

THE HIGH COURT

[2021] IEHC 763
[2015 2214P]

BETWEEN

TOM DARCY

PLAINTIFF

AND

ALLIED IRISH BANKS PLC AND WILLIAM MURRAY

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 1st day of December, 2021.

Introduction

1. This is an application by the second named defendant to dismiss the proceedings against him for want of prosecution and/or on the grounds of delay. The application is brought pursuant to Order 122 of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the court.
2. The statement of claim delivered by the plaintiff discloses that the proceedings relate to the development of certain lands with the assistance of facilities provided by the first defendant. The plaintiff claims, *inter alia*, that the second defendant improperly pressurised the plaintiff and his wife into dropping judicial review proceedings against the local authority and then, with the first defendant, took over the development of the lands in place of the plaintiff and his wife. It is alleged that the development never took place and that the plaintiff has suffered significant losses as a result as he was never able to realise the profits which could have been derived from the lands. The statement of claim contains very serious allegations, including deceit, and these are referred to in more detail below. In his defence, the defendant says he never acted as a developer or agent for the first defendant but was retained by the first defendant as a planning consultant, which is his professional occupation. It is denied that he ever took over the development as alleged and it is denied that he made various representations to the plaintiff and the plaintiff's wife in relation to the development of the lands.
3. The principles relevant to the exercise of this jurisdiction are those set out by Hamilton C.J. in the well-known case of *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 as follows:
 - (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 parties 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 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.

4. Those principles were concisely summarised by the Court of Appeal (*per Irvine J.*) in *Millerick v. Minister for Finance* [2016] IECA 206 as follows:

The court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied, the application must fail. If on the other hand the court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach."

Whether the delay is inordinate

5. The plenary summons was issued on 19 March 2015 and the statement of claim was delivered on 12 November 2015. The second defendant delivered his defence on 1 February 2016, almost 6 years ago. He also appears to have served a notice of indemnity and contribution on the first defendant, although I have not been told when that was done.
6. There have been no other steps whatsoever in the proceedings since February 2016. No particulars appear to have been raised nor has any request for discovery been made. The

plaintiff stated at the hearing of this application that the first defendant has delivered a defence, but the second defendant appeared to be unaware of that and the plaintiff was unable to furnish the court with a copy of it. However, in the course of argument, the plaintiff stated that he had reached an agreement with the first defendant that the proceedings would not be progressed, so nothing turns on that for the purposes of this application.

7. This application issued in October 2019 by which time approximately three and a half years had passed since any step had been taken in the proceedings. At the hearing of the application in November 2021 almost six years had passed since any step had been taken in the proceedings, and there is no prospect of any trial taking place prior to 2023, a period of 14 years from the events giving rise to the plaintiff's claim.
8. In saying this, I am not overlooking the difficulties caused by the pandemic, but on the facts of this case, these have not been particularly material as there was nothing to stop the parties from progressing the pleadings, particulars, and discovery, during the pandemic. The pandemic cannot be said, therefore, to have interfered with the progress of the proceedings as might occur if a hearing date were cancelled, for example.
9. The period of almost six years from the taking of the last step in the proceedings until the hearing of the application constitutes inordinate delay, and indeed this was conceded by the plaintiff at the hearing of the application. In my view, if the relevant period is viewed as being from early 2016 (when the second defendant delivered his defence) to late 2019 (when this application was brought), which is a period of almost four years, that also constitutes inordinate delay.

Whether the delay is excusable

10. The plaintiff served a replying affidavit on 31 January 2020, but this only addressed the merits of the proceedings themselves rather than the issues material to this application, namely the delay, the reasons for it, and the matters relevant to the balance of justice. Apparently, the application was first listed for hearing before my colleague, Keane J., on 23 September 2020 and was adjourned to permit the plaintiff to file an affidavit setting out the reasons for the delay which has occurred in this case. Keane J. also directed the appearance of the solicitors then on record for the plaintiff, who had not appeared before him. Apparently, the solicitors were subsequently discharged by the plaintiff who now represents himself. The plaintiff filed a further affidavit sworn 8 December 2020 and this now contains the essential evidence on which the plaintiff relies to excuse his delay in prosecuting the proceedings.
11. The replying affidavit, sworn 31 January 2020, takes issue with the factual assertions in the second defendant's defence and essentially speaks to the merits of the case. However, as can be seen from the principles set out above, the merits of the case are not the central focus of consideration on an application of this sort, albeit that the issues in the proceedings and the types of evidence which would be required at trial are material to consideration of the balance of justice.

