THE HIGH COURT

[2021] IEHC 370

[2013 No. 2770 S]

BETWEEN

EMERALD HELICOPTOR CONSULTANTS LIMITED

PLAINTIFF

AND

KAM TIM NG

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 21st day of May, 2021.

Application

1. In the application before the Court the defendant seeks the following reliefs: -

    (i) An order pursuant to O. 122, r. 11 of the Rules of the Superior Courts, 1986, as amended, to dismiss the plaintiff's claim for want of prosecution; and

    (ii) Further, or in the alternative, an order pursuant to the inherent jurisdiction of the court to dismiss the plaintiff's claim in the interests of justice due to inordinate and inexcusable delay in progressing the proceedings.

2. The plaintiff opposes the application.

3. In the proceedings, commenced by summary summons on 29 August 2013, the plaintiff seeks a sum of some €127,416.29 which it alleges is due and owing by the defendant on foot of an agreement whereby the plaintiff agreed to carry out service repair and maintenance work to the defendant's helicopter and also provide hangarage for the said aircraft. In a Statement of Claim subsequently delivered by the plaintiff pursuant to an Order of the Court (Birmingham J., as he then was), the sum sought to be recovered was revised to €153,984.49.

Course of the proceedings

4. The following are the relevant steps that were taken in these proceedings to date: -

    - Summary summons, issued 29 August 2013 and served 16 October 2012;
    - 31 March 2014 – Motion for liberty to enter final judgment;
    - 20 October 2014 – proceedings remitted to plenary hearing by Birmingham J. (as he then was);
    - 12 November 2014 – Statement of Claim served;
    - 21 January 2015 – Defence and counterclaim served;
    - 23 February 2015 – reply to Defence and counterclaim;
    - 23 February 2015 – pleadings closed;

- 30 June 2015 – 6 January 2017 – discovery made by defendant following an Order of Court (Cross J.);
- 30 March 2017 – efforts to reach a negotiated settlement break down;
- 22 October 2018 – plaintiff files notice of intention to proceed;
- 26 November 2018 – plaintiff serves notice of trial and matter is set down for hearing;
- 16 September 2019 – plaintiff informs defendant that certificate of readiness is being prepared and seeks name of defendant's Senior Counsel for certification;
- 7 October 2019 – defendant's Solicitor seeks time to consider the file as she recently came to assist in the matter;
- 15 November 2019 – plaintiff sent reminder warning letter that certificate of readiness would issue;
- 2 December 2019 – plaintiff writes again concerning certificate of readiness and seeks identity of defendant's Senior Counsel; and
- 10 February 2020 – defendant's motion to dismiss issued.

5. As already referred to, these proceedings were remitted to plenary hearing by Birmingham J. on 20 October 2014. In the course of an affidavit filed in this application, Mr. Peter Gartlan, Solicitor instructed by the defendant, states that, giving the Court's ruling, Birmingham J. expressed the view that the issues raised were not such that the matter should be unduly delayed and that the case should be resolved sooner rather than later. According to Mr. Gartlan, Birmingham J. expressed the view that this was not a case that should be allowed to linger. The views expressed by Birmingham J. were reflected in the Order made by the Court on that date, which clearly sets out a timetable for the further steps to be taken in the proceedings. The Order of Court states: -

> "**IT IS ORDERED** that this action do stand adjourned for Plenary hearing the Plaintiff to be at liberty to deliver a Statement of Claim within **three weeks** from the date hereof or within such further time as may be agreed between the parties and the Defendant to be at liberty to deliver a defence within **four weeks** from the date of delivery of the Statement of Claim or within such further time as may be agreed between the parties any discovery motions to be issued within **three weeks** thereafter or within such further time as may be agreed between the parties."

It can be seen from the terms of the Order that the various times provided could be extended, but only *"within such further time as may be agreed between the parties".*

Principles to be applied

6. The test to be applied in an application such as this was set out in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. In brief, the Court must make decisions on the following: -

   (i) Was the delay complained of "*inordinate*";

   (ii) If it was inordinate, was it excusable; and

   (iii) If the delay complained of was both inordinate and inexcusable, does the balance of justice lie in favour of dismissing the proceedings.

7. In considering where the balance of justice lies, there have been numerous authorities, in particular from the Court of Appeal, which are of assistance. I refer to the following passage from the judgment of Irvine J. (as she then was) in *Millerick v. Minister for Finance* [2016] IECA 206, where she states: -

   "19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."

8. In an application to dismiss for want of prosecution, the Court has to consider what factor or factors are of sufficient import so as to amount to prejudice to tilt the balance of justice in favour of an order dismissing the proceedings. This matter was considered by Irvine J. (as she then was) in *Cassidy v. The Provincialate* [2015] IECA 74, where she stated: -

   "35. Having reflected upon many of the authorities in relation to the 'delay' *jurisprudence*, I am satisfied that the third leg of the *Primor* test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the *O'Domhnaill* test.

   36. While the *O'Domhnaill* test, *i.e*. is there a real risk of an unfair trial or an unjust result, is one of the factors which may be relied upon by a defendant in seeking to prove the third leg of the *Primor* test, the defendant relying on that test 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. ..."

