Neutral Citation: [2014] IEHC 367

THE HIGH COURT

[2002 No.13249 P]

BETWEEN

TESCO IRELAND LIMITED

PLAINTIFF

AND

THOMAS A. McNEILL, D.H. ADAMS, A.J.C. ALLEN, ALISTAIR J. GRIFFIN, ROY C. McNEILL, STEPHEN B McBRIAR, PHILIP J. McMAHON, COLIN W. REID, WESLEY McCAMLEY AND T. BROWN TRADING UNDER THE STYLE AND TITLE OF WDR AND RT TAGGART

DEFENDANT

JUDGMENT of Mr. Justice Barrett delivered on the 25th day of July, 2014.

1. This is an application by the defendants to strike out the plaintiff's claim (1) for want of prosecution pursuant to Order 122 of the Rules of the Superior Courts, 1986; and/or (2) pursuant to the inherent jurisdiction of the court on grounds of inordinate delay and/or inordinate and inexcusable delay in the prosecution of these proceedings.

Facts

2. Tesco's claim in these proceedings is for damages for negligence and breach of an alleged collateral agreement dated 4th November, 1996, which negligence and breach of contract are claimed to have occurred in the context of the design and construction of a shopping centre in County Monaghan during the 1990s. The defendant is a multi-disciplinary firm of architects and engineers involved in construction design and consultancy. It was retained, in June 1994, by a property developer partnership, Newbay Properties, to provide certain professional services in relation to the development of the shopping centre. Power Supermarkets Limited, which was subsequently acquired by Tesco, agreed to become the anchor tenant of the shopping centre pursuant to a lease of 2nd December, 1994; it engaged Newbay pursuant to a development agreement of the same date. Tesco seeks to rely in part on a purported collateral agreement of 4th November 1996 between Power and Taggart. It is Taggart's case that the proceedings are statute-barred insofar as negligence is concerned and that the entirety of the proceedings ought in any event to be dismissed for want of prosecution. Insofar as negligence is concerned, the complaint made by Tesco is that Taggart discharged its responsibilities negligently in failing to consider and allow for post-construction settlement. That cause of action accrued on the date upon which the design was done. The works commenced in April 1996, so the drawings would have been completed prior to that date. The instant proceedings were commenced on 15th October, 2002, out of time, it is claimed, for an action in tort but within, if just within, the limitation period applicable to claims under the collateral agreement. At the time of the issuing of the defendant's motion to dismiss in August, 2013, no substantive step in the proceedings commenced in 2002 had been taken by Tesco during a period of almost 11 years. What was Tesco doing during this period? As of June 2001, it had instituted arbitration proceedings against Newbay pursuant to an arbitration clause in the development agreement. It also instituted the instant proceedings against Taggart but, according to an affidavit sworn by a solicitor for Tesco *"it would have been uneconomical to prosecute two separate actions in different fora against Newbay and [Taggart]"*. The same solicitor later avers in his affidavit evidence that Tesco's intention in the circumstances arising was *"to prosecute the arbitration first and in the event that it succeeded in the arbitration and was in a position to recover against Newbay there would be no necessity to continue the prosecution of the proceedings against [Taggart]"*. Having successfully prosecuted the arbitration proceedings and obtained an award in excess of €1m in respect of the remedial works that Tesco has been required to carry out at the shopping centre, Tesco now finds that it might not be in a position to recover against Newbay. It is in these circumstances that Tesco has sought to progress the instant proceedings with renewed vigour against Taggart.

Some general principles applicable

3. There are two key lines of authority governing an application for dismissal for want of prosecution. They arise respectively from the Supreme Court decisions in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *O'Domhnaill v. Merrick* [1984] I.R. 151. In *Primor*, Hamilton C.J., at p. 475, summarises the principles to be applied in an application such as that now before the court. The *Primor* principles have since been recited with approval in a number of later cases and the court does not propose to repeat them here. In essence, the *Primor* case establishes a three-limb test to be applied in cases of delay: (1) is the delay inordinate? (2) is the delay inexcusable? (3) even if inordinate and inexcusable, is the balance of justice in favour of or against a case proceeding? There is suggestion in recent case-law, such as *JMcH v. JM* [2004] 3 I.R. 385, that the *Primor* case ought to be viewed as concerned with post-commencement delay only and it is true that on its facts *Primor* was an application to dismiss based on post-commencement delay. However, there are other cases such as *Guerin v. Guerin* [1993] 2 I.R. 287, which pre-date but appear consistent with *Primor*, in which regard has been had to the full backdrop of delay arising.

