THE HIGH COURT

[2023] IEHC 358

RECORD NO. 2013/7238 P

BETWEEN

LIAM O'BRIEN

PLAINTIFF

AND

B.D.O. SIMPSON XAVIER

FIRST NAMED DEFENDANT

AND THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

SECOND NAMED DEFENDANT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 23rd day of June, 2023

Introduction

1. The application before the court was brought by the second named defendant to dismiss the plaintiff's proceedings on the grounds of inordinate and inexcusable delay and/or for want of prosecution.

2. In the proceedings the plaintiff alleges negligence and/or breach of contract on the part of the second named defendant in the course of its customer/banker relationship with him. The alleged wrongdoing occurred in circumstances surrounding three investments. The plaintiff alleges that on foot of reliance on certain representations, warranties and advice made by the second named defendant, he suffered significant losses in relation to his involvement in certain investments. The plaintiff served a statement of claim on 31 January 2017 setting out, in detail, his claim against both the first and second named defendants.

Course of proceedings

(I) Plenary summons issued on 12 July 2013.

(II) Plenary summons served on the second named defendant on 7 July 2014.

(III) Appearance entered on behalf of second named defendant on 8 December 2014.

(IV) A notice of intention to proceed was filed by the plaintiff on 22 December 2016.

(V) A statement of claim was served on 31 January 2017.

(VI) The plaintiff sought to enter judgment against the second named defendant for judgment in default of defence in 2018.

(VII) The plaintiff alleges that a further notice of intention to proceed was filed on 12 February 2018.

(VIII) The plaintiff issued a motion for judgment in default of defence against the second named defendant on 18 April 2018. This resulted in a defence being delivered on 13 August 2018.

(IX) A further notice of intention to proceed was filed by the plaintiff on 22 November 2021.

3. The events complained of in the statement of claim date back to mid-2007. It will immediately be seen that proceedings were issued close to the time when the action would have been statute barred under the provisions of the Statute of Limitations Act 1957 (as amended). It will also be seen that the plaintiff did not serve the plenary summons until close to twelve months after its issue.

Application before the court

4. By notice of motion dated 10 January 2022 the second named defendant sought the following reliefs:

> "1. An order pursuant to the inherent jurisdiction of this honourable court dismissing the plaintiff's claim against the second named defendant on the grounds of inordinate and inexcusable delay.

2. Further or in the alternative, an order pursuant to the inherent jurisdiction of this honourable court dismissing the plaintiff's claim against the second named defendant for want of prosecution".

5. The application was grounded upon an affidavit of Mr. Liam Hugh Lavelle, solicitor, instructed by the second named defendant. In the course of his affidavit he set out the chronology referred to above which he stated amounted to inordinate and inexcusable delay. The plaintiff relied upon an affidavit sworn on 17 April 2018 which appeared to have been delivered in support of his application for judgment in default of defence against the second named defendant.

Principles to be applied

6. There have been a number of authorities of this court, the Court of Appeal and the Supreme Court dealing with the issues raised in this application. I propose to rely upon the oft cited passage from the judgment of the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 at 475:

> *"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised 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 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

(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."

7. The judgment of Irvine J. in the Court of Appeal decision in *Millerick v. The Minister for Finance* [2016] IECA 206. Having referred to the said passage in *Primor* Irvine J. stated:

> *"In light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the Primor test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See Cassidy v. The Provincialate [2015] IECA 74). That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head note of the Primor decision."*

Irvine J. also considered the nature or behaviour on the part of the defendant that could constitute acquiescence in any delay:

> *"39. For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words, a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."*

On the constitutional aspect applications such as this Irvine J. stated:

> *"40. Finally, recent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so*

as to ensure the effective administration of justice and basic fairness of procedures. These decisions have emphasised the constitutional provisions contained in Article 34.1 which requires the courts to administer justice. This constitutional obligation presupposes that the court itself will strive to ensure that litigation is conducted in a timely fashion. In particular, in Quinn v. Faulkner t/a Faulkner's Garage and Another [2011] IEHC 103 Hogan J., at para. 29, criticised the court's prior tolerance to inactivity on the part of litigants when he stated:-

> *'While as Charlton J. pointed out in Kelly v. Doyle [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost 'endless indulgence' towards such delays led in turn to a situation where inordinate delay was all too common: see, e.g., the comments of Hardiman J. in Gilroy v. Flynn [2004] IESC 98, [2005] 1 IIRM 290 and those of Clarke J. in Rodenhuis and Verloop BV v. HDS Energy Ltd [2010] IEHC 465.'"*

8. In dealing with this application I will consider the following matters:

(I) Was there inordinate delay on the part of the plaintiff in prosecuting these proceedings?

