the plaintiff and her partner Orla Cummins.

3. A dispute arose concerning these undertakings. The issue was that, apparently, the charge securing the loans did not extend to the entirety of the property being charged in that it was limited to certain apartments and not the common areas. This dispute was characterised by Hogan J. in the Court of Appeal in *ACC Loan Management Ltd v. Barry* [2015] 3 IR 473 as being "a relatively minor one which, with a modicum of good sense and good will on all sides,

could and should have been resolved." As will be seen the steps taken by the bank to address the matter were completely disproportionate.

4. On 28th September 2012, the deputy head of retail of the bank wrote to Orla Cummins stating that two named bank officials would attend her office to obtain the title deeds of the property subject to the disputed charge. The following day two officials arrived at the solicitor's office demanding the documentation. Following intervention by the Gardaí, the bank representatives left. A full account of these extraordinary events is set out in the judgment of Hogan J. paras. 24 - 29.

5. Following these events, the bank made a formal complaint to the Law Society regarding Ms. Cummins's conduct in contacting the Gardaí. The bank asked the Law Society to treat the failure to hand over the title documents as misconduct. The complaint was withdrawn by the bank. However, this was not the end of the matter.

6. The bank instituted proceedings in the High Court seeking, *inter alia*, a declaration that the plaintiff, Anthony Barry and Orla Cummins were guilty of misconduct for failing to comply with the undertakings. Judgment was given by McGovern J. (*ACC Loan Management Ltd v. Barry* [2014] IEHC 322) dismissing the claim describing it as "an abuse of process". The bank appealed to the Court of Appeal.

7. In the Court of Appeal, Hogan J. gave the judgment of the court. In giving his view of the events of September 2012, Hogan J. stated:

> "33. I confess that I struggle to speak with any degree of moderation regarding this entire episode. It is, perhaps, sufficient to say that the conduct of the Bank's authorised representatives was quite inappropriate. The allegations which they made to the two secretaries and to the Gardaí concerning Ms. Cummins were simply outrageous and completely false. …. So far as the Bank's complaint to the Law Society regarding the second defendant's conduct in contacting the Gardaí is concerned, the most charitable

thing that can be said about it is that it was completely without substance and seems to have been entirely removed from the reality of what in fact had occurred."

Hogan J. also stated:

"38. What, however, the Court does not have is a jurisdiction to grant a declaration that the defendants *are guilty of misconduct* by reason of a failure to honour an undertaking as distinct from *granting an order declaring that they failed to comply with an undertaking.* The High Court has no original jurisdiction formally to declare that solicitors are guilty of misconduct, as this is not a cause of action known to the law."

8. It should be noted that the bank did not appeal the decision of the High Court as regards the plaintiff herein.

9. I think it is fair to say that the words of Hogan J. were very restrained. It could have been said, without any exaggeration, that the actions of the bank were unlawful and fell well below the most basic standards one would expect from a financial institution like the defendant, who would have had available to it legal advice. I do not think that it is at all surprising that the plaintiff initiated these defamation proceedings.

Application before the court

10. By a notice of motion dated 28th July 2020, the bank sought a number of reliefs, in particular:

i. An order dismissing the plaintiff's proceedings for want of prosecution by reason of inordinate and inexcusable delay.

ii. An order substituting "ACC Investments Ltd" for the above-named defendant.

The proceedings

11. As in any application to dismiss the proceedings for want of prosecution, it is necessary to set out the steps taken in the proceedings and when they were taken:

i. Plenary summons – issued 17 January, 2014.

ii. Amended plenary summons – 17 January, 2015.

iii. Appearance entered – 10 March, 2015.

iv. Statement of claim delivered – 11 February, 2019.

v. Bank's notice for particulars – 10 October, 2019.

vi. Replies to notice for particulars – 1 October, 2021.

It will be noted that replies to particulars were furnished after the issue of the within notice. Also, on 5th April 2019, the plaintiff filed a notice of intention to proceed.

Principles to be applied

12. Numerous authorities have set out the principles that should be applied to an application such as this. In simple terms the following three questions have to be addressed:

a) Was the plaintiff guilty of inordinate delay prosecuting the proceedings?

b) If the delay was inordinate, was it excusable?

c) If the delay was both inordinate and inexcusable, does the balance of justice lie in favour of dismissing the proceedings?

13. A look at the chronology of the case clearly shows that the delay was inordinate. It took some five years to serve a statement of claim. The defendant responded by a notice for particulars which was only replied to on 1st October 2021, after the motion had issued. These are defamation proceedings, so it was not a case of awaiting medical or other expert reports which might explain a five-year delay in delivering the statement of claim.

14. Other than a bald statement in the plaintiff's replying affidavit to the effect that she denies progress of her claim was "inordinate or inexcusable", no explanation or excuse was given for the delay. I must therefore conclude that the delay was both inordinate and inexcusable.

15. I should also note that I cannot identify any action on the part of the bank that caused or contributed to the delay in prosecuting the claim herein.

16. I now turn to the issue of the balance of justice. These are defamation proceedings where the plaintiff seeks to defend her professional reputation. It may well be the case, though I have not made any determination in this regard, that the plaintiff's claim would be met by a successful defence of absolute privilege given the complaints of the plaintiff are referable to issues in court proceedings, as referred to above.

17. In the bank's grounding affidavit, it stated that its staff have completely changed since the time of the events complained of, that the bank's structure and business has fundamentally changed and that all key personnel have since left their offices. I refer to the following passage from the decision of the Court of Appeal in *Millerick v. The Minister for Finance* [2016] IECA 206 where Irvine J. states:

> "In light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the *Primor* test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See *Cassidy v. The Provincialate* [2015] IECA 74). That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. **…"**

18. I am satisfied that the matters deposed to in the bank's affidavit do amount to more marginal prejudice. Effectively since the initiation of these proceedings, some eight years ago, the bank has been restructured with the personnel involved in circumstances of this case no longer employed. The bank has, effectively, been closed down. Clearly the bank personnel involved would be required to give evidence and I accept there is now "considerable doubt" as to their availability.

19. By reason of the foregoing, I am satisfied that the bank is entitled to the reliefs which it seeks, as the balance of justice lies in favour of such.

Costs

20. The bank has been successful in its application and so would normally be entitled to the costs of the application and the proceedings to date. However, I have set out in some detail the circumstances that led to the initiation of these proceedings. I have already expressed the view that given the behaviour of the bank, condemned both in the High Court and the Court of Appeal, that it was understandable that the plaintiff would respond by issuing these proceedings. My provisional view is the plaintiff be awarded the costs related to the drafting and issuing of the proceedings herein and that there be no order as to costs on the motion. If either party wishes to make any further submission, they may do so by written submissions (not more than 1500 words) to be filed on or before the 9th day of December 2022 and I will list this matter for final orders on the 19th day of December 2022.