[2019] IEHC 650

THE HIGH COURT

[2014 No. 8126 P.]

BETWEEN

PROMONTORIA (ARROW) LIMITED

PLAINTIFF

AND

JOHN WALSH AND BRONAGH WALSH

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 1st day of October, 2019

1. This is an application on behalf of the defendants for an order pursuant to the inherent jurisdiction of the court dismissing the proceedings on the grounds of inordinate and inexcusable delay on the prosecution of the action.

2. The notice of motion seeks, in the alternative, an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts dismissing the action for want of prosecution but the case was argued solely on the first ground.

3. The action was commenced by plenary summons issued on 19th September, 2014, by which the then plaintiff, National Asset Loan Management Limited, claimed orders pursuant to s. 10 of the Conveyancing Act (Ireland) 1634 setting aside as fraudulent a deed of conveyance and assignment dated 23rd September, 2008, by which the first defendant assured to the second defendant his interest in a property described as *"part of the lands attached to the premises known as 'Tinnahich', Plunkett Avenue, Westminster Road, Foxrock, Co. Dublin",* as well as a deed of mortgage of the same date between the defendants and First Active plc in respect of the same property.

4. The defendants were at all times resident at the property the subject of these proceedings but for whatever reason, or none - none was given - the summons was not served until 15th September, 2015, just four days before it was due to expire.

5. On 18th September, 2015, an appearance was entered on behalf of both defendants. Shortly afterwards, a separate firm of solicitors came on record for the second defendant.

6. The plaintiff, having taken an assignment from National Asset Loan Management Limited of certain loans to the defendants and the security held for them, was substituted as plaintiff by order of the High Court made *ex parte* on 14th March, 2016.

7. Apart from the order substituting the plaintiff, nothing whatsoever was done with the proceedings until 3rd September, 2018, when the defendants' present firm of solicitors gave notice of change of solicitor and on 5th October, 2018 the defendants' new solicitors issued the application which now comes before the court.

8. The application was grounded on a short affidavit of Mr. Walsh which gave the dates of issue and service of the summons, dealt with the changes of the defendants' solicitors, and protested the plaintiff's failure to deliver a statement of claim. The summons, he said, set out the relief claimed but did not disclose the basis of the claim. Without

knowing the basis of the claim, he said, the defendants could not know what witnesses they might need to defend the case. The proceedings, he said, had caused him and Mrs. Walsh distress, anxiety and reputational harm and Mrs. Walsh was, and had been, unable to deal with her property. The case was made that the plaintiff had been guilty of inordinate and inexcusable delay and the court was asked, in the interests of justice, to dismiss the proceedings.

9. In the replying affidavit filed on behalf of the plaintiff, Mr. Alastair Gracey, a senior asset manager employed by a company engaged by the plaintiff to provide loan administration and asset management services, explained that on 24th September, 2008, the defendants borrowed substantial money from Anglo Irish Bank Corporation plc on the security of a first charge over "*a three thousand square feet property at Plunkett Avenue, Foxrock"* in favour of Anglo, and suggested that the gravamen of the plaintiff's claim was that in or about the same time as accepting the Anglo facility, the defendants engaged in *"a series of transactions which were devised to put assets beyond the reach of their creditors, in particular Anglo".* Mr. Gracey exhibited the facility letter and the Registry of Deeds Form 1 showing the registration of the impugned conveyance.

10. Mr. Walsh in his grounding affidavit, had averred that apart from a letter from the plaintiff's solicitors of 7th March, 2016 advising that an application would be made to substitute Promontoria (Arrow) Limited as plaintiff, and a letter of 14th April, 2016 advising of the making of the order of 14th March, 2016, he and his wife had had no communication from the plaintiff. This, suggested Mr. Gracey, was inaccurate and misleading in equal measure. There had been, said Mr. Gracey, extensive without prejudice negotiations between National Asset Loan Management Limited and the defendants, and between the plaintiff and the defendants, "*to resolve the issues in dispute between the parties to these proceedings"* the fact of which, he said, Mr. Walsh ought to have disclosed.

11. Mr. Walsh indignantly rejected the allegation of abuse of privilege and countered that Mr. Gracey's evidence was misleading, presumably, said Mr. Walsh, by reason of his lack of personal knowledge of or involvement in the matters in issue.

