[2020] IEHC 426

THE HIGH COURT

[2012 No. 1781 S]

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

SEAN SUTTON, AIDAN MCGUINNESS, MICHAEL BUTLER, MEL FLANAGAN, JOHN MCCANN AND PHILIP STAUNTON

DEFENDANTS

JUDGMENT of Mr. Justice MacGrath delivered on the 7th day of August, 2020.

1. This is an application by the second named defendant, brought by way of notice of motion dated 22nd August, 2019 for an order dismissing the plaintiff's claim for want of prosecution. Although the notice of motion does not make it clear whether the application is brought pursuant to O. 122, RSC or pursuant to the inherent jurisdiction of the court, counsel for the plaintiff, Mr. Byrne B.L., informed the court at the outset that no technical objection is taken to the format of the motion. The second named defendant, Mr. McGuinness, is not legally represented in these proceedings.

The Applicable Principles

2. The test applicable on this application is that which was enunciated in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, as subsequently developed. Mr. McGuinness relies on *dicta* of Hamilton C.J. and also on the decision of the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206, where Irvine J. (as she then was) summarised the position as follows:-

> *"17. The principles which apply on an application brought to dismiss proceedings for inordinate and inexcusable delay are fully explored in the written submissions that have been delivered by the parties. The most oft cited decision is that of the Supreme Court in Primor plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459 where guidance is given concerning the proper approach to be adopted by the court when met with such an application.*
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> *18. The Court is obliged to address its mind to three issues. The first 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. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.*
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> *19. In considering where the balance of justice lies the Court is entitled to have 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."*

3. At para. 32 on p. 12, Irvine J. continued:-

> *"32. In light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the Primor test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See Cassidy v. The Provincialate [2015] IECA 74). That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head note of the Primor decision."*

4. Thus, if the court concludes that the delay is both inordinate and inexcusable, it must proceed to consider where the balance of justice lies and in so doing, may take into account a number of factors considered to be relevant including the conduct of the parties to the proceedings, the number and complexity of the events and transactions required to be recalled, whether it is a so called documents case; and any other matter which may bear on the case, or its future conduct, including prejudice, established, presumed or inferred.

The Proceedings

5. On the 11th May, 2012, the plaintiff instituted proceedings by way of summary summons against the defendants, jointly and severally, in which it claims recovery of the sum of €2,441,908.80 (it is to be noted in passing that in the body of the summons, the sum due is also stated to be €2,343,045.90) in respect of monies due on foot of two accounts, being a loan account and a current account which the defendants had with the plaintiff's branch at 19 Mardyke Street, Athlone, County Westmeath. The sum of €2,269,342.27 is alleged to be due in respect of the loan account and the sum of €73,703.71 in respect of the current account, both sums being said to be due as of the 31st May, 2010.

6. The application is grounded on the affidavits of the second defendant, Mr. McGuinness, sworn on 22nd August, 2019 and 22nd November 2019. A number of affidavits have been exchanged since then. Mr. McGuinness vehemently denies that he has any liability in respect of these accounts. He states that he did not receive money or benefit from the advancement. Further, he maintains that he was not a signatory to the facility letter and that the signature thereon purporting to be his, is not in fact his signature. This ground of defence is not one of recent origin but was raised by Mr. McGuinness at a very early stage.

7. Mr. McGuinness entered an appearance on the 12th September, 2013. The summons was renewed by order of Peart J. on the 31st July, 2013. No formal step has been taken in the proceedings since the entry of the appearance and prior to the bringing of this motion by the second named defendant, although the plaintiff served a notice of intention to proceed on 21st August, 2019. Without prejudice discussions have taken place, however, and there has been an exchange of correspondence between them.

Background

8. On the 26th May, 2005 the plaintiff wrote to the defendant and to his co-defendants advising that subject to certain conditions, a loan in their favour by way of commercial mortgage had been sanctioned. The purpose of the advancement was to assist in the purchase of a period house and 30 acres in Killala, County Mayo, known as Miller House. The term of the loan was for two years from the date of the first drawing down, with provision for a review date of the 31st May, 2006. Repayments were to be made by eight instalments. Based on the interest rate quoted, a sum of €6,539.60 per month was chargeable quarterly with the total amount repayable being €2,306,950.40. The cost of the credit was therefore €156,950.40 with an annual percentage rate of charge (APR) of 4.25%.

9. By way of security, the plaintiff required that the borrower's solicitors provide an undertaking leading to a first legal charge over the property and it was also expressly provided that the liability would be joint and several. Mr. McGuinness denies that the signature on the contract and mortgage documents is his.

Affidavit Evidence

10. Mr. McGuinness accepts that he wrote to the plaintiff by email on 30th May, 2005 stating that he was in agreement that Mr. Sutton, Mr. Butler, Mr. Flanagan, Mr Staunton and Mr. McCann complete the purchase of the property. This email was sent at the request of a manager, Mr. Clarke, because, as explained by Mr. McGuinness, in another purchase (Bartragh Island) in which he was an investor with three of the individuals, he was the only one to use his own funds for that investment and the bank was seeking comfort in that regard. Mr. McGuinness disputes that he signed a mortgage deed. He exhibits a letter written to Mr. McGuinness' then solicitor, Mr. Adrian Greeney, on the 30th November, 2009 by Ms. Devine, a solicitor representing certain parties to the transaction. She confirmed that she was an employee of the firm of Michael F. Butler & Co from November, 1997 to April, 2007 and that she never represented, advised or met Mr. McGuinness while employed by Mr. Butler. This letter appears to have been written in the context of a claim which potentially may have been brought by Mr. McGuinness against the solicitors who previously acted in the transaction. I should also state that in his affidavit sworn on 18th June 2020, Mr. McGuinness avers that Ms. Devine acted for the plaintiff in the transaction and that Mr. Butler acted for the investors. He exhibits a report from a forensic document examiner, Mr. Sean Lynch dated 5th March, 2011 who, having examined the deed of mortgage dated 3rd June, 2005, expressed the opinion that there was no handwriting evidence in support of the proposition that Mr. McGuinness' signature was that which was contained on the documents. He also avers that in September, 2013 he attended a meeting with his accountant and a representative of the plaintiff at the offices of Lyons Solicitors, who represent the plaintiff, and he avers that at the request of Mr. Lyons he signed an agreement to allow the property to be sold by the plaintiff. He states that his signature was required as the deed of charge was void because of what is described as the confirmed forged signature and that it was accepted by Mr. Lyons that the plaintiff had no recourse against him, that no further action would be taken and that his signature was only required because his name was on the title of the property. He

