

## THE HIGH COURT

RECORD NO. 2014/1715P

BETWEEN/

TIMOTHY EMERY

Plaintiff

AND

DALY DERHAM DONNELLY SOLICITORS AND PEART &amp; CO SOLICITORS

Defendant

**JUDGMENT of Hanna J. delivered on the 12th day of December 2014**

By notice of motion the second named Defendant seeks an order pursuant to the inherent jurisdiction of the Court dismissing the Plaintiffs claim against the second named Defendant on the grounds that the claim is bound to fail by reason of the Statute of Limitations Act 1957 or an order directing a trial of a preliminary issue as to whether the Plaintiffs claim against the second named Defendant is statute barred and dismissing the Plaintiffs claim against the second named Defendant if the action is determined to be statute barred.

The Plaintiffs claim is for damages for negligence arising from the alleged negligence, and/or breach of contract on the part of the Defendants. The Plaintiff engaged the first named Defendant to institute proceedings in a tort action he wished to take. The first named Defendant retained the services of the second named Defendant to act as "Town Agents" for said action. The Plaintiff alleges that the Defendants failed to progress this case and thus obstructed his efforts to achieve justice.

**Background**

The Plaintiff, Mr Timothy Emery, is a retired businessman and full time carer from Fountainstown in Co. Cork. Previously Mr Emery operated a roofing business in Cork. He stored his equipment and materials for this business at a premises which he alleges was under the control of a limited liability company, namely Marina Estate Company Limited. In or about the year of 1986 he alleges that these premises were closed and secured by a parent company of Marina Estate Company Limited. He claims his equipment and materials were wrongfully locked inside the compound and he was unable to recover them.

The Plaintiff retained the first named Defendant, practicing solicitors, to institute proceedings on his behalf to recover damages for breach of contract, negligence and breach of duty against Marina Estate Company Limited and a number of related companies allegedly involved in the operation of the compound in which his chattels were secured. The first named Defendant in turn engaged the services of the second named Defendant, Peart & Co, also practicing solicitors, to act as their "Town Agents" in the case.

Proceedings were instituted against Marina Commercial Park and others by plenary summons dated 12th day of January 1994. Notice of trial was served on the 3rd day of November 1997. A notice of intention to proceed was served upon the Defendants on the 6th day of November 1998 and a new notice of trial was served on the 9th day of December 1998. A certificate of readiness was obtained from counsel in May 1999 which said certificate was lodged in the Central Office of the High Court Dublin on the 26th day of May 1999. In July 1999 the Proceedings issued on behalf of the Plaintiff were struck out by the High Court for non appearance. Thus ended that set of proceedings.

There then followed a number of years of protracted dispute between the Plaintiff, who now appears before me as a personal litigant, and the first named Defendant. It appears that, in addition to his complaints concerning that Defendant, the Plaintiff turned his attention to the second named Defendant as he learned more about that part's involvement as agent and whose alleged default increasingly became revealed to him as information, documentary and otherwise, came to his knowledge. What we do know for sure is that the Plaintiff instituted an earlier set of proceedings against the first named Defendant but not against the second named Defendant. This occurred in 2003. A Statement of Claim in those proceedings was delivered in October of that year. Mr. James Connolly S.C. on behalf of the second named Defendant and moving party in this application informed me that the claims enunciated in the 2003 proceedings as against the defendant therein named completely overlap those levelled against both Defendants in the present proceedings. Mr. Emery did not demur in any respect from this assertion. These proceedings are still in being.

In addition to the foregoing, the plaintiff invoked the Incorporated Law Society's complaints/disciplinary mechanism against his former solicitors, the first named Defendant. This was a protracted affair, ending in the Supreme Court and without apparent satisfaction to Mr. Emery as evidenced by his continuing litigation. Presumably the Plaintiffs complaints relevant to the second named Defendant were aired during the course of those proceedings but at no stage was that Defendant made a party them. The proceedings constituting the subject matter of this application, issued in April of this year, are the first such proceedings involving the second named Defendant in the plaintiff's suit.

The Plaintiff now seeks damages against both Defendants for their alleged negligence in failing to progress his original action. In this application, the second named Defendant applies for the claim against them to be struck out on the grounds that it is bound to fail by force of the provisions of the Statute of Limitations Act 1957. There had been an earlier application along these lines, but Ryan J. determined that a Defence pleading, *inter alia*, the said statute should be filed by the second named Defendant. This has been done and that brings us to this point in time.

I should point out at this juncture that no issue was taken by the applicant as to any want of form with regard to the applicant's pleadings. For the purposes of this application I am taking Mr. Emery's case "at its height" and assume that, insofar as it has any bearing on matters, he has at all material times and as far as he is concerned focussed his complaints on both Defendants. I note with sympathy that Mr. Emery has had health issues both personal and familial

As to the history of court proceedings, that speaks for itself.

