Neutral Citation Number: [2009] IEHC 265

THE HIGH COURT

1999 8844 P

BETWEEN

JAMES CORCORAN

PLAINTIFF

AND

FRANK McARDLE

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 3rd day of March, 2009

The application
On this application, which was initiated by a notice of motion which issued on 18th June, 2003, the defendant seeks an order dismissing the plaintiff's claim "for want of prosecution for inordinate delay".

The claim
In essence, the plaintiff's claim is based on three documents of title in relation to lands known as Lisdoo, Dundalk, County Louth (Lisdoo), the effect of which, *ex facie*, was as follows:

(1) By a deed of conveyance, assignment and transfer dated 15th June, 1990 made between Frances Johnston of the one part and the plaintiff of the other part, which gave effect to a sale for IR£125,000, Lisdoo was conveyed to the plaintiff.

(2) By a declaration of trust dated the 25th July, 1990 (the 1990 declaration of trust) made between the plaintiff on the one part and the defendant on the other part, after reciting that the consideration of IR£125,000 had been provided by the defendant, the plaintiff declared that he held Lisdoo upon trust for the defendant.

(3) By a deed of conveyance, assignment and transfer dated 11th December, 1996 (the 1996 conveyance) the plaintiff conveyed Lisdoo to the defendant.

The plaintiff's substantive case is advanced on two alternative bases. The first is that the execution of the 1990 declaration of trust and the 1996 conveyance was obtained without his informed or any consent and in circumstances which disclose deceit, breach of trust, breach of fiduciary duty, misrepresentation, breach of contract and/or negligence on the part of the defendant, both as the partner (meaning business partner) and legal adviser (meaning solicitor) of the plaintiff. Secondly, the plaintiff has asserted that he has no recollection whatsoever of signing either document and/or having any dealings with the defendant "with the nature, meaning and effect" being contended for by the defendant. The primary relief sought by the plaintiff is a declaration that the plaintiff and the defendant are the joint beneficial owners in equal shares of Lisdoo. That is the essence of the plaintiff's claim, which is complicated by assertions that the plaintiff and the defendant operated a *de facto* partnership through certain companies. Counsel for the parties agreed that that complication was not really relevant to the Court's determination of this application.

In his defence, the defendant comprehensively traversed all of the allegations made by the plaintiff. He claimed that aspects of the claim are statute-barred. He also counter-claimed for damages for slander of title.

Time line in proceedings
The material time line in the proceedings to the date of this application is as follows:-

Date Pleading

3rd September, 1999: Plenary summons issued

4th October, 1999 Plenary summons served

13th October, 1999 Appearance entered on behalf of the defendant

13th December, 1999 Motion for interlocutory injunction brought by the plaintiff

25th February, 2000 Statement of claim delivered

27th February, 2001 Motion for judgment in default of defence

26th February, 2001 Defence and counter-claim delivered

18th June, 2003 Defendant's motion to dismiss

There are a number of observations to be made in relation to the time line.

First, the relief sought by the plaintiff on the interlocutory motion was an injunction restraining the sale of the lands. That motion, which generated a considerable amount of paper, was eventually compromised on the basis that the defendant would not enter into a contract for the sale of Lisdoo without prior notice to the plaintiff.

Secondly, a year elapsed between the delivery of the statement of claim and the delivery of the defence and counter-claim. The delivery of the defence and counter-claim had to be procured by the motion for judgment.

Thirdly, coincidentally, the plaintiff moved to prosecute the proceedings at the same time as the defendant issued his motion to dismiss for delay. A notice of intention to proceed, which was originally dated 16th June, 2003, was sent by letter dated 18th June, 2003 by the plaintiff's then solicitors to the defendant's solicitors. The notice to proceed was lodged in the Central Office on 20th June, 2003.

To complete the picture in relation to this application, six affidavits in all were filed. The affidavits were sworn by the deponents on the following dates: 12th June, 2003 (the defendant); 25th July, 2003 (the plaintiff); 17th October, 2003 (the defendant); 24th November, 2003 (the plaintiff); 26th March, 2004 (the defendant); and 24th May, 2004 (the plaintiff). The position, accordingly, was that by the end of May 2004 this application was ready for hearing on its own.

