

THE HIGH COURT

[2022] IEHC 715

[2012 4625 P]

BETWEEN

ASM ALTERNATIVE FEEDS LIMITED

PLAINTIFF

AND

**THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE, THE STATE
LABORATORY, MINISTER FOR FINANCE, MINISTER FOR PUBLIC
EXPENDITURE AND REFORM, IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 20th day of December 2022

Background

1. This is an application brought by the defendants to dismiss the plaintiff's claim herein on the grounds of inexcusable/inordinate delay in the prosecution of the proceedings and/or an order pursuant to O.122 r.11 RSC dismissing the plaintiff's claim for want of prosecution as there has been no proceedings for more than two years.

2. The plaintiff was incorporated in 2008 and was engaged in the business of the production of animal feeds. On or about 15 June 2011, the defendant's agents attended at the plaintiff's premises for the purposes of sampling produce. Following an analysis of the sample, the defendant's servants or agents detected a level of Dioxin. As a result of this, on 25 July 2011 the defendants temporarily suspended the plaintiff's registration as a feed business operator.

3. On or about 3 August 2011, the defendants accepted that there was an error in the test results which incorrectly attributed the positive results of a third party to the plaintiff. It appeared that the temporary suspension was not immediately lifted.

4. The plaintiff initiated judicial review proceedings which were not defended by the defendants. The plaintiff's registration was restored on 15 December 2011. Thus, there appears to have been a period between 25 July 2011 and 15 December 2011 when the plaintiff's registration as a feed business operator was wrongly suspended.

5. It should be noted at this stage that the previous paragraphs set out what appears to be the basis for the plaintiff's claim herein. Unfortunately, it cannot be said definitively what the plaintiff's claim is, as no statement of claim has been delivered.

Chronology of proceedings

6. The following are the various steps taken in the prosecution of these proceedings:

- (a) Issue of plenary summons – 10 May 2012
- (b) Service of plenary summons – 16 May 2012
- (c) Appearance entered on behalf of the defendants – 14 June 2012
- (d) Notice of intention to proceed served on defendants and plaintiff letter dating a statement of claim had been drafted – 22 August 2014
- (e) Plaintiff seeks voluntary discovery – 14 July 2015
- (f) Second notice of intention to proceed – 16 January 2019
- (g) Third notice of intention to proceed – 28 February 2020
- (h) Fourth notice of intention to proceed – 22 January 2021
- (i) Issue of motion herein – 5 March 2021.

7. The reference to a statement of claim having been drafted arose from a letter from the plaintiff's solicitor to the defendants dated 22 August 2014 which stated:

“--- we have now completed the draft statement of claim and having same approved by our client and when it is finalised and engrossed it will be sent onto you shortly”.

Principles to be applied

8. There are numerous authorities on the court’s jurisdiction to strike out for want of prosecution and to strike out proceedings on grounds of lapse of time by reason of which a fair trial is no longer possible. There is considerable overlap between these two jurisdictions and the following are the questions that have to be addressed:

1. Has there been inordinate delay in the prosecution of these proceedings?
2. If there has been inordinate delay, is it excusable?
3. If there has been inordinate and inexcusable delay, does the balance of justice lie in favour of striking out the proceedings?

9. In considering the balance of justice, the court has to look at whether any prejudice has arisen by reason of the lapse of time between when the events complained of occurred or the proceedings were initiated and date of a possible trial. I wish to refer to two authorities. Firstly, in *Cassidy v. The Provicialate* [2015] IECA 70 Irvine J. stated at para. 36:

“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.”

10. Secondly, *Powell v. New Ireland Assurance Company Plc* [2021] IEHC 260 Butler J. stated:

“20. --- The key factor is that where a plaintiff is responsible for inordinate and inexcusable delay, a defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be struck out. More modest prejudice may tip the balance of justice against allowing the proceedings to continue. Further, the court will in any event take account of the prejudice that

inevitably results from a lengthy delay in the conduct of litigation, the prejudice being commensurately greater the longer the period of delay. In contrast, where a plaintiff has not been guilty of inexcusable delay, there is a positive onus on a defendant not only to establish prejudice but to establish that that prejudice is of a kind and a level which will, in fact, impede a fair trial.”

