

**THE HIGH COURT**

[2021] IEHC 820

[2008 No. 5273 P]

**BETWEEN**

**J. HEERY (JOINERY) LIMITED**

**PLAINTIFF**

**AND**

**FRANK GROGAN**

**FIRST NAMED DEFENDANT**

**AND**

**GERRY DOYLE PRACTISING UNDER THE STYLE AND TITLE OF RUTLEDGE**

**DOYLE**

**SECOND NAMED DEFENDANT**

**AND**

**DAVID O'RIORDAN AND JAMES SHERWIN PRACTISING UNDER THE STYLE**

**AND TITLE OF SHERWIN O'RIORDAN**

**THIRD NAMED DEFENDANTS**

**JUDGMENT of Mr. Justice Meenan delivered on the 10<sup>th</sup> day of December, 2021**

**Background**

1. The plaintiff is a company limited by shares incorporated in the State. In 2006 the plaintiff became involved in property development, having purchased property at Mill Lane, Saggart, County Dublin for a price of €2,325,000. The property was purchased from the first named defendant. The second named defendant acted as solicitor for the first named defendant

in the sale. Subsequently, the third named defendant, who had acted for the plaintiff in the sale, was joined by the plaintiff in the proceedings.

2. In the course of the conveyance, the plaintiff's then solicitor (the third named defendant) raised requisitions and objections on title in the ordinary way. These were responded to in May, 2006. The plaintiff maintains that these replies were inaccurate in that it emerged, following completion, that part of the property had already been registered in the names of third parties. The plaintiff's claim against the second named defendant is that they acted negligently in not ensuring that the replies the first named defendant supplied to the requisitions on title were accurate and complete.

3. The plaintiff initiated proceedings by way of plenary summons issued 1 July 2008, subsequently amended on 9 May 2011. The second named defendant issued a motion in June, 2020 seeking an order striking out the plaintiff's claim on the grounds of inordinate and inexcusable delay in the institution and/or prosecution of the proceedings.

#### **Chronology of proceedings**

4. The chronology is as follows: -

- 1 July 2008 – plenary summons issued;
- 17 June 2009 – Statement of Claim delivered;
- 9 May 2011 – plenary summons amended and, subsequently, an amended Statement of Claim was delivered;
- October, 2012 – second named defendant delivers a Defence;
- 26 June 2013 – plaintiff seeks voluntary discovery;
- 27 February 2015 – second defendant makes discovery, swears a supplemental affidavit of discovery on 9 October 2015;
- 20 December 2019 – plaintiff delivers further particulars of negligence, breach of duty and breach of warranty;

- 2 June 2020 – second named defendant serves notice of intention to proceed;
- 14 April 2020 – plaintiff issues a motion to compel second named defendant to make further and better discovery; and
- 15 June 2020 – second named defendant brings the within application.

In the event of these proceedings going to trial, it can be safely anticipated that no such trial will take place until late 2022 at the earliest. Thus, there would be a lapse of some sixteen years since the time of the events complained of and fourteen years since the initiation of the proceedings. It is also clear that for a period between February, 2015 and December, 2019 no step was taken in the prosecution of these proceedings.

### **Legal principles**

5. The following passage from the judgment of Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 is generally the starting point in identifying the relevant principles to be applied. At pp. 475 and 476 of his judgment Hamilton C.J. states: -

“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 interests of justice require them to do so;

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

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

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

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.”

6. Later judgments of the Superior Courts have considered but not altered these principles. Most recently, Butler J. stated in *Gibbons v. N6 (Construction) Ltd and Galway County Council* [2021] IEHC 138: -

“... the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition. ...”

7. As these are professional negligence proceedings, the following passage from the judgment of Irvine J. (as she then was) in *Flynn v. The Minister for Justice* [2017] IECA 178 is particularly relevant. At para. 19 she states: -

“--- (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.

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(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.”

8. It is clear from the authorities that a court hearing an application such as this has to decide the following matters: -

- (i) Has there been inordinate delay?;
- (ii) If there has been inordinate delay, is such delay excusable?; and
- (iii) If the delay has been both inordinate and inexcusable, does the “*balance of justice*” lie in favour of dismissing the proceedings?

Also, a court has to look at the actions of the defendant bringing the application. If the defendant acquiesced in the delay, then this is a factor that would weigh in the balance against granting the order sought. However, there is a fine line between a defendant acquiescing in delay and a decision not to take any further steps in the action lest it results in “*resuscitating*” proceedings which otherwise would have remained dormant.

