Neutral Citation Number: [2006] IEHC 106

THE HIGH COURT

[1996 No. 292 COS]

BETWEEN

MARTIN WOLFE AND RUTH WOLFE

PETITIONERS

AND

PETER WOLFE, ANGELA WOLFE, RANGER HOLDINGS LIMITED AND JOHN ATKINS & COMPANY LIMITED

RESPONDENTS

AND

THE HIGH COURT

[1996 No. 8656P]

BETWEEN

MARTIN WOLFE AND RUTH WOLFE

PLAINTIFFS

AND

PETER WOLFE, ANGELA WOLFE, RANGER HOLDINGS LIMITED AND JOHN ATKINS & COMPANY LIMITED

DEFENDANTS

Judgment of Ms. Justice Finlay Geoghegan delivered the 15th day of March, 2006.

Preliminary

1. This judgment is given in two similar applications one brought in each of the above entitled proceedings by the first, second and third named respondents/defendants seeking an order pursuant to the inherent jurisdiction of the court dismissing the petitioners/plaintiffs' claims against such defendants by reason of the inordinate and inexcusable delay in the prosecution of the proceedings.

2. The petitioners/plaintiffs are husband and wife. I will refer to them hereafter as the plaintiffs. The first and second named defendants/respondents are husband and wife and shareholders in the third named respondent/defendant. I will refer to these parties as defendants. The first named plaintiff is the younger brother of the first named defendant. The plaintiffs and the first and second named defendants and other family members of both the Wolfe and Atkins families were shareholders in the fourth named defendant/respondent. It is taking no part in the proceedings and some time ago has indicated that it will abide by whatever order is made by the court.

3. The plenary proceedings were commenced by a summons issued on 5th October, 1996. The petition was issued claiming relief under s. 205 of the Companies Act 1963 on 3rd December, 1996. Both sets of proceedings relate to the affairs of the fourth named defendant ("the Company"). It is Cork based trading *inter alia* in the sale of farm and horticultural machinery, fertiliser seed, timber and fuel. The primary transactions complained of in the proceedings took place in June, 1996 in connection with the purchase by the third named defendant of shares of other members of the Wolfe and Atkins families in the Company. There are other complaints including one in relation to the dividend policy and an alleged "campaign of oppression" against the plaintiffs. All claims are denied in the defence.

Procedural History

4. As already appears the proceedings commenced in 1996. Notice of trial in the s. 205 proceedings was served in August, 1997. In February, 1999 amendment to the plenary proceedings was permitted by order of the High Court. On 30th November, 1999, the proceedings were listed for hearing but there was no judge available.

5. Both sets of proceedings came on for hearing before the High Court (Herbert J.) on 21st June, 2000. It was at hearing on 21st, 22nd, 23rd and 27th when an application was made to dismiss both sets of proceedings. It was contended that the case sought to be made on behalf of the plaintiffs went outside the pleadings. On 29th June, 2000, the application to dismiss the proceedings was refused and the petitioners were given liberty to issue a notice of motion seeking liberty to re-amend (there had been an earlier amendment) the s. 205 petition. Following a hearing of that matter Herbert J. delivered a reserved judgment on 28th July, 2000, and by order of that date permitted amendment of the petition as set out in the orders. The amendment was permitted on conditions including orders for costs against the plaintiffs in favour of the defendants.

6. The amended petition was delivered on 2nd October, 2000. A notice for particulars was raised on 8th November, 2000. Replies to those particulars were furnished on 3rd October, 2001. Further particulars were raised on 6th December, 2001, and they were replied to on 29th January, 2002.

7. Amended points of defence were delivered on 17th April, 2002. The primary complaint of delay now made is that since the 17th April, 2002. The only subsequent step taken by or on behalf of the plaintiffs in the proceedings relates to the obtaining of the transcripts of the hearings before Herbert J. A motion was issued seeking same on 3rd July, 2003. The transcripts appear to have been released in March, 2004 on agreed terms including payment by the plaintiffs of a proportion of the cost of same.