12. The only excuse on affidavit in this application is contained in the affidavit of 8 December 2020 and is to the effect that the plaintiff has been involved in four sets of proceedings with the first defendant, and indeed has had some success in at least some of that litigation. These proceedings comprise:
 - a. Summary proceedings 2010/2292S, in which apparently, on 16 February 2011, the first defendant entered judgment against the plaintiff in default of agreement in the sum of €17,422,780.63. This judgment has not been set aside and has not been satisfied.
 - b. Possession proceedings 2010/539Sp in which the plaintiff appealed successfully to the Supreme Court, and which were subsequently discontinued.
 - c. Possession proceedings 2014/44Sp which resulted in a well-charging Order dated 3 June 2015 and which were unsuccessfully appealed by the plaintiff to the Court of Appeal, that Court delivering judgment dismissing the appeal on 14 July 2016.
 - d. Proceedings 2010/1965P brought by the plaintiff against the first defendant in relation to an insurance policy in which the plaintiff ultimately succeeded in the Supreme Court on 10 November 2016.
13. The plaintiff referred at the hearing of the application to the anguish and stress that the litigation has caused for him, and one can easily appreciate that that is so. It is no mean achievement to succeed on appeal against a large commercial entity such as the first defendant, not once, but twice, in the Supreme Court. Regardless of any successes the plaintiff may ultimately have had, they were no doubt hard fought and did not come easily to him.
14. However, the question is whether the fact that the plaintiff was from 2010 to 2016 engaged in protracted and stressful litigation with the first defendant can be a valid excuse for allowing these proceedings to languish without any progress whatsoever since the second defendant delivered his defence in February 2016. In my view, it cannot.
15. First, the other proceedings all seem to have resolved by the end of 2016. Therefore, they cannot justify or excuse the failure to take any steps in these proceedings in the period from early 2016 to late 2019, when this application was first issued.
16. Secondly, in *Millerick v. Minister for Finance*, the Court of Appeal rejected a similar excuse proffered by the plaintiff in that case, where a plaintiff had issued related proceedings against the Motor Insurance Bureau of Ireland arising out of the same road traffic accident, and his solicitor claimed that she had to devote her time to negotiating with the MIBI and to dealing with other litigation between the plaintiff and the MIBI. Irvine J. rejected this, stating that the Minister was a stranger to those negotiations and could not benefit from them.
17. Similarly, in this case, the second defendant was not a party to the various proceedings involving the plaintiff and the first defendant and I do not see how it can reasonably be

said that the plaintiff was entitled to institute these proceedings, which make very serious allegations – including deceit – against the second defendant and then leave them hanging over the second defendant while he engaged in litigation with a third party.

18. At the hearing of the application, the plaintiff acknowledged that the second defendant was separate from the first defendant but said they were “*conjoined twins*”. It is not clear what the plaintiff meant by that, but he cannot have it both ways by suing the second defendant separately from the first defendant in these proceedings and then seeking to treat them as one for the purpose of defending this application. It is notable that the second defendant has averred that he has not been indemnified by the first defendant and it is also clear from the pleadings to date that the plaintiff is suing the defendants as separate entities, alleging, for example, that the second defendant owes him a duty of care (see paras. 50 and 51 of the statement of claim where the defendants are each said to owe such a duty to the plaintiff).
19. In addition to the fact that the plaintiff claims he was taken up with prosecuting that litigation, he also stated at the hearing of the application that he had reached an agreement with the first defendant that these proceedings should not be progressed. While not on affidavit, in deference to the fact that the plaintiff is a litigant in person, I will consider this justification for the delay.
20. I would make the preliminary comment that this may explain why only the second defendant has moved to dismiss the proceedings for delay. However, the significant point is that the second defendant is not alleged to be a party to that agreement nor does it appear that he has received any consideration in return for forbearance in bringing a motion to dismiss for delay and/or want of prosecution. On the contrary, it is evident that the plaintiff wishes these proceedings to continue against the second defendant. In my view, therefore, this does not excuse the plaintiff’s delay in progressing these proceedings, nor does it preclude the second defendant from succeeding in this application.
21. The plaintiff also relied on various significant family illnesses and bereavements, including the deaths of his father and two brothers. He also relies on a medical report dated 12 November 2020, which states that the plaintiff first attended his general practitioner in December 2019, suffering from depression. That post-dated the issue of this application and therefore cannot justify the delay from early 2016 to late 2019.
22. In any event, I think the second defendant correctly relies on *O’Leary v. Turner* [2018] IEHC 7. In that case, the plaintiff had suffered medical difficulties in 2007 and 2013 and had averred that it was not until 2015 that she had “recovered sufficient mental focus to address my action against the defendants”. She then apparently averred to what Baker J. summarised as “a most unfortunate and tragic chain of events in her life which had catastrophic repercussions”. Nevertheless, the court held (at para. 57):

“The personal circumstances of the plaintiff do not, in my view, offer her an excuse for not expeditiously prosecuting the present proceedings. Taking her argument at

its height, the circumstances she describes do not offer justification for me to depart from the clear line of authority that mandates that she proceed efficiently and expeditiously to bring her claim on for hearing. Her personal circumstances were most unfortunate but I cannot excuse her delay on account of circumstances which became less acute in the years after the service of the summons, and her personal difficulties were not at a level that caused her to be incapable of instructing solicitors to commence the proceedings, to engage the intermediary and to engage other litigation and continue, albeit in a limited way, her business interests. No authority has been identified that permits a court to excuse culpable and otherwise unexplained delay on account of personal and financial circumstances of the type identified.”

