Neutral Citation: [2014] IEHC 542

THE HIGH COURT

[2008 No. 1343P]

BETWEEN

PAUL NOLAN

PLAINTIFF

AND

CHADWICKS LIMITED

DEFENDANT

Judgment of Mr. Justice Keane delivered on the 14th November 2014

Introduction
1. This is an application to dismiss proceedings for want of prosecution on grounds of inordinate and inexcusable delay, either in exercise of the inherent jurisdiction of the Court or pursuant to the terms of Order 122, rule 11 of the Rules of the Superior Courts. It is brought against the plaintiff on behalf of the defendant, by motion issued on the 12th June 2014. The motion was heard in the common law motion list on the 21st July 2014.

Nature of the claim
2. The nature of the underlying proceedings in this case cannot be readily ascertained from the pleadings, which have so far progressed no further that the issue and service of a plenary summons in which the plaintiff claims damages for negligence and breach of contract on the part of the defendant.

3. However, from the affidavits exchanged between the parties in the context of the present motion and, more particularly, from the correspondence exhibited thereto, the following general picture emerges concerning the nature of the dispute between them. It appears to be common case that, in or about 2002, the plaintiff who was in the process of building his own house, purchased a consignment of bricks from the defendant, a provider of building materials. In 2004, the plaintiff's solicitors wrote to the defendant alleging that those bricks had been used in the construction of the plaintiffs house but that at least some of them had since been found to be defective. It would appear that an identified company, based in the UK, is the manufacturer of the bricks concerned.

History of the proceedings
4. A plenary summons issued on the 19th February 2008, although it was not served until the 12th February 2009. A memorandum of appearance was entered on behalf of the defendant on the 21st April 2009. No statement of claim has yet been delivered. Indeed, nothing further of any significance occurred until, on the 4th of April 2014, the plaintiffs solicitors wrote to the defendant's solicitors indicating their intention to apply to have the proceedings remitted to the Circuit Court. The defendant's solicitors replied to this letter on the 29th of April 2014 indicating that they would not consent to the remittal of the matter to the Circuit Court and stating that they intended to issue a motion seeking to have the matter dismissed for want of prosecution.

5. Accordingly, the period of delay in this case is that between the 19th February 2008, when the plenary summons issued, and the 12th June 2014, the date of the present motion, that is, one of over six years.

6. Subsequent to the issue of the present motion on the 12th June 2014, but prior to its return date on the 21st July 2014, the plaintiff issued a motion on the 17th July 2014, seeking an order extending the time for the delivery of a statement of claim and an order remitting the proceedings to the Circuit Court. While the plaintiff submits that the two motions should be considered in tandem, logic dictates that it is only if and when the Court concludes that the balance of justice does not require the dismissal of the proceedings on grounds of inordinate and inexcusable delay that the issues of any necessary extension of time for the delivery of a statement of claim and the possible remittal of the proceedings to the Circuit Court can properly arise.

7. A draft of the statement of claim that the plaintiff now wishes to deliver is exhibited to the affidavit that grounds the plaintiff's motion just described.

Governing principles
8. The parties accept that the central test governing the determination of the present application is that summarised by Clarke J. in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148; that is, that the court should, first, ascertain whether the delay in question is inordinate and inexcusable; and, second, if satisfied that it is, the court must then decide where the balance of justice lies.

The first limb of the test
9. The parties agree that the delay in prosecuting these proceedings has been inordinate. They have joined issue, however, as to whether the delay is excusable.

10. In an affidavit sworn on the 21st July 2014, Eric Furlong, the plaintiff's solicitor, deposes to certain matters that the plaintiff submits excuse the delay in the prosecution of the proceedings.

