THE HIGH COURT

[2024] IEHC 567

[Record No. 2014/3 S]

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

JOSEPH ROCHE AND ANNE ROCHE

DEFENDANTS

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 27th day of September 2024

1. The defendants seek to dismiss the plaintiff's summary proceedings on two grounds: firstly, pursuant to O. 122, r. 11 dismissing the proceedings for want of prosecution and, secondly, for inordinate and inexcusable delay. The defendants had also relied on the European Convention of Human Rights, but those arguments were absorbed into the general delay and prejudice case that they made.

Background to the proceedings

2. The proceedings were instituted by summary summons dated 2 January 2014, but time should more properly be calculated from 23 February 2015 when judgment obtained by the plaintiff in default of appearance was set aside by consent. The plaintiff's claim is for judgment in the amount of €887,515.94 arising from four sums of money that they say are due and owing from the defendants on foot of three separate loan facilities (March 2008 and two of July 2012) and an overdraft facility of July 2012. The plaintiff's predecessor had averred that the defendants failed to make the necessary repayments in accordance with the applicable terms and conditions and, on 4 September 2013, the plaintiff's predecessor wrote to the defendants demanding payment. No payments have been made by the

defendants since 25 March 2013. Interest had accrued up to November 2013 which is included in the sum claimed but the plaintiff has chosen to waive any interest accruing thereafter.

Delay

3. The defendants emphasised the summary nature of the plaintiff's proceedings and on their assertions on affidavit, from an early stage in the proceedings, that they had a defence, and that the matter should go to a plenary hearing. Such points are more usually addressed in a motion resisting a plaintiff's application to enter summary judgment, but the defendants seek to rely on those arguments as grounds for dismissing the proceedings for delay. The defendants' counsel says the plaintiff's decision to proceed by way of summary judgment and to maintain that position over a long period of time in spite of the defendants' position on the need for a plenary hearing, goes to the plaintiff's culpability for the delay and to the balance of convenience.

4. The first named defendant swore an affidavit on his own behalf and on behalf of and with the consent of the second defendant, his wife, on 13 November 2015. At para. 3 he said that they disputed the veracity of the plaintiff's claim and that they were not indebted to the plaintiff in any sum whatsoever. Throughout that affidavit he raises concerns about the circumstances in which they engaged with the plaintiff's predecessor in 2006 and states, at para. 10, *"I say that we engaged with NIB/Danske Bank in March 2006 and whatever monies are owing to the Bank relate to this period and to a period in 2010."* He went on to raise concerns about the circumstances in which they signed documents, a meeting with the bank in 2013, the manner in which their repayments were restructured at that time and their difficulties in obtaining their file from their former solicitor who is no longer in practice. He said they intended to request a plenary hearing. In a subsequent affidavit sworn on 4 March 2016, the defendants claim that they were *"tricked"* by the bank into executing a facility letter in relation to all existing loans.

5. The defendants' position, as set out in those affidavits, was challenged by the plaintiff's predecessors. The arguments and counter arguments of both sides were reiterated in five subsequent affidavits on behalf of the plaintiff and seven on behalf of the defendants.

6. The plaintiff's motion to enter summary judgment was listed for hearing and was adjourned on a number of occasions up to November 2018 because of further affidavits being filed, including on a number of occasions when the defendants (who were not legally

represented until March 2018) brought an affidavit with him to court, which led to the matter being adjourned to allow him to file the affidavit. Essentially, from 2015 to November 2018, the matter was proceeding as one might expect in a case of this sort and where the defendant was not legally represented. However, a lengthy delay occurred from November 2018 up to April 2023 when the plaintiff issued a motion to amend their summons. During that period of time, on 14 March 2022, the plaintiff made an *ex parte* application to substitute the current plaintiff for Danske Bank due to the sale of the loan from Danske Bank to the current plaintiff in October 2021. The plaintiff contends that this was a step in the proceedings as per O. 122, r. 11. The next active step taken by the plaintiff was on 21 April 2023 when they issued a motion to amend their summons to reflect what the Supreme Court held in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 should be included. The *O'Malley* decision dates back to 2019.

