THE COURT OF APPEAL

Finlay Geoghegan J.
Hogan J.
Mahon J.

Neutral Citation Number: [2015] IECA 24
Appeal No's. 2014/224 & 225
[Article 64 transfer]

BETWEEN/

TOM TANNER

PLAINTIFF/APPELLANT

AND

AIDAN O'DONOVAN AND ELAINE O'DONOVAN (TRADING AS CONSTRUCTION DESIGN STUDIO)

FIRST AND SECOND DEFENDANTS/ RESPONDENTS

AND

TIMOTHY P. MURPHY

THIRD DEFENDANT/ RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 24th day of February 2015

1. In these proceedings the plaintiff/appellant ("the plaintiff") claims damages for negligence and breach of contract against the first and second defendants (who are architects) and the third defendant (who is a consulting engineer) arising from the construction of a hotel at various dates between 1998 and 1999. By the late summer of 2009 the action had not been set down for trial and the first and second defendants issued a motion on 10th September 2009 seeking to have the action struck out on the ground of inordinate and inexcusable delay. A similar motion was issued by the third defendant on 30th September 2009.

2. On 14th October 2010, the High Court (Feeney J.) made two orders dismissing the plaintiff's claims on the basis of inordinate and inexcusable delay in prosecuting the proceedings, and directed that the said proceedings be struck out for want of prosecution pursuant to the inherent jurisdiction of the Court. The plaintiff originally appealed to the Supreme Court against the making of these orders, but this appeal was transferred to this Court by direction of the Chief Justice (with the concurrence of all the other members of the Supreme Court) on 29th October 2014 in accordance with Article 64 of the Constitution following the establishment of this Court on that day.

The proceedings and their background

3. The first and second defendants ("the first and second defendants") were retained by the plaintiff in 1997 as architects, and the third defendant ("the third defendant") was retained by him as an engineer in relation to the construction of a hotel in Clonakilty, Co. Cork. Complaints by the plaintiff relating to the professional work of the defendants first arose in 1998. The construction work was completed in March 1999 and the hotel was opened for business. The plaintiff maintains that attempts to sell the hotel in 2000, and again in 2001, failed because of problems with the premises which he attributes to breach of contract and professional negligence on the part of the defendants. The premises eventually sold in late 2001 for €1.7m.

4. The present proceedings were instituted by the plaintiff on 1st September 2003. The claim against the defendants was based on their alleged breach of contract, negligence and negligent misstatement or that of their servants or agents. It is clear from the particulars contained in the statement of claim that the difficulties which the plaintiff claims to have encountered materialised from February 2008. It is further claimed that there were on-going delays in the construction of the hotel from February 2008 until it was completed in March 1999.

5. While first and second defendants jointly entered an appearance on 19th November 2003, the third defendant entered an appearance on 9th March 2004. The first and second defendants brought a motion on 10th February 2004 to dismiss the proceedings for want of prosecution by reason of the failure to deliver a statement of claim. That motion did not ultimately proceed on the basis that the plaintiff agreed that he would deliver a statement of claim within a fixed time period. The statement of claim was eventually delivered on 2ndMarch 2004, some six months after the issue of the plenary summons. The statement of claim provided details of the alleged breach of contract/negligence and negligent misstatement of the defendants, their servants or agents. In monetary terms, the plaintiff's claim for damages is for approximately €1.3m.

6. A defence was delivered in May 2006 on behalf of the first and second defendants. The plaintiff then brought a motion in November 2006 seeking to compel the third defendant to deliver his defence. This resulted in a consent order being made in January 2007 which allowed a period of four weeks for the delivery of the defence. While the third defendant believes that the defence was served in February 2007, the plaintiff maintains that it was not actually received until some date in early 2009. While this may (or may not) have been the case, it is noteworthy that the plaintiff did not make any application to the High Court in relation relating to the non delivery of the third defendant's defence at any stage between early 2007 and 2009 when he says he eventually received it.

