



THE HIGH COURT

[2024] IEHC 651

[2010 6477 P]

BETWEEN

SEAN McANDREW

PLAINTIFF

AND

ADRIAN BOURKE, PRACTISING UNDER THE STYLE AND TITLE OF ADRIAN P.

BOURKE & CO. SOLICITORS

DEFENDANT

JUDGMENT of Ms. Justice Bolger delivered on the 13th day of November 2024

1. This is the defendant's application to dismiss the plaintiff's proceedings for delay. For the reasons set out below, I am granting this application and dismissing the proceedings.

Background

2. The plaintiff issued professional negligence proceedings against the defendant in 2010 in which he claimed the defendant had failed to afford him proper legal advice in relation to the conveyance of three properties. He claimed damages for negligence and breach of duty and exemplary damages for "*the failure of the Defendant to comply with his undertaking to Anglo Irish Bank*". Neither the plenary summons nor the statement of claim makes any reference to a portion of the money from a sale of the plaintiff's properties that were held by the defendant in his client account.

3. The defendant says that the plaintiff has not taken any steps in the proceedings since he delivered replies to particulars on 29 July 2014. The plaintiff refers to a number of applications for discovery he has made in which he claimed the defendant had failed to furnish documents in relation to this undertaking. All of the plaintiff's applications for discovery have been refused. The defendant has, of his own volition, sworn two affidavits of discovery. The plaintiff continues to maintain that the defendant has failed to furnish documents to which the plaintiff is entitled.

4. It is not necessary for this court to explore the delay and reasons for it that occurred up to October 2021 because a decision has already been given by Hyland J. on 27 October 2021 in a previous application by the defendant to dismiss for delay. In her judgment, Hyland J. held that the delay since the institution of the proceedings was, at that stage, clearly inordinate and could not be excused by the fact of the plaintiff having brought a number of applications for discovery which Hyland J. described as "*unmeritorious*". She went on to find that the balance of justice lay against dismissing the proceedings because (1) the lack of clarity around the plaintiff's claim that the defendant had furnished undertakings to Anglo Irish Bank, referred to in correspondence both from Anglo Irish Bank and from the defendant; and (2) the monies, in around €41,000, that were held on deposit by the defendant. Hyland J. found that neither of those issues had been adequately explained by the defendant, which tilted the balance of justice in favour of refusing the defendant's application to dismiss the proceedings for delay. She said the balance of justice required the plaintiff be given the opportunity to get the case on quickly, failing which the defendant could bring a fresh application which should address the matters identified in her judgment.

5. The plaintiff did not proceed to get the case on until 7 February 2024 when he served a notice of trial, almost two and a half years after Hyland J.'s decision. It is necessary to examine what occurred between October 2021 and February 2024 to establish if this further period of delay, on top of what had already been found to have been inordinate and inexcusable delay, can be excused and if so whether the balance of justice is in favour of dismissing the proceedings or allowing them to continue.

6. The first step taken by the plaintiff after the delivery of judgment by Hyland J. was some six months later when he wrote to the defendant's solicitors on 12 April 2022 stating that he needed to await the outcome of his appeal to the Court of Appeal in what he said was a decision "*related*" to these proceedings. That case was a claim the plaintiff brought against Launceston Property Finance DAC (hereinafter referred to as 'Launceston'), the fund that had acquired his debt with Anglo Irish Bank. He had applied to the High Court to amend his pleadings and to join a third party and the defendant had applied to have his statement of claim struck out as disclosing no cause of action. The proceedings were struck out by the High Court and that decision was upheld by the Court of Appeal in a judgment dated 27 February 2023 (*McAndrew v. Launceston Property Finance DAC & Anor* [2023] IECA 43). The plaintiff told this court that he had hoped the proceedings would involve Launceston

clarifying what payments had been made to the defendant's own account and what undertakings were outstanding, if any.

7. The plaintiff may have had those hopes for what he could get out of those proceedings, but that was not a realistic legal strategy and cannot justify the further delay engaged in by the plaintiff after delivery of the judgment of Hyland J. in October 2021. The decision of the Court of Appeal only refers to a mortgage over the plaintiff property and does not mention any undertakings given to Anglo Irish Bank. In any event, those proceedings, that were issued by the plaintiff in July 2017, well before the previous application to dismiss was heard by Hyland J., were not mentioned in her judgment or in the plaintiff's last affidavit in that application which he swore on 17 September 2020 and do not seem to be relevant to this claim for professional negligence. He told this court that he could not recall mentioning those proceedings or his appeal to the Court of Appeal to Hyland J. Had he mentioned either the proceedings or his appeal as a reason for his inordinate delay in getting this case on then, I would expect Hyland J. to have referred to it. I conclude that those proceedings and the plaintiff's appeal to the Court of Appeal were not mentioned to Hyland J. and that the plaintiff did not perceive those matters as an excuse for or relevant to his delay at that time. Accordingly, I take the view that he did not consider, when the matter was before Hyland J., that he could not proceed with the within proceedings until the appeal in the other proceedings and/or the underlying decision of the High Court from which the appeal was brought, was finalised.

8. In those circumstances the plaintiff was not entitled to do nothing to progress these proceedings from October 2021, when Hyland J. made it clear that he needed to move them on quickly, until 2 March 2023 when he filed a notice of intention to proceed a short period of time after the Court of Appeal had delivered judgment in the other proceedings.

