[2019] IEHC 809

THE HIGH COURT

[2012/5470 P.]

BETWEEN

ASTA O'KELLY

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND JOHN FITZPATRICK

DEFENDANTS

THE HIGH COURT

[2012/5471 P.]

BETWEEN

BRENDAN KELLY

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED AND JOHN FITZPATRICK

DEFENDANTS

AND

THE HIGH COURT

[2012/7193 P.]

BETWEEN

BRENDAN KELLY AND ASTA O'KELLY

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED

DEFENDANT

Judgment of Ms Justice Faherty dated the 14th day of November, 2019

1. This matter comes before the Court by way of three motions brought by Irish Bank Resolution Corporation Limited (hereinafter "the Bank") in respect of the above three sets of proceedings.

Background

2. In 2004 the plaintiffs mortgaged their property known as "Killbarron", 4 St. Mathias Wood, Church Road, Killiney, Co. Dublin (hereinafter "the Killiney property") with Irish Nationwide Building Society (INBS). The Bank is the successor in title to INBS, having taken over its assets and liabilities.

3. On or about 30th June, 2010 the Bank obtained an order for possession in respect of the Killiney property.

4. An Execution Order dated 28th September, 2011 was served on the plaintiffs by the Dublin County Sherriff, John Fitzpatrick (hereinafter "the Sherriff") who duly recovered possession of the property on or about 18th April, 2012.

5. The within proceedings arise from the repossession of the Killiney property.

6. On the 1st June, 2012 the plaintiffs, individually, issued proceedings by way of plenary summons against the Bank and the Sherriff in which they claimed damages for alleged

assault and trespass to the person. Those proceedings are entitled, respectively, *Asta O'Kelly v. Irish Banking Resolution Corporation Limited and John Fitzpatrick, High Court Record No. 2012/5470P and Brendan Kelly v. Irish Bank Resolution Corporation Limited and John Fitzpatrick,* High Court Record No. 2012/5471P. Those proceedings will hereinafter be referred to as "the assault proceedings".

7. In respect of the assault proceedings, each of the plaintiffs delivered a Statement of Claim on 9th November, 2012. A Notice for Particulars was raised by the Bank on 18th of December, 2012 in each case and Replies to Particulars were delivered by the plaintiffs on 28th January, 2013.

8. The proceedings bearing record no. 2012/7193P entitled *Brendan Kelly and Asta O'Kelly v. Irish Bank Resolution Corporation* (hereinafter "the slander of title proceedings) were issued by the plaintiffs against the Bank on 20th July, 2012, seeking damages for slander of title to goods and property and trespass to the Killiney property. The plaintiffs also seek a declaration that an order obtained by the Bank for possession of the Killiney property was void and/or invalid. Furthermore, the plaintiffs seek an order providing for restitution and/or breach of contract.

9. On 20th July, 2012, the plaintiffs registered a lis pendens in respect of the Killiney property. The Bank entered an Appearance to the slander of title proceedings on 10th September, 2012.

10. On 12th September, 2012, the Bank brought an application to the High Court seeking an order providing for the vacating of the *lis pendens*. The *lis pendens* was vacated by order of the High Court (Ryan J.) on 5th October, 2012. In the course of his judgment in the matter (*Kelly & Anor v. IBRC* [2012] IEHC 401), Ryan J. had the following to say: -

> *"The proceedings, insofar as they assert an interest in land such that would justify the registration of a lis pendens, constitute an abuse of process. The fact that the plaintiffs are unable, even when faced with this motion, to suggest any detail or even any basis for advancing a claim as to an interest in land, is very telling and in my view is quite fatal to their claim and confirms the absence of bona fides in doing so. It seems to me to be quite obvious that the claim at paragraph (b) of the endorsement on the summons was introduced for the sole purpose of providing a colourable justification for registering a lis pendens in the hope of frustrating a sale of the property. The circumstances of the case point irresistibly to that conclusion and there is nothing in the materials put before the court or in any submission made by Counsel Mr. Dixon to suggest any legitimate basis for registering the lis pendens. It would be a clear injustice to permit the processes of the court to been employed for the purpose and only for the purpose of frustrating the exercise of legitimate rights. That would be the case here if the lis pendens were to be permitted to remain. I propose accordingly to order that it be vacated and that paragraph (b) be struck out."*

11. In summary, Ryan J. found the registration of the *lis pendens* was an "*abuse of process"* done in the "*absence of bona fides*" without any legitimate basis.

12. By notice of appeal dated 26th October, 2012, the plaintiffs appealed the Order of Ryan J. to the Supreme Court. By order of the Supreme Court dated 14th December, 2012, the plaintiffs' appeal was dismissed.

13. Following the Appearance entered by the Bank on 10th September, 2012 in the slander of title proceedings, no statement of claim was delivered the plaintiffs in respect of the slander of title proceedings and no further steps to prosecute the slander of title proceedings were taken following the Order of the Supreme Court dated 14th December, 2012 in the *lis pendens* matter.

