

**THE HIGH COURT**

**[2001 No. 4397P]**

**BETWEEN**

**BRENDAN BAGNALL AND McDONNELL COMMERCIALS (MONAGHAN) LIMITED**

**PLAINTIFFS**

**AND**

**McCARTHY COMMERCIALS, FARRANS MATERIALS LIMITED (FORMERLY KNOWN AS TBF THOMPSON IRELAND LIMITED), HYMIX LIMITED AND TBF THOMPSON (PLANT) LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Birmingham delivered the 17th day of April 2012**

1. Before the court are two applications for orders pursuant to the inherent jurisdiction of the Court striking out the plaintiffs' proceedings, against the first defendant in one instance and as against the second and fourth defendant in the other, for want of prosecution and/or on the grounds of inordinate and inexcusable delay.
2. The first named plaintiff is a self-employed hauler of Readymix Concrete by cement mixer lorry. On or about the 6th April 1999, he purchased a Volvo lorry together with a Hymix cement mixing unit from the second named plaintiff, a commercial dealership.
3. The second named plaintiff had, in turn, purchased that lorry from the first named defendant, the distributor. The third named defendant was the manufacturer of the mixing unit and the second named defendant was the appointed distributor in Ireland of Hymix products before that business was taken over by the fourth named defendant.
4. The plaintiffs claim that it became apparent soon after it was purchased that the cement mixing unit was defective. It is claimed that in 1999 and 2000 the second, third and fourth named defendants entered into agreements with the plaintiffs to repair the cement mixing unit, and, when that repair work proved inadequate replaced the unit and finally repaired the replacement unit when it also malfunctioned. The plaintiffs claim that the defendants and in particular the second, third and fourth named defendants breached these agreements with the result that the first named plaintiff was ultimately left with a defective cement unit and suffered loss and damage.

**The history of the proceedings**

5. The plaintiffs commenced these proceedings by the issue of a plenary summons on the 26th March, 2001. At that stage the summons named as the defendants, the first three defendants but subsequently, on the 21st May 2002, the fourth named defendant was added on foot of a court order.
6. The statement of claim was delivered on the 13th March 2003. On behalf of the fourth named defendant it is said that a notice for particulars was served on the 2nd July 2003, to which no reply was forthcoming. The solicitors for the plaintiffs say that at this stage they have no record of receiving the notice for particulars. While I do not for one minute doubt that is so, equally, I have no reason to doubt that the notice for particulars was delivered, and I believe that it is on that basis that I must proceed.
7. On 19th August 2003, the first named defendant delivered a defence.
8. At this point, the defendants point out that no steps were taken in the proceedings on behalf of the plaintiffs for a period of several years until a notice of intention to proceed was served on the 8th January 2008. Somewhat remarkably no activity resulted from the service of the notice of intention to proceed of the 8th January 2008, on the part of the plaintiffs and instead a further notice of intention to proceed was served in April 2009. On this occasion some activity did ensue in that a motion for judgment in default of defence was issued against the second and fourth named defendants. For completeness I should refer to the fact that a notice for contribution and indemnity was served on the first and third named defendants in February 2008, on behalf of the fourth named defendant and on the 15th September 2009, a similar notice was served on behalf of the second named defendant.
9. Following on the motion for judgment in default of defence, a defence was delivered on behalf of the second and fourth named defendants on the 5th August 2009. It should be noted that this defence was delivered although the reply to the notice for particulars was still outstanding and it had been indicated earlier that the defendants would not be in a position to file a defence until a reply to particulars was forthcoming.
10. A notice for trial was served on 15th December 2009, and then in June 2010, the plaintiffs served a notice for particulars in respect of the defence of the second and fourth named defendants. The motion now before the court was issued by the second and fourth named defendant on 14th December 2010, and this was followed by a motion from the first named defendant which issued on 21st February 2011.

**Submissions of parties**

11. The defendants contend that the period that has elapsed since the issue of the proceedings is inordinate and inexcusable. They point out that their motion to strike out the proceedings comes more than nine and half years after the plenary summons was issued. The defendants draw particular attention to the period of over six years between March 2003, and July 2009, when no steps were taken by the plaintiffs in the proceedings.

