

## THE HIGH COURT

2011 No. 2315 P

Between:

NOEL MULLIGAN

PLAINTIFF

– AND –

WILKIE &amp; FLANAGAN, SOLICITORS

DEFENDANT

**JUDGMENT of Mr Justice Max Barrett delivered on 3rd May, 2019.**

1. This is an application for a strike out of the within proceedings pursuant to (i) O.122, r.11, RSC, (ii) the inherent jurisdiction of the court on the ground of inordinate and/or inexcusable delay and/or want of prosecution, and (iii) the principles of basic fairness of procedures, having regard to the overall delay between the events underpinning these proceedings and the anticipated trial date. The hearing focused in the main on item (ii) and the basis for granting the relief sought pursuant to item (ii) is so clear-cut and compelling that the court confines its attentions in this judgment to item (ii).

2. The detail of the proceedings need not be considered at length. The central allegations (and they are at this time but allegations) are that Mr Wilkie: transferred his interest in a contract for the sale of lands without informing his intended co-purchasers; and mis-advised the co-purchasers in such a manner as to leave them with a contractual obligation to purchase costly property without planning permission in place, leaving them exposed to the financial ruin that has unfortunately followed since.

3. In approaching this application, the court has been referred to many cases, including, *inter alia*, *Celtic Ceramics Ltd v. IDA* [1993] ILRM 248, *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 IR 510, *Manning v. Benson & Hedges Ltd* [2004] 3 IR 556, *McBrearty v. North Western Health Board* [2010] IESC 27, *Tanner v. O'Donovan & ors* [2015] IECA 24, *Collins v. MJELR* [2015] IECA 27, *Granahan v. Mercury Engineering* [2015] IECA 58, *Cassidy v. The Provincialate* [2015] IECA 74, *Farrell v. Arborlane* [2016] IECA 224, *Leech v. Independent Newspapers (Ireland) Ltd* [2017] IECA 8, and *Breen v. Wexford County Council* [2019] IEHC 112. Enough ink has been spilled in the judgments in the just-mentioned cases to give the clearest of guidance to this Court as to the principles it should bring to bear in this application, without any need for the court to expound further.

4. The progress of the within proceedings has helpfully been summarised by the defendant in the form of a table which is respectfully adopted by the court, subject to minor amendment of no practical consequence to the adjudication of this application:

| Item No. | Date                | Event   |
|----------|---------------------|---|
| 1        | May 2005-Aug 2006   | This is the period when the events the subject of the proceedings occurred.   |
| 2        | 10 March 2011       | The plenary summons was issued.   |
| 3        | 7 or 8 March 2012   | Attempt to effect service of plenary summons.   |
| 4        | 23 April 2012       | Application to renew summons and/or for substituted service. Order granted; perfected on 25 April 2012.   |
| 5        | 4 February 2013     | Application to set aside renewal issued on 19 June 2012. Application refused on condition that defence be delivered within 4 weeks.   |
| 6        | 4 March 2013        | Statement of Claim delivered on last day of said 4 week period.   |
| 7        | 21 October 2013     | Defendant served notice of particulars followed by 'chasing' letters of 14 November 2013. Motion for particulars issued on 10 January 2014 returnable for 10 February 2014. |
| 8        | 7 February 2014     | Plaintiff delivered replies to notice for particulars.  |
| 9        | 19 May 2014         | Defence delivered.  |
| 10       | 11 July 2014        | Letter seeking voluntary discovery delivered to plaintiff. Motion for discovery issued on 29 October 2014.  |
| 11       | 1 December 2014     | Order for discovery obtained against plaintiff on consent (10 weeks allowed for discovery).   |
| 12       | 9 February 2015     | Affidavit of discovery due but not received.  |
| 13       | 27 March 2015       | Motion to strike out for failure to make discovery filed.   |
| 14       | 26 May 2015         | Plaintiff furnishes incomplete affidavit of discovery.  |
| 15       | 8 June 2015         | Plaintiff's solicitors advised of concerns re. discovery; motion adjourned again.   |
| 16       | 22 and 30 June 2015 | Reminder letters sent to plaintiff's solicitor.   |
| 17       | 30 June 2015        | Plaintiffs agrees to make further discovery; no further discovery received despite repeated correspondence and adjournment of proceedings.                                  |

|    |  |   |
|----|--|---|
| 18 | <b>24 February 2016</b>                  | Motion to strike out struck out with costs to defendant on assurance that plaintiff will swear a supplemental affidavit of discovery. |
| 19 | <b>29 February and 26 September 2016</b> | Defendant sends reminder letters re. deficiencies in discovery but no reply received.   |

5. The defendant points to the fact that the proceedings were issued over seven years prior to the issuance of the motions to dismiss and relate to events that occurred between 13 and 14 years ago. The pre-commencement delay is between 5-6 years. There are four periods of post-commencement delay, viz. (1) delay in service of the summonses (10 March 2011 to April 2012, following renewal of the summonses), (2) delay in exchange of the pleadings (April 2012 to 19 May 2014), (3) delay in the discovery process, and (4) delay since February 2016, with no steps whatsoever being taken.

6. It is not disputed that there has been inordinate and inexcusable delay by the plaintiff. Even if the presence of inordinate and inexcusable delay were disputed, the court would have found same (and a want of prosecution) to present on the facts at hand. That said, the court does not accept what seems to it, with respect, to be the non sequitur that if no excuse is offered for a delay, then that delay is of necessity inexcusable. In any event, there being inordinate and inexcusable delay the sole issue that remains for this Court now to decide is where the balance of justice lies in terms of whether or not this case should be allowed to proceed. In this regard the court notes that:

(1) before attempted service of the summons in March 2012, the best part of six years elapsed without any intimation by the plaintiff of a complaint against the defendant or any intention to sue. That lapse of time has prejudiced the defendant in terms of gathering evidence and setting down recollections of events at a time reasonably proximate to those events;

(2) from the outset of these proceedings the defendant has been complaining about the issue of delay;

(3) since service of the plenary summons, the plaintiff has taken no voluntary step to progress these proceedings; everything done has been pursuant to court order or in the context of a motion brought by the defendants;

(4) this is a claim of professional negligence which has been hanging over the defendant for a considerable time and has had a significant impact in respect of the defendant's professional indemnity insurance and in terms also of the defendant's professional reputation;

(5) this is not a so-called 'documents case'. The key agreements/advice relied upon by the plaintiff are entirely oral, i.e. not only were they not in writing, they are not even evidenced in writing. So this case will turn almost exclusively on oral evidence. It follows that the lapse of time presenting is especially prejudicial.

(6) the earliest that this case will come on for hearing is sometime next year, i.e. 14-15 years after the events that are the subject of the within proceedings, a notably lengthy period of time, especially given the factors referenced at (5).

(7) there is actual prejudice presenting. So, for example: (a) an architect who would have been in a position to give evidence relevant to and perhaps supportive of the defendant's case has retired to Spain and has proven untraceable to now; and (b) an auctioneer who would have been able to give evidence that the defendant considers would have been supportive of his defence died in July 2013; had the proceedings been prosecuted with due diligence this auctioneer would likely have been available to give evidence. There may or may not also be an issue concerning the availability of certain bank officials/documentation.

7. Given the above-mentioned factors the court considers that the balance of justice lies in favour of the court granting an order pursuant to its inherent jurisdiction dismissing these proceedings in the interests of justice and on the ground of inordinate and inexcusable delay and also for a want of prosecution on the part of the plaintiff since the commencement of these proceedings.