

## THE HIGH COURT

RECORD NO: 2011/10660 P

SEAN MCANDREW

PLAINTIFF

AND

ENYA EGAN PRACTICING UNDER THE STYLE AND TITLE OF EGAN DAUGHTER AND CO. SOLICITORS

DEFENDANT

**JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 13th February, 2017**

1. The issue before the Court in the present case is whether the plaintiff's claim should be struck out for want of prosecution and on grounds of inordinate and inexcusable delay. The substantive proceedings brought by the plaintiff involve claims relating to legal services rendered to the plaintiff by the defendant in her capacity as a solicitor in respect of a dispute with a neighbour. The present issue arose by way of motion brought by the defendant, and while the plaintiff was respondent to the motion and the defendant was the applicant on the motion, I think it will be clearer if I refer to the parties by their positions in the substantive proceedings, i.e. Mr McAndrew as the plaintiff and Ms. Egan as the defendant, throughout this judgment. It came before the Court simultaneously with another motion, seeking identical reliefs in respect of a separate set of substantive proceedings (Reference Number 2011/9050 P), involving the same parties, to which I will cross refer in this judgment.

**The history of the proceedings**

2. The plenary summons was issued on the 24th November, 2011 and an appearance was entered by the defendant on the 22nd December, 2011. The plaintiff issued a motion pursuant to a notice dated the 18th July, 2012, for judgment in default of defence, which motion was struck out on consent by order of Mr. Justice O'Neill in the High Court on the 5th November, 2012, a defence having been delivered on 30th July, 2012, some eight months after the plenary summons was issued and seven months after the appearance was entered. The defendant raised a notice for particulars on the 30th July, 2012. The statement of claim was subsequently amended. The plaintiff replied to the notice for particulars on the 20th August, 2012, and raised a notice for particulars on the same date. Replies to the plaintiff's notice for particulars were provided, dated the 7th January, 2013, almost five months later, and a motion for an order requiring the defendant to reply to the plaintiff's particulars was struck out on consent by Mr. Justice Moriarty in the High Court on the 4th February, 2013.

3. The period of delay of which the defendant complains in the present motion is the period of time which has elapsed since the 7th January, 2013, being the date on which the notice for particulars raised by the plaintiff was replied to. The present motion issued in November, 2015, and was not heard until the 13th February, 2017.

*Alleged delay from the 7th January, 2013*

4. The correspondence exhibited to the Court, set out below, gives an indication of the positions of the parties and the steps taken by them in respect of the proceedings throughout the period of claimed delay. The letters sent by the defendant's solicitors express an eagerness to have the matter fixed for hearing with some expedition pursuant to instructions of their client. The plaintiff's responses referred to difficulties faced by him in obtaining legal assistance.

5. The solicitors for the defendant wrote to the plaintiff on the 3rd July, 2013, requesting that a notice of trial be served and the matter be set down for hearing in early course, the pleadings having been closed and no discovery matters remaining outstanding at that stage. The solicitors for the defendant wrote again to the plaintiff on the 14th February, 2014, requesting that the Notice of Trial be served within 21 days. They further stated that should the plaintiff fail to do so, they would proceed to serve the notice of trial on the defendant's behalf and have the matter set down for hearing. This was replied to by the plaintiff by letter of the 27th February, 2014, stating that he was "endeavouring to obtain the services of a Solicitor" and "would be obliged if you delay further action in this case for say, three weeks." This request was acceded to by solicitors on behalf of the defendant by a letter dated the 20th March, 2014, wherein it was confirmed that they would take no further action for a period of three weeks. It also stated that the defendant was anxious to have the matter set down for hearing and that they would be serving a notice of trial on the expiry of the three week period. The plaintiff wrote to the defendant's solicitors on the 8th April, 2014, stating, "As you are aware, my previous solicitor GM solicitors has ceased his practice. However, I am in contact with a new firm of solicitors so therefore will be in a position to deal with the matters next week." This was followed by a letter of the 27th April, 2014, which responded to a letter sent by the defendant's solicitors in October, 2012 alleging non-compliance of the plaintiff's amended statement of claim with the Rules of the Superior Courts.

6. The solicitors for the defendant responded by letter dated the 20th May, 2014, indicating that the issue in relation to the Statement of Claim was not being pursued and that, as they had not received a notice of trial from the plaintiff or solicitors on his behalf, they were proceeding to serve notice of trial. A letter dated the 23rd May, 2014, was subsequently sent to the plaintiff enclosing the notice of trial.

