

THE HIGH COURT

[2021] IEHC 823

[2012 No. 4437 S]

BETWEEN

CABOT FINANCIAL [IRELAND] LIMITED

PLAINTIFF

AND

DAMIEN HEFFERNAN, PATRICK HEFFERNAN AND GRANT MACREA

STATIONERY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 20th day of December, 2021

Introduction

1. This is an application brought by the second named defendant seeking to have the proceedings dismissed as against him for want of prosecution and/or inordinate and inexcusable delay on the part of the plaintiff. These types of application are frequently dealt with by the courts and many have a number of common features. These features include proceedings being issued close to the expiry of the relevant statutory time period, followed by lengthy periods of time in which no steps are taken to prosecute proceedings. However, this application has an unusual feature, which I will set out later in this judgment.

2. These proceedings arise out of moneys advanced by Ulster Bank Ireland Ltd to the first named defendant, in or about 2004, to the second named defendant, in or about January 2009, and a guarantee entered into by the second named defendant, in or about May 2006. The amount which the plaintiff seeks to recover from the second named defendant is a sum of money in the order of some €2.5 million.

3. Proceedings were commenced by Ulster Bank Ireland Ltd by summary summons dated 27 November 2012. In January 2016, Ulster Bank Ireland Ltd transferred the loan and guarantee to Cabot Asset Purchases (Ireland) Ltd. and new solicitors came on record. Subsequently, in May 2019, the loan and guarantee were transferred to the plaintiff. Though the loan and guarantee were transferred to the plaintiff, the file and information concerning the prosecution of these proceedings was clearly not transferred from Ulster Bank Ireland Ltd.'s then solicitor to the solicitors who are on record for the plaintiff. This has led to a situation which, as will become apparent, is unacceptable.

The claim

4. The basis for the claim against the second named defendant is set out in a grounding affidavit of Mr. Carl McCandless of Ulster Bank Ireland Ltd, sworn 1 February 2013. In the course of this affidavit Mr. McCandless states that the second named defendant signed a guarantee in writing, dated 26 May 2006, whereby the second named defendant guaranteed payment to the plaintiff of all present or future liabilities of the first named defendant to a sum not in excess of €2,250,000. Further, he states that pursuant to a facility letter, dated 21 January 2009, Ulster Bank Ireland Ltd provided a loan facility to both the first named and the second named defendants in the amount of €2,386,000 for the purpose of restructuring an existing facility. The alleged breach of the facility letter is that the first and second named defendant failed to make the payments and, as of 4 September 2012, there was an amount due by the first and second named defendants to Ulster Bank Ireland Ltd of €2,515,133.

5. In a replying affidavit, sworn by the second named defendant on 17 June 2013, he sets out the background to these commercial transactions. The first named defendant, who is the son of the second named defendant, became involved in property speculation financed by Ulster Bank Ireland Ltd. It would appear that a number of property purchases by the first named defendant were imprudent, resulting in the first named defendant getting into financial

difficulty. The second named defendant states that he entered into the loan agreement of 21 January 2009 under duress. He further states: -

“... Moreover, I can tell the Court that I did so in circumstances where there was undue influence being imposed upon me by my son and I am advised that this affords me a defence to these proceedings in circumstances where the Plaintiff [Ulster Bank Ireland Ltd] was on constructive notice of such undue influence and failed to provide me with any information and/or advice in relation to the proposed loan nor did it seek to put any safeguards in place.”

The second named defendant makes out a similar defence in respect of the guarantee.

6. In the course of the said affidavit, the second named defendant identifies a Mr. Paul O'Reilly, an employee of Ulster Bank Ireland Ltd, as being the official dealing with both the loan and guarantee. The second named defendant gives an account of his various meetings with Mr. O'Reilly and where they took place. The second named defendant's account and characterisation of the various transactions is denied in an affidavit of Mr. Paul O'Reilly, sworn 24 September 2013. There was an exchange of further affidavits of the second named defendant and Mr. Paul O'Reilly, which concluded in an affidavit sworn by Mr. O'Reilly on 26 May 2014.