11. The first excuse proffered is that the plaintiff experienced unspecified difficulties in ascertaining whether the defects in the bricks at issue were limited to discolouration or extended to affect their durability and safety and, by extension, the structural integrity of the property. Mr Furlong avers that it "it has required numerous updated reports to establish the extent of the damage and the consequent remedial works required." While Mr Furlong avers that the remedial works advised have ranged from the entire demolition and reconstruction of the plaintiffs house to the extraction and replacement of the defective bricks within the existing brickwork, only a single expert report is exhibited in that regard. It is a report of a quantity surveyor, dated the 19th March 2013, and estimates the cost of replacing the defective bricks at €12,035.24.

12. As an explanation for the inordinate delay in delivering a statement of claim in this case, I am entirely unpersuaded by that

excuse. Apart from the bald assertion that numerous updated reports were required to establish the extent of the damage caused to the plaintiffs house by the allegedly defective bricks, no evidence is presented as to why that should have been so.

13. In *Stephens v. Paul Flynn Limited* [2005] IEHC 148, Clarke J. was presented with a similar excuse for the plaintiffs delay in preparing a statement of claim *i.e*. that difficulty had been encountered in the preparation of expert reports that were necessary to enable the proper particularisation of the plaintiffs claim as required by the applicable rule of court. Clarke J. was unable to accept that the explanation proffered rendered the delay concerned excusable for four reasons, each of which is equally applicable in this case.

14. First, the plaintiff in this case was required to move with particular expeditiousness given the lengthy, if not extraordinary, delay in the commencement of proceedings, yet did no do so.

15. Second, the plaintiff has failed to provide any realistic explanation for his assertion that it took as long as it did - *i.e*. until the 19th March 2013 - to produce the relevant expert report. There is nothing in the body of that report to explain why the quantity surveyor concerned was unable to provide the relevant estimate sooner. Insofar as it is averred by the plaintiffs solicitor that the remedial works advised have ranged from the entire demolition and reconstruction of the plaintiff's house to the extraction and replacement of the defective bricks within the existing brickwork, there is no evidence before the Court concerning how or when this purported conflict arose or when and in what circumstances it was resolved in favour of the latter approach. Nor is there any evidence before the Court to explain why the plaintiff's statement of claim was not delivered immediately after the receipt of the quantity surveyor's report now relied upon.

16. On a separate but related point, no attempt has been made to explain why it was necessary to refrain entirely from delivering a statement of claim until the relevant special damage (comprising the cost of the necessary remedial works) could be particularised as a specified sum. While the proper particularisation of a claim is generally to be commended, in the hierarchy of procedural rules it must surely fall below the requirement to comply with the applicable time limits for the delivery of any necessary pleading and the requirement to avoid inordinate delay in prosecuting a claim, save in exceptional circumstances, none of which are evident here.

17. Third, the decision of the Supreme Court in *Gilroy v. Flynn* (Unreported, Hardiman J., 3rd December 2004) strongly suggests that, in particular, delay attributable to a professional advisor may be less excusable than might once have been the case, given the developing jurisprudence of the European Court of Human Rights concerning the requirements of Article 6§1 of the European Convention on Human Rights and the recognition of the requirements of that Convention under the European Convention on Human Rights Act 2003.

18. Fourth, there is now a need, arising by virtue of the developments identified by the Supreme Court in *Gilroy*, *supra*, to exercise a significant degree of additional scrutiny in assessing excuses put forward to explain or justify delay in the prosecution of civil proceedings.

19. For those reasons, I cannot accept the first excuse proffered on behalf of the plaintiff for the inordinate delay that has occurred.

20. A second excuse relied upon by the plaintiff is that, at some unspecified point in time, the plaintiff (presumably, inadvertently) transferred the lands upon which the house built using the bricks is situated to his son in law, as part of the intended transfer of a larger plot of land. The plaintiffs solicitor avers that the process of correctly registering the property has contributed to the delay in the prosecution of these proceedings.

21. I am still less persuaded by this second explanation than I was by the first one. It is difficult to see why the rectification of any such error should have necessitated a delay in the prosecution of the present action. No evidence is provided concerning when the error occurred or when it was rectified. It is therefore impossible to be satisfied that the plaintiff has acted with the necessary expedition in that regard, even if it is accepted that the proceedings could not be progressed until the error was corrected - another proposition that is entirely unsupported by evidence or argument.

