THE HIGH COURT

[2021] IEHC 33

RECORD NUMBER: 2014/7709P

BETWEEN

GREENWICH PROJECT HOLDINGS LIMITED

PLAINTIFF

AND

CON CRONIN

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 20 January 2021

Introduction

1. This is an application brought by way of notice of motion of 21 February 2020 seeking three different reliefs. The first seeks a strike out of the plaintiff's claim for want of compliance with the Order of Jordan J. of 8 July 2019, the second a strike out for inordinate and/or inexcusable delay and/or want of prosecution and the third a strike out pursuant to the inherent jurisdiction of the Court in the interests of justice.

Legal principles applicable to strike out for want of compliance

2. In respect of the first relief, I have very helpfully been directed by counsel for the plaintiff to the decision of the Supreme Court in the case of *Tracey v. McDowell* [2016] IESC 44 where the Court considered the nature of the test applicable when an application is brought to strike out proceedings for failure to comply with a court direction in the context of delay. Because applications of this sort are less common than applications for dismissal for delay *simpliciter*, I will identify the applicable principles flowing from *Tracey* before addressing the particular facts of this case.

3. Clarke J. identifies the applicable test at paragraphs 5.2 and 5.3, noting that the response of a court to a procedural failure should be proportionate, and a case should only be struck out "*in response to procedural failure where, in all the circumstances, that failure is sufficiently serious or persistent to justify the action concerned*", while recognising that there will be cases where it will be proportionate to take such action.

4. He explains the rationale for such a course is, *inter alia* because of the obligation on the State to ensure that litigation is conducted in a timely fashion. Accordingly, there must be sufficient sanctions available to a court for failure to comply with orders or directions made designed to ensure the orderly and timely progress of litigation.

5. At paragraph 5.7 he identifies the obligation on a court as follows:

> *"Where there is a specific failure to comply with a court direction, the Court must assess how serious and significant the failure is, whether it is persistent and whether there is any legitimate explanation for the failure concerned. In the light of those and any other relevant factors, the Court must then determine what sanction or consequence is proportionate".*

6. At paragraph 5.8 Clarke J. observes that there may be cases where, while the overall delay would not warrant the dismissal of proceedings for inordinate and inexcusable delay, nonetheless a significant or persistent failure to comply with orders might justify

dismissal as a proportionate consequence of non-compliance. At paragraph 7.7, he notes that the question remains as to whether a dismissal rather than some lesser measure was within the range of proportionate responses which it was open to the Court to take in the circumstances of the case. He goes on to say that the Court is required to determine where the balance of justice lies.

7. Importantly, in *Tracey*, it was held that the dismissal was a disproportionate sanction given that the plaintiffs had made some attempt (albeit not a satisfactory one) to comply with the relevant direction of the trial judge i.e. that detailed expert medical evidence should be adduced to support the assertion that the case could not proceed because of the illness of Mr Tracey. Ultimately, Clarke J. concluded at paragraph 7.9 that, given that the plaintiffs had progressed the relevant proceedings in a timely fashion up to that point and had provided some additional medical information, the dismissal of the proceedings was a disproportionate sanction. He observed that if there had been no advance in the medical evidence notwithstanding the directions of the trial judge, it may have been proportionate to dismiss the proceedings.

Factual background and chronology

Pleadings

8. It appears from the pleadings that on 7 May 2014, following a public auction, the parties entered into an agreement whereby the defendant acting in his capacity as a statutory receiver over Greenwich Court, Rathmines, Dublin 6 ("the Property"), agreed to sell to Pat Moloughney (in trust) the Property. The plaintiff, of whom Pat Moloughney is a director, has pleaded that it was a term of the contract that the defendant would, prior to completion, procure that the opening in the gable wall of number 4 Greenwich Court would be closed up. The plaintiff alleges that there were various obligations on the defendant in respect of planning permission arising from said works.

9. A plenary summons was issued on 1 September 2014 whereby the plaintiff sought

   (a) Damages for breach of contract; and

   (b) Orders directing the production of documentation.

