[2020] IEHC 646

THE HIGH COURT

[Record No. 2012/2113 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF BANK OF IRELAND

PLAINTIFF

AND

PETER WILSON AND ANNE CAHALANE

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 11th day of December, 2020

Background

1. This is an application by the second defendant for an order striking out the proceedings brought against her by the plaintiff, on the grounds of inordinate and inexcusable delay on the part of the plaintiff in progressing the action.

2. In these summary proceedings, the plaintiff seeks a joint and several judgment against the defendants in the sum of €1,265,884.25, together with interest thereon and costs, pursuant to a loan made to the defendants in 2006. The second defendant's complaint is that while the summary summons issued on 7th June, 2012 and was ultimately served on her on 12th December, 2013, the summons having been renewed in the interim; no steps were taken by the plaintiff to progress the action; as a consequence whereof, the second defendant issued a notice of motion on 28th February, 2017 seeking to have the proceedings against her struck out.

3. In essence, the plaintiff has justified the delay on its part by reference to the fact that it had made a decision to allow the first defendant time to put his financial affairs in order, in the hope that he would be able to discharge his overall indebtedness to the plaintiff, including the joint and several liability of the defendants on foot of the loan the subject matter of these proceedings. The plaintiff also relied on other ancillary grounds, which will be set out in more detail later in the judgment. The plaintiff submits that in the circumstances, the delay on its part was excusable, or in the alternative, that the balance of justice lies in permitting the plaintiff to proceed with its action against the second defendant.

Chronology of Relevant Dates

4. The first defendant and the second defendant were in a long term relationship between 1982 and 2004, during which time they had four children. Unhappy differences arose between them and the relationship ended. On 9th February, 2006, the plaintiff advanced circa €1.3m to the defendants. This was done by means of a credit agreement, the purpose of which was to enable the purchase of a property in Crosthwaite Hall, Dún Laoghaire, Co. Dublin, which it was intended would become the residence of the second defendant.

5. The security required under the agreement for the loan was stated in the agreement to be a first legal charge in favour of the plaintiff over property owned by the defendants in Co. Wicklow; the plaintiff's interest was to be noted on a fire policy covering that property; a

letter of undertaking was to be furnished from the defendant's solicitor to hold the title deeds in trust and to the order of the plaintiff over the property at Crosthwaite Hall and the plaintiff's interest was to be noted on the fire policy on that property also. The agreement further provided "*takeout of this loan from net sale proceeds*" of the Wicklow property, with any residue to be cleared from the first defendant's own funds, or through equity release on existing properties held.

6. A letter of demand seeking repayment of the outstanding balance on the loan was issued by the plaintiff on 20th February, 2012. On 7th June, 2012 the plaintiff issued the summary summons herein against the defendants. An appearance was entered on behalf of the first defendant on 20th August, 2012.

7. Negotiations were held between the three parties in the latter part of 2012 and into 2013. These negotiations ultimately concluded, without any agreement, in or about July 2013.

8. On 14th October, 2013 an order was made by the High Court renewing and amending the summary summons. An order was also made providing for the effecting of substituted service of the amended summons on the second defendant. Service of the summons was effected upon her on 12th December, 2013. An appearance was entered on behalf of the second defendant on 20th December, 2013.

9. Thereafter, the action appears to have gone dormant for a period of just over three years. A notice of intention to proceed was filed on behalf of the second defendant on 16th December, 2016. On 28th February, 2017, the second defendant issued the present motion seeking to dismiss the plaintiff's claim against her for want of prosecution on grounds of inordinate and inexcusable delay.

10. Thus, the period of delay runs from either October 2013, when the order amending the summons and giving the plaintiff liberty to effect substituted service thereof on the second defendant was made, or from 12th December, 2013 when service of the summons was actually effected on the second defendant, and continued until 28th February, 2017, being the date of issue of the present motion by the second defendant; being a delay of three years and four months, or three years and two months, depending on which start date is taken.

Other Relevant Matters

11. This is not a simple debt collection case. There is a dispute between the defendants as to the arrangements between them concerning what was to be done in relation to the repayment of the bridging finance that had been taken out by the defendants to fund the purchase of the Crosthwaite Hall property. It is the second defendant's case that as part of the overall arrangements concerning the breakup of their long term relationship, it had been agreed between the defendants, that she would release her interest in a number of properties that she had held jointly with the first defendant, in return for which, the Wicklow property was to be sold and the proceeds thereof were to be applied to repayment of the bridging loan and if those proceeds were not sufficient to clear the loan, the balance outstanding would be made up by the first defendant from his personal

finances. Thus, the second defendant alleges that she was to get the property in Crosthwaite Hall free from any mortgage or other encumbrance.

