THE HIGH COURT

[2010/2205 P.]

BETWEEN

BRIAN JOHNSON TRADING AS ACE ENGINEERING

PLAINTIFF

AND

CALOR TEORANTA TRADING AS CALOR GAS

DEFENDANT

JUDGMENT of Mr. Justice Binchy delivered on the 3rd day of July, 2018

1. In these proceedings the plaintiff claims damages for breach of contract arising out of the termination, in 2009, of a contract for services between the plaintiff and the defendant. That contract for services has its origin in an oral agreement originally made in 1974, between the plaintiff's predecessor in title, a Mr. Duncan and the defendant. The plaintiff claims that he acquired the business of Mr. Duncan, including the benefit of a contract with the defendant, pursuant to an agreement made on 5th March, 2007 and that the contract with the defendant continued uninterrupted and unchanged until June, 2009, when it was terminated by the defendant.

2. Arising out of that termination, the plaintiff issued these proceedings on 8th March, 2010 and matters progressed very promptly up until 29th June, 2010. A statement of claim was delivered on 4th March, 2010, a defence was served on 24th March, 2010, the defendant served a notice for particulars on 29th March, 2010 and replies to particulars were delivered on 29th June, 2010. Thereafter however there has been some considerable delay in the progression of the proceedings, and arising out of that delay the defendant issued a notice of motion dated 1st August, 2017 whereby it seeks an order dismissing the plaintiff's claim on the grounds of want of prosecution and/or inordinate and inexcusable delay. It is that motion with which this judgment is concerned.

3. The motion is grounded upon the affidavit of a Mr. Sean McCourt, Operations and HR Director of the defendant. In his affidavit, he sets out the chronology of the pleadings as described above and thereafter. Nothing occurred after 29th June, 2010 until the defendant served a notice seeking further and better particulars on 28th January, 2014. On the same date, the defendant served a draft amended defence and sought consent to the proposed amendments contained therein. No response issued either to the notice of further and better particulars or to the request to consent to the filing of the amended defence until 7th June, 2017, when the plaintiff's solicitors served a notice of intention to proceed. In the same letter they said that they would be furnishing replies to the notice for further and better particulars upon the expiration of the notice of intention to proceed. The replies to the notice for further and better particulars were not in fact delivered until 2nd November, 2017.

4. In his grounding affidavit, Mr. McCourt avers that given the nature of the factual disputes between the parties, the defendant will be required to rely on oral evidence of those employees who entered into the alleged contract with the plaintiff's predecessor in title in or around 1974. He says that he believes the 1974 agreement was not recorded in writing. He also avers that evidence will be required in relation to the alleged purchase of Mr. Duncan's business by the plaintiff in March, 2007, in respect of which the defendant pleads that its consent was neither sought nor granted. So therefore there will be a further factual dispute, requiring oral evidence, as to whether or not such consent was sought and/or obtained in March, 2007, more than ten years prior to the issue of the defendant's motion to dismiss the proceedings. In addition, he says, further oral evidence is likely to be required from persons who were employed with the defendant in or about June, 2009, at the time of the alleged breach of contract. In his grounding affidavit, Mr. McCourt does not identify those employees, but in response to the replying affidavit of the plaintiff he identifies two witnesses who would be relevant, and each of whom has retired, one in 2011 and the other in 2017. Aside from the possible difficulties of locating and calling in evidence witnesses who are no longer employees, he avers that such witnesses are likely to have difficulty remembering factual issues from eight and more years ago.

5. While the chronology of pleadings might suggest that nothing was being done between 2010 and 2014, the affidavits indicate that this is not so because Mr. McCourt refers to the swearing of an affidavit of discovery by the plaintiff in September, 2013. He describes this as the last formal step taken by the plaintiff in the proceedings prior to the filing of his notice of intention to proceed in June, 2017, but he acknowledges that there was some correspondence following upon the affidavit of discovery, in early 2014. Taking that as the last date of activity in the matter by the plaintiff until the service of the notice of intention to proceed in June, 2017, Mr. McCourt says that the plaintiff delayed between early 2014 and June, 2017, a period of some three and a half years, without giving any explanation for the delay in the intervening period.

6. Mr. McCourt expresses particular concern that in the letter serving the notice of intention to proceed on 7th June, 2017, the solicitors for the plaintiff specifically refuted any suggestion, as made in the amended defence of the defendant, that the defendant was unaware that the plaintiff had taken over the business of Mr. Duncan. Mr. McCourt says that this allegation was made for the first time in the letter of June, 2017, and not in the pleadings served before that time, and will necessitate the defendant seeking further evidence about matters going back over ten years.

