THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 111

Record Number: 2019/315

High Court Record Number: 2011/2316 P

Edwards J.
Costello J.
Noonan J.

BETWEEN/

CHARLES MCGUINNESS

APPELLANT/PLAINTIFF

- AND -

WILKIE AND FLANAGAN SOLICITORS

RESPONDENT/DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 13th day of January, 2020

1. This is an appeal brought by Mr. McGuinness against the judgment and order of the High Court (Barrett J.) both dated 30th May, 2019.

2. Before I deal with the substantive issues that arise, there is a dispute between the parties as to when the judgment was actually delivered. The application made in this case mirrors an identical application against the same defendant in proceedings in which Noel Mulligan was the plaintiff. Both motions were heard together and one judgment delivered on 3rd May, 2019. It seems to be have been agreed between the parties that the judgment would rule both cases, but it would appear that inadvertently the title of the judgment delivered on 3rd May, 2019 referred only to the Mulligan case.

3. I am satisfied from a reading of the transcripts on each of the dates that this matter was before the court that, although the court issued a separate written judgment in Mr. McGuinness's case on 30th May, 2019, that judgment was in fact delivered on 3rd May, 2019. The relevance of this concerns the swearing of an affidavit by Mr. McGuinness on 28th May, 2019, which has been referred to as 'the McGuinness costs affidavit'. He was given leave by the High Court to file this affidavit purely for the purposes of a hearing on the costs issue which took place on 30th May, 2019 and not for the purpose of re-visiting any issues already decided by the High Court. Insofar as it post-dates the actual giving of the judgment, it purports to deal with factual issues arising from the judgment and cannot be relied upon by Mr. McGuinness in this court.

4. There is no doubt that the High Court had already dealt with the substantive matter before the McGuinness costs affidavit was sworn. That this is so is demonstrated clearly in the transcript of the hearing before Barrett J. on 24th May, 2019, where he said (at p. 2, lines 32-33): -

> "Well, as regards the McGuinness matter, the same order is going to follow, so it will be an order to strike out the proceedings."

5. Accordingly, it is clear that the matter had been finally determined by the High Court prior to the swearing of the McGuinness costs affidavit and as such, the evidence contained in that affidavit is not admissible on appeal, no leave having been granted in that regard by this Court.

6. The other point to which I should refer before dealing with the substance of the matter, is the function of this court on appeal. As an appellate court, this court is concerned with reviewing error in the judgment of the High Court appealed against. Appeals before this court are not hearings *de novo* where parties are free to make new arguments or present new evidence at the hearing of the appeal. This is because such matters have not been the subject of any determination before the High Court. In the present case, virtually all of the submissions made today by Mr. McGuinness were not only never made before, but in some instances ran directly counter to the arguments made on his behalf by his legal representative in the High Court. Moreover, most if not all were neither the subject of the Notice of Appeal nor of the written submissions only recently entered by the appellant. Thus, Mr. McGuinness sought to argue new points and present new evidence to this court without any leave, which could in any event only be granted in exceptional circumstances which do not arise here. This is impermissible. Mr. McGuinness sought to argue that he had only realised these points recently as a litigant in person but the rules apply equally to all parties whether represented or not.

7. Turning now to the substantive claim as disclosed by the pleadings, Mr. McGuinness's statement of claim alleges that in or about May 2005, he entered into an oral agreement with three other persons, namely, Alan Wilkie, Noel Mulligan and Francis O'Brien. The respondent is a firm of solicitors comprising two partners, Alan Wilkie and his spouse, Michelle Flanagan. The partnership has carried on a solicitors' practice for many years in Monaghan town.

8. Mr. McGuinness alleges in his pleadings that the parties orally agreed to enter into a partnership for the purpose of purchasing 50 acres of development land in Co. Cavan. The respondent denies that any partnership agreement was made but does accept that the parties jointly agreed to purchase the lands. Mr. McGuinness alleges that Mr. Wilkie was to act as legal advisor to the partnership, which again is in dispute. On 24th September, 2005, a contract to purchase the lands was executed for the sum of €11 million. It was subject to the purchasers obtaining planning permission for a proposed development of 433 houses and 2 crèches. The respondent says that the arrangement was that the parties would purchase the lands, obtain planning permission and then sell them on without undertaking any development themselves. The planning application was

duly made to Cavan County Council who refused it in April 2006. It would appear that this refusal was appealed to An Bord Pleanála.