12. In his second affidavit Mr. Walsh gave a summary of his dealings with Anglo, with National Asset Loan Management Limited, and with the plaintiff. From this account, which was not contested, I think that it was not quite accurate to say that the object of the negotiations had been "*to resolve the issues in dispute between the parties to the proceedings"*. Neither, I think, was it entirely accurate that there had been "*absolutely no activity at all in the litigation since the plenary summons issued bar the substitution of the plaintiff".*

13. The property the subject of these proceedings is, as I have said, a house called *Tinnahich*, on Plunkett Avenue, Westminster Road, Foxrock, Co. Dublin. It is described in the Registry of Deeds Form 1 and in the endorsement of claim as "*part of the lands attached to the premises known as 'Tinnahich', Plunkett Avenue, Westminster Road, Foxrock, County Dublin shown edged on the map attached hereto together with the right of way*

described in the Lease described as on the south side of Plunkett Avenue, part of the lands of Foxrock". The property offered as security for the Anglo borrowings was described in the facility letter (which was addressed to the defendants at Tinnahich) as "*a three thousand square feet property at Plunkett Avenue, Foxrock".*

14. It did not become clear until Mr. Walsh swore his second affidavit that he and his wife owned two houses at Plunkett Avenue, Foxrock: one, called *Silverstream*, which was mortgaged to Anglo, and the other, *Tinnahich*, which was mortgaged to First Active plc. By reference to the description of the property in the summons (part of the lands attached to *Tinnahich*) and in the Anglo facility letter (a three thousand square feet property, without a name) and, indeed, from Mr. Gracey's first affidavit, it might have been thought that the impugned deeds related to the same property that had been mortgaged to Anglo. In fact, it appears that the security given to Anglo was a mortgage of *Silverstream*, and the impugned conveyance was a conveyance of *Tinnahich*, which was subject to a mortgage in favour of First Active plc.

15. Mr. Walsh vehemently rejected the suggestion that there was anything surreptitious about the transfer of his interest in *Tinnahich* or that there was any attempt or intention to put assets beyond the reach of Anglo.

16. The Form 1 is branded 17th September, 2014, but it clearly shows that the deed of conveyance was registered on 29th October, 2008. There is no indication as to when the plaintiff, or National Asset Loan Management Limited before it, or Anglo before that again, came to know of the conveyance by the first defendant to the second defendant, or the mortgage by the defendants to First Active plc, save that it was prior to August, 2014 when Mr. Walsh was first asked by National Asset Loan Management Limited to reverse it.

17. The first affidavit of Alastair Gracey, filed in answer to the motion, dealt very briefly, and a second affidavit in considerable detail, with a protracted engagement between the parties between February 2016 and November 2017, but did not attempt to explain or excuse the absence of a statement of claim in the eighteen months or so before that engagement commenced, or in the twenty months which have elapsed since the engagement came to an end.

18. The engagement was a protracted negotiation the object of which, on the defendants' side, was to persuade the plaintiff to take the proceeds of a voluntary sale of *Silverstream* in settlement of the Anglo loan. To that extent the negotiations were not directed to resolving the issue the subject of the proceedings. On the other hand, while the parties' object generally was to try to settle the Anglo loan, it was specifically envisaged that if everything else could be agreed, these proceedings would be discontinued: so, to that extent, these proceedings were in the mix. Between about February, 2016, when a proposal was first made, and November, 2017 when the Anglo loan was called up and a receiver appointed, there were a number of failed attempts to find a buyer for *Silverstream* at a price which would satisfy the plaintiff.

19. Ms. Anna Shanley, for the defendant, submitted that even if allowance were to be made for the period of the engagement between the parties (which she said should not count either in justifying or excusing the absence of a statement of claim) there were still thirty months unaccounted for, before the motion was issued.

20. I am unconvinced that the approach urged on behalf of the defendants is entirely correct. Ms. Shanley is quite correct that the court will look at the cumulative periods of culpable delay, but I do not think that it is a matter of simple arithmetic. There was a gap of about 18 months between the date of issue of the summons and the start of the engagement between the plaintiff and the defendants, most of which is attributable to the long unexplained delay in serving the summons. Thereafter there was a protracted engagement which accounted for about 20 months, and then eleven months between 9th November, 2017, when the plaintiff issued a final demand, and 5th October, 2018, when this application issued.

21. It seems to me that the first 18 months cannot simply be added to the last year or so, to get a delay of two and a half years. As I see it, there was, for so long as the negotiations were proceeding at least an unspoken armistice. During that time, and possibly in the time during which the loan was held by National Asset Loan Management Limited, the defendants hoped to achieve a settlement and it seems to me that for so long as the engagement continued, the defendants acquiesced in the fact that the action was not progressing. When the negotiations broke down, however, I think that the fact that the action had lain dormant for years added to the urgency with which it needed to be progressed. In the first period of 18 months or so the summons was relatively fresh, but in the second period it was rather stale, and I think that the court would likely take a more serious view of any failure to progress in the later, than in the earlier period.

