



# No Permission to Stall



## Introduction

Delays in litigation are inevitable, and claims are likely to be delayed following the recent postponement of court procedures and court lists from the current Covid-19 pandemic. That said, parties in litigation must continue to comply with the time limits set out in the court rules because failure by the solicitor to progress cases in an expeditious manner could lead to the case being struck out. If this happens, the solicitor in question could be open to a risk of a case of professional negligence being taken against them. There have been a number of recent cases that demonstrate that the courts are becoming less tolerant of inactivity and delay on the part of litigants and their solicitors. In this article we look at two recent judgments handed down in April and May of this year that provide insightful consideration of the three-part test and factors that should apply in deciding whether a case should be struck out.

In both the cases of *Start Mortgages DAC -v- Mc Namara & anor*, [2020] IEHC and *Myrmidon CMBS (Propco) Limited & anor -v- Joy Clothing Limited & ors*, [2020] IEHC 246 the Court dismissed the proceedings for want of prosecution on the grounds of inordinate and inexcusable delay.

## Start Mortgages DAC -v- Mc Namara & anor

In dismissing these proceedings, Ms Justice Power in applying the relevant principles, concluded that the five year delay in question caused serious prejudice to the Second Named Defendant applicant and gave rise to a substantial risk of unfairness should the matter proceed to trial. The Court also awarded costs in favour of the applicant in relation to the motion to dismiss and in relation to the cost of defending the main proceedings on the basis of the fact that he was brought into costly proceedings that, subsequently, were shelved.

## Background

The facts go back to June 2006 when the Defendants, who were in a partnership at the time, had taken out a loan jointly for €1m to facilitate the purchase of properties. However, later that year the partnership was dissolved with the debt severed between the Defendants. The Second Named Defendant then entered into a re-financing arrangement with the same bank, which had the specific object of paying off his portion of the original €1m debt. He paid off the sum of €500,000 (his portion) but the bank deducted fees with the result that the sum of €462,547.28 was left credited to the loan account.

The bank issued proceedings in July 2010 seeking summary judgment against both Defendants for the remaining balance of the debt. The case was then adjourned to plenary hearing and given a return date for November 2013. By this time, the First Named Defendant no longer lived in Ireland.

According to the Second Named Defendant, no further activity of any kind occurred after November 2013. However, the Plaintiff bank contended that an Order for Discovery was made against him on 11 November 2013. The Second Named Defendant did not comply with the Order for Discovery.

After several years of inactivity, the Second Named Defendant solicitors wrote to the bank on 10 September 2018 calling upon it to serve a Notice of Discontinuance. He claims to have received no reply to that letter nor was any

Notice of Intention to Proceed served. The Second Named Defendant considered that the proceedings were effectively dead.

No further steps were taken after November 2013 until the Second Named Defendant brought the application to dismiss on 14 February 2019. He contended that he wanted to move on with his life without this case 'hanging over him'.

When the motion to dismiss issued, the bank then served a Notice of Intention to Proceed in respect of the main proceedings and had written to the Second Named Defendant's solicitors seeking the affidavit of discovery. The application was contested by the bank with several replying affidavits exchanged.

The Second named Defendant claimed that at the date of the application, over 6 years had elapsed since the motion had issued. He argued that genuine prejudice had been caused to both his health and commercial interests due to these inactive proceedings and that it would be grossly unfair if they were to proceed.

The bank on the other hand in contesting the application principally submitted that it would be wasteful and disproportionate to dismiss the proceedings because the bank would not be precluded from issuing fresh proceedings as its claim against the Defendants was not statute-barred.

## Judgment

The Judge went through the well settled legal principles which set out the three-step approach to be adopted when considering such an application, commonly known as the *Primor* test.

### 1. INORDINATE DELAY

The first test is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the Plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. In this case, the Court held that a failure, since November 2013, to take any step whatsoever in proceedings that were relatively straightforward and non-complex was inordinate by any standards. The Judge considered case law which held that a subjective approach is required when looking at a period of delay because different treatment may be warranted for the same period of delay in different cases, and the Court should react to the given facts of a particular case.

### 2. INEXCUSABLE DELAY

If the Court considers the delay inordinate then the second limb of the test is to ascertain whether that delay can be excused. If the delay can be excused, the application to dismiss must fail.

It is for the Defendant to convince the court that no reasonable explanation exists to excuse the Plaintiff's delay. Explanations for delay should relate to the actual claim itself rather than some other unrelated factor. For example, it has been held in other cases that delay will not be excusable because a Plaintiff was tied up in other litigation or where a Plaintiff delayed on account of having difficulty in obtaining legal representation.

In this case, it was pretty straightforward in that the Court found the delay to be inexcusable as no reason whatsoever was offered by the bank for its failure to prosecute the action.

### 3. BALANCE OF JUSTICE

In the third and last step, the court considers where the balance of justice lies having regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay.

In considering where the balance of justice lies, the Judge in this case referred to authorities that considered that even partial prejudice could justify the dismissal of proceedings. The Court also looked at the separate and distinct basis for the Court to exercise its inherent jurisdiction which was found in a line of jurisprudence that places the emphasis more on the idea of *unfairness* to the defendant rather than the 'balance of justice'. The Judge also

referred to Article 6.1 of the European Convention on Human Rights which requires that proceedings be prosecuted within a reasonable time.

