

February 2022

The High Court dismisses a loan sale purchaser's summary proceedings of €2.5million on grounds of delay.

Analysis of *Cabot Financial (Ireland) Limited v Heffernan & Ors [2021] IEHC 823*, judgment of Justice Meenan delivered on 20 December 2021 (the "**Judgment**")

### Practice Focus

- Summary judgment.
- Order 122, rule 11 of the Rules of the Superior Courts ("**RSC**"), applications to strike out proceedings for want of prosecution and/or inordinate and inexcusable delay on the part of the plaintiff.

### Overview

- The Plaintiff, (Ulster Bank Ireland Limited) (the "**Bank**") advanced money to the First Defendant in 2004 and Second Defendant in 2009. The Second Defendant provided a guarantee in 2006.
- The Bank issued summary judgment proceedings for €2.5 million on 27<sup>th</sup> November 2012.
- On 11<sup>th</sup> February 2013, the Bank made an application to transfer the summary judgement application to the Commercial List of the High Court. This was refused by Mr. Justice Kelly.
- In 2014 the application was transferred to the Common Law List and the hearing was adjourned a number of times, before being struck out for non-attendance on 4<sup>th</sup> February 2016.
- A month before, in January 2016, the Bank transferred the interest in the loan and guarantee of the Defendants to Cabot Asset Purchases (Ireland) Limited ("**Cabot**") and new solicitors came on record for Cabot. The Plaintiff's file was not transferred to the new solicitors.

- On 27<sup>th</sup> June 2019, the Master of the High Court substituted Cabot as Plaintiff.
- On 4<sup>th</sup> September 2019, the Defendant issued the current motion to strike out.
- On 4<sup>th</sup> February 2021, the Plaintiff issued a second motion for summary judgment.

### **The Court's findings:-**

In examining the Defendants' application, Mr Justice Meenan observed and held as follows:-

- Relying on the three step test set out by the Supreme Court in *Primor Plc v Stokes Kennedy Crowley [1996] 2 I.R 459* and citing the more recent decision of Ms. Justice Butler in *Gibbons v N6 (Construction) Limited and Galway County Council [2021] IEHC 138*:

*"..... the court's obligations [is] to ensure the litigation is progressed to a conclusion with reasonable expedition..."*

The Court stated it must decide on the following issues:-

- Has there been inordinate delay in the prosecution of the proceedings?
- If there has been inordinate delay, is such a delay excusable? And
- If the delay has been both inordinate and inexcusable, does the balance of justice lie in favour of dismissing the proceedings?
- The Court also considered the conduct of the defendant and if the defendant acquiesced in the delay, as this would be a factor to balance against granting the order sought.

Justice Meenan found:-

- The proceedings concerned financial actions that occurred between 12 and 17 years ago. As these are debt recovery proceedings and the issues between the parties are not complex, the delay is inordinate.
- The Court took issue with the conduct and explanation of the delay provided by the Plaintiff's solicitor stating "*Groundless speculation and invented "facts" have no place in written legal submissions*". In circumstances where the Plaintiff's present solicitor failed to take basic steps to obtain its predecessor's file, the delay is clearly inordinate and inexcusable.

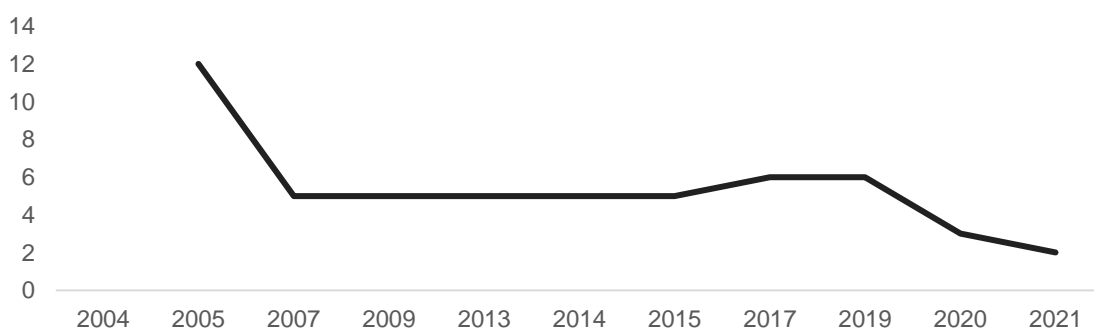
- In considering the balance of justice, the Court was mindful of:-
  - the Bank's 2014 application to the Commercial Court List and the then inherent "*commercial urgency to the proceedings*" and
  - the Second Defendant's current health and having these proceedings "*hanging over*" the Second Defendant for the past nine years. As the Second Defendant had not acquiesced to the delay, the balance of justice lies in favour of striking out the proceedings.
- Citing and applying the judgment of Irvine J. (as she then was) in *Flynn v. The Minister for Justice [2017] IECA 178*, at para. 19: -

*"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."*

In the article *Time's Up for Delay*, the authors\* review applications under Ord.122 r.11 RSC (for delay in progressing proceedings) from 2004 to 2021 and identify a general trend in which, the Courts have a reduced tolerance for a plaintiff's delay in progressing proceedings.

This reduced tolerance culminates in 2021, in three cases of *Gibbons v N6 (Construction) Limited and Anor [2021] IEHC 138*, *Kehoe v Promontoria Aran Ltd & Anor [2021] IEHC 573* and *Diamrem Ltd v Clare County Council [2021] IEHC 408*, where a delay by the Plaintiff of two years was sufficient for the Courts to strike out the proceedings.

### Court tolerance for delay



### **Key takeaways**

- Loan sale purchasers cannot delay in progressing newly purchased proceedings.
- Current case law indicates that the Courts will not tolerate a delay greater than two years.
- The Courts will not tolerate the bringing of a substitute applications to excuse delay in progressing proceedings.
- A defendant can acquiesce the delay.
- The Courts are mindful of a defendant's health and circumstances and the conduct of both parties of the proceedings.

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