THE COURT OF APPEAL

CIVIL

Approved

No Redactions Needed

Court of Appeal Record Number: 2021/302

High Court Record Number: 2013/814P

Neutral Citation Number [2022] IECA 193

Barniville P.
Edwards J.
Costello J.

BETWEEN

RAY DOYLE

PLAINTIFF/
APPELLANT

- AND –

JOSEPH FOLEY

DEFENDANT/
RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 8th day of August 2022

Introduction

1. This is an appeal against the Judgment and Order of the High Court (O'Regan J.) of 9 November 2021 striking out the plaintiff's claim for inordinate and inexcusable delay. I shall refer to the parties as the plaintiff and the defendant throughout this judgment.

Background

2. The plaintiff's claim arises out of a Syndicate Agreement in 2008 by which the plaintiff purchased a share in a stallion standing at the defendant's stud farm in County Carlow.

3. The claim in the Statement of Claim was quite extensive and included an allegation that the defendant induced the plaintiff to invest in the stallion without the *"genuine intent"* properly to manage the stallion. In submissions to this court, counsel for the plaintiff confirmed that his case was not as pleaded in his Statement of Claim but was now limited to allegations that the defendant had mismanaged the stallion, that he had reduced the price of coverings without authorisation and that he had failed to recover fees in respect of coverings which were either not paid for or declared *"not in foal"* despite a subsequent sale of a foal or yearling being recorded as the progeny of the stallion for the years 2007-2010. Counsel accepted that the terms of the Syndicate Agreement furnished to the plaintiff's solicitors in 2014 reflected the syndicate agreement upon which the plaintiff purchased a share in the stallion, but he did not accept that this represented the entirety of the agreement between the parties. He said that terms were to be implied into the agreement arising from either an oral agreement between the plaintiff and the defendant or from the use and practice of the industry at the time.

4. The stallion was transferred to a stud in France pursuant to a lease agreement in 2011 and it covered mares in France from that date. Ultimately, it was purchased by the French stud in August 2014. The plaintiff says that his alleged losses crystalised in 2011.

5. The plaintiff issued a Plenary Summons on 28 January 2013 claiming damages for breach of contract, negligence and breach of duty and the specific performance *"of the express and/or implied terms of the contract agreed as between the plaintiff of the one part and the defendant of the second part in respect of the ownership"* of the stallion.

6. The proceedings progressed at what might best be described as a leisurely pace. The defendant entered an appearance on 16 May 2013 and the plaintiff served a Notice of Change of Solicitor on 19 December 2013. This was followed up by the delivery of the Statement of Claim dated 15 January 2014, a year after the Plenary Summons issued. The defendant raised particulars on 15 February 2014 and on 3 March 2014 the defendant's solicitor filed a Notice of Change of Solicitor.

7. On 26 June 2014, the plaintiff applied *ex parte* for an injunction restraining the defendant, his servants or agents from entering into any binding agreement for the sale of the stallion prior to the conclusion of the proceedings and other related relief. The plaintiff swore the affidavit grounding the application on 26 June 2014. Somewhat confusingly, in light of the fact that he had sued on an agreement whose terms differed to those in the written Syndicate Agreement, in that affidavit he averred that he purchased *"a share in the stallion…on specified terms and conditions particulars of which were set out in writing."* He then exhibited a copy of the Syndicate Agreement. At para. 16 of his affidavit, he said that he had an arguable case against the defendant on the basis, *inter alia*, that:

> *"…By withholding critical information relating to the terms and conditions of the Syndicate Agreement, by failing to communicate with me as a syndicate member, by failing in his duty to properly manage the stallion and to account to me for income received, the defendant is in breach of the terms of the Syndicate Agreement."*

8. These latter terms do not appear in the Syndicate Agreement he exhibited and accordingly can only be terms of the agreement if they can be implied or were the subject of a separate oral agreement between the parties.

9. An interim injunction was granted from 26 June 2014 until 30 June 2014 restraining the defendant from entering into any binding agreement for the sale of the stallion prior to the conclusion of the proceedings and the other relief sought.

10. The defendant swore a replying affidavit on 9 July 2014 and his solicitor swore an affidavit on 18 July 2014. The plaintiff replied to these affidavits on 21 July 2014.

11. On 22 July 2014, by consent, the Interim Order was vacated, and the plaintiff was awarded the costs of the interim injunction against the defendant. The court made no order as to costs in relation to the application for an interlocutory injunction.

12. On 4 August 2014, the plaintiff replied to the defendant's rejoinders on particulars and stated that the agreement between the parties was an *oral* agreement made between the plaintiff and the defendant in February 2007 where in exchange for €28,000 the plaintiff would receive a share in the stallion together with two coverings per annum. Thus, up to that date there appeared to be no difficulty with the plaintiff giving instructions or his solicitor acting on them.