14. On 7th February, 2013 the Irish Bank Resolution Act 2013 came into force. Section 6 of that Act provides: -

> *"6.— (1) In this section "proceedings", subject to subsection (4), includes counterclaims or cross-claims against IBRC, in legal actions brought by IBRC, other than those counterclaims or cross-claims which, if successful, would give rise to a right of set-off.*
>
> *(2) Subject to subsection (6), with effect from the making of the Special Liquidation Order—*
>
> *(a) there shall be an immediate stay on all proceedings against IBRC,*
> *(b) no further actions or proceedings can be issued against IBRC without the consent of the Court,*
> *(c) no actions or proceedings for the winding up of IBRC, or for the appointment of an examiner (whether interim or otherwise) or a liquidator (whether provisional or otherwise) to IBRC can be taken, issued, continued or commenced,*
> (d) the Minister may discharge or remove any liquidator or examiner that had been appointed to IBRC prior to the making of the Special Liquidation Order, and
> *(e) the Special Liquidation Order shall constitute effective and proper notice to each employee of IBRC that his or her employment with IBRC is terminated with immediate effect.*
>
> *(3) Subsection (2)(e) shall not prevent the special liquidator from engaging any person, including any person whose employment with IBRC was terminated upon the making of the Special Liquidation Order, on such terms as the special liquidator sees fit where the special liquidator considers such engagement to be necessary or beneficial for the orderly conduct of the winding up of IBRC.*

(4) The appointment of a receiver pursuant to a debenture or charge created by IBRC shall not constitute proceedings for the purposes of this section.

(5) The making of the Special Liquidation Order in relation to IBRC shall, for the purposes of any enactment or rule of law or of any contract, deed or other agreement to which IBRC is a party, have the same effect as if the Special Liquidation Order were the making of a winding up order by the Court or the appointment of an official liquidator.

(6)(a) The Special Liquidation Order, and any other thing done under the Special Liquidation Order or pursuant to instructions issued or any directions given to a special liquidator pursuant to this Act—

(i) does not affect any proceedings taken, investigation undertaken, or disciplinary or enforcement action undertaken by the Bank, the Director of Public Prosecutions, An Garda Síochána, the Director of Corporate Enforcement or any regulatory authority, in respect of any matter in existence at the time the Special Liquidation Order was made or other thing was done, and

(ii) does not preclude the taking of any proceedings, or the undertaking of any investigation, or disciplinary or enforcement action, by the Bank, the Director of Public Prosecutions, An Garda Síochána, the Director of Corporate Enforcement or any regulatory authority, in respect of any contravention of an enactment or any misconduct which may have been committed before the Special Liquidation Order was made or the other thing was done.

(b) In this subsection "regulatory authority" includes—

(i) the Irish Stock Exchange,

(ii) the Irish Auditing and Accounting Supervisory Authority,

(iii) a prescribed accountancy body (within the meaning of Part 2 of the Companies (Auditing and Accounting) Act 2003), and

(iv) any other authority which regulates, or which may investigate or prosecute, any person under or by virtue of any enactment, rule of law or contract."

The net effect of the passing of the 2013 Act was that a statutory stay was placed on the plaintiffs' assault proceedings and slander of title proceedings against the Bank,by Order of the Oireachtas.

15. On 8th February, 2013, a Defence was delivered on behalf of the Sherriff in each of the assault cases. Thereafter, Notices for Particulars were delivered on behalf of the plaintiffs dated 3rd April, 2013. Replies to Particulars were furnished on behalf of the Sherriff on 12th April, 2013.

16. On 15th July, 2013, applications were brought on behalf of the plaintiffs by way of Notices of Motion returnable to the Master of High Court for an order compelling the Sherriff to furnish further and better replies to the particulars raised. The application was refused by order of the High Court on 15th July, 2013. By Notices of Motion returnable on 11th November, 2013, the Sherriff sought liberty to deliver amended Defences in the assault proceedings and sought directions from the High Court with regard to the hearing of the actions, in particular an order permitting the plaintiffs' cases as against the Sherriff to proceed to be heard separately.

17. On consent, the Master made an Order permitting the delivery of amended Defences on behalf of the Sherriff in the assault proceedings and same were duly delivered on 18th November, 2013. The application to have the plaintiffs' cases as against the Sherriff heard separately was refused by the Master.

18. On 2nd December, 2013, Replies to the Defences of the Sherriff were delivered on behalf of the plaintiffs. No further steps were taken by the plaintiffs in their assault proceedings against the Sherriff.

19. There have been no further steps by the plaintiffs in the assault proceedings against the Bank since 28th January, 2013.

20. On 1st March, 2017, the Sherriff filed two motions seeking to have the plaintiffs' respective assault proceedings dismissed for want of prosecution and/or on the grounds of delay.