7. Between the period from September 2003 (the date of the service of the plenary summons) to March 2009 (the date of service of the defendants' notices of motion which culminated in the order of the High Court under appeal), there were eight occasions when (between them) the defendants applied by motion to the High Court for orders compelling the plaintiff to take specific steps in the proceedings necessary for their processing, or to direct compliance with court orders already made, or seeking to strike out the proceedings for failure to comply with such orders (excluding the motions which are directly relevant to this appeal).

8. These motions can be summarised as follows:-

> 1. The defendants' motion dated 10th February 2004 sought to dismiss the plaintiff's claim because of his failure to deliver a statement of claim.
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> 2. The first and second defendants' motion dated 13th July 2004 seeking an order directing the plaintiff to furnish replies to the defendants' letter seeking particulars dated 25th March 2004, some four months earlier.
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> 3. The first and second defendants' motion dated 7th March 2005 seeking an order striking out the proceedings by reason

of the plaintiff's failure to comply with the order of the court made on 18th October 2004, some five months earlier.

4. The first and second defendants' motion for an order dismissing the plaintiff's action by reason of the failure on the part of the plaintiff to comply with an order of the Master of the High Court made on 29th November 2007, some four months earlier.

5. The first and second defendants' motion seeking an order dismissing the plaintiff's action because of the failure on the part of the plaintiff to comply with an order of the Master of the High Court made on 29th day of November 2007, some eight months earlier.

6. The first and second defendants' motion for an order dismissing the action of the plaintiff by reason of the failure on the part of the plaintiff to comply with an order of the Master of the High Court made on 29th day of November 2007, 30th May 2008 and November 2008, some fourteen months, eight months and four months earlier respectively.

7. The third defendants' motion seeking to compel the plaintiff to reply to particulars set out in a letter dated 5th April 2004, some ten months earlier.

8. The third defendant's motion dated 16th February 2006 seeking an order striking out the plaintiff's claim for failure to comply with an order for discovery dated 31st May 2005, some nine months earlier.

9. The costs of the motions listed above were on each occasion awarded against the plaintiff.

Judgment of the High Court

10. An agreed note of the judgment of the High Court judge was supplied to this Court. It is evident, there from, that Feeney J. identified what he described as "three periods of possible delay". He identified the first period of delay as that prior to the institution of the proceedings in September 2003, and which he described as *possibly* being inordinate and inexcusable. He identified a second period of delay to have been between September 2003 and May 2007, and the third period of delay as being between May 2007 (by which time he noted the defences had been delivered and discovery dealt with) and, the date of service of the notices of motions relevant to this appeal (September 2009), during which period there was no proceeding.

11. Feeney J. was satisfied that the plaintiff's delay up to September 2009 was inordinate and inexcusable. He held that a period of well over two years had passed since the delivery of the defences which he noted was a greater amount of delay than that identified in *Stephens v. Paul Flynn Ltd* [2005] IEHC148. He went on to hold that the balance of justice lay with the defendants in acceding to their application to dismiss the proceedings. In doing so he referred to the fact that these proceedings were claims against individuals relating to their professional competence, and the fact that they were hanging over them for many years. Feeney J. also noted that two potential witnesses (for the defendants) had died, while another had emigrated.

Submissions on appeal

12. The plaintiff's arguments focussed on the questions of whether the delay was excusable and the balance of justice. So far as the excusability of the post-commencement delay was concerned, counsel for the plaintiff, Mr. Condon S.C., pointed out that the defendants had themselves delayed in delivering their defences and they would suffer no real prejudice. He submitted that the defences were largely purely traverses, so that the extensive particulars raised by the defendants had not been necessary. The defendants had not taken any steps to bring the case on to trial.

13. So far as the balance of justice was concerned, Mr. Condon S.C. acknowledged that while two witnesses had died, he contended that they were not central to the case and that all relevant parties were still available to the Court. He also submitted that the plaintiff had plainly suffered a significant and substantial loss as a result of the defendants' conduct for which he would not otherwise have had any effective recourse. Nor was there any reality to the contention that the defendants' had suffered any reputational loss.

