THE COURT OF APPEAL

UNAPPROVED

Record Number: 2023 189
High Court Record Number: 2012/6734P
Neutral Citation Number [2024] IECA 4

Noonan J.

Binchy J.

Meenan J.

BETWEEN/

NOEL BEGGAN AND SIOBHAN BEGGAN

PLAINTIFFS/RESPONDENTS

-AND-

MICHAEL DEEGAN, DYMPHNA DEEGAN, MERLON CONSTRUCTION LIMITED, BRIAN O'ROURKE, PAUL O'TOOLE, McORM LIMITED AND LIBERTY CORPORATE CAPITAL LIMITED T/A PREMIER GUARANTEE FOR IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered *ex tempore* on the 11th day of January, 2024

1. The plaintiffs reside at a dwelling house at 57 Ryebridge Avenue, Kilcock, County Kildare which they purchased as a new build in 2006. Unfortunately, pyrite was used in the construction of the house which subsequently led to structural defects. These appear to have become manifest as a result of cracking emerging in 2011. These proceedings were commenced in 2012. This appeal concerns an application to dismiss on grounds of delay brought by the fourth, fifth and sixth defendants ("the defendants") who are architects and

an architectural firm respectively. The defendants are alleged to have been involved in the design and construction of the house and in addition, the fourth and fifth defendants are alleged to have provided an architect's opinion on compliance with planning permission and/or exemption from planning control in respect of the house.

2. In basic summary, the plaintiffs allege that the defendants were negligent both in terms of the design and their involvement in the construction of the house as well as in the provision of the opinion on compliance. In substance therefore, these proceedings claim damages for negligence against the defendants arising out of their professional involvement in the design, construction and certification of the house. The defendants deny all allegations against them.

3. The relevant chronology of the proceedings to date is as follows:

- 9th July, 2012 - The plenary summons was issued but not served on the defendants until almost a year later on the 2nd July, 2013.
- 24th May, 2013 - The statement of claim was delivered but presumably on these defendants on the date of service of the summons or later.
- 12th August, 2013 - The defendants served a notice for particulars.
- 22nd November, 2013 - Replies to particulars were delivered by the plaintiffs.
- 27th February, 2014 - The defendants delivered their defence.
- 26th March, 2014 - Further replies to particulars were delivered by the plaintiffs.
- 7th March, 2016 - The defendants obtained an order for discovery on this date.
- 8th November, 2016 - The plaintiffs sought voluntary discovery from the defendants.

- 2nd December, 2016 - The plaintiffs' solicitors sent a reminder letter warning that a motion would be brought after 21 days.
- 6th December, 2016 - The defendants' solicitors replied stating they were taking instructions from their clients and expected to revert in early course.
- 21st February, 2017 - The plaintiffs made discovery.
- 19th June, 2018 - The plaintiffs' solicitors sent a reminder concerning discovery.
- 10th February, 2020 - The plaintiffs sent a letter threatening a motion for discovery within 21 days in default of a reply.
- 6th March, 2020 - The plaintiffs served a notice of intention to proceed.
- 8th March, 2020 - The plaintiffs proposed mediation.
- 30th April, 2021 - The plaintiffs served a second notice of intention to proceed.
- 10th September, 2021 - The plaintiffs' solicitors re-sent the letter seeking discovery.
- 14th February, 2022 - The defendants' present solicitors served a notice of change of solicitor on the plaintiffs' solicitor.
- 11th April, 2022 - The within motion to dismiss was issued.

The Affidavit Evidence

4. The application is grounded upon the affidavit of the defendants' solicitors, Mr. Hugh Millar. In his affidavit, Mr. Millar sets out the chronology including most, but not all, of the matters set out above. He says that the issue of discovery has not been pursued by the plaintiffs and there has been no substantive activity in the case since the plaintiffs swore an affidavit of discovery on the 21st February, 2017, over five years prior to the issue of the

motion. As is apparent from the chronology as I have set it out above, that is a matter significantly in dispute between the parties.