21. The Sherriff's applications were heard by the Master of the High Court on 9th May, 2017. Orders were made by consent dismissing the plaintiffs' claims as against the Sherriff for want of prosecution. At the request of the Sherriff, the Master of the High Court placed a stay on the Order for costs to operate indefinitely unless the plaintiffs issued further proceedings as against the Sherriff.

22. On 31st May, 2017, the Bank lodged a Notice of Intention to Proceed in the assault proceedings. A Notice of Intention to Proceed in respect of the slander of title proceedings was lodged by the Bank on 18th October, 2017.

23. On 15th December, 2017, the Bank issued the within three motions seeking, in respect of all the plaintiffs' proceedings, orders pursuant to the Rules of the Superior Courts (RSC) and/or pursuant to the inherent jurisdiction of the Court dismissing the plaintiffs' claims for inordinate and inexcusable delay in the prosecution of the within proceedings and/or in the alternative an order pursuant to o.122, r.11 RSC dismissing the plaintiffs' claims for want of prosecution.

24. Each of the three motions are grounded on an affidavit sworn by Eve Mulconry, the Bank's solicitor.

25. In her affidavit sworn 14th December, 2017 grounding the application to strike out Mr. Kelly's assault proceedings, Ms Mulconry avers as follows: -

"8. As is apparent from the chronology of events…the Plaintiff has taken no steps to progress the proceedings as against [the Bank] since the delivery of a Reply the Particulars on 28 January 2013, over four years ago. The only other contact with the Plaintiff's solicitors was in July 2013 when this firm inquired as to the nature of [the Sheriff's motion to dismiss] and the Plaintiffs' solicitor replied by email stating *'it does not concern you'*…

9. I say and believe that the Plaintiff has had every opportunity to prosecute his claim herein and has failed to do so without any, or any legitimate, reason. The Plaintiff has not taken steps to pursue his claim against [the Bank] or to allow the matter to come before this Honourable Court in an expeditious manner for determination. Having regard to the nature of the allegations made by the Plaintiff against [the Bank] and the losses allegedly suffered by him, I say and believe that the delay in the prosecution of the proceedings is both inordinate and inexcusable…

10.. [The Bank] and its servants or agents acted lawfully in relation to the repossession of the said property pursuant to an Order for possession and an Execution Order claimed by [the Bank] in the prior Circuit Court Proceeding against the Plaintiff. As per the proceedings against [the Sherriff] in the circumstances outlined above I say and believe the balance of justice lies in favour of dismissing the plaintiff's claim against [the Bank] for want of prosecution.

Similar averments are made by Ms. Mulconry in the affidavit sworn by her on 14th December, 2017 grounding the motion to dismiss Ms. O'Kelly's assault proceedings.

26. In respect of the slander of title proceedings, in her grounding affidavit sworn 14th December, 2017 Ms. Mulconry avers as follows:

"15. I say and believe that the Plaintiffs have had every opportunity to prosecute their claim but have failed to do so without any, or any legitimate, reason. The Plaintiffs have not taken steps to pursue their claim against [the Bank] or to allow the matter to come before this Honourable Court in an expeditious manner for determination. I say and believe that the delay in the prosecution of the proceedings is both inordinate and inexcusable.

16. For the avoidance of doubt, [the Bank], and its servants or agents, acted lawfully in relation to the repossession of the said property pursuant to an Order for Possession and an Execution Order obtained by [the Bank] in the prior Circuit Court proceeding against the Plaintiff. In the circumstances outlined above I say and believe that the balance of justice lies in favour of dismissing the Plaintiffs' claims against [the Bank] for inordinate and inexcusable delay and/or for want of prosecution."

27. No replying affidavits have been sworn by the plaintiffs in response to the motions now before the Court.

The relevant legal principles

28. The principles to be applied in any consideration of an application to strike out proceedings on grounds of delay which occurs post-commencement of the proceedings are set out in the decision of Primor Plc v. Stokes Kennedy Crowley [1996] IR 459 (hereinafter referred to as "Primor).

29. The Primor principles were recently discussed in Lyden v. Irish Bank Resolution Corporation Ltd (In Special Liquidation) [2018] IEHC 374.

30. In Lyden, the plaintiff had issued proceedings on 13th December, 2012 seeking a declaration that a contract he had entered into with the defendant was null and void and he sought damages for breach of contract, negligent misrepresentation and negligent misstatement. Consequent on the passing of the 2013 Act, the Lyden proceedings were automatically stayed. On 27th November, 2013 the plaintiff obtained an Order pursuant to s.6 (2) (a) of the 2013 Act lifting the statutory stay on the proceedings and granting the plaintiff liberty to amend the title of the summons to read Irish Bank Resolution Corporation (In Special Liquidation). The plenary summons was then served on the defendant on 11th December, 2013. Thereafter, Mr. Lyden did not deliver a statement of claim. An appearance had been entered by the defendant on 17th December, 2013. On 11th March, 2014, the defendant's solicitors requested the delivery of a statement of claim. The proceedings lay fallow for three and a half years until 29th June, 2017 when the plaintiff served a notice of intention to proceed. After a month had elapsed, the plaintiff still had not delivered a statement of claim. On 6th October, 2017, the defendant issued a motion seeking to have the plaintiff's claim dismissed by reason of the inordinate and inexcusable delay of the plaintiff in prosecuting his claim. It appears that this motion crossed with the plaintiff's statement of claim as it was delivered on 11th October, 2017.