maintains that the reason behind the issuing of the notice of intention to proceed by the plaintiff on 21st August, 2019, was because the plaintiff became aware that he had succeeded in obtaining a settlement in a case relating to the other property at Bartragh Island, and that this property was about to be sold. This information had been made available in a series of without prejudice letters. He describes the late filing of the notice of intention to proceed as opportunistic. Earlier, on the 28th March, 2019, he wrote to Lyons solicitors seeking confirmation that the plaintiff would not proceed against him. He received a reply on 31st May, 2019 stating that there was ample evidence and acknowledgment that he was the borrower and that the funds had been advanced for his benefit. On 10th June, 2019 he informed the plaintiff of his intention to bring this application.

11. Mr. Ted Mahon, senior manager with the plaintiff, in an affidavit sworn on the 10th June, 2020 in response to this application, avers that difficulties were encountered in relation to the service of the proceedings on a number of the defendants, including Mr. McGuinness. This apparently related to knowledge of his then residence. An order for renewal of the summons was made by Peart J. on 31st July, 2013 as was an order for substituted service by ordinary prepaid post. He acknowledges that Mr. McGuinness has at all times claimed that the signatures on the documents were not his and also refers to the meeting which took place on the 12th September, 2013 at Mr. Lyons' office. Although the second defendant had denied that his signature was appended to relevant legal documentation, the plaintiff was anxious to realise its security and had resolved to appoint joint receivers to the property with a view to selling it. While Mr. McGuinness did not accept any liability for the debt, nonetheless, Mr. Mahon states that at the meeting Mr. McGuinness felt it was in the interests of all parties that the receivers be appointed to the property, that it be sold, and the debt be reduced substantially. Mr. McGuinness completed an irrevocable undertaking not to challenge the appointment of the receiver. He had been advised to take independent legal advice but declined to do so. Mr. Mahon also states that Mr. McGuinness indicated that he would cooperate in every possible way with the plaintiff and any receiver appointed by it to progress the sale of the property. Mr. Mahon accepts that Mr. McGuinness did so cooperate in relation to the sale but, he states, not all defendants did. The receivers were appointed by deed of appointment dated 10th April, 2014. The property was offered for sale by public auction on 22nd October, 2014. Mr. Mahon avers that after the appointment of the joint receivers and in the period leading up to the auction, the third named defendant threatened to issue injunctive proceedings against the plaintiff and the receivers to prevent the auction from proceeding. It seems that one of the main issues of concern to the third named defendant was a Victorian fireplace which it was claimed was not a fixture. Ultimately, the sale proceeds were remitted by the solicitors acting for the new purchaser on the 1st July, 2015 and Mr. Mahon states that despite the fact that the sale had closed, letters threatening legal proceedings continued to be issued by the third named defendant.

12. Mr. Mahon explains that two of the defendants have died. The sixth named defendant died in 2012 and first defendant in 2013. The fifth named defendant entered into an Individual Voluntary Arrangement in Northern Ireland from which his financial adviser

confirmed he had recently exited. Mr. Mahon avers that the plaintiff had to deal with the estates of the first and sixth defendant. It was in the context of its dealings with the estate of the first named defendant that the plaintiff became aware that the second and third named defendants had issued proceedings, *inter alia*, against the estate of the first defendant in 2015 and 2017 respectively, relating to shares in the property company which owned Bartragh Island. While Mr. Mahon was not aware of the terms of the settlement, he was aware that a compromise was reached on 20th February, 2019. The settlement involves the sale of the property, arising from which the estate of the first, the second and third defendants, will receive substantial sums. He avers that negotiations have continued on a without prejudice basis between the plaintiff, through its legal advisers, with legal advisers for both the first and third named defendant and also directly with the second defendant, with a view to resolving this issue.

13. Mr. Mahon also disputes and describes as being without foundation, Mr. McGuinness' claim that the plaintiff has accepted that there would be no recourse to him in respect of residual debt, or that no further action would be taken against him. Mr. Mahon state that he was hopeful that the matter might have been resolved on an amical basis but as this is not likely the plaintiff is anxious to proceed to judgment against the defendants.

14. Mr. Lyons in his affidavit sworn on the 12th June, 2020 avers that the issues between the parties essentially revolve around Mr. McGuinness's allegation that the mortgage deed and related legal documents were not signed by him. The bank is unaware of the truth of that matter but, having been made aware of the issue at an early stage by Mr. McGuinness, in order to realise the sole asset held by the bank as security for the debt, and in the expectation that receivers were to be appointed by the plaintiff to sell the security, Mr. Lyons informed the plaintiff in 2013 that it would be advisable if the second defendant completed an appropriate undertaking not to challenge the appointment of a receiver and to cooperate with the sale. Mr. Lyons confirms that the second defendant attended the meeting in his office on the 12th, not 13th, September, 2013. There were two purposes for the meeting, the first being the acceptance of service of the proceedings by Mr. McGuinness. The second was the completion of the undertaking which had been discussed in a previous telephone conversation. Mr. Lyons avers that he explained to Mr. McGuinness that the plaintiff was considering the appointment of receivers to the property *"but that discussions had taken place in relation to the position concerning his allegations about not having signed the mortgage"*. Mr. Lyons avers that he advised the bank in relation to the undertaking and that he also advised that Mr. McGuinness should obtain independent legal advice, but he did not wish to do so. Mr. McGuinness spoke to his accountant and then signed the undertaking which was witnessed by the accountant. Mr. Lyons avers that Mr. McGuinness is mistaken in his recollection of the events and points to a letter from Mr. Lyons to Mr. McGuinness on 31st May, 2019, which he says clearly confirms that Mr. McGuinness has a residual liability to the bank.

