

THE HIGH COURT

[2022] IEHC 355
[2012-11270-P]

BETWEEN

DERMOT O'BRIEN

PLAINTIFF

AND

**THOMAS J. BROOKS, RICHARD BARRETT AND VERONICA COLLINS (PRACTISING
UNDER THE STYLE AND TITLE OF COLLINS BROOKS AND ASSOCIATES SOLICITORS)**

DEFENDANTS

DECISION of Ms. Justice Bolger dated the 13th day of June, 2022

1. This is an application by the defendants to overturn a decision of the Master of the High Court of 18 May 2021 refusing to dismiss the plaintiff's claim for want of prosecution. For the reasons set out below I refuse the defendants' application.
2. The parties agree on the legal principles to be applied as developed by the Supreme Court in *Primor Plc v. Superintendent Foley* [1996] 2 IR 459 and by the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206 and *Cassidy v. Provinciate* [2015] IECA 74. The defendants must establish that the delay was both inordinate and inexcusable and that the balance of justice favours dismissing the proceedings. An important factor in determining the balance of justice will be the defendant's ability to prove that they would suffer prejudice, and even a modest prejudice may suffice.

Background

3. The plaintiff issued a plenary summons in person on 7 November 2012, claiming damages against the defendants arising from what he claims was their negligence and breach of duties in dealing with certain property transactions on his behalf in around 2007. On 22 April 2013, the defendants issued a motion to dismiss the plaintiff's proceedings for failure to deliver a statement of claim. A statement of claim was delivered on 20 May 2013. The defendants raised a notice for particulars on 6 June 2013 and later issued a motion seeking to dismiss the plaintiff's proceedings for failure to reply, which was heard on 16 December 2013. Time was extended for the delivery of replies. The plaintiff did not reply within the extended period, and the defendants had to issue a second motion to dismiss the proceedings for failure to reply, which came on for hearing on 12 May 2014, by which time the plaintiff had delivered his replies. The defendants delivered a defence on 4 December 2014, and sought voluntary discovery by letter dated 22 April 2015, to which the plaintiff did not respond. The plaintiff took no further steps until 16 November 2018, when he filed notice of his intention to proceed, and at that point in time he was legally represented. There was no further engagement from the plaintiff's solicitors until they sent a letter on 11 June 2019 seeking voluntary discovery, but did not give any reason for the category of documentation sought. The defendants claim that this request for voluntary discovery was inadequate. The defendants' solicitors wrote to the plaintiff's solicitors on 12 June 2019 reminding them of the defendants' request for voluntary

discovery, to which the plaintiff's solicitors replied by way of a holding letter dated 27 June 2019. The defendants' solicitors responded to that by letter dated 3 July 2019, setting out the protracted nature of the proceedings. At that point in time, seven years had elapsed since the issuing of proceedings, during which time the defendants maintained that the plaintiff had taken no steps in the proceedings since he delivered a statement of claim in May 2013. The defendants issued the within motion to dismiss on 8 October 2019.

