THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 99
Record Number: 2018/125

Whelan J.
Donnelly J.
Power J.

BETWEEN/

AIG EUROPE LIMITED

RESPONDENT

- AND –

ANTHONY FITZPATRICK

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 9th day of April, 2020

Introduction

1. This is an appeal against an order made by Meenan J. in the High Court on the 13th March, 2018 refusing the appellant's application to dismiss the within proceedings for inordinate delay and/or want of prosecution pursuant to the inherent jurisdiction of the High Court. He further refused to set aside an *ex parte* renewal of the summary summons made by order of the High Court on the 12th January, 2015. The court further ordered the appellant to pay the costs.

Background

2. The within proceedings were instituted by way of summary summons on the 14th September, 2012 seeking payment of the sum of €250,000 as monies due and owing by the appellant to the respondent pursuant to an agreement concluded on the 23rd February, 2012. It does not appear to be in dispute that by virtue of the terms of the said agreement the appellant was obliged to pay €250,000 within six weeks of the 23rd February, 2012 to the respondent's predecessor, Chartis Europe Limited, and that the said sum was not paid.

3. The summary summons was not served by the respondent within the time allowed by the Rules of the Superior Courts.

4. On the 12th January, 2015 an order was made *ex parte* by Noonan J. in the High Court extending time for the renewal of the summons. The order which was perfected on the 12th January, 2015 makes reference to the renewal "of the Plenary Summons". The court also made an order pursuant to O. 8, r. 1 of the Rules of the Superior Courts that the summons be renewed for a period of six months from the said date. An order for

substituted service was made permitting service to be effected on the appellant at two specific addresses; one in County Clare, the other in Limerick City.

Delays between the 14th September, 2012 and the 12th January, 2015

5. This initial period of delay extended over two years.

6. In an affidavit sworn by Wayne Finn on the 28th September, 2017 there is exhibited a note signed by John Somers regarding attempted service of the summary summons on the appellant at addresses at Limerick City and at Sixmilebridge, County Clare. It records that on the 1st November, 2012, about six weeks after the issue of the summary summons, Mr. Somers called to the appellant's residence at Sixmilebridge, County Clare. He spoke with the appellant's son Barry and "he told me that he was not there and was at work. I left my mobile number with him. I identified myself to him. I told him I represented Holmes O'Malley Sexton Solicitors, Limerick."

7. Some days prior, on the 22nd October, 2012, the summons server had attended the appellant's residence in Sixmilebridge and was informed that he was not at home. Mr. Somers also attended the appellant's place of business on the 22nd October, 2012: "I rang Anthony Fitzpatrick and told him who I was and who I represented… I asked to meet him and he told me he was not available."

8. On the 25th October, 2012 Mr. Somers rang the appellant at 1.50pm and the appellant told him he was busy. Mr. Somers states:-

> "I asked him to ring me when he was ready and he never rang me. I rang him at 5.50pm the same day again and I got no answer. Over the last two or three weeks I have called to Anthony Fitzpatrick's office in Newenham Street, Limerick City and the receptionist there told me he was at meetings and that he was busy on each occasion."

Mr. Somers also attended at the County Clare residence of the appellant on the 30th October, 2012 in the evening. Mr. Somers was informed by an individual who stated he was the appellant's son that "his father had not come home from work yet."

9. In a second note exhibited in the affidavit of Wayne Finn, Mr. Somers describes two further attempts to effect service on the 13th and 14th December, 2012. Thus it appears that several attempts were made to effect service within a concentrated period of about eight weeks in the months of October, November and December 2012.

10. Two years later an *ex parte* application was made on the 12th January, 2015 seeking, *inter alia*, an order for substituted service. Service of the summary summons was effected by way of substituted service on the 6th February, 2015 and there is an affidavit of service sworn on the 11th February, 2015 confirming same.

6th February, 2015 to 11th May, 2017

11. This period of delay encompasses approximately two years and three months. The appellant failed to enter an appearance or engage with the proceedings in any way during

this time. No step or effort was made to progress the litigation on the part of the respondent during this time either.