22. I therefore conclude that the period of delay on the part of the plaintiff in prosecuting these proceedings is both inordinate and inexcusable.

The second limb of the test

23. Insofar as I have concluded that the period of delay between the 19th February 2008, the date of issue of the plenary summons, and the 12th June 2014, the date of the present motion, was both inordinate and inexcusable, it is necessary to consider whether, on the facts presented, the balance of justice lies in favour of, or against, permitting the action to continue.

24. In submitting that the balance of justice lies in favour of the dismissal of the action, the defendant relies upon both specific and general prejudice.

25. The single point of specific prejudice relied upon by the defendant is set out in the affidavit sworn on the 12th June 2014 by Pat Walsh, the defendant's company secretary. Mr Walsh avers that the allegedly defective bricks that the defendant sold to the plaintiff were manufactured by another entity, a UK based company, from which the defendant would wish to claim an indemnity or contribution in the event that there is any merit in the plaintiffs claim concerning those bricks. Mr Walsh then avers to legal advice he has received (evidently to the effect that the plaintiffs claim should be dismissed on grounds of general prejudice caused by the inordinate and inexcusable delay in prosecuting it) before continuing:

> "In addition, the Court should take into account the fact that the defendant will suffer prejudice if the claim is allowed to proceed as any claim against [the manufacturer] is now statute barred on any interpretation of the law."

26. I cannot accept that argument. Section 31 of the Civil Liability Act 1961 provides:

> "An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, *or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater*." (emphasis supplied)

27. In this case, the liability of the defendant has not yet been ascertained at trial, nor has the defendant paid damages to the plaintiff as part of any compromise. In those circumstances, it seems to me that the defendant is not statute barred in respect of any claim it may wish to bring against a contributor. Accordingly, I conclude that the defendant has failed to make out any specific prejudice to the conduct of his defence resulting from the plaintiff's inordinate and inexcusable delay in prosecuting his claim.

28. However, I should add, for the sake of completeness, that I reject also the argument put forward on behalf of the plaintiff that, in any event, the defendant could, and should, have moved to serve a third party notice against the intended contributor, even prior to the delivery by the plaintiff of his statement of claim against the defendant. It is noteworthy in this respect that Order 16, rule 1(3) of the Rules of the Superior Courts, which applies to all applications to join third parties, stipulates that, unless ordered otherwise by the court, an application for leave to issue a third party notice must be made within 28 days from the time limited for delivering the defence. It is very nearly an affront to common sense to suggest that a defendant who has not received a statement of claim from a plaintiff should, in anticipation of the plaintiff's claim and of the appropriate defence to it, proceed to seek leave to join a third party in order to claim a contribution or indemnity should a statement of claim ever eventuate and the matter then proceed to trial.

29. A further argument arose between the parties on this point of specific prejudice, in that the defendant sought to place reliance on a letter written to its solicitors by the plaintiff's solicitors on the lih February 2009, referring to the service of the plenary summons in the case effected on the same date and indicating their intention to "immediately thereafter make an application to the High Court for an order joining [the manufacturer] as a co-defendant." The plaintiff objects to any reliance being placed upon that correspondence in that it is headed "without prejudice", in which connection it is appropriate to note that the letter does also contain certain settlement proposals as an alternative to proceeding further with the action. The plaintiff contends that the ambit of without prejudice privilege is broad enough to preclude any reliance on any part of any correspondence so headed. The defendant submits that the privilege is narrower and applies only to admissions of liability made in the course of settlement negotiations, and not to a communication relied on solely to establish that it was made, rather than to establish the truth of its contents.

30. As became clear in the course of argument, there are conflicting authorities on this point, although I would observe in passing that the decision of the Supreme Court in *Ryan v. Connolly* [2001] 2 I.L.R.M. 174 provides compelling support for the proposition that the public interest underpinning the privilege should and must give way to the interest of justice in ensuring that a party is prevented from obtaining an order inconsistent with an express and unequivocal assurance given by that party to the other side, whether or not the correspondence in which that assurance was provided had the "without prejudice" label attached to it.

