[2020] IEHC 468

THE HIGH COURT

[2011 No. 11457P]

BETWEEN

MANHATTAN DESIGN FURNITURE LIMITED

PLAINTIFF

AND

BIJOU BEAUTY LIMITED, SALLY ANN EGLESTON, DEIRDRE KENNY AND DENISE COLLINS

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 18th day of September, 2020.

Introduction

1. This is an application by the plaintiff for an order pursuant to O. 63, r.9 (1) of the Rules of the Superior Courts, discharging the order of the Master of the High Court made on 15th October, 2019, dismissing the plaintiff's proceedings for want of prosecution against the second and third named defendants.

2. The plaintiff's claim against the second and third named defendants arises due to the fact that they were the guarantors of the obligations of the first named defendant under a lease, whereby the first defendant held the premises at 48 Roches Street, Limerick, as tenant to the plaintiff for a period of fifteen years from 8th November, 1999. The plaintiff claims that the amount owed to it by the second and third defendants as guarantors of the obligations of the first defendant, currently stands at €132,567, plus interest.

3. In summary, the second and third defendants maintain that the plaintiff has been guilty of inordinate and excusable delay in the prosecution of its claim against them, by virtue of the fact that the plenary summons was issued on 13th December, 2011 and nothing was done after that until service of a notice of intention to proceed on 1st November, 2018 and service of a notice of motion by the plaintiff seeking judgment in default of appearance against the second and third defendants on 15th April, 2019. In response to that motion, the second and third defendants entered appearances to the action and then issued motions on 6th June, 2019 and 30th July, 2019 seeking to have the plaintiff's action against them struck out on the grounds of want of prosecution, as the plaintiff had done nothing in the action for over seven years since the commencement thereof. The defendants maintain that they have been prejudiced in their defence of the action due to this delay.

Background

4. By a lease dated 6th December, 1999, the first defendant held the premises at 48 Roches Street, Limerick, as tenant to the plaintiff for a period of fifteen years commencing on 8th November, 1999. The second, third and fourth defendants were directors of the first defendant and executed the lease as guarantors of the obligations of the first defendant under the lease.

5. According to the second and third defendants, the business of the first defendant traded successfully as a beautician's salon for approximately nine years. However, they allege that due to defects in the premises in the form of damp, foul smells and rat infestation,

the first defendant was unable to use portions of the premises and in addition due to the unpleasant state of the premises, business declined. The first defendant stopped paying rent to the plaintiff on 11th November, 2008. By letter dated 11th February, 2009, the first defendant wrote to the plaintiff informing it that it would cease doing business from 14th February, 2009. According to the plaintiff, the first defendant abandoned the premises in March, 2009.

6. By letter dated 31st July, 2010, the second, third and fourth defendants wrote to Mr. Tony O'Carroll of the plaintiff company in relation to a third party who was interested in taking over the lease of the premises. They requested that he would consider a rent reduction of 30%. It appears that such consent was not forthcoming from the plaintiff.

7. On 25th February, 2011, the first named defendant was dissolved.

8. On 13th December, 2011, the plaintiff issued the plenary summons herein, which was served on the third defendant on 9th January, 2012 and was served on the second defendant on 10th January, 2012.

9. The plaintiff rented the premises to a third party from March 2012 until February 2013. The plaintiff then rented the premises to another third party from 15th September, 2014, presumably until the expiry of the lease held by the first defendant from the plaintiff, which would have expired in November 2014.

10. It appears that some steps were taken by the plaintiff's former solicitors to progress the matter by submitting an application to have judgment in default of appearance entered against the defendants in the central office of the Four Courts. However, two letters have been exhibited dated 14th June, 2013 and 13th January, 2015, wherein the judgments section of the central office wrote to the plaintiff's former solicitor indicating that they could not mark judgment against the defendants as the proofs were not in order.

11. The plaintiff's present solicitors were instructed in October 2018. They served a notice of change of solicitor and a notice of intention to proceed on 1st November, 2018. On 20th March, 2019, they issued a warning letter to the second, third and fourth defendants indicating that they would proceed to issue a motion seeking judgment in default of appearance unless appearances were entered within a period of 21 days. A notice of motion duly issued on 15th April, 2019 seeking judgment in default of appearance against the second, third and fourth defendants. That motion came on for hearing on 24th June, 2019, by which time the second and third defendants had entered appearances and the fourth defendant was given an extension of time within which to enter her appearance.

12. On 6th June, 2019 the second defendant issued a notice of motion seeking to have the plaintiff's action against her struck out for want of prosecution. The third defendant issued a similar motion on 30th July, 2019.

13. On 10th October, 2019, the plaintiff delivered its statement of claim.

14. The motions which had been issued by the second and third defendants came on for hearing before the Master of the High Court on 15th October, 2019, at which time an order was made striking out the plaintiff's action against the second and third defendants for want of prosecution.

