THE HIGH COURT

[2009 No. 5151 P]

BETWEEN

DES CAVANAGH AND ANNE CAVANAGH

PLAINTIFFS

AND

SPRING HOMES DEVELOPMENTS LIMITED AND MARTIN CURRAN

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 25th day of June, 2019

1. The within motion is brought by the second defendant ("Mr. Curran") to strike out the plaintiff's claim on grounds of delay.

2. The plaintiffs are husband and wife and the owners of the property known as No. 15 Seabrook, Dromiskin, Dundalk, County Louth which is a five bedroom detached dwelling house. The first defendant ("the company") is the construction company that built the house. The second defendant is an engineer. The plaintiffs entered into a building agreement with the company on the 2nd October, 2006 whereby the company agreed to build the house in accordance with the relevant plans and specifications, the house to be completed within three months of the date of the contract. The consideration paid by the plaintiffs was in the sum of €385,000.

3. In fact, it would appear that the house was probably largely complete by the date of the contract because Mr. Curran provided expert certification of the house's compliance with planning permission and building regulations in May, June and August of 2006. These opinions were furnished by the company to the plaintiffs for title purposes and the plaintiffs say they relied upon them.

4. Within a few months of the contract date, and by approximately March 2007, significant structural and other defects in the house emerged. In their statement of claim, the plaintiffs allege that large cracks began appearing in the walls and nails began to pop out of the ground floor ceilings indicative of movement in floor joists. The plaintiffs plead that they instructed engineers to investigate these matters who found that stud partition walls on the first floor were supporting the roof and acting as structural walls when they were not capable of performing that function. The floor joists were allegedly too far apart requiring bridging support. Many other serious defects are identified in the statement of claim.

5. The plaintiffs also complain that the house was sold to them as having habitable rooms on three floors which included the attic space but in fact no planning permission was obtained for this. Consequently, the plaintiffs say that Mr. Curran's written opinion that the house complied with planning permission was clearly erroneous and given negligently. They similarly complain that his opinion regarding compliance with the building regulations was manifestly wrong.

6. As a result of all these matters, the plaintiffs allege that the house is uninhabitable and they have suffered loss and damage.

7. As part of the purchase agreement, the company provided the plaintiffs with the benefit of structural defects insurance cover taken out with Premier Guarantee. It would appear that the plaintiffs made a claim initially on foot of this insurance which resulted in Premier Guarantee's engineers carrying out a structural survey of the house.

8. In his defence, Mr. Curran denies the plaintiff's claim and pleads that any opinions provided by him were not provided in a personal capacity but rather as an employee of Keough Curran Ltd who were retained by the first defendant company and are solely for the benefit of that company. Accordingly, he says the plaintiffs are not entitled to rely on the opinions as Mr. Curran owed them no duty. He denies that the opinions were incorrect. Various other pleas are raised about the plaintiffs failing to mitigate their losses and Mr. Curran also says that any liability rests with the first defendant against whom he has claimed indemnity.

9. It is of some significance to note that there is a close association between Mr. Curran and the company. In the affidavits sworn by him grounding this application, he gives his address as No. 14 Seabrook, Dromiskin, County Louth. This is next door to the plaintiffs' house. In the various engineering certificates executed by Mr. Curran, he gives the company's address as 14 Seabrook, Dromiskin, County Louth, his home. In his affidavit replying to Mr. Curran's application herein, the first plaintiff avers (at para. 30) that Mr. Curran was intimately involved in the running of the company and with the construction of the property.

10. In written and oral submissions at the hearing of this application, it was submitted on behalf of the plaintiffs that Mr. Curran was in effect the builder. The plaintiffs' current expert engineer, Mr. Desmond Kirwan Browne offers the view in the reports exhibited in the plaintiffs' replying affidavit that Mr. Curran effectively carried out the duty of a resident engineer/architect. The extent to which Mr. Curran disputes these facts is unclear, although it should be emphasised that the case as pleaded against him does not make these allegations. The evidence does however appear to suggest that Mr. Curran was most likely the guiding mind of the company.

Relevant Chronology

11. 2nd October, 2006 – Building contract executed.

Circa March 2007 – Structural defects appear.

25th June, 2009 – The plenary summons issued.

5th August, 2009 – Appearance of the second defendant.

8th October, 2009 – Statement of claim delivered.

8th November, 2010 – Second defendant's notice for particulars.

25th November, 2010 – Second defendant's defence.

February 2011 – Premier Guarantee commenced work on the house to rectify the structural defects. The costs of these works amounted to approximately €135,000 which is claimed by the plaintiffs herein by way of subrogation as part of their

claim.