7. In his replying affidavit, Mr. Johnson avers that both sides have exchanged substantial discovery in relation to the matter. This was not contradicted by the defendant. Mr. Johnson acknowledges that there has been a delay since 2014 when the notice for further and better particulars was served by the defendant. He says that that notice required information including a breakdown of all losses claimed by the plaintiff in the proceedings, and that his solicitors had to engage with his accountant in order to address that notice, and the collation of the required information took "a period of time". Mr. Johnson also avers that in September, 2015, his daughter died in very tragic circumstances and that an inquest into her death was held in October, 2017, and has been further adjourned.

8. Mr. Johnson denies that the defendant will suffer any prejudice as a result of the delay that has occurred. Insofar as the agreement between the defendant and plaintiff's predecessor in title was reached back in 1974, Mr. Johnson avers that the employee of the defendant with whom Mr. Duncan originally reached agreement in relation to the provision of services by the plaintiff in 1974, a Mr. David Sheridan, died many years ago – at least fifteen years ago and in any case prior to the issue of these proceedings. It is submitted that that cannot give rise to any prejudice for which the plaintiff is responsible for the purposes of this application. Mr. Johnson also points out that in his grounding affidavit, Mr. McCourt does not name any witnesses which he says will be required, but will no longer be available. (As mentioned above, however, Mr. McCourt does identify specific witnesses who have retired, in his affidavit in reply to Mr. Johnson). Mr. Johnson says that if this application is refused, the proceedings are now ready and may be set down for trial. In his replying affidavit, Mr. McCourt disputes that the matter is ready for trial but does not explain why he considers this to be the case.

Discussion and Decision

9. The principles governing applications such as this are well established and do not need rehearsal here, other than to point out that they are the principles summarised by Hamilton C.J. in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Since *Primor* it is fair to say that the courts have shown increasing reluctance to tolerate delays which might have been tolerated in the past and have emphasised the need to ensure that litigation is progressed expeditiously in order to minimise the possibility of injustice to a party caused by the delay of another in the progression of litigation, as well as to ensure that the State meets its obligations to litigants under the European Convention on Human Rights to ensure that disputes are determined within a reasonable time. This is clear from decisions such as that of Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290 and Clarke J. in *Rodenhuis and Verloop B.V. v. HDS Energy Ltd* [2011] 1 I.R. 611.

10. In her submissions on this application, counsel on behalf of the applicant relied upon two periods during the course of which she submits there was a delay on the part of the plaintiff in excess of three years in the progression these proceedings. The first period is the period between June, 2010, when the plaintiff delivered replies to the first notice for particulars of the defendant, up to September, 2013, when the plaintiff delivered an affidavit of discovery. The second period is from September, 2013 to 7th June, 2017, when the plaintiff's solicitors served a notice of intention to proceed. I think that the first of these periods should be disregarded for the purpose of this application. It is not relied upon by Mr. McCourt, and in his grounding affidavit, he makes reference to the second period only. As I have said above, the plaintiff makes reference to the fact that there was substantial discovery made by both parties and no issue was taken with this averment by the defendant. Even if three years is a long time within which to bring discovery to a conclusion, it would be unfair to hold the plaintiff responsible for the apparent delay between June, 2010 and September, 2013 without knowing a great deal more about exactly what transpired during this period, and specifically about discovery, not least in circumstances where Mr. McCourt himself does not complain about this period in his affidavits.

11. The second period runs from September, 2013 up to June, 2017. However, Mr. McCourt in his second affidavit concedes that this period might fairly be measured from early 2014, up to which point in time there had been correspondence following upon delivery of an affidavit of discovery by the plaintiff in September, 2013. This reduces the second period to one of three and half years. There can hardly be any doubt but that a period of inactivity of three and half years in the course of litigation must be regarded as inordinate. So I will move next to consider whether it was excusable. Mr. Johnson offers two explanations. Firstly, he says it was necessary for his solicitors and accountants to engage with each other in order to address the notice for further and better particulars of the defendant of January, 2014. While that may be so, the replies to this notice, exhibited by Mr. McCourt, extend to a little more than a page. While brevity is to be commended, and is not necessarily reflective of difficulties encountered in preparing replies, or the time required to do so, it is difficult to see why the replies given in this case could not have been given within a period of two months or less.

