

THE HIGH COURT

[2009/8243P]

BETWEEN

PETER BURNS

PLAINTIFF/RESPONDENT

AND

MAYE CONCRETE LIMITED

READYMIX PLC

DEFENDANTS/APPLICANTS

JUDGMENT of Ms. Justice Stewart delivered on the 31st day of March, 2017.

1. This matter came before the Court on the 26th January, 2017, for hearing of the defendants' motion, which was issued on the 27th June, 2016, and returned before the Court on the 11th July, 2016. The defendants seek, inter alia, an order from the Court dismissing the plaintiff's claim for want of prosecution and/or on grounds of inordinate and inexcusable delay. The motion was grounded on the affidavit of Jason Alexander Smalley and was sworn on the 23rd June, 2016. There was a replying affidavit of Anne Hickey, solicitor for the plaintiff, sworn on the 18th July, 2016, together with the documents exhibited thereto. A further replying affidavit of Vishal Puri, acting on behalf of the defendant, was sworn on the 21st October, 2016, together with exhibits. A supplemental affidavit of Anne Hickey was sworn on the 16th November, 2016, and an affidavit of Peter Burns was sworn on the 16th November, 2016. Finally, there is an affidavit of Mark Finucane sworn on the 20th January, 2017. The motion was allocated a hearing date of 26th January 2017. The hearing did not conclude on the 26th January and was resumed on 28th February, 2017.

2. The proceedings arise out of a contract of sale for land, which concluded on 25th August, 2005, between the plaintiff and the first-named defendant. The sale included a building and commercial yard at Aughamore, Co. Sligo, comprised in Folio No. SL18905. The consideration for the purchase of said lands was €935,000.00. The map annexed to the contract of sale extended beyond the boundaries of the folio to include a portion of land contained within Folio No. SL21742 and a portion of unregistered land, neither of which were owned by the first-named defendant. The office building on the land was built in breach of the planning permission provisions. A right of way was granted over the adjoining land held by the first-named defendant but this did not extend to the public road. The plaintiff contends that, while the liability issues are fairly straightforward in this case, it has been necessary to assemble expert evidence in conveyancing, planning and surveying and that the quantum issues potentially arising in this matter are complex.

3. Both parties filed written submissions and made oral submissions to the Court. The defendants' case is that the delay in this case has been inordinate and inexcusable and that the balance of justice requires that the plaintiff's case be dismissed. Further, the defendants submit that they no longer have business interests in the State and are in the process of extracting their business from Ireland and finalising their outstanding business relationships. Thus, they would like this matter to be brought to conclusion.

4. The defendants rely on a long line of authorities, beginning with the seminal decision of *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. They submit that the *Primor* test comprises of two limbs: 1) Whether the delay was inordinate and inexcusable, and 2) Whether, in the Court's discretion on the facts of the case, the balance of justice lies in favour of its dismissal. It is submitted that the rigours of this test are heightened by cases such as *McMullen v. Ireland* 42297/98 [2004] ECHR 404 and *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11, which apply the principles of effective administration of justice and basic fairness of procedures through the rubric of Article 6 of the European Convention of Human Rights. The defendants point to *Millerick v. Minister for Finance* [2016] IECA 206 as an example of this rigorous approach being put into practice, where Irvine J. stated at para. 32:-

"It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings."

The defendants also submit that delay must be calculated from the date the cause of action accrued, which was in 2005. In this regard, they rely on the decision of Finlay-Geoghegan J. in *Manning v. Benson, Hedges Ltd & Ors* [2004] 2 IR 556.

5. In setting out the subjective nature of the *Primor* test, the defendants contrast the decisions in *Stephens v. Paul Flynn Ltd* [2008] IESC 4 and *Morrissey v. Analog Devices BV* [2007] IEHC 70. The plaintiffs rely on *Philip Shields and Hillgrange Services Ltd. v. Interlink Ireland Ltd. T/A Interlink Express* [2014] IEHC 74 to that same end and submit that this case properly outlines the approach that this Court should take in deciding this matter.

