

THE HIGH COURT

[2008 No. 809 S.]

BETWEEN

W.L. CONSTRUCTION LIMITED

PLAINTIFF

AND

CHARLES CHAWKE AND EDWARD JOSEPH BOHAN

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered the day of 22nd January, 2015

1. This action arises out of building works allegedly carried out by the plaintiff for the defendants at the defendants' public house premises known as "The Lord Lucan", Lucan, Co. Dublin. The works were allegedly carried out in 2006.

2. In this application, the defendants seek to have the plaintiff's action dismissed for delay on the part of the plaintiff in proceeding with the within proceedings. The defendants assert that there has been such delay on the part of the plaintiff since the institution of the proceedings, that the court should strike out the proceedings. The history of the proceedings can be summarised in the following way:-

8th April, 2008 Summary Summons
19th November, 2008 Summary summons served
20th November, 2008 Appearance
23rd January, 2009 Motion for liberty to enter final judgment
24th June, 2009 Order of the Master remitting to plenary hearing
22nd July, 2009 Statement of claim
29th July, 2009 Notice for particulars
11th August, 2009 Replies to particulars
11th August, 2009 Notice seeking further and better particulars
15th December, 2010 Replies to particulars
2nd February, 2011 Motion to compel further replies to particulars
2nd March, 2011 Replies to particulars
15th March, 2011 Motion for judgment
10th May, 2011 Defence and counterclaim
28th September, 2011 Reply and defence to counterclaim
13th February, 2014 Notice of intention to proceed
20th March, 2014 Motion to strike out for delay
18th July, 2014 Notice of trial
15th December, 2014 Hearing of motion to strike out for delay

3. The defendants argue that there was an inordinate and inexcusable delay on the part of the plaintiff in the period between the delivery of a Reply and Defence to Counterclaim on 28th September, 2011, and the service of the notice of intention to proceed on 13th February, 2014.

4. In an affidavit sworn on 10th July, 2014, the plaintiff's solicitor dealt with this period in the following manner. He stated that, on the advice of senior counsel, it was necessary to retain an architect to act in the matter on behalf of the plaintiff. The need for such a report arose on foot of the defence delivered in May 2011, where it was pleaded that the sum claimed by the plaintiff was excessive and that there were a number of serious defects with the work done by the plaintiff.

5. The plaintiff's solicitor has stated that he had difficulty finding a firm of architects with adequate knowledge of the litigation process. Ultimately the firm of Keenan Lynch agreed to act in the matter. The solicitor had a number of meetings with the architect and a draft final report was prepared on 13th December, 2011. That report recommended, *inter alia*, a revision of the quantity surveyor's figures which had been prepared by Andrew P. Nugent and Associates on 20th May, 2009.

6. A site visit took place at which the plaintiff's architect viewed "The Lord Lucan" pub with a view to, *inter alia*, assessing the validity of the matters pleaded in the counterclaim.

7. The plaintiff's solicitor has stated that following from the advice given by Keenan Lynch, Architects, he again contacted Andrew P. Nugent and Associates with a view to confirming matters in the quantity surveyor's report. However, Messrs. Andrew P. Nugent and Associates indicated that they no longer wished to act in the matter. In these circumstances, the plaintiff's solicitor was then required to retain another quantity surveyor for the purposes of preparing a final report. In the period of August 2012, until February 2013, several firms were canvassed with a view to assisting with the review recommended by Keenan Lynch, Architects. Ultimately, on 13th February, 2013, the firm of Patrick O'Kane was retained for this purpose. The firm completed its draft report on 1st May, 2013.

8. The plaintiff's solicitor has averred that during this period he continued to meet with Keenan Lynch and meetings were held on several occasions. Matters were progressing and an expert response to the defence and counterclaim delivered in May 2011, was being formulated. Having reviewed the preliminary work performed by Patrick O'Kane, Messrs. Keenan Lynch required further clarification. In addition, senior counsel raised further queries for Messrs. Keenan Lynch to address. An updated report was then provided with the required answers to the queries which had been raised.

9. The plaintiff's solicitor has stated that in the lead up to Christmas 2013, he met with the plaintiff and the final report was discussed. Instructions were then obtained and a Notice of Intention to Proceed was served early in 2014.

10. The law in relation to delay on the part of a plaintiff has been set out clearly by the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The applicable principles were set out by Hamilton C.J. as follows:-

"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(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."

11. Applying this test to the circumstances of this case, I am satisfied that there was an inordinate delay on the part of the plaintiff in the period after delivery of the reply and defence to counterclaim in September 2011, and service of the Notice of Intention to proceed in February 2014. However, I am further satisfied that the plaintiff has put forward a reasonable excuse for this delay. The plaintiff had to engage a firm of architects to issue a report in the matter. In the preparation of that report it was necessary for the plaintiff's solicitor to obtain further information from the quantity surveyor in relation to his figures. It was only at that stage that the plaintiff learnt that the quantity surveyor was not willing to act further in the case. This was a serious blow to the plaintiff's case as the evidence of the quantity surveyor was going to be crucial to the plaintiff's claim.

12. The plaintiff then had to engage a new quantity surveyor to act in the matter. It took some time to obtain the services of a new quantity surveyor. As the plaintiff's solicitor has averred in his affidavit, Messrs. Patrick O'Kane was retained in February 2013. This firm completed its draft report on 1st May, 2013. Thereafter, the plaintiff's architects returned with further queries on the draft report, as did the senior counsel retained on behalf of the plaintiff.

13. The plaintiff's solicitor has averred that in the period prior to Christmas 2013, he met with the plaintiff and took his further instructions in the matter. The Notice of Intention to Proceed was served in February 2014. I am satisfied that the period which elapsed was due primarily to the withdrawal of the plaintiff's previous quantity surveyor and the need to engage a new quantity surveyor to deal with the claim. In these circumstances, while a considerable period has elapsed since the institution of these proceedings, I do not think that the period of two years and four months during which time the defendant did not hear of the proceedings from the plaintiff, was such as to deprive the plaintiff of the right to proceed with its action.

14. In addition, I am satisfied that there has been no real prejudice caused to the defendant by the delay. While the memory of witnesses will have faded over time, this is an impediment that will be experienced by both sides equally. The defendant has not pointed to any particular prejudice that it will suffer by the delay in bringing the action on for a hearing. There is no injustice to the

defendant in having them deal with the action and the counterclaim at this remove. Accordingly, I refuse the defendants' application to dismiss the action on grounds of delay.

15. Finally, the plaintiff should not interpret this decision as some sort of license to proceed with this action in a dilatory fashion. Enough time has elapsed since the institution of these proceedings. The plaintiff should proceed to set the matter down for hearing without delay. As the counterclaim arises out of the same works as those which are dealt with in the main action, the counterclaim should be set down for hearing at the same time. In the event that the plaintiff does not set down the matter for hearing within six weeks from today's date, the defendant has liberty to re-enter this application for an order striking out the plaintiff's claim on grounds of delay.