10. On 5 May 2015, some nine months after the issue of the plenary summons, a statement of claim was delivered. On 16 June 2015 a notice for particulars was delivered by the defendant. On 7 October 2015, replies to those notices were delivered by the plaintiff. A schedule of damages was attached to those replies, identifying the estimated projected profit foregone at €880,000.

11. On 22 October 2015 a defence was delivered. The nature of this defence is important. It pleaded the contract had been rescinded because the purchaser had raised certain requisitions on the planning matters, notwithstanding the exclusion of any warranty pursuant to General Condition 36 and Special Condition 11 (l). (The latter provides *inter alia* that the purchaser shall make no objection or raise any requisition or inquiry in relation to the existence or absence or adequacy of planning permission). Despite the

notice of intention to rescind, the purchaser declined to withdraw the said objection and the defendant rescinded the contract on 30 July 2014.

12. Curiously, no reference is made in the statement of claim to the rescission or purported rescission. No relief was included seeking to challenge the rescission or enforce the contract by way of specific performance. Rather, as identified above, the claim was exclusively for damages.

Motion to vacate lis pendens

13. After delivery of the defence, no steps were taken by the plaintiff. Almost three years went by. Then on 7 September 2018 the defendant brought a notice of motion seeking to vacate a *lis pendens* that the plaintiff had registered over the Property. By order of 26 November 2018, Cross J. granted the relief sought and vacated the *lis pendens*.

14. Following that decision, the plaintiff did nothing. On 6 February 2019, the defendant brought a motion seeking to strike out the plaintiff's claim for want of prosecution and/or inordinate and inexcusable delay, and in the alternative an order striking out the plaintiff's claim for want of prosecution pursuant to Order 122 of the RSC.

Order of Jordan J. of 8 July 2019

15. This motion was heard on 8 July 2019 by Jordan J. and he refused to strike out the plaintiff's case for delay. There is no note of his *ex tempore* judgment but there is some measure of agreement between the parties that he had doubts as to whether the delay was inordinate, tending to consider that it was not. I am told that the attendance note of the defendant's solicitor (not exhibited) records that he observed that even if he had concluded the delay was inordinate, he would not have considered the the balance of justice test was met.

16. However, Jordan J. clearly considered that there was some delay because he indicated he would award the costs of the motion to the defendant on the basis that the defendant was entitled to bring the motion and, most importantly in the context of this case, ordered as follows:

> *"The court doth direct that the plaintiff do within 4 calendar months of the date hereof take all steps necessary to apply to have the matter listed for hearing".*

17. I fully accept, as submitted by counsel for the plaintiff, that I must start from the position that in July 2019, the delay was neither inordinate nor inexcusable and the test for dismissal for delay was not met. However, that does not mean that I must entirely ignore the delay up to that point. As I identify below, both the delay from the issuing of the summons in 2014 to July 2019, and the delay thereafter, is relevant to my consideration of whether the test in Tracey is met.

18. Following the Order, no steps whatsoever were taken by the plaintiff or its solicitor to apply to have the matter listed for hearing. Rather, the four-month period was allowed to lapse and two months later, on 23 January 20202, without any explanation for its failure

to comply with the Order, the plaintiff issued a notice for further particulars of the defence delivered in October 2015.

19. Following the receipt of same, the defendant brought the motion currently before the court, grounded upon the affidavit of the receiver, Mr Cronin, sworn 20 February 2020. Mr. Moloughney, director of the plaintiff, filed a replying affidavit on 2 July 2020. A replying affidavit was sworn by Mr Cronin on 12 August 2020.

Strike out for want of compliance with Order

20. There is no doubt but that there was a wholescale failure to comply with the Order of Jordan J. No steps were taken to apply to have the matter listed for hearing either within four calendar months or at all. The case has not been certified by senior counsel as ready for hearing, and the matter has not been set down for trial. Those steps cannot be taken because counsel for the plaintiff frankly identifies that the case is far from ready for hearing.

21. The issuing of a notice for particulars does not constitute compliance with the Order. A notice for particulars is not a necessary step in applying to have the matter listed for hearing.

22. There was no engagement either in the affidavits filed prior to the motion being heard, during the hearing before Jordan J. or after the hearing in the form of correspondence between the solicitors, indicating that it would not be possible to have the case set down for hearing within a short period.