25th August, 2011 – Plaintiffs' replies to particulars.

9th September, 2011 – Second defendant's notice of indemnity/contribution.

14th September, 2011 – First defendant's notice of indemnity/contribution.

13th October, 2011 – Second defendant's notice for further and better particulars.

21st November, 2011 – First defendant's application to stay the proceedings pending arbitration. The application was opposed by the plaintiffs on the basis that the second defendant was unwilling to participate in the arbitration and thus staying the proceedings would have resulted in increased costs and delay, an argument which the court appears to have accepted in refusing the application. It is noteworthy that while this application was presumably made on the instructions of Mr. Curran in his capacity as a director of the company, in his personal capacity he was unwilling to participate in the arbitration. This may however arise because the litigation against him personally is being dealt with by his professional indemnifiers.

23rd March, 2012 – Plaintiffs' replies to notice for further and better particulars.

10th June, 2013 – Notice of change of solicitor was served on behalf of the first defendant although it seems that the new solicitors inadvertently purported to come on record for both defendants.

13th June, 2013 – The plaintiffs' solicitors served notice of trial. This was objected to in correspondence of the 19th June, 2013 from Mr. Curran's solicitors on the basis that there was no entitlement to serve notice of trial in the absence of first serving a notice of intention to proceed. It was also pointed out that discovery had not yet been exchanged. This letter further indicated that the first defendant's filed accounts for 2011 showed it to be insolvent and it was thus unlikely that the plaintiffs would recover from the first defendant.

16th July, 2013 – A notice of intention to proceed was served.

25th April, 2014 – A further notice of intention to proceed was served.

29th April, 2014 – The second defendant's solicitors wrote saying, inter alia, that the matter was not yet ready for trial and that they would require extensive discovery from both the plaintiffs and the co-defendant before they would be ready to proceed to trial. They asked the plaintiffs' solicitors to confirm agreement to refrain from setting the matter down for hearing until discovery had been exchanged.

20th June, 2014 – The plaintiffs' solicitors replied that the second defendant had had sufficient time and they were now setting the matter down for hearing. On the same date, Mr. Kirwan Browne's first report became available. This was based on an inspection on the 28th January, 2013 and was confined to non-structural defects.

August 2014 – The plaintiffs were provided with a report from Messrs. Finnegan and Jackson, engineers and surveyors relating to non-structural remedial works.

7th October, 2014 – The first defendant's solicitors issued a motion to come off record.

November 2014 – The plaintiffs requested a further engineering report.

2nd February, 2015 – The court made an order allowing the first defendant's solicitors to come off record.

1st October, 2015 – The plaintiffs' solicitors obtained a witness statement from Mr. Paddy Croke, a next door neighbour of the plaintiffs at 16 Seabrook, Dromiskin, County Louth. This statement deals with Mr. Curran's involvement in the construction of No. 15.

June 2016 – Mr. Kirwan Browne provided his second report which offered the opinion that Mr. Curran had primary responsibility for the defects in the property, based on the statement of Mr. Croke which had been made available to him.

17th August, 2016 – The first defendant was dissolved. It would appear that this arose from the company's failure to make annual returns, a matter for which Mr. Curran presumably bears some responsibility.

January 2017 – Mr. Kirwan Browne's third report became available.

April 2017 – The plaintiffs became aware that the first defendant had been dissolved in late 2016.

30th April, 2018 – The within motion was issued.

22nd October, 2018 – The court made an order restoring the first defendant to the register of companies on the application of a third party.

December, 2018 – The second defendant's motion was due to be heard but had to be abandoned due to the late delivery of a replying affidavit by the plaintiffs contrary to the court's directions. This caused a further delay of six months to the final hearing date in June 2019.

Applicable Principles.

12. The principles to be applied in applications of this nature are well settled and not in dispute between the parties. The touchstone continues to be *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. These principles are by now so well known that I think there is little to be gained by restating them in detail. Suffice it to say that the moving party in an application of this nature must establish that the opposing party has been guilty of both inordinate and inexcusable delay and if those criteria are fulfilled, that the balance of

justice favours dismissal of the claim. The *Primor* test is applicable to cases where there has been culpable delay on the part of the plaintiff.

13. A separate, but supplementary, jurisdiction is to be found in the cases beginning with *O'Domhnaill v. Merrick* [1984] I.R. 151 which held that the court has a separate jurisdiction to dismiss a claim for delay, even in the absence of the plaintiff's culpability, where the delay that has occurred means that there is a real risk that a fair trial can no longer be had. In either case, the burden remains on the defendant to establish that the claim ought to be dismissed.

