Neutral Citation Number: [2011] IEHC 462

THE HIGH COURT

2004 19637 P

BETWEEN

JOHN MCGANN AND JUDITH MCGANN

PLAINTIFF

AND

NOEL CONNELLAN, JAMES WILLIAMS, BRIAN AHERN,

MARTIN CONNELLAN, PETER SUMMERS AND PATRICK FREEMAN

DEFENDANTS

JUDGMENT of Mr. Justice Cross delivered on the 12th day of December, 2011

1. Notice of Motion

1.1 The defendant is seeking an order dismissing the plaintiff's claim by reason of alleged inordinate and inexcusable delay or in the alternative an order pursuant to the provisions of O. 122, r. 11 of the Rules of the High Court dismissing the same.

1.2 It is conceded by both sides that the terms of O. 122 do not in this case add to the inherent jurisdiction of the court to dismiss for inordinate and inexcusable delay.

2. Chronology

2.1 The chronology that is relevant in the proceedings is as follows:-

(a) plenary summons – 3rd December, 2004;

(b) appearance – 12th January, 2005;

(c) statement of claim – 17th January, 2005;

(d) defence and counterclaim – 17th May, 2005;

(e) notice of particulars – 17th May, 2005;

(f) replies to particulars – 17th October, 2005;

(g) High Court reply in defence to counterclaim – 17th October, 2005;

(h) notice of further particulars to defence and counterclaim – 17th October, 2005;

(i) replies to notice for further and better particulars – 6th December, 2005;

(j) voluntary discovery offered by the defendants – 21st December, 2005;

(k) notice of intention to proceed – 5th December, 2008; and

(l) fresh request for discovery – 26th July, 2010.

2.2 The proceedings are claims for damages for breach of contract, negligence and misrepresentation resulting from the engaging by the plaintiffs to the defendants, a firm of architects in relation to inspection of property to be purchased by the plaintiffs certifying same in relation to planning permission and alleged negligence *etc*. in their work as subsequently hired.

2.3 There were two contracts, the first in June 2000 being a contract to certify compliance with an existing planning permission and the second an engagement in October 2001 in respect of the continuing development of the property.

2.4 The plaintiffs contend and I accept that it was not until October 2003 that the plaintiffs were aware of a cause of action against the defendants which relates to alleged failure by them to properly certify and the failure by them in relation their subsequent advices and work from which the plaintiffs allege considerable losses.

2.5 When the proceedings were initiated the proceedings were based upon alleged reduction in the value of the property because planning permission was not available to it together with loss of profits and subsequently as a planning permission was obtained the nature of the damages had altered somewhat.

2.6 The defendants allege that the culpable delay is between 21st December, 2005 and 26th July, 2010, a period of four years and seven months and that the only step taken in the meantime was a notice of intention to proceed on 5th December, 2008, after which nothing further was done by the plaintiffs.

3. Argument
3.1 It was contended by Mr. Bernard Dunleavy, B.L., on behalf of the defendants that the delay is inordinate and inexcusable and that the balance of justice favours the dismal of the action and he has claimed that he has suffered a real prejudice in that the first named defendant has averred in his affidavit as follows:-

> "I say and believe that as a consequence of the plaintiffs' delay my own recall concerning the events, the subject matter of these proceedings, and the recall of the other defendants has inevitably deteriorated in the period since October 2001. Moreover we retain the services of David Keane, the former President of the Royal Institute of Architects in Ireland – to act as an expert witness on our behalf. We were able to provide instructions for the benefit of Mr. Keane concerning the circumstances surrounding these proceedings in late 2005 when the matter was still relatively fresh in our minds. Unfortunately, so much time has passed since the plaintiff initiated this action that Mr. Keane has now died. We are now in a position of having to instruct another expert in relation to the matter at a remove of ten years from the alleged accrual of the plaintiffs' cause of action."

3.2 It was not stated in Mr. Connellan's affidavit but was submitted by Mr. John Hennessy, S.C., on behalf of the plaintiffs and was not disputed by Mr. Dunleavy that Mr. Keane passed away in September 2007.

4. The Plaintiffs' Arguments
4.1 It was submitted by Mr. Hennessy, S.C., that the delay was not inordinate that if it was inordinate it was excusable and that in any event the balance of the matter favoured allowing the case to proceed.