Application of legal principles

23. Applying the test in *Tracey*, I must first consider whether the procedural failure was sufficiently serious and/or persistent and if I so conclude I must consider whether the remedy sought i.e. dismissal of the plaintiff's case is a proportionate response. Counsel for the plaintiff observed that the default here was neither sufficiently serious nor persistent. The judgment in Tracey makes it clear that a persistent failure is an alternative to a sufficiently serious failure and that they are not cumulative requirements. But, in fact, it seems to me there is a persistent failure to comply with the Order since the plaintiff has failed to comply since July 2019 and now identifies that it is not ready to apply to apply to have matter listed for hearing and will not be ready for many months, and possibly years.

Sufficiently Serious/Persistent Breach

Relevant Events

24. In considering whether failure to comply with the order was sufficiently serious and/or persistent, it is necessary to look first at the events and then at the reasons given for those events. Before I do so I wish to address alleged motivation for the plaintiff's conduct. At paragraphs 4 and 24 of his grounding affidavit, Mr. Cronin avers that the proceedings are not being pursued *bona fide* but rather with a view to effecting leverage for the plaintiff to negotiate a discounted purchase of the property. At paragraph 11 and 12 of his affidavit, Mr. Moloughney refutes this assertion, characterising it as outrageous. I have insufficient evidence to make any determination in relation to the motivation for

the delay and nor do I need to decide on this issue, since the matter can be decided without a consideration of motivation. I therefore treat as irrelevant all averments in relation to motivation.

25. On the other hand, the following matters seem to me relevant:

- Prior to the Order of Jordan J, the plaintiff had delayed significantly in advancing the proceedings, in particular given (a) the almost three year delay between the filing of the defence and the bringing of the motion to vacate the *lis pendens*, and (b) the complete failure by the plaintiff to take any steps following the order of Cross J. Counsel for the plaintiff says that three years is not a significant period of delay when viewed in context, having regard for example to the decision in *Millerick v. Minister for Finance* [2016] IECA 206, where the delay was eight years. I cannot agree. A three-year delay may be considered in the context of the recommendation of the Review of the Administration of Civil Justice of October 2020 to the effect that an automatic discontinuance would only apply to proceedings which, within a period of 30 months of their commencement, have not been notified to the court as ready for trial. The period of 30 months was recommended as a period within which preparation of the proceedings for trial at first instance, even in a case with complex attributes, might reasonably be expected to be completed for the purpose of compliance with Article 6.1 ECHR. In that context, a three-year delay following the delivery of a defence must be treated very seriously;

- the plaintiff was aware from the Order of July 2019 that the court was concerned about delay and was reflecting that concern by directing the plaintiff to take all steps necessary to apply to have the matter listed for hearing;

- the plaintiff was aware that the court considered the motion justified in being brought, given the costs order that was made;

- the plaintiff never indicated either by way of affidavit or at the hearing that it was not in a position to apply to have the matter listed for hearing;

- the plaintiff did not communicate in any way with the defendant following the court order in respect of an inability to comply with the Order;

- the plaintiff simply ignored the Order in its entirety and was entirely non-complaint;

- the notice for particulars was not a step in having the matter listed for hearing and did not constitute an attempt at compliance;

- the notice for particulars was delivered without seeking to vary the Order or obtaining liberty to deliver same and constituted a wilful disregard of the aim sought to be achieved by the court;

- the plaintiff has failed to identify any time by which it will comply with the Order but rather has identified a number of steps requiring to be taken before the case will be ready to be listed for hearing.

Explanation by the plaintiff for breach

26. I turn now to the explanations given by the plaintiff for its conduct. The core explanation for the breach may be found at paragraph 6 of the affidavit of Mr. Moloughney where he avers that, *"given the issues which arose during the above period [following the Order], it was not possible to have the matter certified for hearing*". It is striking that his response was to simply ignore the Order. Those matters appear to be that there were various legal issues that had not previously been considered, including the effect of compliance with Special Condition 5 requiring the opening in the gable wall to be closed up, on the existing planning permission.

