THE HIGH COURT

[2024] IEHC 74

[Record No. 2013/4013 S]

BETWEEN

EVERYDAY FINANCE DAC

PLAINTIFF

AND

MICHAEL GLEESON, JOSEPH BRACKEN AND HELEN BRACKEN

DEFENDANTS

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 13th day of February 2024

1. This is the second and third named defendants' (hereinafter referred to as "the defendants") application to dismiss the plaintiff's proceedings on grounds of inordinate and inexcusable delay.

Background

2. The plaintiff issued these proceedings by summary summons on 28 November 2013, relying on a letter of sanction dated 23 September 2009. The grounding affidavit referred to an earlier letter of sanction 24 May 2007. The plaintiff sought entry into the Commercial List and asserted that the matter was urgent. By order dated 17 February 2014, Kelly J. (as he then was) refused entry into the Commercial List and remitted the matter for plenary hearing on the basis that triable issues had been identified. He directed a timeframe for exchange of pleadings, including that the plaintiff was to furnish a statement of claim within 21 days. The plaintiff filed their statement of claim almost seven weeks later, on 3 April 2014 and the defendants, who were representing themselves at that time, filed a defence on 16 May 2014 in which they said, *inter alia*, that they believed the loan facility of the 2007 letter was limited in recourse to the site as advised by their bank manager at the time. They said they believed the bank could not come after their other assets and that if they were aware the loan could have affected their family farm, they would never have entered into the project. They also refer, at para. 13, to a review they said was carried out by the plaintiff's solicitors which said

that the bank had very little security, that steps should be taken to ensure the bank customers provide the security vested and that the bank did not have signed letters of sanction.

3. The plaintiff filed a reply on 18 June 2014, para. 5 of which denied that the defendants were advised by any servant or agent of the bank that the loan facility advanced on foot of the first letter of sanction was limited in recourse to the site and pleaded, at para. 10, that the views expressed by the solicitors for the bank, referred to in the defendants' defence, were not binding on or accepted by the bank.

4. Almost four years after delivery of the defence, the plaintiff sought voluntary discovery and raised particulars to which the defendants replied promptly three weeks later and in which they referred again to advice given by the bank's former solicitors whom, they said, confirmed to the plaintiff that their only security was the five acres of the defendants' lands on which the houses were being built. That did not elicit any further comments from the plaintiff and was essentially the last proactive step taken in the proceedings until September 2021 when the plaintiff filed another certificate of readiness indicating their intention to seek a date for trial. The defendants then issued the within motion to dismiss grounded on an affidavit sworn by the second named defendant which denied that they signed the 2009 letter and said that their loan was a non-recourse loan governed by the 2007 letter. The defendants base that, in part, on the wording of the 2007 letter, but also on the conversations they said they had with the bank's officials, including the branch manager with whom they were dealing at the time they entered into the 2007 loan agreement. That version of events averred to in the defendants' grounding affidavit, reflects what the defendants had previously set out in the defence and replies to particulars. The defendants' grounding affidavit also refers to the second defendant's health difficulties since the proceedings were issued, as a result of a serious road traffic accident in September 2017. The plaintiff's replying affidavit was sworn by a bank official who had not been involved in the 2007 or alleged 2009 loan agreements, but he averred to having reviewed the bank's books and records and the correspondence and other documents of the bank's current and former solicitors in relation to the proceedings and their interactions with the defendants. The bank's deponent challenged the second defendant's averment that his health issues caused him and his wife difficulties in dealing with the proceedings and asserted that both defendants are capable of defending the proceedings. His only comment on the defendants'

averment in relation to the alleged conversation with the bank's officials in 2007 prior to entering the loan agreement, was to dispute any prejudice and assert that the case *"centres on a Loan Facility which is largely based on paper record and statements of account involving a very straightforward issue of whether the Defendants entered into a loan agreement or not"* (at para. 31).

5. The defendants swore a further affidavit reiterating their defence and identifying by name the official to whom they had spoken in 2007, who was the branch manager who had signed the 2007 agreement and had only been referred to by the defendants up to then as the bank manager. There was no response to this affidavit. The defendants' sworn averments, in relation to the 2007 conversation with the identified branch manager, have not been challenged on affidavit. I return to this below.