Events subsequent to service of a notice of intention to proceed

12. On the 11th May, 2017 notice of intention to proceed was served by the respondent. This appears to have prompted the appellant to belatedly enter an appearance on the 8th June, 2017 over two years after service of the proceedings upon him. The appellant then issued a motion on the 14th June, 2017 to strike out for want of prosecution and an order setting aside the *ex parte* renewal of the summary summons pursuant to O. 8, r. 1 made, as stated above, on the 12th January, 2015. The appellant invoked the inherent jurisdiction relying primarily on the decision *in Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

Decision of the High Court

13. In an *ex tempore* judgment delivered on the 13th of March, 2018 Meenan J. observed: -

> "…there are a number of matters that have to be established before the court could accede to such an application. First I think it has to be accepted that there was undoubtedly delay on the part of the [respondent] in prosecuting these proceedings. It's an open question as to whether that delay was inordinate or not and various reasons have been put forward, in particular a failure on the part of the [appellant] to engage in these proceedings. But anyway, notwithstanding that, even if the delay was both inordinate and inexcusable, it is also incumbent on the [appellant] to outline to the court a prejudice that has arisen as a result of that delay, and of course counsel for the [appellant] has very correctly relied upon the case of *Primor plc v. Stokes Kennedy Crowley*, and it's entirely clear that in the course of that judgment the court makes expressly clear that even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of or against proceeding with the case. In other words, the [appellant] has to establish prejudice."

With regard to prejudice the trial judge observed: –

> "On the issue of prejudice, two matters have been put forward, firstly that the financial situation of the [appellant] is not good, and instances his own personal situation and also that of John Tobin. However, it seems to me that that could not possibly be prejudice. Firstly, if it be the case that these proceedings – as I will be refusing the application – proceed and the [appellant] is held liable, this is a debt that goes back to 2012…if the [appellant's] financial situation has deteriorated since the date of the agreement, and if that agreement is validated, then that such is a failure on the part of the [appellant] not to pay a debt which a court may well find was lawfully due…that could not possibly amount to prejudice."

The judgment continues at page 36, line 11: –

> "The second matter is that the court's attention has been drawn to the fact that there are other proceedings which involve the former solicitors of the [appellant], and some details of these proceedings have been given, but however it seems to me again that these proceedings again do not disclose any prejudice whatsoever on the part of the [appellant]. It may well be that the [appellant] in those proceedings is seeking an indemnity or a contribution for monies which he may or may not be found due and owing to the [respondent], and if that be the case that is entirely a separate matter and does not involve prejudice in the actual proceedings before the court."

The court accordingly concluded at page 36: –

> "So it seems to me that in the circumstances where the [appellant], despite there being a delay, and even if that delay is inordinate and inexcusable, where the [appellant] has identified no prejudice it follows the court cannot exercise its jurisdiction to dismiss these proceedings for delay or want of prosecution. So in those circumstances I refuse the relief sought."

Grounds of appeal

14. The grounds of appeal contend that the trial judge erred:

    (1) in law insofar as he failed to take cognisance of the principles in the case of *Primor plc v. Stokes Kennedy Crowley* which applied to the appellant's High Court application;

    (2) by failing to grant the reliefs sought despite the delay of the respondent in prosecuting the summary proceedings;

    (3) in not holding the current financial status of the appellant to be a sufficient ground of prejudice; and

    (4) in failing to take cognisance of the appellant's legal submissions and the legal authorities opened by the appellant.

Discussion

15. The chronology of events and the significant lack of progress in prosecuting the litigation is as set out above. It is clear that the conduct of the appellant to an extent contributed to those delays. Service on him ultimately required a court order. No appearance was entered for several years. The matter at issue in the proceedings is the enforceability of a written agreement which represented the compromise of litigation to which the appellant was a party. It is relevant that this is a "pure documents" case. The appellant did not deny the existence of the agreement or its validity in the course of this appeal although it is open to him to raise such issues in defending the proceedings.

16. The principles applicable in any consideration of an application to strike out proceedings on grounds of delay which occurs post-commencement are set out in the leading Supreme Court decision of *Primor plc v. Stokes Kennedy Crowley*.

17. That decision and all subsequent jurisprudence of the Supreme Court on the issue make clear that the trial judge should follow the process identified in *Primor*. Therefore, the first task of the High Court judge in dealing with this application was to ascertain whether the delay by the respondent has been inordinate and, if inordinate, whether, secondly, it was inexcusable. The onus of establishing that delay has been both inordinate and inexcusable lies upon the party seeking to dismiss the proceedings.

18. Where the delay has been shown to be both inordinate and inexcusable the court must then proceed to exercise a judgement on whether, in its discretion, on the facts before it the balance of justice is in favour of, or against, the proceeding of the case.

