THE HIGH COURT

[2023] IEHC 534

Record No. 2012/6610P

Between:

TERRY BYRNE and JANET BYRNE

Plaintiffs

-and-

EAMONN V. CARNEY and JEREMIAH C. MCCARTHY Practising under the Style and Title of CARNEY MCCARTHY SOLICITORS

Defendants

JUDGMENT of Ms. Justice Niamh Hyland delivered on 4 September 2023

INTRODUCTION

1. This is an application by the defendant seeking to dismiss the plaintiffs' claim for want of prosecution and/or inordinate and inexcusable delay. The proceedings are brought by the plaintiffs in respect of alleged professional negligence and breach of contract on the part of the defendant. The defendant acted as the plaintiffs' solicitor in relation to various transactions, including the proposed purchase of a residential property in Foxrock in 2006.
2. In short, the plaintiffs allege that they sought advices from the defendant as to what would happen if they were unable to complete the purchase of the Foxrock property and were informed that they would lose their deposit. However, they allege that they were not informed that, if they did not complete the purchase, they were liable not only

to forfeit their deposit but also for any financial deficiency arising on resale of the property.

3. In the event, the plaintiffs signed the contract on 15 September 2006 but did not complete it. They forfeited their deposit and proceedings were issued by the vendors of the Foxrock property for the shortfall resulting from the subsequent sale of the property. Those proceedings were compromised involving a payment made by the plaintiffs to the vendors in the amount of €237,865.
4. In the context of the protracted disagreement as to discovery that I chronicle below, it is important to note that the plaintiffs retained different solicitors (Madigan solicitors) to act in the proceedings brought by the vendors. When Madigan came on record for the plaintiffs, the defendant provided the plaintiffs' files to Madigan solicitors and kept copies of some but not all of the documents in the files.

MOTION TO DISMISS

5. The motion to dismiss was issued on 12 April 2022 and was grounded on an affidavit of Mr. Carney, solicitor and principal of the defendant, sworn 11 April 2022. That affidavit was replied to by Mr. Byrne, plaintiff, sworn 20 December 2022. A replying affidavit was filed by Mr. Carney on 11 January 2023. Written submissions were provided by both parties prior to the hearing. At the hearing, the parties were given an opportunity to file further written submissions after the hearing to address the relevance, if any, of the decision of the Court of Appeal in *Doyle v. Foley* [2022] IECA 193. Both parties provided supplemental submissions after the hearing in this respect and I have read and considered them.

INORDINATE AND INEXCUSABLE DELAY

6. The chronology of the proceedings identifies that the plenary summons was only issued on 5 July 2012, in other words almost 6 years after the contract for the purchase of the Foxrock property was signed in September 2006. The delay in issuing proceedings means that the plaintiffs had a particular obligation to prosecute the proceedings with dispatch.
7. Unfortunately, that did not happen here. The pleadings were closed on 2 October 2013 but the notice of trial did not issue until 3 November 2015. There has been no explanation for that delay and in those circumstances I am satisfied that this period of delay was inordinate and inexcusable.
8. It appears that a hearing date of May 2017 was given, although it is not clear when that was assigned. That hearing date was vacated due to medical issues on the part of an unspecified witness for the plaintiffs and a new hearing date was assigned of 5 December 2017. There is disagreement between the parties as to when the defendant was told about this hearing date. Nothing material turns on this dispute. The defendant was certainly informed by 16 August 2017.
9. In any case, the hearing did not go ahead on 5 December 2017 because the defendant made an application to the Court to vacate the date due to a late application for discovery. A letter from the defendant seeking "discovery of the files of Carney McCarthy solicitors relating to the transactions the subject matter of the proceedings" i.e. copies of his own files, had been sent on 29 September 2017. It was explained that this request was made late in the day because the defendant only became aware at that stage that the copies of the file retained when the originals were sent to Madigan solicitors were not in fact complete. I will deal with the consequences of the defendant's late request below.

10. The discovery process that followed the letter seeking discovery effectively took 2 years, necessitating a number of court applications, and ending only when a second supplemental affidavit of Mr. Byrne was sworn on 25 September 2019 following an Order of O'Connor J. of 1 July 2019. Within that 2 year period, there was a 6 month delay by the plaintiffs, whereby they agreed to make discovery on December 2017 and discovery was not made until 7 June 2018. A six month delay in making an affidavit of discovery is inordinate. No explanation has been given for the delay in this respect and therefore I treat this delay as inexcusable.

11. As noted above, an Order was made on 1 July 2019 by O'Connor J., directing further discovery and refusing an application by the defendant to strike out the proceedings for delay in making discovery. Following the swearing of the second supplemental affidavit of Mr. Byrne on 25 September 2019, no further steps were taken by the plaintiffs to move the matter on. This was despite the fact that O'Connor J. had indicated that the matter had to be progressed with expedition. The defendant issued a notice of intention to proceed on 9 March 2022 and on the 11 July 2022 brought this motion to dismiss.