31. Notwithstanding the foregoing observation, I find it unnecessary to determine the issue, as I do not see how its resolution either way is relevant to any of the questions that I have to address. The specific prejudice contended for by the defendant is that it cannot now pursue a claim for contribution or indemnity. Whether or not the defendant received an assurance from the plaintiff that the proposed contributor would be joined as a co-defendant in the proceedings on the plaintiff's application is, in my view, *nihil ad rem*. The defendant is not prejudiced because it retains its entitlement to join the proposed contributor as a third party.

32. I turn now to consider the issue of general prejudice. In support of this aspect of his submission, Counsel for the defendant relies on the statement of O'Flaherty J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 (at p. 521 of the report) that "once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably."

33. I accept that some prejudice is likely to follow almost inexorably from any significant delay in proceedings. It is certainly a matter that I am required to take into account. However, each case must turn on its own particular facts. In this case, there are a number of other relevant factors.

34. In this context, the defendant places particular reliance on the decision of Clarke J. in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148 (28th April2005). There are certain strong similarities between the facts of that case and those of the present one. In particular, in *Stephens* Clarke J. found that there is a heavy onus upon a plaintiff to proceed with extra diligence in progressing proceedings where a significant period of delay has been allowed to occur prior to the institution of proceedings. Clarke J. further found that a delay that goes beyond the minimum which may be considered inordinate can be an additional factor to be weighed in balancing the interests of justice. I accept that a delay of that order arises on the facts of the present case.

35. However, there are also striking differences between the facts of this case and those of *Stephens*. In this case, the pre-action *inter partes* correspondence, admitted in evidence without objection, establishes that the parties and, indeed, the UK manufacturer of the bricks have been sharing and discussing test reports on the bricks at issue since 2004. On behalf of the plaintiff, Mr Furlong avers that the bricks remain available for inspection (or, presumably, for any further testing that may be required). On the evidence so far available, there is no suggestion that these proceedings will turn on the resolution of issues of the credibility of witnesses who are being asked to recollect matters that occurred long ago, as Clarke J. found to be a point of significant prejudice in *Stephens*, significantly contributing to the court's finding that there was a "moderate degree" of general prejudice attributable to the inordinate and inexcusable delay in that case.

36. In my view this case is more likely to turn on the assessment of whatever expert evidence there may be concerning whether the bricks concerned are defective. In the case of *Manning v. National House Building Guarantee Company Ltd & Ors* [2011] IEHC 98, Laffoy J. was not satisfied that an extremely lengthy (or inordinate) period of delay would cause serious prejudice in respect of a claim that counsel for the plaintiff submitted was less "a recollection case" than an "expert evidence" case and where either the relevant test results were still available or the tests concerned were capable of being easily replicated. I take the same view in this case for the same reason in respect of the shorter (though still substantial) period of inordinate and inexcusable delay at issue here.

37. In the circumstances, while it is obviously appropriate to acknowledge that some very limited prejudice might follow inexorably from the relevant period of inordinate and inexcusable delay in the prosecution of the plaintiffs claim, it is not possible to quantify the level of that prejudice as significant, or even as moderate (as Clarke J. assessed the level of prejudice that arose in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148 (28th April 2005).

Conclusion

38. For the reasons set out above, I am satisfied that the weight to be attributed to the period of inordinate and inexcusable delay in the prosecution of the plaintiffs claim against the defendant that I have found to have occurred, considered in light of the very limited degree of general prejudice on the part of the defendant that I have identified and the absence of any specific prejudice as matters stand, is such that the balance of justice favours permitting the proceedings to continue. I will therefore refuse the application for an order dismissing the proceedings at this time.

39. If appropriate and necessary, I will hear the parties on the plaintiff's motion for an order extending the time for the delivery of a statement of claim and for an order remitting the proceedings to the Circuit Court.