31. With respect to the principles to be applied, Costello J. opined as follows:

> *"15. The leading decision is that of the Supreme Court in Primor Plc v. Stokes Kennedy Crowley [1996] I.R. 459. The first task of a court dealing with an application of this nature is to ascertain whether the delay by the person seeking to proceed has been inordinate and, if inordinate, whether it has been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable lies upon the party seeking a dismiss of the proceedings.*
>
> *16. Even where the delay has been shown to be both inordinate and inexcusable the court must then further proceed to exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of, or against, the proceeding of the case.*
>
> *17. At p. 475-6 Chief Justice Hamilton summarised the principles of law relevant to the consideration of a motion to dismiss.*
>
> *'(a) The courts have in inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*

(b) It must, in the first instance, be established by the party seeking a dismissal of the proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) Even where the delay has been both inordinate and inexcusable the court must exercise the judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) In considering this latter obligation, the court is entitled to take into consideration and have regard to:

(i) The implied constitutional principles of fair procedures

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

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

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

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

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

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

18. The matters listed at (d) (i) – (vii) are matters which the court is entitled to take into consideration when weighing the balance of justice in the case. While they obviously provide useful guidance of relevant matters for the court to have regard, they should not distract from the fact that the exercise of the court is to weigh the balance of justice and not to determine whether one or more of the factors listed by the chief justice exists in any particular case. At p. 490 of the report Hamilton C.J. said that:

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

19. In considering the issue of the excusability of the delay in Stephens v. Paul Flynn Ltd [2005] IEHC 148 Clarke J. approved the dicta of Lord Diplock in Birkett v. James [1978] A.C. 297:

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

Clarke J. continued:

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

20. In Quinn v. Faulkner trading as Faulkner's Garage & Anor [2011] IEHC 103 Hogan J. stated that:

> *'While as Charleton J. pointed out in Kelly v. Doyle [2010] IEHC 396 it would be wrong for the court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more proactive in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost 'endless indulgence' towards such delays led in turn to a situation where inordinate delay was all too common.'"*

32. In *Lyden*, Costello J. found the delay in the case both inordinate and inexcusable and that the balance of justice favoured the dismissal of the proceedings.

33. Recent jurisprudence has decreed that the *Primor* principles must be seen in light of jurisprudence from the European Court of Human Rights (ECtHR) on the issue of delay. In *Gilroy v. Flynn* [2005] ILRM 290, Hardiman J. stated:

> *"[F]ollowing such cases as McMullen v. Ireland [ECHR 422 97/98 29th July, 2004] and the European Convention on Human Rights Act 2003, the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."*

34. In *Stephens v. Paul Flynn Ltd* [2005] IEHC 148, Clarke J. referred to Hardiman J.'s judgment in *Gilroy* and stated:

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

35. Clarke J. was satisfied, however, that the two central tests remain the same, namely that the Court should:

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

36. Clarke J. went on to state that, for the reasons set out by the Supreme Court in *Gilroy*:

> *"[T]he calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay or issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."*

On appeal to the Supreme Court, the decision of Clarke J. in *Stephens v. Paul Flynn Ltd* was upheld.

37. In *Rodenhuis and Verloop BV. v. HDS Energy Ltd* [2011] 1 IR 611, Clarke J. dismissed the plaintiff's proceedings and again commented upon the fact there should be a recalibration or tightening up the application of the principles, particularly considering Ireland's obligations pursuant to the European Convention on Human Rights (ECHR). This approach was adopted also by Hogan J. in *Quinn v. Faulkner T/A Faulkner's Garage and Anor* [2011] IEHC 103.

38. In *Carroll v. Seamus Kerrigan Ltd and Anor* [2017] IECA 66, the Court of Appeal reiterated the principles contained in Primor. In the course of her judgment, Irvine J. stated:

> *"It is…material to remember that when a Court comes to consider whether the balance of justice favours allowing the action proceed in light of its finding of inordinate and inescusable delay, the author of that delay is not to be absolved of their fault , unless they can point to some countervailing circumstances which the Court considers sufficient to negate the effect of such behaviour, see e.g. the*

comments to this effect of Fennelly J. in Anglo Irish Beef Processors v. Montgomery [2002] 3 I.R. 510."

The within applications fall to be considered having regard, inter alia, to the principles enunciated in the afore-mentioned jurisprudence.

The Bank's submissions

39. Counsel for the Bank submits that the delay on the part of the plaintiffs is inordinate in respect of all three sets of proceedings. It is submitted that the issue of whether the delay is inordinate is one that mixes law and fact.

