

THE HIGH COURT

[2008/11026 P.]

BETWEEN

J. GANNON, NIKKI GANNON & J.J. GANNONS LIMITED

PLAINTIFFS

AND

AIDAN BROWNE, LEO WILSON & LEO WILSON ASSOCIATES LIMITED (IN VOLUNTARY LIQUIDATION)

DEFENDANTS

JUDGMENT of Ms. Justice O'Regan delivered on the 21st day of November, 2019

Issues

1. This matter has come before the court on foot of a notice of motion of the first named defendant dated the 14th of January, 2019, wherein the first named defendant is seeking an order pursuant to O.122, r.11 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court to dismiss the plaintiffs' claim as against the first named defendant for want of prosecution, or in the alternative an order pursuant to the court's inherent jurisdiction dismissing the plaintiffs' claim on the basis of an inordinate and inexcusable delay on the part of the plaintiffs and in the interest of justice by reason of the lapse of time and/or delay. In the further alternative directions of the court are sought.
2. The first named defendant's application is grounded upon his affidavit of the 14th of February, 2019, and is resisted on the part of the plaintiffs by virtue of an affidavit of the plaintiffs' solicitor, Pat Moran, bearing date the 20th of March, 2019.

Background

3. The first and second named Plaintiffs entered into a fee agreement with the first named defendant on or about the 3rd of May, 2002, in connection with the refurbishment of an existing premises at Main Street, Ballinrobe, Co. Mayo. The first named defendant is an architect by profession. Ultimately a contractor was secured for the works and construction commenced in January, 2004. A certificate of practical completion issued on the 30th of May, 2005.
4. By plenary summons of the 18th of December, 2007, the first and second named plaintiff sued the relevant contractor in respect of works carried out wherein injunctive relief together with damages were sought. By the 22nd of July, 2008, the High Court had placed a stay on the proceedings of the first and second named plaintiff against the contractor, with the relevant matter being referred to arbitration. By that date also the arbitrator had been appointed. There is no further update before the court in respect of such proceedings.
5. The within proceedings were issued by plenary summons on the 22nd of December, 2008, against the first named defendant together with the engineer employed by the first and second named plaintiffs and the allied engineering company of the engineer.
6. There is some dispute between the parties as to when the statement of claim of the 23rd of September, 2011, was first served on the first named defendant. However, ultimately

it was served on or about the 15th of June, 2012, following the entry of an appearance on behalf of the first named defendant on the 6th of February, 2009. The necessary notice of intention to proceed by the plaintiffs is dated the 8th of November, 2012, and is addressed to the first and third named defendants only.

7. The first named defendant raised a notice of particulars bearing date the 22nd of November, 2012. Following such service, a notice of intention to proceed as against the first named defendant only, dated the 14th of February, 2019, was served. The within notice of motion followed on the 14th of February, 2019, and since then replies to particulars and updated particulars of loss both bearing dates the 7th of March, 2019, have been served.
8. The plaintiffs have had available to them two engineering reports respectively dated the 24th of January, 2007, and the 14th of September, 2012. In addition, and more recently, the plaintiffs have secured a financial report of DHKN bearing date the 25th of January, 2019.
9. On the 18th of October, 2013, a liquidator was appointed to the third named plaintiff and by subsequent order of the High Court (the application was brought by notice of motion of the 31st of March, 2017), the liquidator was afforded liberty to proceed with the action on the 24th of April, 2017.
10. On the 31st of August, 2010, the third named defendant was dissolved, and on the 13th of July, 2016, the relevant contractor was dissolved.
11. It is common case that the hearing of the within action is unlikely to take place prior to the 15th anniversary of the certificate of practical conclusion.
12. In the affidavit of Mr. Moran two excuses are proffered in respect of the delay in progressing the claim namely: -
 - (a) at paragraphs 4 and 5 of his affidavit he states that the request for particulars of the 22nd of November, 2012, necessitated involving professional financial investigation and an engineering professional which information is now to hand; and
 - (b) at paragraphs 17 and 18 it is asserted that a further issue was the appointment of a liquidator to the third named plaintiff company which occurred on the 2nd of December, 2013. It was not until the High Court granted the liquidator authority to proceed on the 24th of April, 2017, that this difficulty was overcome.
13. The first named defendant asserts the following prejudice: -
 - (1) the proceedings involve allegations affecting his professional standing;