13. Thereafter, the proceedings ground to a halt. No step was taken for nearly four years until on 24 April 2018 the plaintiff's solicitors filed a Notice of Intention to proceed. This was served on the defendant under cover of a letter dated 16 May 2018. On 27 June 2018, the plaintiff's solicitors wrote seeking the consent of the defendant to remit the proceedings to the Circuit Court. There was an exchange of correspondence between the solicitors to which I will refer in greater detail in due course but ultimately on 5 March 2019 the plaintiff's solicitors wrote to the defendant's solicitors referring to prior correspondence and stated:

> *"…in the absence of a response within 14 days of the date hereof, we will proceed with our application to move this matter to the Circuit Court/District Court (as appropriate) and will seek our High Court costs for doing same given that you have refused to allow such a course of action on consent."*

14. On 5 March 2020 (one year to the day later) the plaintiff issued a motion to remit the proceedings to the Circuit Court. This was considerably more than a year since service on

16 May 2018 of the Notice of Intention to Proceed dated 24 April 2018. The motion was served on the solicitors for the defendant on 11 March 2020 and they responded by stating that the motion had been improperly issued as no fresh Notice of Intention to Proceed had issued, as required under the Rules of the Superior Courts. On 20 March 2020, the plaintiff issued a second Notice of Intention to Proceed which he served under cover of a letter of 31 March 2020. Ultimately, as I explain below, the motion to remit the proceedings to the Circuit Court was struck out.

15. The plaintiff issued a second motion seeking to remit the proceedings to the Circuit Court on 17 February 2021.

16. On 18 May 2021, the defendant issued a motion to strike out the proceedings for inordinate and inexcusable delay.

The motion to strike out the proceedings

17. The defendant swore the affidavit grounding the motion to strike out the proceedings on 17 May 2021. The defendant complained that the plaintiff had taken no step in the proceedings between 4 August 2014, when he replied to the Rejoinders on Particulars, and 24 April 2018, when he issued his first Notice of Intention to Proceed. He also complained of delay in relation to the application to remit the proceedings to the Circuit Court. Despite the fact that the Notice of Intention to Proceed had been served upon him under cover of a letter dated 16 May 2018, no motion was served until 11 March 2020. The plaintiff's solicitors then served a second Notice of Intention to Proceed dated 20 March 2020 and again the plaintiff delayed for a period of eleven months before issuing the second motion to remit proceedings to the Circuit Court on 17 February 2021. He said the motion was served on his solicitors under cover of a letter dated 20 April 2021. He argued that in the circumstances the plaintiff had been guilty of inordinate and inexcusable delay in the prosecution of the proceedings. He averred as follows:

"23. I say and believe that the delay occasioned on the part of the plaintiff herein will frustrate my ability to properly defend these proceedings in circumstances where the purchase of a share in the stallion in question occurred in or about 2008. I say that, thereafter, certain accounts were provided to the plaintiff in 2014 to deal with the interlocutory application and t the plaintiff had the benefit of reviewing the accounts and instructed Messrs. B.J. Doyle & Company.

24. I say that while certain accounts remain available, the initial dealings concerning the share agreement which, in my defence, I have pleaded constitutes a Syndicate Agreement or, in the alternative, an oral agreement, is now some thirteen years old. I say that within my defence I have denied agreements alleged by the plaintiff together with the order for specific performance.

25. I say that the plaintiff pleads in his Statement of Claim, inter alia, that I "failed to attract a sufficient quantity and quality of mares for coverings by the stallion in this jurisdiction." I state that the stallion stood in this jurisdiction during the years 2007, 2008, 2009 and 2010 respectively, during a difficult economic period. The progeny of the stallion fell to be sold and/or paid for during that period and the enforcement of payment for any unpaid fees was difficult and complex.

26. I say that the plaintiff now claims:

(a) €3,433 in respect of the plaintiff's proportionate share of the losses incurred in the sale of the stallion fees at reduced prices as opposed to the fee that was set out at the commencement of the years 2007, 2008, 2009 and 2010, and

(b) €9,748.24 in respect of the plaintiff's share of dividends owed to the shareholders from the sale of coverings which were either not paid for or declared "not in foal" despite subsequent sale of a foal or yearling being recorded for the years 2007, 2008, 2009 and 2010.

27. I say that payment for coverings always follows the covering of the mare in question by some months and is often contingent in the industry, firstly, on she having a foal at all and further and often on the foal being marketable, being sold or performing on the track. The variation in the circumstances of payment becomes progressively more complex in an economic downturn as was the case herein.

28. I say that in order to provide independent verification of the circumstances under which the limited number of stud fees complained of for non-payment or reduction in price from the classical "list price" to the trading price would now, at this remove, prove to be extremely difficult as many of the mare owners with whom those transactions took place may not recall the transaction or have gone out of the business entirely. I say that even if I was in a position to trace all relevant mare owners, the owners' memory and recall of the transaction, some 11-12 years ago, will inevitably be compromised by the passage of time and therefore my defence to the claim prejudiced.

29. In that respect, I say, that I have denied the implied terms, namely the duty to attract a sufficient quality of mare for coverings by the stallion; a duty to communicate with syndicate members, other than the terms of the Syndicate Agreement; a duty to consult with shareholders on the management, promotion

and/or a duty to keep records other than those set out within the said Syndicate Agreement.

30. Further I say that in light of the plaintiff's pleas and the pleas contained in your deponent's defence, a large portion of the evidence in these proceedings will concern the evidence of the plaintiff and your deponent as to what occurred and/or what was agreed in 2008 and in the immediate years thereafter. I say that both parties will be disadvantaged and/or prejudiced by the fragility of human memory in circumstances where the detail concerning the representations and/or agreements is now some thirteen years old…" "

18. Despite the fact that the plaintiff had sworn two affidavits in 2014, the replying affidavit was not sworn by the plaintiff but by his solicitor, Mr. Mark O'Kelly. No explanation why the plaintiff did not swear any affidavit was forthcoming. Mr O'Kelly said that during the period 4 August 2014 and 16 May 2018 matters were progressing as the plaintiff was seeking to recover the costs ordered in his favour on 22 July 2014. He said that it took *"a significant period to obtain the payment of those costs which was not resolved until February 2018"*.