7. At issue in the correspondence which followed was having the proceedings set down for trial, along with another set of proceedings involving the same parties, to which I referred in the opening paragraph of this judgment. A letter of the 7th November, 2014, from the defendant's solicitors, served a Notice of Trial and set the matter down for hearing, noting that the plaintiff had failed to do so. It also noted that certificate of readiness had also been filed in both cases and a copy of same was enclosed. It concluded "We confirm that our instructions are to proceed to apply for a Hearing date in this matter at the earliest possible opportunity. In this respect, please confirm whether there are any dates between now and 30 July 2015 which are not convenient for you." Absent a response from the plaintiff, this request to confirm availability was reiterated in a letter from the defendant's solicitors in a letter dated the 23rd February, 2015.

8. The plaintiff responded to this letter by way of letter dated the 20th March, 2015 stating,

"In relation to the above matters I am not in any position to proceed with any hearing/s due to my seeking to bring on Record Solicitor and Counsel. As you are aware, my former Solicitors GM Solicitors ceased to practice and I am without legal advice. In the coping weeks or months you will receive correspondence relative to proceedings being moved forward."

9. The defendant's solicitors responded on the 10th April, 2015, and referred to the plaintiff's letter of the 27th February, 2014, and a

contemporaneous conversation between the plaintiff and the defendant's solicitors, which indicated that the plaintiff was at that stage endeavouring to obtain the services of a solicitor. It stated,

"[w]e note that you have been without legal representation for in excess of a year at this point in time. We would suggest that you have had ample opportunity to instruct new solicitors to act for you in this matter and it is simply not acceptable from our client's perspective that you now write to us indicating that you continue to seek new legal representation."

It then reiterated that the defendant was seeking hearing dates for both matters at the earliest opportunity. It went on to set out that a further four weeks would be provided to allow for the attainment of legal representation by the plaintiff, after which period, if the defendant had not heard from the plaintiff or his new solicitors and received a notice of change of solicitor, the defendant would be proceedings to apply for hearing dates.

10. On the same date, the 10th April, 2015, solicitors for the defendant issued a second letter to the plaintiff, suggesting an alternative course for the resolution of the proceedings; to "compromise both sets of proceedings." It was prefaced with a reiteration of the defendant's position, namely that she had no liability to the plaintiff in either set of proceedings and that the proceedings were without merit, before proposing as follows: "she will bear her own substantial legal costs in defending both sets of proceedings in the event that you formally withdraw both sets of proceedings against her." This received no response from the plaintiff.

11. A Notice of Trial was issued in respect of the substantive proceedings, the subject matter of the present motion, at the behest of the defendant, dated the 22nd May, 2014, and a certificate of readiness was also issued, dated the 10th October, 2014.

### **Prejudice**

12. In the grounding affidavit of Mr. Corcoran, he stated the following in relation to the claimed prejudice to the defendant, arising from the delay of the plaintiff:

"I say that the delay is prejudicial to the Defendant in its Defence of these proceedings. It is likely that with the passage of time witnesses will not be available and their recollection of events will have dimmed over time. In addition, the solicitor who dealt with the file in the Defendant's office, Aidan Crowley, left the Defendant's office some time ago and is no longer practising as a solicitor."

### **The plaintiff's difficulty obtaining legal advice**

13. Originally, the firm of G.M. Solicitors of County Longford were retained by the plaintiff to act on his behalf. They were discharged by notice, filed on the 20th May, 2013.

14. The plaintiff indicated in his letters, set out above, that around the 27th February, 2014, he was "endeavouring to obtain the services of a Solicitor." He noted in his letter of the 8th April, 2014, that he was in contact with a new firm of solicitors and in his letter of the 20th March, 2015, he stated:

"In relation to the above matters I am not in any position to proceed with any hearing/s due to my seeking to bring on Record Solicitor and Counsel. As you are aware, my former Solicitors GM Solicitors ceased to practice and I am without legal advice. In the coming weeks or months you will receive correspondence relative to proceedings being moved forward."

15. In his affidavit of, 11th February, 2016, sworn in relation to the second motion, he provided further detail. He stated that "[t]he deponent then applied to Galligan Johnston Solicitors, 15, Clanwilliam Terrace, Dublin 2. By letter dated the 10th December 2014 they were not in any position to come on record." He exhibited the letter referred to. He continued,

"[t]he deponent then applied to Malcomson Law Solicitor to come on record, but by letter dated the 11th March 2015, they stated that they were not in a position to take on the case. The deponent by letter dated the 20th March 2015 wrote to J. A. Shaw Solicitors advising them that the deponent was not in any position to proceed with proceedings as he was seeking the aid of Solicitor and Counsel."

He also stated that at that time, February, 2016, seeking the assistance of a McKenzie friend.

16. It appears that at some point thereafter, the plaintiff obtained the assistance of a McKenzie friend who was present at the hearing of this motion before the Court.