19. Hamilton C. J. in *Primor* summarised the relevant principles of law, set out more fully below, noting that:-

> "(a) the courts have in inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable…"

20. Hamilton C.J.'s judgment in *Primor* has been the subject of subsequent judicial pronouncements including the decision of the Supreme Court in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 (Hardiman J.) and *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50 (Clarke J., as he then was).

21. The correct approach to an application where the principles in Primor are engaged is exemplified in the judgment of this court in *Governor and Company of the Bank of Ireland v. Kelly & Anor.* [2017] IECA 288. At para. 35 Peart J. observed: -

> "A delay is inordinate where it is excessive or out of the ordinary. There is inevitably in any litigation a time that it takes, even with great diligence and efficiency, to get things done. While the rules of the superior courts provide for times within which particular steps are to be taken, such as that a statement of claim is to be delivered within 28 days from the date upon which a defendant enters an appearance to the originating summons, these must be seen as directory with the aim of facilitating the timely progression of the proceedings from commencement to finality. The fact that a particular step is not taken by a plaintiff within the time prescribed under the rules does not invalidate the proceedings, or mean even that the defendant can obtain an order dismissing the proceedings. Some reasonable latitude as to these time limits is dictated not only by necessary common sense and reasonableness, but by the rules themselves which provide the courts with a power to extend the time provided for the taking of any step in the proceedings."

In that case this court considered the period of two years and six months as being out of the ordinary and inordinate for the first limb of the *Primor* test: -

> "The two and a half year delay to which I have referred is in my view a period of delay that requires explanation and justification under the *Primor* principles. In other words, it needs to be excusable under the second limb of the test. A period that is not inordinate does not need to be excused." (para. 37)

22. Peart J. then considered whether a delay is excusable observing at para. 38: -

> "Under this second limb the court goes on to consider the reasons offered by the plaintiff for the inordinate delay in order to determine whether those reasons and explanations are sufficient to excuse the delay. To simply explain why the delay occurred or the circumstances in which it occurred will not in every case suffice to excuse the delay. What is offered by way of explanation may go towards explaining some of the delay that has occurred but not all of it. If there is a significant period of delay that is not excused despite the explanations offered, the court proceeds to the third limb of *Primor* and must decide if the balance of justice of justice is in favour of or against dismissing the proceedings, taking into account all the circumstances of the case, including perhaps any delay, acquiescence or other conduct of the part of the defendants."

23. In considering the excusability of the delay in *Stephens v. Paul Flynn Ltd.* [2005] IEHC 148 Clarke J. approved the *dicta* of Lord Diplock in *Birkett v. James* [1978] A.C. 297 at p. 322:-

> "A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

Clarke J. continued:-

> "However it seems to me for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

24. The *Primor* principles must be viewed also in light of jurisprudence from the European Court of Human Rights (ECtHR) on the issue of delay. In *Gilroy v. Flynn* Hardiman J. stated:-

> "[F]ollowing such cases as *McMullen v. Ireland* [App. No. 42297/98 (Unreported, European Court of Human Rights, 29th July, 2004)] and the European Convention on Human Rights Act 2003, the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."

25. In *Stephens v. Paul Flynn Ltd.* Clarke J. referred to Hardiman J.'s judgment in *Gilroy v. Flynn* and stated:

> "Notwithstanding the fact that the Supreme Court in that case permitted the continuance of the action, it seems clear, that the court was of the view that there may be a need to reconsider the previously established principles in the light of those recent developments."

26. Clarke J. was satisfied, however, that the central tests remain the same, namely that the court should:-

> "(i) Ascertain whether the delay in question is inordinate and inexcusable; and
>
> (ii) If it is so established, the court must decide where the balance of justice lies."

27. The approach of the trial judge was to proceed on the assumption that the delays disclosed in this case were capable of being both inordinate and inexcusable without making any formal determination on those two specific issues. Based on those assumptions he then proceeded to consider whether on the facts the balance of justice favoured the dismissal of these proceedings as sought by the appellant or to refuse the relief sought.

28. It is clear from his judgment that the trial judge was well aware of the *Primor* jurisprudence and considered that there had been delays in the prosecution of the proceedings. He also considered the failure of the appellant to engage with the proceedings to be a relevant consideration. The question considered by the High Court then, having determined that "even if the delay was both inordinate and inexcusable it is also incumbent…to outline to the court a prejudice that has arisen as a result of that delay", was whether prejudice had been established and thereafter to exercise a judgment as to where the balance of justice lay. The issue then was whether the balance of justice favoured the dismissal of these proceedings given or refusing the relief sought as the trial judge did.