15. Mr. McGuinness replied by way of affidavit sworn on 18th June, 2020. He refers to a meeting which he attended in December, 2012 with his then solicitor, Mr. Greaney, for the purposes of securing the opinion of a handwriting expert. Following that meeting he

received a number of emails from Mr. Greaney which he had exchanged with Mr. Lyons. He avers that it was clear from a telephone exchange on 20th May, 2013 that the bank was not prepared to release him from the proceedings and therefore should have moved forward with the proceedings at that time. He also refers to a number of documents which were produced to him for signature at the meeting which took place in September, 2013, which he refused to sign because he was satisfied he had no liability. One of the documents contain an acknowledgement that the plaintiff was entitled to mark judgment against him. He states that he attended that meeting as it had been indicated to him that a satisfactory solution could be achieved. He avers that he signed the undertaking on the understanding that this was the end of the matter. He also refers to a further meeting which was held at Mr. Lyons' office on 24th May, 2017. He came away from this meeting hopeful of an agreed resolution. Mr. McGuinness also refers to without prejudice correspondence which he states indicated *"a mutually satisfactory outcome from an upcoming credit committee meeting of the plaintiff".* He did not hear further about this and he says that, inexplicably, the plaintiff failed to take steps to advance the proceedings.

16. Mr. McGuinness confirms that the proceedings issued by him against the estate of the first named defendant in 2017 (Record No. 2017/4817P) were compromised on 20th February, 2019 but they concerned Bartragh Island. Further discussions took place on 8th January, 2020 at Mr. Lyons' office, but did not come to fruition.

17. Mr. McGuinness maintains that when the underlying asset was realised, the plaintiff clearly did not have any regard to the residual debt or the advancement of these proceedings. The plaintiff has failed to mark judgment against other defendants or to take steps against them and he describes these failures as being indicative of the inordinate and inexcusable delay on the part of the plaintiff which was "*buttressed by the empty promises and false hope*" which they had given to him of their intention to resolve matters. He maintains that it would be contrary to justice if a party, particularly a party to summary proceedings, made every effort to resolve them but then found himself in a position to have to defend them. Mr. McGuinness avers that it is now clear that the plaintiff was sitting on its hands and had no intention of prosecuting the proceedings.

18. Mr. Lyons, in an affidavit sworn in reply on 27th June, 2020, avers that a variety of complications arose in respect of each of the defendants, including difficulties with service, the individual voluntary arrangement of the fifth defendant and the deaths of the first and sixth defendants. The plaintiff elected to realise the security which it held over the property prior to progressing these proceedings. This was complicated and the sale did not conclude on the 1st July, 2015. He states that had the plaintiff elected to seek judgment for the full amount due on foot of the loan facility, it is probable that one or more of the defendants would have sought to argue that the prosecution of proceedings prior to the realisation of the security was precipitous or inappropriate. With regard to the proceedings brought by the second and third defendants against the estate of the first defendant in 2017, and 2015, which he describes as the related proceedings, they concerned shares in a company, Killala Island Limited, which owns Bartragh Island. The

island is approximately 3km from Miller House, and he states that 50% of the ownership of that property was held by the first defendant. The second and third defendant sued the estate of the first defendant seeking declarations that the shares held by the first defendant were impressed with a trust in favour of the first three defendants, in equal shares. These related proceedings were listed for hearing in February, 2019 when they were compromised. Mr. Lyons avers that while the plaintiff was not privy to the settlement terms, the second defendant suggested that his firm (i.e. Mr. Lyons' firm) would have carriage of sale of the island with the purpose of ensuring that funds that would accrue to the first three defendants would be safeguarded. This was not accepted by one or more of the parties to those proceedings. As at the date of swearing his affidavit, the island had not yet been sold. He avers that the outcome of the related proceedings was of direct relevance to these proceedings in a number of respects, not least in terms of the relationship between the defendants and their repayment capacity. He maintains that it was appropriate for the plaintiff not to progress the within proceedings to a conclusion pending the outcome of those related proceedings. Further, Mr. Lyons states that while the affidavit sworn by Mr. McGuinness conveyed the impression that the plaintiff has simply ignored these proceedings, this is untrue. He suggests that the second defendant now seeks to penalise the plaintiff for engaging in *bona fide* attempts to reach compromise with each of the defendants, including the second defendant. In support of his contention that extensive efforts have been made to compromise the proceedings with each of the defendants, over several years he exhibits a chronology of the engagement by the plaintiff with the various defendants for the period 2017 to 2019. This chronology shows that there are over 90 items of communication between the parties, in excess of 30 of which were with or from the second defendant. Analysis shows that while communications took place between the plaintiff and the second defendant between March, 2017 and May, 2017, there were no further communications until Mr. McGuinness wrote on the 30th January, 2019, which led to further correspondence which has not been opened to the court.

19. Mr. McGuinness submits that the court should disregard these letters as they have not been produced. Mr. Byrne B.L. in reply, submits that the other parties to those without prejudice communications are entitled to confidentiality and that it is not open to the plaintiff simply to disregard their rights. He points out that any communication between Mr. McGuinness and Mr. Lyons ought to be in the possession of Mr. McGuinness. It is argued that this chain of correspondence amounts to more than simply a once off attempt to compromise or engage and which the court must take into account in its assessment of delay.