Chronology of proceedings

7. The chronology is as follows: -

- 27 November 2012: summary summons issued;
- 1 February 2013: motion for judgment issues;
- 11 February 2013: Order of Kelly J. refusing to admit the proceedings into the Commercial List;
- 16 April 2013: motion for judgment first listed in the Master's Court;

- 14 May 2013 – 3 June 2014: motion for judgment adjourned from time to time to facilitate an exchange of affidavits;
- 8 July 2014: motion transferred to Common Law List by Master;
- 22 October 2014: motion listed for mention in Non-Jury List and hearing date fixed;
- 26 January 2015: matter listed for hearing before Hedigan J. but adjourned for hearing to 20 April 2015;
- 20 April 2015: hearing adjourned;
- 13 July 2015: hearing adjourned;
- 12 October 2015: new hearing date fixed;
- 22 January 2016: loan and guarantee transferred from Ulster Bank Ireland Ltd to Cabot Asset Purchases (Ireland) Ltd.;
- 4 February 2016: appears in Non-Jury List for hearing but is struck out for nonattendance;
- 21 March 2016: new solicitors come on record for the plaintiff;
- 31 May 2019: loan and guarantee transferred from Cabot Asset Purchases (Ireland) Ltd to plaintiff;
- 27 June 2019: Order made by Master of the High Court substituting Cabot Financial [Ireland] Ltd as plaintiff;
- 4 September 2019: the within notice of motion is filed; and
- 4 February 2021: plaintiff issues second motion for summary judgment.

Legal principles to be applied

8. I refer, firstly, to the oft cited passage of Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp. 475 and 476. For the sake of brevity, I will not set it out. In the years since this decision of the Supreme Court, these principles have been consistently

applied; though, as Butler J. stated recently in *Gibbons v. N6 (Construction) Ltd and Galway County Council* [2021] IEHC 138: -

“... the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition. ...”

I would also refer to the following passage of the judgment of Irvine J. (as she then was) in *Flynn v. The Minister for Justice* [2017] IECA 178, at para. 19 she states: -

“(8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.”

9. It is clear from the authorities that a court hearing an application such as this has to decide the following matters: -

- (i) Has there been inordinate delay in the prosecution of the proceedings?;
- (ii) If there has been inordinate delay, is such delay excusable?; and
- (iii) If the delay has been both inordinate and inexcusable, does the “*balance of justice*” lie in favour of dismissing the proceedings?

Also, a court has to look at the actions of the defendant bringing the application. If the defendant acquiesced in the delay, then this would be a factor that would weigh in the balance against granting the order sought.

Was the delay inordinate?

10. These proceedings concern financial transactions that took place in 2004, 2006 and 2009, between twelve and seventeen years ago. The summary summons was issued in 2012

and, again, nine years later, but is only at the motion for summary judgment stage. These are debt recovery proceedings and the issues referred to in the replying affidavits are not complex. It is hard to conclude that the delay in prosecuting these proceedings is anything other than inordinate.

Is the inordinate delay excusable?

11. It is clear that the delay in these proceedings was the fault of the plaintiff and its predecessors. The loan and guarantee in question were transferred on two different occasions requiring applications to court. These applications were, essentially, procedural in nature, involving substitution of the plaintiff and change of name.

12. Unfortunately, the plaintiff's attempt to excuse this delay has raised serious issues as to its conduct in the proceedings. In written submissions filed by the plaintiff for this application the following is stated: -

“(viii) Regrettably delays are commonplace in litigation as can be seen from the timeline above, it is submitted that the Court must be particularly cognisant of the fact that the Motion for Judgment had obtained the benefit of 3 hearing dates in 2015 which were adjourned and for reasons unknown to the Respondent [the plaintiff] but it is likely that one or more of those adjournments were either at the behest or with the consent of the Applicant [the second named defendant] which significantly undermines the present application.