12. The second reason for delay given by Mr. Johnson is one of great tragedy which by any standards excuses a significant period of inactivity, and that is the sudden and tragic death of Mr. Johnson's daughter in September, 2015. It is difficult to put any time limit on how long such an event may reasonably be deemed to excuse a delay in progressing litigation but it must be observed that it is probably very difficult for Mr. Johnson and his family to focus on anything else for as long as an inquest is ongoing, as was the case on the date of his replying affidavit of 12th January, 2018. In his replying affidavit, Mr. McCourt treats sympathetically with the issue but he does note that the unfortunate passing of Mr. Johnson's daughter was still two years after the last formal step taken by Mr. Johnson in the proceedings. That, however, ignores that the defendant has, in effect, conceded that the start point for the delay may fairly be measured from January, 2014 up to which point there had been ongoing correspondence following delivery of discovery. So it is more accurate to say that before the plaintiff suffered the tragic loss of his daughter, there had been a delay on the part of the plaintiff in progressing these proceedings of the order of 20 months, just two of which could be excused on the grounds of dealing with replies to particulars. This means that the plaintiff caused an inexcusable delay of eighteen months, up to the date on which his daughter died.

13. As I have said above, the defendant took a sympathetic view of this tragedy in the life of the plaintiff, at least on one analysis, in arguing that without reference to that at all, there has still been a delay of two years. But on the other hand the defendant is also arguing that there has been a total delay in total of three and a half years from January, 2014 to June, 2017. In *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, Fennelly J. made reference to the diversity of events that may delay litigation:-

> "There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim."

14. This would suggest that such events may be taken into account when considering the question of inordinate and inexcusable delay. However, in Truck and *Machinery Sales Ltd. v. General Accident and Another* (Unreported, High Court, Groghegan J., 12th November, 1999) Geoghegan J. stated as follows:-

> "Strictly speaking it would seem to me that excuses relied on should relate in some way to the actual proceedings in hand because an opposing party can hardly be expected to stand aside and wait while the other party resolves its problems which have nothing to do with the litigation. Nevertheless, I am satisfied that all the surrounding circumstances including so called excuses based on extraneous activities must to some extent be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out or allowed to proceed".

15. While it would appear that Geogheghan J. adopted a more stringent approach than Fennelly J., even his more stringent analysis allows for the taking into account of extraneous circumstances, outside the course of the litigation. I have little doubt but that a tragedy of the kind endured by the plaintiff in this case is one such event. Nonetheless, as in all other areas of a person's life, a person afflicted by tragedy reaches a point where he or she must, as best possible, endeavour to resume normality even though their grief continues. This is particularly so where their actions or inactions impact upon others. In the context of litigation, what is a reasonable period to excuse a person, who has suffered a great tragedy, from attending to the litigation, bearing in mind that the delay may impact in some way upon the other party? It may be that a person is so overcome by grief as not to be able to deal with his/her affairs for an extended period, but that has not been suggested in this case. There is no perfect answer to the question, and to some degree at least, whatever answer is given is necessarily arbitrary. But absent special considerations on either side, it seems to me to be reasonable to excuse a party who has lost a child from attending to litigation for a period of twelve months. In this case, the delay during the relevant period is 21 months i.e. September, 2015 to June, 2017.

16. The upshot of the conclusions above is that while the period of delay involved in progressing the litigation in this case is three and a half years, or forty two months, fourteen months of that period may be regarded as excusable, while 28 months of the same period is inexcusable. The question that I must therefore now turn to address is where the balance of justice lies in the particular circumstances of this case in considering the impact upon the proceedings of an inordinate and inexcusable delay of 28 months.

17. I was referred to a number of authorities by the parties in the course of hearing this application. These include the decision of Laffoy J. in *Corcoran v. McCardle* [2009] IEHC 265, the decision of Tanner v. O'Donovan and ors [2015] IECA 24, a decision of the Court of Appeal (Hogan J.) and a further decision of the Court of Appeal (Irvine J.), *Granahan t/a CG Roofing and General Builders v. Mercury Engineering* [2015] IECA 58. All of these cases fell to be determined on their facts. In *Corcorcan v. McArdle*, Laffoy J. noted that there had been a delay of nine years from the earliest point at which proceedings might have been issued, up to the date of the issue of proceedings, and then a further four years between the date of the issue of the proceedings and the date upon which the application to dismiss was initiated. She was most concerned about the latter which she found in the circumstances to be both inordinate and inexcusable. She then considered where the balance of justice lay and concluded that it lay with the plaintiff on the basis that she could find no basis for concluding that the delay had prejudiced the defendant in his ability to defend the claim properly.

