

**THE HIGH COURT****2008 No. 6695P****SIOBHÁN O'DOWD****Plaintiff****– and –****JOHN GAVIN AND GERRARD PETTIT****Defendants****JUDGMENT of Mr Justice Max Barrett delivered on 7th March, 2018.****I****Introduction**

1. By notice of motion dated 8th May, 2017, Mr Pettit seeks an order pursuant to the inherent jurisdiction of the court and/or O.36, r.12(b) of the Rules of the Superior Courts 1986, as amended, (RSC), dismissing Ms O'Dowd's claim on the basis of inordinate and inexcusable delay on her part in the prosecution of these proceedings.

2. Unfortunately, Mr Gavin passed away on 19th January, 2017. So were the court to allow the within proceedings to continue (and it will not) they would require to be re-constituted to lie against Mr Gavin's estate. For now, however, they continue to lie against the late Mr Gavin.

**II****Background**

3. Ms O'Dowd claims, pursuant to a summary summons issued on 11th August, 2008, damages for negligence, breach of duty, breach of statutory duty and/or breach of contract on the part of the defendants. Ms O'Dowd's statement of claim, delivered on 8th October, 2008, claims that the first defendant (now deceased), a building contractor agreed in writing with Ms O'Dowd, on 29th March, 2006, to build a dwelling-house at Barrymore, Athlone, Co Roscommon, for a contract price of €212k. It is alleged that Mr Pettit was retained by Ms O'Dowd as engineer to supervise and oversee the works and to certify the dwelling-house as completed by the late Mr Gavin. The defence of Mr Pettit, delivered on 29th January, 2009, admits that Mr Pettit performed site visits for certain works carried out by Ms O'Dowd's lender. However, it is further pleaded that if there are deficiencies in the construction and finishing of the dwelling, that is a matter solely for the estate of the late Mr Gavin. It has at all times been indicated by Mr Pettit to Ms O'Dowd in open correspondence that he was never retained to supervise works, but was retained to issue interim certificates arising from periodic inspections. Moreover, Mr Pettit has at all times indicated that he issued a snag list, which lists almost all of the items identified in Ms O'Dowd's statement of claim and none of which, he claims, represent structural issues. Mr Pettit also maintains that he could not be held responsible for the late Mr Gavin failing or refusing to complete the snag list, for walking off-site or for any aspect of any (if any) failure by the late Mr Gavin to complete the construction works. The foregoing is by way of background only; obviously any determination as to what are the relevant facts or where any (if any) liability on the part of the defendants (or the late Mr Gavin's estate) lies would be a matter for the court of trial, had the court allowed this matter to proceed to trial and, for the reasons identified hereafter, it will not so allow.

**III****The Progress of the Proceedings and Certain Contentions Made***(i) Chronology of Events.*

4. Rather than engage in a lengthy account of the proceedings, it is perhaps more helpful to set out a summary chronology of what has happened thus far:

11.08.2008 Plenary Summons.

08.10.2008 Statement of Claim.

16.10.2008 Appearance for Mr Pettit.

29.01.2009 Defence of Mr Pettit.

Notice for Particulars from Mr Pettit.

27.03.2009 Replies to Particulars by Ms O'Dowd.

08.02.2010 Notice for Particulars from Ms O'Dowd.

09.02.2012 Notice of Change of Solicitor for Ms O'Dowd.

09.03.2012 Ms O'Dowd's 1st request for voluntary discovery.

22.03.2012 Replies to Particulars by Mr Pettit.

13.09.2012 Notice of Change of Solicitor for Mr Gavin.

26.06.2013 Ms O'Dowd's 2nd request for voluntary discovery.

Replies to Particulars by Ms O'Dowd.

23.01.2017 Ms O'Dowd's 3rd request for voluntary discovery.

20.03.2017 Ms O'Dowd's motion for discovery issues.

19.06.2017 Strike-out motion issues.

28.07.2017 Mr Pettit swears affidavit of discovery.

5. Though Mr Pettit is not entirely without fault when it comes to delay (there is a notable delay between the Notice for Particulars of 08.02.2010 and the replies thereto), there is repeated delay on the part of Ms O'Dowd, including (i) the delay of 3½ years in doing anything following the 2nd request for voluntary discovery, and (ii) the sending of the 3rd request for voluntary discovery a year after a letter of 5th February, 2016, in which Ms O'Dowd indicated that Senior Counsel's preliminary advice had been obtained. In fact, Ms O'Dowd admits by reference to the above chronology that there has been inordinate delay on her part in the prosecution of the within proceedings.

#### IV

##### Applicable Legal Test for Determination of Within Application

6. The law as to the determination of applications such as that now presenting is as summarised and stated by the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74 and thus does not require to be visited in great detail, the court relying on the law as stated in that judgment. Counsel for Ms O'Dowd contended that the *Primor* jurisdiction (as referenced in Cassidy) is the appropriate one to bring to bear in the within proceedings. Counsel for Mr Pettit considered that the *Primor* jurisdiction was the more appropriate but that he also would succeed by reference to the *O'Domhnaill* jurisdiction (as referenced in Cassidy). The court considers that the *Primor* jurisdiction is the more appropriate jurisdiction to invoke, given the culpable delay presenting on Ms O'Dowd's part; however it accepts the contention of counsel for Mr Pettit that his client falls to succeed in the within application whichever of the said jurisdictions the court brings to bear.

