Neutral Citation Number: [2011] IEHC 293

THE HIGH COURT

2001 15031 P

BETWEEN:

ERNEST FAHY AND LIAM FAHY

PLAINTIFFS

AND

THOMAS SCANLON AND AIDAN MCGUINNESS

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 14th day of July 2011:

By Notice of Motion issued on the 28th October 2010 the defendants seek an order striking out the within proceedings, which were commenced by Plenary summons on the 9th October 2001, on the ground that the plaintiffs have been guilty of inordinate and inexcusable delay in the prosecution of same, and/or because the proceedings fail to disclose a reasonable cause of action.

The proceedings arise from the fact that by Agreement in writing executed by the parties on the 5th November 1999 whereby the plaintiffs agreed to purchase a licensed premises from the defendants in consideration of the sum of €1,200,000. The purchase was not completed by the closing date provided for by the said Agreement, and in due course the defendants served a Completion Notice on the 10th December 1999, and when the purchase was still not completed within the period of 28 days specified in that Notice, the defendants forfeited the deposit which had been paid by the plaintiffs, and proceeded to resell the premises.

The plaintiffs' claim is set forth in the General Indorsement of Claim on the Plenary Summons as follows:

> "1. The Plaintiffs' claim is for a declaration that an Agreement or Contract in writing made on 5th November 1999 between the defendants as Vendors and the plaintiffs as Purchasers for the sale by the defendants to the plaintiffs of the premises set forth in the said Agreement has been rescinded, or equitable rescission of the said Contract or Agreement by reason of the said fraudulent and/or negligent and/or reckless misrepresentation by the defendants, with repayment by the defendant to the plaintiff of the deposit of £120,000 and, in addition, damages for breach of contract.
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> 2. In the alternative the plaintiffs claim the said £120,000 as money head and received by the defendants to the use of the plaintiffs and in respect of which consideration as wholly failed."

Briefly stated, the basis on which the plaintiffs claim that the defendants are guilty of fraudulent, negligent, or reckless misrepresentation is that, with a view to introducing the plaintiffs to purchase the licensed premises in question, the defendants repeatedly represented to the plaintiffs that the annual turnover of the said premises was approximately £600,000 and that, in the event that they agreed to purchase the said premises, an Accountant or Auditor's Certificate from the defendants' accountant would be available to certify the said turnover, and that these representations were both false and were known by the defendants to be false in circumstances where the turnover of the premises, unknown to the plaintiffs, was in fact in the region of £300,000 per annum. On the latter basis, it is contended that the real market value of the licensed premises was in the order of £700,000.

The representations alleged to have been made by or on behalf of the defendants to the plaintiffs in respect of annual turnover are alleged to have been oral representations.

The defendants rely, *inter alia*, on Special Conditions 5 and 13 in the Agreement for Sale which provide respectively:

> "5. Should there be any conflict between the terms hereof and the terms of any other agreement written or oral between the parties or their agents relating to the sale of the within mentioned described property, the terms of the within Agreement shall apply."
>
> "13. The Purchasers acknowledge by their execution hereof that they are not being induced to purchase this property by any statement, writing or representation of the Vendors or their agents unless the same is annexed hereto and signed by the parties."

In relation to Special Condition 13 no such statement, writing or representation is annexed to the said Agreement.

In order to address the question of whether these proceedings ought to be struck out on the basis of inordinate and inexcusable delay by the plaintiffs, I will set out a chronology of events as far as the pleadings are concerned.

As already stated, the Vendors' solicitors served a Completion Notice on 10th December 1999 requiring a sale to be completed within 28 days of service thereof. No request for any extension of time for completion was sought by the purchasers' solicitors, and the purchase was not completed within the period specified. By letter dated 2nd March 2000 the Vendors' solicitors wrote to the purchasers' solicitors informing them that the deposit was being forfeited and that the Vendors would proceed to resell the premises, and putting the purchasers on notice that, in the event of any loss being incurred on such re-sale, the Vendors would seek an indemnity from the purchasers in respect of any such loss.