11. The above should be seen in the context of the courts taking a less tolerant view of delay. Delays that might have been tolerated in the past are no longer so. The person who initiates proceedings is obliged to prosecute them without unreasonable delay. Regard must be had to the times set out in the Rules of the Superior Courts for taking various steps in the proceedings. Equally, a person at the receiving end of a legal action is entitled to have it brought to a conclusion as soon as is reasonably possible.

Application of principles

12. The events complained of in these proceedings occurred between July and December 2011. The proceedings issued promptly in May 2012. In the past ten years no statement of claim has been delivered. The only step taken by the plaintiff has been the service of some four notices of intention to proceed. The delay in prosecuting these proceedings cannot be considered as anything other than inordinate.

Is the delay excusable?

13. Two excuses have been put forward by the plaintiff. Firstly, the serious ill health suffered by the Principal Director of the plaintiff company. Whereas I have sympathy for the ill health suffered by Mr. Nigel Foster I cannot see how this amounts to a credible excuse for not taking the basic step of delivering a statement of claim. The plaintiff had no difficulty in commencing judicial review proceedings which would require the furnishing of a statement of grounds. The excuse of ill health is not consistent with what was set out in the letter from the

plaintiff's solicitor of August 2014 as set out above. There is no reference to any ill health on the part of Mr. Foster delaying the proceedings.

14. Equally I do not accept the excuse of financial difficulties as a reason for not prosecuting the proceedings. The plaintiff may well have been in financial difficulties but I cannot see that they were of an order not to serve a statement of claim. It appears from the papers that at all stages the plaintiff was legally represented, and financial problems did not stand in the way of serving notices of intention to proceed and issuing a letter in July 2015 seeking voluntary discovery. I am therefore satisfied that the plaintiff's delay was both inordinate and inexcusable.

15. I now turn to the balance of justice. In a replying affidavit Mr. Paul Vickers, Assistant Principal Officer of the defendant, sets out in detail the names of witnesses required by the defendant to defend the proceedings. He refers to:

- (a) Dermot A. Ryan – Deputy Chief Inspector, who was involved in the efforts to trace the feed consignments and the suspension decision making process – retired 5 July 2015.
- (b) Dr Liam Hyde – Senior Inspector and Head of Division, who had a central role in efforts to trace the feed consignment – retired 1 April 2015.
- (c) John Downey – Assistant Principal, who also had a central role in efforts to trace the feed consignments – retired 23 April 2019.
- (d) John Jordan – District Superintendent, who made site visits – retired 28 February 2016.
- (e) Jim Brady – Supervisory Agricultural Officer, who also made site visits and attempted other site visits during the defendant's investigation process – retired 2 October 2016 and has subsequently died.

(f) David Behan – Chief Inspector of the defendant, played an oversight role in the suspension of decision-making process and investigation – retired 22 August 2015.

16. It should also be noted that if this action were allowed to proceed, a trial date before 2024 or early 2025 would be highly unlikely. This lapse of time between the events complained of in 2011 and the date of a possible trial in 2024/2025 clearly gives rise to considerable prejudice to the defendant in defending these proceedings.

17. I do not accept the submission of the plaintiff that this is a “documents” case. It is clear that evidence of the events between July and December 2011 would be required. If this were a “documents” case, it makes the failure of the plaintiff to prosecute the proceedings all the more inexcusable. It should also be noted that the defendants have not contributed to the delay.

Conclusion

18. By reason of the foregoing, I am satisfied that the defendants are entitled to an order striking out the proceedings herein. As this judgment is being delivered electronically, my provisional view is as the defendants have been entirely successful, they are entitled to an order for costs of the motion and the proceedings. Should either party wish to make any submissions they may do so by written submissions (no more than 2,000 words) to be filed on or before 13 January 2023. I will list the matter on 20 January 2023 for the purpose of making final orders.