

THE HIGH COURT

[2019] IEHC 954
[2013 No. 5514 P]

BETWEEN
BRENDAN KIRWAN

PLAINTIFF

AND

MARGEURITE CONNORS TRADING UNDER THE STYLE AND TITLE OF M.J. O'CONNOR SOLICITORS, M.J. O'CONNOR SOLICITORS, EAMONN BUTTLE, FILBECK LIMITED, NORMAN BUTTLE, MARY BUTTLE, HILARY BUTTLE, JOHN O'LEARY TRADING UNDER THE STYLE OF M.J. O'CONNOR SOLICITORS, BRID O'LEARY TRADING UNDER THE STYLE AND TITLE OF M.J. O'CONNOR SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 2nd day of September, 2019

Background

1. These proceedings concern certain property transactions that took place between the third and fourth named defendants and the plaintiff. In 2005, the plaintiff was the owner of certain property in Wexford Town and wished to have this property developed. Negotiations between these parties proceeded through 2005. Initially, the plaintiff made a proposal that the third named defendant would pay him €4,000,000 in respect of the properties, comprising of a €1,000,000 cash payment, and that the plaintiff would retain property to the value of €3,000,000 in the development once constructed. The third named defendant rejected this proposal.
2. By a contract dated 5 July 2006, between the plaintiff and the third named defendant, the third named defendant agreed to purchase land owned by the plaintiff subject to, *inter alia*, the third named defendant securing planning permission. Also on 5 July 2006, the third named defendant entered into a loan agreement with the plaintiff whereby he advanced to the plaintiff the sum of €1,000,000, which would be repayable either when the contract was terminated or planning permission had been secured. As security for the loan the plaintiff executed a mortgage deed, also dated 5 July 2006, giving the third named defendant security over certain lands of his.
3. The following is the relevant documentation which was exhibited in the course of the hearing of this motion before the Court: -
 - (a) A document titled "Details of agreement" set out the terms under which the plaintiff proposed to sell certain property to the third named defendant. This document is undated and unsigned;
 - (b) A contract for the sale of the land, dated 5 July 2006, signed by the plaintiff and the third named defendant;
 - (c) A letter, dated 5 July 2006, in which the terms of a loan from the third named defendant to the plaintiff are set out. This letter is signed by both the plaintiff and the third named defendant;
 - (d) An indenture of mortgage, made 5 July 2006, securing the said loan;

- (e) A letter, dated 20 April 2009, signed by the plaintiff, wherein he states that the said contract of 5 July 2006 was now terminated and that he was not in a position to repay the money given in 2006 but that the plaintiff was "in a position to offer you property in lieu of my debt to you"; and
 - (f) A letter, dated 21 July 2009, from the plaintiff to the third named defendant, signed by the plaintiff, wherein he confirmed that he had received €1,000,000 in 2006 and that, as the sale was rescinded, he, the plaintiff, owed the third named defendant the sum of €1,000,000. The letter confirmed that the plaintiff had agreed and accepted that this said debt was assigned to Filbeck Limited, the fourth named defendant. The letter also confirmed the plaintiff had paid the sum of €20,000 to the fourth named defendant, thereby reducing the debt to €980,000.
4. As referred to in the letter of 21 July 2009, the third named defendant assigned his legal rights under the said loan agreement to the fourth named defendant.
 5. The failure of the property project, the subject of the contract of 5 July 2006, resulted in litigation. In addition to these proceedings before the Court, there were two other sets of proceedings: -
 - (i) Proceedings titled *Filbeck Limited v. Brendan Kirwan* [2011] 4998 S wherein the fourth named defendant sought to recover the sum of the €980,000, being the balance of monies due and owing under the loan agreement (the 2011 proceedings); and
 - (ii) Proceedings, titled *Brendan Kirwan v. Eamonn Buttle* [2012] 2995 S, in which the Plaintiff claimed the sum of €3,000,000 from the third named defendant on foot of the document referred to in para 3 (a) above (The 2012 proceedings).
 6. In the 2011 proceedings, the fourth named defendant obtained judgment against the plaintiff in the sum of €980,000 in the Central Office as no appearance was entered. The plaintiff (the defendant in the 2011 proceedings) issued a motion to set aside this judgment on 4 December 2012.
 7. The defendant in the 2012 proceedings, the third named defendant in these proceedings, brought an application seeking an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts dismissing or staying the said proceedings on the grounds that they disclosed no reasonable cause of action or that they were frivolous and vexatious. Both these motions, in the 2011 proceedings and the 2012 proceedings, were listed for hearing on 5 December 2013. However, the plaintiff had already issued these above entitled proceedings. In the motion concerning the 2011 proceedings, the plaintiff filed an affidavit which stated the following: -
 - "2. Due to reflection and in light of new evidence which suggests all documents prepared and advised by M.J. O'Connor Solicitors are null and void from the outset,