#### V

##### Inordinate Delay

7. As mentioned, Ms O'Dowd accepts that there has been inordinate delay on her part in the prosecution of the within proceedings.

#### VI

##### Inexcusable Delay

8. Ms O'Dowd does not accept that the inordinate delay presenting is inexcusable. Mr Pettit takes a different view. In his affidavit evidence, he points to discovery being sought in March 2012 and June 2013 and his prompt response in this regard. He contends that the delay of 3½ years in doing anything following the 2nd request for voluntary discovery is inexcusable (and further maintains that the further request was not warranted in any event). He contends that the sending of the 3rd request for voluntary discovery, which came a year after a letter of 5th February, 2016, in which Ms O'Dowd indicated that Senior Counsel's preliminary advice had been obtained, also involved inexcusable delay.

9. A lengthy affidavit has been sworn by the solicitor for Ms O'Dowd in which the solicitor largely blames Ms O'Dowd's legal team, herself included, for the history of delay that has arisen on the part of Ms O'Dowd. The court is sympathetic to the fact that Ms O'Dowd appears not to be a woman of great means and is availing of the resources of a Law Centre that is doubtless over-worked and under-funded. It considers too that allowance can be made for some of the unavoidable administrative delay that occurs when, for example, getting a legal aid certificate; not to make such allowance, it seems to the court, would be to punish someone for being poor. But such sympathy and allowance cannot explain away all the delay arising. And following on, *inter alia*, the judgment of Hardiman J. for the Supreme Court in *Gilroy v. Flynn* [2004] IESC 98, the notion that one can invoke delay, even grave delay on the part of one's professional advisors as a 'Get Out of the Bind Created By Delay'-card is, unfortunately, no longer especially tenable. The effect of, *inter alia*, *Gilroy* is that the court does not accept the contention by counsel for Ms O'Dowd, by reference to the judgment of Ryan J. in *Cassidy v. Martin Butterly and Co Ltd and ors* [2014] IEHC 203, para. 4(2) that it suffices to provide an excuse for the inexcusable to become excusable; factors such as those identified in *Gilroy* come into play in this regard, and here in a manner that favours Mr Pettit's cause.

#### VII

##### Prejudice

###### (i) The Natural Dimming of Memory.

10. Mr Pettit points to the fact that if the within proceedings are allowed to continue, he will be placed in a position where he is asked to recollect attendances and utterances (the contract central to the dispute appears to be an oral one) from as long ago as May 2006, rendering his prospect of obtaining a fair trial most unlikely, given his natural failure of recollection over time. This is accepted by the court.

###### (ii) The Death of the late Mr Gavin.

11. Unfortunately, as mentioned, the late Mr Gavin passed away on 19th January, 2017. Mr Pettit maintains that this unhappy event prejudices him greatly when it comes to the within proceedings. In this regard he avers as follows:

"[Mr Pettit] has at all times indicated that any claim for loss or damage is solely a matter for [the late Mr Gavin] ....Further, [the late Mr Gavin]...was in possession of knowledge with respect to the nature and extent of works carried out, with respect to the particulars of the manner of construction which goes directly to...[Ms O'Dowd's] claim, the

*nature of the retainer of [Mr Pettit]...with [Ms O'Dowd]...and/or may have had documentary records, all matters which now [Mr Pettit]...will not have ability to rely upon or question by way of cross-examination and/or by way of seeking voluntary discovery of [Mr Gavin]".*

12. The foregoing is accepted by the court. The unfortunate death of the late Mr Gavin is a factor to which the court must, pursuant to the decision of the Supreme Court in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 I.R. 510 give some weight. Indeed Keane C.J., at 515, considered that this was a factor which in that case had been given insufficient weight, notwithstanding that the trial judge proceeded conscious of same, so it is a factor that falls clearly to be given no little, albeit not undue, weight.

13. Additionally, given the nature of Ms O'Dowd's claims, the court does not see that it is practicable to separate out (any) elements of her claim (if any) which are not affected by the death of the late Mr Gavin and to proceed solely with a trial of same.

*(iii) Professional Integrity and Insurance.*

14. Mr Pettit avers that (1) his professional integrity has been called into question as a result of the within proceedings, and (2) he has suffered a related increase in his professional indemnity cover that rendered such insurance unaffordable.