20. In his affidavit sworn on 29th June, 2020 Mr. McGuinness avers that he does not accept that difficulty was encountered in the service of proceedings on him. Referring to the chronology of communications, he states that it is telling that only two letters were communicated with the fourth defendant and therefore it is disingenuous to suggest that the progress of the proceedings would be precipitous prior to the sale of the underlying asset. He maintains that the attempt to attribute the existence of related proceedings to the delay in the prosecution of these proceedings is disingenuous. The plaintiff has no

interest in Bartragh Island. The outcome of these proceedings will only be relevant to the plaintiff in the event that Bartragh Island was sold and if the plaintiff has judgment against those defendants in respect of which enforcement action might be taken. The third defendant is involved in the island and Mr. McGuinness avers that if there was a relationship between the proceedings as suggested, had it wished to do so, the plaintiff could have advanced these proceedings and marked judgment against the fourth named defendant. He also avers that although he has not had sight of the letters, it can be inferred that they constitute an attempt by the plaintiff to settle the proceedings with one hand tied behind its back as "*unfortunately for the plaintiff they have not progressed these proceedings and obtained judgment as against the defendants."*

21. In a further affidavit Mr. Mahon criticises, as undesirable, the suggestion implicit in Mr. McGuinness' affidavit that the plaintiff should have pursued separate applications for summary judgment against each of the defendants. The liability of the parties is joint and several and the defendants were affected by various issues which arose in respect of the sale of Miller House. He also maintains that at no point prior to June, 2019 did the second defendant make complaint of delay in the prosecution of the proceedings and suggests that this application has been brought because of Mr. McGuinness' displeasure at the outcome of settlement negotiations.

22. Mr. Mahon clarifies that Miller's house was sold in contested circumstances on 1st July, 2015. On 21st July, 2015 the net sale proceeds of €682,134 were applied to the loan account the subject matter of these proceedings. He avers that but for interference with the sales process this amount would have been significantly higher.

23. Mr. Mahon avers that it is clear from the correspondence exhibited by Mr. McGuinness, that he was aware of the difficulties.

24. Finally, on 7th July, 2020 Mr. McGuinness in a further affidavit, raises objection to the failure by the plaintiff to exhibit the communications with the other parties. He disputes that he has suggested that the plaintiff should have brought separate proceedings against certain of the other defendants but makes the point that the failure of the plaintiff, over an eight year period, to mark judgment against the fourth defendant who has not entered an appearance, is indicative of the attitude and delay of the plaintiff. He denies that this application was brought because he was disappointed by the outcome of settlement negotiations. He is disappointed at what he describes as the duplicitous nature in which the plaintiff has acted in conducting the negotiations. Finally, he states it is unclear whether and to what extent the proceeds of sale were applied to the loan.

Submissions

25. Mr. McGuinness submits that the delay is inordinate and inexcusable and, if excusable, that the balance of justice lies in favour of the dismissal of the proceedings. He submits that the delay extends to events prior to the issue of the proceedings. Default is alleged to have occurred on the 25th June, 2008 with proceedings not being issued until the 12th May, 2012. He also points to the failure on the part of the plaintiff to mark judgment against the fourth named defendant, the fact that two of the defendants are now

deceased and that there was a failure to advance matters after the sale of the underlying asset.

26. The prejudice which he relies upon is, as outlined in written submissions, that "*the existence of summary judgment proceedings for such an inordinate time colours his good name and reputation and has a consequent impact on the health of the second defendant*". In his affidavit sworn on 7th July, 2020, Mr. McGuinness avers, inter alia, that he had no other option but to bring this motion, having taken into account the two of the defendants were deceased and his own health was deteriorating. He relies on the decision of Meenan J. in *Caulfield v. Fitzwilliam Hotel Group Ltd* [2019] IEHC 427, Pilkington J. in *Grant v. The Minister for Communications, Marine and Natural Resources* [2019] IEHC 468 and that of the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206. I have referred to these principles above.

27. Mr. Byrne B.L. relies on the decision of Simons J. in *Bank of Ireland Mortgage Bank v. Neary* [2019] IEHC 169 and of Barr J. in The Governor and Company of Bank of Ireland v. McCrann [2019] IEHC 818. As Neary concerned an application for summary judgment, Mr. McGuinness submits that it is not relevant to the principles applicable to his application.

28. Mr. Byrne B.L. concedes that the delay in this case is inordinate but submits that it is excusable for the following reasons:

    1. The plaintiff encountered difficulties in dealing with the several defendants, two of whom have since died.

    2. The plaintiff elected to sell the property before proceedings were continued against the defendants. This process commenced in mid-2013 and was not completed until the 1st July, 2015. Counsel relies on the decision of Simons J. in Neary in support of the proposition that the plaintiff was not under a duty to exercise its power of sale over the mortgage securities at any particular time. This principle of law was considered by Simons J. in the context of an application for summary judgment and in particular on the basis of a ground of defence advanced by the defendant that the plaintiff bank was under a duty either to enforce its security against the mortgaged property or to accept the voluntary surrender by the borrower. At para. 54 of his judgment Simons J. observed as follows:-

> *"The case law establishes that a creditor, such as the plaintiff bank, which has the benefit of security is not obliged to enforce same. See, in particular, China South Sea Bank v. Tan Soon Gin [1990] A.C. 536 at 545.*
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> > *'In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously*

or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security, he must sell for the current market value, but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor. The creditor is not obliged to do anything.

… No creditor could carry on the business of lending if he could become liable to a mortgagor and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock C.B. in Watts v. Shuttleworth, 5 H. & N. 235, 247, it appears to their Lordships that in the present case the creditor did no act injurious to the surety, did no act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any time or at all.'"

Simons J. concluded that the bank was entitled to elect between extremities and the fact that it did so did not provide a defence. The bank's contractual right to entitlement to sue for the debt was not negated by the purported surrender of the beneficial and legal interests in the mortgage properly. By analogy, while it is not argued a bank which enjoys a several types of security is immune from the *Primor* principles, it is submitted that the bank was entitled to attempt to realise that security before continuing with the proceedings, a step which enured for the benefit of the defendants. It is submitted that this provides justification for delay.