- (2) by reason of the dissolution of the contracting party and the engineer's limited company, the first named defendant has been hampered in bringing a notice of indemnity and/or contribution or joining the contractor as a third party; and
 - (3) part of the claim levied as against the first named defendant is that he failed to adequately supervise the relevant building contractor and oral evidence would be pivotal in this regard.
14. The 1st named defendant argues that in the event of the court being satisfied that there is inordinate and inexcusable delay, the balance of justice favours the striking out of the proceedings by reason of: -
- (1) the first named defendant was not responsible for any delay and did not acquiesce nor engage in conduct to indicate that no difficulty arose with respect of the delay (the first named defendant does acknowledge that the raising of particulars might possibly be considered some form of acquiescence and accordingly the main focus of the first named defendant's argument is from the raising of particulars to the notice of intention to proceed in January, 2019), nor did the first named defendant encourage any avoidable expense;
 - (2) the statement of claim is pleaded generally and fails to distinguish between the liability of each of the three parties involved. In addition, similar proceedings were instituted as against the contractor;
 - (3) the issues of prejudice against the first named defendant cited above;
 - (4) the fire to the hotel in 2010 and the failure to carry out any repairs since that time (as per reply to particulars of the 7th of March, 2019), together with the potential unavailability of any documents because of the dissolution of a number of parties results in a real possibility of an unfair trial; and
 - (5) the courts have indicated that a delay culture must be ended and Article 6.1 of the European Convention on Human Rights requires proceedings to be concluded within a reasonable timeframe. In addition, Article 34.1 of the Constitution requires the courts to administer justice, and delay is an adverse consequence on the proper and efficient administration of this justice.
15. The plaintiffs argue: -
- (1) the plaintiffs have a constitutional right of access to the courts and this would be lost if the case was dismissed;
 - (2) all the excuses for the delay have been furnished;
 - (3) there is no affidavit evidence saying the first named defendant has a good defence; and

- (4) the hotel is still in situ and can be examined.
16. In addition to the foregoing the plaintiffs have argued, although no evidence is forthcoming in respect of such arguments, that: -
- (a) the plaintiffs had no control over the liquidator;
 - (b) the defendants, other than the first named defendant, do not have resources for which the first named defendant might recover; and
 - (c) the plaintiffs have difficult financial circumstances and there is a complex ownership situation with regard to the hotel.

Jurisprudence

17. Both parties acknowledge that the starting point of any jurisprudence is the Supreme Court decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, where it was held that it is necessary to establish inordinate and inexcusable delay on the part of the respondent party and thereafter an assessment has to be made as to where the balance of justice lies in regard to the seven headings identified in that matter.
18. The first named defendant also refers to *Gilroy v. Flynn* [2004] IESC 98 Supreme Court, where Mr. Justice Hardiman stated that the courts have become even more conscious of the unfairness and increased possibility of injustice which attaches to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued.
19. In *McMullen v. Ireland* no.42297/98 [2004] ECHR, it was indicated that Article 6.1 of the European Convention on Human Rights required the resolution of proceedings within a reasonable time and as to what was reasonable would involve, depends on the circumstances of the case, the conduct of the plaintiffs and what was at stake.
20. Mr. Justice Kearns indicated in *Stephens v. Paul Flynn Limited* [2005] IEHC 148, that even partial prejudice may justify a dismissal in respect of the third leg of the Primor test.
21. In *Quinn v. Faulkner t/a Faulkner's Garage & anor* [2011] IEHC 103, Mr. Justice Hogan indicated that there was a public interest in the timely administration of justice having regard to Article 34.1 of the Constitution and there should be no endless indulgence in delay.
22. In *Gorman v. Minister for Justice, Equality and Law Reform & ors* [2015] IECA 41, Ms. Justice Irvine held that a twelve-year delay between the relevant events and the trial of the action could amount to a dismissal even with an absence of specific prejudice. The ability to test the veracity of evidence would be hampered and justice would be put to the hazard, in particular in a case which did not involve reliable documents. In that case at para. 72 Ms. Justice Irvine found that, the fact that the defendant was reacting to a step taken by the plaintiffs, as opposed to being proactive in seeking a dismissal was not a valid ground of complaint as against the defendant.

23. In *Cassidy v. The Provincialate* [2015] IECA 74, Ms. Justice Irvine referred to *O'Domhnaill v. Merrick* [1984] I.R. 151 Supreme Court, where it was held a case might be dismissed in circumstances where asking a defendant to defend the case would place that defendant under an inexcusable and unfair burden. The test would be, if there was a real or substantial risk of an unfair trial or an unjust result.
24. In *Millerick v. Minister for Finance* [2016] IECA 206, Ms. Justice Irvine was satisfied that where the delay was inordinate and inexcusable marginal prejudice may justify a dismissal although she also stressed that the absence of proof of prejudice does not mean there would not be a dismissal. Rather the plaintiffs must point to countervailing circumstances to cancel the effect of the delay. The court distinguished between culpable delay and mere inaction by the defendant which is not considered to be culpable given that the plaintiff has a primary responsibility to advance the proceedings. Reference was also made to Article 34.1 of the Constitution where the courts are mandated to administer justice and delay has adverse consequences on the proper and efficient administration of such justice.
25. In *Farrell v. Arborlane Limited & ors* [2016] IECA 224, Mr. Justice Sheehan was satisfied that where there was culpable delay on the part of the plaintiffs, the defendant did not have to establish prejudice to be able to identify a significant risk of an unfair trial. Modest prejudice would be sufficient where the delay is inordinate and inexcusable. The court was satisfied that a defendant should not have to wait twelve to thirteen years with allegations affecting his professional standing. Article 6.1 of the European Convention on Human Rights requires that there not be excessive indulgence. The court noted that memories fade with time resulting in a difficulty with a fair trial. The court is not only concerned with the position of the parties but with the administration of justice generally. In that case there was no distinguishing liability identified in the statement of claim as against the various defendants where the statement of claim ascribed equal level of culpability to all defendants, and the court was satisfied that this was a factor that could be taken into account in weighing the balance of justice. In that case the prejudice was the defendant had a difficulty in securing insurance and the matter was hanging over him for a considerable time (there was an eighteen-year gap between the occurrence of the alleged negligence act and the prospective trial of the action) and this was sufficient to dismiss the proceedings.
26. In *Comcast International Holdings Inc. & ors v. Minister for Public Enterprise & ors; Persona Digital Telephone Ltd & anor v. Minister for Public Enterprise & ors* [2012] IESC 50, McKechnie J. stressed a need for a subjective approach in looking at the period of delay on the basis that the same years of delay in different cases may demand different treatment and the court should therefore react to the facts of a particular case.
27. In *Cavanagh & anor v. Spring Homes Developments Limited & anor* [2019] IEHC 496, Mr. Justice Noonan accepted a degree of prejudice suffered by the defendant by reason of the passage of time, and that had to be balanced against the loss of the plaintiffs' constitutional right of access to the court which would not be likely set aside. The