19. At paras. 4 and 5 of his affidavit he explained the inaction in the proceedings by reference to the ill health of both himself and his client. He averred as followed:

"4. The plaintiff has advised me that he has suffered ill health relating to his lung for a number of years. His condition has required him to move to Spain, where the climate is dryer. An unfortunate consequence of this move has been that it has been more difficult to organise meetings and take instructions. The restrictions imposed as a result of the Covid 19 pandemic severely limited the plaintiff's ability to return to Ireland in order to deal with matters relating to the proceedings.

5. I have also suffered ill health over the years which has impacted upon my ability to deal with matters as efficiently as previously. I have stopped taking on new litigation work and transferred matters that were not at an advanced stage, which has greatly assisted me in my ability to close out the small number of court proceedings in which I continue to act."

20. He then took up the story at the service of the first Notice of Intention to Proceed dated 24 April 2018 without in any way suggesting that either his or his client's ill health had improved by that date. He exhibited the correspondence between the parties. On 24 June 2018, he wrote stating *"to confirm that we will be making an application to transfer this matter to the Circuit Court in due course. You might confirm your consent to such an application being made."* On 9 July 2018, the defendant's solicitors agreed that the case should not be in the High Court and stated that the defendant *"will consent to it being taken out of the High Court"*. They indicated that it should be dealt with in the Small Claims Court. They repeated a request that the plaintiff outline his case in full and stated that in the absence of such information, *"we are not in a position to determine where exactly this case should be"*. The letter concluded as follows:

"We would further add that it is approximately four years since this matter was dealt with in the High Court (the injunctive order was vacated by Judge Gilligan on 22 July 2014). Our client accordingly is seriously compromised and prejudiced arising out of the inordinate, inexcusable and, indeed, outrageous delay on your client's part to put a proposition forward that he intends to proceed with this litigation."

21. Mr. O'Kelly replied on 4 September 2018 noting the consent of the defendant *"to this matter being sent to the Circuit Court for decision."* The letter set out that the accounts which had been provided in the injunction proceedings had been examined by an

accountant who indicated that the loss per share to the members in the syndicate stood at approximately €13,200 excluding the damages claimed for the mismanagement of the stallion while under the defendant's care and control. The defendant's solicitor replied on 1 October 2018 stating that the letter of 9 July 2018 had simply stated that the case should not be in the High Court. Unfortunately, the letter proceeded:

> *"We do not consent to its transfer to the District Court and remain of the view that if needed your client has in any case (which is denied) then it could be dealt with in the District Court."*

22. The letter also repeated the assertion that the defendant has been seriously compromised and prejudiced by the delay in progressing the proceedings. They repeated the request for a copy of the plaintiff's accountant's report and stated that as the defendant was *"currently engaged in yearling preparation and sales and will be so engaged exclusively until December"* that no further pleadings should be exchanged or steps taken until the plaintiff furnished the documents requested *"and until such time as our client has had a chance to resurrect his paperwork and respond comprehensively to your letter of the 4th of September"*.

23. On 22 November 2018, Mr. O'Kelly replied asking the defendant's solicitor to clarify exactly what his client was consenting to. He denied that the defendant had been prejudiced by any delay and asserted that there was no obligation on the plaintiff to provide a copy of the report. The letter concluded by stating that the defendant had had sufficient time to consider the letter of 4 April 2018 and awaited a reply *"as a matter of priority."* On 11 January 2019, (erroneously dated 2018) Mr. O'Kelly followed up stating that he had already given the defendant's solicitor sufficient opportunity to consider the content of the letter and he awaited a reply as a matter of priority.

24. The defendant's solicitor responded on 17 January 2019 stating that his client was making progress and in the course of finalising queries which had been raised and indicating that they expected a reply in the near future.

25. The correspondence exhibited by Mr. O'Kelly ceased at this point, but Mr. Walsh, solicitor for the defendant, had earlier exhibited relevant correspondence including a letter of 5 March 2019 from Mr. O'Kelly where he stated:

> *"...in the absence of a response within 14 days of the day hereof, we will proceed with our application to move this matter to the Circuit Court/District Court (as appropriate) and will seek our High Court costs for doing same given that you have refused to allow such a course of action on consent."*

26. Nothing occurred for precisely a year until, on 5 March 2020, the plaintiff issued a motion to remit the proceedings to the Circuit Court. The motion was served on the defendant's solicitors under cover of a letter of 11 March 2020. Mr. O'Kelly averred at para. 8 of his affidavit:-

> *"Unfortunately, by that date, the plaintiff's Notice of Intention to Proceed was more than twelve months old and the court declined to make an order on that ground."*

27. Mr. O'Kelly did not refer to the letter from the defendant's solicitors dated 16 March 2020 noting that the plaintiff had failed to issue a fresh Notice of Intention to Proceed and that they would be objecting to the motion on that basis and seeking the costs of the motion.

28. In addition, the account given in his affidavit differed to that set out in the written submissions and expanded on in oral submissions to this court. In written submissions it was stated that the motion of 5 March 2020 was initially adjourned *"on consent in line with the adjournments generally made as a consequence of the Covid 19 pandemic to 22 June 2020"*. It was then stated in the written submissions that on 22 June 2020 that motion

was struck out with liberty to re-enter by the court. Counsel for the plaintiff informed the court that the plaintiff was aware that the motion would have to be struck out on the basis that it had been issued after the first Notice of Intention to Proceed had effectively lapsed and that due to inadvertence, there had been no attendance in court on the (virtual) return date for the motion.