12. That contention is hotly disputed by the first defendant. Not only does he dispute those contentions which have been made in the affidavit sworn by the second defendant in the course of this application, but he has also instituted proceedings in 2017 against the second defendant seeking a number of reliefs, to include directions pursuant to s.31 of the Land and Conveyancing Law Reform Act 2009, to require the second defendant to consent to the sale of the Wicklow property; an order requiring her to account to the first defendant for the profits received from the rent of the Wicklow property and a declaration that the first defendant is entitled to the equitable interest in the property at Crosthwaite Hall.

13. It is pleaded by the first defendant that he is entitled to the reliefs claimed in the separate proceedings on foot of an agreement reached between the parties in or about 2006 at the time of the breakdown of their relationship. It is further pleaded that the second defendant has persisted in frustrating the performance of that agreement, which has triggered the default on the part of the first defendant in making repayments to the plaintiff and/or has increased his indebtedness in respect of the bridging loan finance the subject matter of the summary proceedings in this case.

14. In an affidavit sworn on 28th November, 2019, by the solicitor acting for the first defendant, Ms. Mary Hayes, it was specifically denied on the part of the first defendant that there was any agreement reached between them that the second defendant would get the property in Crosthwaite Hall mortgage free. However, it was accepted that the bridging loan was to be financed by the sale of the Wicklow property, which it was alleged by the first defendant, did not come to pass because the second defendant actively obstructed the sale of the Wicklow property by refusing to give up vacant possession thereof. It was stated that insofar as the indebtedness on foot of the bridging loan may have increased over time, that was due to the default on the part of the second defendant in giving up vacant possession of the Wicklow property so as to permit the sale thereof.

15. It is not necessary for the court on the hearing of this application to express any view whatsoever in relation to the merits of the case put forward by either of the defendants in relation to the alleged agreement concerning the purchase of the property at Crosthwaite Hall, or the circumstances in which the bridging loan would be repaid. It will suffice for the court to note that there is a bitter and acrimonious dispute between the defendants in the background to these proceedings.

16. That dispute has been incorporated into the present proceedings, due to the fact that the second defendant has served a notice of indemnity/contribution on the first defendant, effectively claiming that on foot of the alleged agreement between the parties, in the event that she is found to be liable to the plaintiff in the proceedings herein, she is entitled to an indemnity from the first defendant in respect of any such indebtedness.

Submissions on Behalf of the Second Defendant

17. It was submitted on behalf of the second defendant that her application herein to have the plaintiff's proceedings against her struck out on the grounds of inordinate and inexcusable delay, complied with the test set out in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

18. It was submitted that the total period of delay from date of issue of the summary summons on 7th June, 2012 to the date of issuance of the second defendant's motion on 28th February, 2017, being four years and eight months, was both inordinate and inexcusable. In the alternative, even if one took the period from 15th October, 2013, when the order was made renewing and amending the summons and giving the plaintiff liberty to effect substituted service thereof on the second defendant, to the date of issuance of the second defendant's motion, which was a period of three years and four months, that was still a period of inordinate and inexcusable delay.

19. It was submitted on behalf of the second defendant that she had been unaware that the plaintiff had made a unilateral decision not to proceed with its action against the defendants, so as to enable the first defendant to have time to improve his financial position, until she had read such averments in the affidavits filed on behalf of the plaintiff in this application. The second defendant stated in her affidavits, that she had never been aware of any such decision on the part of the plaintiff. She had never consented to the action being delayed, or being put into abeyance, to allow the first defendant time to improve his financial circumstances.

20. It was submitted that at all times the second defendant was anxious that the action would be brought on to a hearing, so that her claim on foot of her notice of indemnity and contribution against the first defendant, could be determined. She had never acquiesced to the action going into abeyance. In that regard, reference was made to correspondence sent by her solicitor on 1st July, 2014 to Mr. Rory Collins of Margetson & Greene, the solicitors acting for the plaintiff, informing him that counsel had been instructed to draft a notice of motion and grounding affidavit to have the plaintiff's case against the second defendant struck out for want of prosecution. That threat was repeated in further correspondence from the second defendant's solicitor to Ms. Maeve Callaghan, Business Manager of the plaintiff in a letter dated 18th November, 2015. In the circumstances, it was submitted that the second defendant had not acquiesced in any way in the action being put into abeyance.

21. It was suggested that insofar as the plaintiff made a decision to allow time to the first defendant to improve his financial position, that was motivated by the plaintiff's own commercial interests, in view of the fact that the first defendant had a number of liabilities outstanding to the plaintiff at that time. It was submitted that it was not permitted at law for a plaintiff to make a unilateral decision to put an action into abeyance, pending the outcome of separate proceedings or events: see Comcast *International Holdings v. Minister for Public Enterprise* [2012] IESC 50; *Bagnell v. McCarthy Commercials* [2012] IEHC 205 and *Rodenhuis and Verloop BV v. HDS Energy Limited* [2010] IEHC 465.