The only action taken by the plaintiff to advance the prosecution of the proceedings after this application was initiated was to request voluntary discovery by letter dated 30th October, 2003. It would appear that the request was not responded to on behalf of the defendant. I mention this because counsel for the defendant was critical of the failure by the plaintiff to move the proceedings along after this application had commenced. In all of the circumstances, I do not think that criticism was warranted.

Delay in bringing the application to hearing
The delay between the time when this application was ready for hearing, which was late May 2004, and when it came on for hearing on 25th February, 2009, almost five years later, is partly explained by the fact that the defendant initiated another application in November 2004. On 3rd December, 1999 the plaintiff had registered these proceedings as a *lis pendens* against Lisdoo. On 17th November, 2004 the defendant issued a notice of motion seeking an order vacating the *lis pendens*. Six affidavits were filed in connection with that application up to June 2005. Apparently, it was agreed between the parties that both applications of the defendant would be heard together. The second application would appear to have been ready for hearing in June 2005. It is not clear to me why the applications did not get listed for hearing shortly thereafter. However, in early March 2008 the defendant filed his fourth affidavit on the application to vacate the *lis pendens* and no less than a further eight affidavits were filed in the period leading up to July 2008.

The defendant's application to vacate the *lis pendens* was listed for hearing together with his application to dismiss on 25th February, 2009. The Court was told that the parties had agreed that the motion to vacate the *lis pendens* should be struck out and an order to that effect was made with the costs of the motion to be costs in the cause. Obviously, as counsel for the defendant pointed out, if the action is dismissed, the *lis pendens* will fall with it and the defendant will be entitled to an order vacating it as of right.

I am not satisfied that I can form a view as to the cause of the delay in dealing with both applications. Even though it is common case that the issue of any prejudice caused by delay falls to be determined as of 18th June, 2003, when this application was initiated, it seems to me that the fact that the defendant has not forced on this application is a factor to be taken into the equation in determining where the balance of justice lies.

The evidence
In contrast to the volume of paper which the application for the interlocutory injunction and the application to vacate the *lis pendens* generated, the six affidavits filed on this application are sparse on facts. In his grounding affidavit, the plaintiff set out his defence and the time line. Having referred to the period of two years (in fact, twenty seven months) which elapsed from the delivery of the defence and counter-claim to the issuing of the motion to dismiss, the defendant asserted that there was both inordinate and inexcusable delay on the part of the plaintiff which had the effect of denying the defendant the free and unfettered use of his lands. In subsequent affidavits the defendant has referred to the prejudice and unwarranted hardship he has suffered without elaborating. In his third affidavit he averred that the real reason why the plaintiff had not prosecuted the proceedings was because the purpose of bringing them in the first place was solely to put pressure on the defendant in respect of his shareholding in a company, Trevarrick Limited, in which it would appear that the defendant and the plaintiff were equal shareholders, which the defendant had indicated that he would not sell to the plaintiff.

The excuse advanced by the plaintiff for the twenty seven month delay was that he was distracted by his involvement in other proceedings involving the defendant. The other proceedings were the following:

> (a) An action between Brian Britton, as plaintiff, and the defendant, the plaintiff and Trevarrick Limited, as defendants (Record No. 1997 No. 43S), which started out as summary proceedings in the High Court and which around 1999 were referred to plenary hearing.
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> (b) Circuit Court proceedings (Record No. 1999 No.38) between the plaintiff, as plaintiff, and the defendant, as defendant, for recovery by the plaintiff of monies advanced to the defendant. Those proceedings were heard in the Circuit Court in July 2003 and determined in the plaintiff's favour. However, they were subject to an appeal to this Court which was still pending when the final affidavit (sworn on 24th May, 2004) was filed on this application.

The plaintiff averred in his first affidavit that, as a result of his preoccupation with those proceedings involving the defendant, he had not advanced these proceedings as expeditiously as he would otherwise have wished to have done during the period.