it would be inappropriate to proceed with this case until the outcome to plenary case 2013 No. 5514 P is known.”

The plaintiff also filed an affidavit containing exactly the same paragraph in the motion in the 2012 proceedings.

8. On 5 December 2013, the two motions were listed for hearing and were adjourned generally in order to facilitate the plaintiff to prosecute these proceedings.

The plaintiff's claim

9. The first, second, eighth and ninth named defendants in these proceedings were Solicitors involved in the property transactions of 2005/2006 (the Solicitor defendants). One member of the said Solicitors' firm, Margeurite Connors, the first named defendant, advised the plaintiff in connection with the said transaction. The third named defendant was advised by John O'Leary, also of the said firm, who is the seventh named defendant.
10. The plaintiff's claim against the Solicitor defendants is, *inter alia*, that the documents of 5 July 2006 "did not reflect the true nature of the transaction". However, in the course of the proceedings before the Court this claim developed into one of fraud and/or forgery on the grounds that the plaintiff was holidaying in France on 5 July 2006 and, thus, could not have signed either the contract or the mortgage deed on that date. However, there is no such claim in the proceedings issued by the plaintiff in 2013. It should be noted that in an affidavit filed by Mr. John O'Leary, Solicitor, the seventh named defendant, he states that the plaintiff signed the said documents which were returned on 20 April 2006. The documents were then held in suspense (in accordance with common practice) to allow for resolution of an issue affecting the plaintiff's ability to give a required first ranking mortgage to the third named defendant. This issue was resolved at the beginning of July, 2006 and the said agreements were dated 5 July 2006 and then came into effect.
11. The plaintiff's claim against the other defendants (the Buttle/Filbeck defendants) are a repeat of the claim made in the 2012 proceedings. Further, the plaintiff claims an order "striking out" the judgment obtained in the 2011 proceedings and that those proceedings were "frivolous and vexatious". Therefore, essentially, these proceedings combine both the 2012 proceedings and the plaintiff's objections to the fourth named defendant having obtained judgment in default of appearance in the 2011 proceedings.

Applications before the Court

12. Both the Solicitor defendants and the Buttle/Filbeck defendants have issued motions in which they seek to have these within proceedings dismissed for want of prosecution.

McKenzie Friend

13. The plaintiff appeared in person at the hearing of the defendants' motions. He was accompanied by his son who requested to make submissions on his behalf. The practice direction on McKenzie Friends (31 July 2017), in reflecting a number of earlier authorities, provides that though a McKenzie Friend may provide moral support for a litigant by taking notes, helping with case papers and quietly giving advice, he/she does not have a right of audience; but in "exceptional circumstances" a court may permit a McKenzie Friend to

address the court. The defendant's son submitted to the Court that the defendant suffered from a degree of dyslexia which made it difficult for him to present his case to the Court. In support of this a medical report was produced. In my view, this medical report was not sufficient so I directed that the author of this report, a medical doctor, be present in Court to give direct evidence. Dr. Michael Reardon duly attended and informed the Court that the plaintiff had dyslexia with consequent difficulties in reading documents and writing. There was no suggestion of an absence of mental capacity.