22. It was submitted that in the circumstances, whether one took the longer period of delay commencing with the issuance of the summary summons in June 2012, or the shorter period of delay commencing with the making of the order renewing the summons in October, 2013; the delay until issuance of the within motion by the second defendant on 28th February, 2017, was both inordinate and inexcusable.

23. Turning to the issue of the balance of convenience, it was submitted that the following factors pointed towards the balance tilting in favour of the plaintiff's action against the second defendant being struck out: firstly, the court was entitled to have regard to the fact that these are summary proceedings commenced by way of a summary summons. It was submitted that it was settled at law that such proceedings, which were summary in nature, ought to be progressed swiftly by the plaintiff: see *Havbell DAC v. O'Hanlon [2018] IEHC 557.*

24. Secondly, on one of the properties over which the second defendant had released her interest, being a property at Haddington Terrace in Dún Laoghaire, Co. Dublin, the first defendant had, by an instrument dated 12th December, 2017, diminished his equity in the property by executing a mortgage in favour of his new partner. Furthermore, in 2018 the first defendant had married his new partner, meaning that the property at Haddington Terrace, was now a family home within the meaning of the Family Home Protection Act, 1976. It was submitted that the second defendant had therefore suffered a significant diminution in her opportunity to recover payment from the first defendant on foot of her claim pursuant to the notice of indemnity/contribution.

25. Thirdly, it was submitted that while payments in excess of €0.5m had been paid by the first defendant in respect of the loan on the Crosthwaite Hall property, no payment had been made thereon since 2011. Therefore, the interest accruing on the loan had continued to increase due to the inactivity on the part of the plaintiff in pursuing its action herein. That in turn had worsened the overall liability of the second defendant on foot of the said loan.

26. Fourthly, in her affidavits, the second defendant had stated that she had a fear that the first defendant may be preparing to retire and possibly to relocate abroad, without discharging the amount owed on the Crosthwaite Hall property. The second defendant stated that the first defendant had recently sold his business for a sum of approximately €3m, of which he had apparently received the first tranche of €800,000. Notwithstanding that, no further payment had been made in respect of the loan outstanding on the Crosthwaite Hall property. It was submitted that having regard to the matters set out above, together with the inordinate time that had passed since the inception of the proceedings, the second defendant had suffered prejudice by reason of the delay on the part of the plaintiff to prosecute the action.

27. Counsel further submitted that, while it could be argued that the plaintiff's action against the second defendant rested essentially on documentary evidence concerning the terms of the credit agreement entered into in 2006, oral evidence was going to be necessary in relation to the overall agreement between the first defendant and the second defendant,

upon which the second defendant's notice of indemnity and contribution was based. In such circumstances, she had been prejudiced by the delay on the part of the plaintiff, because the resolution of the issues between her and the first defendant, would depend on the recollection of witnesses to conversations and events that had taken place over fourteen years ago. Thus, it was submitted that there was a very real prejudice to the second defendant in having to meet the proceedings at this remove.

Submissions on Behalf of the Plaintiff

28. In response, Mr. Miller BL on behalf of the plaintiff, submitted that such delay as there had been in the prosecution of the within proceedings, was entirely excusable. In relation to the initial period from the date of issue of the summons on 7th June, 2012 to 14th October, 2013, when the application was made to renew the summons and effect substituted service thereof on the second defendant, a number of things had happened within that period which rendered the delay excusable.

29. Firstly, there had been negotiations between the parties in the latter part of 2012 and in 2013. Indeed, in an email sent by the second defendant to the plaintiff on 17th October, 2012, she welcomed the plaintiff's decision to suspend the proceedings pending the negotiations that were ongoing. It was submitted that it was not until the unsuccessful conclusion of those negotiations in July 2013, that it was necessary to take steps to have the summons renewed and to obtain an order to effect substituted service on the second defendant. That had been necessary due to the fact that fifteen attempts had been made to effect personal service on the second defendant during the month of August 2012, but without success. It was following the making of the order by the High Court on 14th October, 2013, that service of the summons was effected on the second defendant on 12th December, 2013. It was submitted that in these circumstances, there had been no inexcusable delay from the institution of proceedings to the effecting of service thereof on the second defendant.