## The Statute of Limitations

Section 11 of the Statute of Limitations Act, 1957 sets out the requisite time periods in which certain actions must be brought. The following are material to the present application:

*11.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued-*

*(a) actions founded on simple contract;*

*(2) (a) Subject to paragraphs (b) and (c) of this subsection, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.*

The inherent jurisdiction of the Court

The Court further possesses an inherent jurisdiction to dismiss claims in limine where it appears that they are frivolous or vexatious or bound to fail. A number of criteria must be met before this jurisdiction may be exercised. The first criterion is that the exercise must be used sparingly and only in clear cases. Secondly, it is to be adjudicated upon on the pleadings, and in doing that the Court is required to look at the material as pleaded, taking the plaintiff's case at its highest and giving the most beneficial interpretation of the facts as pleaded, allowing for a working assumption that these facts will all be established in the best possible light from the point of view of the plaintiff. Thirdly, the Court has to be satisfied that, on the pleadings, there are no means by which the pleadings could be rescued by their amendment.

The jurisprudence of the court in applications of this kind is based on general principles which are to be found in case law. The first of the cases to confirm this inherent jurisdiction is *Barry v. Buckley* [1981] IR 306, which involved a dispute about sale of land. The judgment of Costello J constitutes a clear statement of the relevant law here. Costello J. (as he then was) stated at page 308-

*"But, apart from order 19 [of the Rules of the Superior Courts], the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case... The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the Plaintiffs claim must fail.*

*This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the Plaintiffs case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a Defendant. "*

McCarthy J. in *Sun Fat Chan v. Osseous Ltd* [1992] 1 IR 425,428 remarked, in reference to the sparing nature by which the jurisdiction ought to be utilised, that-

*"The jurisdiction is different from that directly arising from Rules of the Superior Courts where a statement of claim discloses no cause of action ... Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought. "*

In *Ewing v. Ireland and the Attorney General* [2013] IESC 44 MacMenamin J. provided a helpful summation of the law in this area, stating-

*"As this appeal concerns issues which now frequently come before the courts, it may be helpful to make some more general observations as to the conduct of this and similar applications. Court time is now a scarce resource; the courts have a public duty to ensure that such time is used appropriately. As well as rights of access to the courts, both represented litigants and litigants-in-person have duties. There is no duty to allow the continuance of unstateable cases to full hearing. Pleadings must be focused on the real issues, as must written and oral submissions...*

*As well as the jurisdiction outlined which the Court obtains under the Rules of the Superior Courts, the Court also has an inherent power to strike out entire proceedings. In such an application, the Court considering the matter is not limited to a consideration of the pleadings but may be free to hear evidence on affidavit relating to issues in the case. This jurisdiction exists to ensure that an abuse of Court does not take place.*

*This more radical power should be used sparingly. A Court must take the Plaintiffs case at its highest, and assume that all the relevant matters which are pleaded by a Plaintiff will be established by him. A Court must also take into account that a situation may exist where a simple amendment of the pleadings could 'save ' the case.*

*In Riordan v Ireland (No. 5) [2001] 4 JR. 463, O'Caoimh J in the High Court considered Dykun v Odishaw (Unreported, Alberta Court of Queen's Bench, Judicial District of Edmonton, 3rd August, 2000), which in turn referred to the decision of the Ontario High Court in Re Lang Michener and Fabian (1987) 37 D.L.R. (4th) 685. He held that the following matters tended to show that a proceeding is vexatious:*

*(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;*

*(b) where it is obvious that an action that cannot succeed, or if the action would lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;*

*(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;*

*(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;*

(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.

### **Submissions of the plaintiff**

The Plaintiff, a litigant-in-person, alleges that the Defendants' actions in failing to progress his proceedings against Marina Estate Company Limited constituted a breach of contract and negligence and as a result caused him to suffer loss and damage. The Plaintiff contends that he made numerous requests to reinstate his proceedings over the course of his dealings with the Defendants. The Plaintiff also alleges that particular blame ought to be assigned to the second named Defendant in this regard, as the responsibility for progressing paperwork for the case had been delegated to this party by the first named Defendant.

The Plaintiff alleges that the second named Defendant misled the first named Defendant on several occasions regarding the progression of his case. The Plaintiff also alleges that a letter from the second named Defendant to the first named Defendant dated 22nd December 1998 acknowledges fault for failing to progress the case. The letter discusses the Plaintiff's case and refers to the delay experienced in setting down the case for hearing. The material extract from the document appears to be the final sentence, which states-

*"I am afraid the delay in setting is my own. I apologise for the delay involved. "*

The Plaintiff submits that only through concerted and sustained efforts was he able to retrieve the requisite information regarding the progression of his case from the Defendants. The Plaintiff alleges that it was common for the second named Defendant to prevaricate during this process.