29. It is a matter of considerable concern that an officer of the court should swear the affidavit in the terms which I have quoted, and which clearly do not reflect what actually occurred in respect of the motion of 5 March 2020.

30. Finally, in respect of the final period of delay, the plaintiff's solicitor refers to the fact that he served a second Notice of Intention to Proceed dated 20 March 2020 and that *"efforts were made during 2020 to resolve the proceedings without recourse to the courts but that these ultimately proved to be unsuccessful"*. He then said that the second motion to remit the proceedings to the Circuit Court was issued on 17 February 2021 with a return dated for 17 April 2021. The motion was returned to 22 July 2021 and was further adjourned.

31. In relation to the question whether oral evidence would be required at the trial of the action or the prejudice to which the defendant may be subject if the claim proceeds, Mr. O'Kelly averred:-

> *"12. The plaintiff's claim is based upon a syndicate agreement that both parties accept was entered into by the parties in 2008. The plaintiff alleges that pursuant to said agreement, he was entitled to a share in income arising in relation to a stallion. The plaintiff claims that he was not paid the monies owed to him by the defendant in pursuant to the said syndicate agreement.*

13. In his defence, the defendant admits the existence of a written syndicate agreement and certain terms thereof, but denies other terms including that the defendant was responsible for the management of the stallion.

14. The stallion was sold (sic) in 2011 and any losses crystalised on that date. The nature of the within proceedings is such that the prosecution or defence of the proceedings will not rely to any significant extent upon human memory. The plaintiff's claim is evidenced in written agreements, accounts and records held by the defendant and the plaintiff. In that regard, the defendant has already furnished accounts to the plaintiff. Consequently, the defendant will not suffer any significant prejudice in the proceedings as a result of any delay in the prosecution thereof."

32. The plaintiff objected that the defendant's motion seeking to dismiss the proceedings on the grounds of inordinate and inexcusable delay issued on 18 May 2021, the day after the first return date for the plaintiff's motion to remit the proceedings to the jurisdiction of the Circuit Court. He submitted that the plaintiff was clearly seeking to progress the claim, having first requested the defendant's consent to the remittal of the proceedings on 27 June 2018 *"in an attempt to avoid the delay and expense that has transpired since that date."* He also pointed out that the defendant had not sought to serve a Notice of Trial and he concluded that the plaintiff would be severely prejudiced by the dismissal of the proceedings and that he was advised that the balance of justice lay in favour of refusing the defendant's application.

33. A replying affidavit was sworn by the defendant's solicitor objecting to reference to without prejudice discussions. He simply contested that there was *"extensive engagement"*. He said that there was one telephone conversation on 19 May 2020 to

discuss the case generally and thereafter there were three letters exchanged between the parties on a without prejudice basis between the 2nd and 24th June 2020.

Decision of the High Court

34. The trial judge determined the application by reference to the principles enunciated by Hamilton CJ in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459. She summarised these as requiring the court to answer three questions:

- Was there inordinate delay?
- Was the delay inexcusable?
- If the answer to both questions was yes, then where does the balance of justice lie?

35. She considered two periods of delay, that being from July 2014 (when the defendant delivered his defence) and April 2018 (when the plaintiff issued his first notice of intention to proceed). The second period was from April 2018 to February 2021 (when the second motion to remit the proceedings to the Circuit Court issued).

36. She concluded that the delay between July 2014 and April 2018 and April 2018 and February 2021 (when the second motion to remit the proceedings to the Circuit Court issued) amounted to inordinate delay on the part of the plaintiff. She held that the defendant had not acquiesced in the delay and therefore the inaction of the defendant could not be relied upon by the plaintiff in arguing that the delay was not inordinate. She held that there was no active delay on the part of the defendant and that any inactive delay should not be "counted against the defendant".

37. She then went on to consider whether the delay was inexcusable. She held that taxation of the costs of the interim injunction was not a matter which went to the progress of the proceedings and accordingly could not afford an excuse for the delay in progressing the proceedings. As regards the ill health of both the plaintiff and his solicitor, she held

that the evidence in both cases was insufficient for her to hold that the litigation could not have been progressed. She therefore concluded that the delay was inexcusable in respect of the period July 2014 and April 2018.

38. As regards the delay from the issuing of the notice of intention to proceed in April 2018 and the final issuing of the second motion to remit the proceedings to the Circuit Court in February, 2021, she agreed that the correspondence from the defendant's solicitor was not "particularly clear" but said that it was always going to be necessary for the plaintiff to bring a motion to remit the matter to the Circuit Court and accordingly the correspondence did not afford an excuse in the circumstances of this case.

39. She then proceeded to consider where the balance of justice lay. The plaintiff argued that his case was a "document case" and that a fair trial was possible in the circumstances. It was alleged that the prejudice to the plaintiff far outweighed any asserted prejudice by the defendant. The trial judge held:

> *"Insofar as the document element of the case is concerned, this might be considered to be a case where documents will be of assistance but there will be issues to be determined that are likely to turn on the recollection of witnesses. So this is not to that extent a purely document case or a document case that will be of significant or invaluable assistance to the witnesses."*

She accepted that the plaintiff's claim included claims based upon oral agreements and that it was not confined to the terms of the written syndicate agreement. She noted that the stallion had been sold (in fact leased) in 2011 and thus that any witness testimony in relation to agreement would be heard ten or even twelve years after the event. She referred to the decision in *Rogers v Michelin Tyre Plc and Another* [2005] IEHC 294, *Millerick v Minister for Finance* [2016] IECA 206 and *O'Connor v John Player & Sons Ltd* [2004] 2 ILRM 321 in relation to the threshold of prejudice which a defendant must show on a

motion to dismiss governed by the *Primor* line of jurisprudence. She noted that marginal prejudice was held to be sufficient by the Court of Appeal in *Millerick* while Clarke J. in *Rogers* was of the view that a general prejudice was sufficient and that in *O'Connor* Quirke J. was of the view that no prejudice was required to be established.