30. It was accepted that the plaintiff had not taken any steps to prosecute the action between 12th December 2013 and the time when the second defendant's motion issued in February, 2017. However, it was submitted that there were good reasons why the plaintiff had not prosecuted the action during that period. Firstly, the plaintiff had been anxious to allow the defendants a period of time to attempt to resolve their difficulties arising out of the breakup of their long-term relationship. Secondly, the plaintiff had allowed the first defendant time to get his business affairs back up and running following the financial crash that had occurred in 2008 and in the years thereafter, so as to enable him an opportunity to reduce his overall indebtedness to the plaintiff, including his indebtedness on foot of the loan the subject matter of these proceedings.

31. It was pointed out that the first defendant was in effect the sole breadwinner in the family. The second defendant had only ever worked in the first defendant's company and had done some part time work on her own account after the breakup of their relationship. However, there was no reality to her repaying the loan the subject matter of these proceedings. It was submitted that in such circumstances, it was entirely reasonable and sensible for the plaintiff to give the first defendant time to see if he could reduce the joint

and several indebtedness of the defendants to the plaintiff on foot of that loan. It was pointed out that insofar as payments were made by the first defendant on foot of the loan, those had inured for the benefit of both defendants. Thus, it was sensible for all parties to take whatever steps would enable the first defendant to be in a position to repay the loan.

32. It was pointed out that as the property at Crosthwaite Hall was the primary residence of the second defendant, this meant that she came within the Code of Conduct on Mortgage Arrears and came within the Mortgage Arrears Resolution Process. That had been instigated by the plaintiff in 2016. It was entirely reasonable for the plaintiff to defer taking any action on foot of the within proceedings, while that process was underway.

33. There had also been a problem with the first legal charge that was created over the Wicklow property, which it transpired had been wrongly vacated. The plaintiff had had to take separate steps to have that matter rectified, including issuing proceedings against the defendant's former solicitors.

34. In relation to the balance of convenience, it was submitted that there was no real prejudice suffered by the second defendant as a result of the delay in prosecuting the action between December 2013 and February 2017. This was due to the fact that the proceedings concerned an action to recover monies due on foot of a loan. The right of recovery would turn, not on oral evidence, but on the terms of the credit agreement of February 2006 and the payments made thereunder in the following years. None of that would turn to any real extent on oral evidence at the trial of the action. Furthermore, insofar as the second defendant maintained that her primary action was on foot of her notice of indemnity/contribution against the first defendant, it would actually be to her benefit to enable the within proceedings to continue, so that those issues could be determined sooner rather than later.

35. In relation to the conduct of the plaintiff in permitting the first defendant time to put his financial affairs on a better footing, it was submitted that that was an entirely reasonable step to have taken and the results thereof would inure to the benefit of the second defendant. Indeed, the fact that the first defendant had managed to sell his company for circa €3m, was testament to the fact that it had been prudent to allow him time to put his business affairs in order. Counsel referred to the decision in *Bank of Ireland v. McCrann* [2019] IEHC 818, as authority for the proposition that a bank can explore other avenues of recourse and if those prove unsuccessful, can continue with its primary action against the defendants.

36. Finally, it was submitted that the making of the order sought by the second defendant herein, would be futile, because if such an order was made, the plaintiff was still entitled to institute fresh proceedings as the sum owed on foot of the original loan was a continuing debt in respect of which it had a right of action. Thus, it was submitted that there would be no overall benefit to the second defendant in being successful on this application; it would merely delay the ultimate resolution of her indebtedness to the plaintiff and her alleged right to an indemnity in respect of such indebtedness from the

first defendant. In all the circumstances, it was submitted that the court should refuse the application of the second defendant herein.

Conclusions

(a) Applicable legal principles

37. The principles to be applied in this case are the well-known principles set down by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley*, as formulated by Hamilton C.J. at p.475. It is not necessary to set these principles out here, as they are very well known. The principles in the *Primor* case were summarised by Irvine J. (as she then was) in *Millerick v. Minister for Finance* [2016] IECA 206 in the following way:-

> *"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."*

Thus, the court must ask itself three questions: was the delay inordinate; if so, was it inexcusable and if the answer to both those questions is in the affirmative; where does the balance of justice lie?

38. In deciding those questions, the court can have regard to all of the circumstances of the case, not just those arising in connection with the litigation. It can also have regard to the wider circumstances of the relationship or interaction between the parties. In *Truck and Machinery Sales Limited v. General Accident, Fire and Life Assurance Corporation plc* [1999] IEHC 201, Geoghegan J. stated as follows at p.4/5:-

> *"Strictly speaking it would seem to me that the excuses relied on should relate in some way to the actual proceedings in hand because an opposing party can hardly be expected to stand aside and wait while the other party resolves its problems which have nothing to do with the litigation. Nevertheless, I am satisfied that all the surrounding circumstances, including so called excuses based on extraneous activities, must to some extent be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out or allowed to proceed."*

