APPROVED
[2021] IEHC 602

THE HIGH COURT

[2014 No. 2455 P]

BETWEEN

BRIAN EGAN

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AND JOHN G. DILLON LEETCH AND ROBERT POTTER COGAN FORMERLY PRACTISING UNDER THE STYLE AND TITLE OF DILLON LEETCH AND SONS SOLICITORS NOW JOHN G. DILLON LEETCH PRACTISING UNDER THE STYLE AND TITLE OF DILLON LEETCH AND COMERFORD SOLICITORS AND SEAN MALONEY AND ASSOCIATES

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 22nd day of September, 2021.

Introduction

1. On 13 February 2014 the plaintiff, acting on his own behalf, initiated proceedings against the defendants claiming, *inter alia*, damages for negligence, breach of duty (including breach of statutory duty by the second named defendant (a firm of Solicitors)) in allegedly failing to comply with a Solicitor's undertaking relating to lands comprised in Folios 41976, 56199 and 40857 County Galway, allegedly permitting the plaintiff to purchase the said properties without the benefit of any engineering supervision, failing to resolve boundary issues and failing to register the plaintiff as owner of the entirety of the site in the sale.

2. A Statement of Claim was delivered on 31 March 2014, which expanded the claim against the second named defendant, claiming: -

> "… The second named Defendant was party to the negligent or fraudulent misrepresentation in failing to qualify the certificate of title and in hiding from both the Plaintiff and the first named Defendant, the fact that the certificate of title did not begin to cover the entire property purchased by the Plaintiff. …"

3. The second named defendant delivered its Defence on 6 March 2015. This Defence pleaded, *inter alia*, that the plaintiff's claim was statute barred, that the plaintiff was guilty of inordinate and inexcusable delay in the commencement and/or prosecution of the proceedings and that the plaintiff was guilty of contributory negligence.

4. The second named defendant ("the Solicitors") have brought a motion seeking to have the plaintiff's claim dismissed on the grounds of want of prosecution and also on the inherent jurisdiction of the Court to dismiss proceedings where a fair trial is no longer possible by reason of lapse of time between the date of the events complained of and the date of trial. In addition, the Solicitors maintain that the plaintiff's claim is an abuse of process in that no supportive report from a suitably qualified expert was obtained prior to the issuing of the proceedings. In fact, such a report was only obtained in 2019, some five years later.

Principles to be applied

5. The application before the Court proceeded on the grounds of want of prosecution and the inherent jurisdiction of the Court, referred to at para. 4 above. In reaching its conclusion, the Court has to consider the following: -

(i) Has there been an inordinate delay in prosecuting these proceedings?;

(ii) If there has been inordinate delay, is such excusable?; and

(iii) Even if the delay has been both inordinate and inexcusable, does the *"balance of justice"* lie in favour of dismissing the proceedings?

6. As is frequently the case in applications such as this, the Solicitors rely on authorities that overlap applications for want of prosecution and those relying on the inherent jurisdiction of the Court. This Court frequently has to deal with applications such as this. In *Palmer v. Palmer & Ors* [2020] IEHC 108, this Court stated: -

"**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… .' "

The course of the proceedings

7. It is necessary to set out both the date, or dates, of the alleged events that give rise to the proceedings and the dates that various steps were taken in the proceedings: -

(i) The Statement of Claim refers to the purchase by the plaintiff of the lands in question in September 2004 and certification of title in February 2005;

(ii) Plenary summons issued 13 February 2014;

(iii) Statement of Claim delivered 31 March 2014;

(iv) Defence delivered by the Solicitors, following a motion for judgment in default, on 6 March 2015;

(v) 22 May 2015, plaintiff writes to say that he will be seeking discovery;

(vi) 23 July 2015, the Solicitors agree to discover its file, though not the ten categories sought by the plaintiff;

(vii) 25 January 2016, the plaintiff issues a motion for discovery after an affidavit of discovery made by the Solicitors;

(viii) 4 March 2016, the plaintiff appoints Paul Kelly and Co. to act as his Solicitors;

(ix) 5 April 2016, Beauchamps, who are instructed by the Solicitors, write to Paul Kelly & Co. seeking confirmation that an expert report has been obtained and confirming consent to appropriate amendments in the Statement of Claim; and

(x) 25 February 2019, Paul Kelly & Co. complain that requisitions on title raised at the time of purchase were not discovered in the affidavit.

8. According to the replying affidavit filed by the plaintiff, around January 2014 he sought to instruct a firm of Solicitors in Athenry, County Galway. This firm prepared a letter that set out a number of issues concerning the purchase of the property. However, according to the plaintiff, this firm was not prepared to act against the Solicitors.

9. On 4 December 2018, Paul Kelly & Co. wrote to Mr. Barry Lysaght, of Malone and Martin Solicitors, seeking an expert report *"regarding the negligence of Robert Potter Cogan then of Dillon-Leetch & Comerford Solicitors"*.

10. Following a further exchange of correspondence, Mr. Barry Lysaght of Malone and Martin Solicitors furnished an expert report, dated 12 June 2019, and a further report, dated 17 January 2020.