14. The defendants urged the court to take account of the length of time and delay since the cause of action accrued at some point in 1999 (if not, indeed, earlier), in assessing the overall delay in concluding these proceedings. It was argued that having regard to, in particular, the significant period of time between the date of the accrual of the cause of action and the date of the institution of these proceedings in 2003, there was a heavy onus on the plaintiff to ensure that the action would proceed to a hearing without undue delay. It was emphasised that there were considerable and unjustified delays in responding to notices for particulars, and that a number of applications to court for orders compelling the plaintiff/ to respond to the request for particulars, and to make discovery were necessary.

15. Counsel for the first and second defendants, Mr. Gleeson S.C., contended that there was a pattern of waiting for court orders in order to progress the litigation, and of a disregard for court orders when made. The suggestion made on behalf of the plaintiff that discovery issues was a reason for the failure to serve a notice of trial was dismissed, because it was a failure to complete the discovery process on the part of the plaintiff that greatly contributed to the delay. There was on the part of the plaintiff a pattern of non compliance with court orders, which required repeated applications to the court. Mr. Gleeson S.C. further rejected the argument that the particulars raised were unnecessary.

16. So far as the issue of prejudice was concerned, Mr. Gleeson S.C. emphasised that the retainer of the defendants in 1997 was essentially on the basis of an oral agreement, and that the first complaints arose in 1998. Oral evidence was therefore a very significant and important feature of the case, and the fact that two of the sub contractors had died, and another had emigrated, was prejudicial to the position of the defendants and their ability to properly defend the claim. Memories and recollections, especially as to detail, would have faded over the intervening years.

17. Mr. Gleeson S.C. also submitted that the jurisdiction to dismiss for inordinate and inexcusable delay is a discretionary jurisdiction and which was properly exercised in this instance by the High Court judge when determining the motion to dismiss in 2010. It was argued that having regard to the discretionary nature of the relief granted to the defendants, this Court should only intervene in exceptional circumstances. In support of this contention, reference was made to the *dicta* of Lynch J. in *Martin v. Moy Contractors* [1999] IESC 26 and those of Kearns J. in the Supreme Court in *Stephens v. Paul Flynn Limited* [2008] 4 I.R. 31 stated that a plaintiff, in seeking to overturn a dismissal for want of prosecution in the High Court was required to demonstrate that there had been an unreasonable exercise of discretion or some other error of principle by the judge in the lower court.

18. Counsel for the third defendant, Ms. Smith, also laid emphasis on the fact that the retainer between the plaintiff and her client was an oral one and there was a general lack of documentation which might clarify the extent of that relationship. It followed that oral evidence would be required, but echoing the comments of Finlay Geoghegan J. in *Manning v. Benson & Hedges Ltd.* [2005] 1

I.L.R.M. 190, she submitted that the recollection of the witnesses would inevitably have dimmed after such a lapse of time.

19. Ms. Smyth also contended that this was a case where the plaintiff had started late. This, coupled with a pattern of non-compliance with the timetable prescribed by court orders, meant that delays which might otherwise have been excused should not be tolerated by the court.

20. All three defendants placed considerable emphasis on the fact that the defendants were professional architects and an engineer, and that the litigation effectively alleged professional negligence on their part, and that there was therefore an even greater onus on the part of the plaintiff to process the litigation expeditiously. Not having done so had resulted in a cloud hanging over the defendants and their professional competence over a very lengthy period, and a period prolonged by virtue of delay and repeated delay on the part of the plaintiff.

21. I propose first to deal with the submissions concerning the scope of appeal, before proceeding to consider the substantive merits of the appeal.

The scope of the appeal
22. So far as the first and second defendants' arguments regarding the scope of appeal is concerned, I would note that, for the reasons set out in the most recent judgment of the Supreme Court in *Lismore Builders Ltd. v. Bank of Ireland of Finance Ltd.* [2013] IESC 6 and in the judgment of this Court which was delivered by Irvine J. in *Collins v. Minister for Finance* on 19th February 2015, the jurisdiction of this Court in cases concerning substantive decisions - such as those dismissing actions for reasons of undue delay and want of prosecution - is not confined to those cases where an error of principle has been shown and that this Court is free to exercise its own independent judgment in the matter. It will, of course, pay particular heed to the manner in which the High Court has exercised its own discretion in cases of this kind. It is against that background that I now propose to consider the substantive merits of the appeal.