### **Applicable legal principles**

17. The principles of law applicable to this motion have been set out in the judgment which I gave in respect of the motion heard concurrently with the present motion, to which I referred in the opening paragraph of this judgment. Adopting those principles for the purposes of both proceedings, I now apply them to the circumstances of the present case.

### **Application of the principles to the present case**

*Was the delay inordinate?*

18. The delay complained of is from the 7th January, 2013, the date on which the defendant issued replies to the notice for particulars raised by the defendant, to the present. The correspondence exhibited by the parties, set out above, supports the assertion that no steps were taken by the plaintiff during this period to directly advance the proceedings and the plaintiff has adduced no evidence to the contrary. The period of inactivity complained of amounts to approximately 4 years, 1 month. I note that the motion to strike out was issued in 2015, which was met with continued delay by the plaintiff and was not heard until the 13th February, 2017. It seems to me that the period of delay was inordinate.

*Was the delay excusable?*

19. The reason advanced by the plaintiff for the delay in advancing the proceedings is the difficulty he encountered in obtaining solicitor and counsel.

20. A number of authorities have indicated a reluctance to find sufficient excuse in the fact that delay can be attributed to a plaintiff's legal advisers. These authorities demonstrate the general rule that responsibility will rest with the plaintiff for failure to

expedite matters in such circumstances, although the personal blameworthiness of the plaintiff is a matter which may be considered in the exercise of a court's discretion (see the comments of Finlay P in *Rainsford*). Comments of similar effect were made by MacMenamin J. in *McBrearty v North Western Health Board* [2007] IEHC 431, when he said,

"I consider that even (as here) in the circumstances of an absence of culpability on the part of the plaintiff, culpability may nonetheless be imputed to the plaintiff by virtue of delay on the part of his solicitors in the determination as to whether or not the delay was inexcusable. Different considerations apply, however, in the third aspect of the test, that of 'balance of justice'."

These cases illustrate that the responsibility for advancing their case lies at the door of the plaintiff. Although these comments were made in circumstances where the party had a legal team, in my view they have relevance to situations such as the present, where the difficulty lies in retaining legal representation in the first place. If there is an onus on plaintiffs to advance their proceedings even where he or she is legally represented, there must be a similar onus to do so where they are not, provided that they have been allowed a reasonable period of time to find a new legal team. Much more than a reasonable period in that regard has elapsed, and the plaintiff is not entitled to stall the proceedings indefinitely while he searches for a new legal team. There comes a point where he must accept that he has to deal with the proceedings even without a legal team.

#### *The balance of justice*

21. In determining where the balance of justice lies in this case, the Court is cognisant of the non-exhaustive list of factors set out by Hamilton C.J. in *Primor*, quoted above, as well as the evolving jurisprudence on the need to hear cases within a reasonable time, owing to obligations placed on the courts pursuant to Article 6 of the European Convention on Human Rights and the European Convention on Human Rights Act, 2003.

22. In respect of the claimed prejudice to the defendant, the defendant appealed to the general diminution in the quality of witness evidence as a result of the passage of time. Although it was stated on affidavit that the individual responsible for the plaintiff's file, Mr. Crowley, had left the office of the defendant some time ago and no longer practiced as a solicitor, there is no suggestion that he would be unavailable to give evidence should the matter proceed to trial. In contrast to the prejudice alleged in respect of the separate proceedings involving the parties, in relation to which, as noted, a motion seeking identical reliefs was heard in tandem with the present motion, there was no specific prejudice alleged such as the death of a witness.

23. I have also considered the conduct of the defendant in the proceedings and I have noted the delays attributable to the defendant, including a period of some 8 months between the issue of the plenary summons and the filing of a defence, which action was taken only after the plaintiff brought a motion for judgment in default of defence. I further note a period of significance, which was a delay of almost five months to respond to the plaintiff's notice for particulars, which replies were only served following the issuance of a motion by the plaintiff.

24. Nonetheless, the inordinate period of time which has elapsed since the plaintiff has taken his last step in the proceedings, and the failure to move matters on since the motion issued in November, 2015, in my view is such that the balance of justice requires a striking out of the proceedings for inordinate and inexcusable delay.

25. The defendant also made an application under Order 122, Rule 11 of the Rules of the Superior Courts to have the proceedings dismissed for want of prosecution, no steps having been taken by the plaintiff in excess of two years in the proceedings. Having heard the evidence in this matter, I find that the defendant is also entitled to the relief sought on this ground.

#### **Conclusion**

26. Accordingly, I will make an order for the striking out of the proceedings, the subject of the motion presently before the Court, by reason of inordinate and inexcusable delay and want of prosecution.