The Plaintiff also cites the lengthy process of seeking recourse through the disciplinary procedures of the Law Society as being a contributing factor for the delay in bringing forward the present proceedings.

### **Submissions of the second defendant**

For the second named Defendant, Mr. James Connolly S.C., while emphasising his client's denial of any alleged negligence on its part, offers one central plank upon which rests the essence of his application. The Plaintiff's claim as against the first named Defendant is incontrovertibly statute-barred by virtue of section 11 of the Statute of Limitations Act, 1957.

Counsel refers to the fact that in the General Endorsement of Claim of the Plenary Summons, the Plaintiff sets out clearly the years in which it was alleged there was involvement on the part of the second named Defendant being the years 1994 to 1999. Counsel submits that if this was accepted to be the case then clearly there was a passage of fourteen years before the proceedings herein were instituted. Nothing had been pleaded on the motion which would indicate anything that precluded Mr Emery from having moved against the second named Defendant.

In light of this, counsel submits that the court exercise its jurisdiction to dismiss the claim in limine by reason of the fact that it is bound to fail. This stems from the inability of the claim to surmount the fact that it is statute barred. Counsel submits that the Court is in as informed a position to rule on this matter as if the case were being fully heard. There is no extra information which would be available to a court in full hearing.

Counsel accepts that it is a jurisdiction that is sparingly exercised, but if it is established that the criteria referred to herein has been met, then the Court, in the interest of the administration of justice, must exercise this jurisdiction. Counsel submits that the three criteria for the courts to exercise its inherent jurisdiction in this regard have been met.

In respect of these criteria, counsel cited a number of examples of the operation of these criteria in the case law.

In *Buckley v. Barry*, Costello J. stated that -

*If, having considered the documents, the Court is satisfied that the Plaintiffs case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a Defendant. "*

Counsel submitted that his clients were being exposed to further costs and further trouble unnecessarily in having to participate in proceedings which are bound to fail. Counsel submitted that *Buckley* does not require that the claim is manifestly causing irrevocable damage to a defendant as part of a two part test. Rather, this is something the court may take into account when looking at the situation in the round.

Counsel submitted that it is obvious that the present claim cannot succeed in line with head '(b)' of the test to discern whether a claim is vexatious as set down in *Ewing*.

Counsel cites the comments of Feeny J. in *Sugg v. Legal Aid Board* [2009] IEHC 348, in relation to the court's inherent jurisdiction, which stated that it *"may be used to dismiss an action on the basis that on admitted facts, it cannot succeed."* Counsel submits that, for arguments sake, even if the disputed facts were indeed accepted and established by the Plaintiff in a full action, it does not add up to a case that can succeed. This is because it cannot overcome the statute of limitations.

In relation to the letter of 22nd December 1998 which is purported to acknowledge fault, Counsel submits that this merely refers to the delay in setting down the case which is a separate matter. Counsel submits that the Plaintiff's submissions in relation to his delay in instituting proceedings against the second named Defendant provide an explanation but not an excuse.

Counsel submits that there is no justice to be served by having the case pleaded out, fully heard and then fully determined. Based on the admitted facts, the claim is barred by statute and therefore should be struck out.

### **Decision**

I am persuaded by the arguments of counsel for the second named defendant. The Plaintiff has endeavoured to pursue legal recourse through a number of avenues. Following his original action being struck out by the High Court, the Plaintiff made a complaint to the Law Society. This was solely in respect of the first named Defendant. His complaint was referred by the Law Society to the Solicitor's Disciplinary Tribunal, who appeared to have made a decision favourable to the Plaintiff. This decision was subsequently upheld on

appeal to the High Court and Supreme Court. These decisions have no bearing on the present proceedings

I have carefully considered the submissions of the parties including written submissions offered by the Plaintiff and handed in to me (by consent) on Tuesday 9th inst. I am satisfied that the involvement on the part of the second named Defendant did not extend beyond 1999. This has been accepted to be the case by both parties. There was, thus, a passage of fourteen years before the proceedings herein were instituted. This plainly exceeds the six year limitation period as set down by the Statute of Limitations Act, 1957. There has been no evidence submitted to suggest the existence of some fraud to reset the time period and no alternate mechanism exists to extend the time period as far as his case against the second named Defendant goes.

Whatever about the merits of Mr Emery's case against the first named Defendant in these or other proceedings, and which have not been at all contested here, this case is statute barred against the second named Defendant, and there are no means by which that could change on the amendment of the pleadings.

The case against the second named Defendant in these proceedings must fail and is therefore dismissed.