40. Balancing these issues and having regard to the now limited extent of the claim she nonetheless held that a fair trial could not be held or that justice would not be put to the hazard in relation to the trial if it were permitted to proceed. Accordingly, she struck out the proceedings and made no order on the motion to remit and she awarded the defendant the costs of the motion to dismiss and the cost of the proceedings up to the date of the delivery of a defence.

The Appeal

The plaintiff's submissions

41. The plaintiff appealed the decision. In debate with the members of the court, counsel for the plaintiff conceded that the period of delay was inordinate. He argued that it was excusable upon four grounds:

(1) The period of time taken up with the taxation of the costs of the interim injunction.

(2) The ill health of the plaintiff.

(3) The ill health of the plaintiff's solicitor.

(4) The response of the defendant to the proposed application to remit the proceedings to the Circuit Court and in particular the lack of clarity in the position of the defendant.

42. He submitted that the first three grounds taken together amounted to an excuse in respect of the period between July 2014 and April 2018 and he also relied upon the inaction of the defendant during that period. As regards the second period, he argued that

the trial judge erred in drawing an analogy with a limitation period and that at all times the plaintiff was engaging with the defendant and endeavouring to progress the litigation.

43. If the court came to consider the balance of justice, he said the balance of justice tilted in favour of the plaintiff by reason of the inaction of the defendant. It was clear that the plaintiff was trying to move the case on and the defendant delayed in issuing the motion to dismiss the proceedings for the delay.

44. He also said that the defendant had acquiesced in the manner in which the proceedings had been progressed by the plaintiff and that the defendant had effectively acquiesced in that approach until he issued his own motion to dismiss the proceedings.

45. He said it was possible to have a fair trial. The case was entirely documentary, and it was based upon accounts produced by the defendant. If oral evidence was required, the parties will be assisted by the documents which the defendant himself has produced. Counsel said that the oral evidence of the parties as to their agreement will be "run of the mill evidence" as to the terms of the agreement. The evidence which will be given is not such that it will be so affected by the passage of time as to render a fair trial impossible. In particular, the expert evidence will be based upon the records previously produced by the defendant and is not such as to be unduly affected by the passage of time. Evidence from the owners of mares was not necessary and the defendant had given no details of any steps taken to trace these possible witnesses and thus this issue did not establish irremediable prejudice on the part of the defendant.

46. It was submitted that the defendant is required to establish moderate/marginal prejudice and that the defendant's case is insufficient to establish either moderate or marginal prejudice. In particular, it was pointed out that the defendant had not detailed any steps he had taken to try to identify potential witnesses who then may not be available therefore the plea was just a general averment that this may be difficult. He said that the

alleged difficulty in proving whether there was a failure to declare coverings or unauthorised discounts is not relevant as the plaintiff is now confining his case to foals actually registered in Weatherby's. As regards alleged unauthorised discounts, the defendant either was or was not authorised to grant such discounts, the reasonableness or otherwise of such discounts was not an issue in the case. If the defendant says no foal was produced, then the plaintiff cannot contradict this and therefore fading memories are not so relevant.

The defendant's submissions

47. Counsel for the defendant submitted that the evidence in relation to the plaintiff's ill health did not excuse the inordinate delay which was admitted in this case. There was no evidence as to the plaintiff's condition, whether he was incapacitated at any time or whether he was prevented from giving instructions. Likewise, there was no evidence that he could not use technology or even a telephone to communicate with his solicitor. As regards the evidence concerning the plaintiff's solicitor's health, he said that it was equally inadequate. At its height, it is suggested that he retained files which he *could* manage and there was no detail whatsoever of any time he was absent from the office. He does not say how his ill health impacted his ability to handle the plaintiff's case. In addition, he does not say how the Covid pandemic prevented him from progressing the motion to remit the proceedings to the Circuit Court.

48. In relation to the second period of delay, he referred to the reply of 9 July 2018 which indicated that the proceedings should not be in the High Court and that the defendant had already been prejudiced by the delay which had occurred. While he accepted that the letter of 1 October 2018 was confused, he nonetheless pointed to the letter from the plaintiff's solicitor of the 5 March 2019 which showed that the plaintiff had formed the intention to remit the proceedings to the Circuit Court and, it is said, that this

meant that the question of any lack of clarity or the consent of the defendant afforded no excuse for the failure to issue the motion shortly thereafter.