I note that the plaintiffs' solicitors wrote to the defendants' solicitors on the 5th July 2000 referring*, inter alia*, to the forfeiture of the deposit. They also raised the dispute about the amount of the turnover, and to an application for loan approval by the plaintiffs' accountant to a Bank, which was promised subject to a certificate as to turnover being produced. The letter refers to efforts made by the accountant to get such a certificate from the second named defendant, and it is alleged in this letter that in fact the second named defendant stated that the accounts before him for the business disclosed a turnover of only €300,000 per annum. This letter sought a return of the deposit in these circumstances, and threatened these proceedings, as well as the registration of a *lis pendens*,

as information had come to hand that the Vendors were reselling the premises by Public Auction on the following day. It would appear to be the case therefore that the first time that this claim was made to the Vendors was when they learned that the premises were about to be resold, rather than in the immediate aftermath of the forfeiture of the deposit some months previously.

I have not been provided with any response to this letter.

Nothing further appears to have happened until the 10th October 2001, some 19 months after the deposit was forfeited, when the plaintiffs' solicitors wrote again to the defendants' solicitors, this time enclosing a copy of the plenary summons, and called upon the Vendors' solicitors to enter an appearance. The letter stated that this summons had been served on the defendants. That cannot have been correct as will become apparent from the narrative very shortly.

The Vendors' solicitors responded by letter dated 15th October 2001 stating that the plenary summons enclosed had not properly issued as there was no record number shown thereon, and informed the purchasers' solicitors that they could not therefore enter an appearance. By letter dated 26th October 2001 the purchasers solicitor's enclosed the original plenary summons which had issued on the 9th October 2001 and called upon the Vendors' solicitors to enter an appearance. This was responded to by letter dated 1st November 2001 wherein the vendors solicitor's requested confirmation that the plenary summons had been served on the defendants and that, subject thereto, an appearance would be entered.

By letter dated 6th November 2001 the purchasers' solicitor again confirmed that both defendants had been served with the plenary summons and indicated that on entry of appearance, a Statement of Claim would be delivered. It is unclear to me how that letter came to be written since it is a fact that the first named defendant was not personally served with the plenary summons until 14th May 2002, as appears from the endorsement of service in that regard upon the plenary summons, and the second named defendant was not served until 28th July 2004 following a renewal of the plenary summons and an order for substituted service by ordinary post. An appearance was entered on behalf of the first named defendant on the 21st May 2002, and on behalf of the second named defendant on the 23rd August 2004. The plaintiffs contend that each defendant, but particularly the second named defendant, evaded service, and caused delay themselves thereby in the progress of these proceedings.

Nevertheless, by the 23rd August 2004 an appearance had been entered on behalf of both defendants,

The defendants' solicitor's grounding affidavit states at paragraph 4 (iii) that a Statement of Claim was not delivered until 12th January 2005. This date was confirmed also by Counsel during the course of argument. No date for delivery thereof is contained on the copy Statement of Claim contained in the Book of Pleadings produced; but I think the 12th January 2005 may not be the correct date of delivery as, first of all, there is in a booklet of correspondence a letter dated 10th November 2004 sent by registered post by the plaintiffs' solicitor to the defendants' solicitor enclosing a Statement of Claim; and secondly, this was followed on the 16th November 2004 by a Notice for Particulars from the defendants' solicitors. It must be the case that the correct date of delivery of the Statement of Claim is the 10th November 2004.

That Notice for Particulars was not responded to until some 6 years later on the 10th November 2010 – some two weeks after the present Notice of motion was issued.

The only step taken by the plaintiff following the receipt of the defendants' Notice for Particulars in November 2004 was the service of a Notice of Intention to Proceed on the 29th May 2008. There is nothing before me to indicate that any correspondence passed between the two forms of solicitors in the meantime. The plaintiffs appear to have taken no step whatsoever for a period of some three and a half years.

One would have thought that the service of that Notice to Proceed indicated some intent that the proceedings would be further prosecuted by the plaintiffs. Subject to their own need to reply to the Notice for Particulars received in November 2004, the next step which the plaintiffs could have considered was to call upon the defendants to deliver a Defence, and if necessary proceed to issue a Notice of Motion seeking judgment in default of defence. These are not difficult steps to take if the plaintiffs were intent on proceeding, yet the fact is that nothing happened at all for almost another two years when once again the plaintiffs served a Notice of Intention to Proceed on the 23rd February 2010. By letter of the same date, the plaintiffs' solicitor wrote to the defendants' solicitors noting that they had not yet received the defendants' Defence, and warning that if same was not delivered within 21 days, a motion for judgment would be issued.