4. The defendants have identified four separate periods of delay as follows.
 - (i) Pre-commencement delay from 2007 to 2012. The defendants do not move directly on this delay but, in reliance on the decision in *Stevens v. Flynn* [2008] IESC 4, contend that the plaintiff was under a particular obligation to prosecute his proceedings with expedition, as there had already been a long delay prior to the inception of the proceedings.
 - (ii) November 2012 to May 2014, a period of some three and a half years. The plaintiff describes this delay as "procedural skirmishes".
 - (iii) A lengthy period of delay of some four and a half years from 14 November 2014, from when the plaintiff wrote his warning letter in relation to the defence which led to the filing of the defence on the 4 December 2014, until the plaintiff sought voluntary discovery by letter dated 11 June 2019. The defendants contend that the notice of intention to proceed filed by the plaintiff's solicitors on 15 November 2018 does not constitute a step in the proceedings and relies in this regard on the decision of Fennelly J. in *Anglo Irish Beef Processors Ltd and DJS Meats Ltd v. Montgomery and Others* decision of 31 July 2002, where Keane C.J. described as correct the decision of the trial judge to reject the submission that either a notice of intention to proceed or a notice of a change of solicitor constituted a proceedings for the purposes of the rules. The defendants rely on the decision of Ní Raifeartaigh J. in *McAndrew and Egan* [2017] IEHC 346, in which a delay for a period of four years and one month was found to be inordinate.
5. The plaintiff does not seriously challenge that the delay of some four and a half years was inordinate, but seeks to excuse the delay taken to deliver his statement of claim in March 2013 by reference to the complexity of the issues, and of dealing with the 32-paragraph notice for particulars. He says he encountered difficulties in securing an accountant's report, and that there were issues arising from the retirement of his financial advisor. He seeks to rely on his status as a lay litigant until 2018. The plaintiff lays heavy emphasis on the defendants' conduct and the defendants' letter of 22 April 2015, which he says he has no recollection of receiving. He says he never agreed to make discovery in respect of the categories contained in that letter, and he criticises the defendants for not having issued the motion which was threatened in that letter. He highlights that the defendants in their letter of 12 June 2019 did not warn that they were going to issue a motion to strike out the entire proceedings for delay, but instead as recently as June 2019 indicated that they would be pursuing discovery by way of motion. The plaintiff says the defendants

did not signal their intention to issue a motion to dismiss for want of prosecution but simply indicated that he should agree to the discovery to avoid a motion. He also highlights the absence of any prejudice asserted by the defendants in their letter. However, the plaintiff does not identify any reason why he did not instruct his solicitor until 2018, or why he had difficulties in obtaining the assistance of an accountant.

Is the delay inordinate?

6. There has been inordinate delay by the plaintiff in progressing his proceedings. I accept that he was obliged to move expeditiously in progressing his proceedings given the fact that he issued his proceedings very close in time to the statutory limitation period. He did not do so. A period of delay of four and a half years, whether viewed on its own or in addition to a previous delay of three and a half years, is undoubtedly inordinate as confirmed by Ní Raifeartaigh J. in *McAndrew v. Egan*.

Was the delay excusable?

7. I do not accept that the plaintiff's status as a lay litigant constitutes an excuse for his delay. It is clear from the pleadings, which he drafted and filed on his own without legal assistance, that he was able to formulate his claim and comply with the rules. The plaintiff does not identify any reason why he did not or could not instruct solicitors until 2018.
8. The plaintiff describes the second period of delay of some three and a half years as procedural skirmishes. That does not constitute a valid excuse for such a lengthy period of delay.
9. The subsequent period of delay of some four and a half years is not excused by the plaintiff's claim to have had unexplained difficulties in securing an accountant's report or unexplained issues arising from the retirement of his former financial broker. The defendants' conduct at that time does not constitute acquiescence in the delay and in that regard I follow the decision of Irvine J. (as she was then) in the Court of Appeal decision in *Flynn v. The Minister for Justice and Others* [2017] IECA 178. The same judge in *Millerick v. the The Minister for Finance* held that the conduct of both parties to the proceedings has to be examined, but that the conduct of the litigation by the plaintiff is the primary focus of attention. Irvine J. held at para. 36 that "A defendant does not have an obligation to bring the proceedings to hearing".
10. In all of the circumstances I do not accept that the plaintiff has excused the inordinate period of delay that has occurred.

The balance of justice

11. Having found that delays occurred which are both inordinate and inexcusable, the court must consider where the balance of justice lies. A significant factor in this exercise is identifying any prejudice that the defendants will suffer if the proceedings are to continue and the extent to which the defendants have established that they are at real risk of an unfair trial due to the delay.
12. Irvine J. (as she then was) in her decision in *Millerick* confirmed that "modest prejudice" is sufficient. The plaintiff challenges whether this analysis is consistent with the principles

set out by the Supreme Court in *Primor*. Whether modest prejudice is sufficient or not, it is necessary to examine the precise prejudice the defendants claim they will suffer, in circumstances whether the burden of proof rests on the defendants to establish that prejudice.