4. Notwithstanding any finding that delay has been inordinate and inexcusable, the third limb of the *Primor* test may require that a case proceed where the balance of justice favours such a result. In all cases the court must also have regard to the second line of authorities referred to at the outset of this judgment, namely those arising from the decision of the Supreme Court in *O'Domhnaill v. Merrick*. In that case, Henchy J. referred, at p.157, to the need:-

> *"to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend'.*

The interaction and concurrent validity of both lines of authority has been approved recently by the Supreme Court in *McBrearty v. North Western Health Board & Others* [2010] IESC 27. Thus, having tested the proceedings by reference to the *Primor* principles, it falls to the court also to consider the present application specifically by reference to the standard established in *O'Domhnaill*. In passing, it is perhaps worth noting that both lines of authorities appear consistent with the constitutional imperative, referred to by Hogan J. in *Donnellan v. Westport Textiles Limited* [2011] IEHC 11 at para. 24, that the courts put an end to stale claims so as to ensure the effective administration of justice and basic fairness of procedures.

5. The foregoing are the leading precedents and general principles currently applicable to any proceedings concerned with dismissal

for want of prosecution. The same precedents and principles appear to apply regardless of whether the application to dismiss is grounded on o.122 of the Rules of the Superior Courts or the inherent jurisdiction of the court. The court turns now to apply the tests established in *Primor* and *O'Domhnaill,* as well as certain other authorities that are of particular relevance to the present proceedings.

Is the delay arising inordinate?
6. The question of whether a period of inactivity constitutes inordinate delay is primarily one of fact and no universal benchmark exists as to what is or is not inordinate delay. In *O'Connor v. John Player and Sons Ltd* [2004] 2 ILRM 312, Quirke J. held that a delay of 4 years and 11 months between the issue of a plenary summons and the delivery of a statement of claim was inordinate. Clarke J. opined in *Comcast International Holdings Incorporated & Others v. Minister for Public Enterprise & Others* [2012] IESC 50, at para. 5.1 of his judgment, that even in cases where the formulation of a detailed statement of claim would undoubtedly take some time *"delays of a fraction of five years have been considered inordinate".* Sometimes much longer delay is tolerated because of the specific circumstances pertaining in a particular case. In the present case the court considers that it cannot reasonably be contended that a delay of over five years prior to issuing a plenary summons, followed by an interval of well over a decade before delivery of the related statement of claim can be described as anything other than inordinate delay. Even if one accepts that *Primor* is concerned with post-commencement delay only, the court is of the view that the elapse of more than ten years between the issuance of the plenary summons and the delivery of the statement of claim is in and of itself inordinate delay.

Is the delay arising inexcusable?
7. There is an abundance, perhaps even a surfeit of authority on the issue of when delay is to be considered inexcusable. Some of the leading applicable authorities are considered below.

8. In *Truck and Machinery Sales Ltd. v. General Accident Fire and Life Assurance Corporation plc* [1999] IEHC 201, the plaintiff sought to excuse delay by virtue of the fact that it had been distracted by its involvement in other litigation. Geoghegan J. doubted that such an excuse could render a delay excusable, stating, at p.4, that:

> *"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."*

9. In the present case the delay in pursuing the litigation occurred because of initially unanticipated delays in the arbitration proceedings, compounded in the end by the fact that Tesco's ability to recover against Newbay the amounts awarded against the latter following the arbitration proceedings had become a matter of some uncertainty. None of this has anything to do with Taggart and there is nothing in the surrounding circumstances which suggests that Tesco's delay ought to be seen as other than inexcusable. Had Tesco made Taggart privy to its tactical thinking as regards completing the arbitration before continuing the litigation and had it thereafter kept Taggart regularly apprised of matters, or had Taggart acquiesced in the delay then the conclusion of the court would be otherwise, but none of these circumstances pertain.