On the 1st March 2010, not surprisingly, the defendants' solicitor responded stating firstly that they had assumed that the plaintiffs had abandoned their claim "bearing in mind the fact that there was no substance therein". Secondly, they informed the plaintiffs' solicitor that they were required to wait for one month to elapse following service of the Notice of Intention to Proceed before proceeding, and that a further letter of consent to late delivery of Defence should issue after that time, and that the defendants would then deliver their Defence and serve Notice of Trial. But this letter also indicated that in view of the delays by the plaintiffs the costs of defending the proceedings would be sought, and that Counsel would be consulted in relation to the possibility of obtaining an order for security for costs.

On the 24th March 2010 a further letter of consent to late delivery of Defence was sent.

In due course, the plaintiffs' Notice of Motion seeking judgment in default of defence was issued on the 6th August 2010, and the defendants' motion to strike out these proceedings was issued on the 28th October 2010. Both motions are before this Court. For obvious reasons the defendants' motion should be determined first.

Explanations for delay:
Before setting out how the extraordinary delays in this case since the delivery of the plaintiffs' Statement of Claim on the 10th November 2004 are sought to be explained and excused in the replying affidavits, I want to deal firstly and briefly with the plaintiffs' contention that the defendants' own behaviour by evading service of the plenary summons, and that this should be taken into account by the Court when weighing the balance of justice between the parties. Simply put, I am not going to take account of any delay which occurred or may have been caused by any evasive action by the defendants. Even if it be so that either defendant, and particularly the second named defendant, made life difficult for the plaintiffs in that regard, and I am reaching no firm conclusion in that regard, the overwhelming delay in this case is that which has taken place after November 2004, and if the defendants are entitled to their order striking out these proceedings for delay, there is nothing of any or sufficient weight to be attached to pre-service delay which could possibly act as a counterweight.

The first replying affidavit of Josepha Madigan, solicitor, is lengthy but the greater part of the affidavit deals with the nature and merits of the plaintiffs' claim and the difficulties which were experienced in relation to effecting service of the proceedings on the

defendants. In fact paragraph 19 is the only paragraph which seeks to explain the delays subsequent to service. The relevant portion of that affidavit states:

> "19. I say further that the prosecution of this claim has been made difficult by a number of failures … including the fact that the solicitor originally dealing with this matter, Patrick Madigan senior, became seriously ill with cancer and other ailments and this led to a further delay the progression of the case.
>
> In 2004 another solicitor Stefan O'Connor took over the management of the plaintiffs' file.
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> Unfortunately this solicitor, Stefan O'Connor, left the firm in late 2005 contributing to a further delay in presentation of the claim.
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> Patrick Madigan senior took over the case again in late 2005. However Patrick Madigan senior suffered many illnesses during 2005, 2006 and 2007 and was out of the office for considerable periods.
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> In 2007 he was diagnosed with two separate cancers, namely breast cancer and Hodgkin's disease. He also had a heart condition and diabetes.
>
> He was on chemotherapy and other cancer treatments through all of 2007 up to now and is still undergoing cancer treatment which has forced him to retire as a practising solicitor."

A further lengthy replying affidavit was sworn by Josepha Madigan, solicitor. That affidavit runs to some 16 pages but, as with the first replying affidavit, deals principally with the nature of the plaintiffs claim, how it arises and aspects of the evidence which would be given by the plaintiffs. It makes the point that the defendants never issued any motion to dismiss the proceedings for want of prosecution until 2010 and submits also that it is significant that the defendants did not seek specific performance of the contract, and that they failed to deliver a Defence. It deals also at great length again with the difficulties encountered in effecting service of the proceedings on each of the defendants. Paragraph 16 and paragraph 19 are the only paragraphs which seek to address the reasons for the delay following the delivery of the Statement of Claim. In truth, these paragraphs state nothing which is not referred to in paragraph 19 of the first affidavit. It adds nothing to the explanations already offered.

