THE HIGH COURT

[2021] IEHC 120

Circuit Court Record No.: 2017/094

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN

B

(APPELLANT, FORMERLY RESPONDENT)

– AND –

A

(RESPONDENT, FORMERLY APPLICANT)

JUDGMENT of Mr Justice Max Barrett delivered on 23rd February 2021.

I

Introduction

1. This is an application to strike out Ms B's appeal in the within proceedings on grounds of inordinate and inexcusable delay on her part in progressing same. Reliance is placed on the court's inherent jurisdiction in this regard, which jurisdiction was recognised by Hamilton CJ in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, at p. 475, where he observed, that *"(a) [T]he 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",* moving on to observe*, inter alia,* as follows:

> *"(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*
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> *(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 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."

II

Background

2. The divorce application in this matter came on for hearing on 4th April 2019. When it was opened before the Circuit Court, the court took a certain view of the matters before it and urged the parties to go outside the court and try and reach a settlement. Thereafter, the matter was essentially settled between the parties and what was agreed between them was reflected in a subsequent court order, albeit that the order itself does not reflect that it was a settlement order made on consent. It appears that there was an element of delay on the part of the appellant in the progress of the divorce proceedings.

3. A notice of appeal was lodged on time. There was no application for a stay. The matter came before the High Court on 7th May 2019. On that occasion it was adjourned by consent of the parties, it seems because both parties, who were legally aided in the Circuit Court were at the time seeking legal aid in respect of the appeal. The matter returned to the court on 2nd December 2019. On that occasion the appellant sought an adjournment to further explore the issue of legal aid; that application was objected to by the respondent on the basis that Ms B had, by that time, more than sufficient time since the previous April to resolve the issue of legal aid, particularly in circumstances where she had been legally-aided before the Circuit Court and thus was not coming new to the legal-aid system. The matter was then adjourned on a peremptory basis to May 2020 but did not proceed on that date as a result of the first Covid-related national lockdown.

III

Summary Chronology

4. By way of summary chronology, the following are the key/dates events presenting:

04.04.2019	Divorce order and ancillary orders made.
07.05.2019	Appeal comes before High Court. Adjourned on consent to allow both parties time to seek legal aid.
02.12.2019	Matter returns to court. Further adjournment granted to Ms B, over Mr A's objections to allow Ms B to further explore the issue

	of legal aid. Matter adjourned to May 2020 and marked peremptory.
May 2020	Although the matter was adjourned to May 2020, the first Covid lockdown meant that it could not proceed. Neither of the parties bears any responsibility for this.
07.12.2020	Matter returns to court on this date, court sittings having resumed. Solicitor appears for Ms B indicating that he is willing to come on record for her in the appeal.

IV

Assessment of Delay Presenting

5. The adjournment granted in May 2019 was on consent, i.e. both parties contemplated that an adjournment to December 2019 would suffice to put a lawyer in place and progress the appeal. Neither party bears any responsibility for the Covid-related delay, i.e. the fact that the second (opposed) adjournment to May 2020 actually ended up lasting until December 2020. By the time the adjourned matter came on for hearing on 7th December 2020, Ms B had a solicitor willing to come on record for her but no more, i.e. despite having commenced her appeal in April 2019, 20 months later her only achievement in terms of prosecuting the appeal was that she had managed to find a solicitor who was willing to come on record. The court notes that, in fairness:

   (1) Ms B needed to engage with a third party, the Free Legal Aid Centre, to determine whether she was eligible for legal aid in respect of her appeal.

   (2) the entirety of the seven-month period between May 2019 and December 2019 cannot be held against Ms B as, following on the agreed adjournment granted on 7th May it was obviously going to take at least some time to seek free legal aid and, if she was refused free legal aid for her appeal (and she eventually was) it would take extra time to engage the services of a solicitor privately.

   (3) Ms B clearly bears no responsibility for the fact that the State went into a Covid-related lockdown in May 2020.

6. Notwithstanding the foregoing, the court cannot but note that it was not until March 2020 that Ireland proceeded into its first Covid lockdown. So Ms B had from the granting of the second adjournment in early-December 2019 through to sometime in March 2020 to enter a solicitor's office and engage a solicitor to take carriage of her appeal. There was also a notable lightening of Covid-related restrictions in June 2020 and a progressive tightening of restrictions from about September 2020 onwards. So Ms B had from June 2020 to sometime in September 2020 to enter a solicitor's office and engage a solicitor to take carriage of her appeal. But even during the lockdowns phone lines remained open and the internet was a constant presence. So efforts to contact a solicitor by phone or the internet could have been made at any time in 2020.