5. The Law
5.1 The legal principles in this matter are not essentially in dispute.

5.2 Commencing with the judgment of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, the position is as follows:-

> "(1) In deciding whether to dismiss proceedings for want of prosecution, the court should inquire as to whether the delay on the part of the person seeking to proceed has been first inordinate and, even if inordinate, whether it has been inexcusable. The onus of establishing that the delay has been both inordinate and inexcusable lies upon the party who is seeking a dismissal and opposing a continuance of the proceedings.
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> (2) Where a delay has not been inordinate and inexcusable there are no real grounds for dismissing the proceedings.
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> (3) Even where the delay has been both inordinate and inexcusable, the court must further proceed to exercise a discretion as to whether, on the facts, the balance of justice is in favour of or against the proceeding of the case. Delay on the part of a defendant seeking a dismissal of the action and, to some extent, a failure on his part to exercise his right to apply at any given time for the dismissal of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion.
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> (4) While a party acting through a solicitor must, to an extent, be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the court's discretion."

5.3 This decision and the principles behind it were, in effect, reaffirmed by the judgment in Clarke J. in *J.P. Stephens v. Paul Flynn Limited* [2005] IEHC 148, which decision was followed in the Supreme Court appeal of that case [2008] 4 I.R. 31. Clarke J. referred, however, to the growing jurisprudence inflamed by the enactment of the European Convention on Human Rights Act 2003 and stated:-

> "Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore:-
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> 1. Ascertain whether the delay in question is inordinate and inexcusable; and
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> 2. If it is so established the court must decide where the balance of justice lies.
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> However it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

5.4 In the case of *Stephens*, Clarke J. noted that the level of prejudice identified by the defendant could only be described as "moderate" and that there was no question of a witness having died but that memories would fail and concluded:-

> "In all of the above circumstances I am satisfied that the weight to be attributed to both the delay and its excusability coupled with the moderate degree of prejudice and the minor weighting attributable to the limited inaction on the part of the Defendant is such that the balance of justice favours the dismissal of the proceedings."

5.5 In *Jackson v. Minister for Justice, Equality and Law Reform & Ors* [2010] IEHC 194, Dunne J. reviewed all the relevant authority including *Gilroy* and *Stephens v. Paul Flynn Limited* and concluded that in that case that delay was both inordinate and inexcusable and dealing with the issue of the balance of justice, Dunne J. quoted the judgment of Hamilton C.J. in *Primor* at p. 490 as follows:-

> "Being satisfied that in each case there was inordinate and inexcusable delay on the part of the plaintiff, I must now consider whether on the facts in this case the balance of justice is in favour of or against the proceeding of the case. Delay on the part of a defendant seeking a dismiss of the action and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution are ingredients in the exercise by the court of its discretion.
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> But they are not the only such ingredients. The court is obliged to consider whether the total delay has been such that a

fair trial between the parties cannot now be had and whether the defendants have been prejudiced by the continued delay."

5.6 Dunne J. continued:-

> "…However, I do think it is important to emphasise the point noted by Hamilton C.J., which is at the root of an application such as this, namely, whether the total delay has been such that a fair trial between the parties cannot now be had and whether the defendants have been prejudiced by the continued delay. I accept as I have indicated above that there must be some prejudice to the defendants by reason of the delay in prosecuting theses proceedings. I have placed that prejudice at the moderate end of the scale. However, there is nothing on the application before me to suggest that a fair trial between the parties cannot now be had, because of the total delay herein…"

5.7 It is interesting to note that Dunne J. in the above *Jackson* case held that the prejudice was "moderate" which was the same degree of prejudice held by Clarke J. in *Stephens* but each judge came to on the facts of their cases different decision as to whether the proceedings should be dismissed.

5.8 I accept the above authorities and in particular I accept Dunne J's analysis that what is at issue is to whether there is a fair trial bearing in mind, of course, that a fair trial includes a trial conducted with reasonable expedition.

6. Inordinate?
6.1 I have no hesitation in holding that the delay of four years and seven months floridly described in the defendant's affidavit as being "nearly half a decade" between 21st December, 2005 when voluntary discovery was made on 26th July, 2010, was indeed inordinate. It was submitted to me by Mr. Dunleavy, on behalf of the defendant that whereas culpable delay was the above period that I ought to take into account the delay between the cause of action and the issuing of the proceedings. The second contract was entered into in October 2003 and the proceedings were not issued until December 2006.