40. Regarding the slander of title proceedings, the Bank relies on the delay of five years and four months between the issuing of the plenary summons on 20th July, 2012 and the issuing of the motion to dismiss the proceedings on 15th December, 2017, during which time the plaintiffs failed to deliver a Statement of Claim. In effect, the Bank contends that the plaintiffs have taken no steps in the proceedings since the Order of the Supreme Court dated 14th December, 2012.

41. With regard to the assault cases, the Bank points to the fact that the plaintiffs have not taken any steps beyond the delivery of their respective Statements of Claim on 9th November, 2012, and their Replies to Particulars on 28th January, 2013. It is submitted that by any standards, the plaintiffs are guilty of inordinate delay.

42. It is also the Bank's position that the delays in respect of all the proceedings are inexcusable. Counsel also submits that the balance of justice favours the Bank in all the cases given the time that has elapsed since the events which precipitated the issuing of the proceedings.

43. It is submitted that the Bank is at a disadvantage regarding the assault proceedings as no bank official was present when the alleged assaults occurred.

44. It is further contended on behalf of the Bank that quite apart from the fact that the plaintiffs' proceedings should be dismissed applying the principles set out in the case law (particularly given the approach of the ECtHR to the issue of delay), the Court should have regard to the fact that the Bank is in liquidation on foot of an Act of the Oireachtas. The Special Liquidator is concerned with winding up the Bank in the public interest. Thus, when considering the issue of prejudice suffered by the Bank, and by extension the Exchequer and public at large, the Court should recall the purpose of the 2013 Act which, *inter alia*, includes that it is necessary in the public interest to ensure that the financial support provided by the State to the Bank is, to the extent achievable, recovered as fully and efficiently as possible.

45. Given, therefore, that the Oireachtas has passed legislation providing for the appointment of the Special Liquidator, the efficient winding up of the Bank is in the best interest of the Exchequer and the public at large. It is submitted that as the Oireachtas has prescribed that the orderly winding down of IBRC was in the common good, the prejudice suffered by Bank impacts negatively on the common good.

The plaintiffs' submissions

46. The principal submission advanced on behalf of the plaintiffs is that the Court cannot hear the within motions as the stay on the proceedings imposed by the coming into force of the 2013 Act has not been lifted in any of the cases.

47. While the Bank contends that the plaintiffs have not sought to lift the stay it has not said why it itself did not apply to lift the stay. Albeit that counsel for the Bank cites authority to say that the stay can be lifted, he does not say how that puts the plaintiffs under a duty to do so. Counsel for the plaintiffs emphasises the fact that the stay imposed by the 2013 Act was for the benefit of the Bank.

48. It is submitted that in the assault cases, the plaintiffs delivered their Statements of Claim promptly and did so before the coming into force of the 2013 Act and the ensuing stay. No Defence has been delivered to either assault case by the Bank. It is submitted the consequences of the stay having been imposed is that the plaintiffs have been stopped from proceeding with their cases. Furthermore, in none of the legal authorities (*save Lyden*) relied on by the Bank was there a stay in being when the applications to dismiss the proceedings were brought. Counsel thus contends that the authorities relied on by the Bank are not relevant to the within proceedings.

49. It is submitted that the Bank has cited no authority to say how it can bring the within motions when there is a stay in being. Had the plaintiffs applied to lift the stay, it would be for the Bank to say whether it should or should not be lifted. This is so given that the plaintiffs have never been privy to the Bank's activities on foot of the stay granted by the 2013 Act.

50. The Bank served a Notice of Intention to Proceed in all three cases in November 2017. This was in circumstances where the Bank had not applied to lift the stay. Furthermore, the Notices of Intention to Proceed all state that the Bank is ready and able to continue with the proceedings. It is thus contended any question of delay can only be considered from the time of the Bank's Notices of Intention to Proceed were issued.

51. It is further contended that there is no basis for the Bank's reliance on the fact that the plaintiffs' assault proceedings against the Sheriff were struck out. Same came about on foot of a negotiated agreement. The Bank remains a defendant in the assault proceedings.

52. It is the plaintiffs' contention that the Bank wishes to piggyback on the actions taken by the Sheriff in the assault proceedings, proceedings which were not stayed under the 2013 Act.

53. It is the plaintiffs' contention that as all the proceedings before the Court involve a stay imposed by the 2013 Act, the within motions should not have been brought without the Bank having invited the plaintiffs to apply to lift the stay and then to seek the directions of the Court. It is acknowledged that both parties have the right to apply to have the

stay lifted. Yet the Bank did not make any application prior to bringing their motions. It is submitted that the Bank's actions, therefore, are irregular and wrong.