27. But this cannot be considered as a reason for the delay for two reasons. First, those concerns are not relevant to the proceedings as currently pleaded. Second, there is no explanation why those concerns are only raised in 2020 when the matters giving rise to the concern were known since 2014.

28. Dealing with the relevance of the matters first, at paragraphs 8 to 10, 12 and 14, the averments proceed on the basis that the plaintiff is or will be, following the determination of the proceedings, the owner of the Property. Mr. Moloughney identifies his concern in respect of the adverse effect of Special Condition 5 on "*the good title to the property (the defendant) has sold*" and at paragraph 11 avers that the plaintiff is seeking "*legitimate clarification in advance of the plaintiff expending significant sums further developing and completing its property"*. His overall concern appears to be whether work by the defendant in complying with Special Condition 5 and carrying out works will affect the Property's planning situation.

29. There is an air of complete unreality about these averments given that the only relief sought is damages and the rescission of the contract has not even been challenged. The reliefs sought in these proceedings do not envisage the plaintiff ever acquiring ownership of the property and therefore there is no reason that the plaintiff should be concerned about whether works that were to be completed by the defendant would affect the planning status of the Property. As discussed below, the plaintiff may be intending to radically alter the reliefs sought so as to claim specific performance. But I can only evaluate this motion based on the pleadings before me. Thus, the concerns identified by the plaintiff in respect of Special Condition 5 cannot justify delay as they are not relevant to the determination of the present proceedings.

30. But even if this was not the case, they could not justify the delay because Special Condition 5 is not new. It was in the memorandum of agreement for sale of 7 May 2014. It has been known to the plaintiff since then. Moreover, at paragraph 4, Mr Moloughney says he had "*sought to clarify the position from the outset*" and at paragraph 13 that *"it is evident from the outset that the plaintiff has been actively seeking such clarification"*. Those averments suggest that he was always concerned about this issue. If so, it is hard

to understand why he waited until 2020 to consider the implications of Special Condition 5 for his proceedings. He refers in paragraph 4 to an issue that came to light concerning a strip of land sold with the Property that may not have been in the vendor's ownership, but exhibits no correspondence seeking information in that regard nor identifies the nature of the concern, the location of the land in question or the identity of the third party referred to. Nor does he in any way identify why that is relevant to the instant proceedings. Even taking this averment at its height (as I have done with all the averments of Mr. Moloughney), his failure to explain its relevance to the proceedings means it cannot be used to justify delay.

31. In summary, there is no explanation why the concerns now raised were not addressed when the plenary summons and/or the statement of claim were drafted in 2014/2015.

32. Two other reasons were given that I address below, both seeking to explain why the four-month deadline was not met. But it is worth observing, given what the plaintiff has said about what remains to be done in the case (discussed below), even if the plaintiff had been given six months or more to take all steps necessary to apply to have the matter listed, it would have been insufficient.

33. The first explanation is found at paragraph 6 of the affidavit of Mr Moloughney, being that his solicitor thought the four-month period did not expire prior to February 2020, when the long vacation and Christmas vacation were taken into account. This misunderstanding apparently arose because the solicitor had not taken up a copy of the Order. It is always important for a solicitor to understand the precise terms of an Order where it imposes a binding obligation on his or her client and taking up the Order is vital in that regard. But even without a copy of the Order, there was no reason for the solicitor to assume that the reference to four months in fact meant four months plus any intervening periods out of the legal term. Nor was there any compliance even by February 2020. Accordingly, I do not consider the misunderstanding of the plaintiff's solicitor in this respect excuses any delay.

34. The second explanation was that, given the Order was perfected on 10 July 2019, with the legal year ending on 31 July 2019, it was not possible to take steps at that time which would have enabled a hearing date to be applied for and that the summer vacation then intervened. I do not understand that explanation. There were three weeks until the end of term to take the necessary steps. Further, the long vacation does not prevent activity during the months of August and September. The Central Office is open. There are daily vacation sittings. Barristers and solicitors are generally available, if not for the totality of August and September, for significant periods therein. The day is long gone when August and September were treated as periods of total inactivity for litigation lawyers. Reference is made to various meetings with lawyers that took place from October onwards. But the obligation was to take the necessary steps to apply to set the case down for hearing. References to meetings that did not achieve that aim cannot justify the delay.