The balance of justice

29. Under the final limb of *Primor* it is incumbent on the court to assess whether the balance of justice favours or goes against the dismissal of the proceedings. Hamilton C.J. in *Primor* identified a series of factors that a court should take into consideration and have regard to when considering where the balance of justice lies when the inherent jurisdiction of the court to strike out proceedings is invoked. The principles are set forth in the judgment as follows at pp. 475 to 476: -

"(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

30. The matters identified by Hamilton C.J. in *Primor* at (i) – (vii) above are ones which the court is entitled to have regard to when weighing the balance of justice in a given case. They provide useful guidelines for a court tasked with weighing the balance of justice. Hamilton C.J. observed at p. 490 that:-

> "The court is obliged to consider whether the total delay has been such that a fair trial between the parties cannot now be had and whether the defendants had been prejudiced by the continued delay."

31. As was observed by Peart J. in Governor and Company of the *Bank of Ireland v. Kelly & Anor*. at para. 50: -

> "Under this limb of the test the respective interests of the parties and the potential prejudice to each party must be carefully balanced. The court's overriding duty is to dismiss proceedings when the interests of justice require that this be done. The jurisdiction arises only where delay has been found to be both inordinate and inexcusable."

32. The inherent jurisdiction to strike out proceedings operates for the purposes of preventing injustice and to minimise the risk of an unfair trial arising from culpable and unexcused

delay on the part of a plaintiff. It operates as a deterrent to culpable delay that risks visiting an injustice on a defendant.

A pure documents case

33. Prejudice must be evaluated in the context of the issues in the case and the nature of the dispute and a material consideration is whether proof or defence of the claim is substantially based on documentary evidence. Irvine J. in *Collins v. Minister for Justice* [2015] IECA 27 observed that the first matter to be addressed by a court when considering where the balance of justice lies is the extent to which a defendant has demonstrated he would be likely to be prejudiced if the proceedings were allowed to continue. She stated at para. 107 as follows:-

> "…Of significant relevance to that issue must be the nature of the claim being advanced by the plaintiff in the proceedings."

34. This case centres on a single document being a settlement agreement executed on the 23rd February, 2012.

35. In this context, Clarke J. (as he then was) noted in *Comcast International Holdings v. Minister for Public Expenditure* at para. 6.3 of his judgment:-

> "While one should not become overly enmeshed in terminology on degree such as 'mild', 'moderate', 'severe' or 'extreme', I would, respectfully, disagree with Gilligan J. and would instead characterise the prejudice established on behalf of the Minister in this case as being mild. A number of factors need to be taken into account. At least so far as many of the issues which are likely to arise in these proceedings at trial are concerned, this case can be regarded as a so-called 'documents' case, where there are contemporary records of much of the matters which will require to be addressed in evidence. It is, of course, the case that this is not a pure 'documents' case where the issues turn on the construction of documents and where oral testimony is likely to be of only marginal relevance. In such cases prejudice caused by delay will be non-existent or extremely remote. However, the availability of contemporary records will, in my view, at least so far as a lot of the issues likely to arise are concerned, minimise any risk of prejudice."

Prejudice

36. While all relevant matters must be taken into account in determining prejudice, two issues invariably arise: firstly, whether the appellant was prejudiced by the respondent's delay; and secondly, whether there was anything in the appellant's conduct which contributed to the delays or would militate against granting the reliefs sought.

37. Prejudice will not be presumed. A party who asserts prejudice must demonstrate it. As Irvine J. at para. 107 in *Collins v. Minister for Justice* observed, the first matter to be addressed by a court when considering where the balance of justice lies is the extent to which the defendants would likely be prejudiced if the proceedings were allowed to continued:-

> "…Of significant relevance to that issue must be the nature of the claim being advanced by the plaintiff in the proceedings."

38. Prejudice arising from the fact that the litigation is pending and ongoing is in large part the inevitable result of the appellant's evasion of service over time coupled with his failure to enter an appearance to the summary summons for a number of years. This is not relevant prejudice in the context of the presumed obligation of a party who enters into a contract to pay a liquidated sum to honour its terms.

39. The trial judge engaged in the process of assessing prejudice alleged to have been suffered by the appellant noting that there had been an agreement to pay a sum of money in 2012 which a court may well find enforceable and any alleged intervening deterioration on the appellant's finances could not amount to prejudice.