Application of principles

11. It will be seen from the matters set out above that some ten years elapsed between the transactions complained of and the issue of the plenary summons. Given this lapse of time, it was clearly incumbent on the plaintiff to prosecute the proceedings without any further delay. This clearly did not happen. Over 2015/2016, a Defence was delivered by the Solicitors and discovery was attended to, though not to the satisfaction of the plaintiff. In April 2016, after the plaintiff had instructed a firm of Solicitors, that firm was informed of the requirement that there be a supportive expert report as per the Supreme Court decision in *Cooke v. Cronin & Neary* [1999] IESC 54. The plaintiff's Solicitor was also informed that, following receipt of a supportive expert report, no objections would be taken to appropriate amendments in the Statement of Claim.

12. It would appear that the plaintiff took no further steps for a period of nearly three years until February 2019 when a complaint was made concerning the discovery made by the Solicitors.

13. I am satisfied that the delay in prosecuting these proceedings was inordinate, all the more so given the lapse of time between the impugned transactions and the commencement of proceedings. One would have thought that given the absence of a supportive expert report that this would have been sought as a matter of urgency. This was not the case.

14. I also consider the delay to be inexcusable. The plaintiff commenced proceedings as a lay litigant. A lay litigant may be given some latitude by the Court; however, this latitude does not extend to applying different rules than would be applied where a litigant instructs Solicitors. The plaintiff must have clearly known that by initiating these proceedings he was calling into question the professional reputation of the Solicitors concerned, all the more so where he was alleging fraudulent misrepresentation. It would seem that the plaintiff did not instruct Solicitors until March 2016, claiming that he encountered difficulties in finding a Solicitor prepared to act against another Solicitor. I do not accept that this is a valid excuse in that the Law Society of Ireland maintains a *"Negligence Panel"* of Solicitors in each county willing to sue other Solicitors. Further, there is no suggestion that Solicitors on this panel would only act in circumstances where their fees are paid up front.

15. It would appear that much of the delay that occurred between March 2016 and February 2019 was due to the plaintiff seeking a supportive report from a suitably qualified expert. Given that it is well established that professional negligence proceedings should not be initiated without such a supportive expert report, I am of the view that this delay was inexcusable.

16. In his replying affidavit of 7 February 2020, the plaintiff maintains that he had some mental health issues and personal family problems which he attributes to the Solicitors *"having left me in a mess financially due to its negligence…"*. In support of this he exhibits a report from Dr. Deignan, dated 15 February 2019. This report states that the plaintiff attended in January 2012 with severe anxiety and depression related to business and marital difficulties he was experiencing at the time. Dr. Deignan states that the plaintiff continued to attend him over the following two years and *"was not able to function in terms of managing his business"*. However, the medical report goes on to state that the plaintiff's symptoms persisted until February 2014 and that he required medication and was referred to a psychologist during that time. This suggests to me that, though the plaintiff may have had ongoing health issues since

February 2014, these were not of a level that would have prevented him from prosecuting these proceedings, which he initiated in February 2014. Therefore, I do not accept that there is a basis for accepting that the plaintiff's medical condition at the time was an excuse for the inordinate delay.

17. As I have found that the delay in prosecuting these proceedings is both inordinate and inexcusable, I have now to consider the *"balance of justice"*. I refer, again, to the passage from the judgment of Irvine J. (as she then was) in *Flynn v. Minister for Justice* where she states that: -

> "(8) … 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."

18. The plaintiff was dealing with Mr. Robert Potter Cogan of the Solicitors. The letter from the plaintiff's Solicitor to their expert specifically sought an opinion *"regarding the negligence of Robert Potter Cogan…"*. Unfortunately, Mr. Cogan is no longer in a position to give evidence. This is all too clear from a medical report of 3 July 2019 from Dr. Michael Brogan. In addition to a number of serious medical conditions, Mr. Cogan has cognitive problems to the extent that he is no longer able to manage his own affairs. Dr. Brogan concludes: -

> "In conclusion after spending about an hour with Robert, 30 minutes of which his wife Jill was in our company, it is my firm opinion that Robert would not be physically or mentally fit to attend Court as a witness or give reliable evidence because of his cognitive problems."

Thus, it is the case that Mr. Cogan, against whom allegations of professional negligence and fraudulent misrepresentation have been made, can no longer defend the proceedings. In my view, this is prejudice at the top end of the scale.

19. In response, the plaintiff maintains that this is a *"documents"* case and that the evidence of Mr. Cogan is not required to defend the proceedings. I do not accept that this is the case. A professional person sued for negligence must be entitled to an opportunity to give his or her account and interpretation of whatever documents are relevant. It seems to me that this is a view which is also held by Mr. Barry Lysaght, the plaintiff's expert. In his second report, under the heading *"Conclusions"*, he states in respect of a number of the actions of Mr. Cogan that are criticised that *"[i]t will be a matter for evidence whether the Solicitors did so in this case"*. In giving his expert view, it would appear implicitly that Mr. Lysaght was not of the view this is a *"documents"* case.

20. In an application such as this the actions of the moving party also have to be considered. I cannot see that the Solicitors contributed in any material way to the delay in the prosecution of these proceedings. Indeed, the opposite is the case. When it became clear that the plaintiff did not have the benefit of a supportive expert report, the Solicitors instructed by the moving party stated that they would consent to appropriate amendments in the Statement of Claim when such a report became available. That was in April 2016.

Conclusion

21. By reason of the foregoing, I am satisfied that the Solicitors are entitled to the relief sought herein and I will dismiss the proceeding as against them. I will hear the parties as to the order required and also as to the issue of costs. The parties may make submissions in respect of this within fourteen days, such submissions to be no longer than 1,000 words.