Neutral Citation [2017] IEHC 102

THE HIGH COURT

[2007 No. 9577P]

BETWEEN:

TIMOTHY GEANEY

PLAINTIFF

-AND-

ANTHONY GEANEY

AND

IRISH NATIONWIDE BUILDING SOCIETY

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 17th day of February, 2017

1. The motion before this Court is one for the striking out of the plaintiff's proceedings on the grounds of delay in relation to proceedings which were issued on the 20th December, 2007. The case itself concerns a claim that a Deed of Transfer from 1995 between two brothers regarding the division of a family farm in County Cork should be set aside. The plaintiff claims that the Deed of Transfer should be set-aside on the grounds of *non est factum* and misrepresentation. The second named defendant, Irish Nationwide Building Society, has no role in these proceedings.

2. In reaching its decision, this Court considers the effect, on a motion to strike out proceedings for delay, the fact that;

a. a contributory factor in the delay was an attempt by the plaintiff to have the dispute mediated and,

b. a second contributory factor in the delay was an attempt by the plaintiff to have the costs of litigating the dispute reduced by having the case remitted to the Circuit Court.

3. Before outlining the delay in this case, it is relevant to note that, while the plaintiff's Replies to Particulars contained an allegation that the defendant's wife (who has since died) misrepresented the effect of the Deed of Transfer, counsel for the plaintiff has confirmed that this was a mistake made in drafting this reply and no such claim is part of the plaintiff's case.

Pre-proceedings delay

4. With regard to the pre-proceedings delay, which occurred between 1995 and 2007, the plaintiff claims that he only learnt about the import of the impugned Deed of Transfer in late 2006 and then only discovered in August 2007 the true meaning of the Deed of Transfer from the solicitor who had prepared the Deed. For this reason, it seems to this Court that while there is a considerable delay between the execution of the Deed of Transfer in 1995 and the issue of the proceedings in 2007, this aspect of the delay it is not inordinate or inexcusable so as to justify the proceedings being struck out. Indeed, this conclusion is also consistent with the defendant's own approach to the pre-proceedings delay, since no attempt was made by the defendant in dealing with these proceedings, immediately after they had issued, to have them struck out even though it was some 12 years after the Deed was signed. The first attempt by the defendant to have the proceedings struck out on the grounds of inordinate and inexcusable delay is when this motion was issued on the 11th July, 2016, *albeit* that delay is pleaded in the defendant's defence which was filed on the 28th September, 2010.

Post proceedings delay

5. As regards the post-proceedings delay, there is a time-lag between the plenary summons which was issued in December 2007 and the filing of the defence on the 28th September, 2010. In this period, the defendant issued two motions. The first was a motion to deal with the delay by the plaintiff in filing a Statement of Claim. This resulted in an agreed time-frame for the filing of the Statement of Claim, which appears to have been duly complied with by the plaintiff. The second motion was in relation to the delay by the plaintiff in replying to Particulars. This motion also resulted in an agreed time-frame for the Reply to Particulars, which also seems to have been duly complied with by the plaintiff. In both instances it appears that the defendant did not contest or appeal the orders made by the Court on its motions.

6. Nonetheless, it is clear to this Court that there does appear to have been some foot-dragging on behalf of the plaintiff. It seems that the plaintiff is willing to make the claim that the Deed of Transfer should be set-aside and thereby he make serious allegations against his brother and indeed he has registered a *lis pendens* against lands which his brother believes are his. This has a negative impact on the title of that property, yet the defendant does not appear to have been in any rush to prosecute that claim. While this appears to be a fair description of what occurred between 2007 and 2010, it is this Court's view that this aspect of the delay in filing the Statement of Claim and then in Replying to Particulars could not be described as being inordinate and inexcusable, so as justify the proceedings being struck out.

7. The next matter for consideration is the period between when the defence was filed in December 2010 and July 2016, when this motion was issued and in particular the attempted mediation by the plaintiff and his attempt to reduce the litigation costs, during this period.