7. The delay between 2018 and 2022 and/or 2023 was a lengthy one and would certainly be considered inordinate, particularly in circumstances where the plaintiff had chosen to proceed by way of summary summons which should be progressed expeditiously. As Barr J. in *Bank of Ireland v. Wilson* [2020] IEHC 646 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)

However, what renders this period of delay different from many periods of delay that come before the court where nothing is being done to progress the litigation, is the fact that the motion was adjourned by consent on 15 separate occasions since 2019. In addition, assigned hearing dates were adjourned a number of times between December 2018 and October 2020, again on consent. The plaintiff says that those adjournments were due to negotiations that were ongoing since 2018. The parties disagree on the precise period of time that negotiations were going on during those years but agree that there were some negotiations taking place since 2018, which was why they both consented to the adjournments. There is also reference in the papers to adjournments because of the plaintiff's substitution application that was eventually made in March 2022.

8. In principle, the court would consider an adjournment by consent for the purpose of negotiations to excuse delay and part of the court's wish to encourage and facilitate such

negotiations. However, given the conflict on the evidence, the plaintiff's explanations do not excuse the entirety of this period of delay from 2018 to 2022/2023.

9. The fact that the defendants agreed to 19 adjournments in total during the time that I have found in principle constitutes an inordinate delay, must be taken into account because a defendant's conduct must also be considered in assessing whether a period of delay is excusable or not.

10. I find that the delay from 2018 to 2023 was inordinate, particularly given that the plaintiff had chosen to proceed by way of summary summons and to continue with these proceedings despite the defendants' repeated view that they should go to plenary hearing, but I also find that the delay is excused by reason of the defendants' participation in consenting to a vast number of adjournments of motions and hearing dates during a time that they were legally represented, which they did in order to allow negotiations to take place and to facilitate the plaintiff's substitution application.

Balance of convenience

11. I proceed to consider the balance of convenience, firstly, in the event that I am wrong in finding the delay to have been excusable and, secondly, because the defendants assert the *O'Domhnaill* jurisdiction in saying that delay has rendered it impossible for them to secure a fair trial.

12. Any prejudice on both sides must be considered in determining where the balance of convenience and/or the balance of justice lies. The plaintiff seeks judgment fixed in the amount of €887,515.94 since these proceedings were issued as they have waived any interest accruing since November 2013. If the proceedings are dismissed, they will lose the opportunity to litigate over four substantial debts they say are due and owing to them. Whilst the defendants have disputed the veracity of the plaintiff's claim, they do not seem to dispute the existence of historic debts due to the plaintiff's predecessor or the fact that no repayments have been made on their loans since March 2013.

13. The prejudice asserted by the defendants relate to their ability to run what they say is their full defence to the proceedings, i.e. that the bank breached its contract with them in adjusting their repayment plan in February 2013, that the bank manufactured a default situation and that they were tricked into signing documentation. They maintain they are prejudiced in running those defences due to the delay which has limited the documentation available to them from the data access request they did on Danske Bank. The

correspondence and documentation arising from that data access request was not put on affidavit before this court. The defendants have averred in their affidavit of 4 March 2016 to their need to obtain a copy of a 2006 facility letter that is not exhibited in any of the plaintiff's affidavits. The absence of this letter has been a stated issue for the defendants since 2016. However, there is no suggestion that the delay between 2018 to 2023 affects this issue or creates any prejudice in addition to that which has, on the defendants' case, existed from the outset due to the absence of this letter.

14. The defendants are also concerned that any discovery (if they are permitted to proceed by way of plenary hearing) will not be sufficient for them to make their defence. That is, to some extent, a hypothetical concern (described by their counsel as a *"hazard"*) as there is, at present, only the prospect of discovery. Even if the defendants do secure a plenary hearing and the resulting right to seek discovery, there is no crystal ball to indicate what documents may or may not be directed to be provided in discovery and/or may or may not be furnished whether in response to a request for voluntary discovery or in compliance with an order, including documentation that may not have come within the scope of the data access request and may, therefore, have been properly excluded therefrom.