8. On 7th June, 2005, a motion was issued in the plenary proceedings seeking the orders dismissing the claims pursuant to the inherent jurisdiction of the court. It was returnable for the 4th July, 2005. On 27th June, 2005, a similar motion was issued in the petition proceedings returnable for the 11th July, 2005. It is these motions which were heard before me in February, 2006.

9. On 7th July, 2005, notice of change of solicitor for the plaintiffs from George F. Daly and Co. to M.J. O'Connor and Co. was served and filed. This was the second notice of change of solicitor for the plaintiffs since the hearing before Herbert J. In 2001 there had been a change from the original solicitors to George F. Daly and Co.

Applicable Law

10. Counsel for both parties were in substantial agreement that the principles to be applied by this court in determining the present applications or those set out by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and summarised by Hamilton C.J. at pp. 475- 476 as follows:-

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of

justice require them to do so;

(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 a judgment on whether, in its discretion, on the facts 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 plaintiff's 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 amounts 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 be other than that merely caused by the delay, including damage to a defendant's reputation and business.

11. It was submitted, correctly on behalf of the defendants that whilst these principles continue to be applicable they must be applied in accordance with the approach of the Supreme Court in certain later decisions including *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 and *Gilroy v. Flynn* [2005] 1 ILRM 290. The Court's attention was drawn in particular to what were termed "significant developments" since the decision in *Primor v. Stokes Kennedy Crowley* by Hardiman J. in *Gilroy v. Flynn*. Only the second and third developments are of relevance to the facts herein as stated by Hardiman J at pp. 293 - 294.:

> "Secondly, the courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as *McMullen v. Ireland* ECHR 422 97/98, July 29, 2004 and the European Convention on Human Rights Act 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time. These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."

12. I respectfully agree with the view expressed by Clarke J. in *Stephens v. Paul Flynn Limited* [2005] IEHC 148 and *Rogers v. Michelin Tyres plc* [2005] IEHC 294 that the decisions since *Primor plc v. Stokes Kennedy Crowley* do not mean that there have been a change in the factors which the court should properly take into account in assessing where the balance of justice lies but rather that the weight to be attached to the various factors may need to be reconsidered.

13. It remains the position as set out clearly and succinctly by Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510 that "each case must be judged on its own merits" (p. 520) and also at p. 518:

> It always necessary for the defendant applicant to demonstrate, and he bears that burden, that the plaintiff has been guilty of inordinate and inexcusable delay. Subject to that, however, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation. The separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just.

Delay

14. The delay relied upon by the defendants is primarily the delay since the delivery of the amended points of defence on 17th April, 2002. However, the defendants whilst confining their complaint primarily to this period submit that it must be considered in the context of what had happened before Herbert J. in June/July, 2000, and also the time taken by the plaintiffs for subsequent steps.

15. In considering the delay in this application the Court must have regard to what happened in June/July, 2000. The case was brought on for full hearing. It could not proceed by reason of the difference between the claims sought to be advanced and those pleaded. The plaintiffs were permitted, albeit subject to conditions to amend the petition and an application to dismiss was refused. The plaintiff obtained the benefit of a court exercising a discretion in their favour in the interests of justice. They were then under an obligation to bring the matter forward with reasonable expedition, consistent with the complexity of the litigation.

16. The amended petition was delivered on 2nd October, 2000, and no complaint is made of this. A lengthy and searching notice of particulars was served by the defendants on 8th November, 2000. This was not replied to until 3rd October, 2001. This delay is the second matter which the defendants submit should be taken into account in assessing whether or not the further period of delay was inordinate. I agree that this should be so.

17. It is the period between 17th April, 2002, and the issuing of the motions herein in June, 2005 which is alleged to be inordinate.

