Neutral Citation Number: [2009] IEHC 131

THE HIGH COURT

2006 3113 P

BETWEEN

JOHN KILLEEN

PLAINTIFF

AND

PADRAIG THORNTON WASTE DISPOSAL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 18th day of March, 2009

Notice of Motion

1. Pursuant to a Notice of Motion dated the 27th June, 2008, the defendant company, having secured permission to amend its Defence in this regard, sought an order, pursuant to the inherent jurisdiction of this Court, "dismissing the plaintiff's claim… on the basis that the defendant is prejudiced and/or unable to properly and/or effectively defend the proceedings due to the death of Mr. Padraig Thornton (deceased)". Having heard this Motion on the 2nd February, 2009, I reserved judgment on this relief because of the rather unusual basis upon which the motion was moved. I now give reasons in respect thereof.

Background

2. In early 2001, the defendant company was anxious to purchase certain lands in South Meath and North Kildare for the purposes of developing a motor recycling facility and landfill thereon. In the belief that the plaintiff could assist in this intended acquisition, the company acting at all times through its director, Mr. Padraig Thornton entered into an agreement with the plaintiff in or about that time. This agreement was entirely oral and was never either in full or in part committed to or recorded in writing. That an "oral agreement" existed between the parties is not in dispute but what is, are the terms thereof.

3. Mr. Killeen alleges that the agreement, concluded between himself and Mr. Padraig Thornton, who was vested with both apparent and actual authority from the defendant company, was as follows:-

> (i) That the company would pay the plaintiff 50% of any savings which it made on acquiring the targeted lands below a price of IR£20,000 *per* acre,
>
> (ii) That it would pay the plaintiff the sum of IR£100,000 plus VAT if one of the landowners, a Mr. Fergal Farrelly entered into a contract for the sale of his lands, and thirdly
>
> (iii) That if another landowner, a Mrs. Delia Duggan, who had earlier withdrawn from her declared intention of entering into a contract, did in fact subsequently do so, then the plaintiff would be remunerated for his services although at the time no specified amount was agreed.

4. In the events which happened, all three aspects of this alleged agreement in fact occurred and consequently, the plaintiff now seeks in these proceedings payment by way of damages for breach of contract and/or misrepresentation and/or on a *quantum meruit* basis.

5. The defendant's position, as outlined in its defence is that the only agreement which existed was one for the payment of a sum of €126,973.81 plus V.A.T.; this in respect of the plaintiff's facilitating efforts as part of the acquisition process. These services, which were acknowledged to have been performed, were paid for in full by the company on receipt of an invoice dated 14th February, 2002. Save for this position all other aspects of the plaintiff's claim were denied.

6. As appears clearly from the documentation in this case, including the affidavit evidence, it is common case that whatever agreement existed between the plaintiff and the defendant was one made solely between Mr. Killeen and Mr. Padraig Thornton and was entirely verbal. Neither it, nor any part of it was ever noted or attested. The agreement, it was therefore said, was strictly concluded on a one to one basis and was, for its entirety, processed orally.

7. Because of the personalised manner in which the agreement was concluded, and by reason of the unfortunate death of Mr. Padraig Thornton on the 29th March, 2005, it is now claimed on behalf of the company that since it has been deprived of the evidence of an essential, indeed, its only witness to this transaction, it is prejudiced and thus is unable to properly and/or effectively defend these proceedings. That being the situation, it now seeks to have the entire case dismissed. On the factual side the defendant does not allege delay or assert any additional matter, save to point out that the plaintiff must have known for some considerable time of the impending death of Mr. Thornton. In response, the plaintiff claims that he held off with the instant proceedings for that very reason, namely Mr. Thornton's decaying health, and that at no stage did he seek to gain a tactical advantage in the circumstances which existed.

8. Without passing any comment whatsoever on the merits of this case or on what other legal or evidential defences

might be available, I propose to assume that, for the purposes of this motion, Mr. Thornton was the most influential witness which the defendant company had at its disposal, and that in his absence no comparable or alternative source of evidence is now available to it.