18. In *Tanner v. O'Donovan and others,* on the other hand, Hogan J. found that a delay of six years between the date of the issue of the proceedings and the date of issue of the motions to dismiss to be both inordinate and inexcusable in the particular circumstances of that case. On the question of balance of justice, he noted that the case fell to be determined largely on the existence or otherwise of an oral contract for the provision of engineering and architectural services, the terms of which (if there was one) were in dispute. He said that any fair hearing of the claim would thus be very dependent on oral evidence and the recollection of detail associated with architecture and engineering services and the construction of a building. The contract had commenced in 1998 and the motion to dismiss the proceedings was heard by the High Court on 14th October, 2010 when the motion was granted. Hogan J. considered that the time lapse between 1998 and 2010 was inherently prejudicial since the capacity of witnesses, on all sides, to recollect the detail of the kind involved in the case was undoubtedly considerably impaired. Two potentially relevant witnesses had died and another had emigrated to the United States and it was unclear if he would have been available for the trial. Accordingly, Hogan J. concluded that in all of these circumstances, the balance of justice required the dismissal of the proceedings.

19. In *Granahan t/a CG Roofing and General Builders v. Mercury Engineering*, the High Court had also dismissed the plaintiff's claim on the grounds of inordinate and inexcusable delay. On appeal, Irvine J. in the Court of Appeal identified three periods of significant delays on the part of the plaintiff after the delivery of the defence. Each of these periods was in excess of a year. Moreover, depending on how one viewed the delays, it was arguable that they could be considered to be much longer in terms of their effect; for example, a letter seeking voluntary discovery was not issued by the plaintiff until more than four years after the delivery of the defence. Irvine J. was satisfied that when the periods of delay were taken cumulatively, they could only be considered as being inordinate. Irvine J. noted that the plaintiff did not put forward any reasons for the delays and the case was not one of any particular complexity. Accordingly, she found that the delay was also inexcusable, and was not in any way contributed to by any conduct of the defendant. She then went on to consider where the balance of justice lay. In that case also the defendant contended that it would suffer significant prejudice because a number of potential witnesses were no longer in its employment. Irvine J. conducted a detailed analysis of this argument and concluded by saying that she was not satisfied that the defendant was likely to suffer even moderate prejudice due to the potential unavailability of witnesses, because she was not persuaded that the defendant would not have available to it any relevant witnesses required to defend the proceedings. The analysis that Irvine J. conducted is most helpful in the consideration of this application and for that reason it is worth quoting in *extenso*:-

> " 39. While at face value the averments contained in Mr. Lacey's affidavit contend for significant prejudice, and clearly the trial judge was impressed that this was so, I am inclined to agree with counsel for the plaintiff that the prejudice alleged is much more likely to be illusory than real.
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> 40. First, any defendant faced with litigation should know what witnesses it is likely to need to counter the allegations made. Accordingly, it should ensure that it obtains contact details for any such witness as may, for whatever reason, leave its employment. Thus, I place little weight upon the fact that a number of the defendant's potential witnesses are no longer in its employment.
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> 41. Secondly, Mr. Lacey does not state what steps, if any, were taken to ensure that these witnesses would remain available to give evidence at the trial when they left. Neither does he state what efforts, if any, he had made to trace their whereabouts prior to swearing his affidavit. Did he, for example, consult professional registers, social media, former colleagues etc.?
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> 42. Thirdly, even if this action had been brought on for trial as early as 2012 at least three of the five witnesses mentioned by Mr. Lacey would at that stage already have left the defendant's employment. Further, given that Mr. David Doyle is working for the defendant company in Sweden it can hardly maintain it is prejudiced by reason of the fact that he is no longer working in Ireland.
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> 43. Fourthly, Mr. Lacey does not state that any of these witnesses, if contacted, would be unlikely to be available to travel to Ireland for the trial. Even if they had, the fact that a witnesses is out of the jurisdiction and may have difficulty, due to work commitments seeking time off to return to give evidence, this no longer poses the same type of problem that used to exist in times before the court could direct that evidence be taken by way of video link.
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> 44. For the aforementioned reasons I am not satisfied that the defendant is likely to suffer even moderate prejudice due to the potential unavailability of witnesses. Its concerns in this regard cannot be equated to the type of prejudice that potentially arises for a defendant who, as a result of delay, has lost, through death or illness, the evidence of some crucial witness.
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> 45. As to whether the defendant is likely to suffer general prejudice due to delay, this is a matter of significant concern to the Court on this appeal. Regrettably, if the appeal is allowed the proceedings may not be heard for some considerable period of time as the plaintiff appears intent on making an application to amend his statement of claim to plead new allegations of fraud, forgery and possibly defamation. If that application is successful, regardless of due expedition on the part of both parties, it will be some time before the action is heard."