39. It is well settled at Irish law that in some circumstances it may be appropriate for a plaintiff to hold off prosecuting the action, while he awaits developments that may be taking place either in other litigation, or in the market generally. However, it is equally clear that a party cannot unilaterally take the decision to put the proceedings "*on hold*". He must inform the opposing party why he is taking that decision and either get express consent to the matter going into abeyance, or at least the opposing party must acquiesce

in that course of action being taken. In *Rodenhuis and Verloop BV v. HDS Energy Limited*, Clarke J. (as he then was) stated as follows as para. 3.4:-

> *"It does not seem to me that it is open to a party to take the unilateral action of allowing one set of proceedings to go to sleep because of the existence of another set of proceedings and then use the connection between the two sets of proceedings as an excuse for having allowed the proceedings concerned to go to sleep. If it is truly felt that it is inappropriate for some reason not to progress a set of proceedings because of the existence of other proceedings, then it is at a minimum incumbent on the party who holds that view to raise the issue in correspondence and seek to reach agreement. If agreement cannot be reached, then it is incumbent upon the party either to progress the proceedings or to make some application to the court for directions…"*

40. Dicta to similar effect are to be found in the judgment of the Supreme Court in *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50 and also in the judgment of Bermingham J. (as he then was) in *Bagnall v. McCarthy Commercials* [2012] IEHC 205. However, on occasion, it will be appropriate for a plaintiff to put one set of proceedings "*on hold*" while he pursues alternative remedies, as long as the defendant in the first set of proceedings acquiesces in that course being taken: see judgment of this Court in *Bank of Ireland v. McCrann* [2019] IEHC 818.

41. It is also necessary for the court to have regard to the nature of the proceedings. Where the plaintiff has elected to pursue a summary form of proceedings, he will be expected to proceed with his action relatively quickly, as that is the essence of an action provided for under the summary procedures provided for in the Rules of the Superior Courts. In *Havbell DAC v. O'Hanlon*, McGrath J. stated as follows at para. 20:-

> *"I must also take into account the nature of these proceedings. They are summary proceedings. Such proceedings should be expedited with all due dispatch. This has not occurred in this case and in my view no reasonable explanation, satisfactory or otherwise has been advanced by the plaintiff for this. I have little doubt but that the defendants have suffered a general prejudice which is that if they are required to answer these proceedings at such remove they will have had to endure unnecessary oppressiveness or proceedings hanging over them for in excess of eleven years, something which in my view they should not have or had to endure. Further, it seems to me that in the context of the nature and extent of this delay, it would be inequitable and against the balance of justice to require the defendants to defend this case at such remove. To do so, in my view, might also be said to run contrary to any obligations or commitments on the part of the State pursuant to the European Convention (on Human Rights) in a case of this nature, to ensure the expeditious progress and conclusion of proceedings."*

42. Finally, in applying the tests set out in the *Primor* case, the court is obliged to have regard to the obligations of the State under the European Convention on Human Rights to ensure that parties to litigation receive a fair hearing from an independent tribunal within

a reasonable period of time. In the *Rodenhuis* case, Clarke J. stated as follows at para. 5:-

> *"For the reasons set out by me in my judgment in Stevens v. Paul Flynn Limited [2005] IEHC 148 (Unreported, High Court, Clarke J., 28th April, 2005), I had come to the view that, while the test to be applied by the court remain as set out in the long standing jurisprudence contained in cases such as Primor plc v. Stokes Kennedy Crowley [1996] 2 IR 459, the weight to be attached to factors properly taken into account in applying that test needed to be recalibrated in favour of a greater strictness of approach. In so doing, I had regard amongst other things, to the judgment of Hardiman J. in another Supreme Court case, Gilroy v. Flynn [2004] IESC 98, [2005] 1 ILRM 290, and, in particular, the references by Hardiman J. in that case to the effect of the jurisprudence of the European Court of Human Rights."*

43. Clarke J. went on to note that at that time, there appeared to be differences of approach between individual judges of the Supreme Court (and differently constituted divisions of that court) to the relevance of the case law of the European Court of Human Rights; nevertheless Clarke J. came to the conclusion that the law in this area should, were possible, be interpreted in a manner so as to bring it into conformity with the European Convention on Human Rights, so that the interpretation was compatible with the State's obligations under the Convention. He stated as follows at paras. 8 and 9:-

> *"…the obligation on a State which subscribes to the European Convention on Human Rights is to provide for a timely disposition of court proceedings. The Convention does not of itself, therefore, necessarily require that proceedings be struck out for delay as such.*
>
> *9. However, it does seem to me that the European Convention on Human Rights is of some relevance in this area. The relevant obligation is one of the member state. It is clear from the jurisprudence of the European Court of Human Rights that the fact that, in some jurisdictions, the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the relevant state from complying with the requirement to ensure that cases be dealt with in a reasonable time."*

44. Thus, the court is obliged to have regard to the fact that the party who complains of the delay on the part of the party bringing the action, has a right to have the case that is brought against them, determined within a reasonable time.