Attempted mediation

8. As regards the attempted mediation, this was first raised by letter dated 23rd April, 2012, from the plaintiff's solicitors to the defendant's solicitors. In that letter, the plaintiff suggested mediation of their dispute. This suggestion of mediation was not accepted by the defendant and as a result the plaintiff brought a motion before the High Court on the 15th April, 2013, applying for the adjournment of the proceedings to facilitate mediation. This motion was struck out with no order as to costs, as Cooke J. felt that it would be fruitless adjourning the proceedings if the defendant was not interested in mediating.

9. It is relevant to note that the Irish Courts look favourably on the notion that parties to litigation should seek to reach agreement between themselves, without the cost, publicity and adversarial outcomes of litigation. This is clear, not just from caselaw in which the parties are encouraged to mediate (such as the encouragement provided by Cooke J. in these proceedings, which is noted

below), but also from the fact that there are Rules of Court which encourage and facilitate mediation. It is this Court's view therefore that, in the context of a strike-out application on the grounds of delay, the Court should be slow to penalise unnecessarily parties to a dispute who propose or enter mediation, even where that might lead to some delays in the prosecution of their extant litigation claim, unless of course the Court is of the view that the mediation or proposal of mediation is designed simply to facilitate such delay or it is otherwise unjustified.

10. In this regard, it is relevant to note that Cooke J. felt that mediation would be the most appropriate solution for this dispute when the motion came before him. He also wanted this point put to the defendant personally to see if it would lead to a change in his attitude to mediation. As events transpired, it did not lead to any change in attitude on the part of the defendant. Nonetheless, it seems to this Court that Cooke J.'s view, that mediation was the most appropriate solution for this dispute, supports this Court's conclusion that between April 2012 and April 2013 there were *bona fide* attempts to have the dispute mediated. On this basis, this Court is of the view that the plaintiff should not be penalised, in the context of a strike out application, for any delay resulting therefrom.

Attempt to reduce litigation costs

11. After the attempted mediation was unsuccessful in April 2013, the plaintiff took a different tack, namely he sought to have the matter remitted to Cork Circuit Court with unlimited jurisdiction, so as to make a considerable saving in legal fees for both parties. He did this initially on the 6th June, 2013, by having his solicitor send a letter to that effect to the defendant's solicitor, but no response was received to that proposal. A reminder was sent by letter dated 20th December, 2013, to which no reply was received and accordingly a Notice of Trial was served on the solicitors for the defendant on the 23rd January, 2014.

12. In light of the very significant difference in costs between a High Court hearing and a Circuit Court hearing, it is understandable, in this Court's view, that a second attempt was made by the plaintiff at seeking to persuade the defendant to have the matter heard in the Circuit Court. This was done by a letter from the plaintiff's solicitor to the defendant's solicitor dated 23rd February, 2015, which was the same date that a Notice of Intention to Proceed was sent by the plaintiff's solicitor to the defendant's solicitor.

13. Between the date of this initial letter of 23rd February, 2015, and 20th June, 2016, there followed a series of reminder letters and phone messages from the plaintiff's solicitor to the defendant's solicitor. In this Court's view, it is significant that during this period of almost a year and a half, those letters and those messages were not returned or replied to, by the plaintiff's solicitor (save for inconsequential holding letters). Indeed, while the plaintiff's solicitor initially stated by letter dated 8th April, 2015, that his client would respond immediately to the proposal, there was in fact no rejection or acceptance by the defendant of the proposal, regarding the attempt to reduce legal fees, right up until 20th June, 2016.

14. It is difficult for this Court to avoid the conclusion that this failure by the defendant to respond to a proposal, which was not in the least bit complicated, requiring no more than a simple yes or no, must have been a deliberate act of foot dragging on the part of the defendant. In the context of his defence in 2010 alleging delay, it is curious, to say the least, that the defendant would engage in such an approach since a simple 'no' would have forced the plaintiff to push on with his High Court proceedings.