The Law

9. Counsel on behalf of the defendant referred to many cases, and opened some, in which the court was called upon to exercise its inherent jurisdiction or apply O. 19, r. 28 of the Rules of the Superior Courts, so as to terminate proceedings on the ground of abuse or delay. There is no doubt but that the general principles of law applicable to such circumstances are well established with the only issue, in many of the cases, being how such principles are applied to the individual facts of each case. Recent cases such as *Gilroy v. Flynn* [2005] ILRM 290 and *Desmond v. MGN Ltd*. [2008] IESC 56, where some differences may be detected as to the impact of the European Convention of Human Rights Act 2003, on those principles, are not relevant to the instant case. Accordingly it is unnecessary to quote at any length from authorities, such as *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 or *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. A short passage however, from the judgment of Keane C.J., in *Ewins v. Independent Newspapers (Ireland) Limited* [2003] 1 I.R. 583 at 586 – 587 shows what the general position is. The learned Chief Justice said:-

> *"I am satisfied that the correct approach on an application of this nature as has been frequently made clear by many authorities, to all of which it is not necessary to refer, is for the court in the first instance to consider whether the actual delay in prosecuting the claim is inordinate. If it is not, then that is of course an end of the application. If it is, the court then has to go on to consider whether although inordinate, it is excusable and again if it is excusable that will be an end of the application. Then as has been again frequently said, even at that stage where the delay is both inordinate and inexcusable, the court must go on to consider whether the justice of the case, on balance, requires that the proceedings be either struck out or left to take their course. Undoubtedly, one of the matters to which the court has to have regard in deciding that third issue, is whether there is any prejudice resulting to the defendant as a result of the delay. That only comes into the equation of course if one has already come to the conclusion that the delay is both inordinate and inexcusable. If it is inordinate and inexcusable, then the court must consider all the circumstances including, as in this case, the non-availability of a particular witness…"*

10. It is infinitely clear that this line of authority is based on a core allegation which must be established before the third tier of the criteria is even contemplated. That is "delay". Without such a finding, it is entirely unnecessary to consider whether any passage of time is inordinate or inexcusable much less where the balance of justice lies. A qualifying pre-condition to these principles, is therefore the establishment by the moving party of a delay which is recognisable in law as at least potentially leading to the other findings contemplated by the aforesaid test. In this case there is no such allegation made and therefore in my view this line of authority is simply on principle not available to the defendant. It cannot assist it with regard to the relief sought.

11. Notwithstanding this clear cut position the defendant company still sought to rely on *Hughes v. Moy Contractors Limited* [1999] IEHC 244, in particular on a passage from the last page of that judgment where Carroll J. said:-

> *"While I take the point that other witnesses are available, it seems to me that Mr. Ledwidge was absolutely essential to the case being made by the Plaintiff. In being deprived of Mr. Ledwidge's evidence I am satisfied that both the second and third Defendants are gravely prejudiced and that there is a substantial risk that it would not be possible to have a fair trial in the absence of his evidence."*

It is therefore claimed that this passage is supportive of the defendant's motion.

12. In my view this cannot be so, as a reading of the entire judgment makes it clear that the facts of the case fell within, and its disposal was determined by, the ordinary principles above mentioned. In *Hughes*, the Plenary Summons issued in July, 1992, and was served on the defendants between March and April, 1993, a Notice of Intention to Proceed issued in March, 1995 and a second in September, 1997 with the Statement of Claim being delivered only 9th February, 1998. Notices for and Replies to Particulars were exchanged between the parties with the Motions, seeking to dismiss for want of prosecution on the grounds "of inordinate and inexcusable delay" being issued in March and April, 1999. At p. 6 of the judgment the learned judge specifically recites *Primor Plc v. Stokes Kennedy*, [1996] 2 I.R. 457 and having concluded that the delay was inordinate and inexcusable went on to consider the final question; namely, where the balance of justice lay. It was in that context that the above recited passage appears in her judgment. In these circumstances that case therefore clearly falls within the parameters of the general principles.

13. The proposition which is really being advanced is that, without the occurrence of some preceding event or circumstances, which is attributable to a party, and which is capable of being legally condemned, another party can have the proceedings against him dismissed, solely on the basis that some evidential material, either in person, written or object form, once available is now no longer: as a result that party's prospects have been to a significant or material extent diminished: and so, through some process of equality of justice the proceedings should be terminated. Or viewing it from the other perspective, can a party's right to litigate in such circumstances be ended?

