

THE HIGH COURT

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

**SEÁN COYNE & COMPANY LIMITED TRADING AS COYNE & CULLOTY & TADGH
GALAVAN INSURANCES LIMITED TRADING AS
PROPERTY PARTNERS GALAVAN**

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 8th day of November, 2019

Background

1. These proceedings concern a professional negligence claim against the second named defendant, a notice of discontinuance having been served on the first named defendant. The plaintiff alleges that the second named defendant's servants or agents were guilty of negligence, negligent misstatement, misrepresentation, breach of duty and/or breach of contract arising out of the provision of a valuation report in respect of a commercial unit: Unit 7, The Reeks, Tralee Road, Killarney, Co. Kerry. This valuation report was provided to the plaintiff on 20 February 2008.
2. The following are the various steps that were taken in the proceedings: -
 - (a) Plenary summons issued – 10 February 2014;
 - (b) Plenary summons served – 9 February 2015;
 - (c) Appearance on behalf of second defendant – 7 April 2015;
 - (d) Motion to compel delivery of Statement of Claim – 26 June 2015;
 - (e) Statement of Claim delivered – 31 July 2015;
 - (f) Notice of discontinuance filed against first defendant – 31 July 2015;
 - (g) Notice for particulars raised – 1 October 2015;
 - (h) Replies to particulars – 25 November 2015;
 - (i) Joinders raised in respect of replies to particulars – 12 January 2016;
 - (j) Defence delivered – 10 February 2016.
3. On 11 June 2018, the second named defendant issued a notice of motion seeking an Order that the plaintiff's claim be dismissed for want of prosecution and/or in the interests of justice on the grounds that the plaintiff has been guilty of inordinate and inexcusable delay.

Principles to be applied

4. The issues that arise in this application have been considered by the Superior Courts on numerous occasions over the past 25 years or so. As ever, the starting point is the following passage from the judgment of Hamilton C.J. in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459: -
- “(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.”
5. In the past number of years a number of factors have influenced how courts apply these principles. Firstly, the courts have been less tolerant of a culture of delay in the taking and prosecution of proceedings, particularly in cases of professional negligence. Secondly, litigants have rights under Article 6(1) of the European Convention on Human Rights. I refer to a more recent statement of the principles that are applicable by Irvine J. in the

decision of the Court of Appeal in *Flynn v. The Minister for Justice, Commissioner of An Garda Síochána Ireland and the Attorney General* [2017] IECA 178: -

“Legal Principles

19. In the course of his judgment the trial judge set out a summary of the key principles to be considered by a court when asked to exercise its inherent jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay. He did so by reference to a number of relatively recent decisions on the issue. Given that, subject to one important exception, these are not controversial I gratefully adopt and below set forth the summary of the relevant principles identified by Barrett J. at para. 5 of his judgment. I have also taken the liberty of including one additional factor emanating from the judgment of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3. I.R. 510.

- (1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.
- (2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.
- (3) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.
- (4) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.
- (5) Even when delay has been 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 case proceeding.
- (6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.
- (7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.
- (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.

- (9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.
- (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.
- (11) The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its considerations, not only its own constitutional obligations but the State's Convention obligations.
- (12) The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations.
- (13) There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence).
- (14) The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action.
- (15) As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them.
- (16) Where a plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed.'

20. Having regard to the precise wording used by the trial judge which is replicated at para. 19 (11) above, I think it is necessary to state that I doubt whether it is correct to say that the courts *are themselves under an obligation by virtue of Article 6(1) ECHR* to see to it that all litigation is heard within a reasonable time, at least so far as Irish domestic law is concerned..."

Application of principles

6. It is readily apparent from the chronology, set out at para. 2 above, that the plenary summons was issued within days of the possible date for the expiry of the time limited by the Statute of Limitations Acts 1957 – 1991. Thus, approximately six years elapsed between the date on which the valuation report was provided, 20 February 2008, and the date on which the summons was issued, 10 February 2014. The summons was not served until one day before its expiry. There is no suggestion that there was any difficulty in serving the summons within the twelve months from its date of issue.