7. It follows that even taking the second adjournment date (2nd December 2019) as the date from which to count whether there was any delay presenting (and that is perhaps to be somewhat generous to Ms B), and bearing in mind that (a) the intended May 2020 hearing-date was marked peremptory, and (b) by virtue of the Covid-19 pandemic Ms B was given an extra seven months from May 2020 before her appeal actually came on for hearing, all Ms B managed to achieve throughout this period was that on 7th December 2020 she had a solicitor willing to come on record for her. Thus, even in this most generous assessment of the facts presenting, Ms B is guilty of months-long delay for which no good reason has been offered to the court. The court must regretfully conclude that, even looking to 2020 alone, Ms B's very considerable delay in finding and entrusting carriage of her appeal proceedings to a solicitor was both inordinate and inexcusable on the facts presenting. Where then does the balance of justice lie?

V

The Balance of Justice

8. In the court's discretion, and on the facts presenting, is the balance of justice in favour of or against the proceeding of Ms B's appeal? In approaching this question as to where the balance of justice lies, the court notes the following factors:

(1) Ms B enjoys a right of appeal, though she has no right to the unending indulgence of the court when it comes to progressing that appeal.

(2) as a result of the appeal it has not been possible to sell the onetime family home, with the result that Mr A continues to live in what his counsel has submitted at the hearing is "*substandard accommodation*". (This prejudice is perhaps even worse than it would otherwise be, given the extent to which the successive lockdowns have resulted in people generally spending more time in their places of accommodation than would likely be the case in a non-lockdown scenario).

(3) Ms B has twice previously obtained the indulgence of the court, first by being granted the agreed adjournment on 7th May 2019 and then by being granted the second (contested) adjournment on 2nd December 2019. Yet despite this indulgence as to time, and despite the incentive of the second order being marked peremptory, and despite the lockdown resulting in the adjournment of December 2019 lasting until December 2020, even by 7th December 2020 Ms B had merely managed to find a solicitor who was willing to come on record for her in her appeal, nothing more.

(4) although the second adjournment was granted to May 2020, the Covid lockdown and the related closure of the courts for a time in 2020 meant that in fact Ms B enjoyed a protracted period from 2nd December 2019 until late-2020 to engage a solicitor to progress her proceedings yet failed to do so. The court has already recounted above how there was a good six-month period in 2020 when Ms B could physically have gone to the offices of a solicitor and notes also that even during the lockdowns the phone and internet systems continued to work.

(6) by contrast, Mr A secured a solicitor in a timely manner.

9. Both parties are entitled to basic fairness of procedures. The court does not see how it could conceivably be consistent with such basic fairness that having been divorced in April 2019, pursuant to a settlement agreement that was embodied in a court order, almost two years later Mr A finds himself in a position where he cannot live in such accommodation as he wishes to live in because his former wife has dallied in an appeal that is hers to progress, with the result that the family home cannot be sold and the proceeds of sale deployed.

10. The delay presenting and the consequent and continuing accommodation-related prejudice that has accrued to Mr A (as well as the prejudice of living under the constant shadow of appeal proceedings that his wife, it seems for no good reason, and consistent with a pattern of delay in the divorce proceedings, has simply not progressed in an appropriately timely manner) make it unfair to Mr A that Ms B's appeal should be allowed to succeed and, indeed, make it just to strike out that appeal.

11. The court does not see that Mr A is guilty of delay: he agreed to the first adjournment date and managed to arrange legal representation in a timely manner. Nor is there any delay or conduct on the part of Mr A that amounts to acquiescence on the part of Mr A in Ms B's delay.

12. The court considers that to allow the appeal to continue at this time would be to cause serious prejudice to Mr A. Having been divorced in April 2019, pursuant to a settlement agreement that was embodied in a court order, almost two years later Mr A finds himself in a position where he cannot live in such accommodation as he wishes to live in because his former wife has dallied in an appeal that is hers to progress, with the result that the family home cannot be sold and the proceeds of sale deployed. There comes a point when, unfortunately but unavoidably, being divorced has to mean being divorced, with each party going her or his separate way and not being enmeshed in appeal proceedings which one party has commenced (as is her right) but which she has dallied and delayed in progressing at an appropriate pace despite twice being indulged by the court in terms of being granted adjournments and despite enjoying, because of the Covid-related closure of the courts in 2020, a longer-than-expected timeframe within which to procure a solicitor to progress that appeal.

VI

G.S. v. P.S.

[2011] IEHC 122

13. Before closing, the court turns to consider the decision of the High Court in *G.S.*, a decision on which counsel for Mr A placed some reliance as pointing to a particular 'need for speed' in the progressing of court proceedings.