The substantive merits of the appeal
23. The principles regarding the exercise of the jurisdiction to strike out on the grounds of inordinate and inexcusable delay have been set out at length by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and a wealth of subsequent case-law. The relevant questions are set out in the three-pronged test set out in *Primor:* (i) was the delay inordinate? (ii) if so, was the delay inexcusable? and (iii), even if the answers to these two questions is in the affirmative, does the balance of justice require the proceedings to be dismissed.

Relevant period of delay
24. It is necessary, first, to consider the relevant period of delay for the purposes of the *Primor* test. It is the period since the commencement of the proceedings up to the date of hearing of the motions to dismiss by the High Court Judge which is the period which must be considered for this purpose. For the reasons next set out, however, the period from the date of the accrual of the cause of action to the issue of proceedings is also relevant to the assessment of the question as to whether post issue delay is inordinate or inexcusable.

25. While it is not easy to be precise as to when the plaintiff's cause of action first arose, judged by the particulars contained in the statement of claim it would seem that it is contended that very serious problems arose at a relatively early stage in the construction process. Thus, for example, among the allegations is the contention that the roof of the hotel was so badly designed that it was in danger of a collapse and that this was drawn to the defendants' attention in February 1998. It is further contended that the building as so constructed was unsafe and not in compliance with the Building Regulations, with the result that the site was in fact closed from April 1998 to July 1998.

26. While it is true that the plaintiff maintains that he experienced on-going problems in terms of certification of compliance with the Building Regulations until the hotel was ultimately sold in December 2001, the essence of the claim relates to defective work which was said to have occurred in the period from February 1998 to March 1999. If the plaintiff's contentions are correct, major construction problems manifested themselves relatively quickly after the commencement of construction work. In such circumstances one might have expected that the proceedings of this kind would have been speedily instituted. Hence the commencement of the proceedings in September 2003 must in these particular circumstances be adjudged to be a late start. This made it all the more incumbent on the plaintiff to proceed with expedition thereafter. As Lord Diplock observed in *Birkett v. James* [1978] A.C. 297, 322:

> "A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which have been excusable if the action had started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

Was the delay inordinate?
27. By any standards, the delay was inordinate. The plenary summons issued in September 2003 and yet by the date of the issue of these motions to dismiss for want of prosecution in September 2009, the matter had not been set down for trial and no active steps had been taken by the plaintiff in the proceedings for a year (and them only in response to motions brought by first and second named defendants). Nor had any such steps been taken prior to the hearing of these motions by Feeney J. in July 2010.

28. The pace of the present proceedings was so leisurely - the late start notwithstanding - that, as I have already observed, no less than eight separate motions were issued by the defendants' respective solicitors in relation to either default of pleading by the plaintiff on the one hand or a failure to comply in a timely fashion with court orders on the other.

29. It follows, accordingly, that the first limb of the *Primor* test has been satisfied.

Was the delay inexcusable?
30. The delay by the plaintiff which attended the proceedings were, for the most part, inexcusable. One might excuse some of the delay which attended the period from October 2003 to March 2004. During that period the solicitors for the first and second defendant had asked that service of the plenary summons be delayed for a few weeks. There was then an objection raised by the first and second defendants to the plaintiff's then firm of solicitors which necessitated a change of solicitors. During the period the matter had been referred to the Law Society for resolution and the plaintiff's original solicitor was understandably reluctant to reply, for example, to the particulars directed by the High Court by order dated 18th October 2004 given the objection which was outstanding.