45. In reaching its decision in this case, the court has had regard to the principles set out in the cases cited above.

(b) Decision in this case

46. The court can begin by dealing with two periods of delay on which it is reasonably simple to reach a conclusion. Firstly, there has been quite some delay in bringing the present

motion on for hearing. The motion issued on 28th February, 2017, but was not heard before this Court until 19th November, 2020. The court is satisfied that there was no culpable delay on the part of the second defendant in moving the motion due to the fact that she had ill-health for a portion of this period; there was a very tragic death in the family and the onset of the Covid-19 pandemic in 2020 delayed the hearing of the matter, which had to be done remotely in November 2020. Neither party made any point in relation to the period that had elapsed between the issuance of the notice of motion and the hearing of the motion; accordingly, it has not been a factor in the decision reached by the court in this case.

47. The first period in respect of which the second defendant makes complaint is the period from issuance of the summary summons on 7th June, 2012 to service of the renewed and amended summons on her on 12th December, 2013. While that was an inordinate period, I am satisfied that that period of delay was excusable due to the fact that negotiations were held between all the parties in the latter part of 2012 and continuing until July 2013. When the negotiations did not reach a successful conclusion, the plaintiff had to reactivate the proceedings. That involved bringing an application before the High Court to renew the summons. In view of difficulties that had been encountered by the summons server in effecting personal service of the summons in August 2012 and his inability to effect service at that time, an application was also made for liberty to serve the summons by substituted service on the second defendant. The plaintiff was granted an order giving it liberty in that regard in October 2013. The summons was served on the second defendant on 13th December, 2013. I am satisfied that in these circumstances the delay that occurred between issuance of the summons and service thereof on the second defendant was excusable. Furthermore, insofar as the action was put "*on hold*" during that period, the second defendant acquiesced in such delay, as is evidenced by the content of her email of 17th October 2012, expressing appreciation for the fact that the plaintiff had held off proceeding with the action while the negotiations were taking place.

48. Turning now to deal with the main period of delay which is complained of by the second defendant, being the period from October 2013, when the order was made renewing and amending the summons and 28th February, 2017, when the second defendant issued her motion to dismiss the action for want of prosecution, I am satisfied firstly, that the correct commencement date for this period is in fact the date on which service was effected of the summons on the second defendant on 13th December, 2013. I am satisfied that the plaintiff had moved with reasonable expedition to obtain an order for substituted service and had acted promptly on receipt of such order in effecting such service. Accordingly, I hold that the relevant period of delay in this case runs from 13th December, 2013 to 28th February, 2017; a period of three years and two months.

49. In relation to the first question for determination under the Primor test, the court is satisfied that a period of three years and two months during which no step is taken by a plaintiff to prosecute summary proceedings, represents an inordinate delay.

50. The second question for determination is whether that delay is excusable in all the circumstances of the case. In determining this question, the court can have regard not only to the circumstances surrounding the litigation itself, but can also have regard to the wider circumstances existing between the parties generally: see *Truck and Machinery Sales Limited v. General Accident, and Fire and Life Assurance Corporation plc.*

51. The plaintiff has submitted that the court should have regard to the following factors as excusing its inaction during this period: the fact that the defendants were in the midst of what was effectively a family dispute; the fact that it was reasonable to allow the first defendant time to get his financial circumstances in better shape, so as to reduce his overall indebtedness to the plaintiff, including the joint and several indebtedness of the defendants on the loan the subject matter of these proceedings and the fact that they had to take steps to have the first legal charge, which had been vacated, reregistered against the Wicklow property.

52. I do not think that the first excuse proffered is a valid one. While it may be reasonable to allow parties to a family dispute some time to sort matters out, the defendants had separated in 2004. The loan the subject matter of these proceedings had been taken out in 2006 to enable the purchase of the Crosthwaite Hall property. The proceedings themselves were instituted in 2012 and were effectively reactivated against the second defendant from December 2013. Given that timeline, it cannot be said that the delay that occurred between December 2013 and February 2017 was activated by a desire to enable the defendants to reach an accommodation inter se.

53. While the second excuse proffered on behalf of the plaintiff is certainly reasonable from a commercial point of view and in particular having regard to the commercial interests of the plaintiff; it cannot justify the period of delay due to the fact that it is well settled in the case law that a party cannot make a unilateral decision to suspend litigation while it pursues other avenues of redress, or awaits the outcome of other events, without at the very least securing the acquiescence of the defendants in that course of action being taken: see the *Rodenhuis, Comcast* and *Bagnall* cases.

