

**THE HIGH COURT**

[2022] IEHC 368

**[2012/3684 S]**

**BETWEEN**

**ADRIAN O'DOHERTY PRACTISING UNDER THE TITLE AND STYLE OF  
MCENTEE & O'DOHERTY SOLICITORS**

**PLAINTIFF**

**AND**

**MARTIN FINNEGAN AND MICHELE FINNEGAN**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Bolger delivered on the 17th day of June, 2022**

1. This is the defendant's application to dismiss the proceedings for delay. The court must establish: -

- (1) Has there been inordinate delay?
- (2) If so, is that delay excusable?
- (3) If the delay is both inordinate and excusable, does the balance of justice lie in favour of dismissing the proceedings?

**Background**

2. The plaintiff is a solicitor who was engaged by the defendants to act for them in High Court proceedings arising from defects in the construction of their home. The defendants settled that case by direct engagement with one of the other party's solicitors for an all-in amount (i.e. inclusive of compensation and costs) of approximately €317,000 from which the defendants agreed to pay €53,000 towards the costs of one of the other parties. The defendants did not make any payment to the plaintiff in respect of his costs or the expenses he had incurred on outlay, counsel and engaging expert witnesses.
3. The plaintiff furnished a final bill of costs to the defendants on 17 July 2007, which the defendants declined to pay. The plaintiff referred that bill to taxation and a lesser amount was allowed by the Taxing Master. The defendants refused to pay those costs and the plaintiff issued these proceedings by way of summary summons on 27 September 2012, seeking judgment in the amount of €183,971.56, being the amount allowed on taxation less some small payments that the defendants had paid on account in 2004 and 2006, along with interest and costs.
4. There has been considerable delay in progressing this claim, none of which is attributable to the defendants and some of which is acknowledged by the plaintiff as having been due to him and some of which he says were due to administrative difficulties he experienced with the Taxing Masters Office. During all those periods of delay, the plaintiff was engaged in correspondence with the defendants and filed a number of notices of intention to proceed (on 1 September 2014, 16 November 2015, 20 June 2017, 11 October 2018 and 14 October 2019). Whilst the plaintiff accepts that those notices do not constitute

pleadings, it is clear that they, along with the plaintiff's correspondence, served to make the defendants aware at all times of the plaintiff's intention to proceed with this claim.

5. The periods of delay can be categorised as follows:
  - (i) 2014-2017. The plaintiff says this was due to his inability to pay stamp duty of approximately €7,000 until 2017 which meant he could not extract the certificate of taxation.
  - (ii) 2017-2020. The plaintiff says this not of his making but was due to administrative issues in the Taxing Masters Office which delayed him in taking up the certificate of taxation. The defendant contends this delay would not have happened had it not been for the plaintiff's earlier delay.
  - (iii) March 2020 to the date of this application. The plaintiff says this delay was due to covid restrictions.
6. The certificate of taxation was eventually made available to the plaintiff by the Taxing Masters Office on the day of the hearing of this motion (17 February 2022), and the plaintiff's counsel confirmed the plaintiff's intention to discharge the payment due as soon as possible, and to file the motion seeking liberty to enter final judgment within two weeks thereafter.
7. The defendants made two separate complaints to the Law Society in relation to the plaintiff, neither of which were upheld. The defendants have also engaged with the media and, according to the plaintiff, have engaged in an online campaign of unfair and defamatory criticism of the plaintiff.

#### **The defendants' submissions**

8. The defendants suffered considerable stress as a result of the defects in their house and the uncertainty that this caused for them, which was the subject matter of the proceedings they engaged the plaintiff to bring for them. They say that their stress has been exacerbated by the plaintiff's delay in progressing these proceedings. The defendants intend to defend and counterclaim for what they say was the plaintiff's negligent advice to them and they exhibited a three-page chronology of events which they say will form the basis of their defence and counterclaim. Most of their chronology refers to letters, file notes and other documents. The defendants believe there will be significant disputed recollection in relation to the matters set out in the chronology and that this will make it difficult for them to obtain a fair trial on those issues after so many years. They do not identify any other witnesses they intend to call and do not specify the basis for their belief that there will be disputed recollections over the matters set out in their chronology.
9. The defendants rely on the dicta of Irvine J. (as she was then) in *Millerick v. Minister for Finance* [2016] IECA 206 in which she stated:

“In the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings”.