14. Under Article 40.3 of the Constitution, a party has right of access to the courts, which phrase, before *Tuohy v. Courtney* [1994] 3 I.R. 1, was assigned to the same parameters as the right to litigate. See also *the State (Quinn) v. Ryan* [1965] I.R. 70. In Tuohy, where the constitutionality of s. 11 of the Statute of Limitations Act 1957, was in issue, a distinction was made between both, with the right to litigate being described as *"the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law"* (p. 45). That right, although subject to all these exceptions and restrictions (including the courts right to dismiss for abuse of process) is self evidently an essential right within our constitutional framework.

15. Supporting the value of this right is the necessary ancillary guarantee of fair procedures. In *Re Haughey* [1971] I.R. 217 at 264 it was put thus:

> *"Article 40, s. 3, of the Constitution is a guarantee to the citizen of basic fairness of procedures … in proceedings before any tribunal where a part to these proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may effect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights".*

Although said in the context of tribunals this passage from the judgment of O'Dhalaigh C.J. also clearly applies to courts established under the Constitution.

16. Either as part of, or as another supporting feature, is the concept of an equality between the parties. Hardiman J. quoted his judgment in *O'Callaghan v. Mahon* [2006] 2 I.R. 32 in *J. F. v. D.P.P.* [2005] 2 I.R. 174 at 182, where he had said:

> *"A major issue in civil and criminal procedural law is the extent of which either side must make disclosure to the other. This has led to the development of an impressive body of jurisprudence both in the United Kingdom and in Strasbourg. The latter has significantly influenced the former and will no doubt influence our jurisprudence too, in particular through the concept of 'égalité des armes', which might be regarded as the opposite of that state of imbalance and disadvantage described by Ó Dálaigh C.J. as clocha ceangailte agus madraí scaoilte."*

Following this quotation he continued:_

> *"The point here is that égalité des armes is not a new concept but rather a new and striking expression of a value which has long been routed in Irish procedural law. In Steel and Morris v. United Kingdom (Application 68146/01) (Unreported, European Court of Human Rights, 15th February, 2005) the European Courts of Human Rights said:-*
>
> *'50. The adversial system… is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality…*
>
> *59. The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial (see Airey v. Ireland [1980] EHRR 305). It is central to the concept of fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.'"*

17. This right of access and that of fair procedures, to include this principle of opportunity and equality of arms, have from time to time been built upon to argue that in some particular circumstances the court should dismiss an action on the grounds of delay or on the other recognised grounds which loosely can be described as those constituting an "abuse of process". That a court has an inherent jurisdiction to dismiss a claim in the interest of justice cannot be in doubt. This has been said in several cases such as *O'Domhnaill v. Merrick* [1984] I.R. 151, *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *Barry v. Buckley* [1981] 1 I.R. 306 at 308 but always within context: delay, no cause of action, vexatious, bound to fail, *res judicata*, the rule in *Henderson v. Henderson* (1843) 3 Hare 100 etc. So always within rules, whether substantive or procedural, and whether designed to control the process, avoid oppression or regulate rights.

18. I have not however been able to unearth any rule or law, statute or judgment made, which, without more, would enable the non-moving party to erase pending litigation because evidence once available is no more. As with the cases referred to at para. 9 *et seq.* above, context is everything and in the instant case the tragic context is the unpredictable hazards of life. The death of Mr. Thornton can best, indeed only, be described as "pure misfortune". Whilst the scales of justice are one thing, the mischance and tragedy of death is another. Therefore, where a statable cause of action is brought within time and where the plaintiff's action and conduct are unaffected by any act or omission recognisable in law as giving rights with legal consequences, I cannot see how life's chance can prevent a party from pursuing his litigation. In truth Mr. Thornton's death has no relationship with any cognisable event in law.

If there should be an exception to this, it seems to me that such circumstances must truly be extraordinary before warranting such dismissal.