14. Having considered the evidence of Dr. Reardon, and the fact that this application necessarily involved numerous affidavits and exhibits, I reached the conclusion that such amounted to "exceptional circumstances" and permitted the plaintiff's son to address and make submissions to the Court.

Steps taken in the 2013 proceedings

15. The following are the steps taken in the proceedings before the Court: -

- 30 May 2013 plaintiff issues plenary summons;
- 30 June 2013 plaintiff delivers plenary summons/statement of claim;
- 27 August 2013 appearance entered on behalf of the Solicitor defendants;
- 17 June - 25 June - 26 June 2013 appearance entered by Buttle/Filbeck defendants;
- 24 September 2013 plaintiff provides a "grounding affidavit" in which he sets out his complaints, the subject matter of the proceedings;
- 15 October 2013 the Solicitor defendants deliver a notice for further and better particulars;
- 4 November 2013 plaintiff delivers replies to Solicitor defendants' notice for particulars;
- 6 December 2013 notice for particulars delivered by the Buttle/Filbeck defendants;
- 15 November 2013 Defence delivered by the Solicitor defendants; and
- 6 December 2013 Defence delivered by Buttle/Filbeck defendants.

As can be seen from the above, the plaintiff took no step to prosecute these proceedings since December, 2013, some six years ago.

Principles to be applied

16. The jurisdiction to dismiss proceedings for want of prosecution has been considered in numerous judgments of the Superior Courts over the past 25 years or so. I will confine myself to two authorities. Firstly, I refer to the judgment of Hamilton C.J. in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 I.R. 459: -

"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows: —

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interest 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."

17. More recently, Irvine J. in the Court of Appeal decision of *Flynn v. the Minister for Justice, Equality and Law Reform* [2017] IECA 178, para. 19, referred to the following principles which had been identified in the High Court decision under appeal (Barrett J.) and included an additional factor from the judgment of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510: -

- "(1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.

- (2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.
- (3) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.
- (4) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.
- (5) Even when delay has been 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 case proceeding.
- (6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.
- (7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.
- (8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. 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.
- (9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.
- (10) All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name.
- (11) The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its considerations, not only its own constitutional obligations but the State's Convention obligations.

- (12) The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations.
- (13) There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence).
- (14) The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action.
- (15) As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them.
- (16) Where a plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed."

Very clearly, a number of these principles stated by Irvine J. have a direct application to this action.

18. The events, the subject matter of these proceedings, took place in 2006. These proceedings were not issued until 2013, some seven years later. There were earlier proceedings in the 2011 and 2012 proceedings but, as I have referred to earlier, these proceedings were in effect consolidated in the 2013 proceedings, save for the addition of the Solicitor Defendants.
19. Following a delay in issuing these proceedings, the plaintiff was under an obligation to proceed with expedition. This clearly did not happen. We are now some 13 years after the events complained of. I am satisfied that the delay was inordinate, but was it excusable?
20. The plaintiff put forward two "excuses". Firstly, the plaintiff maintains that a notice for particulars was served but not responded to. Secondly, the plaintiff complains that there was a delay in obtaining his file from a Solicitor who had earlier been instructed in the matter. Dealing with these "excuses": -
 - (i) Notice for particulars: -

The plaintiff maintains he served a notice for particulars, dated 10 January 2014, on the Solicitor defendants. In an affidavit by Peter Kiely, on behalf of the Solicitor defendants, it is stated that there is no record of them ever having received such a notice for particulars. It is stated that a notice was received in November, 2018, after the issuance of the motions. If there was an outstanding notice for particulars since January, 2014 it is, to say the least, most surprising that the plaintiff did not

in the last five and half years seek to follow this up either by way of a letter of reminder or issuing a motion to compel replies. Therefore, I do not accept this as being a valid excuse.