The only other fact which is deposed to, which may be of relevance, is that the plaintiff averred in his affidavit of 24th November, 2003 that it was likely that Lisdoo had a value in excess of €6,000,000 at that stage. In his next affidavit the defendant did not dispute that valuation but contrasted it with the amount being claimed in the Circuit Court proceedings, IR£€9,500.

The law
The parties are in agreement as to the principles of law applicable in determining an application to dismiss proceedings on the grounds of delay under the Court's inherent jurisdiction. The relevant principles are those summarised by Hamilton C. J. in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 (at p. 745 *et seq*.), which were recently applied by the Supreme Court is *Desmond v. M.G.N. Limited* [2008] I.E.S.C. 56 in which judgment was delivered on 15th October, 2008. Hamilton C. J. stated:

> "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 a 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 parties 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 to 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."

As was pointed out in the majority judgment of Macken J. in *Desmond v. M.G.N. Limited*, the Court has to apply two tests:

> (1) to ascertain whether the delay complained of is inordinate and inexcusable, and
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> (2) if it is so established, where the balance of justice lies.

I will consider each of the tests in turn.

Inordinate and inexcusable delay?
Counsel for the defendant identified three periods of delay, namely: between 1990 and the commencement of the proceedings in 1999; between 1999 and 2003, when this application was initiated; and post 2003. However, he acknowledged that the real focus is on the second period.

In relation to the first period, counsel for the defendant pointed to the fact that the statement of claim does not disclose when the plaintiff discovered the existence and effect of the 1990 declaration of trust and the 1996 conveyance and no date is disclosed by reference to which one can identify the date of the plaintiff's knowledge. It was submitted that, having regard to the seriousness of the allegations against the defendant, it behoved the plaintiff to identify that point in time. Counsel for the plaintiff did not dispute that it is not disclosed when the plaintiff knew he had a cause of action. However, the point was made on behalf of the plaintiff that the defendant had not raised a notice for particulars. It is true that in the *Primor* case Hamilton C. J. quoted, with apparent approval, the statement of Lord Diplock in *Birkett v. James* [1977] 2 All E.R. 801 (at p. 808) to the effect that a late start makes it more incumbent upon the plaintiff to proceed with all due speed and that a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ has issued. The problem here is that it is not clear whether the plaintiff made a late start, because the crucial fact as to when his cause of action accrued is not clear and the defendant never bothered to take the steps to ascertain when it accrued. It would seem that the proceedings were first threatened in a letter dated 2nd December, 1998 from the plaintiff's solicitors to the defendant. I am assuming that their reference to 2nd December, 1999 in the statement of claim is a typographical error. That was within two years of the 1996 conveyance which passed the title to Lisdoo to the defendant. The plenary summons was issued nine months later. In the circumstances, I do not consider that the defendant, on whom the onus of proof lies, has established that the plaintiff made a late start.

In relation to the second period, in my view, there are two material periods of delay. The first is the one year period of delay on the part of the defendant in delivering the defence and counter-claim, which was probably truncated by the plaintiff's motion for judgment. The second is the twenty seven month period of delay between the delivery of the defence and counter-claim and the issuing of the defendant's motion to dismiss. In my view, both periods of delay must be characterised as inordinate. It is the plaintiff's delay of twenty seven months which is of primary materiality for present purposes. The question which arises in relation to that delay is whether it was inexcusable.

The excuse put forward by the plaintiff is that he was distracted by his involvement in the other litigation with and against the defendant. Counsel for the defendant referred to a passage from a judgment of this Court (Geoghegan J.) in *Truck and Machinery Sales Limited v. General Accident and Anor*. (Unreported, High Court, 12th November, 1999), in which a similar excuse was relied on. Geoghegan J. stated as follows:

> "Strictly speaking it would seem to me that the 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."