49. In relation to the balance of injustice, even if the plaintiff limits his claim to the three categories identified by counsel at the hearing of the appeal, nonetheless it was submitted that the passage of time means that it is not possible to have a fair trial. He denied that the case was solely a documents case and he referred to para. 14 of the replying affidavit which he said shows that there was acceptance that there will be oral evidence beyond the documents relied upon to produce the expert report of Mr. Doyle. Both parties will be required to give oral evidence as to what was agreed in 2008 in order to establish or refute the alleged implied terms of the agreement. Necessarily this will be given at a very far remove from the event in question. He accepted that he was relying upon a general prejudice, as no active steps had been taken to identify any other possible witnesses and it was based upon anticipated problems rather than identified ones. He said that it would be necessary to give expert evidence as to what price was reasonable to charge in an economic crisis such as occurred between 2008 and 2011, though he did accept that expert evidence is not quite so dependent on memory as other types of evidence.

50. As regards the complaint that the defendant had been guilty of delay or acquiescence, he said that the defendant cannot be held liable for failing to set the case down for trial as he is not obliged to do and likewise, having warned of the prejudice already incurred by reason of the delay, he was not required immediately to bring a motion to dismiss the proceedings. Therefore, this was not a factor to which much weight should be given.

51. Finally, he says while there was some confusion, at most arising, from the *inter partes* correspondence, it spanned less than one year and in the overall circumstances of the case was not such as to tilt the balance of justice in favour of permitting the action to go to trial.

The approach of this Court on appeal

52. This was not in dispute between the parties and was recently restated by Barniville J. (as he then was) in *Gibbons v N6 (Construction) Limited and Galway County Council* [2022] IECA 112 in a judgment delivered on the 16 May 2022. I gratefully adopted the decision as correctly setting out the law in this area. Barniville J. concluded his summary of the position with a quote from para. 28 in *Cassidy v. Provicialate* [2015] IECA 74:

> *"... while this Court must give due consideration to the conclusions of the High Court judge, it is nonetheless free to exercise its own discretion as to whether or not the claim should be dismissed, if satisfied that the interests of justice dictate such an approach."*

Relevant legal principles

53. In paragraphs 78 to 105 in *Gibbons*, Barniville J. sets out the relevant legal principles and I do not propose to repeat them here. It is well-established that there are two separate, but sometimes overlapping, strands of jurisprudence which may arise on an application to dismiss proceedings on the grounds of delay. In this case the parties are agreed that the application engages the first strand alone, that is the principles set out by Hamilton CJ in the Supreme Court in *Primor*. There are three limbs to the *Primor* test:

(1) The defendant must establish that the delay on the part of the plaintiff in prosecuting the claim has been inordinate.

(2) If that is established, then he must establish that the delay has been inexcusable.

(3) If it is established or agreed that 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 proceedings of the case."* (*Primor* p. 475, para. (c))

54. In *Primor*, Hamilton CJ listed matters which the court was entitled to take into consideration when considering where the balance of justice lay. However, this is not an exhaustive list or cumulative test but rather is a guide to a court in determining where the balance of justice lies as between the parties. Each case very much depends on its own facts.

55. It is important for the court to bear in mind the constitutional context. While litigants have a constitutional right of access to the courts, all parties have a constitutional right to fair procedures and to a timely resolution of their litigation. Furthermore, the public have an interest in ensuring the timely and effective administration of justice. (*Donnellan v Westport Textiles Limited & Ors* [2011] IEHC 11, *Cassidy* and *Millerick)*. In more recent times a stricter approach has been taken by courts dealing with delays in the conduct of litigation than in the past. In *Comcast International Holdings Incorporated & Ors v The Minister for Public Enterprise* [2012] IESC 50, Clarke J. held that applications to discuss proceedings on grounds of delay would be approached *"on a significantly less indulgent basis than heretofore"*.

56. Unless the defendant has been in default, little weight should be attached to any delay or acquiescence, as observed by Fennelly J. in *Anglo Irish Beef Processors Limited v Montgomery* [2002] 3 IR 510 that:

> *"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'..."* (p. 519)

57. As regards the degree of prejudice which must be established by a defendant when he seeks to have proceedings dismissed on the basis of inordinate and inexcusable delay, Barniville J. summarised the recent jurisprudence as follows:

"99. ... Irvine J. in the Court of Appeal in Cassidy stated that, for the purposes of the third limb of the Primor test "which obliges the defendant to prove that the balance of justice favours the dismissal of the claim", the defendant does not have "the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the O'Domhnaill test." (para. 35). Irvine J. explained that while a real risk of an unfair trial or an unjust result is one of the factors which can be relied on by a defendant seeking to persuade the court that the balance of justice favours the dismissal of a claim, the defendant "does not have to establish prejudice to the point that it faces a significant risk of an unfair trial". (para. 36). She continued:

> *"Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay."* (at para. 36)

...

101. Irvine J. repeated those comments in McNamee (at para. 34) and summarised the position as follows:

> *"Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test."* (para. 35)

102. In Millerick, Irvine J. reiterated that "in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings." (para. 32) She went on to say:

> *"That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. [in Primor]…"* (para. 32)

58. Finally, in para. 105 of *Gibbons*, Barniville J. rejected the submission that there should be a distinction between expert evidence cases and document cases on the one hand and other cases as being unhelpful. He held that it was preferable to consider on the facts of each case the nature of the prejudice asserted by the defendant and to weigh that prejudice as part of the overall assessment of where the balance of justice lies.

Discussion

59. In oral submissions counsel for the plaintiff accepted that the delay in this case was inordinate. While the onus is on the defendant to prove that the delay is also inexcusable, if the court is not persuaded by any of the excuses for the inordinate delay advanced by the plaintiff, normally this will suffice to establish that the delay has also been inexcusable.