10. In *Comcast,* the Supreme Court decided that the delay in prosecuting the proceedings in issue in that case was excusable in circumstances where the plaintiffs said that they were waiting for the completion of the investigative stage of a tribunal of inquiry, the Moriarty Tribunal, into the granting of the State's second mobile phone licence. The plaintiffs' claim in that case involved very serious allegations of corruption and misfeasance of public office by a Government minister. The Supreme Court therefore considered that the case was exceptional and that in the unique circumstances of the case it was legitimate for the plaintiffs to wait until evidence had been heard at the tribunal which might assist it in framing its claim against the State.

In the course of her judgment, Denham C.J. noted, at para. 40, that:

> *"In general, it is not open to a party to decide unilaterally not to proceed with proceedings in a case for a particular time and reason. However, in the interests of fair and just proceedings, there are exceptions. This is one such exception, where in the interests of justice, I find that the delay is excusable."*

11. The court does not consider that there is anything of like exceptionality in the instant proceedings as pertained in the *Comcast* proceedings which would bring Tesco's actions, un-acquiesced in by Taggart, within the ambit of the exception identified by Denham J. in the above-quoted text. Moreover, there is, in the judgment of Clarke J., text that is decidedly unhelpful to Tesco's cause in the present proceedings. Clarke J. considered that a party wishing to 'park' its claim pending the outcome of some external event cannot rely on a unilateral, unsignalled decision by it to do so as an excuse for its delay. Per Clarke J., at paragraph 5.8 *et seq*. of his judgment:

> *"[I]t seems to me that a party, who wishes to adopt what might, in ordinary circumstances, be considered to be an unorthodox approach to litigation (such as by putting the proceedings on hold pending some event), is required to, at a minimum, place on record with all other parties to the litigation, that that course of action is being adopted. It does not seem to me that it is legitimate for a party to adopt an unorthodox approach to litigation on a unilateral basis ...Unorthodox action signalled contemporaneously and not contested at the time is likely to be more readily accepted by the court as providing an excuse than the same action taken unilaterally and only referred to after the event as retrospectively providing an explanation."*

12. Clarke J. also indicated, at para. 5.34 of his judgment, that when it became clear that the relevant module of proceedings, which in the present case would be the arbitration, was going to take a lot longer than anticipated, then the prosecuting party, here Tesco, ought to have made clear again that it was proposing to await developments.

13. The court does not consider that a decision to proceed with arbitration and then with related litigation can properly be described as 'unorthodox'. However, if, as is the case here, the rationale for that approach is not expressly advised to the affected party, *i.e.* Taggart, and if that party is not kept apprised of unanticipated delays arising, here in the arbitration, and also of the intended course of action given those delays, then it appears to the court that, consistent with the judgment of Clarke J. in *Comcast*, any delay arising by virtue of that initial decision cannot later be pleaded successfully to be excusable. The court is cognisant of the fact that Hardiman J., at para. 4 of his judgment in *Comcast,* suggested that case was likely *sui generis*. Even so, the court considers that the observations of Denham C.J. and Clarke J., to which reference has just been made, are apposite in the context of the instant proceedings.

14. In *Silverdale and Hewetts Travel Agencies v. Italiatour* [2001] 1 ILRM 464, Finnegan J. held in effect that substantial commercial

enterprises are expected to pursue litigation with reasonable expedition and a failure to do so is culpable. Per Finnegan J., at p.469:

> *"In considering a party's personal blameworthiness one must look at the circumstances of the party ...[T]he plaintiff in the present case ...is a considerable commercial enterprise and must be expected to pursue litigation of a commercial nature with reasonable expedition and to that end take steps to ensure that its legal advisors act in an appropriately expeditious manner".*

It appears to the court that there is nothing in this observation which places Tesco's actions in the present proceedings in any better light or which stands to the benefit of Tesco in any way.