7. However, this was not the end of the delay. The Statement of Claim was delivered on 31 July 2015, following a motion to compel its delivery. This was followed by a notice for particulars and replies. The Defence was delivered on 10 February 2016. The plaintiff took no steps to prosecute the proceedings thereafter. On 10 July 2018, the second named defendant's motion herein was issued.
8. Some ten years elapsed between the date on which the valuation report, the subject matter of the proceedings, was delivered and the issue of the motion to dismiss for want of prosecution. This is not a particularly complex claim and, given the time lines already referred to, I am satisfied that the delay involved is inordinate. However, is it excusable?
9. The plaintiffs filed an affidavit, sworn by Mr. Sean Cotter, bank official, which put forward a number of reasons for the delay. Firstly, in the 2013 to 2015 period, the plaintiff negotiated and completed a significant number of loan sale transactions with a view to limiting the number of non-performing loans on its balance sheet. Mr. Cotter states that the completion of these loan sales was an essential aspect of the recovery of the Irish Banking Sector. This may well be correct but I do not accept this has anything to do with the second named defendant. Though a loan was involved, the claim against the second named defendant is not in respect of a loan, but rather the furnishing of a valuation report.
10. Mr. Cotter correctly states that this is a claim which involves professional negligence which required the plaintiff to consider carefully the details of the claim before issuing and serving proceedings. However, as referred to above, proceedings were not issued until nearly the expiry of the time allowed by the Statute of Limitations Acts, 1957 – 1991, and a Statement of Claim was only delivered following the issue of a motion. It seems to me that the plaintiff had plenty of time before issuing and serving the proceedings and delivering a Statement of Claim to consider and take advice on the claim. Therefore, I do not find this to be a credible excuse for delaying prosecution of the action.
11. A further reason for the delay, put forward by Mr. Cotter, is that the plaintiff considered it to be appropriate that losses arising from the sale of the property would be crystallised before the proceedings were progressed. The property in question was sold on or about 10 November 2014. If this be the case, I find it very hard to understand why there is no reference to any such sale in the Statement of Claim which was delivered on 31 July 2015, some nine months after the sale. There is reference to the sale of November, 2014 in the replies of the second named defendant's notice for particulars, dated 25 November 2015. This does not explain why, notwithstanding the delivery of the Defence in February, 2016, the plaintiff took no further steps to prosecute the action.
12. I am satisfied that the delay in this case has been both inordinate and inexcusable. The next issue which I must consider is where the balance of justice lies.
13. In her affidavit on behalf of the second named defendant, Ms. Anna-Maria Galavan refers to a fatal explosion that took place on 13 July 2013 in the second named defendant's office building. As a result, the only computer was destroyed and, as it was not backed

up, records were destroyed. In addition to the office – files, notes and documentation were also destroyed. The valuation report, the subject matter of the proceedings, was not recovered as were the second named defendant's notes in respect of the said report. Though this may create some difficulties in defending the action, it seems to be the case that Ms. Galavan was an author of the report and so should be in a position to give evidence as to the basis upon which the report was compiled. In any event, the explosion took place at a time before the proceedings had been issued, thus, any prejudice that may have arisen cannot be attributed to the delay on the part of the plaintiff. However, it is the case that were this action to proceed to a trial, witnesses on behalf of the second named defendant would, to an extent, have to rely on what opinions they gave and the reasons for them. It is now over ten years since the relevant report was furnished and there must be a significant risk that in that time period, and whatever period may elapse between now and the date of a trial, memories will have significantly dimmed.

14. I attach particular significance, as does Mr. Cotter in his affidavit on behalf of the plaintiff, to the fact that these are proceedings involving allegations of professional negligence. I refer, again, to the passage cited from Irvine J. in Flynn where she states: -

“(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.”

15. A further matter that has to be considered is whether the second named defendant has itself been guilty of delay or has acquiesced in the plaintiff's delay. I am satisfied that there has been no delay on the part of the second named defendant. Following the delivery of the Statement of Claim, the second named defendant served a notice for particulars which were replied to. Rejoinders were raised in respect of these replies on 12 January 2016 and the Defence was delivered on 10 February 2016. I cannot identify any delay on the part of the second named defendant. Following the delivery of the Defence, it was reasonable for the second named defendant to wait a period of time before issuing the within motion.

Conclusion

16. By reason of the foregoing, I am satisfied that the delay on the part of the plaintiff in prosecuting these proceedings was both inordinate and inexcusable. However, for the reasons stated, I am satisfied that the balance of justice lies in favour of granting the reliefs sought by the second named defendant and I therefore dismiss the proceedings.