31. This matter was ultimately resolved with the transfer of the file to the plaintiff's new solicitors in March 2005. While some period

must be allowed to those solicitors to familiarise themselves with the file, the replies to particulars raised by the first and second defendants were only served on 30th May 2005. There was then a further request for particulars which was fully replied to on 16th July 2006. A defence was served by the first and second defendants in May 2006. There was very little justification for not taking active steps after that date in procuring the defence of the third named defendant and having the matter set down for trial.

32. There was also delay on the part of the third defendant in serving a defence. The statement of claim was served in March 2004, and the third defendant initially raised particulars in April 2004 and was required to bring a motion in February 2005 to obtain replies. The third defendant also unusually sought discovery in advance of delivering a defence and the plaintiff engaged in that process. A consent order was made by the Master of the High Court on 31 May 2005 directing certain discovery by the plaintiff within 8 weeks. The consent order was not complied with and a motion to strike out for failure to make discovery was brought in February 2006. Ultimately the plaintiff furnished an affidavit of discovery on 29th March 2006 (approximately 10 months after the consent order requiring this to have been done in 8 weeks). In meantime the plaintiff's solicitor sought a defence and by letter of 27th July 2005 indicated that unless a defence was delivered "before the end of this week" a motion would issue. However, no such motion issued until November 2006 and in January 2007 the third defendant was given time to deliver a defence.

33. The third defendant's solicitors maintain that a defence was filed along with a notice to produce and a notice claiming indemnity and contribution on 27th February 2007. The plaintiff's solicitors maintained that these documents were never received by them and that they first had sight of them when they were exhibited in the affidavit grounding the present motion to dismiss which was issued in September 2009.

34. I cannot forbear observing that the conduct of the litigation from both the plaintiff and the third defendant has in this respect been unsatisfactory, whichever account is correct. Even if the third defendant is correct, his defence was filed some eighteen months after the plaintiff's solicitor had clearly indicated in July 2005 that he required a defence notwithstanding the discovery process which was also taking place.

35. If the plaintiff is correct, then the question arises as to why no further action had been taken by him to compel the delivery of the defence prior to August 2009 well over five years since the delivery of the statement of claim and in excess of two and a half years since the order compelling the third defendant to file a defence. Even on that version of events, the plaintiff's further delay in not taking active steps to prosecute the proceedings after such a length of time – even allowing for the delays on the part of the third defendant – was itself entirely inexcusable. The fact that a defendant has been inactive does not excuse a plaintiff from prosecuting proceedings with the appropriate degree of expedition and vigour, not least where (as here) the plaintiff has delayed before issuing proceedings. This is perhaps especially so when the other defendants (*i.e.,* in this case, the first and second defendants) had already long since served their defence some three years earlier.

Balance of justice

36. It remains then to consider the balance of justice. It is true that courts have traditionally reluctant to strike out claims of this kind on the ground of undue delay, since this necessarily impinges on the litigant's right of access to the courts. Yet measured by the state of the evidence at the date of the High Court hearing in October 2010, the balance of justice nevertheless favoured the dismissal of this particular claim having regard to these particular facts.

37. Perhaps the most obvious consideration here is that the delays up to October 2010 have been prejudicial. It is clear from the pleadings that the agreement contended here for by the plaintiff was an oral one, but, for example, the third defendant has denied the existence of any such agreement or that, as also claimed, that he made representations to the plaintiff prior to any such appointment. Accordingly, the case rests largely on the existence of an oral contract, the terms of which (if there was one) are in dispute. Any fair hearing of the claim would thus be very dependent on oral evidence and the recollection of detail associated with architectural and engineering services, and the construction of a building.

38. The lapse of time between 1998 and 2010 was accordingly inherently prejudicial, since the capacity of the witnesses – on all sides – to recollect this detail has doubtless been considerably impaired. As Finlay Geoghegan J. said in *Manning v. Benson & Hedges Ltd.* [2005] 1 I.L.R.M. 190,208:

> "Delays of four to five years as a matter of probability will reduce the potential of such witnesses to give meaningful assistance or to act as a witness."