15. As to (1), the court's attention has been drawn in this regard to the observation of Murphy J. in *Hughes and anor v. Cusack* [2016] IEHC 34, para. 85, that *"thirty or forty years ago in this State, a claim of negligence or breach of contract against any professional would have been viewed as personally damaging. But the world has moved on and there is now an appreciation that even the best and most competent professionals can on occasion make mistakes"*. Of course, in addition to people possessed of this fair-minded appreciation, there are doubtless also people, perhaps a great many people, who are wont (i) to view the commencement of civil proceedings as proof of wrongdoing, (ii) to believe (regardless of the substance or outcome of civil proceedings) that 'there is no smoke without fire', and/or (iii) to find in the fact that someone has been named in a news report that she or he must have done something wrong to be in court. In fact, Ms O'Dowd, through her solicitor, seems to have journeyed some way down one or other of the paths identified at (i)-(iii). Thus Ms O'Dowd's solicitor has averred that as Mr Pettit has been sued in two other sets of proceedings, *"I do not believe that [he]...can with any degree of probity suggest...that his professional integrity/reputation and standing within the community has suffered and continues to suffer solely or purely by reference to the continuance of the within proceedings"*. To the extent that it is possible (if it is possible post-*Hughes*) to be found to have suffered a diminution in reputation by virtue of the mere commencement or continuation of proceedings, the court would observe as follows:

– first, when it comes to those other proceedings to which reference is made by Ms O'Dowd's solicitor (a) one of those sets of proceedings has been compromised, with the result that one cannot know how Mr Pettit was positioned as regards the claim/s made against him in those proceedings, and (b) a second set of proceedings, apart from the within proceedings, is ongoing, and Mr Pettit might or might not succeed in those other proceedings (just as he might or might not have succeeded in the within proceedings had they been allowed to continue, and they will not be allowed to continue). So there has never been any end-judgment against Mr Pettit. (It seems to the court to be undeniable that such a judgment, as opposed to the types of claim referenced in *Hughes*, would necessarily have yielded a diminution in professional reputation).

– second, the commencement of three sets of proceedings, with one compromised, two ongoing, and no negative end-judgments against Mr Pettit to this time, does not have the result that, in effect, Mr Pettit has no reputation left to lose through the continuation of these proceedings. Professional people spend many years studying and working to earn their professional qualification/s and reputation and it does not seem to the court that a court could readily find, by reference to the previous commencement of one or more sets of civil proceedings, certainly in the circumstances now presenting, that all traces of a hard-won professional reputation had been so diminished as to be incapable of further and separate diminution.

16. Finally, on a slightly separate but nonetheless significant note, the court notes in this regard that in his judgment for the Court of Appeal in *Farrell v. Arborlane Ltd and ors* [2016] IECA 224, Sheehan J., at para.33, took the view that prejudice had been suffered by the appellant in that case by having an allegation of professional negligence hanging over him for an unnecessarily protracted length of time.

17. As to (2), Mr Pettit avers that the increase in premium was due to these proceedings, as opposed to the collective effect of the three sets of proceedings commenced against him. The court is mindful in this regard that Sheehan J., in *Farrell*, at para.33, also concluded that Mr Lawton, the professional gentleman who brought the appeal in that case had *"established further prejudice as a result of the fact that he has encountered difficulties with his insurance company when renewing his professional indemnity insurance"*. Like difficulties have presented here; it may be (the court does not know) that those difficulties were, as Ms O'Dowd contends, compounded by the other proceedings in which Mr Pettit has found himself involved. But he has averred to having *"encountered difficulties with his insurance company"* nonetheless.

## VIII

### Behaviour of Mr Pettit/Acquiescence

18. Ms O'Dowd contends that Mr Pettit has acquiesced in her delay. In this regard, the court recalls the following observation of Irvine J. in *Millerick v. The Minister for Finance* [2016] IECA 206, para. 39, following a consideration of relevant precedent:

*"I am satisfied that...for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."*

19. There is, with every respect to Ms O'Dowd, nothing in Mr Pettit's behaviour that even begins to approach the nature of the conduct contemplated by Irvine J. in the above-quoted text, no *"positive acquiescence"*, no *"reassurance"*, nothing.

### **Application of *Primor* Jurisdiction**

20. It is accepted by Ms O'Dowd that there has been inordinate delay on her part. The court is satisfied, for the reasons stated previously above, that the delay is inexcusable. As to where the balance of justice lies, it appears to the court for the reasons stated above, that considerable prejudice will accrue to Mr Pettit if the within proceedings are allowed to continue, such that it would be (i) unfair to Mr Pettit to allow the within proceedings to continue and (ii) just to strike out Ms O'Dowd's motion, not least (though not only) because in light of the time that has passed since the relevant incidents occurred there is a real risk that it would not be possible for Mr Pettit to have a fair trial.

### **X**

### **Application of *O'Domhnaill* Jurisdiction**

21. Though the court, for the reasons stated above, considers that the *Primor* jurisdiction is the correct jurisdiction to bring to bear in the within proceedings, it notes for the sake of completeness that, so far as the *O'Domhnaill* jurisdiction is concerned, the court considers for the reasons stated previously above that, by reason of the passage of time since the critical incidents at issue in the within proceedings, there is a real or substantial risk of an unfair trial or an unjust result.

### **XI**

### **Conclusion**

22. Though the court is mindful of, and has brought to bear in its considerations, the consequences for Ms O'Dowd of its acceding to the within application, nonetheless, for the various reasons stated above, the court considers that it is coerced as a matter of law into acceding to the within application, and will order accordingly.