6. Thus, the defendants have clearly asserted, both in this application and previously in their substantive pleadings since 2013, that the 2007 agreement is the only one governing the loan and that they entered into it on the basis of representations made to them by the bank's officials as a result of which they understood that their liability would be limited to the site and not to the remainder of their assets including their family farm.

Delay

7. The delay in this case of approximately eight years from the institution of the proceedings in 2013 (that the plaintiff initially claimed were extremely urgent) until the end of 2021 when they moved to set the matter down for trial (not for the first time) was, on any analysis, inordinate. The plaintiff presented a number of excuses, all of which date from 2019 onwards, by which time the plaintiff had already allowed six years to pass since issuing proceedings in reliance on a loan that had, by then, been in default for in around three years. The excuses presented by the bank included the insolvency and bankruptcy proceedings of the first named defendant (who was not a party to this application) in which the plaintiff was engaged, but they never informed the second or third named defendant of this or of their apparent decision to put these proceedings on hold pending the outcome of those personal insolvency and bankruptcy proceedings. They also claimed that settlement discussions were going on in or around 2019/2020. I am not satisfied that the correspondence at that time (some of which was without prejudice) confirms settlement discussions in which both parties were engaged as it clearly demonstrates both parties maintaining their positions and not indicating any real interest in engaging with the other. The plaintiff also relies on

correspondence from the third defendant of June 2020 in which she said that they were referring the matter to the Financial Services Ombudsman. No such complaint was ever made. I do not accept that this correspondence excuses the delay at that late stage in circumstances where the replying correspondence from the bank's solicitors, on which the plaintiff now relies, advised the defendants that, if they did not reconsider their *"entrenched position and deal with your indebtedness to the Bank, we are instructed to proceed with the above matter"*.

8. I am satisfied that the plaintiff's delay has been both inordinate and inexcusable. I, therefore, turn to whether the balance of justice favours the reliefs sought.

The balance of justice

9. The decision of Collins J. in the Court of Appeal in *Cave Projects Ltd v. Kelly* [2022] IECA 245 draws together many strands of the *Primor* jurisprudence that has been applied in this court, sometimes in a less than consistent manner. Collins J. said it is important that *"assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis."* The plaintiff's counsel submitted that no such evidential basis of prejudice has been established by the defendants here such as a witness who is now deceased or unwell or unable to recall necessary evidence and instead, they have made assumptions which cannot equate to the necessary evidential basis.

10. It is clear from the submissions made on both sides that oral evidence will be necessary if this matter proceeds to trial and both counsel confirmed their intention to call witnesses at trial. The evidence is likely to be about the execution of the loan agreement of 2007 and the circumstances in which the bank claim that a further agreement was entered into by the parties in 2009 along with the defendants' denial of the knowledge of or involvement in any 2009 agreement. The original of the 2009 agreement is not available and neither party suggested there is any further documentation, such as attendances or file notes, pertaining to the lead up to the execution of the 2007 agreement or the alleged 2009 agreement.

11. Any hearing will likely take place in 2024, some 17 years after the events of 2007 when the parties entered into an agreement and 15 years after the alleged events of 2009 when the bank claims that the parties entered a further loan agreement. In *Gorman v. The Minister for Justice, Equality and Law Reform* [2015] IECA 41, Irvine J. (as she then was) stated, at para. 62:-

> *"Regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable the evidence becomes."*

This *dicta* was relied on by Costello J. in *Gallagher v. Letterkenny General Hospital* [2019] IECA 156 in dismissing the proceedings because she said the continuance of a case of that kind at that remove would undoubtedly put justice to the hazard.

12. The inordinate and inexcusable delay which has occurred here, for which the plaintiff is almost exclusively responsible, will inevitably render the evidence of all witnesses more fragile and unreliable, particularly given what seems to be the absence of further documentary evidence on the circumstances of the 2007 loan agreement and alleged 2009 agreement. That reality is not altered by the plaintiff's claim that the defendants have failed to identify the details of how their ability to defend the case has been impaired by the passage of time. The type of evidence the plaintiff seems to say must be averred to by its deponent fails to recognise what Collins J. clearly found in *Cave*, i.e.:-

> *"absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice."* (p. 33)