40. It is incumbent that prejudice is clearly articulated rather than a vague generalised assertion. With regard to the basis of prejudice identified at para. 10(a) of the appellant's affidavit of November 2017 it pertains to litigation against his former solicitors: "…the first solicitor who was on record for me in the initial proceedings *viz* Record No. 2015/3555P". This apparently pertains to negligence proceedings against named individuals and there is also a reference to Record No. 2012/2323S. However, no clear basis is identified that could amount to material prejudice for the purposes of the *Primor* test. This merely references litigation that the appellant has embarked upon. It is noteworthy that no details were forthcoming in the affidavit of November 2017 as to precisely what has transpired in the said litigation, whether it has progressed to a conclusion, what the outcome was, and what the relevance of the litigation was in terms of substantiating a claim consistent with prejudice in the context of the current application.

Other issues

41. In part the delays in question are referable to the appellant himself. The proceedings were served upon him in early February 2015. He delayed two years and four months before entering an appearance. In an affidavit sworn in these proceedings on the 10th November, 2017 he deposes he has no recollection of receiving the summons prior to the 10th May, 2017:-

> "I did receive a copy of the Order or renewal and Summons after the Notice of Intention to Proceed was received by this Deponent *circa* 10th May, 2017. I have no recollection of receiving the summons beforehand."

42. I am satisfied that there was ample evidence before the High Court however, to satisfy the judge that service was effected in early 2015 in accordance with the order of the court. That order provided for substituted service.

43. The appellant contends that he was unaware of the necessity to enter an appearance. The appellant is a businessman and appears well familiar with litigation and this assertion stretches credulity in circumstances where his own submissions to this court make reference to High Court litigation [2005 No. 1057 P] Mount Kenneth Investment Company

and by Order Greenback Investment, plaintiffs, and Patrick O'Mara, Anthony Fitzpatrick and John Tobin, defendants. Clearly this shows that the appellant was a party to litigation in 2005. His engagement in the litigation would have involved instructing his solicitors to enter an appearance. There is reference to other litigation in 2015, [2015 No. 3555 P], where a firm of solicitors were on record and that seems to have resulted in litigation between the appellant and a firm of solicitors who acted for him at that time. This is apparently a negligence suit. It appears that the appellant's grievance with his former firm of solicitors pertains to their handling of litigation on his behalf, the details of which are scarce, but the record number is [2012 No. 2323 S]. I am satisfied on balance that the appellant's active engagement in several distinct sets of proceedings including the institution of proceedings against his erstwhile solicitors for professional malpractice and as well as that, proceedings [2013 No. 837 S] instituted by Bank of Ireland against the appellant and John Tobin which he refers to in his affidavit and in the written legal submissions wholly undermine the appellant's averment at para. 7 of his affidavit where he deposes: -

> "I say in reply to the Plaintiff's averment I understand I do not have a legal obligation to enter an Appearance. I did not understand an Appearance was so important until I consulted my legal advisors in May 2017… I believe it is the Plaintiff who is at fault and who is now attempting to blame this Deponent for their own delay."

44. The practical consequences are that the delays between early February 2015 and the 8th June, 2017 are primarily referable to the appellant's decision not to enter an appearance in circumstances where I am satisfied on balance that he at least understood that to enter an appearance was a material step in litigation. At all events ignorance of the law or procedural rules does not assist the appellant.

Impecuniosity

45. The appellant deposes: "I would not now be in a financial position to pay €250,000 if called upon due to the recession and other financial reasons." Inability to pay does not absolve a contractual obligation to discharge a debt that is due and owing. In circumstances where the claim is for a liquidated sum incorporated in a written instrument the validity of which does not appear to be in contest, it is of general prejudice one might normally expect such as the dimming of memories, the loss of evidence or crucial documents, or other elements tending to clearly compromise the fairness of a hearing and wholly absent in the instant case.

46. The jurisprudence identifies two discrete lines of authority in the context of inordinate and inexcusable delay. Firstly, the authorities which emanate from *Primor* which itself was a re-articulation of the principles set forth by the then President of the High Court Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561. Separately there is a line of authorities based on *O'Domhnaill v. Merrick* [1984] I.R. 151. The impact of those bodies of authorities was analysed by this court in *Cassidy v. The Provincialate* [2015] IECA 74 where at para. 37 this court observed: -

> "Clearly a defendant, … can seek to invoke both the *Primor* and the *O'Domhnaill* jurisprudence. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?" (*per* Irvine J.)