35. I am also struck by the fact that there are no exhibits to the affidavit of Mr Moloughney evidencing any of the matters that he avers to. Specifically, despite several references to

seeking clarification from the defendant in relation to the effect of Special Condition 5, no correspondence with the defendant or his solicitor is exhibited. Counsel for the plaintiff refers to the absence of clarification to assist him in taking decisions as being a factor in the delay. But for the reasons set out above, the plaintiff has not established that the clarifications he required were relevant to the case made. Nor has he provided any evidence of requests for clarification.

Conclusion on Sufficiently Serious/Persistent Breach

36. In summary, having regard to the events surrounding the breach of the Order and the reasons provided for non-compliance, I find the plaintiff has committed both a sufficiently serious and a persistent breach and there is no legitimate explanation for the failure. Accordingly, following *Tracey*, I must now determine what sanction or consequence is proportionate.

Proportionality

37. There are two matters particularly relevant to proportionality and the balance of justice here: the further steps intended to be taken in the case and the question of prejudice.

Further steps proposed

38. I have referred briefly to the plaintiff's intention to alter the case it is making. This warrants further exploration. The plaintiff has served a notice for particulars which relate largely to the impact of the proposed works on the existing planning permission of the Property, a matter that, as identified above, is irrelevant to the case made.

39. At paragraph 7 of Mr. Moloughney's affidavit, he avers that it is intended to file a reply to the defence in which *"the purported rescission which the defendant asserts at paragraph 9 of the defence is also challenged and has never been accepted by the plaintiff".*

40. I was told by counsel for the plaintiff in the course of the hearing that discovery will be sought. This is in circumstances where two of the reliefs in the plenary summons were for production of documents. No steps have been taken to advance these reliefs and no explanation has been sought as to the reasons for the enormous delay in seeking discovery.

41. To my surprise, I was also told that there may be an attempt to consolidate these proceedings with other proceedings seeking specific performance of the very same contract, which were apparently recently issued, although those proceedings have not been notified to, or served on, the defendant. I am told that the only notification the defendant has had of these proceedings is by way of discussion between counsel last week, presumably prompted by the hearing of this motion. No copy of the plenary summons has been provided to me or the defendant.

42. In short, it appears that is intended to very significantly reformulate the present case and that it cannot be set down for hearing until that is done.

43. That information has three important implications for this motion. First, if the above reformulation is permitted, a very significant period of time will elapse before the case be set down.

44. Second, there is absolutely no reason given as to why this approach was not adopted in 2014/2015 when the plenary summons and statement of claim were drafted, issued and served. As noted above, no reasons are provided as to why the extant concerns in relation to the effect of Special Condition 5 are only now necessitating changes to the pleadings. There is no reason given why the rescission of the contract of July 2014 was not challenged in the plenary summons as opposed to in 2021. There is no reason given for why an action for specific performance was not brought in 2014 as opposed to by way of separate proceedings, apparently issued in 2020. As counsel for the defendant correctly observed, an election was made in the proceedings in 2014 that an action for damages would be brought rather than specific performance. It is too late for the plaintiff to do an about turn in 2020 and decide that, after a court has ordered it to apply to set the case down within four months, it will instead ignore the Order and substantially recast its case.

45. Third, none of these plans appear to have been brought to the attention of Jordan J. in the motion before him since had they been, he would presumably not have directed the plaintiff to "*take steps necessary to apply to have the matter listed for hearing".* No explanation is given for this failure.

Prejudice

46. The plaintiff asserts there will be little prejudice here in respect of lack of recollection as oral evidence will play a minor role. The defendant alleges prejudice in having to run a case where a significant period of time will have elapsed, while acknowledging that this is a case where documents will be at least as important as oral evidence if not more so. There is always prejudice by virtue of significant delay where a case requires recollection from witnesses of events long past. The extent of the prejudice will depend on the extent to which recollection is an important feature of the case.