14. These decisions have recently been considered in a number of judgments of the Court of Appeal upon which Mr. Curran's counsel places particular reliance. In *Millerick v. Minister for Finance* [2016] IECA 206, the plaintiff was involved in a road traffic accident on the 28th March, 2007 in which he suffered personal injuries. The plaintiff issued proceedings against the Minister for Finance alleging that the driver of the offending vehicle was a member of An Garda Síochána.

15. However, he also issued separate proceedings against the Motor Insurer's Bureau of Ireland in which he alleged that the driver was unknown. The proceedings were issued close to the limitation period which the court found gave rise to a particular obligation of expedition on the part of the plaintiff. In the proceedings involving the Minister for Finance, the plaintiff allowed a period of over four years to elapse when nothing was done to progress the case resulting in a successful motion being brought by the Minister to dismiss.

16. It is clear that, particularly having regard to the conflicting allegations made by the plaintiff concerning the identity of the driver, the recollection of witnesses as to the events in issue was critically important. In the course of delivering the court's judgment, Irvine J. observed that in general, a defendant will not be blamed for mere inactivity when the onus lies on the plaintiff to progress the case. Irvine J. held that the court is entitled to have regard to all relevant circumstances and in that case, one such circumstance was the fact that even if the plaintiff's claim against the Minister was dismissed, his claim against the MIBI would survive.

17. Accordingly, the dismissal against the Minister would not necessarily result in the plaintiff losing all prospect of recovery. The court noted (at p. 11):

> "Of additional relevance is the fact that, unlike in most other cases where a claim is dismissed, Mr. Millerick will remain entitled to pursue his claim in respect of his injuries against the MIBI. That is not to say that his claim in those proceedings might not be met with an application that they be dismissed for inordinate and inexcusable delay. However, without expressing any view on the likely outcome of such an application, it appears likely that Mr. Millerick would be on somewhat firmer ground if asked to meet such an application than he finds himself in the present case. It is to be noted that the fact that a plaintiff may have a potential alternative method of recovery available to them, should their proceedings be dismissed, is something that may be factored into the Court's consideration as to where the balance of justice lies."

18. In *Gorman v. The Minister for Justice* [2015] IECA 41, the plaintiff alleged that he was assaulted in a Garda station on the 15th January, 2001 by members of the force which caused him to suffer bruising. There was a total conflict of evidence as between the plaintiff's recollection of events and those of the Gardaí allegedly involved and there was little or no documentary evidence that would have assisted matters. The plaintiff allowed a delay of some five years to occur between the conclusion of the discovery process and the bringing of a motion by the defendants to dismiss.

19. Although no specific prejudice was alleged by the defendants and they accepted that contemporaneous witness statements were available to them, the court found that a probable gap of some twelve years between the occurrence of the incident and the likely trial meant that the balance of justice required dismissal. Being an assault claim, this would have come before a jury who would be asked to decide between conflicting evidence of events occurring over a decade earlier.

20. One of the factors identified in the court's judgment, delivered by Irvine J., as relevant to the court's consideration of the delay was the complexity of the case, or more accurately the lack of it. Thus Irvine J. observed (at p. 14):

> "In considering whether delay is excusable, one of the factors material to the court's consideration is the complexity of the case. Here we have what was correctly described by the High Court judge as the simplest of cases. The claim concerns a factual dispute between the parties as to whether or not the plaintiff was assaulted on a particular day. That issue will be resolved by reference to the plaintiff's own oral testimony and the evidence of the witnesses called by the defendants. This is not a case in which delay has arisen due to any difficulty in identifying the names and later tracing the whereabouts of potentially valuable witnesses. Further, this is not the type of action where the plaintiff's solicitor, as often happens in personal injuries cases, has had to engage experts to advise on complex liability or causation issues."

21. The court was further of the view that the relatively minor nature of the plaintiff's injuries was something to which the court could have regard in assessing the balance of justice. Thus Irvine J. stated (at p. 20):

> "64. If, for example, the plaintiff was maintaining that as a result of the assault he would never work again or would in some other way be permanently incapacitated, then the court would have to weigh those factors in the balance. However, the injuries he complains of are confined to bruising from which, according to the pleadings and particulars, he has made a complete recovery. In these circumstances, there is less of a concern that justice will be undermined by the dismissal of the proceedings."

22. The court noted that because of the minor nature of the injuries, there was no objective medical evidence in the form of x-rays, scans, or test results to corroborate them which made expedition of the proceedings all the more important. As against all of that from the defendant's point of view, the court had regard to the extremely serious nature of the allegations made against the Gardaí involved which meant that they were left waiting some twelve or thirteen years before they would be afforded an opportunity to clear their good name.