29. The third aspect of justification which is advanced by the plaintiff is that there were related proceedings which involved similar defendants. These proceedings were instituted in 2015 and 2017 and, it is submitted, that it was reasonable for the plaintiff to await the outcome of these proceedings and that they were relevant to any proposed recovery. Mr. Byrne B.L. does not, however, suggest that such difficulties are sufficient in themselves to justify the bank not advancing its case but contends that they constitute further factors to be considered. Those proceedings were not compromised until 20th February, 2019 and were of relevance not only to what the bank might hope to achieve from these proceedings in terms of recovery but were also relevant to the efforts made to attempt to achieve a compromise. He also suggests that Miller house is 'connected' with the lands the subject matter of the 'related' proceedings on Bartra Island. In this regard Mr. Mahon, in his second affidavit, expressed the plaintiff's belief that Miller House was acquired on the basis that a reception centre would be required for Bartragh Island.

30. The fourth ground which is advanced is that the plaintiff endeavoured to conclude and finalise the proceedings through negotiations. Between 22nd March, 2017 and 18th December, 2019 there were 97 separate communications between the plaintiff and all defendants with a considerable amount of those communications taking place between the plaintiff and the second named defendant. It is submitted that these are intensive communications unlike situations where attempts at compromise are limited, such as with isolated meetings or communications. Mr. Byrne B.L. submits that parties should not be penalised for endeavouring to reach a compromise in without prejudice negotiations, particularly in multiparty proceedings. He relies on the decision of Barr J. in *McCrann*, which he submits is highly relevant. Barr J. concluded that the delay of five years was inordinate, but he was satisfied in the circumstances which prevailed, that it was excusable. There, proceedings had been instituted in 2012. The plaintiff unsuccessfully brought a motion seeking liberty to enter final judgment in July, 2012 and nothing further occurred until a notice of intention to proceed was served in 2017. A further period of 14 months elapsed before a second motion for summary judgment was issued. In response, the defendant issued a motion seeking to have the proceedings struck out on the grounds of delay. The excuse advanced by the plaintiff was that they were pursuing other securities which involved the appointment of a receiver over certain mortgaged property and the forced sale thereof. This would have the effect of reducing the ultimate indebtedness of the applicant, the second defendant on foot of guarantees. The second defendant furnished these guarantees in respect of the indebtedness of two companies of which she was a director. It was also argued that in the two years thereafter a significant amount of correspondence passed between the solicitors acting for the parties with a view to possible compromise of the proceedings (nine letters in all) and that the inaction on the part of the plaintiff in progressing the proceedings in the period 2012 to 2017 was excusable.

31. Barr J. observed as follows at paras. 25 et seq:-

> *"In considering the excusability of the delay the Court is entitled to have regard to the surrounding circumstances. In this regard, the Court is satisfied that when the plaintiff elected to pursue recovery of the debt by relying on other forms of security held by it, the second defendant was kept informed of that. That involved the appointment of a receiver and the sale of land in County Roscommon. The receiver was appointed in 2013 and the land was sold in September 2015. The proceeds thereof would have reduced the overall indebtedness of the second defendant to the plaintiff on foot of the contract of guarantee.*
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> *26. The Court must also have regard to the fact that in the period 13th April, 2016 to 30th May 2017, there were nine letters passing between the parties in relation to a possible compromise of the proceedings. Some of those letters were simply chasing up further responses or noting that there was no response to a previous letter. Nevertheless, I am satisfied from the description of that correspondence given in Mr. McDonald's affidavit and from the exhibits thereto, that there were bona fide steps being taken to see if a compromise could be reached between the parties.*

The second defendant was participating through her solicitor in those negotiations. It is not at all uncommon for plaintiffs to hold off taking further steps in proceedings while negotiations are ongoing. Indeed, that is almost universally the case.

27. In these circumstances, the Court is of the view that while a five-year period was certainly very lengthy, there was no question but that the second defendant was aware that the proceedings were still extant against her. She was not deceived into thinking that the proceedings had been abandoned by the plaintiff. She had participated to some extent in negotiations between the parties in an effort to resolve the matter. In these circumstances the Court is of the view that the delay was excusable."

Barr J. further concluded that if he was incorrect in respect of the excusability of the delay, the balance of justice dictated that the proceedings should continue. It was not a case where critical witnesses had died or become unavailable and issues in the case would "*turn on documentary evidence*". He was also not satisfied that prejudice had been established. Mr. Byrne B.L. submits that the facts of the instant case are even stronger. In *Neary* the defendant was a guarantor, rather than a primary creditor and the engagement found to justify the delay was less intensive than in this case. Mr. Byrne B.L. also submits that Mr. McGuinness was never given to believe that the case would '*go away'*.

32. Mr. McGuiness submits that the facts of McCrann are distinguishable and that there is a significant difference in this case in that no step was taken from the time the property was sold in July, 2015 until March, 2017, when the exchange of correspondence commenced. He also submits that *Neary* may be distinguished on the basis that it was concerned with an application for summary judgment, rather than an application to have proceedings dismissed on the grounds of delay.

Discussion and Decision

Inordinate Delay

33. The plaintiff has conceded that the delay in this case is inordinate.

Inexcusable Delay

34. The court must consider whether Mr. McGuinness has discharged the onus of proof of establishing that the delay is inexcusable. As Barr J. pointed out in McCrann, in the assessment of whether delay is excusable, the court is entitled to take into account particular difficulties which may have arisen in the case under consideration and also the surrounding circumstances, in order to assess whether the delay is excusable. Further, given that these are summary proceedings, the court ought to take into account the requirement that such proceedings should, in normal course, be pursued with due expedition and within a reasonable time.