60. In relation to the first period of delay, I agree with the trial judge that the issue of recovering an award of costs made during the course of the proceedings – in this case the cost of an interim injunction – is extraneous to the conduct of the proceedings themselves. As such, it does not afford an excuse for failing to progress the proceedings and, in particular, does not excuse the delay between July/August 2014 and the issuing of the first Notice of Intention to Proceed in April 2018.

61. I also agree with the trial judge that the evidence adduced in relation to the ill health of the plaintiff and the plaintiff's solicitor comes nowhere near excusing inaction for a

period of three years and eight months. The plaintiff and his solicitor were active in pursuing an interim and interlocutory injunction in June and July 2014 but apparently matters changed thereafter, though this is not stated. The court was given no detail of the plaintiff's illness and no medical report was presented. There was no evidence that the plaintiff could not give instructions during the period either due to ill health or because he was in Spain. There is no indication that he permanently resided in Spain throughout this period. It is striking that in contrast to the period between 2014 and 2018, he appears to have been able to give instructions in June and July 2014 and from April 2018. No explanation for this discrepancy has been put forward. The same observations apply in relation to the evidence concerning the ill health of the plaintiff's solicitor. This was not one of the cases he handed over to another firm to deal with. Presumably this was on the basis that he would be in a position to properly fulfil his professional duties. He gives no indication as to how his ill health impacted upon his ability to deal with this file. As in the case of the plaintiff, there is no explanation as to why he appears to be able to deal with the proceedings from April 2018 but was not in a position prior to that date to progress the litigation at all.

62. It was suggested that while individually each explanation offered by the plaintiff might not excuse the delay but that taken together, they do. No evidence was advanced to support this argument or any explanation as to how any one situation impacted upon the other. As was said by the former Chief Justice Denham memorably on another occasion, *"seven times zero is still zero"*. I am accordingly satisfied that the trial judge was correct to conclude that the delay in respect of the first period was inexcusable and that this had been established by the defendant for a period of three years and eight months.

63. In relation to the second period, from the issuing of the first Notice of Intention to Proceed in April 2018 until the hearing of the second motion to remit the proceedings by

the High Court, under O. 122, r.11 of the Rules of the Superior Courts, a person who serves a Notice of Intention to Proceed must give the other party one month's notice. If a further year elapses thereafter and there has been no proceeding from the last proceeding (being the service of the Notice of Intention to Proceed) then a party who decides to proceed must issue a fresh Notice of Intention to Proceed. In this case after one month's notice had been given to the defendant, the plaintiff's solicitors wrote on 24 June 2018 seeking the consent of the defendant to remitting the proceedings to the Circuit Court. On 9 July 2018, the defendant's solicitors agreed that the matter should not be in the High Court but did not agree that the matter should be remitted to the Circuit Court. The letter stated that the defendant had been seriously prejudiced by the delay in the progressing of the proceedings in 2018. This should have acted as a warning to the plaintiff's solicitors. They ought thereafter to have acted with expedition. As it was, ten years had elapsed since the agreement, the subject of the dispute, had been entered into. Unfortunately, the correspondence between September 2018 and March 2019 did not advance matters from the plaintiff's perspective. The defendant's solicitors clearly did not state that the defendant would agree to remit the proceedings to the Circuit Court. As was pointed out by the trial judge, whether or not the defendant consented to the application, the plaintiff would always be required to bring a motion as an order of the court remitting the matter to the Circuit Court was required in the circumstances. There is no real explanation why the plaintiff's solicitors did not proceed to issue the motion in the circumstances.

64. By 5 March 2019 the plaintiff's solicitors wrote stating that they would issue the motion forthwith (see para. 13 above). If the motion had issued shortly after the fourteen days afforded for a response, then the motion would have been within one year of the issuing of the first Notice of Intention to Proceed and therefore would have been validly issued. For reasons which remain unexplained and therefore unexcused, the plaintiff's

solicitor waited a further year until 5 March 2020 to issue the motion to remit the proceedings to the Circuit Court. By this time, more than one year had elapsed since the last proceeding in the proceedings and accordingly he was required by O.122, r.11 to issue a further Notice of Intention to Proceed before the motion could validly be issued. This flaw was pointed out by the defendant's solicitors upon receipt of the Notice of Motion. The plaintiff's solicitors, upon realising his difficulty, issued a fresh Notice of Intention to Proceed on 20 March 2020. At that point in time, he ought to have withdrawn the first motion to remit the proceedings and been ready to issue a second motion to remit the proceedings as soon as thirty days from the service of the second Notice of Intention to Proceed had elapsed. That did not occur.

65. The plaintiff delayed in issuing the second motion until 17 February 2021, a delay of eleven months. The plaintiff seeks to excuse this delay on two bases: the impact of the Covid 19 pandemic and settlement negotiations between the parties. In relation to the pandemic, there is no evidence from the solicitor that he could not have issued the motion sooner. In effect, this was an argument advanced by counsel on behalf of the plaintiff which was not grounded in any evidence.

66. The reference to settlement negotiations was a reference to without prejudice negotiations where the defendant had not waived his entitlement to have those negotiations withheld from the court. The defendant's solicitor objected- correctly in my view- to reference to those negotiations at all. He then pointed out that in total it amounted to one telephone call on 19 May 2020 and three letters in June 2020 and said that there were no negotiations thereafter. Thus, they could not excuse a further delay until 17 February 2021 progressing the proceedings. I agree.

67. It is also important to recall that the solicitor gave an inaccurate account on affidavit as to what occurred in relation to the first motion to remit. This is a fact to be considered by the court in determining whether the delay in respect of this period of time is excusable.