5. Mr. Millar avers that the allegations against the defendants are of negligence in the course of their professional work and he says (at para. 7):

> *"These allegations have been hanging over these defendants since the institution of the proceedings on the 9th July, 2012, with resulting adverse reputational implications for these defendants. I say and believe, and I am advised by these defendants that the existence of the proceedings is an issue which must be reported by them annually on the renewal of their professional indemnity insurance policy and it is having an adverse effect on them."*

6. Mr. Millar does not identify what that adverse effect is and, in particular, does not appear to suggest that the defendants have incurred additional premia as a result of the existence of these proceedings. That is the extent of the prejudice to the defendants identified in Mr. Millar's first affidavit.

7. This affidavit was replied to by the plaintiffs' solicitor, Mr. Richard Bowman. He complains that the defendants' original solicitors, Pembroke Solicitors, remained on record as far as he was aware throughout and no notice of change of solicitor was ever served. This is disputed by Mr. Millar in a subsequent affidavit where he deposes that he served a notice of change of solicitor on Mr. Bowman and identifies the details of that with particularity which are not subsequently contradicted. Little turns on this however as the relevant events relied upon by the defendants appear all to have occurred prior to Mr. Millar's involvement.

8. With regard to delay, Mr. Bowman contends that much of the delay was caused by the defendants, whose solicitors never responded to repeated requests and reminders for

discovery from the defendants with the sole exception of their letter of the 6th December, 2016 saying they were taking instructions and would revert in early course. Mr. Bowman thus suggests that much of the delay was in fact caused by the defendants rather than the plaintiffs. Mr. Bowman also refers to the fact that he sought mediation on two occasions in 2020 and 2021 and this appears to have gone nowhere. He refers to other events concerning the seventh defendant which are not material to these defendants. Mr. Bowman says that he did not motion any of the parties because he was endeavouring to foster goodwill with a view to ultimately attempting to resolve the matter. Mr. Bowman also refers to difficulties arising from the pandemic and the fact that he contracted Covid on two occasions during the period described above. While he accepts that there was delay, he disputes that it was inordinate or inexcusable and also avers that the defendants have not been prejudiced by the delay.

Judgment of the High Court

9. The motion judge delivered an *ex tempore* judgment recorded on the Transcript. Having set out the facts, the judge said that counsel for the defendants identified four periods of delay and these were as follows:

(1) From July 2012 to July 2013, a one year period between the issuing of the summons and its service. This delay is unexplained.

(2) From March 2014 to November 2016, being the period of two and a half years between the defendants delivering their defence and the plaintiffs seeking discovery which is again unexplained.

(3) This is the period of four and a half years from March 2017 when the plaintiffs made discovery to September 2021 when they re-issued their letter seeking voluntary discovery against the defendants.

(4) The period from September 2021 to the issue of the motion on the 11th April, 2022.

10. Suffice it to say that in considering each of these, the judge came to the conclusion that overall, there had been both inordinate and inexcusable delay on the part of the plaintiffs. Counsel for the plaintiffs fairly conceded today that he was not disputing this finding. On the issue of excuseability, with reference to Mr. Bowman's affidavit, the judge said that regarding the first period, there was no explanation. Regarding the second, again there is no explanation. In respect of the third, the judge noted that there was a dispute as to who was at fault in relation to the delay caused during the discovery process. With regard to the fourth period, the judge said that there was an explanation proffered by Mr. Bowman that mediation was being sought but the judge did not accept that this was a valid excuse for parking the proceedings. She was of the same view in relation to the suggestion by Mr. Bowman that he was trying to foster goodwill between the parties.

11. In discussing the third period, the one concerning discovery by the defendants, the judge expressed the view that it was not adequately explained by the plaintiffs and they could not avoid responsibility for not pursuing the matter for what appears to be the best part of five years. However, at the same time, the judge did observe that, looking at the correspondence, it was undoubtedly the case that the defendants had failed to respond to the plaintiffs' requests for discovery and had they done so, they would have been in a better position to seek to dismiss the claim. The discovery here was particularly important and, as the judge said, vital to the running of the case and although the plaintiffs had delayed

significantly, she had to factor in the defendants' conduct also which in her view had contributed to the delays. She found it significant that the defendants had advanced no reason as to why they had not responded to the requests for discovery from the plaintiffs.

12. She felt that even where there was equal culpability on this issue as between the plaintiffs and defendants, this must be relevant to the balance of justice which she had to assess. In her assessment of that balance, the judge had regard to relevant authorities including the judgment of Collins J. speaking for this Court in *Cave Projects Limited v Gilhooley & Ors* [2022] IECA 245. On the issue of prejudice, the judge considered that there was little evidence of prejudice on the part of the defendants from the delay. She felt that the case was likely to be primarily a documents case.