35. The reasons which have been advanced by the plaintiff in support of its contention that the delay is excusable relate to what occurred following the institution of proceedings,

rather than before, and revolve around a number of matters which I have referred to in some detail above, including the deaths of two of the defendants, the Individual Voluntary Arrangement of another in Northern Ireland, difficulties in the sale of Miller House, issues arising in relation to what are claimed to be related proceedings and the fact of the communications between the plaintiff and all parties between 2017 and 2019. The proceedings, described by the plaintiff as being 'related', have not been opened to the court, but it appears from the affidavits sworn on this application that they concern shares in a company which owned Bartragh Island, and involved a number of parties who are also defendants in these proceedings, including Mr. McGuinness.

36. While the court must view the delay of the plaintiff in its entirety, it seems to me that it is appropriate to analyse the accepted delay by looking at a number of different periods of time within the overall time span between the accrual of the cause of action, which Mr. McGuinness suggests accrued in May, 2008 and the bringing of this application. Again, I should make it clear that Mr. McGuinness at all times denies that he was a party to this agreement, or that he has any liability in respect thereof. I am also conscious of his contention that his signature was not appended to the deed of mortgage or indeed to any of the contractual documentation.

37. The first period of delay, or lapse of time, is that which occurred between the date upon which the cause of action accrued and the institution of the proceedings. Although proceedings may be instituted within time, where there has been a delay in the institution of proceedings, it is incumbent on the moving party to proceed with all due speed thereafter. See, for example, *O'Domhnaill v. Merrick* [1984] I.R. 151. On the assumption and accepting that the cause of action accrued, as Mr. McGuinness suggests, no later than May, 2008, proceedings were not instituted until approximately four years thereafter. While referred to in his affidavits, no great emphasis was placed on this period of time during this application. Nevertheless, in my view, it ought to be considered. On the evidence, no explanation is advanced as to why proceedings were deferred until 11th May, 2012. The loan facility letter is dated 26th May, 2005. The loan was due for review on 31st May, 2006. The period of the agreement is stated as being for two years which, on the face of it, suggests that the intention was that the amounts advanced would be repaid within that time. The court has not been made privy to any letter of demand, communication, correspondence or exchanges that may have taken place regarding the calling in of the loan or the threatening of proceedings. It is difficult to assess what, if any, justification is advanced in respect of this period or, whether, as a matter of law, delay during that particular period might be considered to be excusable or inexcusable. However, it is clear from letters exhibited to Mr. McGuinness' grounding affidavit, in respect of this period, that the significant issue of his signature had been raised prior to the institution of the proceedings. This is evident from Ms. Devine's letter of the 30th November, 2009 and Mr. Lynch's report of 5th March, 2011.

38. Mr. McGuinness disputes that there was any difficulty in serving proceedings on him. It would seem from the exhibited correspondence that there was some level of communication between the parties at that time and that in 2011, Mr. McGuinness or his

solicitor Mr. Greaney were in communication with the plaintiff at least for the purposes of having original documents examined. It is also evident from the email communications between Mr. Greaney and Mr. McGuinness which he has referred to in his affidavit of 18th June, 2020, that Mr. Greaney and Mr. Lyons were in communication, at least as far back as February, 2013, prior to the plaintiff applying for the order for substituted service and the renewal of the summon. This is particularly evident from the emails sent by Mr. Greaney to Mr. McGuinness on 28th February, 2013, 15th April, 2013 and a memo of 20th May, 2013. It seems that at least one topic concerned proceedings against Mr. Butler and Ms. Devine. Some insight is given in relation to Ms. Devine's situation by reference to her letter of the 30th November, 2009 in which she stated that she was at a loss to advise her insurance company of the type of claim been alleged against her by Mr. McGuinness. She stated that any claim should be maintained against Mr. Butler because she never represented, advised or met Mr. McGuinness when employed by Mr. Butler. An email of 15th April, 2013 between Mr. Greaney and Mr. McGuinness regarding the issue of indemnity insurance and a claim arising therefrom includes the following sentence:-

> *"The substance of your case against MB and JD will be directly relevant to Ulster Bank and you will recall me saying to you after the meeting with the bank in December that they will see the "fruits" of any such litigation as being part of their, the bank's harvest."*

Reference is also made to the results of a discussion about what would be expected from the bank in return for certain information. In a further memo of 20th May, 2013, reference is made to a telephone call with Mr. Lyons. In my view, the correspondence indicates that throughout 2013, and perhaps even before the summons required to be renewed, the parties were in communication.

39. With regard to the period between 2013 and 2015, I am satisfied, as a matter of general principle, that the sentiments expressed by Barr J. in *McCrann* apply. In the circumstances which prevailed, that the plaintiff elected to pursue recovery of the debt by relying on other forms of security, in my view, is not to be criticised and, on balance ought to be considered to be sufficient to excuse any delay during that period up until the premises were sold and the net proceeds thereof applied to the loan account on 21st July, 2015. Mr. McGuinness was at all times aware of what was intended. In his signed undertaking of 12th September, 2013, he accepted and acknowledged the entitlement of the plaintiff to appoint a receiver over the property and he agreed and irrevocably undertook not to challenge the appointment of the receiver. While the intention and effect of this undertaking is disputed by Mr. McGuinness, it seems to me that any such dispute is more pertinent to the substantive liability issue, rather than to the issue of whether or not a period or a particular period of delay is excusable. It is clear that the proceeds of any sale might reduce the overall, albeit disputed, indebtedness, if any, of the defendant. Therefore, I am satisfied on the evidence that delay in the period between September, 2013 and when the sale proceeds were applied to the loan is excusable as a matter of law.