47. Here, as pleaded, it appears there would be moderate prejudice since recollection will not feature particularly strongly. However, the contours of the case, should it be altered in the way now suggested by the plaintiff and particularly if it is consolidated with the proceedings seeking specific performance, are now most uncertain. The prejudice to the defendant may well increase. The particulars served in 2020 suggest that the plaintiff is intending to broaden the case in a way that may increase the relevance of recollection by witnesses of past events. I am satisfied the proposed approach of the plaintiff is likely to increase the prejudice beyond a moderate level.

48. There is also significant prejudice to the defendant in seeking to have the existing case moved on or dismissed over seven years only to face a substantial recasting of the proceedings at this point in time.

49. Further, the defendant also asserts prejudice at paragraph 25 of Mr. Cronin's last affidavit to the effect that the secured creditor is prejudiced in his capacity to realise the secured property and to market and sell same in discharge of the debts owing to him as the property remains unsold. The plaintiff says there is no evidence of any steps taken to sell the property and no evidence of any material effect on the defendant. It is true that it is not explained why the property cannot now be sold, given that the *lis pendens* has been removed. However, I am willing to accept that the presence of proceedings in respect of the Property may inhibit the sale, in particular if the plaintiff seeks to argue in the proposed reply that the rescission is invalid and that a valid contract for sale has been executed, the approach taken in the affidavit of Mr. Moloughney. Moreover, if the plaintiff seeks specific performance through consolidation of proceedings, this will undoubtedly prejudice the defendant in selling the property.

50. For those reasons, I am satisfied there is considerable prejudice to the defendant in the failure of the plaintiff to abide by the Order of July 2019.

Nature of a proportionality review

51. The essence of a proportionate decision is that there is a reasonable relationship between the aim sought to be achieved and the means used to achieve it. In this case, the aim is as stated in *Tracey* – that courts must have an effective means of ensuring that proceedings are determined within a reasonable time. The question is whether in this case, dismissal is necessary to achieve that aim. I am satisfied that it is. This is not a case where the plaintiff inadvertently breached the Order but by the time the motion was heard, the plaintiff either had set the matter down for hearing or was ready to do so. To dismiss in those circumstances would likely be disproportionate. Nor is it a case where the case cannot be set down for a significant time period due to the necessity for further pleading, amendments, further discovery etc. but there is a very good reason for those steps, for example the discovery of a highly relevant fact that could not have been discovered earlier. In that case it might be disproportionate to strike out the claim.

52. Rather, it is a case where the plaintiff delayed, where Jordan J. addressed the undoubted delay in the case by imposing a requirement intended to permit the case to be heard in early course, where the plaintiff ignored the Order and instead took a step designed to ensure the matter would not get on in early course, and where the plaintiff is now intending to alter and expand its case in a way that will cause very substantial further delay without any justification for waiting until 2021 to seek to make those changes. In addition, the defendant has been and will continue to be significantly prejudiced by the delay.

53. In those circumstance, to allow the plaintiff to maintain these proceedings would fundamentally undermine the aim of ensuring that the legal system appropriately sanctions a significant, material or persistent procedural failure to comply with orders imposed to address delay. The plaintiff has ignored the Order to date and is proposing to do so for some considerable period into the future. In those circumstances, I cannot conceive of a lesser sanction that would nonetheless be effective in achieving the aim

sought. In my view, the balance of justice clearly favours dismissal and it is a proportionate response.

Strike out for delay

54. The notice of motion also seeks dismissal for inexcusable and inordinate delay and want of prosecution pursuant to the inherent jurisdiction of the Court at paragraph 2. That relief is unnecessary as I have granted the first relief. However, for the sake of completeness, if it was necessary to adjudicate on this ground, I would have concluded that the delay, measured from the issuing of the plenary summons on 1 September 2014 to the issuing of this motion on 21 February 2020, was in all the circumstances inordinate. Further, given my rejection of the reasons for that delay, I would have treated the delay as inexcusable. Finally, for the reasons set out above in the context of the first relief, the balance of justice would have required dismissal.

Conclusion

55. For the reasons set out above, I will strike out the plaintiff's claim because of failure to comply with the Order of 8 July 2019.