9. While that appeal was pending, in or about June 2006, Mr. Wilkie agreed to dispose of his one quarter interest in the transaction to Mr. O'Brien, who would then be entitled to a 50% interest in the lands, for a sum of €1 million. Mr. McGuinness alleges that this was done without notice to him or Mr. Mulligan and effectively behind their backs, an allegation which is disputed by Mr. Wilkie.

10. The statement of claim pleads further that in July 2006, Mr. Wilkie advised the other three participants that they should withdraw the appeal to An Bord Pleanála and if necessary re-apply for a fresh permission at a later date. Mr. McGuinness alleges that this advice left him exposed to having to complete the transaction and proceed with the purchase, as the withdrawal of the appeal meant that the conditional clause in the contract fell. Ultimately, it would appear that the project was never realised, most likely as a result of the economic collapse. The original purchase of the lands was financed by Ulster Bank Ltd. who advanced a sum of €12 million. for that purpose. This was apparently arranged through the intervention of another party, Michael Fingleton, who was an associate of Mr. O'Brien's and whom it was proposed would take a financial interest in the matter. Following the collapse of the project, Mr. McGuinness was sued by Ulster Bank. who obtained a judgment against him for a sum in excess of €13.6 million.

11. It is against the foregoing background that these proceedings arise. In essence, the motion before the High Court was brought by the respondent on the grounds of delay. In that regard, I propose to adopt the timeline schedule set out in the judgment of the High Court for the purposes of this judgment. The plenary summons was issued on 10th March, 2011. It simply claimed damages for negligence and breach of contract, making no mention of the partnership agreement or the basis upon which the claim for damages was being advanced. It will be seen therefore, that the summons was issued between five and six years after the event in issue and, if the limitation period is six years, close to the expiry of that period, but in any event very late.

12. No attempt to serve the summons was however, made until almost a year later on either the 7th or 8th March, 2012. For reasons which are unclear, certainly from the judgment, although sought to be explained today by Mr. McGuinness, particularly as the defendant is a firm of solicitors with a place of business in Monaghan, Mr. McGuinness was apparently unable to effect service resulting in the summons expiring twelve months from its issue. This necessitated an application to renew the summons which was made on 23rd April, 2012 *ex parte* in the normal way and was granted. The defendant then sought to set aside the renewal and that application came before the High Court on 4th February, 2013 and was refused. The High Court however, ordered that the statement of claim should be delivered without further delay within four weeks.

13. It was delivered on 4th March, 2013, the last day of the four week period, and this was the first occasion that the defendant knew what case was being made against it, now seven to eight years after the relevant events. In that regard, it is material to note that

no correspondence was addressed to the defendant in advance of the institution of the proceedings. The claim came as all the more of a surprise because, according to the evidence of Mr. Wilkie and Ms. Flanagan, Mr. McGuinness continued to instruct the firm in other matters throughout. Following the seeking and giving of particulars, a defence was delivered on the 19th May, 2014 and shortly thereafter letters seeking voluntary discovery.

14. It seems that the next two years were taken up with discovery issues, the defendant seeking to compel the plaintiff to make discovery eventually culminating in a motion to strike out the claim for failing to make discovery, which was itself struck out with costs to the defendant by agreement. Even despite that, the defendant alleged that the discovery was deficient and corresponded with the plaintiff in that respect, the last letter being dated 26th September, 2016, which correspondence was never replied to. Mr McGuinness sought to argue today that the chronology of events set out in the affidavit of Sinead Ryan sworn on 22nd June, 2018 and the description of those events was incorrect, although he took no issue with them in the High Court despite the fact that he swore a replying affidavit. This again is impermissible as I have explained.

15. Thereafter, nothing happened until the motion to dismiss was issued on 26th June, 2018, then twelve to thirteen years after the events in issue.