18. The present proceedings are procedurally now unusual by reason of the aborted hearing in 2000. Neither party was clear as to precisely what steps have to be taken to now obtain a hearing date. Notices of trial have been served in both actions. They do not appear to have been struck out. In the order of the High Court of 28th July, 2000, giving liberty to amend the parties were given "liberty to apply". Actions are given dates for hearing in the Chancery List in the normal course after they appear in a list to fix dates. They can only appear in that list where they have been certified by counsel as ready for trial. Alternatively applications are made to the judge in charge of the Chancery List in cases of urgency or other special circumstances for a hearing date once a case is certified as ready for hearing.

19. Following the delivery of the amended points of defence the only further procedural step which appears to have been necessary on behalf of the plaintiffs was the filing and delivery of a certificate of readiness. This would then have resulted in the case reappearing in the list to fix dates or alternatively it might have been necessary to make an application to court for a hearing date. Obviously before counsel could issue a certificate of readiness proofs in relation to the amended pleadings would have had to have be directed and complied with.

20. Notwithstanding that the claim may be considered a complex one a period in excess of three years to take these steps is inordinate.

Excusable

21. The next issue is whether on the facts herein the plaintiffs have explained this delay in such a way that the court may find it to be excusable.

22. The plaintiffs offer two excuses. The first relates to the period taken to obtain the transcripts of the hearing in June, 2000 and the second relates to changes of solicitor.

23. It appears that at the request of counsel for the defendants an overnight transcript was taken and made available to the defendants in June, 2000. The plaintiffs did not have access to this. The plaintiffs through their solicitors sought copies of the transcript both from the solicitors for the defendants who are the applicants in these motions and the fourth named defendant, the Company of which the plaintiffs and defendants are shareholders. Ultimately the plaintiffs brought a motion to the court seeking the transcripts dated 3rd July, 2003. The affidavits sworn in that application were produced and referred to in this application together with the correspondence exhibited. It appears that such motion came before the court on six occasions between October, 2003 and February, 2004 and ultimately the matter was compromised and the plaintiffs by agreement obtained the transcripts in April, 2004 following a payment of €9,046 to the defendants' solicitors on the 29th March, 2004. The defendants' position at all times was that the plaintiffs were entitled to the transcripts provided they paid either all or their share of the cost of same. The matter appears to have been complicated by the position of the fourth named defendant and an allegation by the plaintiffs that the fourth named defendant had paid some or all of the cost of the transcript and as a result that as shareholders they should have been entitled to obtain for free copies of the transcripts. The attempts to obtain the transcripts appear to have started earlier than 2003 but on the evidence before me were not progressed with expedition.

24. An affidavit was sworn on behalf of the defendants by their solicitor, Arthur Comyn in July, 2003 in response to the motion seeking the transcripts. In that affidavit the defendants' position as to the basis upon which the transcripts would have been made available is explained. No point is made that either the transcripts were unnecessary to prepare for the new hearing or that the plaintiffs were then in delay.

25. I would be prepared to accept that some part of the three year period is excusable by reason of the exchanges which took place in relation to the transcript. Such period, however, is less than one year and therefore there remains a period of in excess of two years which for the steps which had to be taken appears inordinate which is not excusable by reference to the transcripts.

26. The second excuse proffered relates to changes of solicitor.

27. The first change of solicitor occurred after the hearing in 2000. Whilst the court has not been given the date upon which the notice of change of solicitor was served by George F. Daly and Co. this appears to have been after the delivery of the notice of particulars on 8th November, 2000, and prior to the furnishing of the replies on 3rd October, 2001. Accordingly such change is not relevant to any delay after the delivery of the amended defence in April, 2002.