12. The defendants claim that they are significantly prejudiced by the delay in prosecuting the proceedings. The second and fourth named defendants point out that in order to amount a defence to the proceedings they would need to be able to call upon the evidence of the persons acquainted with the defects on the original unit and those involved in carrying out repairs. In that regard the fourth named defendant points out that it ceased trading in January 2010, due to the fall in demand for its products because of the recession and the decline of activity in the construction sector, with the result that it has terminated all of its employees' contracts. They point to a number of individuals who are unavailable to give evidence because their whereabouts are unknown.

13. The defendants contend that the actual repairs to the units were undertaken in some cases directly by the third named defendant which is no longer trading and in some cases by the representatives of a company that has not been involved in these proceedings, called Deoval Limited. Again, that company does not appear to be active and is said it is unclear whether any representatives of the company would be available to speak about the repairs that were carried out in 1999 and 2000. The second and fourth named defendants also point to the fact that because of the passage of time there are no weighbridge records available from Cement Roadstone required to investigate the possibility that the first named plaintiff was overloading the lorry and by overloading causing the defects.

14. In addition, the second and fourth named defendants say that in August 2003, they received an indemnity from the third named defendant in the proceedings and they point to correspondence evidencing this fact. However, they say that the third named defendant is no longer trading and is effectively insolvent with the result that the indemnity provided as part of a commercial agreement is now of no value.

15. The plaintiffs acknowledge that there has been delay in advancing the proceedings and offer an explanation in terms of the fact that during the period of delay the focus was not on the litigation but on ensuring their commercial survival by devoting as much time and effort as was possible to regaining their reputation which had been damaged because of the difficulties with the mixer. The plaintiffs claim that each of the defendants can reasonably be expected to defend the action notwithstanding the passage of time, and say that such delay as has occurred has not prejudiced the defendants.

### **The applicable legal principles**

16. The test to be applied on an application to strike out proceedings by reason of delay is not a matter of serious disagreement. In *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, Finlay P., as he then was, held that it should be determined first whether there has been an inordinate and inexcusable delay on the part of the plaintiff. Where such a delay has been established the Court must then go on to consider how to exercise its discretion as to whether to dismiss or not. In this regard, the Court should have regard to whether the balance of justice favours allowing the action to proceed or the dismissal of the action. In the case of *O'Domhnaill v. Merrick* [1984] 1 I.R. 151, the Supreme Court clarified that where there has been inordinate and inexcusable delay the plaintiff is required to identify countervailing circumstances if the case is not to be dismissed. The matter was put in the following way:-

"Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where, as in this case, the delay has been inordinate and Inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent."

17. How the Court will set about its task was addressed by the Supreme Court in the case of *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where Hamilton C.J. referred to the factors that will be taken into account in determining where lies the balance of justice in the following terms:-

"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 amounts to acquiescence on the part of the defendant in the plaintiffs 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 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, and
- (vii) The fact that the prejudice to the defendant referred 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."

18. In this case I am satisfied that there has been inordinate delay. In particular the complete lack of activity between March 2003, and July 2009, apart from the service of a notice of intention to proceed on foot of which no activity took place, must be regarded as inordinate by any standard.

19. The plaintiffs seek to explain and excuse the delay by pointing to the fact that the focus of their attention during this time was on commercial survival and that they were devoting all their time and efforts to the business. I am afraid that I do not regard this explanation and excuse as being at all satisfactory. The plaintiffs unilaterally took the decision to put the proceedings on hold. That was a decision made without reference to the defendants and in the circumstances I must conclude that the delay was both inordinate and inexcusable.

20. It remains necessary to consider whether the interests of justice are served by dismissing the plaintiffs' claim or permitting the claim to proceed and in particular it is necessary to consider whether there are countervailing circumstances, given that I have concluded that there has in fact been delay which is both inordinate and inexcusable.

21. As to whether there are any countervailing circumstances I should say at the outset that I do not believe that there has been acquiescence in the delay on the part of the defendants. It is true, of course, that the motion to strike out or dismiss could have been issued earlier. In the case of the second and fourth named defendants it is also true that, although a notice seeking further particulars was delivered, no efforts were made to compel delivery of a reply and ultimately a defence was delivered before the particulars were replied to. However, it is undoubtedly the case that the reason these proceedings have been delayed was not because of any action or inaction on the part of the defendants but because the plaintiffs chose to delay.

22. Looking at the wider picture there are a number of aspects that require consideration. There is first of all the nature of the proceedings themselves - essentially a sale of goods matter involving a new Volvo lorry with a cement mixing unit attached. There does not seem to be any dispute about the fact that the first named plaintiff experienced very significant problems indeed with his new purchase. On the face of it, this was a matter the first named plaintiff was entitled to pursue and might have been expected to pursue. This is a factor which weighs in favour of the plaintiff being permitted to proceed with the action.