40. The next period to be considered, it seems to me, is the period between July, 2015, when the asset, Miller House, was sold by the receiver and 22nd March, 2017, when Mr. Lyons wrote to Mr. McGuinness informing him of the sale, that the proceeds of the sale had been applied in reduction of the sums due and that in the absence of proposals the plaintiff would make application to the Master of the High Court for liberty to enter final judgment. While this letter makes clear that the amount of indebtedness has been reduced on the loan account to €1,605,171.70, it is not at all clear why the bank did not inform Mr. McGuinness of this fact at an earlier time; and no particular excuse is advanced as to why this was not done. But it also seems to me that it would be inappropriate to view this period in isolation and what must also be considered, given the joint and several nature of the defendant's liability, are the events which were occurring in respect of Bartragh Island. This brings me to a consideration of the period of delay between 2015 and 2019, which to some extent overlaps with the previous period of delay.

41. The plaintiff contends that arising out of contact with the estate of the first defendant, who died in 2013, it became aware that the third defendant and the second named defendant had instituted proceedings against the estate of the first defendant in 2015 and 2017. These were not compromised until February, 2019. It was also during this period, or at least a portion of this period between March, 2017 and December, 2019, that the plaintiff was in communication with the defendants. It is true, as has been pointed out by Mr. McGuinness, that that the communication with him, which commenced in March, 2017 appears to have been suspended in May, 2017 and did not recommence until Mr. McGuinness wrote to the solicitor for the plaintiff on the 1st February, 2019. Following this, however, there was a considerable exchange of correspondence between the parties to this application. While in my view the court in normal circumstances, should be slow to unduly place emphasis on or to engage to any significant extent on a consideration of without prejudice communications, nevertheless, I am satisfied, that it is appropriate for the court to do so in this case. Given the joint and several nature of the liability of the defendants, any recovery or reduction in the debt of one was likely to affect all and any payment by one was likely to affect the liability of all. While on the basis of the information which has been placed before the court it may be inappropriate to describe the Bartragh Island proceedings as '*related'*, they concerned a different property with different plaintiffs and defendant, nevertheless, on the evidence, I am satisfied that they were relevant to the negotiations which were taking place and thus to the issue of delay. Mr. McGuinness' letter of 28th March, 2019 provides some evidence of this.

42. In *McCrann*, Barr J. concluded that the court was required to have regard to nine letters which passed between the parties between April, 2016 and May, 2017 in relation to possible compromise of the proceedings. Some were written to chase up on correspondence or simply noting that there was no response to previous letters. Nevertheless, he was satisfied from the description of the correspondence that there were *bona fide* steps being taken to see if a compromise could be reached between the parties and that the moving party on that application participated in those negotiations. Barr J. observed that it is not at all uncommon for plaintiffs to hold off taking further steps in

proceedings while negotiations are ongoing. In the instant case, given the multiplicity of communications between the parties, and even though there was a period between May, 2017 and January, 2019 where there does not appear to have been communication between Mr. McGuinness and the plaintiff or *vice versa*, I am satisfied that it is an appropriate case in which to take into account the totality of the communications and correspondence in the assessment of whether or not the delay is excusable, or if not excusable, on the issue of where the balance of justice lies.

43. Mr. McGuinness submits that the correspondence should not be admitted in evidence because he has not been given copies thereof. Mr. Byrne B.L. argues that it would be inappropriate to disclose without prejudice correspondence with third parties, who have rights in the matter. Mr. McGuinness suggests that over 60 pieces of correspondence have not been described as being without prejudice in the prepared schedule of correspondence exhibited to Mr. Lyons' affidavit sworn on 27th June, 2020. Mr. Byrne B.L. accepts that while not every letter is expressly described as being without prejudice, the letters are part of a chain of communications made in the context of without prejudice communications and that Mr. Lyons, who is an officer of the court has deposed to the chronology of engagement in the context of his averment concerning the extensive efforts which have been made to compromise the proceedings.

44. In so far as Mr. McGuinness raises objection to this correspondence being considered, it is clear that approximately 30 items of such correspondence were exchanged between Mr. Lyons and Mr. McGuinness and to which he has, or ought to have, access. The correspondence which he exhibits is, in my view, supportive of the contention that such communications relate to potential compromise, or the failure to compromise. Two letters which were opened to the court bear this out. Mr. McGuinness wrote to the plaintiff on 28th March, 2019 and Mr. Lyons replied on 31st May, 2019. In his letter, Mr. McGuinness advised that any proceedings before the court would be opposed. He reiterated matters concerning his signature on documents. He stated that notwithstanding that the bank was a stranger to the other litigation, nevertheless he was willing to provide information should he be requested. He also outlined proposals on a without prejudice basis which I do not believe it is either necessary or desirable to repeat in this judgment. Mr. Lyons replied on 31st May, 2019, and in respect of this aspect of Mr. McGuinness' letter and having noted the position, concluded as follows:-

> *"… You will appreciate that we would not be at liberty to confirm to you whether or not proposals have been received from the other parties. It suffices to say, the instructions we hold from the bank are to now arrange to issue Notices of Intention to proceed against all parties to the action and attend to the services of the notices in early course."*

Mr. McGuinness maintains that the plaintiff has not been genuine in attempting to resolve matters and that from the time of first interaction he has been faced with empty promises. The plaintiff takes a different view. I am satisfied, nevertheless, that it is the fact of these communications which is of primary importance and relevance to the issue

under consideration. I am also not satisfied that prejudice to Mr. McGuinness has been established on the ground that copies of all letters and communications have not been given to him or to the court. As stated, the correspondence between the plaintiff and Mr. McGuinness, the parties to this application, in my view, corroborates the plaintiff's contention that negotiations were ongoing throughout this period; and it is the fact of these negotiations which is of most significance.

45. Taking into account all matters including the communications between the parties, the undertaking in respect of the receiver, the awaiting of the outcome of the compromise of the Bartragh Island proceedings, I conclude that, while there are certain periods of delay in respect of which there is little evidence of reasons or excuses therefor, when viewed in its entirety and on balance, the delay in this case is in all the circumstances excusable.

