

## THE HIGH COURT

[2001 No. 17460P]

BETWEEN

GERALD J.P. STEPHENS

PLAINTIFF

AND  
PAUL FLYNN LIMITED

DEFENDANT

**Judgment of Mr. Justice Clarke delivered the 28th April, 2005.**

1. In this case the Plaintiff appeals against an order of the Master of the High Court of 14th October, 2004. That order directed that the Plaintiff's claim "do stand dismissed for want of prosecution on the grounds of the inordinate and inexcusable delay on the part of the plaintiff in the commencement and prosecution of the proceedings". There was a previous order made by the court (O'Neill J.) on 19th March, 2002. That order refused certain relief sought by the Defendant (who was the moving party) and reserved costs. Nothing now turns on that order. However, certain matters remain in controversy as to what actually happened in this court on that date which I will address in the course of reviewing the history of the case.

**The Case**

2. It is common case that the Plaintiff employed the Defendant to construct a substantial house at Thornhill Manor, Hollymount in County Mayo. Disputes appear to have arisen between the parties in the course of the project. The Defendant complained that the Plaintiff failed to make payments in accordance with the contract entered into between the parties while the Plaintiff complained about delay in the construction process and the quality of certain of the works carried out. Matters appear to have come to a head on 5th December, 1995 when, it is common case, the Defendant boarded up the front door of the dwelling house then under construction. On the Defendant's case this was done in order to protect his position given the entitlement which he asserts he had under the contract to cease work when payment was in significant arrears. A hotly disputed altercation then arose during which the Plaintiff alleges and the Defendant denies that the Plaintiff was assaulted by the principal of the Defendant company.

3. On the above basis the Plaintiff claims that he was entitled to, and did in fact, treat the actions of the Defendant as a repudiation of the contract which repudiation he accepted. In those circumstances he sues, in substance, for damages for wrongful repudiation which he measures as the cost of completing the building (including the cost of remedying the alleged defects) less the balance which remained unpaid as of the date of the alleged repudiation of the original contract price.

4. It would appear, therefore, that if this action were to go to trial the principal issues would be the following:-

(a) the factual circumstances surrounding the events leading to and on 5th December, 1995 insofar as they are material to the question of whether the Plaintiff was entitled to treat the Defendant as having repudiated the contract. Apart from the hotly contested events which occurred on the site on that day the other facts which seem, at this stage, to be likely to be relevant concern the progress of the contract, the extent to which there had been significant defects in the workmanship, and the payment record of the Plaintiff.

(b) Secondly in the event that the Plaintiff were to succeed in persuading the court that the contract had come to an end by virtue of his acceptance of a repudiation thereof by the Defendant the question of the quantum of his claim would arise which would necessitate a consideration of the work done up to the point of the termination of activity on site by the Defendant, the reasonable costs of completing the works contracted for including the remedying of any defective workmanship and, perhaps, the extent to which it would be necessary in any such calculation as is contended for by the Plaintiff to take into account the possibility that the true value of the contracted works may have been varied by virtue of alterations in the requirements of the Plaintiff or other factors not attributable to the Defendant and recoverable under the contractual terms agreed between the Plaintiff and the Defendant.

**The Proceedings**

5. The first striking matter which needs to be noted is that the proceedings herein were not commenced until 29th November, 2002. I am mindful of the fact that in the course of the hearing counsel for the Defendant made clear that it would be the Defendant's intention, if the Plaintiff is permitted to proceed with the action, to plead the Statute of Limitations. Given that the matter of the applicability of the Statute was not argued before me I would wish to be careful not to express any view on the merits or otherwise of such a defence. However it should be noted that even on the basis of the Plaintiff's Contentions the cause of action arose on 5th December, 1995 by virtue of the wrongful repudiation of the contract by the Defendant and thus the proceedings were, at best, issued just a few days short of the expiry of the limitation period of six years. A memorandum of appearance was entered on behalf of the Defendant dated 30th January, 2002 requesting the delivery of a Statement of Claim. No statement of claim was delivered within the time prescribed for so doing in the Rules of the Superior Courts. By letter dated 14th February, 2002 the Defendant's solicitors wrote a reminder to the Plaintiff's solicitors in respect of the statement of claim. A reply was received on 20th February which drew attention to the fact that junior counsel had withdrawn from the case. In the course of the hearing it became clear that the withdrawal of junior counsel was as a result of an objection on the part of the Defendant by reason of a previous professional involvement on the part of junior counsel.