6. The plaintiff concedes that there has been a delay in this case capable of being characterised as inordinate. However he submits that, given the particular circumstances of the case, the delay is not inexcusable. The plaintiff points out that the defence, which was ultimately filed on the 30th January, 2012, was only filed following three motions for judgment in default of defence brought before the courts. On that basis, the plaintiff submits that delay should be calculated from that date. I accept that proposition with regard to this case. It seems to me that a defendant who is alleging delay cannot include, as part of that delay, lost time for which it is responsible. Given that the plaintiff had to motion the Court on three separate occasions in order to procure the filing of a defence, the defendants cannot absolve themselves of the blame for that lost time. Thus, any alleged delay on the part of the plaintiff commenced on the 30th January, 2012. A letter stating an intent to file a notice of intention to proceed was sent on 1st October, 2015, but the notice was not ultimately filed for a further seven months, meaning that the cumulative delay for which the plaintiff is responsible amounts to four years and four months. While the plaintiff concedes that this period is inordinate, he maintains that the delay is excusable for the reasons outlined below.

7. The plaintiff submits that these proceedings are a difficult, complex and technical action which required detailed consideration before Senior Counsel could properly prepare a Certificate of Readiness, on foot of which the solicitor could arrange to set the matter down for trial. In addition, the plaintiff commenced a legal action against the solicitors who represented him with respect to the initial purchase and dealings in property. The plaintiff's solicitor avers that, per her instructions, both this action and the professional negligence action against the former solicitors would be conducted in tandem. However, she avers that the defendants in the professional negligence proceedings brought an application to have that matter expedited and, despite resistance from the plaintiff, the list judge assigned an early hearing date. That matter was ultimately disposed of on the 11th December, 2013. Once that matter was concluded, a substantial and extensive brief was furnished just prior to Christmas 2013 for the purposes of preparing an advice

on proofs and preparing this matter for the service of a Notice of Trial.

8. The plaintiff contends that the period between the delivery of that brief and 1st October, 2015, (when the aforementioned letter of that date was sent) was taken up by complying with the advices of counsel, the obtaining of expert evidence and other such tasks. Effectively, he submits that there were various activities ongoing in that period in relation to the preparation of the case for trial. Ultimately, Senior Counsel certified the matter as ready for trial on the 19th May, 2016. On 12th June, 2016 a notice of intention to proceed was served. On the 27th June, 2016, the defendants issued the motion to dismiss and, on the 21st July, 2016, a hearing date was fixed for that motion. Subsequent affidavits were filed, as outlined above.

9. While it is accepted that the delay was inordinate, it remains to be determined whether the delay is inexcusable. It seems to me that the delay in this matter was excusable, given the complexity of the matters outlined by counsel for the plaintiff. I am also of the view that, while later authorities such as *Millerick* indicate that a more stringent view is to be taken in terms of the amount of excusable delay, this remains a matter for the Court to determine, keeping in mind the factual context of the particular case arising for consideration. This approach is borne out by the decision of Ryan J. (as he then was) in *Shields* (supra). In that case, the proceedings issued in 1998 and the pleadings closed in 1999. There was a discovery request in or around 2003 and an ongoing dispute in relation to the adequacy of that discovery did not conclude until 2012. In 2013, a notice of intention to proceed was filed. In June, 2013, the plaintiff set the matter down for trial. One week later, a notice of motion was filed to strike out the proceedings for failure to prosecute on the grounds of delay. The delay in this case comprised a period of approximately fourteen years. While Ryan J. held that the delay was grossly excessive, he nevertheless had to enquire whether it was inexcusable. In answering this question, he stated at para. 41:-

"The word sets the bar high but its strict meaning of being quite unforgivable is not the sense in which it is used in this context. The question is whether any reasonable, credible explanation has been proffered for the delay overall or the particular periods. In this case, it seems to me that the crucial necessity of discovery for the plaintiffs, firstly in respect of their own seized documents and also as to the defendant's records, seems to me to have justified the extended pursuit by the solicitors. The fact that another affidavit was sworn on behalf of the defendant as late as 2010 warrants the conclusion that the search by the plaintiffs was justified. The necessity for this saga of discovery dispute is debated in the affidavits and it is of course impossible to decide on factual disputes by reference to the affidavits. Having said that, the case made by the plaintiffs seems to me to be sufficiently made out, albeit on a prima facie basis, to justify the continued demands for more information about the documentary material."