10. The defendants argue that the fact they are uninsured, in itself, constitutes prejudice and rely on the decision of the Supreme Court in *Mangan v. Dockery* [2020] IESC 67 at para. 137:

“Then there is the insurance issue, an important factor and one which was determinative for two of the defendants in *McBrearty*. These two “personal defendants”, so described by the learned judge, were doctors who were no longer indemnified and thus faced a potentially huge financial burden, should the action succeed against them. Geoghegan J. felt that the trial judge had overlooked the “*enormity of the worry and upset this would cause*” (pg. 46) and that this made their continuing involvement in the action fundamentally unfair. The final defendant was the Health Board, for which no similar prejudice existed, thus the plaintiff was permitted to continue against it.”

#### **The plaintiff’s submissions**

11. The plaintiff acknowledges his role in the delays that occurred between 2014-2017 and seeks to excuse other delays by reference to the matters set out at para. 5 above. He disputes that any of those periods of delay were inordinate or that the defendants have identified any actual prejudice. He argues that even if the defendants are permitted to file a counterclaim taking issue with how they were advised and represented by the plaintiff, that the plaintiff’s delay will not impede them from making that case, which will be made almost entirely by reference to the documentation and an expert’s report from an examination of the file, which remains intact and available to all. He contends that the balance of justice is therefore in favour of the continuation of the proceedings.
12. The plaintiff relies on the dicta of McGuinness J. in *Carroll Shipping Limited v. Mathews Mulcahy & Sutherland Limited* [1998] IEHC 46 at para. 11: “Where matters are at issue which are not, or are not fully, covered by documentary evidence, there is a greater likelihood of prejudice resulting from delay”. The plaintiff relies on *Truck & Machinery Sales Limited v. General Accident Fire and Life Assurance Corporation plc.* [1999] IEHC 201; *Dunne v. ESB* [1999] IEHC 199; *Campbell-Sharp Associates Limited v. NBNI JV Limited* [2013] IEHC 470 and *Permanent TSB Finance Limited v. Orcona Limited* [2014] IEHC 541 as examples of document heavy cases that were allowed to proceed in spite of periods of delay.

#### **Decision**

13. The basis on which this court will exercise its inherent jurisdiction to dismiss proceedings for delay is well established by the decisions of the Supreme Court in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and *O’Domhnaill v. Merrick* [1984] IR 151. The defendant must establish that a plaintiff has been guilty of inordinate and unreasonable delay such as gives rise to a substantial risk of an unfair trial and/or serious prejudice to them. The assessment of prejudice must include a consideration of “where justice falls” (as per McKechnie J. in *Mangan v. Dockery* [2002] IESC 67).

14. The delay in this case occurred from 2012 to date. A delay of eight years is inordinate. Nevertheless all of the delays since 2017, when the plaintiff was finally able to pay the stamp duty, are excusable as they were due to circumstances outside of the plaintiff's control. The fact that the delay may be a continuing consequence of the delay from 2014-2017, for which the plaintiff is responsible, does not prevent the post-2017 delay being excused.
15. The period of delay from 2014-2017 is also excusable by the plaintiff's cash flow problems given that some of those problems must have been contributed to by the defendants' failure to pay the costs they had incurred in their High Court proceedings, including any expenses such as outlay and expert witness costs that may have been paid out by the plaintiff from his own resources.
16. As the entirety of the delay that has occurred in this case is excusable, it is not necessary to consider prejudice and the balance of justice test. However, in the event that I am incorrect in my view that the entire period of delay is excusable, I will proceed to consider the balance of justice.
17. The test was applied relatively recently by the Supreme Court in *Mangan v. Dockery* [2020] IESC 67 where an application to dismiss proceedings for delay was unsuccessful. I have previously cited this decision in *Hennessy v. Ladbrooks Payments (Ireland) Ltd & Anor.* [2022] IEHC 60 where I stated at paragraph 26.

"The proceedings, in which damages were claimed for medical negligence, were commenced in 2008 arising from the circumstances of the plaintiff's birth in 1995. Two co-defendants were joined in 2016 and in 2017 they brought motions to have the proceedings dismissed on grounds of delay. McKechnie J. reiterated the well-established case law and set out a number of points consistently made therein, including at paragraph 109 (iv):

'the existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.'

McKechnie J. cited the following passage in the judgement of McKechnie J. in *Calvart v. Stollznow* [1980] 2 NSWLR 749, which was approved by Murphy J. in *Hogan v. Jones* [1994] 1 ILRM 512:

'Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice.'

McKechnie J. acknowledged that the overall time in that case being some 25 years since the event complained of occurred 'may seem stark on its face' but she concluded that a 'lengthy frontline period in and of itself may not necessarily be fatal. A more detailed examination of the circumstances, such as excusability, prejudice and the like, including where justice falls, is always essential' (at paragraph 134). He found

that there was not a serious risk of an injustice being done 'whereas the undoubted prejudice to the plaintiff would be enormous. In any event, there is a continuing obligation on a trial court to ensure that fair procedures and constitutional justice is always adhered to.' He therefore held that it was not justified to terminate the proceedings without a hearing on the merits at that point in time (at paragraph 146)".