6. At or around that time the Defendant brought an application in respect of a contention relating to the receipt of abusive phone calls which ultimately was determined by O'Neill J. on 19th March, 2002. The following day the Defendant's solicitors again wrote to the Plaintiff's solicitors requesting the outstanding Statement of Claim. That letter further threatened a motion to compel delivery. In a reply of 26th March, 2002 the Plaintiff's solicitors indicated that they were currently preparing a Statement of Claim and arranging a consultation to facilitate same. An intervening phone call would appear to have occurred followed by a letter of 10th July, 2002 again seeking a Statement of Claim. There was no reply to that letter.

7. The Statement of Claim was finally delivered on 27th November, 2003 after a period in excess of a year and four months during which there appears to have been no contact between the parties' respective solicitors. It is accepted that the Statement of Claim was not, in a technical sense, validly delivered by virtue of the fact that no notice of intention to proceed had been served by the Plaintiff and that a period of one year had elapsed since the last step in the action.

8. It is contended that the reason for the delay in the preparation of the Statement of Claim was the difficulty encountered in

obtaining necessary reports from expert witnesses instructed on behalf of the Plaintiff which reports were necessary to enable the proper particularisation of the claim as required by the rules for inclusion in the statement of claim.

### The Law

9. In *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 which, despite the volume of reports in which it appears, was decided by Finlay P. (as he then was) in 1979 the following general principles were enunciated:-

1. In deciding whether to dismiss proceedings for want of prosecution, the court should enquire as to whether the delay on the part of the person seeking to proceed has been first inordinate and, even if inordinate, whether it has been inexcusable. The onus of establishing that the delay has been both inordinate and inexcusable lies upon the party who was seeking a dismissal and opposing a continuance of the proceedings.
2. Where a delay has not been inordinate and inexcusable there are no real grounds for dismissing the proceedings.
3. Even where the delay has been both inordinate and inexcusable, the court must further proceed to exercise a discretion, as to whether on the facts, the balance of justice is in favour of, or against the proceeding of the case. Delay on the part of a defendant seeking a dismissal of the action and, to some extent, a failure on his part to exercise his right to apply at any given time for the dismissal of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion.
4. While a party acting through a solicitor must, to an extent, be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the courts discretion.

10. In *Hogan v. Jones* [1994] 1 ILRM 512 Murphy J. having referred to *Rainsford* further approved and applied a principle stated by Lord Diplock in *Birkett v. James* (1977) 2 All ER 801 at p. 808 to the following effect:-

"It follows a *fortiori* from what I have already said in relation to the effects of statutes of limitation on the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied on must relate to the time which the Plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the Plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued".

11. Having regard to the above it is clear that inordinate and inexcusable delay in the commencement of proceedings is not, in itself, a factor though it may colour what happens later. To that extent the order of the Master is incorrect.

12. Counsel for the Defendant drew attention to the recent decision of the Supreme Court in *Gilroy v. Flynn* (Unreported judgment of Hardiman J. delivered 3rd December, 2004). As is pointed out in that judgment there have been significant developments in the area of delay since the above decision in *Rainsford* and also the judgment in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Those developments include the amendment of the relevant provisions of the Rules of the Superior Courts (Order 27) to include a provision to the effect that the court "shall" dismiss an action on a second application to dismiss "unless the court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure".

13. Hardiman J. also drew attention to the developing jurisprudence of the institutions established under the European Convention on Human Rights and the applicability of that Convention to Irish domestic law by virtue of the enactment of the European Convention on Human Rights Act 2003. This country's obligations were made clear in cases such as *McMullen v. Ireland* (ECHR 442 97/98. 29th July, 2004). It is also clear from that jurisprudence that the courts have an obligation independent (and indeed in certain cases despite) of the parties, to ensure the speedy resolution of matters brought before them.

14. Notwithstanding the fact that the Supreme Court in that case permitted the continuance of the action, it seems clear, that the court was of the view that there may be a need to reconsider the previously established principles in the light of those recent developments.

15. Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore:-

1. Ascertain whether the delay in question is inordinate and inexcusable; and
2. If it is so established the court must decide where the balance of justice lies.