16. It is notable from the foregoing chronology that the only steps actually taken by Mr. McGuinness in these proceedings voluntarily, that is to say without either order of the court or being pressed to do so by the other side, were the issue and service of the plenary summons. There is more than ample authority for the proposition that where proceedings are commenced very late in the day, as here, there is an onus on the plaintiff to prosecute them expeditiously – see for example the judgment of this Court in *William Connolly and Sons Ltd t/a Connolly's Red Mills v Torc Grain and Feed Limited* [2015] IECA 280.

17. By no stretch of the imagination could it be claimed that the plaintiff has prosecuted these proceedings with anything approaching the vigour that the law requires. I agree with the views of the trial judge that the jurisprudence on delay is by now so well settled that it does not require further elaboration from this court. Suffice it to say that there are primarily two strands of jurisprudence that are relevant for the court to consider. The first strand comprises the well-known *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 principles, which hold that where it is established that both inordinate and inexcusable delay on the part of the plaintiff has occurred, the case may be dismissed if the balance of justice favours such dismissal. In considering where the balance lies, moderate prejudice may be sufficient to tip the balance in favour of the defendant. This is the basis upon which the High Court approached the matter.

18. The second strand, which arises under *O'Domhnaill v. Merrick* [1984] IR 151, is where the delay that has occurred is such that a fair trial can no longer be had, even in the absence of any blameworthy delay on the part of the plaintiff. In this category of case, the bar is

considerably higher and the defendant is required to establish prejudice of sufficient magnitude to render a fair trial impossible.

19. As the trial judge noted, there was significant pre-trial delay, exacerbated by the fact that no notice of the claim was given prior to the institution of proceedings. There were then four periods of post commencement delay, first a delay of over a year in serving the belatedly issued summons. Second, there was a delay of over two years in closing the pleadings, most of which was attributable to the plaintiff. Third, there was a delay again of over two years in making discovery, which even after that was not fully resolved and finally, there was a delay of another two years when the plaintiff did nothing at all to progress the case. In that regard the onus is on the plaintiff to progress the case, not on the defendant, as judgments of this court have noted.

20. No explanation of any colour was offered for these delays. At the hearing before the High Court on 11th April, 2019, Mr. McGuinness's solicitor, Mr. Dore, quite properly conceded that the delay in this case was inordinate – see transcript p. 54, lines 32-33. I think it fair to say that Mr. Dore did not suggest that it was other than inexcusable. Even in the absence of such concession, each of these delays was individually probably inordinate but cumulatively, certainly so. Furthermore, I am satisfied that there is nothing evident in the documents before this court which suggest that the trial judge was in error in concluding that the delay was not only inordinate but also inexcusable. He was therefore correctly of the view that the balance of justice fell to be considered.

21. It is clear from both proceedings and affidavits in this case that it is not, as the trial judge concluded, a "documents" case. Most, if not indeed all, of the central issues that arise on foot of the pleadings will have to be determined by the court on oral evidence. Without attempting to state the issues exhaustively, they include: -

    (i) What was the nature of the alleged oral agreement made in 2005, which Mr. McGuinness says resulted in a partnership agreement, which the defendant denies.
    (ii) What was the nature of Mr. Wilkie's involvement in the matter beyond being a co-purchaser of the lands? Was he retained as a solicitor to advise the parties and if so, what were the terms of his retainer, what advice did he give and how was it acted upon? These are matters that can only be resolved by oral evidence.
    (iii) The disposal by Mr. Wilkie of his interest in the transaction is claimed by Mr. McGuinness to be wrongful and without notice to him, whereas on the other hand Mr. Wilkie says that Mr. McGuinness and indeed Mr. Mulligan were well aware that Mr. O'Brien was to become a 50% stakeholder in the matter. The determination of this issue can only be made on oral evidence.
    (iv) What advice, if any, did Mr. Wilkie give to Mr. McGuinness and/or the other parties concerning the withdrawal of the planning appeal and the consequences of that? Again this turns entirely on oral evidence.