23. As the foregoing demonstrates, both *Millerick* and *Gorman* were simple and straightforward cases involving a single event occurring on a particular date many years earlier, the occurrence or not of which could only be proved by oral evidence and which was very much in dispute. They might colloquially be described as classic "swearing matches".

24. *Farrell v. Arborlane Ltd* [2016] IECA 224 was somewhat different. The facts there were more closely analogous to those arising in the present case. The plaintiff purchased an apartment in 2002 and defects in the construction manifested themselves shortly thereafter. However, proceedings did not issue until some five years later on the 20th December, 2007. It took a further six and a half years for the plaintiff to serve a statement of claim on the 29th May, 2014 by which time some twelve years had already passed from

the relevant events.

25. The seventh named defendant successfully brought a motion to dismiss which was issued on the 11th February, 2015. The seventh defendant was an engineer who, as in the present case, provided a certificate of compliance on foot of which he was sued. In dismissing the proceedings against the seventh defendant, Sheehan J. noted that there was undoubted prejudice arising to him as a result of having an allegation of professional negligence hanging over him for such a lengthy period.

26. The court however identified an additional aspect of prejudice to the seventh defendant and that was his difficulty in renewing his professional indemnity insurance, clearly a very important matter to any professional person, because of the existence of the proceedings. Although not expressly mentioned by the court in its judgment, the dismissal of the claim against the seventh defendant left a number of other substantial defendants available to the plaintiff against whom she could pursue her claim.

Discussion

27. There have undoubtedly been significant periods of delay by the plaintiffs in this case. It has to be recognised that a building contract type case such as the present would not normally be expected to proceed with the same expedition as an uncomplicated personal injuries claim, for example, and I do not think the two are directly comparable. Inevitably a claim such as this requires input from a range of experts such as architects, engineers, quantity surveyors, valuers and the like. Detailed and lengthy assessment of defects is frequently necessary which can in some cases involve substantial opening up works, although that is not in issue here. However, experts inevitably require time to carry out surveys, compile their findings and report on them. In the context of that and the relevant six year limitation period, I do not think that a delay of some two years between the appearance of the defects and the institution of the proceedings is to be regarded as necessarily unreasonable.

28. Thereafter, the proceedings progressed at a relatively normal pace for such claims for about three years up until March 2012 culminating with the plaintiffs' replies to further and better particulars. It must be born in mind that during this period, significant structural works were undertaken by Premier Guarantee in 2011 which undoubtedly had a bearing on the progress of the case. Progress was also affected by the first defendant's application for the stay in 2011.

29. However, after delivery of replies to particulars on the 23rd March, 2012, nothing further of significance happened until June 2013, a delay of some fifteen months which is unexplained. June 2013 was when the company's new solicitors intervened in the matter although that intervention was relatively short lived as they remained on record for a period of about a year and a half only.

30. It has to be said however that the plaintiffs' solicitors attempted as of June 2013 to advance the case by serving a notice of trial but unfortunately did so in a defective manner by failing to first serve a notice of intention to proceed, an objection taken by Mr. Curran's solicitors. Apart from that technical objection, Mr. Curran's solicitors also made clear that they would not agree to the matter being set down until they had obtained discovery. Although the plaintiffs' solicitors, prompted by Mr. Curran's solicitors, did respond by serving a notice of intention to proceed in July 2013, nothing was done on foot of this until a further notice of intention to proceed was served in April 2014 leaving another unexplained gap of some nine months.

31. The plaintiffs' solicitors' attempts to reinvigorate the case in April 2014 was met with robust objection by Mr. Curran's solicitors insisting that the matter was not ready for trial and they would require "extensive" discovery before the matter could proceed. They expressly asked the plaintiffs' solicitors to refrain from setting the matter down for hearing until discovery was exchanged.

32. As Mr. Curran's counsel points out however, that did not have the effect of stopping the case in its tracks because the plaintiff's solicitors responded in June that they were setting the matter down in any event. Mr. Curran makes a particular complaint of what followed because between June 2014 and the issuing of the motion to dismiss almost four years later on the 30th April, 2018, nothing further was heard from the plaintiffs' solicitors.

33. The plaintiffs seek to explain this delay by reference to the fact that various reports were being sought from their engineer, Mr. Kirwan Browne, although it is difficult to understand why Mr. Kirwan Browne was instructed for the first time to provide relevant engineering reports some seven years after the event. It is also difficult to see why his relatively short reports took so long to produce.

34. Also during this period, the first defendant's solicitors sought and obtained permission to come off record, Mr. Croke's witness statement was obtained, the company was dissolved and three reports were provided by Mr. Kirwan Browne together with one from Finnegan and Jackson. Although the first named plaintiff says that part of the reason for the delay was his ill health, this is not explained in any meaningful way.