18. In applying that test to the facts of this application, I do not consider that the defendants have established that the passage of time gives rise to a substantial risk of an unfair trial, particularly given the documentary nature of their proposed defence and counterclaim, as evidenced by their chronology they have exhibited, which refers in the most part to documentation. The chronology does not identify any matter on which the defendants will be relying solely on their recollection of events that took place many years ago. Even if they do have to rely on such recollection in giving their evidence, they have been aware of the proceedings since 2012 and have had ample time since then to prepare for their defence, counterclaim, and the presentation of their evidence to support the case they wish to make. The defendants have not identified any specific matter on which their recollection is unclear or unreliable, or any basis for their apparent belief that their recollection of events of what took place long ago will be disputed. They cite no reason, such as medical issues or very advanced age, why any witness' recollection may be unreliable.
19. I am also satisfied that the application of the balance of justice test favours a finding in favour of the plaintiff having regard to the level of prejudice that the plaintiff will suffer if the proceedings are dismissed and he is not permitted to assert his claim against the defendants. The defendants do not dispute that the plaintiff acted for them in their High Court proceedings and that they received substantial settlement monies from their direct settlement of that case, from which they chose not to discharge the costs their solicitor had incurred in bringing the case. The defendants argue that this was due to their dissatisfaction with the plaintiff's work on their behalf. However, it is the quality of the work rather than the existence of it that they dispute. They do not identify any criticism of the work done by junior counsel, senior counsel, or the expert witnesses the plaintiff engaged on the defendants' behalf, all of whose costs are included in the claim for monies due that the plaintiff has instituted in these proceedings. I am therefore satisfied that a far more significant prejudice would befall the plaintiff if the proceedings were to be struck out at this stage, than will fall to the defendants if the proceedings are permitted to continue, subject to all reasonable steps being taken by the plaintiff at this stage to expedite the litigation as much as is possible.
20. I do not consider the defendants' status as an uninsured person to be relevant to determining prejudice. The case law to which I was referred, namely *Mangan v. Dockery* [2020] IESC 67 and *McBrearty v. NWHB* [2010] IESC 27 related to defendants whose professional indemnity had lapsed due to the passage of time. A defendant who has lost the benefit of insurance due to a plaintiff's delay might be able to identify that as a tangible prejudice arising from the delay. Here the defendants were never insured, and

whilst the prospect of being liable to the plaintiff for the large sums of money being claimed must be stressful for them, that is a consequence of the litigation and not of the delay. The defendants' uninsured status has not changed since 2012 and that is not, therefore, evidence of prejudice arising from the delay such as might tip the balance of justice in favour of striking out the proceedings.

21. In relation to the defendants' application for relief pursuant to O.122, r.11, I did not understand the defendants to be pursuing that relief separately to the general points made by the defendants in relation to delay and the inherent jurisdiction of the court. If I am wrong on that then I note that the jurisdiction afforded by O.122, r.11 is a discretionary one and for the same reasons as I outline above in relation to the excusability of the delay, the absence of prejudice and the application of the balance of justice test, I refuse that aspect of the defendants' application also.

### **Conclusions**

22. I am refusing the application to strike out the proceedings for delay. Whilst the period of delay is inordinate, I am satisfied that it is excusable. I am not satisfied that the defendants have established prejudice from the delay, particularly given the documentary nature of their defence and proposed counterclaim. The balance of justice is in favour of allowing the proceedings to continue given the greater prejudice that would be suffered by the plaintiff if they were to be dismissed. This is subject to the plaintiff's undertaking to file their motion for liberty to enter final judgment within two weeks of taking up the certificate of taxation and also to the plaintiff's additional undertaking (similar to that given to the court in *Truck and Machinery Sales Limited v. General Accident Fire and Life Assurance Corporation plc* [1999] IEHC 201) not to seek interest in respect of the period of delay attributable to the plaintiff, which I determine here to have been the period between 2014-2017.

### **Indicative costs**

23. My indicative view is that costs should follow the cause and that the plaintiff is entitled to the costs of defending this application from the defendants with execution of any costs order to be stayed pending the outcome of the proceedings.
24. The matter will be listed before me for mention at 10 a.m. on 6 July to allow the parties to make such further oral submissions as they wish in relation to the costs and the final orders to be made. I am not requiring written submissions but if the parties do wish to make them they should be lodged with the court at least 24 hours before the matter is back before me.