Submissions of the Parties

15. While the second and third defendants were separately represented, their arguments can be taken together. They submitted that in this case there was an inordinate delay on the part of the plaintiff in bringing its proceedings. In this regard, they stated that there was both pre-commencement delay, due to the fact that the first defendant had ceased paying rent from November 2008, yet the plenary summons did not issue until December 2011. It was submitted that the court was entitled to have regard to this period of delay when considering the more significant delay which occurred post commencement of the proceedings. In that regard, it was submitted that a delay of over seven years between the date of issuance of the summons on 13th December, 2011 and the issuance of the warning letter on 20th March, 2019 in advance of the notice of motion dated 15th April, 2019 in respect of the application brought by the plaintiff seeking judgment in default of appearance against the second and third defendants, could not be seen as being anything other than an inordinate delay.

16. It was further submitted that this delay was completely inexcusable. In this regard, the defendants pointed out that only one affidavit had been sworn on behalf of the plaintiff, which was sworn by its present solicitor, who had been instructed in the matter in October 2018. He had not been able to proffer any reasonable excuse for the inaction on the part of the plaintiff in proceeding with its action after December 2011. The only steps that he had been able to point to were the unsuccessful attempts to obtain judgment in default of appearance in the central office against the second and third defendants in June 2013 and January 2015; which applications had been unsuccessful because the proofs were not in order. Furthermore, Mr. Cadogan, the plaintiff's present solicitor, had very candidly admitted in his affidavit that from the documents before him, there was no explanation for the delay that had occurred between 2015 and 2018. In these circumstances, it was submitted that the delay on the part of the plaintiff in proceeding with its action was totally inexcusable.

17. It was submitted that all of the parties were agreed that the appropriate test which the court had to apply was that set down by the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. It was submitted that in this case where there was both inordinate and inexcusable delay, the court then had to go on and decide where the balance of justice lay in relation to whether or not the action should be allowed to proceed. In this regard, it was submitted that the second and third defendants had suffered prejudice as a result of the delay on the part of the plaintiff in proceeding with its action against them. In particular, it had been averred in the affidavit sworn by the second defendant, that the books and records which had been held by the first defendant were no longer available to the defendants because they had been lost in the intervening years. This was significant because the second and third defendants wished to make the

case that the first defendant would not have been liable for the rent claimed by the plaintiff, due to the fact that the premises had been in an appalling state of repair, which had ultimately led to the decline and cessation of the business of the first defendant. The defendants allege that they were greatly prejudiced by the absence of these books and records and of photographs showing the state of the premises at the relevant time.

18. Furthermore, due to the lapse of time, the ability of the second and third defendant to recall relevant dates and events had diminished with the passage of time and they were therefore prejudiced in their defence of the action.

19. It was submitted that in relation to the claim for payment of the insurance premia by the second and third defendants as guarantors of the obligations of the first defendant under the lease, that obligation only arose once a formal demand for payment of such premia had been made by the plaintiff of the first defendant. Due to the loss of documentation in the intervening years, the second and third defendants would not be in a position to prove that no such demand had been made by the plaintiff of the first defendant.

20. It was further submitted that in this case the second and third defendants were not responsible for the delay that had occurred in the prosecution of the action, nor had they acquiesced in such delay. It was submitted that they were entitled to ignore the proceedings, as they had done, due to the fact that it appeared to be the case that the plaintiff had no intention of proceeding with its action against any of the defendants, due to the fact that it took no steps whatsoever to prosecute the action for a period of seven years after the proceedings had commenced.

21. It was submitted that in the circumstances of this case, where there had been no action taken by the plaintiff to pursue the action over a period of seven years, it was unjust and unreasonable to expect the defendants to be in a position to properly defend themselves at the trial of the action. Accordingly, it was submitted that the court should strike out the proceedings against the second and third defendants for want of prosecution.

22. In response, counsel for the plaintiff submitted that in relation to the question of whether there was inordinate and/or inexcusable delay on the part of the plaintiff, he relied on the decision in *Promontoria (Arrow) Ltd v. Walsh and Anor* [2019] IEHC 650, where Allen J. held that the premise of any argument that the plaintiff had 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. In that case, an appearance had been entered on behalf of the defendants, but it did not require production of a statement of claim. The judge held that 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 could not be said to have been guilty of delay in doing so. He went on to hold that the defendants had never called for a statement of claim and before issuing the motion that was before the court, had not made any complaint that the plaintiff had not delivered one. He concluded by stating that absent a requirement for delivery of a statement of claim, the plaintiff was not obliged to deliver one and could not

be said to have been guilty of delay. For that reason, he refused the defendant's application.