68. In my judgment the delay in issuing and progressing a valid motion to remit the proceedings to the Circuit Court between April 2018 and February 2021 was inexcusable save for two periods, the period between July 2018 and March 2019 (seven months) when the plaintiff's solicitor sought agreement in respect of the application to remit the proceedings and the two notice periods of one month each prescribed by O.122, r.11. This means that the total period in respect of which the plaintiff has not excused the delay is two years and one month. Thus, the total period of inordinate and inexcusable delay in respect of the two periods amounts to five years and nine months.

69. The plaintiff argued that the defendant's delay afforded an excuse for his delay. He identified delay on the part of the defendant being (1) a failure to issue a Notice of Trial and (2) a failure to issue a motion to dismiss the proceedings for want of delay at an earlier date. He also relied upon the correspondence between July 2018 and 2019. I confess that as a matter of logic I fail to understand how inaction on the part of the defendant excuses the plaintiff's inaction in this case. On appeal, counsel for the plaintiff did not press the argument that the defendant ought to have served a Notice of Trial any time after August 2014. I agree with the trial judge that there is no obligation on a defendant to serve a Notice of Trial and therefore a defendant cannot be held to have improperly delayed proceedings by failing so to do.

70. Counsel for the plaintiff emphasised the confusion caused by the defendant's correspondence and his failure to agree to remit the case to the Circuit Court. I have made allowances for this in my consideration of the period in which there was no excuse for the delay up to the letter of the plaintiff's solicitor of 5 March 2019. As regards the rather

audacious argument that in failing to issue a motion to dismiss for delay at an earlier point in time that, when a defendant does issue such a motion, the relief should be refused because the defendant also delayed, in his case, in seeking to dismiss the proceedings, is not one which I find persuasive or attractive. In addition, it is contrary to the observations of Fennelly J. in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 IR 510 where he observed that:

> *"...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"..."*

71. In my judgment on the facts in this case, it does not afford the plaintiff an excuse for the inordinate delay which occurred in the conduct of these proceedings.

72. Having determined that the delay in this case was both inordinate and inexcusable, the court must then consider the balance of justice. In this regard, it is important to emphasise that marginal prejudice sustained by the defendant by reason of the inordinate and inexcusable delay suffices, as was accepted by counsel for the plaintiff.

73. I am satisfied that the defendant has met that threshold based on general prejudice arising from the passage of time. If this case were to proceed to trial, there would necessarily be a contest between the plaintiff and the defendant as to what was agreed between them in 2008. This can only be resolved on oral evidence as it is the plaintiff's case that the syndicate agreement does not comprise the entire agreement reached between the parties in 2008. Each of the parties will be required to give their evidence in respect of events which occurred fourteen years ago.

74. I am satisfied that this is not solely a documents case, contrary to the submissions of the plaintiff, and, as was held by the trial judge, that while the documents may be of assistance, they are not of significant or invaluable assistance. The report of the plaintiff's

accountant based upon records provided by the defendant does not alter this conclusion. The defendant also must be entitled to adduce his own expert evidence and, assuming that there is a difference in the evidence of the two experts, a trial judge will be required to resolve any discrepancies. While their evidence may not be as vulnerable to the uncertainties which may arise from the inevitable dimming of memories with the passage of time, nonetheless it cannot be said to be free from or immune to such frailties. Thus, the quality of the evidence for both parties will be impacted with the increased risk to the fairness of the trial. While I accept that the requirement is that there be a fair trial-not a perfect one- the threshold of prejudice which the defendant is required to pass is that of moderate or marginal prejudice. This has been met in this case in my judgment.

Conclusion

75. The plaintiff accepts that he has been guilty of inordinate delay.

76. The explanations offered by the plaintiff to justify or excuse the delay do not excuse the delay. The issue of recovering the costs of an interim injunction are not relevant to the progressing of the proceedings. The evidence of the ill health of the plaintiff and his solicitor is not sufficient to explain why the case could not proceed between July/August 2014 and April 2018, especially when the plaintiff and his solicitor were apparently able to progress the proceedings both before and after the period of delay between 2014 and 2018. There was no real excuse for the periods of delaying issuing a motion to remit the proceedings to the Circuit Court after the service of a notice of intention to proceed in April 2018, which delay was largely repeated in relation to the second notice of intention to proceed and the second motion to remit the proceedings.

77. The defendant has established moderate prejudice if the case were to proceed to trial based upon the general prejudice inherent in a trial in respect of matters which occurred between 2008 and 2011 and which would require critical issues to be resolved by oral

testimony. This suffices to establish that the balance of justice lies in favour of dismissing the proceedings.

78. It follows therefore in my judgment that the balance of justice lies in granting the relief sought in the High Court and I would refuse the appeal.

79. As this judgment is being delivered electronically, it is the practice to indicate what I propose should be the order of this court in respect of the costs of the appeal, subject to any application as to costs which may be brought. The respondent has been completely successful in this appeal and it is my provisional view that he is entitled to his costs. The provisions of s. 169 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts apply and, in my judgment, there are no reasons to depart from the normal rule that costs follow the event. If any party wishes to contend otherwise, the party should contact the Office of the Court of Appeal within 14 days to request a short oral hearing on the costs, though any party who requests such a hearing which results in an order in line with that indicated provisionally, may incur the further costs of such a hearing.

80. Barniville P. and Edwards J. have read this judgment in advance and indicated their agreement with same.