(ii) Obtaining of file: -

This is dealt with in an affidavit filed by Mr. Seamus Turner, Solicitor of M.J. O'Connor Solicitors. The plaintiff maintained that his file was only delivered to him in 2017 and, thus, he was under a disability in prosecuting the proceedings. Mr. Turner confirms that the original file was returned to the plaintiff in April, 2017, but that a copy of the entire file was sent to the plaintiff's then nominated Solicitor in April, 2010. In support of this, Mr. Turner exhibits a letter to the said Solicitor which enclosed the copy file. Therefore, I conclude the absence of a file is not a valid excuse.

21. Therefore, it follows that in prosecuting these proceedings the plaintiff has been guilty of inordinate and inexcusable delay.
22. The Court now must look at where the balance of justice lies. The proceedings against the Solicitor defendants started out as being a claim for, in essence, professional negligence but has now developed into a claim of fraud. As Irvine J. stated, persons against whom serious allegations are made that affect their professional standing "should not have to wait over a decade before being afforded opportunity to clear their name". Were this action to proceed, it probably would be heard and determined within 10 years of the date of issue, 2013; nonetheless, I am of the view that the Solicitor defendants were entitled to have the claim against them determined reasonably expeditiously. This did not happen.
23. Further, the events complained of took place in excess of 13 years ago. The first named defendant, who was instructed by the plaintiff, retired in 2008 and in recent times appears to have suffered from ill health. These factors, together with the fact that a person's ability to recall events diminishes over time, amount, in my view, to significant prejudice resulting in a significant risk of an unfair trial.
24. The Buttle/Filbeck defendants have also suffered prejudice. Mr. Eamonn Buttle, the third named defendant, advanced the sum of €1,000,000 to the plaintiff in 2006. This became repayable in 2009, some 10 years ago. Though judgment was obtained in November, 2012, the fourth named defendant (successor of the third named defendant) has been unable to execute the judgement against the plaintiff pending the determination of these proceedings. Further, in these proceedings the plaintiff has made serious allegations of fraud against the Buttle/Filbeck defendants. I refer to para. 14 of the general endorsement of claim, which refers to "fraudulent claims" and "attempts to extort monies from Brendan Kirwan". These allegations are clearly damaging to the reputation and standing of the defendants involved. Like the Solicitor defendants, these defendants are entitled to have these claims dealt with expeditiously. These defendants are also similarly affected by the lapse of time between the events complained of and a possible date for the hearing of the action.

25. A further matter which the Court has to consider is whether the Solicitor defendants or the Buttle/Filbeck defendants have been guilty of culpable delay themselves. These proceedings were initiated when motions were pending in the 2011 and 2012 proceedings. As referred to earlier, the plaintiff filed an affidavit in those motions in which he stated that it would be "inappropriate" to proceed with the 2011/2012 cases until the outcome of this case. The defendants were entitled to expect that the plaintiff would prosecute these proceedings expeditiously. Further, it cannot be said that either of the defendants "implicitly encouraged the plaintiff to incur further expense in pursuing the claim". Though the motions to dismiss for want of prosecution were issued in August, 2018 and November, 2018 some years after the last step had been taken in the proceedings, I am satisfied such delay is not culpable.
26. Another factor which the Court has to consider is that set out in the judgment of Irvine J. in *Flynn v. The Minister for Justice, Equality & Law Reform* [2017] IECA 178. At paragraph (15) it states the Court must "bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them". I am satisfied that, as these are proceedings that were based on a failed commercial venture, there is no factor of such a nature as would warrant the exercise of the Court's discretion in favor of the plaintiff.

Conclusion

27. By reason of the foregoing, I will grant both the Solicitor defendants and the Buttle/Filbeck defendants the reliefs which they seek in their respective notices of motion seeking orders to dismiss these proceedings for want of prosecution.
28. Having dismissed these proceedings, there are consequential orders that are required to be made in both 2011 and 2012 proceedings. I will hear the parties in respect of this.