14. *G.S.* was a case in which the appellant wife was found by the High Court to have been guilty of delay and oppressive conduct in the pursuit of her appeal. The case was drawn to the court's attention because of certain observations by Abbott J., at para.6 of his

judgment, *inter alia*, as to the issue of delay in the context of appeals and, in particular, in family law appeals, Abbott J. observing as follows:

> *"The delay which a court will tolerate in the case of appeal is generally much shorter and, as a matter of practice, the High Court strikes out appeals on a regular basis in the event of the appellant failing or refusing to take steps by way of filing a book of appeal or appearing to prosecute the appeal. In such cases these drastic steps have in the light of the jurisprudence arising in the 'Primor' case to consider the balance of justice between the appellant who is to have its case struck out by the striking out of the appeal, and the respondent who may seek the benefit of a positive decision in the Circuit Court in early course. The court generally considers this balance in terms of assessing the balance between the prejudice suffered by the respondent by reason of the default of the appellant. In financial terms such prejudice could arise in family law cases between the parties where matrimonial property is subject to heavy debt, giving rise to penal interest payments or is otherwise in danger of deteriorating or where the parties cannot solve a difficult situation of living together without separation until they secure the release of assets to enable them to purchase or rent alternative accommodation.*
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> [Note: Here the type of prejudice which Mr A contends to arise is essentially the last-mentioned form of prejudice to which Abbott J. refers. Thus Mr A has been living in what his counsel referred to at the hearing as "*sub-standard accommodation".* He wishes to see what was the family home sold at last so that he can move to better accommodation.]
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> *However, a distinctive and often overriding consideration arises especially in family law delay cases from the fact that in these cases there is considerable urgency in resolving custody and access issues for the children in addition to maintenance payments for them. It has been long the practice of the courts to deal with infants' claims and minor matters with the utmost urgency. While this practice does not have the statutory backing as it might have in other jurisdictions and in Scotland, for instance, (except abduction cases) it has foundations in statute and, indeed, in the Constitution arising from the obligation of the courts to give paramount consideration to the interests of children in relation to issues where they are concerned. Thus, in a delay case the interposing of a child's interest on the competing interests of the parties to an appeal will always give a far greater urgency to the necessity to dispose of the appeal and to penalise delay.*
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> [Note: The applicable statutory provision in this regard at this time is the provision made in s.3(1) of the Guardianship of Infants Act 1964, as amended, to the effect that:
>
> > *"Where in any proceedings before any court, the –*
> >
> > *(a) guardianship, custody or upbringing of, or access to, a child, or*

(b) administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question the court, in deciding that question, shall regard the best interests of the child as the paramount consideration."

Two points might perhaps be made at this juncture. (1) The particular issue that Abbott J. identifies presents only in cases where, pursuant to statute, the best interests of a child fall to be treated as the paramount consideration, i.e. it is not an issue that presents in all family law cases. To the extent that the contrary was contended for in the within proceedings, i.e. that the above-quoted observations of Abbott J. apply in, or ought to be viewed as applicable to, all family law cases, this contention is respectfully rejected by the court. (2) A question might respectfully be posed as to whether Abbott J. is entirely correct in the last quoted sentence above. Perhaps, to put matters in '*Primor-speak'*, it is more accurate to state not that "*the competing interests of the parties to an appeal will always give a far greater urgency to the necessity to dispose of the appeal and to penalise delay*" but rather that when it comes to deciding where the balance of justice lies pursuant to the *Primor* line of authority, whatever decision is made in this regard must, in those family law cases where, pursuant to statute, the best interests of a child fall to be treated as the paramount consideration, accord with wherever the best interests of any affected child/ren are perceived to lie. The within is not a case in which the interests of any children arise for consideration: there were four children of the marriage but none of them is a dependent child.]

This greater urgency poses a dilemma for the appellate court seeking to solve the problem of delay by reducing considerably the circumstances where the appellate court may appropriately strike out the appeal for failure to prosecute by reason of the fact that such striking out may penalise an innocent child whose interests may not be properly catered for by the order appealed against.

[Note: Three points present in this regard. (A) It requires one to accept that the "*greater urgency*" invariably presents. (B) Further to (A), it seems possible as a matter of logic that an assessment as to where the interests of justice lie, in circumstances where the paramount interests of a child are not in play, would be the same as they would be in a case that is in every way identical, save that the paramount interests of a child are in play. (C) At least in theory, there seems no reason to assume that there will be a greater number of cases in which a strike-out would be deleterious to a child's best interests than there would be cases in which a strike-out would accord with a child's best interests. Again, the within is not a case in which the interests of any children arise for consideration: there were four children of the marriage but none of them is a dependent child.]

VII

Conclusion

15. For the reasons stated above, the court will exercise its inherent jurisdiction to strike out Ms B's appeal proceedings for want of prosecution on her part. Unless the parties wish to make further submission in this regard, the court would propose to make no order as to costs.