54. In this case the plaintiff, clearly with a view to benefitting its own commercial interests, made a decision to allow time to the first defendant to get his business back up and running. That may well have been a very prudent commercial decision for the plaintiff to make. However, it did so without informing the second defendant of what they proposed to do. As was stated by Clarke J. in the *Rodenhuis* case, if a plaintiff wants to put the proceedings "*on hold*", he must either get the consent of the defendants to that being done, or he must seek the directions of the High Court to permit that to happen. Neither of those things were done in this case.

55. Furthermore, having regard to the dicta of McGrath J. in the *Havbell v. O'Hanlon* case, the court has to have regard to the fact that the plaintiff elected to pursue summary proceedings in respect of the recovery of this debt. Once it decided to adopt that procedure, it was obliged to progress the litigation in a timely manner, as envisaged under the Rules of the Superior Courts.

56. The plaintiff also put forward as an excuse for the delay, the fact that it had reinstituted the MARP process in 2016. However, the court does not view that excuse as being meritorious for two reasons. Firstly, the second defendant had already been through the MARP process and indeed had appealed the initial decision made thereunder back in 2013 and it had not led to a resolution of the matter. The plaintiff attempted to justify the institution of a second MARP process on the basis that they had had regard to some unspecified provisions and decided that it was necessary to reinstitute the same process again. They did not identify the provisions which required this to be done. The court does not find this credible. Secondly, the second defendant through her solicitor made it clear that she did not intend to go through the MARP process for a second time. Accordingly, the court does not find this excuse meritorious.

57. A further excuse proffered by the plaintiff was to the effect that they had to take steps to have the first legal charge on the Wicklow property reinstated. Indeed, they had instituted proceedings against the defendant's former solicitor for breach of his undertaking in that regard. However, the court was not given any specific details as to how long that process took. Of perhaps more relevance, the court was not informed why that action in relation to that issue, had any bearing on the present proceedings, which are simple debt recovery proceedings. The court does not find this excuse credible.

58. At the end of the day, the second question boils down to a simple question: can a plaintiff elect for valid commercial reasons to put an action on hold so as to allow one of the defendants time to put his financial affairs in order, without informing the other defendant that it proposes to take this course of action and why it is so doing? I am satisfied on the basis of the case law and having regard to the provisions of the European Convention on Human Rights, that a plaintiff cannot take such a unilateral decision. The defendant who has been left in the dark, in this case the second defendant, is entitled to complain of the delay in prosecuting the claim against her, notwithstanding that there may have been valid commercial reasons from the plaintiff's point of view for putting the action on hold.

59. Having regard to all of these circumstances, the court finds that the delay in this case from December, 2013 to February, 2017 was inexcusable.

60. In argument, counsel for the plaintiff relied on the decision of this Court in *Bank of Ireland v. McCrann* for the proposition that it was permissible for a lender to pursue other remedies with a view to obtaining payment of its debt, rather than pursuing a particular defendant on foot of a contract of guarantee. However, in that case, the second defendant, who had guaranteed the debts of the first defendant, had participated in negotiations which had taken place during the period in respect of which complaint was made and had also been fully aware of the fact that the plaintiff in that case had taken steps to obtain repayment of the debt in reliance on security that it held over lands in County Roscommon held by the first defendant.

61. It was in those circumstances that the court held that the second defendant could not complain of the delay on the part of the plaintiff in pursuing its action against her on foot

of the guarantee. The circumstances in that case were quite different to the circumstances in this case, where the second defendant was effectively left completely in the dark during the relevant period. She could not be said to have acquiesced in the delay, due to the content of the letters issued by her solicitor, wherein she had threatened the plaintiff that they would bring a motion seeking to strike out the action for want of prosecution unless the plaintiff proceeded with it. Thus, there is no question of acquiescence on the part of the second defendant in the delay on the part of the plaintiff.

62. As the first two questions under the *Primor* test have been answered in the affirmative, it is necessary for this Court to determine whether the balance of justice lies in favour of striking out the proceedings, or allowing them to continue. The plaintiff has submitted that the second defendant has not been prejudiced in any way due to the delay on its part in proceeding with the action during the period in question. Indeed, it goes further and states that the second defendant is in fact in a better position by virtue of the fact that the first defendant has managed to sell his company for circa €3m, which will be used to reduce his overall indebtedness to the plaintiff, including the indebtedness of the defendants on foot of the loan the subject matter of these proceedings. In short, the plaintiff argues that it was a good idea to allow the first defendant time to put his financial affairs back on track and that having been done, all of the parties will benefit by the fact that he was given time to do so.