(v) What were the causes of the failure of the project and the losses that Mr. McGuinness says he suffered? These issues are clearly complex and multifactorial and certainly largely, if not entirely, to be determined on oral evidence.

22. If this matter proceeds to trial, each of the witnesses to these transactions and events will be asked to recollect from memory events occurring some fifteen to sixteen years in the past. I cannot see how that could amount to other than a facsimile or parody of justice, as one judgment describes it. Furthermore, it is not a case where witnesses could even be said to have the benefit of written statements of their recollections made at an early juncture because the defendant had no idea of what case was being made against it before it received the statement of claim in March 2013, already seven to eight years after the relevant events.

23. It seems to me that even if there were no other factors arising, it is difficult to avoid the conclusion that this case is very close to, if not actually within, the *O'Domhnaill v. Merrick* strand of jurisprudence, where a fair trial is manifestly no longer possible. As I have noted, the High Court, having applied the *Primor* test, correctly in my view, went on to consider the balance of justice and factor in any relevant prejudice to the respondent. It seems to me that it is uncontroverted that very significant prejudice has been and will be suffered by the respondent as a result of the delays that have occurred in this case.

24. Mr. Wilkie avers that an important witness for the defence if the case proceeds would have been Mr. Padraig Smith, the auctioneer who was directly involved in the sale of the lands. The nature of the relevant evidence Mr. Smith would have been able to give is set out at para. 6 of Mr. Wilkie's affidavit but unfortunately, Mr. Smith died on 16th July, 2013. By the latter date, had the case been commenced and prosecuted with any degree of diligence by the plaintiff, it should have long since been concluded. Ms. Flanagan avers at para. 8 of her affidavit that another critical witness from the defendant's point of view would have been the architect involved in the project, Mr. David McCormack. He has now retired from the architectural firm involved and resides permanently in Spain. She has been unable to obtain any contact details for him.

25. Mr. Wilkie at para. 7 of his affidavit refers to three bank officials formerly employed by Ulster Bank who were centrally involved in the transaction and he believes could have highly relevant evidence to give concerning the matter, which would support the defendant's case. As these witnesses are retired, they no longer have access to any of the Ulster Bank files in the matter and at this remove in time are extremely unlikely to have any reliable recollection of relevant events.

26. Ms. Flanagan attests to the fact that as a small country firm of solicitors, these proceedings have had a major impact on the defendant's business. First, the cost of its professional indemnity insurance has increased significantly on an annual basis. Further, their insurance for the relevant time would not in any event cover a claim of the magnitude that is made here, in excess of €13 million, which quite understandably exposes them to very great personal pressure. In over three decades in practice, the firm

has never had a professional negligence claim and obviously in a small local community, a claim of this magnitude is bound to become widely known and potentially have a detrimental effect on the ongoing goodwill of the practice. A number of authorities has considered that having claims not only of negligence, but of serious wrongdoing hanging over the heads of professional persons over a protracted period of time is in itself a source of prejudice for obvious reasons.

27. Turning briefly to the grounds of appeal, grounds 1 – 8 and 11- 13 are based on the content of the McGuinness costs affidavit which, as I have explained, is inadmissible before this court. Even if it was admissible, the grounds complain of fraud, unjust enrichment, conflict of interest and so forth, none of which is in any way relevant to the issue in this application, delay. The same applies to the subsequent grounds which consist of complaints about lack of candour and concealment of facts, all entirely irrelevant. Insofar as the grounds suggest that the plaintiff did not cause any delay, this is manifestly incorrect as the trial judge held and there is no basis for interfering with that determination. The final ground complains of error in the judgment in consideration of various articles of the Constitution, which is totally non-specific and affords no ground at all.

28. Accordingly, I am entirely in agreement with the views of the learned trial judge stated with admirable clarity and brevity in his judgment. I am satisfied that he identified all the relevant criteria and applied them appropriately to the facts of the case in reaching his conclusion that the balance of justice firmly favoured dismissal.

29. I would dismiss this appeal.

30. [Edwards J.]: I agree with the judgment delivered by Noonan J.

31. [Costello J.]: I agree with the judgment delivered by Noonan J.