20. Irvine J. then went on to consider whether or not the defendant might suffer general prejudice due to delay. She said:-

> "I am mindful of the fact that the greater the time interval between the events in question and the date upon which an action is heard the more fragile and unreliable the evidence is likely to be with the ever increasing chance of an unjust result. However, that said, many cases of great complexity are, for reasons unconnected with any default on the part of the parties, heard at a significant remove from the events concerned and the court is left with the task of trying to achieve a just result, regardless of the ensuing complications. In this case there is some small amount of comfort afforded by the fact that the defendant maintains that its agreement with the plaintiff came to an end when various tradesmen

whom he supplied failed certain trade tests and there is no suggestion that the evidence pertaining to these tests, which the men were obliged to undergo, will not be available if the matter is allowed to proceed to trial.

What I have to ask myself is whether the balance of justice in this case is best served, as was found by the learned High Court judge, in the dismissal of the action. Having weighed in the balance the terminal prejudice to the plaintiff in having his claim dismissed and his constitutional right of access to the court revoked against the prejudice likely to be visited upon the defendant if the action is to be allowed proceed, I believe that the balance of justice is not achieved in the dismissal of the plaintiff's claim. While mindful of its constitutional obligations to bring to an end the culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of proceedings, as advised by Hogan J. in *John Donnellan v. Westport Textiles Ltd*. [2011] IEHC 11 and Ireland's obligations which arise by reason of Article 6 of the Convention, I am nonetheless satisfied that, at this point in time, the balance of justice favours allowing the claim proceed."

21. Much, if not all of the same considerations apply to this decision. Firstly however, it should be observed that there is nothing to suggest that the agreement or agreements reached between the plaintiff and his predecessor with the defendant was of any particular complexity. As I have already indicated, whatever may have occurred in 1973 was always going to present a difficulty in evidential terms, due to no fault of the plaintiff, especially in the absence of a written contract. The Court will also be concerned with events in 2007 and 2009. Specifically, the question will arise as to whether or not, in 2007, either Mr. Duncan or the plaintiff sought the consent of the defendant to the transfer of the contract between Mr. Duncan and the defendant to the plaintiff. It is not pleaded that there was written agreement or consent to this transfer, and in the absence of a written agreement, this important issue will have to be determined by the evidence of the plaintiff himself and possibly also the former employees of the defendant, one of whom is now retired seven years and the other of whom retired last year. But the defendant pleads that no consent was sought or given, so arguably the evidence to be given on its behalf will be very simple. If no consent was sought or given, then the entitlements of the parties in this respect will most likely fall to be determined as a matter of law rather than as a matter of fact. But one way or another, the issue does not appear to be one of any great complexity. Certainly, this is in no way analogous to the kind of contract which was under consideration in *Tanner v. O'Donovan & others*, which involved a contract for the provision of engineering and architectural services.

22. Secondly, as in *Granahan* the defendant would have known from the outset of these proceedings what witnesses it was likely to require to counter the allegations made. The proceedings themselves were issued in a timely manner and the defendant most probably obtained statements from relevant witnesses which may be used to refresh their memories. If it did not obtain such statements, it should have done so. The fact that witnesses are no longer in the employment of a litigant is not by itself a significant prejudicial factor to be taken into account, unless the witness is no longer available to give evidence, which has not been suggested in this case. People come and go from employment all the time and are frequently called as witnesses while in retirement or engaged in other employment. It is only their proven unavailability that should be taken into account in applications such as this, and not the mere possibility of the same.

23. For these reasons I am satisfied that the defendant is unlikely to suffer prejudice, even moderate prejudice, due to the potential unavailability of witnesses. As to the question of general prejudice, I share the views expressed by Irvine J. in *Granahan*. I consider that the balance of justice in this case is best served in allowing the claim to proceed.