The Court was satisfied that the inordinate and inexcusable delay in this case had caused significant prejudice to the applicant on a number of fronts. The Court found that the unfairness asserted by the applicant was threefold—personal, professional, and procedural. The prejudice put forward by the Second Named Defendant included:

- **Commercial prejudice:** Whilst all his loan facilities were fully serviced and up to date, his credit rating was, nevertheless, damaged because of the delay, particularly, from 2013 and 2019 when the economy had improved. Serious business opportunities had presented themselves but based on a poor credit rating arising only in respect of this disputed loan, he was unable to build and develop his business.
- **Adverse effects on health:** The Defendant claimed he had suffered significant stress with the proceedings left hanging over him and his family. To support this, he exhibited a medical report.
- **Evidential difficulties:** In terms of complying with the discovery order, he claimed that this was grossly unfair as he no longer has access to business diaries, text messages and phone numbers of that time. The firm of solicitors he engaged at the time of the dissolution of the partnership no longer existed. A number of the bank's personnel who dealt with the loan, no longer worked in the bank and, had not come forward to swear affidavits contesting his account of what had transpired.

The Judge looked to the fact that the First Defendant had left the jurisdiction. To that end the Judge held that the potential impact which the absence of corroborative records and relevant witnesses may have upon the fairness of the trial, should this case be allowed to proceed, was not to be understated.

The Court also looked at whether it could be said the Defendant acquiesced in the delay given his inactivity after the making of the Order for Discovery. However, the Judge was satisfied that the delay of the Defendant was more one of understandable inactivity as opposed to culpable acquiescence as he had been waiting on a response from the bank to separate correspondence.

The bank on the other hand submitted that it would be wasteful and disproportionate to dismiss the proceedings because the bank would not be precluded from issuing fresh proceedings as its claim against the Defendants was not statute-barred. The Judge noted that the issue of limitation was not one for determination in this application and further held that the Court cannot determine the application on the basis of some hypothetical claim that might be brought in the future.

In this case the Court notably held that permitting a Plaintiff to stall proceedings, without cause, for years on end, solely on the ground that the Statute has not expired, does not have the appearance of justice. In concluding the Judge was satisfied that the balance of justice requires that these proceedings be dismissed for want of prosecution and on the grounds of inordinate and inexcusable delay.

## **Myrmidon CMBS (Propco) Limited & anor -v- Joy Clothing Limited & ors**

In this case, the general timeline was as follows:

- *Summary summons served on 21 January 2009.*
- *Appearances entered on behalf of the defendants on 2 February 2009.*
- *The matter was transferred to plenary hearing and a statement of claim was delivered on 24 November 2009.*
- *A defence and counterclaim delivered on 8 February 2010*
- *Updated particulars of claim served by the Plaintiff on 26 July 2010.*
- *The plaintiff served a notice of change of solicitor and a notice of intention to proceed on 4 November 2011 and again on 7 November 2013.*
- *A reply and defence to the counterclaim was delivered on the 24 June 2014.*
- *Discovery sought by the Defendants on 18 September 2014.*
- *On 29 July 2016, the solicitor for the plaintiff served a further notice of intention to proceed and a notice of change of name of solicitor.*

- *Save for a without prejudice meeting in January 2018, the case went quiet.*
- *An application to strike out was brought in March 2019.*

## Judgment - Key findings

In this case, the court acceded to the Defendant's application and dismissed the proceedings. In consequence, the counterclaim was dismissed. In delivering Judgment, Mr. Justice MacGrath again referred to the three-stage *Primor* test and found delay to be inordinate and inexcusable. While we do not propose to go over the same points as made in the case above, some points of interest to note from this Judgment include the following:

- *The objection of the Defendants that the case was not ready for trial did not amount to acquiescence or estoppel in terms of delay but was taken into account in the balance of justice analysis.*
- *It is for the Defendants to discharge the onus of proof of establishing that the Plaintiffs have been guilty of inordinate and inexcusable delay.*
- *The obligation is on the Plaintiff to persuade the court that the balance of justice favours the case proceeding.*
- *The without prejudice meeting was not to be taken into consideration by the court in its assessment of delay as such negotiations should not affect or alter the legal rights of the parties.*
- *The Judge was not satisfied that concrete prejudice had been established but at a minimum there was likely to be general prejudice to the Defendants regarding its ability to defend the claim*
- *The Judge also considered the prospective delay in that if this matter were to proceed it was likely to be some time more before the case comes on for hearing.*
- *The court took into consideration the further general prejudice to the defendants arising from the oppressiveness of a claim hanging over them for such a period of time.*
- *The Judge noted the Defendants' concession that if the claim was struck out, that the counterclaim would also be struck out.*

The Judge concluded that the balance of justice lay against the continuation of the proceedings including the counterclaim.

## Conclusion

It is apparent from these recent cases that the Courts are cracking down on stale claims with each case being determined on their specific facts. Applications to strike out on grounds of delay are becoming increasingly common and worthwhile where there is protracted delay evident both pre and post commencement of proceedings.

In applying the above to the present situation, many solicitors are now working remotely and as such many may not have access to all the usual resources such as hard copy documents and client instructions. Delays in progressing with claims will be inevitable on both sides because of the pandemic but there are clearly limits as to what delay the courts will tolerate if an application to dismiss is brought at some future date. Plaintiffs who have their claims struck out on grounds of delay will in turn look to see if they can hold their solicitor responsible by making a claim grounded on negligence. From the Plaintiff's position, it is important that in looking at matters through a longer lens that cases are not permitted to unreasonably stall during these turbulent times. On the other hand, from a Defendant's position, there may be opportunities on the horizon.

## Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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