15. What happened on the 20th June, 2016, was that the plaintiff's solicitor eventually got to talk to the defendant's solicitor and he told him that in the absence of any agreement from the defendant, regarding the case being remitted to the Circuit Court, he would be forced to push the case on and apply for a trial date. Therefore on the 21st June, 2016, the plaintiff's solicitor served a Notice of Intention to Proceed and he put the defendant on notice of his intention to apply for a trial date before the end of July 2016.

16. At this stage, the defendant had left six years pass, since he had alleged delay in his Defence, without seeking to have the proceedings struck out on grounds of delay. However, it seems clear to this Court that it was the plaintiff's stated intention to apply for a trial date, in this letter of 21st June, 2016, which was the impetus for the filing of the motion by the defendant just a few weeks later, on the 11th July, 2016, for the proceedings to be struck out on the grounds of delay.

17. This Court takes account of the aforesaid foot dragging behaviour of the defendant in assessing his claim that the plaintiff's claim should be struck out on the grounds of delay. In addition, it is this Court's view that in the context of a strike out application, a party to litigation should not be unnecessarily penalised for a *bona fide* attempt to reduce the costs for *both* parities in having their dispute litigated, even where that might lead to some delays in the prosecution of their extant litigation claim, unless of course, the Court is of the view that the proposals are designed simply to facilitate such delay or, are otherwise unjustified. This is because just as the Courts encourage mediation, it is also the case that the Courts are acutely conscious of how expensive litigation is for ordinary members of the public. Accordingly the Courts will encourage parties, who fail to resolve their dispute by mediation or other means, to seek to litigate in the cheapest manner possible and they will not be unnecessarily penalised when they do so.

18. On this basis, this Court concludes that the plaintiff should not be penalised, in the context of a strike out application, for any delay from the end of the mediation attempts, in April 2013 until June 2016, caused by his attempts to remit the matter to the Circuit Court.

Conclusion

19. This Court concludes that the post-proceedings delay in this case between September 2010 and June 2016 is not inordinate and inexcusable in light of:

a. the attempts of the plaintiff to have the dispute mediated;

b. the attempts by the plaintiff to have the costs of the litigation reduced; and,

c. the manner of the response of the defendant to those proposals.

On this basis, and as it has been concluded that the pre-proceedings delay was also not inordinate and inexcusable, this Court is of the view that the delay in this case is not inordinate and inexcusable.

20. Even if the delay was held to be inordinate and inexcusable, it is clear to this Court that the detailed affidavits of the two brothers show that they have a vivid recollection of the alleged events surrounding the transfer of something which is of huge significance to them both, namely the division of a family farm, even though it took place over 20 years ago. Equally it is clear that the plaintiff is not relying upon a claim that the defendant's wife misrepresented the transfer and so no prejudice is suffered by allowing the trial to proceed, although she has since died. While the solicitor who was involved in the transfer, Mr. Comyn, is retired from practice, this Court does not believe that this of significant prejudice to the defendant's case.

21. This Court would add that the essence of this Court's decision is that the plaintiff should not be penalised for making attempts to have the dispute mediated and for seeking to reduce the costs of litigating his dispute, once mediation was not feasible. Accordingly, he should be allowed to have his case heard. While this Court was not dealing with the merits of the plaintiff's claim, and without wishing to suggest that this Court has its mind made up in this regard, it is nonetheless of the view that the defendant does appear to have made, at least an arguable point, that the fact that an unstamped and unregistered Deed of Transfer from 1988 exists in similar terms to the impugned Deed of Transfer from 1995, raises the issue of whether the plaintiff will be successful in his ultimate aim of dividing the farm along the lines he wishes, even if the 1995 Deed of Transfer were to be set aside.

22. Now that the parties have had their dispute aired in the High Court (at no doubt, a significant cost to them) and that they have heard in open court the strength of the other side's arguments, they might consider, once again, the recommendation of Cooke J. that this is not a dispute that is suited for an even more expensive outing in the High Court and whether there is any way this case might be resolved in some other manner and, in particular, by the making of offers by either or both of them which might resolve the matter without further litigation.