12. An attempt is made in the affidavit of Mr. Byrne of 20 December 2022 to explain this delay of almost 3 years. He refers to the COVID epidemic and says it was not possible to proceed to progress litigation during that time, saying that this situation persisted albeit to varying degrees of severity until late 2021. He says that the proceedings would require oral evidence, and the attendance of witnesses, and were not suitable for remote hearing.

13. This explanation completely ignores the period from 25 September 2019 to March 2020. That was precisely the period when the plaintiffs ought to have been moving matters on but failed to do so. Moreover, I do not accept that Covid justified the

plaintiffs unilaterally deciding not to advance matters. The plaintiffs were obliged to set the matter down and thereafter it would be for the Court to decide what steps, if any, required to be taken to accommodate the difficulties caused by Covid.

14. In summary, there are three different periods of delay by the plaintiffs that I treat as inordinate and inexcusable:

    - 2 years from the close of pleadings in 2013 to the setting down of the proceedings in 2015;
    - 6 months from the agreement to make discovery in December 2017 to the affidavit being sworn in June 2018;
    - 2 years and 10 months from the filing of a discovery affidavit in September 2019 to the bringing of this motion by the defendant in July 2022.

BALANCE OF JUSTICE

15. I turn now to the balance of justice. I must now consider whether the balance of justice means that I should accede to the request of the defendant to strike the proceedings out. I am conscious that the burden of proof rests on the defendant to persuade me that the matter should be struck out. There are a number of different considerations of principle that will always apply in every strike out application. The first is the fact that a strike out ends a plaintiff's claim. The second is the public interest in the expeditious administration of justice. What differentiates one case from another is the factual matrix onto which these principles are laid. To assist a court in determining these applications, various issues require to be addressed in the context of the balance of justice. The first and most important will generally be whether there has been prejudice to the defendant by reason of the plaintiff's delay. The conduct of the defendant must also be looked at, in particular whether it has contributed to delay.

16. Where a plaintiff has been guilty of inordinate and inexcusable delay and that delay has obviously prejudiced a defendant, the balance of justice is more likely to favour a dismissal. In *Cave Projects Ltd v Kelly* [2022] IECA 245, the Court of Appeal discussed the question of prejudice. At p.33 of the judgment, Collins J. observed as follows:

> "*In many (if not most) applications to dismiss based on the Primor principles, the defendant will assert that some specific prejudice has arisen from the delay of the plaintiff. As McKechnie J observed in Mangan v Dockeray, "the existence of significant and irremediable prejudice to a defendant", such as by reason of the unavailability of witnesses, the fallibility of memory recall, loss of 9 documentary records such as medical records (Mangan involved a claim for medical negligence) " usually feature strongly" (at para 109 (iv)).*
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> *The absence of any specific prejudice (or, as it is often referred to in the caselaw, "concrete prejudice") may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice. The caselaw suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence – and the difficulty that courts may have in resolving conflicts of evidence – relating to events that may have taken place many years before an action gets to trial. That such difficulties may arise cannot be gainsaid. But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis*".

17. In the decision in *Doyle v. Foley* [2022] IECA 193, Costello J. recognised the competing interests in any application to dismiss for want of prosecution, observing as follows:

> "*While litigants have a constitutional right of access to the courts, all parties have a constitutional right to fair procedures and to a timely resolution of their litigation. Furthermore, the public have an interest in ensuring the timely and effective administration of justice*."

18. In relation to prejudice, she concluded that the threshold based on general prejudice arising from the passage of time had been met on the facts of that particular case, noting that if the case were to proceed to trial, there would necessarily be a contest between the plaintiff and the defendant as to what was agreed between them in 2008 that could only be resolved on oral evidence. In those circumstances, she concluded that the defendant had established moderate prejudice that sufficed to establish that the balance of justice lay in favour of dismissing the proceedings.

Delay on the part of the defendant

19. Turning to the issues this case, I think it necessary to first consider the question of delay on the part of the defendant. The Statement of Claim was delivered on 30 April 2013, particulars issued on 17 May 2018, the replies to those particulars in August 2013 and on 2 October 2013 the defence was delivered. Two years went by until the notice of trial issued in 2015. On 16 August 2017, the defendant was notified that the matter was listed for hearing on 5 December 2017, although it will be remembered that the matter had already been listed in May 2017 and the plaintiffs had sought a later hearing date due to medical issues, to which the defendant consented.

