

THE HIGH COURT

[2013 No. 1503 P]

BETWEEN

BRIAN PALMER

PLAINTIFF

AND

THOMAS PALMER, KAPP AND PETERSON LIMITED,  
KAPP AND PETERSON (HOLDING) LIMITED,  
WINSTONE INVESTMENTS LIMITED AND  
LOMSEY LIMITED

DEFENDANTS

**JUDGMENT of Mr. Justice Meenan delivered on the 31st day of January, 2020**

**Background**

1. The plaintiff and the first named defendant are brothers whose parents owned a well-established public house, in Kiltarnan, Co. Dublin, called the "*Golden Ball*". In the 1980s the plaintiff and the first named defendant inherited the majority shareholding in the "*Golden Ball*" and also in a carpark attached to the public house. The public house and lands (the Kiltarnan site) were owned by a company of which the plaintiff owned 49% of the shareholding, the first named defendant owned 49% and the remaining 2% was owned by their sister.
2. In or about 1992, the first named defendant purchased the third named defendant, having borrowed a sum of money from the plaintiff. In the following years, the first named defendant developed the third named defendant and the plaintiff managed the said public house and the Kiltarnan site.
3. Unfortunately, over the following years disputes arose between the plaintiff and the first named defendant. On 22 February 2007, the plaintiff and the first named defendant allegedly entered into an agreement (which was referred to as the "*Stillorgan Park Agreement*"). Under this agreement the Kiltarnan site was to be placed on the open market, with the plaintiff having the right to top the highest bidder by ten euro. At the same time, the premises of the third named defendant was to be placed on the open market with the first named defendant having the right to top the highest bid by ten euro. The result of this alleged agreement would have been that the first named defendant would benefit on the sale of the Kiltarnan site and the plaintiff would benefit from the sale of the third named defendant's premises.
4. In the event the highest bid on the Kiltarnan site was €17.5 million and the plaintiff exercised his option to top that bid by ten euro. To finance this transaction, the plaintiff borrowed monies from Bank of Scotland and went on to complete the purchase of the Kiltarnan site. Thereafter, the plaintiff alleges that the first named defendant failed to place the third named defendant's premises on the open market, as was allegedly provided for in the *Stillorgan Park Agreement*. The plaintiff alleges that this resulted in serious financial loss for him. There were various attempts made to settle this dispute, by negotiation and mediation, but on 13 February 2013 the plaintiff issued the Plenary Summons.

5. On 29 July 2013, the plaintiff was adjudicated a bankrupt. Unfortunately, in addition to his financial problems, in the years after 2013 the plaintiff suffered from serious medical issues and an irretrievable breakdown of his marriage. On 16 September 2016 the plaintiff was discharged from bankruptcy.

### **The proceedings**

6. The general endorsement of claim on the Plenary Summons claims, inter alia, damages for breach of contract, damages for negligent misstatement, and damages for fraudulent misrepresentation. There are further claims that there was a failure to maintain the plaintiff either as a member and/or a director of the second, third, fourth and/or fifth named defendants. No further steps were taken by the plaintiff in the proceedings until October, 2017, when a Notice of Intention to proceed was served. Following this, the first, second and third named defendants entered an Appearance, on 18 January 2018.
7. The plaintiff has never delivered, nor attempted to deliver, a Statement of Claim. Though the inter parties' correspondence gives a good indication as to what the claim is, and the basis for it, it is for the plaintiff to formulate the claim that is actually being made in a Statement of Claim. No Statement of Claim was delivered during the plaintiff's period of bankruptcy, at a time when the cause of action would have vested in the Official Assignee. There was no attempt to deliver a Statement of Claim along with the Notice of Intention to Proceed. Further, no Statement of Claim in draft form was exhibited in the affidavits opposing the first, second and third named defendants' application.