15. The defendants are also concerned about what they believe will be the flawed recollections of potential witnesses in any potential plenary hearing, due to the passage of time. Their concerns in that regard are vague and generalised. They suggest the bank's witnesses may be in difficulties in recalling evidence after so many years. It is not yet clear what documentary evidence may be available, if there is oral testimony at all. The defendants also claim their own recollection is impaired. I do not see how that causes prejudice at the necessary level to allow the balance to be struck in the defendants' favour, given the extensive and detailed affidavits they have sworn (comprising of six separate affidavits) since 2015 setting out the basis for their defence in a clear and detailed format.

16. In any event, even if discovery and oral evidence is to be allowed in the context of a plenary hearing that may be directed, the plaintiff's case and the defendants' defence will, to a large extent, come down to the interpretation of the facility letters, loan agreements and/or overdraft agreements on which the plaintiff relies in seeking judgment against the defendants. The defendants challenge the bank's actions in February/March 2013 restructuring the defendants' repayments to take account of errors made by the bank in calculating repayment figure over the previous years which resulted in some of the thirteen-

year loan that had been due to close out in July 2013, remaining unpaid. The plaintiff says in response that the terms and conditions of their agreements with the defendants allowed them to restructure the repayments as they did. The defendants say this was a breach of those agreements and that the situation was manufactured by the bank to force them into a default situation that never actually existed. These are largely issues of contractual interpretation, albeit resolution may require discovery and/or oral evidence. That will be a matter for the judge that will be hearing the defendants' application to enter the matter to summary judgment, assuming the defendants proceed with their long stated intention to seek to have the matter remitted for plenary hearing.

17. The decision of Collins J. in *Cave Projects Ltd v. Kelly* [2022] IECA 245 requires a causal connection between a delay and the prejudice that a defendant claims to have suffered. Here, there has been inordinate delay between 2018 and 2023, but much of the prejudice for which the defendants contend occurred well before that, including the defendants' difficulties in obtaining their file from their former solicitor despite a number of written requests in 2015 to which they received no reply. The defendants also claim prejudice from the absence of documentation which they assert was due to Danske Bank's departure from the Irish market in October 2013, well before the 2018 to 2023 delay. The only prejudice asserted by the defendants that can be attributed to the delay between 2018 and 2023 is their generalised claims of the impaired recollection of potential witnesses. Insofar as the first defendant claims that his own recollection is now impaired, that position is challenged and/or neutralised by the detailed affidavits he has sworn on behalf of himself and the second defendant since 2015.

18. Any issues that may arise from the inordinate delay between 2018 and 2023 can be dealt with by a trial judge whether at plenary hearing, if the defendants succeed in securing such a hearing, or in hearing the motion to enter summary judgment, if they do not. I follow the decision of Donnelly J. in *Sullivan v. HSE* [2021] IECA 287 at para. 108:

> *"In those circumstances, which of course remain to be tested in a court, the defendant has not established its case that there is a real risk that it cannot get a fair trial or have a just result. The judge hearing the trial will ensure that should such a risk be established at the hearing of the action the defendant will not be prejudiced."*

Order 122, rule 11

19. Order 122, rule 11 states:

> *"In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule."*

20. The defendants argue that the plaintiff's *ex parte* application for a substitution order which was made and granted on 14 March 2022, is not a proceeding. They rely on the decision of Geoghegan J. in the Supreme Court of *O'Dwyer v. Boyd* [2002] IESC 54 where the issue was whether the defendants had taken a step into proceedings in applying for an adjournment of a motion for judgment. Geoghegan J. found that this was not a step but simply a holding operation. In contrast, he endorsed the approach of Finlay P. in *O'Flynn v. Board Gáis Éireann* [1982] ILRM 324:

> *"…it seems clear that the step which should be held fatal to a party seeking to refer a matter to arbitration is a step which involves costs, in other words a step which invoked the jurisdiction of the court at his instance or which institutes some matter whether by way of motion or otherwise in the court. In the case of the Brighton Marine Palace and Pier Limited v. Woodhouse [1893] 2 Ch. 486 it was held that an agreement reached by letter between the parties for the extension of time for a defence was not the taking of a step by the defendant which could debar him from obtaining a staying order under the Acts. In the course of the judgment of North J. in that case he points out that it was not a proceeding in the action but rather in a sense outside the court."*