(x) Finally, and whilst the Plaintiff was not involved in the litigation at the time, it must be noted that the Motion for Judgment listed for hearing on 4 February 2016 appears to have been struck out for the non-attendance by either party. It is obvious that the Plaintiff's failure to attend arose from the loan sale which had completed two weeks earlier and the practical impossibility of the newly engaged solicitor coming on record to deal with the proceedings any sooner than they did on 21 March 2016. No excuse or

explanation is given for the Applicant's [the second named defendant] failure to attend the hearing and it is respectfully suggested that the Applicant's non-attendance for hearing significantly added to the delay in these proceedings. As deposed to by Mr. Dillon, the Applicant was aware of the assignment from Ulster Bank to CAPI in January 2016 and if the Applicant had attended at the hearing on 4 February 2016 it is likely that the Motion for Judgment would have been determined many years ago." (Emphasis added)

13. Having received the written submissions on the part of the plaintiff, not surprisingly, the above statements drew a response by way of affidavit from the second named defendant's solicitor, Mr. John Carroll, of Crowley Millar. In his affidavit he exhibited emails and correspondence that passed between his firm and that of the plaintiff's then solicitors. These emails and correspondence were opened and considered during the course of the hearing of this application. The following conclusions can be drawn: -

- (i) There was no basis for the assertion by the plaintiff that the second named defendant sought adjournments as claimed;
- (ii) There was no failure on the part of the second named defendant to attend any hearing so there is no basis for the assertion that "*the Applicant's [the second named defendant] non-attendance for hearing significantly added to the delay in these proceedings*"; and
- (iii) There was no failure on the part of the second named defendant to attend at the hearing on 4 February 2016.

14. The purpose of written legal submissions in an application such as this is to identify for the Court the relevant legal authorities and their application to the facts of the case. Groundless speculation and invented "*facts*" have no place in written legal submissions. In this case I believe that this unacceptable situation came about because of the plaintiff's present solicitor's

failure to take the basic step of obtaining from its predecessor's the file on this litigation. Clearly the inordinate delay on the part of the plaintiff is inexcusable.

“Balance of justice”

15. In looking at where the “*balance of justice*” lies, I believe that I am entitled to take into account the matters which I have referred to at paras. 12 to 14 above. Unfortunately, this was compounded by a further matter. Following the issue of proceedings, the then solicitor for the plaintiff sought to have the matter entered into the Commercial List. For this purpose, the solicitor signed a certificate pursuant to O.63A, r.4 (2) of the Rules of the Superior Courts. The solicitor certified, *inter alia*, as follows: -

“... In addition to the foregoing, there is a commercial urgency to the proceedings and therefore the proceedings would benefit greatly from the procedures available in the Commercial List under Order 63A.” (Emphasis added)

This certificate was dated 1 February 2013, in excess of eight years ago. In the course of the hearing of this application an inquiry was made as to what was the “*commercial urgency*” referred to. Counsel for the plaintiff was unable to enlighten the Court on this.

16. In his replying affidavit, the second named defendant set out the basis for his defence to these proceedings, namely: undue influence of which Ulster Bank Ireland Ltd (the plaintiff's predecessor) had constructive notice of and a failure to ensure that the second named defendant obtained independent legal advice. If these proceedings were allowed to continue, it would require the giving of evidence of conversations that took place, allegedly, in informal settings many years ago. Passage of time will make it all the more difficult for a court hearing this matter at a trial date, which will inevitably be over a year's time, to decide where the truth lies. Further, the second named defendant is now some 78 years of age, retired and has undergone heart surgery. 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. I am

satisfied that the second named defendant has reached the threshold of prejudice as identified by Irvine P. in *Flynn v. The Minister for Justice*, referred to above. I am further satisfied that no acquiescence has been identified on the part of the second named defendant.

17. For the above reasons, I conclude that the balance of justice lies in favour of granting the reliefs being sought by the second named defendant.

Conclusion

18. By reason of the foregoing, I will make an order in terms of the second named defendant's notice of motion and dismiss the proceedings as against him. As for costs, my provisional view is that as the second named defendant has been "*entirely successful*" in this application, he is entitled both to the costs of defending these proceedings to date and to the costs of this application, such costs to include reserved costs, to be adjudicated in default of agreement. I will put the matter in for mention in this Court on 20 January 2022.