### **Application of principles**

9. It seems to me beyond argument that there has been inordinate delay in the prosecution of these proceedings. The plenary summons issued on 1 July 2008. The Statement of Claim was only delivered following a motion by the second named defendant to compel its delivery. Subsequently, an amended Statement of Claim was delivered joining the third named defendant into these proceedings. This was in May, 2011, some two years after delivery of the original Statement of Claim. The second named defendant delayed in delivering its Defence, and only did so following a motion brought by the plaintiff in June, 2012.

10. Following the delivery of the Defence in June, 2012, a significant period of time was spent dealing with discovery. As the second named defendant was the solicitor instructed by the first named defendant, it was almost inevitable that issues concerning legal professional privilege would arise. Thus, there was a delay in the plaintiff obtaining discovery. However, between October, 2015 and December, 2019 the plaintiff took no steps to prosecute these proceedings. In my view, a delay in excess of four years in prosecuting these professional negligence proceedings cannot be considered as anything other than inordinate.

11. In his replying affidavit, Mr. James Heery, director of the plaintiff, states that his wife, who was a fellow director, died on 19 May 2015. He states that he was devastated at his wife’s illness and death, and found himself unable to engage with his solicitors to assist them in the review of the discovered documentation and give instructions for the briefing of an expert. Further, he states that the difficulties which he was experiencing due to his bereavement were

*“compounded by the fact that I have significant difficulty with reading and writing. I say that my wife Noeleen was one of the few people who knew this and she had written and read every letter and document and knew the detail of my case and I was not equipped to manage after her death”* (para. 13 of affidavit sworn 26 November 2020).

**12.** I do not doubt for one moment the tragedy of the death of the plaintiff’s wife and its effects on him. However, the fact is that these proceedings are taken by a limited liability company, concern a purchase of land for, apparently, development purposes and involve making allegations of professional negligence.

**13.** In my view, Mr. Heery was entitled to a period of time away from dealing with his legal and financial matters following the death of his wife in 2015; however, this time should not have amounted to some four years. If Mr. Heery had, as he says, difficulty with reading and writing, I have no doubt but that his solicitor would have been of assistance. For these reasons, I believe that the delay in prosecuting these proceedings was both inordinate and inexcusable.

**14.** The next matter which I have to consider is the *“balance of justice”*. As I have found that the plaintiff’s delay has been both inordinate and inexcusable, it is the case, per Irvine P. referred to above, that relatively modest prejudice arising from that delay may be sufficient to grant the order sought. In this case, I am satisfied that the prejudice identified by the second named defendant is more than modest. Firstly, as already noted, these are professional negligence proceedings and the second named defendant should not have to wait a period of fourteen years or so to have the matter determined (this is assuming that a trial would take place in 2022). The existence of professional negligence proceedings must have been a source of upset and discomfort for the second named defendant since their initiation in 2008. More particularly, the first named defendant in respect of whom the second named defendant was acting has now died and, thus, cannot give evidence. As the second named defendant deposed to his replying affidavit (sworn before the death of the first named defendant): -

“The nub of my Defence is and has always been that I acted in accordance with the instructions that the first defendant gave me when furnishing those Replies to Requisitions. I have no doubt that the first defendant would have corroborated my account if this matter had been brought to trial with expedition. I am gravely concerned the first defendant’s memory has now diminished as is evident from the Second Affidavit of Andrew Coonan the medical report exhibited thereto. In my view, this raises a real and unavoidable risk of prejudice if this matter was to proceed to trial at this remove.”

15. I do not accept, as the plaintiff submits, that this is a “*documents*” case. Whereas there may be some documentation, the evidence that might have been given by the first named defendant would have been crucial. Even if the first named defendant was not called as a witness by the second named defendant, were he to have given evidence he would have been subject to cross-examination by the second named defendant.

16. In my view, the second named defendant did not acquiesce in the delay. It is correct that for a period in excess of four years neither the plaintiff nor the second named defendant took any step to prosecute these proceedings, or to bring them to a conclusion. I do not think that this amounts to acquiescence on the part of the second named defendant. It was up to the plaintiff to prosecute the proceedings, which he did not do for reasons that I have found not to be excusable. I therefore find that the balance of justice lies in favour of granting the reliefs sought by the second named defendant.

### **Conclusion**

17. By reason of the foregoing, I will grant the reliefs sought by the second named defendant herein. As for costs, my provisional view would be that as the second named defendant has been “*entirely successful*” in this application that he is entitled both to the costs of the application and the costs of defending these proceedings to date (such costs to be

adjudicated in default of agreement). Should the plaintiff wish to make submissions on this, he may do so by furnishing written submissions within fourteen days of the date hereof. This matter will be listed for mention to deal with the orders to be made and costs on 13 January 2022.