9. The plaintiff did not proceed to serve a notice of trial for another year after serving his notice of intention to proceed. In the meantime, by letter dated 5 June 2023, he sought consent from the defendant to amend his pleadings which unsurprisingly was refused in the defendant's solicitors' response of 1 August 2023. The plaintiff asserts that the defendant solicitors only replied after "*considerable delay*". The defendant's solicitors replied some seven weeks after the plaintiff's letter, during the annual summer court recess. I do not accept the plaintiff's claim that this period of time contributed to the delay and/or that the delay in getting the case on lies at the hand of the defendant, as the plaintiff asserted in his

written submissions to this court. Perhaps the letter could have been responded to a little sooner but that period of seven weeks over the summer is relatively short, particularly when set against the plaintiff's inexcusable delay going over very many years.

10. The plaintiff engaged in further correspondence in April 2024 in which he sought the defendant's assistance in his dealing with Launceston and engagement in relation to the monies the defendant held on deposit – issues that are outside of these proceedings although within the amendments that the plaintiff wished to make to them. The defendant's position on those issues are set out in a reply dated 23 May 2024. That correspondence and the two affidavits sworn by the defendant in the within application to dismiss, explain the reference made to undertakings in the earlier correspondence as a mistake made by the bank that was then repeated in later correspondence. The defendant also explained why he holds monies from the sale of the plaintiff's properties on deposit and his belief that those monies cannot be released to the plaintiff because they form part of a settlement the plaintiff reached and in relation to which the defendant believes he has ongoing professional obligations. That issue is not for this court to resolve in these proceedings as they do not come within the claim for damages for professional negligence, as pleaded. The plaintiff is a lay litigant, but even so he is responsible for the parameters of the claim he chose to bring in 2010, in which he sought damages for negligence and breach of duty. He did not seek any of the remedies he later sought in his correspondence of April 2024, including asking this court to direct the payment out of the monies held by the defendant and to direct the defendant to deal with Launceston for him at this point in time. Those matters are not part of the within proceedings and it is not the case, as asserted by the plaintiff, that this court can intervene on those issues.

11. The plaintiff's delay in getting the proceedings on since 2021 is clearly inordinate and entirely inexcusable, on top of a delay previously found to have been inordinate and inexcusable. I now proceed to consider where the balance of justice currently lies.

12. The issues raised in Hyland J.'s judgment in relation to the reference to undertakings in the correspondence and the defendant's retention of a portion of the proceeds of the sale from the plaintiff's properties, have been addressed by the defendant both in correspondence and in his affidavit grounding this application and his replying affidavit. The defendant's account of what he said were mistaken references to undertakings in the correspondence is corroborated by the fact that the decision of the Court of Appeal makes no reference to

undertakings but does refer to a mortgage and a receiver. The plaintiff also refers in his own replying affidavit sworn on 24 July 2024 to his property which "*will remain mortgaged*". He also refers to the defendant holding the proceeds of sale of his properties "*in his client account forever*". Whether that is so or not, those issues cannot and will not be resolved by the within proceedings for damages that the plaintiff instituted in 2010 and which he attempted, unsuccessfully, to amend in 2023 to include those issues. Those issues are not part of these proceedings and insofar as the historic lack of clarity about them tipped the balance of justice back in 2021, the issues have now been sufficiently explained to this court. Those issues do not now form any basis for a refusal by this court to dismiss the proceedings in which there has been inordinate and inexcusable delay by the plaintiff.

13. The defendant asserts that he will suffer prejudice if the proceedings are permitted to continue after such a long period of time. He says it is not likely he will now find relevant witnesses who have any memory of the transactions on which the plaintiff seems to be relying. That generalised assertion of difficulty locating unidentified witnesses might not normally suffice to establish evidence of prejudice, but here there is the added complication arising from the fact that Anglo Irish Bank was wound up in 2013, having been nationalised in 2009. The defendant also refers to the difficulties this case has presented to him in obtaining professional indemnity insurance, which again is a somewhat generalised claim but here there is an additional factor in that the plaintiff contacted the defendant's insurers personally after he issued a motion for attachment and committal that was subsequently dismissed. The plaintiff also made a complaint to the gardaí and to the Law Society in 2018 claiming that the defendant has perjured himself. Finally, the defendant relies on a report of his doctor confirming the impact that these proceedings and the length of time they have been going on, have had on his health. The report is redacted in part but there is a clear reference in it to the impact on the plaintiff's health.

14. In all the circumstances and even though the evidence of prejudice is of a general rather than specific prejudice, I am satisfied that the defendant has established the prejudice that the Court of Appeal has found to be sufficient to succeed under the *Primor* test (*Cassidy v. the Provincialate* [2015] IECA 74, *McNamee v. Boyce* [2016] IECA 19). The balance of justice is clearly against allowing the claim to proceed and the case, therefore, comes within the exceptional circumstances in which the Court of Appeal determined in *Cave Projects Ltd*

v. Kelly [2022] IECA 245 that a case should not be allowed to proceed where the balance of justice is against it, as a consequence of a significant delay.

15. I therefore dismiss the proceedings on grounds of inordinate and inexcusable delay in circumstances where the balance of justice rests in favour of dismissal.

Indicative view on costs

16. The defendant has succeeded in his application to dismiss the proceedings on grounds of delay which give rise in principle to an entitlement to costs. However, confusion was caused to the plaintiff by references made in historic correspondence by the defendant and other third parties to undertakings to Anglo Irish Bank, and by the absence of any clear explanation why the defendant continued to hold monies from the proceeds of sale of the plaintiff's properties in the defendant's client account. Those issues have now been clarified by the defendant but at a very late stage in the proceedings. That seems to me to form the basis for the court, in accordance with s. 169(a) of the Legal Services Regulation Act 2015, to direct that there should be no award of costs. I will put the matter in before me at 10.30am on 21 November 2024 to allow the parties to make whatever submissions they might wish to make in respect of final orders including costs.

The plaintiff appeared for himself.

Counsel for the defendant: Michael Mullooly BL