15. In the relatively recent case of *O'Carroll and Another v. EBS Building Society & Another* [2013] IEHC 30, the plaintiff, as personal representative of a deceased investor, took proceedings arising out of the deposit of certain monies by the deceased with a Mr. Hall, the second-named defendant, who was licensed to accept deposits on behalf of EBS Building Society. Mr. Hall had taken the deposit but instead of placing it with EBS had invested or otherwise used it for his own benefit. The deceased investor died in 2000. Probate was granted in 2002. The plaintiff instituted proceedings in 2004. Mr. Hall consented to judgment in 2008 but died in 2012, by which time attempts to enforce the judgment against him had been unsuccessful. In 2013, EBS brought an application to dismiss the plaintiff's claim. O'Malley J. held that the delay arising was inordinate but not inexcusable, stating *inter alia*, at para. 36ff, that:

> *"While it may be unusual to pursue one defendant while letting matters lie in respect of another, this is a case where one defendant had, at a relatively early stage, admitted liability and consented to judgment. If the plaintiff's claim could be satisfied by him it would clearly be in everyone's interest not to engage in superfluous litigation. EBS was fully aware of the course being taken by the plaintiffs and, while not formally acquiescing in it, did not seek to force the case on. The plaintiffs never abandoned their case against EBS, making it clear at all times that they would discontinue proceedings only when matters were fully resolved with Mr. Hall ...In my view, delay which is largely attributable to a course of action taken by the plaintiff, to the knowledge of the defendant, which would if successful be to the benefit of the defendant, is not inexcusable. It might be otherwise if the defendant has specifically taken objection to the course of action."*

16. In the present case, Tesco commenced the instant proceedings against Taggart and then went off to pursue its arbitration proceedings against Newbay. Its apparent intention, if it was successful in those proceedings, was to recover against Newbay. Having been successful, it is not now certain that it will be able so to recover. So Tesco has elected instead to pursue the instant proceedings against Taggart with renewed vigour. Tesco's tactical decisions were not made with the knowledge of Taggart. Indeed Tesco's approach in these proceedings was not unlike that of the plaintiff in *Desmond v. M G.N Limited* [2009] 1 I.R. 737. In that case, Mr. Dermot Desmond, a prominent businessman, issued proceedings for libel in May 1998 concerning certain newspaper articles that alleged he had made various corrupt payments. However, a notice of intention to proceed was only issued in February 2005. The reason offered by Mr. Desmond for the significant delay in the proceedings was that he had acted on legal advice. In the present case, Tesco likewise acted in a manner that it considered to accord best with its legal interests. The Supreme Court in *Desmond* considered that the delay arising was both inordinate and inexcusable, though a majority were satisfied that the balance of justice required that Mr. Desmond's action should be allowed to proceed. Referring to Mr. Desmond's decision to *"park"* his defamation proceedings pending the determination of certain issues by an ongoing tribunal of inquiry into certain payments to politicians (the 'Moriarty Tribunal'), Kearns J., as he then was, observed at p.752, albeit in a dissenting judgment, that:

> *"[T]he defendant was never informed of the plaintiff's decision to "park" the case nor was it invited to acquiesce in it. The lengthy delay almost certainly gave them reasonable grounds to believe that this litigation had simply "gone away" and would never be brought before any court."*

This last point touches again upon the issue of signalled delay to which reference was made by Clarke J. in his judgment in *Comcast*, as referred to above and applied in this case.

17. In *O'Carroll*, O'Malley J. also refers to the fact that the delay arising was attributable to a course of action, *viz.* the pursuit of Mr. Hall, which would, if successful, have been to the benefit of EBS Building Society. In this case there was no such benefit to Taggart. Indeed the opposite applies as notwithstanding the delay and despite Tesco having been successful in the arbitration proceedings, Tesco has elected in any event to pursue with renewed vigour the instant proceedings against Taggart.

18. For the reasons stated above, the court considers, consistent with the general trend of the applicable authorities, that there is no basis on which Tesco's delay in these proceedings could be described as other than inexcusable.

Where does the balance of justice lie?

19. It will be recalled that under the *Primor* test even if delay is found to be inordinate and inexcusable, the court is required to consider whether the balance of justice is in favour of or against a case proceeding. Separately, under the line of authorities commencing with *O'Domhnaill v. Merrick*, the balance of justice is the determinative factor, regardless of whether the delay was inordinate and/or inexcusable.

20. In *Primor,* Hamilton C.J., at p.475, indicated that the following criteria could be taken into account when determining where the balance of justice lies:

> *"(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."