47. There is no evidence put before the court as to whether the appellant was or was not in a position to pay a sum of €250,000 at any date from 2012 onward. The words "I would not now be in a financial position to pay…" connote that he was at a certain undefined time in a position to so do. However, "due to the recession and other financial reasons" is distinctly lacking in clarity and the type of particularity that is called for where the exercise of judicial discretion to strike out proceedings is being invoked. It is not clear what prejudice emanates from a set of proceedings, [2013 No. 837 S], involving the Bank of Ireland and what has transpired in the said proceedings over the past seven years. There is reference that the appellant "may seek an indemnity in the sum of €2.2 million approx.". The degree of vagueness is unsatisfactory but in its totality the affidavit fails to identify operative prejudice such as would have engaged the third limb of the *Primor* test.

Alleged meeting with Mr. Fehily

48. The appellant contends that he was available and was wholly unaware of attempts to effect service upon him. However, details in that regard are somewhat inconsistent. At para. 5 of his affidavit he deposes that "the Plaintiff well knew where I was and I say I even attended the Plaintiff's solicitors offices in Limerick… and discussed the matter with Harry Fehily in 2014 and no mention of any failed service attempts was made to this Deponent." At para. 8 of the same affidavit, presumably referring to the said meeting he deposes that he "…referred earlier to a meeting in the Plaintiff's solicitor's office about this matter with Harry Fehily in July, 2015 and confirm none of the purported service attempts were mentioned to me at that meeting." The purpose of the said meeting, the circumstances surrounding same, are not identified. The year is unclear, the averments are inconsistent. One suggesting it took place in 2014, the other a year later. It is not clear who were present at the meeting, how long it took place, and whether the encounter touched and concerned, directly or otherwise, the issues the subject matter of these proceedings.

Conclusions

49. A party who claims prejudice must identify with sufficient particularity the details of same to enable the court to carry out an evaluation as is warranted in circumstances where the practical consequences of succeeding in the application is that a plaintiff's claim, otherwise possibly maintainable in all material respects, is shut out from access to a determination. Such a requirement is all the more important in circumstances such as the present where there exists an instrument duly executed, not apparently challenged or contested with regard to its validity which, at least *prima facie*, appears to support the claim advanced by the respondent to this appeal. I am satisfied in the circumstances that the appellant did not place before the High Court such averments as would satisfy the test in the Primor line of authorities.

The balance of justice

50. Nowhere has the appellant established that he would be significantly prejudiced in his ability to defend the claims were the action permitted to proceed. There is no suggestion that any potential witness is unavailable. In such circumstances the court is entitled to have regard to what might be considered a general prejudice and assess whether it arises at all. White J. in *Pat Reynolds & Sons Ltd. v. ACC Bank plc* [2016] IEHC 510 at paras. 21 to 23 observed: -

> "In exercising its discretion, the court has to consider a number of factors:-
>
> (i) general prejudice;
> (ii) specific prejudice;
>
> The court also considers it relevant to take into consideration the nature of these proceedings and also some other factors in respect of the plaintiff's knowledge.
>
> The court is entitled to infer some general prejudice to the defendants in these proceedings due to the delay…"

51. In a case where the claim is based on contractual obligations and pertains to a liquidated sum pleaded to arise thereunder the court has a limited function in inferring prejudice above and beyond that specifically asserted and identified on the part of a defendant as flowing from the delays in prosecuting proceedings by a plaintiff.

52. As was made clear by Hamilton C.J. in *Primor*: "The nature, extent and effect of such prejudice should be considered at the time of the application to dismiss the proceedings for want of prosecution". (p. 497)

53. In my view this falls into a category of cases characterised as "documents" type cases.

54. It is also to be recalled, as O'Flaherty J. observed in *Primor*, "courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them".

55. The function of the trial judge in determining the application was not to punish the plaintiff but rather to identify any potential prejudice and ensure that justice was done as

between the parties. The balance of justice fell to be considered against the factual matrix which obtained.

56. In all the circumstances I am satisfied that the trial judge was correct in his conclusions in circumstances where the appellant failed to identify prejudice of such a nature, extent and effect which existed at the date of the application to dismiss for want of prosecution as warranted the striking out of the proceedings.

57. I would accordingly dismiss this appeal.

58. As the events of the COVID-19 pandemic required this judgment to be delivered electronically the views of the other members of the court are set out hereafter.

Donnelly J. I have read and agree with the judgment herein delivered.

Power J. I have read and agree with the judgment herein delivered.