28. The plaintiffs decided to change their solicitors further in June, 2004. The circumstances giving rise to that decision are explained at paragraphs 21 to 23 of the plaintiffs affidavits sworn in this application on 20th July, 2005, as follows:-

> "21. Having received the transcripts our new solicitors wrote to us on the 2nd April 2004 and indicated that due to the backlog of cases in the Chancery list the earliest we might expect a date for hearing would be January 2005. We were greatly concerned by this and by the fact that our Solicitors appeared to be rather slow in reverting with advices for the retrial. Accordingly my wife Ruth enquired from the Court's Service about the backlog of cases in the chancery list and was told that there was roughly a six week delay between a trial date application and a trial at that stage.
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> 22. This information shocked us and we agreed on the 30th of June 2004 with our then solicitors that a new firm should take over the prosecution of the case.
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> 23. Subsequently we were told by our then solicitors that the files would not be released until they had drawn up a bill of costs and a substantial portion of those costs were discharged."

29. The first named plaintiff further explains that the drawing up of the Bill of Costs took seven months and there were then negotiations as to undertakings both with George F. Daly and J.W. Donovan (the previous solicitors) which meant that the present solicitors M.J. O'Connor only came on record by a notice of change of solicitor dated 7th July, 2005, with files being handed over in the week ending Friday 22nd July, 2005.

30. Messrs George F. Daly are no longer acting and were not represented at the hearing and may not be aware of the contents of this affidavit.

31. It does not appear to me that the decision by the plaintiffs to change their solicitors in June, 2004 with the consequential inaction for a period of approximately one year should be considered by the court as constituting facts which make this period excusable. The

plaintiffs by 2004 must have been familiar with both litigation and dealings with solicitors. Whilst they may have been disappointed with the information which they state was received from their solicitors as to the timing of the probable hearing in the Chancery List once they were told by the solicitors that the files would not be released until a Bill of Costs was drawn and a substantial portion of the costs were discharged, it must have been obvious that such steps coupled with the necessity of a new solicitor becoming fully familiar with the proceedings would greatly prolong the preparation for trial. The plaintiffs could have avoided this further delay.

32. Accordingly I am satisfied that the defendants have established that the delay since April, 2002 by or on behalf of the plaintiffs in having the proceedings certified as ready for trial was both inordinate and inexcusable. The Court must therefore continue to consider whether the balance of justice is in favour of or against proceeding with the case in accordance with the principles set out above.

Balance of Justice

33. The prejudice alleged by the defendant by reason of the delay may be summarised as:

> 1. Commercial prejudice to the fourth named defendant in its trading activities by reason of the continued existence of these proceedings.
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> 2. The general prejudice by reason of diminution in memories in relation to the transactions the subject matter of the proceedings.
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> 3. Particular prejudice by reason of the age and retirement of two named witnesses.
>
> 4. Financial prejudice in that the defendants have had to take out a mortgage to pay legal costs associated with the first hearing which by reason of the stay placed on the order for costs they have not been able to recover from the plaintiffs.

34. Each of the above are matters which it is proper for this Court to take into account. The commercial prejudice is the type referred to by the Supreme Court in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510. The prejudice in holding a trial at a date which is far removed from the events to which it relates is now well recognised by the courts. The retirements of the named individuals are of less significance. It is however important that on the facts of the case there is no prejudice of the type which sometimes arises such as an important witness having died in the intervening period.

35. The prejudice to the plaintiffs if the claim is dismissed is obvious in that they would not be entitled to pursue their claim. On the particular facts of this case they already have one order for costs against them of an amount which the solicitors for the defendants have estimated in correspondence of being in the order of €300,000. They have also in March, 2004 paid to the defendants €9,048 to procure the transcripts which counsel advise were necessary for the preparation of the hearing.