Considerations

54. Notwithstanding the plaintiffs' argument that time should only run against them once the stay is lifted (an argument with which I do not agree for reasons set out hereunder), it cannot be gainsaid that the delay in these cases is inordinate. Thus, the question which arises is whether the delay in prosecuting the proceedings is excusable. Insofar as the plaintiffs rely on the passing of the 2013 Act for not proceeding with their cases, the Bank's contention is that that argument has no merit. Counsel for the Bank pointed to the decision of Ryan J. in *Quinn & Ors v. IBRC* [2013] 1 IR 393, where it was held that the Court can lift the stay imposed by the 2013 Act, on application to it by a plaintiff, (or indeed a defendant). Ryan J. stated:

> *"The question that arises here is what impact does S. 6(2)(a) have on the plaintiffs' litigation that was in existence at the time of the making of the special liquidation order. Obviously, one thing it does is to put a stay on those proceedings, but the real question is: what more does it do? Is it intended to terminate the proceedings? Is this an enactment by the Oireachtas that simply puts an end to all existing actions against IBRC?*
>
> *The parties to this motion argue that the obvious answer is that it does not and cannot have that effect. In other words, the legislature does not have the power to declare that a proceeding that is already in existence before the court but has not yet been heard will no longer be an action to be heard by a court now or at any time in the future. They say that would obviously be an interference in the court process, it would prevent access to the courts for determination of rights or entitlements or claims, it would be a breach and a manifest breach of the separation of powers between legislature and judiciary and it would also offend against other basic principles of democracy as well as constitutional law. Such a construction put on the paragraph would also offend principles of equality and would be wholly irrational because of the difference of treatment of pending and intended litigation. The catalogue of infractions of rights and principles would be unrivalled in Irish legal and constitutional history.*
>
> *The curious situation thus arises on the motion that there is no dispute between the parties as to what the result, that is, my decision, should be on the interpretation of section 6(2)(a). They are both in agreement that there is indeed a stay which was imposed on the making of the special liquidation order but they say that the legislation must be read as envisaging or at least permitting an application to this Court to lift the stay and let the case continue. They also agree that it is appropriate that the court should lift the stay. They argue that the stay is a temporary measure that was imposed under the Act and that it makes no sense to construe the provision in any other way. (at paras. 5-7)*

55. Ryan J. ultimately concluded, at para. 48 of his judgment, that the stay imposed by the 2013 Act was intended to be subject to being lifted on application to the Court. Given what is set out in *Quinn*, the Bank argues that there is no basis upon which the plaintiffs are entitled to sit back and rely on the stay and then, when met with an application to strike out their proceedings on grounds of delay, merely rely on the fact of a stay. I agree with the Bank's argument.

56. There can be no ambiguity as to what was open to the plaintiffs. From April 2013, following the decision in *Quinn*, it was clear that they could apply to the Court to lift the stay so that they could progress their cases. That facility was not taken up by the plaintiffs.

57. The import of the plaintiffs' submissions is that they can rely on the stay and apply to lift it whenever they decide, and that time will only begin to run when they re-activate the proceedings by lifting the stay. As already stated, I accept the Bank's proposition that this argument has little merit. Furthermore, the plaintiffs have not laid out any factual basis for their submission by way of affidavit. In all the circumstances, I find the plaintiffs' delay in relation to all three cases inexcusable.

58. The question which now arises, is whether the balance of justice favours the dismissal of the plaintiffs' proceedings.

59. As part of the Court's consideration on this issue, it seems to me that I must consider the fact that neither the Bank, nor the plaintiffs applied to have the stay lifted prior to the issuing of the within motions. As referred to already, it is acknowledged by both parties that they had the right to apply to have the stay lifted. The Bank never applied to lift the stay prior to issuing its Notices of Intention to Proceed and the issuing of the within motions. On the other hand, the plaintiffs themselves never sought at any point to lift the stay, in order to progress their proceedings.

60. The plaintiffs argue that the within motions should not have been brought without the Bank having invited the plaintiffs to apply to lift the stay and then to seek the directions of the Court. It is submitted that the gravelman of the Bank's application to strike out the cases for delay is misconceived as there is a stay in place in respect of all the proceedings. The plaintiffs' argument is that the Bank's actions are irregular and wrong. They contend that the Bank's failure either to itself apply to have the stay lifted or request the plaintiffs to do so is a relevant consideration in the context of the *Primor* test. As provided in principle (iii) of *Primor*, where the Court finds that the delay is inordinate and inexcusable it must decide where the balance of justice lies.

61. In his written submissions, counsel for the plaintiffs conceded that the Court, using its inherent jurisdiction, may intervene without a formal application and lift the stay. For the purposes of adjudicating on the within motions, the Court is satisfied to do so.

62. Counsel for the plaintiffs submits that the balance of justice lies with the plaintiffs. He contends that this is so because it is the Bank who was the beneficiary of the stay. Thus,

the plaintiffs contend that it is not open to the Bank to just sit back and benefit from the stay while at the same time criticising the plaintiffs for not applying to lift the stay. Counsel also pointed out that none of the authorities relied on by the Bank deal with the situation where the stay was still in being at the time the motions to dismiss issued. Counsel emphasises the fact that the stay was imposed in ease of the Bank.