   Thus, as the *Primor* test is applicable in this application, the defendant will have to satisfy the Court that it has suffered "*relatively modest prejudice*" arising from the delay complained of.

Application of principles

9. The first task of the Court on hearing an application such as this is to identify the relevant period of delay. Most litigation is subject to delay of some kind insofar as it is rarely the case that the times laid down by the Rules of the Superior Courts for taking various steps in proceedings are adhered to. In this case, we have a timetable that was set out in the Order of Birmingham J. and any departure from that timetable had to be with the agreement of both the plaintiff and the defendant. In January, 2017, the defendant served on the plaintiff its affidavit of discovery. It is very clear that the timetable set out by Birmingham J. was not being followed by either party, and the defendant cannot rely on any delay in that period given that it had clearly acquiesced in such delay. This being the case, I am satisfied that the relevant period of delay commences on 30 March 2017, when efforts to reach a negotiated settlement broke down.

10. It is necessary now to look at what steps were taken in the period 30 March 2017 to 10 February 2020, when the motion herein issued. This exercise has to be done against the background that this is not a particularly complex case and that all the relevant issues had been set out in affidavits from both parties in the application for summary judgment. Between 30 March 2017 and 22 October 2018, when the plaintiff served a notice of intention to proceed, the plaintiff took no step and the only explanation seems to be that he was out of the country working on contracts on a number of occasions, but only for short periods.

11. In the period 26 November 2018 to 16 September 2019, the plaintiff took no steps. On 16 September 2019, the plaintiff wrote to inform the defendant that a certificate of readiness was being prepared and sought the name of the defendant's Senior Counsel. The plaintiff maintains that such was necessary in order to comply with Practice Direction HC 75.

12. Practice Direction HC 75 states: -

> "5. With effect from 9th April, 2018 the party who desires to certify the proceedings as ready for trial and to seek a hearing date shall give a month's notice to the other parties of the intention to do so. During that period the parties must consult so as to ensure accurate completion of the Certificate of Readiness, particularly insofar as the duration of the trial is concerned."

It was clearly appropriate for the plaintiff to seek the name of the Senior Counsel who would be appearing for the defendant. However, when this name was not forthcoming there was nothing preventing the plaintiff from completing the certificate of readiness, as they had done what they could to "*consult*" with the defendant. This was understood by the Solicitor for the plaintiff, as in the letter of 16 September 2019 seeking the identity of the defendant's Senior Counsel he stated: -

> "In the absence of hearing from you within a period of 7 days from this date then our Counsel will proceed to issue a Certificate of Readiness on the basis that you have not revealed the identity of your Counsel."

Also, in this period the Solicitor instructed by the defendant was out of the office due to illness. However, this was only for a period of ten days, as is confirmed by exhibits both in the affidavit of the plaintiff and the Solicitor for the defendant.

13. What emerges from the foregoing is that there was a period between 30 March 2017 and 10 February 2020, a little short of three years, in which the plaintiff effectively took no steps to prosecute the action. Given the subject matter of the proceedings, and the fact that the Court in its Order of 20 October 2014 set out a timetable for the taking of various steps, this delay is inordinate. The excuses given of the director of the plaintiff being briefly out of the country on work and the failure of the defendant to identify its Senior Counsel fall well short of the being reasonable. Thus, I conclude that the delay identified was both inordinate and inexcusable.

14. I now have to consider where balance of justice lies. The Court has to consider whether the defendant has established "*moderate prejudice*". The affidavits grounding this application have been sworn by two Solicitors instructed by the defendant. Mr. Peter Gartlan states that the defendant's ability to ensure that necessary witnesses will be available to give evidence at the hearing of the action has been greatly hindered due to the passage of time and the plaintiff's ability to recall and give accurate evidence of the events, the subject of the Defence, *"is likely to have greatly diminished as 10 years have passed since the occurrence of such events*".

15. In my view, the foregoing does not establish even "*moderate prejudice*". Firstly, one might have expected that if recall was a problem there would have been an affidavit to that effect from the defendant himself. Secondly, reference is made to a period of ten years having passed; however, this period of time has to be looked at in the context of the defendant acquiescing in the delay until March, 2017. Thirdly, "*necessary witnesses*" have neither been identified (save for a Mr. Toporowski) nor have any facts been deposed as to any serious difficulties arising in their availability. Fourthly, all of these concerns as to prejudice have to be seen against the background of the various issues in these proceedings having been dealt with in affidavits filed in the application for summary judgment. Finally, the defendant's Solicitor would have attendances on the defendant whereby, if necessary, he would be able to refresh his memory.

Conclusion

16. By reason of the foregoing, I am satisfied that the defendant has not identified any prejudice as would tilt the balance of justice in favour of granting the order sought. However, I have found that the plaintiff's delay was both inordinate and inexcusable. This cannot continue and, with this in mind, I am listing this matter for mention on 7 October 2021 for the purposes of fixing a date for the hearing. Although the defendant has not been successful in its application, given the delay of the plaintiff, I propose reserving the costs of this application to the trial of the action. Should the parties seek an alternative order on costs, I will allow fourteen days for written submissions in respect of this.