Alison Enright BL for the defendants has referred at the outset to the judgment of Finlay P. (as he then was) in *Rainsford v. Limerick Corporation* [1995] 2 ILRM. 561. That was a case where the reason for delay was sought to be excused by reason of the fact that a solicitor dealing with the plaintiff's file left the firm, and further by reason of the fact that the senior partner in the firm who took over the file thereafter was periodically ill for a considerable period of time and attending his office only to a limited extent until his death. While Finlay P. stated that this feature made the delay understandable he did not consider that it made it excusable. Having concluded that is the delay in that case was inordinate and inexcusable, he went on to say that he was not, however, satisfied on the evidence before him that the plaintiff himself could fairly be blamed for the inordinate and inexcusable delay since, as a result of the injuries which he sustained in the accident which gave rise to the proceedings, he had been severely handicapped and had been involved in long and protracted medical treatment involving considerable difficulties for him in the carrying on of his ordinary life and a considerable degree of immobility. He felt that this of itself would be to some extent an excusing circumstance, and it was understandable in those circumstances that the plaintiff would not have been in a position to press his solicitor, who was ill, more strenuously in relation to the prosecution of the claim. In that regard he stated:

> "I would I think be departing from common sense if I were not aware of the sort of reluctance which an ordinary citizen living in the city of Limerick would be likely to show towards asserting with the strength and militancy his rights against an ailing solicitor who had long been established in practice and who was manifestly in ill health. Therefore, while it cannot be said that the plaintiff is entirely blameless for the inordinate and inexcusable delay that has occurred, he does not in my view share the full blame for it and there is no evidence before me that he was particularly dilatory in his personal approach to the problems with which he was faced."

Having reached the conclusion that the delay was both inordinate and inexcusable, the learned judge, nevertheless, concluded that it was necessary "to try and ascertain where the justice of the case lies in the balance between dismissal and its continuance".

The first matter that he took into account was the very severe injuries which the plaintiff suffered in his accident and for which he was seeking to be compensated. In that regard he stated:

> "What the defendants seek to have dismissed is no mere trivial or ordinary action but one which is probably vital to the future material prospects of the plaintiff. No action brought by a litigant to the courts should be considered unimportant or trivial if a bona fide cause of action exists. In relation, however, to the exercise of a discretion as to where the balance of justice may lie it seems to me that a material consideration must be the gravity of the claim concerned and the consequences of its dismissal upon the injured claimant. In this case it seems to me that the consequences would be dire. The second material consideration is the type of claim on the issue of liability which arises in this case".

He then went on to consider whether any real prejudice was suffered by the defendant by reason of the delay. While he was satisfied that there was some possibility of prejudice, including in relation to the recollection of witnesses so long after the material events, he nevertheless concluded that there did not appear to be any real prejudice, and decided that the balance of justice was in favour of permitting the action to proceed, and that the chances of a major injustice to the plaintiff were the action to be dismissed was significantly greater than the chance that a major injustice would be done to the defendants by allowing it to proceed.

At this point, I should say that apart from the plaintiff's solicitor's assertion that the plaintiffs were at all times anxious to proceed with their claim, there is no evidence that any efforts were made by them in that regard. Neither plaintiff has filed an affidavit and there is no evidence whatsoever that they were concerned about the delay, and made any complaints or otherwise urged their solicitors for progress. I have already referred to the fact that even after the deposit was forfeited, several months passed before any issue was raised with the defendant's solicitors in relation to the turnover figure for the licensed premises upon which the sale price was predicated. It was only on the eve of a public auction for the resale of the premises that a letter was written. This is not a case in which there is any evidence that the consequences of a dismissal of these proceedings would have the sort of dire consequences for the plaintiffs which Finlay P. was satisfied would be faced by Mr Rainsford. It was a commercial transaction on foot of which both the plaintiffs seek to recover their deposit, over eleven years ago.

In addition, the defendants assert prejudice based firstly on the obvious effect that the extreme delay in this case must be assumed to have on the recollection of parties as to what was or was not stated to the plaintiffs in relation to the amount of the annual

turnover of the licensed premises prior to the Agreement for Sale bing executed or thereafter. One of the persons involved in that issue, Frank Fahy, and who, according to an affidavit which he swore in 2001 (not in the context of these proceedings) indicates that he would support the plaintiff's case. Obviously his death in 2010 has deprived the plaintiffs of the benefit of that evidence. But in so far as the defendants are deprived of an opportunity to cross-examined him in relation to whatever evidence he would give in support of the plaintiffs, they may also be prejudiced by his absence, and have stated that they are so prejudiced. But they are also clearly prejudiced because of the effect of this length of delay on the recollection of relevant witnesses, and, in a case of this kind, that prejudice can be presumed to be real. It must be borne in mind at all times that more than 11 years has already passed since these events, and further time will inevitably pass before this case is ultimately heard, if the case is allowed to proceed.