21. Further guidance to that given in *Primor* as to the criteria that might be considered by the court in determining where the balance of justice lies are to be found in the judgment of Finlay Geoghegan J. in *Manning v. Benson and Hedges* [2004] 3 I.R. 556 and that of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510. In the *Anglo Irish Beef* case the Supreme Court decided that the balance of justice was in favour of striking out certain proceedings concerning an indemnification being sought under a particular share purchase agreement. In the course of his judgment, Fennelly J. observed as follows, at p.518, *et seq*:

"[T]here may ...be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim. No comparable misfortune has been advanced in the present case. The claim is of a purely commercial character. On the plaintiff's own version of it, it is perfectly straightforward. The plaintiffs are well-advised, well-known companies and are fully armed with all the means of pursuing their claim to judgment ....[T]he court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation .... [W]hen the court comes to strike that balance of justice in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J, it will need to find something weighty to cancel out the effects of the plaintiffs' behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs ' claim dismissed ... In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something akin to acquiescence."

22. The *Manning* case involved a claim by plaintiffs that, by reason of wrongful acts by the defendants, they had started and continued the deleterious habit of smoking tobacco and had incurred various personal injuries over the years as a result. The defendants brought applications seeking, amongst other matters, to dismiss the plaintiffs claims for want of prosecution on the grounds of inordinate and inexcusable delay. In granting the reliefs sought, Finlay Geoghegan J. identified, at p.569, the following non-exhaustive factors as relevant to the court's jurisdiction:

"1. has the defendant contributed to the lapse of time;

2. the nature of the claims;

3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;

4. the nature of the principal evidence; in particular whether there will be oral evidence;

5. the availability of relevant witnesses;

6. the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date.

Further, on the second question it will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

23. When it comes to the issue of delay, the court can find nothing in the behaviour of Taggart that is worthy of reproach or criticism or indeed a finding that it in any way contributed to same: the delay that arises is one in which Taggart have not acquiesced, and the on-going rationale for, and prolongation of such delay was not communicated contemporaneously to them by Tesco. What the court can discern is a real possibility, if not a probability, that if the instant proceedings are allowed to continue at this remove in time from the events to which they relate, Taggart will be seriously prejudiced, both because the relevant events happened almost two decades ago and also because certain key witnesses have died. Tesco cannot escape its share of responsibility for the delay that has arisen in the bringing of these recently reinvigorated proceedings. Moreover, there is the fact that the prospective trial date, were the case to proceed, would be some way off. The court is conscious too that the instant proceedings involve pleas of professional negligence bearing on a professional person's reputation. As O'Hanlon J. observed in *Celtic Ceramics Limited v. IDA* [1993] IRLM 248 at p.258 et seq:

"It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of inordinate and inexcusable delay on the part of a plaintiff and I would respectfully echo the view expressed by Henchy J in Sheehan v. Amond that it should be possible to invoke 'implied constitutional principles of basic fairness of procedures' to bring about the termination of such proceedings."

24. There may of course be instances in which such proceedings would not be "*very unfair and unjust*". An example of this would be a case in which a party decided to 'park' litigation pending the conclusion of related arbitration and conducted itself in a manner akin to that identified by Clarke J. in *Comcast*. However, in this case, Tesco has not conducted itself in the manner which Clarke J. identified: it did not make Taggart privy to its tactical thinking as regards the conduct of the arbitration and the sequencing of the litigation, and it did not keep Taggart apprised as matters proceeded. Indeed it is difficult not to conclude that Tesco perceived the court proceedings as a 'chip left on the table' on the off-chance that, as proved to be the case, there was some stumbling block encountered in or following the arbitration proceedings. If so, Tesco's gamble in this regard has not paid off. Regardless, however, of whether Tesco so perceived the litigation, the court concludes, having had regard to the various authorities considered above, and to the particular facts of these proceedings, and for the reasons stated, that the balance of justice in this case lies against Tesco's action being allowed to proceed.

Conclusion

25. The court orders that the claim of Tesco Ireland Limited in these proceedings be struck out pursuant to o.122 of the Rules of the Superior Courts and the inherent jurisdiction of the court. Given the order being made the court does not consider it necessary to consider or determine the issue of whether the proceedings are statute barred insofar as any allegation of negligence is concerned.