plaintiffs would then be left without a remedy. In the circumstances, Mr. Justice Noonan concluded that the balance of justice just about favours the dismissal of the motion and the matter was to be case managed. That case concerned a straight forward issue and was largely record based together with expert report, and oral evidence was not pivotal. The matter involved a four-year gap where the defendant had an influence on the delay.

28. Although the plaintiffs did refer to the case of *Carroll Shipping Limited v. Mathews Mulcahy & ors* [1996] IEHC 46, the court was referring to the case of documentary evidence only, finding that in the case of inordinate or inexcusable delay this would not necessarily prevent the holding of a fair and just trial.
29. In the instant matter both parties acknowledge the necessity for oral evidence in the matter, not least because of the allegations of a lack of supervision.

Decision

30. I am satisfied that there was no pre-action delay as between the certificate of practical completion on the 30th of May, 2005, and the issue of the plenary summons on the 22nd of December, 2008 - there was a gap of some three and a half years. However, proceedings were instituted well within the six-year limitation period.
31. There was a delay between the 22nd of December, 2008, and potentially the 23rd of September, 2011, when the plaintiffs assert that the statement of claim was first served. The first named defendant subsequently raised particulars from the 22nd of November, 2012, in respect of the statement of claim without complaint as to the lateness of service of the statement of claim.
32. By the date of service of the notice for particulars the plaintiffs had available to them two engineering reports, respectively dated the 24th of January, 2007, and the 14th of September, 2012, the latter of which dealt with individual liability of each of the defendants and the contractor. In those circumstances, I am satisfied that there was information available to the plaintiffs to at least respond to the bulk of the particulars raised even if some of same had to be left over until the securing of an updated financial report.
33. No evidence is before the court relative to why there was a delay of in excess of three years and three months between the appointment of a liquidator to the 3rd named plaintiff (on the 2nd of December, 2013) and the application to the court for authority for the liquidator to proceed with the action (on the 31st of March, 2017). It is suggested on behalf of the plaintiffs in submissions that the plaintiffs had no control over this delay. However, there is no evidence before the court as to any steps taken by the plaintiffs to expedite the application which was ultimately made by notice of motion of the 31st of March, 2017, or to explain to the first named defendant the reason why there was a delay during this period.
34. The excuse of waiting for a financial report between the service of the notice for particulars and the subsequent notice of intention to proceed is in my view wholly

inadequate. There was no real attempt in the affidavit of Mr. Mullen to justify this delay. There was no evidence given by him as to when the financial report was sought and what steps were taken to expedite the securing of such report during the intervening six-year period.

35. In all of the circumstances I am satisfied that the delay, limited to the period between the notice requiring particulars and the notice of intention to proceed is inordinate and the excuses proffered are inadequate. Accordingly, the delay is inordinate and inexcusable.
36. Insofar as the balance of justice is concerned on the one hand the plaintiffs have a right of access to the courts under the Constitution and a dismissal of the proceeding at this time would clearly have a devastating effect on their hope of recovering in respect of their losses claimed. On the other hand, the case involves allegations affecting the first named defendant's professional standing. The contractor who appears from report held by the plaintiffs on the 14th of September, 2012, to bear the brunt of the responsibility for the matters complained of by the plaintiffs, dissolved on the 13th of July, 2016, which has added to the prejudice suffered by the first named defendant in that he can no longer serve a third party notice on such contractor. Furthermore, this is a case in which oral evidence as to the adequacy of the first named defendant's supervision of the building contractor in or about 2005, being at least fifteen years prior to any prospective trial, will be relevant.
37. I am satisfied in the circumstances that the balance of justice favours the dismissal of the proceedings at this time. Accordingly, the first named defendant should succeed in his application to the court.