39. In *Rogers v. Michelin Tyres* [2005] IEHC 294 Clarke J. stated that as the delay affected the ability of witnesses to recall the minutiae of an important meeting some ten years earlier, this meant that the defendant had suffered what he described as "at least a moderate degree of prejudice in defending this action." Likewise, in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290, 293-294 Hardiman J. spoke to the same effect then he observed that:

> "…. the Courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued."

40. All of this necessarily compromises the basic ability of the courts to discharge their fundamental constitutional mandate to administer justice as prescribed by Article 34.1 of the Constitution. As Finlay Geoghegan J. said in *Manning* ([2005] 1 I.L.R.M. 190, 202):

> "The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial."

41. In this regard, it has to be also noted that both the main electrical contractor and the lighting contractor had both sadly died ever before these motions to dismiss had issued. While the plaintiff admittedly disputes any suggestion that these were central witnesses, yet their absence hampers the ability of the defendants to reconstruct the events of 1998-1999. An employee of the first and second defendants who inspected the building on their behalf has since emigrated to the US. It is unclear whether he would have been available for the trial.

42. In assessing this question of the balance of justice, regard must be had to two further considerations, namely, the obligation on the plaintiff who starts late to proceed with expedition and the fact that the allegations in this case directly impact on the professional reputation and good name of the defendants. So far as the former consideration is concerned, I have already made it clear that I do not consider that the plaintiff proceeded with the necessary expedition which would have been required where (as here) there was, in fact, a late start.

43. So far as the second consideration is concerned, while the details of the adverse impact on the defendants' professional reputations are admittedly sparse, it is nonetheless plain that the very existence of such proceedings could in itself potentially impact on those reputations, possibly even in a far-reaching way. A finding that that there had been negligence on the part of any of the defendants had caused or brought about a state of affairs where a hotel was structurally unsafe and had been closed for a three month period as a result would seriously impact upon their professional reputations. Indeed, in other circumstances the very existence of a claim of this kind could affect a professional person's capacity to secure or renew professional indemnity insurance (not least having regard to the significant quantum of damages claimed by the plaintiff) and might even required to be notified to professional bodies. All of this is to recognise that proceedings of this is not simply about the recovery of a monetary award, but may well have significant reputational implications.

44. The unfairness associated with undue delay in this context has long been recognised. As O'Hanlon J. observed in this context in *Celtic Ceramics Ltd. v. Industrial Development Authority* [1993] I.L.R.M. 248, 258-259:

> "It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of the inordinate and inexcusable delay on the part of a plaintiff and I would respectfully echo the view expressed by Henchy J. in *Sheehan v. Amond* [1982] I.R. 235 that it should be possible to invoke 'implied constitutional principles of basic fairness of procedure' to bring about the termination of such proceedings.'"

45. To this I would add that the effective protection of the right to a good name expressly guaranteed by Article 40.3.2 of the Constitution necessarily implies that claims of this kind – with obvious implications for the good name of a professional defendant – should be heard and determined within a reasonable time. Any other conclusion would undermine the substance and reality of that express constitutional guarantee.

46. All of this means that the courts are obliged, where possible, to ensure that claims of this kind are adjudicated within a reasonable time if they are to remain faithful to the constitutional commitment to protect the right to a good name as protected by Article 40.3.2.

47. In arriving at this conclusion, I have not overlooked the conduct of the third defendant and, specifically, the delay on his part in filing a defence since the conduct of the defendants is also a relevant factor so far as any examination of the balance of justice is concerned. However the plaintiff had his own remedies in respect of that default of which he did not properly avail. Having regard to his late start he was under a particular obligation to move the litigation forward.

48. The fact remains that the delay has been such as to compromise the ability of the courts to do justice in respect of allegations which, if accepted, would seriously impact on the good name and reputation of the defendants. In these circumstances, I find myself obliged to hold that the balance of justice favours the dismissal of the proceedings.

Conclusions

49. It follow, accordingly, that as there has been inordinate and inexcusable delay on the part of the plaintiff and as the balance of justice also requires the dismissal of the proceedings, I would dismiss the appeal against the decision of Feeney J. to dismiss the proceedings.