Counsel for the plaintiff submitted that the situation here is entirely different to the type of situation referred to by Geoghegan J. in that passage, in that the plaintiff's involvement in the other litigation could not be regarded as extraneous activities. While it appears that the plaintiff and the defendant were bound together in various property and other transactions, some involving Traverrick Limited, these proceedings concerning Lisdoo are discrete proceedings. I do not think the plaintiff has advanced a reasonable excuse for allowing these proceedings lie fallow for twenty seven months. However, I think the existence of the professional and business relationship between the plaintiff and the defendant is a factor to be taken into account in determining where the balance of justice lies.

In relation to the third period of delay, from 2003 to date, insofar as it is relevant, it was the existence of the defendant's applications which halted the proceedings. It was within the defendant's power to pursue the application to dismiss vigorously. One wonders whether, if the defendant had faith in this application, why he bothered to delay matters by bringing the application to vacate the *lis pendens*. As was acknowledged on the hearing of the delay motion, if the proceedings are dismissed, the *lis pendens* falls with them. I can find no basis for laying the delay since 2003 at the door of the plaintiff solely.

In summary, I consider that it has been shown that the plaintiff was guilty of inordinate and inexcusable delay in not advancing the proceedings for twenty seven months after the delivery of the defence and counter-claim.

The balance of justice
In the application of the matters listed by Hamilton C. J. which the Court is entitled to take into consideration when determining whether on the facts the balance of justice is in favour of or against the case proceeding, the following observations are apposite:

> (a) On the day of this judgment, these proceedings are just nine and a half years old, which is hardly a satisfactory state of affairs, particularly, given that, as was submitted by the counsel for the defendant, the resolution of the issues raised on the pleadings to date will turn on oral evidence. In apportioning responsibility for the antiquity of the proceedings, only twenty seven months can be fairly ascribed to the plaintiff solely. There has been one years' delay on the part of the defendant in delivering the defence and counter-claim. Responsibility for the delay since May 2004 in bringing this application to hearing is probably shared by the parties, but it was the defendant who should, and could, have brought the application to hearing much earlier.
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> (b) The additional costs incurred by the plaintiff in defending the motion to vacate the *lis pendens*, which has been struck out without a hearing, and which was unnecessary if the defendant had good grounds for a dismissal of the proceedings on the grounds of delay is a matter to which, in my view, some weight has to be attached.
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> (c) The defendant has not alleged any specific prejudice. His counsel submitted that it is clear on the authorities that general prejudice can be inferred from delay. He quoted a passage from the judgment of O'Flaherty J. in the *Primor* case in which he stated that there was much in a suggestion made by counsel for one of the defendants in that case "that once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably". However, the basis of the decision of O'Flaherty J. was that the prejudice as chronicled which the defendants would face in that case was total and insurmountable. Counsel for the plaintiff submitted that the central question is whether the circumstances as at June 2003 were such that there could be a fair trial. The defendant has not contended that they were such that there could not be. He has adduced no evidence from which one could infer that there was a risk of an unfair trial. As counsel for the plaintiff put it, there was no suggestion that potential witnesses were dead, or had emigrated to Australia. There is absolutely nothing before the Court to suggest that, even at this remove, a fair trial is not possible. There is no other evidence of prejudice, save for the bland assertions made by the defendant in his affidavits, to which I have referred earlier.

The factors to be weighed in the balance in this case, in my view, in broad terms are the potential consequences of the plaintiff not being allowed to pursue his claim as against the prejudice to the defendant which may ensue if he is forced to defend the proceedings. In the balancing process, it seems to me, that one must approach the matter on the assumption that the plaintiff has a good cause of action. The consequences of the plaintiff not being permitted to pursue his claim, on the basis of that assumption, would be that he would be deprived of an asset which may have had a value in the region of €3,000,000 five years ago, whatever its value now. As against that, if the plaintiff is forced into defending the claim there is no basis for concluding that the delay for which the plaintiff is responsible has prejudiced him in such a way as to affect his ability to defend the claim properly or that he would suffer any other prejudice which would match or outweigh the potential harm to the plaintiff, if he was not allowed to proceed.

In the light of the foregoing factors, in my view, the balance of justice is in favour of the proceedings continuing.

Order
There will be an order dismissing the defendant's application.