Balance of justice

46. If I am incorrect in the above conclusion, I am nevertheless satisfied that the balance of justice lies in favour of the case proceeding. Mr. McGuinness' submissions in this regard to some extent overlaps with his submissions in relation to excusability. He submits that no step was taken in the proceedings for eight years and that the following factors must be taken into account in assessing the balance of justice:

    a. The failure of the plaintiff to mark judgment in the office against the fourth defendant is indicative of the plaintiff's attitude to the advancement of the proceedings;

    b. The plaintiff's failure to advance matters after the sale of the underlying asset which was a time for the plaintiff to have regard to the residual balance due to it and its interaction with the existence of these proceedings;

    c. He has suffered some prejudice because of the existence of the proceedings for an inordinate time, which colours his good name and reputation and has a consequent impact on his health and wellbeing;

    d. There are no countervailing circumstances to excuse the inordinate delay;

    e. That it is he who has taken steps to advance matters but that his actions in so doing do not amount to acquiescence;

    f. Reliance is placed on Grant and Millerick where Irvine J. observed:-

> *"…for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words, a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise*

if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

Mr. McGuinness submits that there is no evidence of culpability on his part. He also points to four meetings which he had with the plaintiff's solicitor and on leaving them felt that the bank had no case against him. Given the grounds of defence advanced he has maintained that the proceedings have to be transferred to plenary hearing.

47. Counsel for the plaintiff, Mr. Byrne B.L., submits that there are a number of factors which ought to be taken into account in exercising the court's inherent jurisdiction when considering the balance of justice or the balance of prejudice. The plaintiff's claim is for a significant sum. Monies were advanced to the defendants. This is not a case of a surety, rather it concerns a creditor. Further, he submits that there is no positive evidence of any specific prejudice alleged by Mr. McGuinness.

48. In *Millerick*, Irvine J. stated that where a delay is inordinate and inexcusable, even marginal prejudice will be sufficient for a court to exercise its discretion to dismiss the proceedings. Mr. McGuinness advised the court both in his affidavit and in his submissions that he has health problems. Mr. Byrne B.L. points out that in four separate affidavits which have been placed before the court, Mr. McGuinness does not point to his health difficulty as giving rise to any prejudice. In his affidavit sworn on the 7th July, 2020, Mr. McGuinness refers to his health difficulties, but this seems to be in the context of applying for an early hearing of this application. Thus, he states at para. 5 of that affidavit that:-

"I say in response to paragraph 13 and 14 of the Affidavit of Ted Mahon I have brought this application in the following circumstances. I had engaged in settlement negotiations with the Plaintiff and their Solicitors in good faith, I was not as Ted Mahon suggested disappointed with the outcome of the settlement negotiations but was disappointed by the duplicitous nature in which the Plaintiff acted in conducting those negotiations. I further say as a result and in the knowledge that the Plaintiff had no real interest in resolving matters I have had no other option but to bring this motion, having taken the following factors into account, two of the defendants are deceased and my own health was deteriorating."

49. No evidence has been advanced on this application of such health difficulties, whether they are related to any delay or whether they will impact upon Mr. McGuinness's ability to defend the proceedings. Nevertheless, it seems to me that the court ought to afford some weight to Mr. McGuinness' age and his statement regarding his health.

50. A factor which also ought to be taken into account is that the essence of Mr. McGuinness's defence is that he was not a party to the loan and that the signature on the loan is not his. Nothing in the evidence which had been placed before the court suggests that any delay on the part of the plaintiff has had an adverse effect on Mr. McGuinness's ability to advance this defence. To this extent, it seems to me that the claim might be viewed as a documents type case where reliance on memory may not be as significant as

in cases where a defence, or indeed a claim, is dependent on the basis of what was said, when it was said and who said it. This was considered a significant factor in *Caulfield*, in the context of a bullying and harassment claim. Meenan J. observed at para 13:-

> *" It is now necessary to consider "the balance of justice". The first matter to be considered is that the nature of the claim which is one for bullying and harassment. Claims of this nature necessarily require the testimony of those who were present or who witnessed the alleged events. These events are alleged to have occurred some ten years ago. A lapse of time of this order must impinge upon the accuracy of those who may give evidence concerning the alleged events. This must amount to prejudice for the first named defendant in defending the claim. I also take into account the delay that elapsed between the events complained of and the application to PIAB, which was in the order of some two years."*

51. To the extent that Mr. McGuinness is critical of the plaintiff's failure to proceed against other defendants, in particular the fourth defendant, no evidence has been advanced as to prejudice, real, presumed to be inferred arising from any failure of the plaintiff in this regard. Nor has evidence been advanced that he will be in any way inhibited in seeking indemnity from that defendant in the context of these proceedings, if appropriate, on such grounds as he may wish to advance. In so far as attempts were made to recover monies from the sale of the property or to await the outcome of other litigation, I accept the substance of the submission of Mr. Byrne B.L. that awaiting of the outcome of such proceedings was, if anything, in ease of the second defendant in that recovery from other defendants may have the effect of reducing any liability which Mr. McGuinness may have, given the joint and several nature of the alleged liability.

52. Nowhere is it suggested that a witness or witnesses will no longer be available. It is true that two of the defendants have died, but it has not been contended on this application that their death will impact upon the ability of Mr. McGuinness to defend these proceedings. While this court has sympathy for Mr. McGuinness, who has advised the court that he has never defaulted on a loan, and while I also take into account his age and the fact that these proceedings have in existence for some time, given the totality of the evidence, I am not satisfied that prejudice has been established, such as to tip the balance of justice against the case proceeding.

53. In all the circumstances, I am not satisfied that the balance and interests of justice are such that the court should exercise its inherent jurisdiction to dismiss the proceedings. I am satisfied that the balance of justice lies in favour of permitting the proceedings to continue. In the circumstances, therefore, I must dismiss this application.