13. The defendants state on affidavit that the evidence of any witnesses available to give evidence on their behalf will be significantly undermined by the inordinate passage of time, and will affect the accuracy of the recollection. They also say that the solicitor who dealt with the plaintiff's files, Ms. O'Donovan, has long since retired from the defendants' legal practice (although it is not suggested that she is not available to them). The defendants state that it is likely the significant bank documentation and possibly bank officials relevant to the proceedings will be unavailable for the hearing. Finally, the defendants state that their professional reputation has been damaged by having a claim for professional negligence hanging over them over a considerable period of time.
14. Issues arose in the course of the hearing as to whether this is a purely documents case or not. The plaintiff said on affidavit that the court should note the importance that the correspondence, records, and similar such documents would play in the case that he has advanced. He describes the case as one which will undoubtedly be dominated by contemporaneous documents and records kept or sent by his former solicitors, and he asks the court to consider the importance of documentary evidence in this case when weighing or assessing any allegation in generalised prejudice. In contrast the defendants say that there will be testamentary evidence required including that of the solicitors who advised the plaintiff and bank witnesses. The defendants state on affidavit that it is "possible" that bank officials relevant to the proceedings will be unavailable for the hearing. However, nothing has been put on affidavit of any attempt made by or on behalf of the defendants to secure the availability or establish the non-availability of those witnesses, or to have secured a record of their evidence when the proceedings issued and when recollections may have been clearer.
15. This is not a case where any potential witness has been identified as having died, as being unavailable, or whose recollection has been adversely affected by medical difficulties, as occurred in decisions such as *Mulligan v. Wilkie and Flanagan Solicitors* [2019] IEHC 289.
16. The defendants did not query the identity of the bank personnel, referred to by the plaintiff in general terms, when they raised a notice for particulars, but rather only sought copies of correspondence, notes, memoranda, or telephone conversations, or notes of same made between the plaintiff and the bank or its representatives.
17. The plaintiff relies on the Court of Appeal decision in *Sullivan v. HSE* [2021] IECA 287 in which, despite the death of a witness and the unavailability of certain records, the court allowed proceedings to continue after delays of between three and a half and four and a half years, which the court accepted was inordinate.

18. The court has also had regard to the decision of the Supreme Court in *Mangan v. Dockery* [2020] IESC 67, where proceedings were allowed to continue in spite of very lengthy delays.

Conclusions

19. The delays in this case are both inordinate and inexcusable. However, I do not consider that the balance of justice lies in favour of dismissing the proceedings, as I do not consider the defendants have identified any sufficient prejudice arising from that delay such as may give rise to an unfair trial. Even though I accept that modest prejudice would be sufficient, I do not consider the defendants have identified even modest prejudice. The fact of a delay must, in any event, be balanced against the prejudice that the plaintiff will suffer if he is to be denied the opportunity to make his case.
20. This is a case in which the documentary evidence will be significant albeit it will not be the only source of evidence.
21. There is no evidence presented by the defendants as to why any of their witnesses may be unavailable, or of any attempts to address any such difficulties from when they were first made aware of these proceedings. I am not satisfied that the defendants have established sufficient evidence of a risk they will suffer an unfair trial that could outweigh the prejudice to the plaintiff of striking out these proceedings.
22. I find support for this approach in the decisions of the Court of Appeal in *Sullivan* and of the Supreme Court in *Mangan*, where proceedings were permitted to continue in spite of very lengthy periods of delay.
23. I refuse the defendant's application to dismiss.

Indicative view on costs

24. My indicative view on costs is that the plaintiff, having succeeded in defending the application to dismiss, is entitled to his costs. I will fix the matter for hearing at 10 am on 17 June to enable the parties to make such further submissions as they wish to make in relation to costs and/or whatever final orders require to be made. I do not require written submissions.