22. Mr. Stephen B. Byrne, for the plaintiff, sought to justify the failure to deliver a statement of claim by reference to the decisions of the High Court in *ACC Bank v. McEllin* [2013] IEHC 454 and *Bank of Ireland Mortgage Bank v. Neary* [2019] IEHC 169, which spell out that a secured creditor is not obliged to exercise his enforcement options in any particular order or at any particular speed. He contended that the plaintiff could not be charged with delay for as long as it was endeavouring to realise the security it had over *Silverstream*. In argument, however, Mr. Byrne conceded, as he had to, that the plaintiff was not a secured creditor insofar as *Tinnahich* is concerned.

23. Although at the time the motion issued upwards of four years had elapsed since the date the summons was issued and upwards of three years since it was served, no statement of claim had been delivered. By the time the motion was heard, nearly five years had elapsed since the date of issue of the summons and nearly four years since it was served. Mr. Byrne declared that his client was prepared to abide any directions the court might make but did not apply for an extension of time to deliver a statement of claim or give any indication as to when, or even whether, the plaintiff proposed to do so.

24. The case was argued, on both sides, by reference to the well-established progressive test as to whether there had been inordinate delay; whether if there had been inordinate

delay, it was inexcusable; and, if there had been delay which was both inordinate and inexcusable, where the balance of justice lay.

25. The arguments, on both sides, were clear, focussed and succinct but did not address what appears to me to be the central issue in the case and which, although not argued, I do not believe that I can properly ignore.

26. The premise of any argument that the plaintiff has been guilty of inordinate and inexcusable delay, or of any delay, must be that the plaintiff has failed to do something which it was required to do.

27. As I have said, on 18th September, 2015 an appearance was entered on behalf of the defendants. Mr. Gracey, in his first affidavit, observed that the notice of entry of appearance did not require delivery of a statement of claim. That was correct but the significance of the omission to require delivery of a statement of claim appears not to have been appreciated.

28. Order 12, r. 5 (1) of the Rules of the Superior Courts provides:-

> *"5. (1) A defendant shall, on the day he enters an appearance to an originating summons, give notice of his appearance to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself by serving the marked duplicate memorandum. … In the case of a plenary summons, the memorandum shall include a notice stating whether the defendant requires delivery of a statement of claim or not.*

29. Order 20, rr. 3 and 4 of the Rules provide:-

> *"3. Where the defendant enters an appearance to a plenary summons and, at the time of entering such appearance or within eight days thereafter, gives notice in writing to the plaintiff or his solicitor, that he requires a statement of claim to be delivered, the plaintiff, if he has not already done so, shall deliver a statement of claim within twenty-one days from the receipt of such notice.*
>
> *4. Subject to the provisions of Order 13, rule 17 as to filing a statement of claim when there is no appearance, no statement of claim need be delivered when the defendant fails to appear or fails to serve such notice as is mentioned in rule 3. Where the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the Court may make such order as to the costs occasioned thereby as shall be just, if it appears that the delivery of a statement of claim was improper or unnecessary."*

30. Order 21, r. 1 provides:-

> *"1. Where a defendant enters an appearance to a plenary summons he shall deliver his defence and counterclaim (if any)-*

(a) *In case he does not by notice require a statement of claim, within twenty eight days from the entry of appearance; or*

(b) *In any other case within twenty eight days from the date of delivery of the statement of claim or from the time limited for appearance, whichever shall be later."*

31. It seems to me that these rules are dispositive of this application. The defendants having failed to call for a statement of claim, the plaintiff was never under any obligation to deliver one. Since the plaintiff was never obliged to deliver a statement of claim, it cannot be said to have been guilty of delay in doing so.

32. I should say that I would not necessarily, in an appropriate case, strictly apply the eight day time limit in O. 20, r. 3, so that if a defendant did not at the time of entry of appearance or within eight days thereafter, but did later, call for delivery of a statement of claim, time might run against the plaintiff from the time such a request might be made: but this is not such a case. The defendants never called for a statement of claim and did not, before issuing this motion, make any complaint that the plaintiff had not delivered one.

33. For completeness, with the caveat that it is *obiter*, I do not believe that I could have accepted the argument that the plaintiff would have been entitled to deal with its claim against *Tinnahich* on the basis that it was part of the range of remedies available to it as a secured creditor. That property was not, and never was to have been, held as security for the loans since acquired by the plaintiff and I see no reason why, for the purposes of any claim against it, the plaintiff would have been in any different position to any other unsecured creditor of the defendants.

34. Absent a requirement for delivery of a statement of claim the plaintiff was not obliged to deliver one, and cannot be said to have been guilty of delay.

35. For this reason, I must refuse the application.