23. On the other side of the coin the defendants, and in particular the second and fourth defendants, point to a number of respects in which they have been disadvantaged or prejudiced by the delay. Fergal Crowe, who was the employee of the second/fourth defendant who dealt directly with the plaintiff, left that employment some years ago. The second and fourth defendants are not aware of his current whereabouts, or where he is now employed. There have been attempts to trace him but these have been unsuccessful. Two mechanics, Tommy Sweeney and Jason Glynn, who were employed as such by the second and fourth named defendants and were involved in inspecting the vehicle's defects, have also left their employment and their whereabouts are unknown. Repairs were carried out by the third named defendant and by the company called Deoval Limited. While that company, Deoval Limited, remains on the companies' register, efforts to make contact with it have proved unsuccessful. The defendants have also pointed to the absence of weighbridge records which might have established overloading on the part of the plaintiffs. With the exception of the point in relation to the weighbridge records, which seems quite speculative in nature and not firmly grounded in fact, these are points of substance. It is true that we do not know what precise evidence would have been given by Mr. Crowe, Mr. Sweeney or Mr. Glynn if they were available or just how helpful the evidence would be to the defendants but the delay has denied the second and fourth named defendants the opportunity to put this evidence before the Court.

24. However, the matter that is of the greater significance in my view for these defendants is that the second and fourth named defendants have been denied the benefit of an indemnity provided by the third named defendant. The third named defendant is not in liquidation but it has apparently ceased to trade and it is insolvent, thus the indemnity that the third named defendant agreed to provide in August 2003, is now of no assistance to the second and fourth named defendants.

25. This is a matter of enormous practical significance for the second and fourth named defendants. They have gone from a situation where they could have expected with some confidence that they would not be actively involved in the present proceedings to a situation where they are left without an effective indemnity. In that regard it is appropriate to note that correspondence in August 2003, had referred to the fact that there was agreement that the second and fourth named defendants would be "taken out of the legal case involving Brendan Bagnall" and would therefore have no liability in the matter either to Hymix Limited or Mr. Bagnall, which correspondence was responded to by the Managing Director of Hymix Limited who confirmed that he agreed in principle with the settlement and releasing defendants from the Brendan Bagnall case. In a situation where the plaintiffs have been guilty of inordinate and inexcusable delay, it would be contrary to the interests of justice to require these defendants to defend these stale proceedings in these circumstances.

26. So far as the first named defendant is concerned, the position is somewhat different. The case against this defendant is as the distributor of the Volvo lorry with the original Hymix unit. It is not suggested that the first named defendant had any involvement in the repairs or servicing of the equipment in question. Indeed according to the affidavit of Mr. Michael McCarthy, sworn on behalf of the first named defendant, the alleged defects with the unit were not brought to the attention of the first named defendant at the time and indeed, as it is put, this defendant only discovered that there had been a problem "coincidentally" in February 2001.

27. The fact that its involvement is a more limited one means that the scope for pointing to specific prejudice is less. Indeed, this defendant deals with the question of prejudice by saying that the prejudice arises from the fact that it is left in the position of last man standing.

28. This is a somewhat dramatic way of describing the situation, but it does give an indication of how its role in the litigation has been changed fundamentally by the passage of time. As a distributor its position was a limited one. Indeed it might be thought that there was little to distinguish its position from that of the second named plaintiff. If there were problems with the units when delivered it, as distributor, could expect to look to its supplier. If the problems were with maintenance or repairs then this defendant would be comforted by the knowledge that it had no involvement in that area. However a side effect of the recession, and the number of victims it has claimed is that the scope for the defendant to pass on or to share the burden has been reduced. The plaintiff issued its proceedings during the height of the boom. It consciously decided not to devote attention to the proceedings it had issued, but focussed on the conduct of its business. It made that decision without reference to the first named defendant. The position of the first named defendant is now altogether a more difficult one than would have been the situation had the case proceeded in the normal way. In my view, the interests of justice would not be served by permitting the first named defendant to be placed in that situation. Accordingly, I will accede to its application also. The effect of this is that the plaintiff's claim against the first, second and fourth defendants is struck out for want of prosecution and on the grounds of inordinate and inexcusable delay.