Geoghegan J., in applying that dicta, described an application for an adjournment as *"a totally neutral act in the context of whether it is an intention to refer to arbitration or proceed with litigation."* (at p. 19 of his decision)

21. That decision seems to support the defendants' case that the numerous consent adjournments should not necessarily preclude the application of O. 122, r. 11 as they are not a *"proceeding"*. However, rule 11 was given a more focused consideration by Noonan J.

in the High Court in *Danske Bank v. Walsh* [2018] IEHC 799, where the issue arose as to whether the service of the summons itself could be considered to be a *"proceeding"* within the meaning of the rule. Noonan J. referred to the aforementioned decision of Geoghegan J. in *O'Dwyer v. Boyd* and concluded that the service of the proceeding is *"a step and a very important step in proceedings"*. He viewed the service of proceedings as a fundamental step in litigation because:

> *"…the court cannot exercise jurisdiction over a defendant until such time as he is served and is on notice of the proceedings… It has immediate and direct consequences"*.

He gave the example of the service of a notice for particulars or a reply to particulars as clearly being a step even though it is done without any direct intervention by the court.

22. The requirement for a *"proceeding"* for the purpose of O. 122, r. 11 is satisfied by the making of an order within the litigation, even were that is made on an *ex parte* basis. Even if the defendants are correct and a *"proceeding"* requires the involvement of both parties to the litigation, a substitution order does come within that concept as the other party who was not put on notice nor involved in the *ex parte* application for the order, has the right thereafter to apply to vacate the order and the party who secured the order on an *ex parte* basis is required to advise the other party of their right to do so. Therefore, it is not an order made devoid of any engagement or interest of the defendants and is a *"proceeding"* for the purpose of O. 122, r. 11.

23. The defendants also sought to rely on an error in one of the affidavits sworn by the plaintiff's predecessor's deponent who swore an affidavit on behalf of the then plaintiff relating to work they had done whilst employed by Danske. At the time they swore the affidavit they claimed to have been employed by and as an officer of Danske but were in fact employed by Pepper Finance. The plaintiff's solicitor subsequently averred to that having been a drafting error, but no further affidavit, rectifying or otherwise, was ever sworn by the deponent who had averred to matters that turned out to be untrue. The defendants assert that this matter is relevant to the fact of the substitution order made in March 2022 and to the court's determination as to whether that was a *"proceeding"* for the purpose of O. 122, r. 11. I do not agree. Certainly, there may be issues arising from what the plaintiff describes as errors in one of their affidavits that may be required to be addressed at some stage in the proceedings, including on any reliance placed on that affidavit, but it does not change

the nature or consequence of the substitution order made by this court in March 2022 which was and remains a *"proceeding"* for the purpose of O. 122, r. 11.

24. If I am wrong on that and the substitution order was not a *"proceeding"* within O. 122, r. 11, then I exercise the discretion afforded to me by that rule to decline to dismiss proceedings given the active involvement of both parties to the litigation in agreeing a vast number of consent adjournments over the period of two years prior to the institution of the defendants' motion to dismiss pursuant to O. 122, r. 11.

Conclusions

25. I dismiss the defendants' applications.

26. The plaintiff has brought a motion to amend its summons which is going to push out the timing of the hearing of the plaintiff's motion for summary judgment further. I will hear counsel on what orders, if any, I can or should make to ensure the parties are not subject to any further unnecessary delay.

Indicative view on costs

27. My indicative view on costs, in accordance with s. 169 of the Legal Services Regulation Act 2015, is that the plaintiff, having succeeded in defending the motion to dismiss, is entitled to their costs to be adjudicated upon in default of agreement with a stay on the execution of those costs pending the final outcome of the proceedings. I will put the matter in for mention before me on 10 October 2024 at 10:30am for final orders including costs.

Counsel for the plaintiff: Gary McCarthy SC, Shaula Connaughton-Deeny BL

Counsel for the defendants: Michael Tuite SC, Stephen Donnelly BL