23. Mr. O'Flaherty B.L. on behalf of the plaintiff submitted that this case was similar to the decision in the *Promontoria* case. The plaintiff had issued a plenary summons, but the defendants had never entered any appearance thereto and had not called upon the plaintiff to take any further step and in particular had not called upon it to deliver its statement of claim. In these circumstances it could not be said that the plaintiff had been guilty of culpable delay.

24. Counsel further submitted that even if the court held against him on that point, the balance of justice lay in favour of allowing the action to proceed. He submitted that given the particular circumstances of this case, there was in fact no prejudice suffered by the defendants in being called upon to defend the action at this remove.

25. It was submitted that this was a commercial case which was essentially a claim for arrears of rent and arrears of insurance premia, which were owed by the first defendant to the plaintiff under the terms of its lease; which obligations were guaranteed by the second, third and fourth named defendants, who were directors of the first defendant at the relevant time. In these circumstances, it was a simple debt collection case, which did not require extensive viva voce evidence, such as would be the case in relation to the liability aspects of a personal injury action.

26. It was submitted that the argument raised by the defendants in relation to their being prejudiced by the lapse of time in giving viva voce evidence, or due to the loss of documents which had been once held by the first defendant in relation to the state of repair of the premises, was totally irrelevant to the plaintiff's claim against the defendants. Even if the premises were in a state of disrepair, that could not be an arguable defence to the plaintiff's claim in these proceedings, due to the fact that under the lease, the obligation to keep the premises in repair lay upon the tenant. Therefore, if the premises had fallen into the state of disrepair as alleged by the defendants, that was a matter that was entirely the responsibility of the first defendant. That that was in fact the position, was evidenced by the fact that in 2008, the first defendant had purported to carry out repairs to the premises. Therefore, the first defendant was aware at all times that it bore the obligation to keep the premises in good repair.

27. In relation to the assertion that the books and records of the first defendant had been lost in the intervening years, counsel submitted that that was entirely the fault of the second and third defendants, as they were directors of the first defendant. If the company had become insolvent in or about 2009, as appeared to the be the case from the correspondence exhibited in the affidavits, then the directors should have put the company into liquidation and the books and records would have been retained by the liquidator. They had not done so, and the company had simply been dissolved for failure to comply with its statutory obligations in February 2011. If the documents had become lost subsequent to that, that was entirely the fault of the defendants.

28. In relation to the question of recovery of the arrears of insurance premia, counsel stated that the burden of proof lay upon the plaintiff to establish that demand had been made by it of the first defendant for payment of such premia and therefore the plaintiff would have to produce documentation showing that such demand had been made by the plaintiff of the first defendant. Thus, the defendants would not be prejudiced by the absence of any documentation in the possession of the first defendant.

29. Counsel submitted that this was a simple case seeking arrears of rent and arrears of insurance premia due by the first defendant to the plaintiff. It was not denied that the first defendant had failed to make such payments under the lease. In these circumstances, it was submitted that the second and third defendants were liable as guarantors of the obligations of the first defendant under the lease. This did not require viva voce evidence from the defendants or other witnesses, it was purely a debt collection case and accordingly the defendants were not prejudiced in having to meet the claim at this remove. For these reasons, it was submitted that the court should refuse to strike out the plaintiff's action against the defendants.

Conclusion

30. It was agreed between the parties that the correct test to be applied by the court on this application was the test set down in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and the test set down by Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, at p. 475 – 476. The test set down in those cases is very well known and it is not necessary to restate it in this judgment.

31. It was also agreed between counsel that the courts had become less tolerant of delay on the part of litigants in recent years: see dicta of Clarke J. (as he then was) in *Rodenhuis and Verloop B.V. v. HDS Energy Ltd* [2011] IEHC 465; dicta of Hogan J. in *Donnellan v. Westport Textiles Ltd* [2011] IEHC 11.

32. More recently, in *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. (as she then was) stated as follows at para. 40:

> *"Finally, recent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures. These decisions have emphasised the constitutional provisions contained in Article 34.1 which require the courts to administer justice. This constitutional obligation presupposes that the court itself will strive to ensure that litigation is conducted in a timely fashion."*

33. The court is satisfied that having regard to these decisions, there is a requirement both under the Constitution and under the European Convention on Human Rights to ensure that where a person is sued, the proceedings brought against them are progressed in a timely manner. The fact that the progress of proceedings is largely within the hands of the person bringing the action, does not mean that they can dictate the progress of proceedings at whatever pace may suit them. This positon was made clear by Irvine J.