63. The plaintiff further argues that the second defendant would not be materially better off even in the event that she was successful in her application to have the proceedings struck out for want of prosecution, due to the fact that the debt, being a continuing contractual obligation, the plaintiff could simply reinstitute fresh proceedings against the defendants. That would merely delay the entire matter and in particular, would delay her alleged right of recovery on foot of her notice of indemnity/contribution against the first defendant, which is based on an alleged agreement that she would be given the Crosthwaite Hall property mortgage free.

64. On behalf of the second defendant it was submitted that she had suffered prejudice by virtue of the delay on the part of the plaintiff in proceeding with its action against her and her former partner. It was submitted that if the proceedings had been prosecuted by the plaintiff in a timely manner, a number of benefits would have flowed to the second defendant as follows: firstly, the amount of the debt would have been less, as there would have been less interest due on the principal sum; secondly, she would have obtained a determination years ago in relation to her claim against her former partner on foot of her notice of indemnity/contribution and thirdly her position in terms of any ultimate recovery that she might have against the first defendant was adversely affected by the fact that he created a mortgage in favour of his new partner and that that woman has since become the wife of the first defendant, thereby meaning that the Haddington Terrace property is now a family home, with the statutory protection that that involves.

65. Furthermore, it was submitted that the second defendant's claim against the first defendant in respect of the alleged agreement between the parties, that in consideration

for her releasing her interest in other jointly owned properties, the proceeds of sale of the Wicklow property would be applied to discharge the debt owing on the Crosthwaite Hall property and that in the event that such proceeds were not sufficient to discharge the debt, the first defendant would discharge the balance thereof from his personal funds; would all depend on oral evidence from both of the defendants and from the second defendant's brother-in-law, who is alleged to have heard the first defendant confirm the terms of the agreement, as alleged by the second defendant, and there would be evidence from her accountant. Therefore, it was submitted that this is not solely a documents based case, but will involve oral evidence on the very important issue as to what the agreement was between the defendants as to the division of their properties and the application of the proceeds of sale thereof.

66. Having considered these submissions, the court is satisfied that the balance of justice in this case lies with the making of an order striking out the proceedings for want of prosecution. The second defendant is now a single lady of relatively limited earning capacity. She had worked for part of the time that she was in a relationship with the first defendant, as a bookkeeper in one of his companies. After the separation, she had worked part-time in a shop business that she had set up in Howth, but it has since ceased trading. Given her age and work experience she has to be seen as being in somewhat of a vulnerable position. Once the proceedings were issued against her, she was entitled to expect that she would achieve resolution of her primary dispute with the first defendant on foot of her notice of indemnity/contribution. Instead, what happened was that the proceedings were put on hold, despite the protestations of the solicitor acting for the second named defendant, while the plaintiff made a unilateral decision to allow time to the first defendant, so that his overall indebtedness to the plaintiff might be reduced. While that was probably a valid commercial decision for the plaintiff to take, it was not reasonable for the plaintiff to take that decision unilaterally without any notice to the second defendant.

67. The court is satisfied that the second defendant has suffered prejudice by virtue of the fact that the proceedings were put on hold and indeed, may have continued on hold, but for the issuance of the motion by the second defendant. There are a number of facets to the prejudice. Firstly, the first defendant during that period executed some form of mortgage in favour of his new partner. Secondly, he has since married his new partner, thereby rendering the property at Haddington Terrace a family home, with all of the statutory protections that that involves. In these circumstances, the court is satisfied that the second defendant has suffered a prejudice by virtue of the fact that the plaintiff unilaterally elected not to pursue the action for a period of time so as to improve its own financial position. In these circumstances, the balance of justice lies in favour of dismissing the proceedings for want of prosecution.

68. Accordingly, the court proposes to make an order striking out the plaintiff's action against the second defendant for want of prosecution. The parties will have a period of six weeks within which to make written submissions as to the content of the final order and on costs and on any other matters that may arise.

69. Finally, and by way of *obiter dicta*, the court would make the comment that there are difficult issues arising between the defendants connected with the breakup of their long term relationship. It is in the interests of all parties to this litigation that there is an overall resolution to all of the issues that arise, so that the bank can be repaid its loan and the defendants can reach a workable resolution which will enable them to move on and go their separate ways. To that end, while the court is not making a formal invitation pursuant to s.16 of the Mediation Act, 2017, the parties would be well advised to consider mediation, as it is a process that is ideally suited to achieving a fast and fair outcome to the difficult issues that arise in this case. In the event that the parties wish to do so, the court would be willing to defer making a final order in this matter pending the holding of such mediation and in the event that it was successful, the court would be prepared to make whatever consent orders may be agreed between the parties.