16. However it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore.

### Application to this case

17. Based on *Hogan* it is clear that there was a very heavy onus upon the Plaintiff to proceed with extra diligence in progressing these proceedings having regard to the fact that a delay of just a few days short of six years had been allowed to occur prior to the issuance of the proceedings in the first place. In the light of that fact I would have been satisfied that a delay of over 20 months in the filing of a statement of claim was inordinate even on the basis of what I might call the traditional jurisprudence. It is clear that in the light of the factors identified by the Supreme Court in *Gilroy* that view must be taken with even greater strength.

18. As to whether the delay is excusable it would appear that the only real reason put forward was the difficulty encountered in obtaining reports from the Plaintiff's experts necessary to enable counsel to draft the appropriate particulars required for inclusion in the statement of claim. To this may be coupled the fact that it would appear that the relevant expert was ill for at least a portion of the relevant time. However it does not seem to me that having regard to:-

- (a) the undoubted need to move with extra expedition in the light of the extraordinary delay in the commencement of proceedings;
- (b) the lack of any realistic explanation as to why it should have taken the expert concerned as long as it apparently did to produce a report;
- (c) the statement in *Gilroy* to the effect that, in particular, delay attributable to a professional advisor may be less excusable than might once have been the case; and
- (d) in the light of the need, by virtue of the developments identified by the Supreme Court in *Gilroy*, to exercise a significant degree of additional scrutiny on excuses put forward,

19. I am satisfied that the delay is inexcusable.

20. Having reached that conclusion it is necessary for me to consider where the balance of justice lies. However prior to dealing with same it is necessary to deal with a number of what I might call side issues which arose in the course of argument.

### **Side Issues**

#### *(a) Arbitration*

21. The Defendant makes complaint about the fact that just before these proceedings were issued the Plaintiff had commenced arbitration proceedings arising out of the same matter. However it was made clear by counsel for the Plaintiff, and I accept, that those proceedings were commenced by virtue of the impending expiry of the limitation period for the purposes of covering an eventuality where the court found that court proceedings should be stayed pending arbitration and the relevant arbitration proceedings not having been commenced, the Plaintiff might have found himself statute barred in respect of the only means of pursuing his claim. Having regard to that explanation and to the undertaking given by the Plaintiff that in the event of these proceedings continuing the arbitration proceedings will be discontinued I do not believe that the arbitration issue is of any relevance to my consideration.

#### *(b) The litigious nature of the Plaintiff*

22. There is exhibited in the Defendant's grounding affidavit a significant volume of reportage of various proceedings in which the Plaintiff has, apparently, been involved in recent times. Those facts are of limited relevance to the issues which I have to decide. They are, as was pointed out by counsel for the Defendant, relevant to show that the Plaintiff had at all material times ready access to a sufficient number of professional advisors to enable him to pursue and defend a variety of forms of litigation with apparent vigour. Insofar as it might be contended from comments that are attributed to various judges who have had to consider such litigation that the Plaintiff may have been considered to be an untrustworthy witness I should indicate that I do not consider that that matter is of any relevance at this stage. The fact that judges who have had occasion to assess the credibility of the Plaintiff in the past do not appear, so far as the reportage is concerned, to have been greatly impressed by the Plaintiff's evidence, is not a matter to which I should pay any regard in an application such as this. The fact that the Plaintiff has also being engaged, apparently, in a large amount of litigation is not a factor either. The Plaintiff is entitled to the same consideration as any other plaintiff in the mounting of these proceedings.

23. Therefore save to the extent that I am satisfied that it has been established that the Plaintiff had ready access to sufficient professional advisors at a roughly contemporaneous period to the delays experienced in these proceedings so as to enable him to bring and defend other proceedings with vigour I do not consider that any of the above materials are relevant.

#### *(c) The criminal prosecution*

24. Reference was, in particular, made to the fact that, at the instigation of the Director of Public Prosecutions, a charge of assault was brought against the principal of the defendant company arising out of the same incident on 5th December, 1995 which is a central feature of these proceedings. That charge was dismissed after a summary trial in the District Court. This again does not seem to me to be of any relevance. The only issue which the learned District judge had to consider on the occasion in question was as to whether it had been established beyond reasonable doubt that an assault occurred. Clearly the learned District judge was not so satisfied. That does not, in any way, preclude the Plaintiff from seeking to persuade any other court in any other appropriate civil proceedings that the same facts can be established to the satisfaction of the court on the balance of probabilities.