6.2 I accept, however, that for the purposes of culpable delay what occurred before the issue of proceedings should not form part of the culpability and indeed in this case, I do not find that there has been any real delay as I accept that the plaintiffs were not aware of any possible breaches by the defendants prior to October 2003 and that the plenary summons was issued in December 2004.

7. Inexcusable?
7.1 A number of excuses have been proffered by the plaintiffs for the delay:-

> (a) first of all it was stated that the claim could not be fully quantified or finalised until the dwelling house was ultimately constructed. It is undoubtedly the case that the nature of the plaintiffs' claim did change when the plaintiff finally obtained a planning permission which was not as extensive as the planning permission applied for by the defendants but armed with that permission the plaintiff's proceeded to construct a dwelling house.
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> I do not hold that such a matter could excuse the delay as the plaintiff could easily have submitted estimated accounts and if the basis of his quantification of loss did alter during the course of the proceedings then this could have been signified to the defendants.
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> (b) It was submitted by the plaintiffs that the delay was also caused due to the efforts of the plaintiff to mitigate his loss by constructing his house on a cheaper basis than might otherwise have been the position and that he could not be aware what was his loss until it had been mitigated. As Mr. Dunleavy has submitted, I am not of view that this an excuse for a failure to proceed, a burden of proof lies on the defendant to establish a failure to mitigate and as the authorities indicate the plaintiff is not under a "duty" to mitigate his loss merely that he cannot recover from a defendant more than what is reasonable in the circumstances.
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> (c) The third ground advanced by way of excuse is that the delay was caused by the need of the plaintiff to obtain and receive a proper quantity surveyor's report, this is a variation of the first grounds by way of excuse but again I do not see that is a valid excuse as the matter could have been set down and particulars given by way of estimation and indeed the quantity surveyor could have been engaged as at a much earlier stage in the proceedings.
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> (d) The fourth excuse proffered was that the delay was caused or contributed to by the defendants' actions or inactions. I do not believe that the defendants' inactions are really relevant in this case. It is complained that the defendant failed to write any letter demanding that the plaintiff hurry on with his case and that is undoubtedly the case. It is also indicated that the defendant could have brought this motion earlier. I always have a sympathy with defendants meeting such a response as clearly the defendant proceeds too early then there will be no inordinate or inexcusable delay and if he proceeds too late, he risks the wrath of a court in saying merely he was letting sleeping dogs lie.

7.2 It is clear that a defendant is not entitled to let sleeping dogs lie. It is also clear that a letter or two from the defendants urging the plaintiff to proceed or indeed setting down the case themselves would have been preferable. However, I do not think in the circumstances that the delay in getting the proceedings on is really caused or to any significant extent contributed to by reason of any delay on the part of the defendants.

8. Did the defendants acquiesce in the plaintiffs' delay?
8.1 The fifth ground advanced to excuse delay is that the defendants acquiesced and agreed in this delay by agreeing the procedures adopted by the plaintiff.

8.2 It is conceded by Mr. Dunleavy on behalf of the defendants that if the plaintiff could establish that the defendant acquiesced in the plaintiff's delay then his motion must fail.

8.3 This matter was put in issue by the affidavit of Theresa O'Donohue's solicitors on behalf of the plaintiffs when she stated:-

> "I say that I recall that at the time of the said correspondence (I cannot recall the precise date) I had a telephone conversation with Nina Gaston, Solicitor of O'Hare, O'Connor, Walshe in the course of which I advised Ms. Gaston that my clients were proceeding with the construction of the house and would assess their losses on completion, Ms. Gaston did not formally acquiesce in the deferral of quantification, but I clearly took it from the content and tenor of our conversation that she undertook the position and understood that quantification would be deferred. I say that she certainly did not communicate to me that such deferral was not acceptable. I say that I did not make any note of the

conversation as I understood that the position was clear and was understood by the solicitors on both sides, namely Ms. Gaston and this deponent. I say that my understanding was reinforced by the lack of any open correspondence raising any issue as to alleged delay until receipt of the notice of motion and grounding affidavit in respect of the within application."