(as she then was) in *William Connelly & Sons Ltd v. Torc Grain and Feed Ltd* [2015] IECA 280 in the following terms:

> *"Accordingly, it is clear that entirely independent of the views of the parties to litigation, the court itself must, because of its constitutional mandate, by its own conduct ensure that litigation is completed in a timely fashion."*

34. The court is satisfied that in considering this application, it must begin by asking the question has there been an inordinate and inexcusable delay on the part of the plaintiff and, if so, where does the balance of justice lie in relation to whether the proceedings should be allowed to proceed or not. On the first aspect, it was submitted by counsel on behalf of the plaintiff that this case came within the decision in the *Promontoria v. Walsh* case. However, I do not think that that decision assists the plaintiff. This is due to the fact that in the *Promontoria v. Walsh* case, there had been protracted negotiations between the parties, during which time the action was allowed to go into abeyance. The judge referred to this as being a period of "*unspoken armistice*". In those circumstances, the defendant was held to have acquiesced in the proceedings going into abeyance. In this case there was no such acquiescence on the part of the defendants. Furthermore, the fact that there were no appearances filed on behalf of the defendants in this action and therefore no request made of the plaintiff to furnish its statement of claim, cannot be used as a means of excusing the inordinate seven-year delay on the part of the plaintiff to proceed with the action once it had been commenced by issuance of the plenary summons on 13th December, 2011.

35. Accordingly, the court is satisfied that there was inordinate delay on the part of the plaintiff in this case after issuance of the plenary summons. However, the court is not satisfied that there was any pre-commencement delay in the period between when the first defendant stopped paying rent in November 2008 and December 2011 when the plenary summons issued, due to the fact that the first defendant had written to the plaintiff asking it to stay its hand in taking any action.

36. The court is also satisfied that the post-commencement delay was inexcusable. It is noteworthy that no affidavit has been filed by any director or officer of the plaintiff company to explain why it did nothing in the seven years after it had issued the plenary summons. The only affidavit filed on behalf of the plaintiff, was the affidavit filed by Mr. Cadogan, its present solicitor. He was able to glean very little from the documents that had been made available to him by the plaintiff's former solicitor. All he could point to were the two letters from the judgments section of the central office declining to enter judgment in favour of the plaintiff due to deficiencies in the proofs that had been furnished with those applications. Those letters had issued in June 2013 and January 2015. He very candidly admitted that there was nothing on the file that would explain any subsequent delay between 2015 and 2018. It was also noteworthy that he was not able to point to any instructions from his client as to why nothing had been done during the seven-year period that elapsed after issuance of the plenary summons. In these

circumstances, the court finds that the delay on the part of the plaintiff was both inordinate and inexcusable.

37. Turing to a consideration of the balance of justice as required by the third limb of the *Primor* test, the court has had regard to the dicta of Irvine J. (as she then was) in *McNamee v. Boyce* [2016] IECA 19 at para. 35:

> *"Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test."*

38. There are similar dicta from the same judge in the *Millerick case*, where she stated that it was clear from the relevant authorities that in the presence of inordinate and inexcusable delay, even marginal prejudice may justify the dismissal of the proceedings.

39. Having considered the facts in this case and the arguments of counsel, I am satisfied that the second and third defendants have established that they will be prejudiced in their defence of the action, if they are called upon to defend the action at this remove. I have reached that conclusion for the following reasons. Firstly, their ability to give viva voce evidence of the state of disrepair of the premises and of the interaction which they had on behalf of the first defendant with the plaintiff as landlord, will have diminished due to the passage of time. Furthermore, the loss of the books and records of the company, which may well have contained documentation, including photographs, which supported their claim in relation to the extent of the dilapidation of the premises, puts them at a distinct disadvantage in this regard. While I accept the point that has been made by counsel on behalf of the plaintiff, that the repairing obligation under the lease lay upon the tenant; if it were the case, as alleged by the defendants, that the walls were in such a state of disrepair that rats were literally coming through the walls into the premises, I think that there is an arguable case that that would fall outside the normal ambit of a repairing covenant. In these circumstances, I am satisfied that they are prejudiced due to the lapse of time and the loss of the documents from putting forward their defence based on the state of repair of the premises.

40. Similarly, the loss of the documents belonging to the first defendant, puts the other defendants at a disadvantage in relation to dealing with the issue as to whether any demand for payment of the insurance premia was in fact made by the plaintiff of the first defendant, as required by the lease. While the burden of proof in this regard may well lie upon the plaintiff, the absence of such documentation is a considerable impediment to the defendants in establishing their defence to this aspect of the claim.

41. In these circumstances, the court is satisfied that the defendants have established that they have suffered prejudice which certainly meets the threshold of constituting "moderate prejudice" as required by the case law.

42. Finally, the court is satisfied on the evidence before it that the defendants did not cause any of the delay in this case, nor did they acquiesce in it.

43. Accordingly, the court finds that the balance of justice is against permitting the plaintiff's action to continue against the second and third defendants. The court will make an order striking out the plaintiff's action against the second and third defendants for want of prosecution.