19. As is clear, this application deals with the unavailability, by reason of death, of an important witness. Even, however, if Mr. Thornton was a party, instead of being a witness, the relief sought would not be granted. Order 17, rule 1 of the Rules of the Superior Courts state:-

> *"A cause or matter shall not become abated by reason of the death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgement; but judgement may in such case be entered, notwithstanding the death."*

20. O'Floinn notes in *Practice and Procedure in the Superior Courts* (2nd Ed.) at p. 185 that:

> *"If the event terminates the cause of action, the proceedings are abated. However, inter alia, the terms of Part II of the Civil Liability Act 1961 provide that, on the death of any person, all causes of action vested in him or subsisting against him will survive for the benefit of the estate or against it, as the case may be, subject to a number of exceptions: ss. 6 – 10. Thus, an action commenced by an employee is not automatically abated by the death of his employer: Hutton v. Phillippi [1982] ILRM 578. See also Moynihan v. Greensmyth [1977] IR 55."*

21. Section 8(1) of the Civil Liability Act 1961, states:-

> *"On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate."*

The accepted causes of action are found in s. 6 and are:-

> *"(a) a cause of action for breach of promise to marry or for defamation or for seduction or for inducing one spouse to leave or remain apart from the other or for criminal conversation, or*
>
> *(b) any claim for compensation under the Workman's Compensation Act, 1934."*

22. Thus, save in very limited circumstances, where there is in existence a cause of action, it is clear that a plaintiff may proceed despite the death of the defendant himself. Even where an action is not in being, the death of a potential party or of a valuable witness, even the only witness, will not prevent the issue of proceedings. That this is so can be seen from road traffic accidents (and other forms of proceedings, e.g. employer's liability claims) where either one or other of those involved in the collision may be killed, but yet even if there were no other eye- witnesses to the accident, both parties' estates can sue. Indeed this point has equal application, if, short of death, a witness is not available, for whatever reason; such as illness, memory loss, immigration, unknown whereabouts etc. That is not to say that any such action will be successful. The moving party would still have to prove on the balance of probability negligence, breach of duty, causation and damage. There is, therefore, in my view, nothing in Irish law which would prevent a plaintiff from bringing a cause of action within time against the estate of a deceased person.

It is therefore clear that even where the deceased person was a party to the action, that fact and no more does not, subject to statutory provisions, prevent an existing cause of action from continuing or the institution of new proceedings.

23. The situation in criminal law may not be quite the same. Under Article 38.1 of the Constitution, an accused person must be tried in due course of law. In several cases touching upon this Article, such persons have sought to prohibit the continuation of their trials on the basis of prejudice. One form of such prejudice, which has agitated the courts, is delay and its consequences. For example, an important witness may have died, or is untraceable or suffers from memory loss or, by reason of physical or mental health or otherwise, is unavailable. What thus is the position of the accused person?

24. The answer to that question is not called for in the present motion as the underlying proceedings are purely civil in nature. It is interesting to note, however, what the Supreme Court in *PW v. Director of Prosecutions* (Unreported, Supreme Court, 24th June, 1998) said on this point. Lynch J. stated that if the death of a witness could result in the prohibition of a criminal prosecution *"the same would seem to apply in the case of the death or disappearance of a witness whom the defence wish to call or cross examine, no matter how promptly the case might have come to trial. This cannot be and is not the law."* (pp. 6-7) In other words in the context of the case, without some culpable delay the trial would proceed. In subsequent decisions that court has again engaged with this topic and has queried the logic of such an approach. If there was a real and substantial risk of an unfair trial then why should the trial not be prohibited, even without an attendant finding of delay? The jurisprudence in this area therefore remains open to further development. For the present it is sufficient to note the distinction between the principles as they apply in civil litigation, and in criminal proceedings, where of course the death of an accused ends the prosecution.

Miscellaneous Points:

25. There is no suggestion in this case that the plaintiff deliberately withheld the institution of proceedings so as to gain an advantage from the death of Mr. Thornton, and therefore it is not necessary to consider the legal consequences if he had. However, it must be doubted that even if he had, such fact would by itself be sufficient to enable a like application as the present to succeed.

26. There are two further matters that might quickly be dealt with. Firstly, the Plenary Summons in this case issued on 10th July, 2006, whereas the Notice of Motion was not issued for a further period of two years. This, though not argued, could in itself create a serious difficulty for the success of the motion. Secondly, Mr. Thornton's date of death was 29th March, 2005, and thus preceded the institution of these proceedings by almost 18 months.

27. For these reasons I will dismiss the application.