8.4 This affidavit was answered by an affidavit of Nina Gaston sworn on 25th March, 2011 as follows:-

> "I beg to refer to paragraph No. 4 of Theresa O'Donohue's affidavit in which she refers to a telephone conversation with this deponent around the time of the correspondence exhibited at 'TOD 1/1'. I am disturbed by the averment of the plaintiffs' solicitor in this regard. I note that Theresa O'Donohue cannot recall the date of the conversation and – somewhat unusually – she appears to have taken no attendance of the same or made any note recording this discussion five years ago. Having reviewed by file, I have no attendance note of any telephone conversation at that time with Theresa O'Donohue. I have also reviewed by contemporaneous, dated, manuscript notebooks in which I noted telephone conversations, even if they are not formally recorded on the file. There is no note of any telephone conversation with Theresa O'Donohue between 1st May, 2006 and 31st August, 2006."

8.5 Both of the above affidavits are sworn by officers of the court and both are entirely consistent one with the other and I accept the veracity of both deponents and that they were attempting as best they can to formulate what they could and could not aver to.

8.6 Whereas Ms. Gaston does not specifically say that she does not remember the telephone call. I accept Mr. Dunleavy's argument that it is clearly implicit that she does not and indeed that she does now does not believe such a conversation took place.

8.7 I also accept that no details of this conversation are provided and indeed that the correspondence between the parties makes no reference to such agreement or acquiescence.

8.8 The court is, however, left with a positive averment on behalf of the plaintiff. That the solicitor for the defendant did in fact acquiesce in what occurred, namely that the matter was to be in effect placed on hold until the losses were assessed. Ms. O'Donohue is very clear that there was not a formal acquiescence but it is clear first of all that she believed the defendant to be of that viewpoint and I am convinced she acted upon that assumption and the subsequent proceedings were in effect delayed because of it. I am referred by Mr. Dunleavy to the decision of Hardiman J. in *Aer Rianta Cpt. v. Ryanair* [2001] 4 I.R. 607 at 623 which refers to the principle as set out in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 875 that "that the mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself constitute a ground for granting leave to defend" and Hardiman J. concluded that on number of occasions issues of credibility as to affidavits arose starkly in that a defendant's affidavits were mutually contradictory or were factually contradicted by those of a private investigator which were accepted as accurate or as in the case of *Anglin* where "indisputable documentation of a commercial transaction rendered the alternative chronology proposed by the defendant quite untenable" and in these circumstances it is suggested, and I accept that a court could prefer one affidavit over another.

8.9 I do not see that any of those situations arise in this case. I am faced with the positive averment of a understanding which may well have arisen from the silence of the defendants' solicitors being reached that understanding being cemented by the efflux of time and accordingly, I hold that the effect of the matter was for the defendants to acquiesce in the course of action or rather inaction undertaken by the plaintiff and it follows from that conclusion that the motion should fail.

9. The Balance of Justice

9.1 In view of my decision above, it is not necessary for me to inquire into the issue where the balance of justice lies, however, as this matter was extensively canvassed, I accept that in this case there is some prejudice against the defendants. I do not believe that the prejudice is as great as the defendant contends. This is a case that essentially will be decided on the documentary evidence: was there an extant planning permission which was complied with by the building that was in the course of construction when the plaintiffs purchase same? Were the defendants negligent or in breach of contract in relation to their actions or inactions in relation to the second planning permission. Clearly, however, there is going to be some evidence as to what was or was not represented by the parties and I accept that there will be some prejudice against the defendant. The fact that there may also be prejudice against the plaintiff and the plaintiffs can be cross examined as to their lack of recollection, is for the purpose of this application as I see it neither here nor there.

9.2 The fact that the defendants' expert has passed away is not in my view as a serious a matter as is contended by the defendants in that the expert unfortunately died in 2007 and the defendants have apparently done nothing in relation to instructing a further expert to date. In addition, it is clear that the original instructions given to Mr. Keane in 2005 can be used again not alone to instruct the new expert but also presumably to refresh the memory of the defendants if that memory requires refreshing.

9.3 In the circumstances, I would view the extent of the prejudice against the defendants as being not insignificant but probably not reaching the "moderate" level as identified in their respective cases by Clarke J. and Dunne J.

9.4 In all the circumstances of the case were I to have to balance the justice between the parties, I would not be satisfied that the defendants could not obtain a fair trial if it was allowed to proceed and the balance of justice would favour allowing the matter to continue.

10. Order

10.1 I am satisfied that the delay in this case was inordinate but for the reasons as outlined above was not inexcusable and I order that the defendants' motion be dismissed.