Ms. Enright has referred to the principles of law relevant to the consideration of the issues raised in an application to dismiss proceedings for want of prosecution, as summarised by Hamilton C. J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R.459. Those are set forth at page 475 of his judgment as follows:

> "The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows: --
>
> (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss the claim when the interests of justice require them to do so;
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> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise of judgement on whether, in its discretion, on the facts is the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
>
> (i) the implied constitutional principles of basic fairness of procedures,
>
> (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiffs action,
>
> (iii) any delay on the part of the defendant -- because litigation is a two party operation, the conduct of both parties should be looked at,
>
> (iv) whether any delay or conduct of the defendant and months to Acquiescence on the part of the defendant in the plaintiff's delay,
>
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
>
> (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
>
> (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and the other than that merely caused by the delay, including damage to a defendant's reputation and business."

In my view a significant prejudice arises not only for the plaintiffs, but significantly as far as this issue is concerned for the defendants, by reason of the death of Frank Fahy. Prior to the plaintiffs entering into a contract for the purchase of the licensed premises, Mr Fahy was in occupation of the licensed premises and running the business under a lease from the vendors. As deposed by the defendant's solicitor, the defendants were not therefore involved in running the licensed premises and, accordingly, neither knew or had access to the turnover figures themselves, and the only person who could have had access to any audited accounts relating to the public house was Mr Fahy who was operating the business. Had this action proceeded with any sort of normal dispatch, he would have been available to the defendants in order to be either called by or cross-examined in relation to the turnover of the business and would have been able to produce any accounts which may have assisted in establishing the true turnover. He would also have been cross-examined in relation to any conversation he may have had with the plaintiffs either before or after the Agreement for Sale was executed, and upon which the plaintiffs seek to rely. He was not the only person upon whose evidence the plaintiffs seek to rely, but his evidence would of course have been very important, albeit that the plaintiffs would have sought to rely on his evidence as well, and are themselves prejudiced by his unavailability.

It has to be said also that, on the basis of the evidence available at this point in time, particularly the existence of the two special conditions to which I have already referred, the mountain which the plaintiffs would need to climb in order to succeed in these proceedings is a high one, and there must be a considerable doubt as to whether they would ultimately achieve a summit.

Given the extreme delay in this case, the effect of that delay on the recollection of witnesses, the death in 2010 of Frank Fahy, the nature of the case itself and the necessary reliance by the plaintiffs upon the recollection of oral statements made at the relevant time, now some 11 years or more ago, I have no difficulty in concluding that the balance of justice lies in favour of striking out these proceedings.

While the plaintiffs were of course entitled, pursuant to their constitutional right of access to the Courts, to commence proceedings in order to try and redress a wrong which they allege has occurred, it is a right which is accompanied by an obligation upon them to prosecute those proceedings with reasonable expedition. They have failed to do that.

The right to a fair hearing and one within a reasonable time is a right which both parties to the proceedings enjoy, and are entitled to have vindicated by the Courts. The Courts have in more recent times adopted a more stringent attitude to the question of delay. This change has resulted in part at least from the provisions of Article 6 of the European Convention on Human Rights following the coming

into law of the European Convention on Human Rights Act, 2003 and by reference to decisions of the European Court of Human Rights to which the Courts here are obliged to have regard. In my judgment delivered recently in *Mulcahy v. Iarnrod Eireann/Irish Rail*, unreported, High Court, July 2011 I dealt with similar issues, albeit in the context of an application to renew a Plenary Summons, and in particular I referred to the comments of Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290, as well as those of Clarke J. in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148. I refer to these comments again for the purpose of the present decision, and I believe that they support strongly my view in the present case that the proceedings should be struck out on the grounds of inordinate and inexcusable delay, and I will so order.

In these circumstances, it is unnecessary to reach any conclusion in relation to the alternative ground put forward by the defendants, namely that the proceedings do not disclose a reasonable cause of action.