#### *(d) The Undertaking*

25. It is contended that the Plaintiff is in breach of an undertaking given to the court on the 19th March, 2002 to the effect that a statement of claim would be lodged within 3 weeks from that date. In view of the fact that there is no mention either in the court order or the letter written the next day by the Defendant's solicitors, to such an undertaking, I am not satisfied that any formal undertaking was given. There may well, however, have been an indication that a statement of claim would be furnished within that timescale.

26. It is however, relevant that the Defendant had, in his application to the court, sought an early delivery of the statement of claim and had made clear the necessity for urgency. Against that background the further delay of 20 months in delivery the Statement of Claim has to be seen as particularly blameworthy.

### **The relevant factors**

27. Having discounted much of the above as side issues I now turn to the factors which are relevant to a consideration of the balance of justice. For the reasons indicated above it does seem to me that there needs to be a re-calibration of the weight to be attached to many of those factors in favour of imposing a significantly greater obligation on parties to move with expedition. The factors, and my assessment of them, are as follows:-

#### *(a) The degree of delay*

28. For the reasons indicated above I am satisfied that there was a very significant delay indeed particularly having regard to the principle set out in *Birkett* to the effect that a particular obligation to move with expedition lies upon a party who has waited to the last moment to commence proceedings within the limitation period. I am satisfied that a delay which goes beyond the minimum which may be considered inordinate can be an additional factor to be weighed in the balance. I am satisfied that such a delay occurred

here.

*(b) The excuse tendered*

29. I am also satisfied that the Plaintiff has not only failed to render that delay excusable but has failed to do so by a significant margin and this must also be a factor to be taken into account.

*(c) Prejudice*

30. The Defendant contends for prejudice based upon the fact that the evidence which will require to be tendered to the court will be impaired by the lapse of a minimum of ten years between the events and any likely trial date. He has not, however, been able to point to any specific witness who is no longer available. It must also be taken into account that there are, apparently, statements of the relevant witnesses to the events of the 5th December, 1995 taken by the Gardaí on the occasion in question. That being said an issue as to the credibility of witnesses (which will almost certainly arise) will be all the more difficult of resolution where those witnesses are being asked to recollect matters that occurred so long ago. While the prejudice may not be quite as great as the Defendant contends for I am satisfied that it will nonetheless be of some significance. In relation to the evidence which will need to be tendered in respect of quantum I am not so sure that the same level of prejudice has been established. It would appear on the evidence that the Defendant was afforded, at the relevant time, an opportunity to have the premises concerned inspected by an engineer. It has not been contended that the engineer concerned is not available or that his records have become unavailable by the passage of time so as to render his evidence less clear. As the onus will lie upon the Plaintiff to establish his case it will be necessary for the Plaintiff to call all necessary witnesses concerning the quality of the works carried out by the Defendant, the extent of the works which remained to be done as of the date of the departure of the Defendant, and the costs of all additional and remedial works that were required. There will be some additional difficulty placed upon the Defendant at being asked to attempt to evaluate that evidence in respect of events that occurred a very considerable period of time ago. However on the basis of the evidence before me I could not place that prejudice at a higher degree than moderate.

*(d) Inaction of the Defendant*

31. It is clear from both *Rainsfort and Hogan* that "delay on the part of a Defendant seeking a dismissal of the action and, to some extent, a failure on his part to exercise a right to apply at any given time for the dismissal of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion". In this case there was no significant delay on the part of the Defendant. It might be said that there was some inaction between July 2002 and November 2003. However it is clear that even on the basis of the traditional test inaction is of less weight than delay. It is described as applying "to some extent". While remaining a factor it is one which, in the current context, should be given an even lower weighting.

32. I am therefore satisfied that the Defendant has suffered prejudice by virtue of the delay, but that same cannot be placed at too high a level. Finally in that regard I have considered the prejudice on the basis of the delay from the time of the incidents giving rise to the proceedings rather than solely in respect of the period from the commencement of the proceedings to date. While I agree that the court is confined, in determining whether a delay has been inordinate, to the period subsequent to the commencement of proceedings I am of the view that in assessing the balance of justice the court has a wider discretion and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings.

33. In all of the above circumstances I am satisfied that the weight to be attributed to both the delay and its excusability coupled with the moderate degree of prejudice and the minor weighting attributable to the limited inaction on the part of the Defendant is such that the balance of justice favours the dismissal of the proceedings. I will therefore affirm the order of the Master but vary same by deleting the reference to "commencement".