(II) If such delay was inordinate, was it excusable?

(III) If the delay was both inordinate and inexcusable, does the balance of justice lie in favour of granting the relief sought?

Inordinate delay

9. I have set out above the chronology of the steps taken in the proceedings to date. I have referred to the fact that the proceedings were issued close to the expiry of the time allowed by the Statute of Limitations Act 1957 (as amended). This fact imposes on the plaintiff an onus to progress the proceedings without delay given the lapse of time that has already occurred between the events complained of and the issue of the proceedings. In the instant case, a further period of time just short of twelve months was allowed to elapse before the plenary summons was served. Even at this stage the proceedings were not prosecuted with any great vigour and the statement of claim was served on the second named defendant on 31 January 2017, close to two and a half years after service of the summons. There then followed service by the plaintiff of a notice of intention to proceed, though the second named defendant denies this.

10. Following a motion for judgment in default of defence the second named defendant delivered its defence on 13 August 2018. The plaintiff does not appear to have taken any steps between that date and the service of a further notice of intention to proceed on 22 November 2021.

11. In light of the foregoing, the lengthy delays between taking the most basic steps in the proceedings cannot be considered as being anything other than inordinate.

Is the inordinate delay excusable?

12. These are commercial type proceedings and, at all stages, the plaintiff had available to him legal advice. In the course of an affidavit sworn by the plaintiff in respect of an application by the first named defendant to dismiss the proceedings for want of prosecution, the plaintiff seeks to explain the delay on the basis that there was contact/negotiations between the parties to resolve the dispute without the necessity for a trial. There was also an attempt to arrange a mediation. Whereas it is entirely reasonable that parties should seek to resolve differences without recourse to legal proceedings, it remains the case that when legal proceedings are initiated, particularly where there has been significant lapse of time between the events

complained of and the issue of the proceedings, there is an onus on the plaintiff to proceed without undue delay. In this case there is no suggestion that the plaintiff refrained from taking certain steps in the proceedings on the basis of any representation, express or implied, not to do so because of ongoing negotiations.

13. It is the case that there was a delay in the second named defendant delivering its defence, but that delay pales in comparison to the delay on the part of the plaintiff both in initiating and prosecuting his proceedings.

14. By reason of the foregoing, I am satisfied that the delay is both inordinate and inexcusable.

Balance of justice

15. Referring to the authorities cited above, I would accept that even marginal prejudice might justify striking out these proceedings. The height of the second named defendant's case on prejudice is set out in the affidavit of Mr. Lavelle as follows:

> "7. I say and believe that this defendant has a full defence to this claim. In addition, I say and believe that due to the efflux of time and turnover of staff this defendant is now in a position where it may be difficult to find witnesses to give oral evidence at trial, if necessary."

16. The above statement has to be seen in the context that both in the statement of claim and replying affidavit the plaintiff makes specific reference to a named individual as holding "himself out as offering financial advice on behalf of the second named defendant and at all material times in relation to this investment and the other investments set out in this statement of claim, the plaintiff relied on the said financial advice."

There is no information from the second named defendant to the effect that there is no availability or any impediment on the part of the named individual to be in a position to give evidence at trial, notwithstanding the lapse of time. In my view, where a named individual has

been identified by the plaintiff, a general assertion that a lapse of time may make the giving of evidence difficult is not sufficient to establish even a low level of prejudice as would warrant striking out these proceedings.

Conclusion

17. By reason of the foregoing, I dismiss the application by the second named defendant to strike out these proceedings. As for the costs of this application, my provisional view is that though the plaintiff has been successful in defeating this application, I have found him to be guilty of inordinate and inexcusable delay in prosecuting his action and thus I propose to reserve the costs of this application to the trial of the action. If either party wishes to take issue with this, they may do so by furnishing written submissions (not more than 1500 words) on the issue of costs. Such submissions are to be filed on or before Friday 14 July 2023. I will list this matter for final orders on Friday 21 July 2023.