35. I am satisfied that the periods of delay to which I have referred, particularly the last, can only be described as inordinate and as no satisfactory explanation has been forthcoming from the plaintiffs for those delays, they must also be regarded as inexcusable. The case thus resolves down to the issue of the balance of justice.

36. I think the first point to note in that regard is that a significant part of the delay in this case appears to stem from the plaintiffs' efforts to try and progress the case against both defendants at the same time. This was the reason for their opposition to the company's application for a stay and the court appears to have agreed with this approach.

37. Mr. Curran complains that from his perspective nothing was done by the plaintiffs to bring the case forward over at least a four year period and to some extent, this gives the impression that he was in the dark as to what was occurring during that period. That may well have been true of Mr. Curran's solicitors but of course the delay has to be viewed in the context of Mr. Curran's influence over, and involvement in, the affairs of the company.

38. In June 2013 new solicitors came on record for the company and I assume they received their instructions from Mr. Curran. A year and a half later the same solicitors sought to come off record, again presumably because they were no longer in receipt of instructions from Mr. Curran. Thereafter the company failed to make annual returns, a matter as I have said for which Mr. Curran must bear some responsibility, resulting in its being struck off the register in August 2016, a fact of which the plaintiffs only became aware in April 2017. It must be said however that they took no steps to restore the company to the register before an application in that respect was made by a third party in October 2018 which was granted by the court.

39. The authorities clearly show that delays of the magnitude that have occurred here may be assumed of themselves to work prejudice on a defendant even in the absence of evidence of specific prejudice. Inevitably such delay has to impact to a greater or lesser degree on the ability of witnesses to accurately and reliably bring key events to mind.

40. In this regard however there is an important distinction to be drawn between cases which essentially revolve around the oral evidence of witnesses to the events in issue and those where documentary evidence reduces the significance of such oral evidence. In the former category, the court will more readily assume prejudice than in the latter.

41. In the present case, the only specific prejudice asserted by Mr. Curran is that his chances of recovering from the first defendant had been reduced by the plaintiffs' delays. I have to say that given Mr. Curran's involvement *qua* director of the company, I find this argument unimpressive. There is in any event no evidence before the court to suggest that even in the absence of delay by the plaintiffs, Mr. Curran's chances of obtaining an indemnity from the company would have been any better given that his own solicitors pointed out as far back as June 2013 that the company was insolvent.

42. The case made against Mr. Curran in the pleadings is relatively straightforward. It is said that he negligently certified that the house complied with planning permission and building regulations. It seems to me that whether that is so or not is probably largely a matter of record and may to a significant extent depend on the evidence of experts who have inspected the house and prepared reports of their finding. I do not think therefore that it can be categorised as a case where the oral evidence of the parties based purely on recollection will be pivotal.

43. In that respect, I think this case is to be distinguished from cases such as *Millerick* and *Gorman*. I accept that there will be a degree of prejudice suffered by Mr. Curran by reason of the passage of time and that such prejudice must be balanced against the loss of the plaintiffs' constitutional right of access to the court in a case which is clearly very serious for them. This is a right which cannot lightly be set aside.

44. Although as I have noted this case has parallels with *Farrell v. Arborlane*, there are some important points of distinction. In that case, it took the plaintiffs some twelve years to serve a statement of claim and the court noted that the case was unlikely to be tried until some eighteen years after the relevant events. Although the court identified the allegations of professional negligence hanging over the defendant as a source of prejudice, as here, there was the additional and important issue of the defendant's insurance cover being affected by the outstanding claim against him. Finally, the dismissal of the seventh defendant from those proceedings did not leave the plaintiff without any remedy.

45. All of these factors are to be distinguished from those arising in the present case. Although as I have said, prejudice from delay is to be assumed in favour of Mr. Curran, he has not identified any credible specific prejudice. Although Mr. Curran points particularly to a four year gap when nothing was happening from his perspective as the second defendant, it is clear that events were occurring during this period which were directly attributable to his influence over the first defendant which were a source of at least some of the plaintiffs' delay which, although I have found was not excusable, was to an extent understandable.

46. I must bear in mind that the dismissal of the claim against the second defendant will result in the plaintiffs being left without any remedy in respect of alleged defects in their family home so serious that they have been unable to live in it for many years even despite the works carried out by Premier Guarantee. I therefore conclude that the balance of justice just about favours the dismissal of this motion. The case must however now proceed with speed and I intend to ensure that this happens by bringing the matter immediately into case management so that it can be brought to trial at the earliest opportunity.