### **Principles to be applied**

8. A starting point is the oft cited passage in the judgment of Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, which sets out the principles to be applied. For the sake of brevity, I will not set them out again but will refer to a more recent decision of Irvine J. in the Court of Appeal in *Flynn v. Minister for Justice* [2017] IECA 178 which, at para. 19, referred to the following principles which had been identified in the High Court decision under appeal (Barrett J.) and included an additional factor from the judgment of Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 I.R. 510.
  - “(1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.
  - (2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.
  - (3) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.
  - (4) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.

- (5) Even when delay has been 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 case proceeding.
- (6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.
- (7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.
- (8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.
- (9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.
- (10) All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name. ..."

#### **Application of principles**

9. The Plenary Summons was issued in February, 2013, six years after the conclusion of the "*Stillorgan Park Agreement*". Clearly there was a concern as to the provisions of the Statute of Limitations Acts. Thus, there was lateness in the issuing of proceedings, which created an obligation to proceed with expedition.
10. Some five months after the issue of the plenary proceedings, the plaintiff was adjudicated a bankrupt. In these five months the plaintiff took no steps to progress the proceedings and no Statement of Claim was delivered. The period for which the plaintiff was in bankruptcy has to be taken into account in that the Official Assignee, in whom the action was now vested, chose to take no further step. I refer to a letter, dated 11 October 2019, from the Official Assignee addressed "*to whom it may concern*", which states the following: -

"During the course of his bankruptcy, I was informed by Mr. Palmer of these proceedings, which concern an action against his brother Thomas Palmer for breach of an agreement. I ultimately decided not to pursue these proceedings."

11. The plaintiff was discharged from bankruptcy on 29 July 2016. However, the cause of action remained vested in the Official Assignee, notwithstanding this, Solicitors for the plaintiff served, in October, 2017, a Notice of Intention to Proceed. However, there was still no Statement of Claim forthcoming from the plaintiff, even in draft form. This is at a point in time in excess of ten years after the conclusion of the "*Stillorgan Park Agreement*" and the date upon which it was alleged that the first named defendant was in breach of same. A further two years or so have now elapsed without a Statement of Claim.
12. It is clear to me that this delay has been inordinate. Further, I cannot see any excuse for this delay. I appreciate that the plaintiff encountered serious health and family problems but, as these are commercial type proceedings, I cannot see how such could be considered as an excuse for the delay. The medical reports exhibited in the affidavit of the plaintiff, which substantiate his serious medical problems that affect his ability to work, do not suggest any lack of capacity on his part to take decisions. The breakup of the plaintiff's marriage cannot have been anything other than distressing, all the more so in the context of financial difficulties, but I do not see how this could amount to an excuse not to prosecute the proceedings.
13. The fact that the fourth/fifth named defendants have been dissolved is not an excuse for failing to deliver a Statement of Claim. Therefore, I conclude that the delay was both inordinate and inexcusable.
14. The next matter I have to consider is the balance of justice. This has to be seen against the repeated failure to deliver a Statement of Claim. As stated by Irvine J. in *Flynn v. Minister for Justice*, where there has been culpable delay the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Though the "*Stillorgan Park Agreement*" may be central to this action, and lapse of time may not prevent either consideration of it or its construction, nonetheless, evidence may be necessary to assist the Court in reaching its conclusion. The passage of some thirteen years, longer when a trial date into the future is taken into account, must affect the recollection of the parties involved. Further, the fact is that for the period of the plaintiff's bankruptcy the Official Assignee took a decision not to pursue the proceedings.
15. Amongst the reliefs sought in the Plenary Summons is damages for fraudulent misrepresentation. This is a serious allegation, which undoubtedly adversely affects the reputation of the first named defendant. The first named defendant should not have to wait a period of eight years or so, allowing for a future date of trial, before being given an opportunity to defend himself. I am satisfied that the balance of justice lies in favour of dismissing these proceedings.

#### **Conclusion**

16. By reason of the foregoing, I am satisfied that in taking and prosecuting these proceedings the plaintiff has been guilty of inordinate and inexcusable delay and that the balance of justice lies in favour of dismissing the proceedings.