Ryan J. then concluded:

"I am satisfied in these circumstances that the delay is not inexcusable."

10. Ryan J. then proceeded to examine where the balance of justice lay, a matter that would fall to be considered if the plaintiff's delay was both inordinate and inexcusable. He stated at para. 41:-

"...This arises if there are features of the case that are in the plaintiff's favour. Clearly, if no such elements are present, the balance of justice favours the defendant and dismissal of the case. This is where the defendant's conduct of the litigation is more particularly considered and the issues include the following, bearing in mind that it is impossible to supply an exhaustive list of considerations for circumstances that are endlessly variable."

- *Was the defendant responsible for all or part of the delay?*
- *Did the defendant condone the delay?*
- *Did the defendant intentionally or otherwise lead the plaintiff to believe that it was content to go along with the delay? This is where Clarke J's active and passive delays by the defendant are relevant.*
- *Prejudice to the defendant weighs heavily but any specific prejudice is absent in this case."*

11. Finally, Ryan J. considered whether the exercise of discretion in favour of the plaintiff on the balance of justice would offend any other principle to which the Court must have regard. He stated at para. 41:-

"...This will depend on the particular circumstances of the case, just like all the other elements of the test, but there will be certain actions and occasions on which it will be legitimate to invoke for consideration another principle such as has been recognised by the courts in reference to the obligation under Article 6 of the European Convention on Human Rights and the interest of the courts, independent of the parties, in the efficient conduct of litigation. On this question, balance of justice weighs in the plaintiffs' favour by reason, in particular, of

(a) the defendants delay in making the application;

(b) the fact that the defendant is responsible for a significant part of the delay;

(c) the correspondence of April 2013 that gave the plaintiffs implicit comfort that they would not be exposed on this front."

Taking all these questions into account, Ryan J. dismissed the application to strike out the plaintiffs claim for want of prosecution.

12. It seems to me that the defendants in this case must bear some responsibility for the delay in this matter being progressed to trial. At the hearing of this motion, the defendants repeatedly referred to the plaintiff's alleged failure to inform them and bring to their attention the action against their former solicitors. The defendants referred to ss. 16 and 17 of the Civil Liability Act 1961 in particular, which addresses the law relating to liability for concurrent wrongdoers. There is no application pursuant to ss. 16 or 17 currently before the Court. This Court is dealing with an application to dismiss the proceedings for want of prosecution on grounds of delay that is alleged to be inordinate and inexcusable. The defendants submit that ss. 16 and 17 are relevant in determining where the justice of the matter lies. I do not accept that proposition. It seems to me that to rely on the provisions of ss. 16 and 17 at this juncture would be to pre-emptively deny the plaintiff access to justice and his constitutional rights to litigate this claim. It is undoubtedly the case that the outcome of the plaintiff's earlier professional negligence action against his former solicitors will have some bearing on the outcome of these proceedings when it ultimately goes to trial. However, it would be premature for this Court to dismiss the plaintiff's claim even partially on foot of those provisions and I do not propose to do so.

13. While I am satisfied that the delay was inordinate, I am also satisfied that a reasonable excuse has been proffered for that delay, namely the technical, difficult and complex nature of these proceedings and the necessary collation of the appropriate expert evidence prior to the matter being certified as ready to proceed. I am satisfied that the delay was not inexcusable. I am further satisfied that, having balanced the constitutional rights of the plaintiff and the defendant in respect of access to the courts and the desirability of the orderly and efficient conduct of litigation, the balance of justice lies with allowing the plaintiff to proceed with this action. For the reasons outlined above, I will dismiss the defendants' motion.

14. I will hear counsel further in respect to any ancillary orders required.