36. In considering whether the delay identified of two years to two and a half years even when added to the earlier periods in this litigation is such that there is a substantial risk that it would not be possible to have a fair trial and in considering the prejudice alleged it is important to consider the nature of the claims being made. Having regard to the re-amended petition delivered in October, 2000 and the re-amended defence in April, 2002 it appears to me probable that the principal issues in this litigation may be:

> 1. The nature of the transactions carried out in relation to the purchase of shares in 1996 and in particular whether or not the Company advanced money directly or indirectly in connection with such share purchases.
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> 2. Whether such transactions were in breach of s. 60 of the Companies Act 1963; *ultra vires* the Company or in breach of s. 31 of the Companies Act 1990.
>
> 3. Whether or not in 1996 there existed pre-emption provisions in relation to the shares of the Company conferring rights on the plaintiffs and if so whether the share transactions in 1996 were carried out in breach of the plaintiffs' such rights.
>
> 4. Whether or not alleged heads of agreement of 1994 gave rights at law or in equity to the plaintiff such that they should now be considered as the owners of more than 10.172% of the company.
>
> 5. Whether such transactions are as established to have taken place in relation to the transfer of shares and the funding of same in 1996 and such other identified actions or omissions alleged against the first and second named defendants in relation to periods up to the time at which it is alleged they were obliged to call an annual general meeting for the year ended 31st October, 1998, are such that the powers of the directors of the company were being exercised in a manner oppressive to the plaintiffs or in disregard of their interests as members.
>
> 6. If any of the claims of the plaintiffs are made out the relief to which the plaintiffs would be entitled and in particular as claimed whether they are entitled to have their shares in the company bought out by the defendants upon a basis that they are deemed to be the owners of 32.476% of the issued share capital of the company or whether only as the owners of 10.172%

37. The formulation of the above issues is not intended as exhaustive. I recognise that there are a number of other allegations made by the plaintiffs such as allegations of conspiracy. However this does not appear to be a main claim in the proceedings. I note from the amended statement of claim delivered in the plenary proceedings that there is no claim for damages for conspiracy. There are claims made for damages against the first and second named defendants for misfeasance and breach of fiduciary duties. However the transactions which are alleged to constitute the misfeasance and breach of duty by the defendants are the same transactions which are the subject matter of the s. 205 petition and will primarily require the court to decide upon the legality and validity of the same transactions.

38. As already indicated I am satisfied that there is potential prejudice to the defendants by reason of the length of time which has elapsed since the transactions to which the claim relates. However these proceedings were commenced in a timely manner after the alleged transactions. The defendants have been on notice at all times that those transactions are challenged. Discovery has already been made. Having regard to the issues identified it appears to me that in both proceedings the primary issues to be determined by the court will relate to identifying exactly what transactions took place and the validity or otherwise of those transactions. The nature of the transactions will be established by documentary proof. The validity or otherwise of the transactions will primarily follow from a consideration of the precise nature of the transactions, the memorandum and Articles of Association of the Company and the procedural steps taken in relation to the transactions which should be recorded by resolutions and minutes. Accordingly it appears to me that whilst undoubtedly there will be oral evidence it is likely to be of less significance than the documentary evidence which should be available to the defendants.

39. In these proceedings the first named plaintiff is the younger brother of the first named defendant. It is admitted that the plaintiffs are the registered owners of 10.172% of the Company. Regretfully it appears that relationships between the plaintiffs and the first and second defendants has long broken down. The plaintiffs have not been directors of the company since the early nineties. The Company is valuable. The parties must resolve their differences to make progress. A significant purpose of these proceedings appears to require the defendants to purchase the plaintiffs' shares in the Company but on the basis the plaintiffs contends for namely that they are deemed to be the owners of 32.47% of the Company rather than only 10.172%.

40. I have concluded that the balance of the interests of justice is in favour of permitting the plaintiffs to proceed but on a conditional and limited basis. The balance of justice appears to me to require that the plaintiffs be given one final opportunity to prepare for trial and to deliver a certificate of readiness. The form of the order will be an "unless order", i.e. there will be an order dismissing the plaintiffs' claim unless a certificate of readiness is delivered and filed prior to a specified date. I will hear counsel for both parties prior to fixing the date.

41. The second conditions I propose imposing on the continuance of the proceedings is that they now be subject to case management by the Court in preparation for trial. Again, I will hear counsel on the timing for same and propose speaking with Laffoy J. who is in charge of the Chancery list as to the court in which it will take place.