63. In contrast, the Bank argues that what the plaintiffs are now seeking to do is to rely on an absolutist technical argument (namely that the Bank should have applied to lift the stay before issuing the within motions) that should not be accepted given the delays that have occurred since 2013.

64. To my mind, the fact that neither party sought to lift the stay is but one of the relevant factors to be weighed when considering where the balance of justice lies in these cases.

65. I turn firstly to the slander of title proceedings.

66. The Bank asserts that the sole purpose of the slander of title proceedings was to create a device to enable the plaintiffs to register a lis pendens to delay the sale of the Killiney property. I note that the slander of title proceedings have already been the subject of strong criticism by Ryan J. in *Kelly & Anor v. IBRC* [2012] IEHC 401. Given the findings of Ryan J., and the Orders made by the Supreme Court, coupled with the plaintiffs' inaction since December, 2012 (including failing to apply at any point after 7th February, 2013 to lift the stay), and noting, in particular, the plaintiffs' failure to deliver a Statement of Claim between July, 2012 and 7th February, 2013 (in circumstances where they managed that feat in the assault proceedings) I find that the balance of justice favours the dismissal of the slander of title proceedings.

67. There remains the question of the plaintiffs' respective assault proceedings. These proceedings rest with the plaintiffs having delivered their respective Statements of Claim in November, 2012 and responding to the Bank's Notices for Particulars on 28th January, 2013. There is no suggestion that the plaintiffs were tardy in the progressing of the assault proceedings up to that point in time. Within ten days or so of the Replies to Particulars having been furnished, the stay was imposed by Act of the Oireachtas.

68. Counsel for the plaintiffs contends that there is nothing in the affidavits sworn on behalf of the Bank to say why the cases cannot now proceed. It is argued that as the Bank has not put in a Defence to the assault cases the plaintiffs cannot say what facts are in issue. Counsel also points out that, in any event, the matters the subject of the assault cases have been recorded, both on the news and on UTube. In this regard, I have already referred to the absence of any replying affidavits from the plaintiffs.

69. It is contended that the Bank advances only general prejudice. Counsel for the plaintiffs submits that this must be viewed in the context of the Bank having the benefit of a stay in respect of which the plaintiffs had no input. Accordingly, counsel queries how can it be said that the plaintiffs are responsible for the delay as the Bank has never sought to lift the stay? It is thus submitted the balance of justice favours the plaintiffs.

70. In response to the plaintiffs' contention that the Bank has not laid out any basis for its claim of prejudice, counsel for the Bank points to the *dictum* of Costello J. in *Lyden*, where the learned Judge addresses this type of argument. She stated: -

"34. The plaintiff argued that the defendant had not made out any particular claim that it was prejudiced by the delay in this case. In the light of these observations of Clarke J., and of the case now pleaded by the plaintiff, I do not agree with these submissions. The defendant has not exaggerated the prejudice it will suffer if this case comes to trial but it has made out a case that it will suffer some prejudice in defending this case. It is important to note that in both Stephens and Comcast prior written statements from potential witnesses existed. That is not the case here.

35.. A defendant is not required to point to specific prejudice, such as the non-availability of a witness or the loss of documents in order to have the court conclude that the balance of justice would favour the dismissal of the proceedings. In Carroll v. Seamus Kerrigan Ltd [2017] IECA 66 Irvine J. said at para. 26:

> *'While the respondent has not asserted any particular prejudice, it would be wrong in my view, for this Court not to infer some prejudice as a result of the appellant's delay in prosecuting his claim against the respondent. First, the court will have to make findings of fact concerning the circumstances in which the appellant was allegedly injured over 15 years ago and in circumstances where neither his employer, nor the person who allegedly perpetrated the assault remain a party to the proceedings.*

36.. At para. 13 of the judgment the court held:

> *'It is, however, material to remember that when a court comes to consider whether the balance of justice favours allowing the action proceed in the light of its finding of inordinate and inexcusable delay, the author of that delay is not to be absolved of their fault, unless they can point to some countervailing circumstances which the court considers sufficient to negate the effect of such behaviour: see, e.g., the comments to this effect of Fennelly J. in Anglo Irish Beef Processors Limited v. Montgomery [2002] 3 I.R 510.'*

37. Irvine J. went to hold in para. 24:

> *'There is, in any event, a long line of authority to support the dismissal of actions in the presence of moderate prejudice where the court has found the plaintiff guilty of inordinate and inexcusable delay. In Stephens v. Paul Flynn Ltd [2008] 4 I.R. 31 Kearns J. concluded that a defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the Primor test.'*

38.. When Irvine J. referred to a plaintiff pointing to countervailing circumstances which a court might consider sufficient to negate the effects of his or her delay she would

have had in mind the unpredictable hazards of life which can afflict the course of litigation, to use the phrase of Fennelly J., whereby individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction or where documents may have been mislaid, lost or destroyed. There are no such countervailing circumstances asserted or relied upon by the plaintiff in this case. The plaintiff knew or had available to him all of the ingredients to commence and pursue his litigation from 2009 or at the very latest February, 2012. In circumstances where the key events occurred towards the end of 2006 it was incumbent upon him to act with dispatch at that stage.