23. In my view, this approach applies to the various personal circumstances referred to by the plaintiff here. Notwithstanding the loss of his father, in itself a significant life event, the premature deaths of two of his brothers, and the medical difficulties of his wife and son, it does not seem to me that these very sad and distressing events constitute an excuse for failing to prosecute the proceedings with reasonable expedition.
24. I am therefore of the view that the delay is also inexcusable, and I now turn to consider the balance of justice.

Balance of Justice

25. Certain factors which may on occasion be relevant to the balance of justice are entirely absent here, such as any action by the second defendant which could constitute acquiescence in the delay.
26. The key issue in the balance of justice here relates to the nature of the causes of action pleaded against the defendant, the possible prejudice to the defendant in allowing the proceedings to continue, and the risk of an unfair trial. These three factors are not entirely distinct, as will be evident from the brief discussion below, and while I set them out separately, I will consider them in their totality in order to decide whether it is in the interests of justice that the proceedings should be allowed to continue.
27. First, it should be noted that the statement of claim makes very serious allegations against the second defendant, including an accusation of deceit. This is one of the most serious allegations that can be made against a defendant and even the fact of making it can be damaging to a defendant. In those circumstances, it is incumbent on a plaintiff to move the proceedings on expeditiously, which this plaintiff has singularly failed to do.
28. Secondly, the defendant says that the continued existence of the proceedings is damaging to him professionally. While he is not sued in professional negligence as such, his counsel stated at hearing that he has to disclose the continuance of the proceedings each year when renewing his professional indemnity insurance and has suffered increased premia as a result. While this is not on affidavit, given that I have afforded some latitude to the plaintiff in going outside his sworn averments, it is appropriate that I should afford similar latitude to the second defendant.

29. However, even without this information as to the effect on his professional indemnity policy, it follows from the nature of the proceedings itself that there is a general prejudice to a person in the position of the second defendant as the accusations relate to his professional life. Counsel for the second defendant relied on *McGuinness v. Wilkie and Flanagan Solicitors* [2020] IECA 111 for this proposition and I agree that this is something I must take into account in considering the balance of justice.
30. Thirdly, and perhaps most significantly, there is a significant risk that a fair trial is no longer possible. The events pleaded date back to 2009, with a lot of emphasis on a meeting which the plaintiff says took place in the offices of Fingal County Council on 10 September 2009. A significant plank of the plaintiff's case rests on the allegation that, at this meeting, the second defendant placed undue pressure and duress on the plaintiff and his wife to withdraw a judicial review application that they had brought in respect of the refusal of planning permission. This inevitably is going to involve oral evidence as to what was said (and perhaps how it was said) at that meeting, and it is difficult to see how this can be fairly tried at this remove of time, given that the proceedings could not be ready for trial until 2023 at the earliest, approximately 14 years after the event complained of.
31. Furthermore, as the second defendant points out, while he cannot point to any specific witness who is no longer available, it is likely that some of the Fingal County Council employees involved in the matter have retired or have changed employment and may not be available as witnesses.
32. I do not lay too much stress on that latter point as there is no evidence of any inquiries made by the second defendant, once the proceedings were issued, directed at ascertaining who might be a relevant witness, but the centrality of oral evidence to the events of 2009 is evident and is a real issue of concern in considering whether a fair trial can now take place.
33. In addition, at para. 48 of the statement of claim, it is alleged that both defendants "individually and together falsely represented" to the plaintiff that they intended to manage the developments when they did not intend to do so. At paras. 56 and 57 of the statement of claim, the plaintiff alleged that the second defendant requested and received sums of money taken by the first defendant from the plaintiff's account without his knowledge and authority, and that the defendants conspired with each other to force the plaintiff and his wife to abandon their application for judicial review and to cede control of their properties and developments to the defendants for the defendants' gain.
34. It is clear from these pleas that it is intended to canvass a very wide array of interactions between the plaintiff and the defendants and if, as the plaintiff stated in argument, there was some kind of settlement between the plaintiff and the first defendant, it may well be that the proceedings will only continue against the second defendant, who will then not have the benefit of the first defendant's investigations and steps to defend the allegations. It is difficult to see how a court can consider these matters fairly some 14 years after they occurred.

35. It is my view that these various aspects of the balance of justice favour the dismissal of the proceedings as against the second defendant.

Conclusion

36. In conclusion, the delay here has been inordinate and inexcusable, and the balance of justice favours the dismissal of the proceedings, which contain serious allegations against the second defendant, the defence of which is now prejudiced by the fact that 12 years have already passed since some of the most significant events pleaded. It is likely that no trial can take place before 2023, given the failure of the plaintiff to progress the proceedings. In those circumstances, I will dismiss the proceedings as against the second defendant.