

THE HIGH COURT

2013 No. 10649 P

Between:

CHRISTOPHER MAXWELL

PLAINTIFF

– AND –

LIAM LYSAGHT practising under the style of

FRANCIS J. O'MAHONY & CO AND LIAM LYSAGHT & CO

– AND –

JOHN W CARROLL, FINBAR J CROWLEY, CATHERINE M KEANE AND HUGH J MILLAR practising under the style of CROWLEY MILLAR SOLICITORS

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 17th July, 2019.

1. Mr Maxwell claims to have been badly served by Mr Lysaght in respect of a personal injuries claim that he commenced concerning an alleged 'trip and fall' incident in 2001. He then approached the second to fifth-named defendants. A dispute has arisen as to whether, *inter alia*, the second to fifth-named defendants were instructed to act for Mr Maxwell in relation to a claim brought against the first defendant. On 03.10.2013, the within proceedings issued. Thereafter the key events presenting are:

30.12.2013 Appearance entered by second to fifth-named defendants.

07.03.2014 Motion filed to direct Mr Maxwell to deliver a statement of claim.

13.03.2014 Statement of Claim delivered.

2013-2015 Requests for Particulars and Motion and Order

10.12.2014 Defence of the second to fifth-named defendants. No reply to defence has ever been served.

15.05.2015 Defence of first defendant.

31.07.2015 Affidavit of discovery of fifth-named defendant. The fifth-named defendant avers in this regard:

"[O]n the 31st July 2015 an Affidavit of Discovery was sworn in these proceedings by me discovering the entire file..."

The discovery of the entire (copy) file is an answer to the contention by Mr Maxwell that the lien being exercised at this time over the original file held by Crowley Millar has contributed to the delay presenting since 07.07.2016. More particularly, there was mention that the said delay has been caused by a refusal to allow inspection by Mr Maxwell's team of the retained original file. No good reason has been offered as to why such inspection is required or would advance matters in circumstances where a copy of the entire file has been discovered.

07.07.2016 Last letter received from Mr Maxwell's solicitor prior to issuance of strike-out motion.

☐ Significant Delay

25.10.2018 Strike-out motion issues.

17.12.2018 First Return Date for Motion to Dismiss.

2. The law as to strike-out for inordinate and inexcusable delay has been considered at length by the appellate courts in recent years. As good a summary as any of the applicable principles is to be found in the relatively recent judgment of the Court of Appeal in *Farrell v. Arborlane Ltd and ors* [2016] IECA 224, para 20. The court proceeds by reference to those principles.

3. Inordinate delay? Has there been inordinate post-commencement delay on Mr Maxwell's part? Unfortunately for Mr Maxwell, the answer to this question is 'yes'. Following the commencement of proceedings, there was inordinate delay in the proceedings between 07.07.2016-25.10.2018.

4. Inexcusable Delay? No good excuse has been offered for the inactivity from 07.07.2016-25.10.2018. There is mention that in this timeframe an expert's report was being sought. A couple of points might be made in this regard:

(1) although the decision of Clarke J., as he then was, in *Greene & anor v. Triangle Developments Ltd & anor* [2008] IEHC 52 has been reversed by the Court of Appeal (see [2015] IECA 249), the judgments in the Court of Appeal make no comment on Clarke J.'s observation in his judgment, para.4.3, that:

"It is, of course, the case that no party should issue proceedings (or join a third party to existing proceedings) without having a credible basis for so doing. That situation applies with particular force in cases where it may be considered appropriate to maintain a claim for professional negligence. It would be most inappropriate for any party to issue proceedings alleging professional negligence or join a third party against whom professional negligence was to be alleged, without having a sufficient expert opinion available that would allow an assessment

to be made to the effect that there was a stateable case for the professional negligence intended to be asserted. In some types of litigation it may well be possible for solicitors or counsel to form a judgment as to the existence of a stateable case on the basis of evidence without the benefit of expert reports. However, it seems unlikely, at least in most cases, that any such judgment could responsibly be formed in relation to a claim in professional negligence without having an appropriate expert report which addressed the alleged failings on the part of the professional person concerned."

Given the absence of express treatment by the Court of Appeal with this aspect of Clarke J.'s judgment in *Greene*, it does not seem to this Court that it is departing from the rules of precedent to invoke the just-quoted observation and to express its respectful agreement with the substance of same.

(2) the court does not see that the above-quoted observations of Clarke J. in *Greene* should not apply to alleged professional negligence on the part of solicitors. Solicitors too have a professional reputation; that reputation is a part of their stock-in-trade and no more lightly to be impugned than that of medical professionals. Moreover, it does not seem to the court that it is prudent for a solicitor who is consulted with a view to suing another solicitor for alleged professional negligence to himself take on the mantle of expert in this regard, rather than consulting with another solicitor or even counsel, though the court's view in this regard is *obiter* because, as will be seen hereafter, it is not necessary to the decision it reaches in this judgment. Why is the court of this view? Because of the financial self-interest that may present for a solicitor approached with a view to commencing professional negligence proceedings against another solicitor in taking a particular view of another solicitor's actions and the financial pressures that an overly insistent client who brings other business to a firm may bring to bear on such a solicitor. Doubtless most, perhaps all solicitors would be immune to such temptations/pressures; but sometimes prudence demands that one 'go the extra mile'.

5. Regardless, however, of points (1) and (2), the court respectfully does not see that where proceedings are commenced (as here) without sight by a plaintiff's legal advisors of the file of the solicitor against whom negligence is alleged, and where fulsome discovery was made on 31.07.2015 and where an ensuing expert report was not obtained until 08.02.2017, that the delay presenting in this regard could properly be described as excusable delay. Yes, it takes time to do things, but, with every respect, not that much time. Likewise the court does not see that any delay presenting while the insurance position of the first-named defendant was explored following the commencement of these proceedings excuses the identified delay in terms of the progress of these proceedings.

6. Balance of justice? Nothing in Mr Maxwell's various averments justifies the delay on his part, post-07.07.2016, in relation to a claim that will ultimately require the court to rule upon the strength of his claim for personal injuries arising out of an accident in 2001 – almost two decades ago – as well as the lengthy history of events that followed. There is an obligation on a plaintiff who is pursuing a claim that will involve consideration of events of no little antiquity to progress with at least some expedition. Here there has been a failure to proceed with such expedition, with the result that were the within proceedings to continue, it would be very difficult to ascertain if Mr Maxwell would ever have succeeded in his 'trip and fall' claim or what damages he might have recovered if it had been pursued properly when it ought to have been. These are Mr Maxwell's proceedings to progress and there is, unfortunately for him, no good explanation for why they have progressed as slowly as they have since 07.07.2016. Additionally, when it comes to assessing where the balance of justice lies, the court cannot but bring to bear in its assessment of matters the averment of the fifth defendant, in his affidavit grounding the within application that "*For the past five years these Defendants have been faced with professional negligence proceedings and this has had and continues to have an impact on our professional indemnity insurance and premium*", a matter of no little injustice given the delay presenting.

Conclusion

7. For the reasons outlined above, the court will grant an order dismissing Mr Maxwell's claim for want of prosecution on the grounds of inordinate and inexcusable delay. In passing, the court ought as a matter of fairness to note that the allegations of professional negligence referenced in the within judgment remain but allegations at this time.