13. The Supreme Court in *Primor* made it clear that it is for the defendant to establish that the balance of justice lies in favour of dismissing the proceedings. This does not allow the plaintiff to ignore the events which the defendants say mean the proceedings should be dismissed. The plaintiff's deponent did respond to the defendants' averments in the affidavit grounding this application about the second defendant's poor health and the consequences this had for the third defendant's ability to deal with the proceedings. He also challenged the defendants' claim not to have signed the 2009 letter which he described as (at para. 8 of his replying affidavit) a defence of one *non est factum* which was *"a mere assertion without meaningful corroboration that the signatures are not theirs."* However he made no comment on the defendants' averment that representations were made to them by the bank manager at the time they entered into the 2007 loan agreement, despite the previous denial in the plaintiff's reply that the defendants were advised by the bank's servants or agents that the loan facility advanced on foot of the 2007 agreement was limited in recourse to the site.

14. It is for the court to weigh up the evidence that both parties have chosen to put on affidavit and, in doing so here, I am satisfied that this is the type of case where, as

recognised by Collins J. in *Cave*, general prejudice may suffice. As well as the defendants' evidence in relation to the execution of the 2007 agreement and their denial of having signed the 2009 agreement, the original of which is no longer available, there are two further elements of this case which are relevant to determining where the balance of justice lies.

15. Firstly, the plaintiff's approach to the litigation in seeking to enter the matter into the Commercial List on grounds of urgency in 2013 and then allowing inexcusable periods of delay to mount up thereafter. A similar situation was described by Meenan J. as having compounded the situation in *Cabot Financial (Ireland) Ltd v. Heffernan* [2021] IEHC 823. In *Bank of Ireland v. Wilson* [2020] IEHC 646 Barr J. held:-

> *"Where the plaintiff has elected to pursue a summary form of proceedings, he will be expected to proceed with his action relatively quickly, as that is the essence of an action provided for under the summary procedures provided for in the Rules of the Superior Courts."* (para. 40)

Similarly, in *Havbell DAC v. O'Hanlon* [2018] IEHC 557, MacGrath J. took account of the summary nature of the proceedings which he said *"should be expedited with all due dispatch"*.

16. Secondly, the second defendant sustained a life altering injury in 2007 which has had significant implications for him and the third defendant, his spouse. That does not in itself render him or the third defendant incapable of dealing with the proceedings but it is part of their current life which, when added to the eight years during which they have had the proceedings hanging over them from 2013 to the issuing of the motion in 2021, renders their situation comparable to that of the defendants in *Havbell* where MacGrath J. said they had,

> *"suffered a general prejudice which is that if they are required to answer these proceedings at such remove, they will have had had to endure unnecessary oppressiveness of proceedings hanging over them for in excess of eleven years, something which in my view they should not have or had to endure"*. (para. 20)

In *Cabot Financial (Ireland) Ltd v. Heffernan*, the defendant was 78 years of age and had undergone heart surgery. Meenan J., in finding the threshold of prejudice had been reached, described the defendant as *"having had these proceedings 'hanging over' him for the past nine years, and possibly for a further year into the future, must have been a source of stress and upset"*.

17. The plaintiff contends that the balance of justice is in favour of allowing the proceedings to continue, in particular because a dismissal will involve writing off a substantial debt relating to a loan that the defendants acknowledge they received. The position of a bank whose proceedings are struck out on grounds of inordinate and inexcusable delay cannot be seen as different to those of, for example, a plaintiff in a personal injuries action, simply because of the large sums of money involved. If anything, a bank is in a different situation as they have the benefit of the vast resources, something that the courts have traditionally applied against such organisations in attributing blameworthiness for delay. In *Anglo Irish Beef Processors v. Montgomery* [2002] IESC 60, Fennelly J. said the plaintiffs were a *"well-advised, well-known company and is fully armed with all the means of pursuing its claim to judgment"*, in finding the delay was inexcusable and the balance of justice favoured striking out the proceedings.

18. In all of the circumstances of this case, I am satisfied that the balance of justice is in favour of allowing the application to strike out the proceedings for delay.

Indicative view on costs

19. As the defendants have succeeded, my indicative view on costs is, in accordance with s. 169 of the Legal Services Regulation Act 2015, that they are entitled to costs of this application and of the proceedings to be adjudicated upon in default of agreement. I will put the matter in for mention before me at 10:30am on 6 March 2024 at which time I will hear whatever submissions the parties wish to make in relation to costs and final orders.

Counsel for the plaintiff: Paul George Gunning BL

Counsel for the plaintiff: Darrach MacNamara BL