

THE HIGH COURT

[2011 No. 11922 P]

BETWEEN

JOSEPH GILMARTIN

PLAINTIFF

AND

DECLAN GILLEECE

AND

GILLEECE MCDONNELL O'SHAUGHNESSY LIMITED

DEFENDANTS

**JUDGMENT of Mr. Justice Meenan delivered on the 8th day of November, 2019**

**Background**

1. In or about April, 2005, the plaintiff, his late father and another person purchased lands at Coolbane, Castleconnell, Co. Limerick (the development lands) from Norman Bird and Donal Bird (the Birds). Between 2005 and 2008 the plaintiff and others developed a housing estate comprising of some eleven detached houses on the development lands.
2. By an alleged agreement, made in or about April, 2005, the plaintiff and others obtained and employed the second named defendant to act as an estate architect in relation to the development. It is alleged that both defendants were aware, or ought to have been aware, that the plaintiff and others relied on their expertise in setting out the estate layout map and ensuring that each of the eleven detached houses were on the development lands.
3. The plaintiff alleges that the defendants, or one or other of them, gave certificates to the effect that the said eleven dwelling houses were built on the development lands. Subsequently, each of the eleven houses were sold.
4. The plaintiff alleges that, in or around August, 2009, he discovered that a number of the said houses were not built on the development lands but rather on land that was still owned by the Birds. This gave rise to the following legal proceedings: -
  - (i) In proceedings having High Court title "Norman Bird and John Bird, plaintiffs, v. Joseph Gilmartin, defendant, 2012 No. 548P", the plaintiffs seek, *inter alia*, damages for trespass, slander of title and unjust enrichment, as well as an account of profits from the plaintiff in these proceedings. A Statement of Claim was delivered on 30 September 2016 (the Bird proceedings); and
  - (ii) In separate proceedings having High Court title "Catriona (otherwise Kate) Shannon, plaintiff, v. Joseph Gilmartin and Declan Gilleece, defendants, 2013 No. 7621P", the plaintiff, who was a purchaser of one of the said houses, seeks various orders against the plaintiff and the first named defendant in these proceedings, including damages for negligence, breach of duty (including breach of statutory duty), breach of presentation and breach of contract. The Statement of Claim in these proceedings was delivered on 18 June 2015 (the Shannon proceedings).

I will refer to both these proceedings as "*the Bird/Shannon proceedings*".

5. It is clear that the plaintiff anticipated the issuing of the Bird/Shannon proceedings. On 22 December 2011, the plaintiff issued the plenary summons in these proceedings wherein he sought damages for professional negligence and breach of contract in respect of architectural services provided by the defendants to the plaintiff in respect of a housing development known as "Coolbane Wood, Castleconnell, Co. Limerick", interest and costs.

### **The proceedings**

6. The plenary summons was served on the defendants on 30 January 2012. Nearly four years later, on 3 December 2015, the second named defendant entered an appearance. No Statement of Claim was delivered until 21 February 2018, which was after the issue of the notice of motion before the court where the second named defendant seeks to dismiss the proceedings for want of prosecution or, in the alternative, an order pursuant to the inherent jurisdiction of the court dismissing the proceedings on grounds of inordinate and inexcusable delay.
7. The contents of the Statement of Claim are instructive in that, though the plaintiff seeks damages for breach of contract, negligence and breach of duty (including breach of statutory duty), the principal relief being sought is an indemnity and/or contribution in respect of the Bird/Shannon proceedings. This is clear from the particulars of loss and damage pleaded, which makes specific reference to the Bird/Shannon proceedings.
8. In his affidavit Mr. David Scott, on behalf of the plaintiff, makes clear that these proceedings were issued for fear of the expiry of the prescribed time under the Statute of Limitations Act, 1957. As, in my opinion, the plaintiff's claim is essentially for a contribution and/or indemnity, there is no explanation as to why the plaintiff in these proceedings did not make an application to join the defendants, or one or other of them, as third parties in the Bird proceedings and the Shannon proceedings. I refer to s. 27(1) of the Civil Liability Act, 1961 which provides: -  
  
"27(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part —  
  
(a) ...  
(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed."
9. Thus, the failure to serve a third party notice is not a bar to seeking an indemnity and/or contribution, though such is at the discretion of the court.

### **Principles to be applied**

10. The principles which a court should apply, on an application such as this to dismiss for want of prosecution, are well established. I refer to the following passage from the judgment of Hamilton C.J. in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459: -

- “(a) The courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) It must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) *Even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against 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 basic fairness of procedures,
  - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and 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 it 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.”

11. Over the past 23 years or so these principles have been considered and applied in numerous decisions of the Superior Courts. I am satisfied that the instant case can be resolved by the direct application of the *Primor* principles.

**Application of principles**

12. The plenary summons was issued in December, 2011. The Statement of Claim was only delivered in February, 2018, following the issue of this motion. A delay of over six years in the delivery of the Statement of Claim cannot be considered as being anything other than inordinate.

13. Though inordinate, I am satisfied that in the circumstances the delay was excusable. Following the issue of the Bird/Shannon proceedings, the Solicitor for the plaintiff did seek

Statements of Claim in these proceedings, albeit without much vigour. The Statements of Claim were delivered in June, 2015 (the Shannon proceedings) and September, 2016 (the Bird proceedings). I accept that as the plaintiff's claim against the second named defendant is for a contribution and/or indemnity that such could not be proceeded with until the said Statements of Claim had been delivered. This appears to have been the substance of the correspondence that passed between the Solicitor for the plaintiff and the Solicitor for the second named defendant, I refer to letters dated 25 October 2016 and 8 November 2016 which refer to the Statement of Claim having been delivered in the Bird proceedings. These letters also refer to the possibility of joining the defendants, or one or other of them, as third parties.

14. It is clear from the principles to be applied that the court also has to look at the actions of the second named defendant. It seems to me that the second named defendant was aware of the manner in which the plaintiff was proceeding. To my mind, this is confirmed by the fact that no appearance was entered to the plenary summons until 3 December 2015, nearly three years after service. Further, no application was made by the second named defendant to compel delivery of a Statement of Claim. In my view, this amounts to acquiescence on the part of the second named defendant in the plaintiff's delay.
15. The second named defendant, in its various affidavits, refers to the possible non availability of relevant documentation, that being general certificates and certificates of identity. Reference is also made to the lapse of time between the events complained of and the date of a possible trial, which may result in a fair trial being no longer possible. In the absence of discovery, I cannot, at this stage, make a determination on this. If this matter is to be pursued, it can be pleaded in the Defence to be dealt with, either at the hearing of the action or by way of a further notice of motion.

### **Conclusion**

16. By reason of the foregoing, I will not grant the reliefs sought by the second named defendant. However, I will give the following directions: -
  - (a) That the plaintiff's claim against the second named defendant is to be confined to seeking an indemnity and/or contribution in respect of the Bird proceedings and/or the Shannon proceedings; and
  - (b) Following discovery, the second named defendant is to be at liberty to have the issue that a fair trial is no longer possible by reason of lapse of time be determined.
17. As I have confined these proceedings to seeking a contribution and/or indemnity in respect of the Bird/Shannon proceedings, there is an onus that those proceedings proceed without further delay. It is now in excess of three/four years since the Statements of Claim were delivered and it is not clear whether any further steps have been taken to prosecute the actions.