

# THE HIGH COURT

[2021] IEHC 853

[2014 No. 79 P]

BETWEEN

PATRICK DUNNING

PLAINTIFF

AND

OWEN MURPHY

DEFENDANT

## **JUDGMENT of Mr. Justice Meenan delivered on the 21<sup>st</sup> day of December, 2021**

### **Background**

1. These proceedings concern the ownership of a horse, “*My Girl Anna*”. The plaintiff alleges that, in or around early January, 2010, he met with the defendant at a public house. He alleges that the defendant asked him to come in with him in the ownership of the said horse. The plaintiff alleges that he agreed that he would come in with the defendant in the ownership of the horse and told the defendant to go ahead with the purchase. The plaintiff and the defendant agreed to go ahead and purchase the horse and that they would put her in training with Muredach Kelly. At the time, the defendant had separated from his wife and his then partner, Ms. Alison Clancy, was present at the said meeting.

2. The plaintiff alleges that he and the defendant were to be equal co-owners of the horse and that no other party was mentioned as being in any way involved. In or around February, 2010, the horse was purchased and the plaintiff believes that the consideration was €500 and that the defendant took possession of the horse’s “*passport*”.

3. The horse performed well at a number of race meetings and won the “*Flying Fives*” in the Curragh on 26 August 2012, with prize money of €39,000. The plaintiff believes that, ultimately, the horse won a total of €96,260 in prize money over various races.

4. In or around January, 2013, the plaintiff alleges he met with the defendant to discuss the future of the horse. The plaintiff expressed the view that the horse, a mare, was a “*once in a lifetime mare*”. The defendant suggested they should send her to a stallion and put her in foal. The plaintiff alleges that he agreed with this course of action. In the summer of 2013, the plaintiff alleges he was informed by the defendant that the mare had gone into foal. Unfortunately, in September or October of that year, the mare lost her foal. Following this, the plaintiff alleges during the course of a telephone conversation that the defendant suggested that the mare be put into the December sales at Tattersals Newmarket.

5. The plaintiff alleges he heard nothing further from the defendant concerning the sale, but the plaintiff’s son received a telephone call from a person who had attended the sale who congratulated the plaintiff on the price achieved. The plaintiff immediately made enquiries and discovered the horse had been sold on 2 December 2013 for £152,000 (sterling guineas). The plaintiff maintains he was never paid his half of the price.

6. The plaintiff issued plenary proceedings by a summons, dated 17 January 2014, and a statement of claim, delivered 28 February 2014. The plaintiff claims, *inter alia*: -

- (i) A declaration that the plaintiff was at all material times a co-owner with the defendant in equal shares of the mare “*My Girl Anna*”;
- (ii) A declaration that the plaintiff is entitled to 50% of the £152,000 (sterling guineas); and
- (iii) An order directing the defendant to pay to the plaintiff the said sum.

7. The defendant has issued a notice of motion seeking an order of this Court dismissing the plaintiff's action for want of prosecution on the grounds of inordinate, inexcusable and/or unreasonable delay on the part of the plaintiff in the prosecution of the action.

### **Chronology of proceedings**

8. The following are the steps that were taken in the prosecution of these proceedings: -

- (i) Plenary summons issued 17 January 2014;
- (ii) A statement of claim delivered 28 February 2014;
- (iii) Motions for judgment in default of defence 4 July 2014;
- (iv) Defence delivered 13 October 2014;
- (v) Notice of intention to proceed 19 November 2019; and
- (vi) Notice of motion, herein, March, 2021.

9. It can be seen from the above chronology that, effectively, no substantive step was taken in these proceedings since October, 2014, save for a notice of intention to proceed some five years later in November, 2019.

### **Principles to be applied**

10. The various authorities which a court relies upon in dealing with an application such as this are well established. The starting point is the oft cited passage from the judgment of Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The principles set out therein have been considered, but not altered, in numerous decisions since. Essentially, a court engages in a three step process: -

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

11. Mr. Frank Callanan SC, on behalf of the plaintiff, has correctly and appropriately conceded that the delay in the prosecution of these proceedings is both inordinate and inexcusable. Thus, the Court is concerned with the “*balance of justice*”. Mr. Michael Mulcahy SC, on behalf of the defendant, relied, in particular, on the following passage from the judgment of Irvine J. (as she then was) in the decision of the Court of Appeal in *Flynn v. Minister for Justice* [2017] IECA 178, where she states: -

“19. ... (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. ...”

Mr. Mulcahy also relies on the following passage from the judgment of Butler J. in *Gibbons v. N6 (Construction) Ltd and Galway County Council* [2021] IEHC 138: -

“21. Thus, the only remaining issue is whether the delay will cause the first defendant prejudice in the defence of the proceedings or more generally. The onus lies on the moving party in an application of this nature to establish that the delay complained of is both inordinate and inexcusable. Once that has been done, the onus then shifts to the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice favours allowing the claim to proceed. Further, that is a weighty obligation (see Irvine J. in *Flynn v. Minister for Justice* [2017] IECA 178, followed by McGrath J. in *Myrmidon CMBS (Propco) Ltd v. Joy Clothing Ltd* [2020] IEHC 246).”

### **“Balance of justice”**

12. It is clear from the pleadings that much, if not all, of this case will hinge on the conversation that took place in the public house “*in and around early January 2010*”. Those

present were: the plaintiff, the defendant and, according to the plaintiff, Ms. Alison Clancy. The passage of time between January, 2010 and the date of a possible trial, almost certainly not before October, 2022, may well dim memories. However, there is no suggestion that, other than the passage of time, there is any impediment on the parties involved to give an account of who said what. The defendant does allege that the plaintiff had conceded to a Mr. Noel Lawless (who apparently worked at Horse Park Stud from where the defendant allegedly acquired the mare) that the defendant was the owner of the said horse. Mr. Lawless died in August, 2018. This evidence may well have been of assistance to the defendant. Were this to have been the situation, I might well have concluded that the defendant had demonstrated sufficient prejudice for me to grant the order he is seeking. However, there is a further matter.

**13.** In February, 2020, Ms. Alison Clancy instituted proceedings against the plaintiff in these proceedings, claiming that she is entitled to a 50% share of the net proceeds of the sale of the said horse. In her statement of claim, delivered in March, 2020, she states at para. 3: -

“3. In or around the year 2010, the Plaintiff acquired the ownership of a mare called “My Girl Anna”, and she agreed with a Mr. Owen Murphy that she would hold the mare in equal shares with him.”

Assuming that Ms. Alison Clancy is in a position to prove her claim, it has to follow that both Ms. Clancy and Mr. Owen Murphy (the defendant in the instant proceedings) are in a position to give evidence of ownership of the horse. As the plaintiff stated that he is also in such a position, it would follow that, despite the passage of time, both the plaintiff and defendant in the instant proceedings, and Ms. Alison Clancy in the other proceedings, are all in a position to give evidence as to ownership. This would indicate no prejudice. The absence of prejudice means that the balance of justice lies against granting the order sought.

**14.** Now that there are two sets of proceedings concerning the ownership of the same horse, it seems to me that the parties ought to consider making an application to consolidate both sets

of proceedings or to have them managed in such a way that the ownership of the said horse can be determined at one hearing.

**Conclusion**

**15.** By reason of the foregoing, I am dismissing the defendant's application herein and would invite the parties to make short written submissions (no longer than 1,250 words) on the issue of costs. These submissions should be lodged no later than 21 January 2022, and I will list the matter to deal with costs on 28 January 2022.