39. In my judgement, even if all relevant witnesses are in fact available to the defendant if and when this action comes to trial, nonetheless, by reason of the passage of time, they will be required to give evidence in relation to events which occurred in 2006 and a court will be required to assess their truthfulness and the accuracy of their evidence after this very significant lapse of time. This fact to my mind means that the defendant has suffered a significant prejudice. There may be witnesses whose testimony will not be accepted by the trial judge as reliable where the result may have been otherwise if they had given their evidence closer to the events, with potentially very great prejudice to the defendant.

40. There are cases where unavoidably the court is required to accept evidence of events which may have occurred decades prior to the hearing of the action: applications brought pursuant to s. 117 of the Succession Act, 1965, equitable claims to land, adverse possession claims and claims to easements acquired by prescription are just some examples. However, frequently, the delay in those proceedings is unavoidable and is certainly not attributable to any delay on the part of the litigants in bringing the case to trial. Different considerations apply when it was at all times possible to bring forward a claim in a timely and efficient manner".

71. Counsel for the Bank also highlights the fact the assault proceedings arise from an occasion where the Sheriff was removing persons from the Killiney property pursuant to an Execution Order. He makes the point that within proceedings are not document-based. Were this the case, the Bank might have been able to rely on documentary evidence to assist its defence of the within proceedings.

72. It is the case that the contents of the plaintiffs' respective Statements of Claim do not suggest that the Bank would be able to rely on documents to assist it in its defence of the assault proceedings such as might alleviate, to some extent presumably, the prejudice that arises for the Bank by reason of the passage of time. However, it is also the case that the Bank is not suggesting that witnesses which might otherwise be available to it are not available. Indeed, counsel for the Bank makes the point that the Bank's agents or employees were not involved in the alleged events of 18th April, 2012 when the Sherriff and his agents attended at the Killiney property. Regarding this particular point the Court observes that the Bank would in all probability have advanced that self-same argument even if the assault proceedings had been progressed with expedition.

73. It is of course well established that a defendant is not required to point to specific prejudice, such as the non-availability of a witness or the loss of documents, in order to have the Court conclude that the balance of justice would favour the dismissal of the proceedings. The fact of the delay itself may be enough to swing the balance of justice in favour of a defendant. However, as far as the present case is concerned, the afore-mentioned tenets are tempered by the fact that a stay was imposed on the assault proceedings, an event over which the plaintiffs had no control, albeit that I accept it was open to them to apply to have the stay lifted. That entitlement notwithstanding, the imposition of the stay is, to my mind, a countervailing circumstance to which the Court can have some regard when considering where the balance of justice lies, overall.

74. It must also be borne in mind that the Bank itself could have applied to lift the stay in order to deliver its Defences to the assault proceedings. I accept the plaintiffs' contention that the Bank was in a better position than the plaintiffs to know when it could see fit to deliver its Defences to the assault proceedings. Given the fact that the stay was imposed in ease of the Bank, I find this factor weighs more heavily than the argument that the plaintiffs themselves could have applied to lift the stay and then motion the Bank (should that have proved necessary) to deliver its Defences. I also take into account the fact that the plaintiffs had delivered their Statement of Claims in the assault cases and replied to the Bank's Notices for Particulars in early course. To this end, the circumstances of the present cases are distinguishable from the factual matrix in Lyden where the Statement of Claim was only delivered almost four years after the issuing of the proceedings (and the lifting of the stay) and only when the defendant had issued a motion to dismiss the proceedings.

75. I also take account of the fact that on 31st May, 2017, the Bank advised that it intended to proceed with the assault cases within one month of the issue of its Notices of Intention to Proceed. However, no steps were taken by the Bank until December, 2017 when the within motions issued.

76. In all the circumstances, and for the reasons outlined, I am satisfied that the balance of justice weighs in favour of allowing the assault proceedings to go ahead. The Court, however, proposes a time schedule to ensure that the assault proceedings are progressed hereafter without delay.

77. To this end, the Court proposes that the Bank deliver its Defences within three weeks. Any Reply on the part of the plaintiffs to be filed within ten days of delivery of the Defences. If there is to be a request for voluntary discovery by either side, same to be furnished within two weeks of the close of the pleadings and responded to within three weeks of the voluntary discovery request. If any requested voluntary discovery is not forthcoming within the specified three weeks timeframe, any relevant motion for discovery to issue within two weeks of the date the voluntary discovery was due.

Summary

78. With regard to the slander of title proceedings, the relief sought by the Bank at para. 1 of the Bank's Notice of Motion is granted.

79. With regard to the assault proceedings, the reliefs sought by the Bank are denied.