20. During this time, the defendant never sought discovery. The first letter seeking discovery was sent on 29 September 2017, after the date that the case had originally

been given a hearing date i.e. May 2017. As noted above, this necessitated an application that the hearing date of December be vacated. Ultimately, the discovery process took two years.

21. The defendant says that this was the fault of the plaintiffs because of the way in which they approached discovery. However, discovery often takes significant periods of time due to the approach of one or other party. It is for that reason that a hearing date will not generally be allocated until discovery is completed. The defendant ought to have considered the position in relation to documents after delivering its defence in 2013 and taken the necessary steps. The defendant may have assumed that such steps would not been necessary, given that it believed that it had retained full copies of the papers when the file was provided to Madigan solicitors. That assumption turned out to be incorrect, and necessitated extensive engagement on discovery. But that was a matter that the defendant ought to have considered long before the hearing date was assigned. The defendant's failure to do so undoubtedly contributed to the delay in getting the case on since the hearing date had to be vacated and two further years were taken up in relation to discovery.

22. Insofar as prejudice is concerned, the case law cited above has emphasised the importance of prejudice as a factor in the balance of justice. The defendant has in my view suffered prejudice. This arises both because of the impact of the lapse of time in a case where oral evidence will certainly play a part, and because his legal practice is adversely affected by the existence of proceedings against them. He has averred at paragraph 19 of his replying affidavit sworn 11 January 2023 that the litigation is a worry for him and his family and has been for the past 10 years since the proceedings issued. He says the fact of those proceedings continues to be a problem for him in renewing his professional indemnity insurance each year and if the litigation proceeds

that will continue to be the case for some years to come. He refers at paragraph 47 of his affidavit of 11 April 2022 that he has suffered adverse consequences in respect of premium and terms of insurance since 2012.

23. However, no specific details of the increased insurance premium or terms or indeed loss of business has been given. Nor has any specific witness been identified as a person whose memory has been particularly affected by the loss of time. Nonetheless, given the importance of oral evidence in this case, and the length of time since the events took place, I have no difficult in concluding that the defendant has certainly suffered moderate prejudice. In *Doyle,* that was sufficient to tip the balance of justice in the defendant's favour and resulted in a decision to dismiss the plaintiff's case. However, in *Doyle*, unlike the position here, there was no active delay on the part of the defendant.

CONCLUSION

24. I have already concluded that there were three periods of inordinate and inexcusable delay on the part of the plaintiffs and that the plaintiffs had a particular obligation to move with expedition given the very significant delay in issuing the proceedings. They spectacularly failed to fulfil that obligation. That delay has caused moderate prejudice to the defendant. Absent any other factor, that would be sufficient to accede to the defendant's application to dismiss the proceedings.

25. However, I cannot ignore the fact that, had the defendant sought discovery in a timely fashion, i.e. after the filing of the defence in 2013, the case would have been ready in all likelihood to go ahead in 2017. Nor can I ignore the fact that it was the defendant that vacated the trial date in 2017 because of the failure to seek discovery at the appropriate time. The defendant has proffered no excuse that I can accept for the delay in seeking discovery. That delay has contributed to the overall delay in this case, although it is undoubtedly significantly less impactful than the delay of the plaintiffs.

26. As I note earlier in this judgment, dismissal for delay motions always involve a difficult balancing exercise between the plaintiff's entitlement to have their case heard and the interest of the defendant – and the public – in the expeditious administration of justice. Here, by a narrow margin, it seems to me that the balance of justice favours refusing the defendant's application because of the part it played in the delay. To accede to an application to dismiss for want of prosecution, thus ending the plaintiffs' case, where a trial date was vacated because a defendant had not made a timely request for discovery, would in my view be unjust, even where the plaintiffs themselves have delayed very significantly. There is evidence of active delay on the part of the defendant, and this is enough in my view to tip the balance against dismissal.

27. In support of this application to dismiss, Mr. Carney of the defendant has averred that he believes that a trial date is over 18 months away. Given the delay to date and the years that have elapsed since the events the subject matter of these proceedings, I consider this is an unacceptably long time period. I propose to put this case in for active case management to ensure that this case is given the earliest date possible. This will necessitate both parties putting their house in order on an urgent basis. In this respect I am conscious that a trial date was already given to this case and therefore I expect to be in a position to allocate a trial date in early course. I will put the matter in mention on **4 October** with a view to fixing a hearing date subject to the submissions of the parties. The parties have an obligation to take all necessary steps to ensure that the case is ready to be given a trial date on 4 October.

28. As to legal costs, my provisional view is that no Order for costs should be made, given my entitlement under s.169 of the Legal Services Regulation Act 2015 to take into account the manner in which the parties conducted their case. If any party wishes to

contend for a different form of costs Order than that proposed, they will have an opportunity to do so orally on 4 October when the proceedings are next listed.