13. Referring to Mr. Millar's affidavit concerning the question of prejudice, the judge felt that these were not detailed averments and there was nothing to identify for example any additional cost to the defendants in relation to their insurance. Similarly, there was no specification of the alleged adverse reputational implications for the defendants. Nor was there any suggestion of the absence of any witnesses or relevant documents which would enable the defendants to properly defend the matter.

14. She did not consider that the oral evidence would be particularly important, and in this context, I think the judge was clearly referring to evidence of oral conversations relevant to the matter between the parties. Therefore, she considered that the argument that memories would have dimmed was not a particularly forceful one in the context of this being a documents case. She was of the view that because of this, it was unlikely that there would be any significant prejudice by the lapse of time to the defendants.

15. The judge's overall conclusion was that the balance of justice required that she refuse the application although she did so, as she described it, by a very narrow margin.

Delay

16. Applications to dismiss claims for delay are among the most common dealt with by the courts. Consequently, there is a great deal of jurisprudence on the topic with new decisions emerging frequently. These are not always easy to reconcile. Indeed, it is notable from the submissions of the parties in this appeal that the perceived tension in some appellate judgments has led the High Court in at least one case to adopt the approach that, in case of conflicting decisions, the more recent judgment is to be preferred.

17. This appeal provides a good example with each side arguing persuasively that different cases support the outcome they seek. With so many judgments to choose from, one has to be cautious in placing reliance on isolated statements that may appear to support one side or the other.

18. This case is concerned with the *Primor plc v Stokes Kennedy Crowley* [1996] 2 I. R. 459 line of jurisprudence as distinct from that arising under *O'Domhnaill v Merrick* [1984] I.R. 151. To succeed under the latter, a defendant must demonstrate that there is a real risk that a fair trial can no longer be had. Under *Primor* however, it has been said repeatedly that moderate prejudice short of that may suffice. It seems clear therefore, that under *Primor*, a case may be dismissed even though a fair trial is still possible. One would have thought that for a plaintiff to suffer the draconian remedy of having their case dismissed, notwithstanding that a fair trial is still available, the level of prejudice suffered by the defendant as a result of delay, even if described as *"moderate"*, must be significant enough to make it unfair to the defendant for a trial to proceed.

19. This is recognised in *Primor* where Hamilton C.J. held that one of the factors relevant to the assessment of the balance of justice was *"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." As Collins J. put it in *Cave,* proceedings should not be dismissed unless it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant – at p. 37.

20. Of the types of prejudice that may suffice, clearly fair trial prejudice is the most important. Thus, a defendant may not be able to establish a real risk of an unfair trial, but nonetheless show that it has become more difficult to defend the claim and it would be unfair to ask the defendant to bear that additional burden, a burden caused by the plaintiff's default.

21. Generalised prejudice is often claimed to arise by reason of the impact on memory of the passage of time and this is obviously an important consideration for the resolution of disputed events solely or mainly dependent on oral evidence of recollection. In what are commonly referred to as *"documents"* cases, this factor assumes considerably less importance. In such cases, the resolution of the issue turns primarily on the interpretation of documents, so that the role of recollection based oral evidence is substantially reduced.

22. Other types of prejudice that often arise are damage to reputation and business, the ongoing stress of litigation or perhaps financial loss occasioned by having to meet additional professional indemnity insurance costs by virtue of the extant claim.

23. In the case of non fair trial prejudice, it must be borne in mind that in most such cases, the prejudice complained of will often have arisen by the mere commencement of proceedings and what is really in issue is the prolonging of that prejudice beyond the point where it ceases to be a fair and normal incident of the litigation.

24. The cases tend to show that such non fair trial prejudice rarely, if ever, suffices on its own to warrant dismissal and more often than not, is an additional factor to be placed on the

scales alongside fair trial prejudice in the court's assessment of where the balance of justice lies.

The Appeal

25. Turning to this appeal, the defendants make two submissions which merit particular attention. The first is that a finding of moderate prejudice should justify the dismissal of the proceedings, in the absence of what are described as countervailing factors. I do not think this can be correct in principle. The authorities show that moderate prejudice may suffice, which is quite different. What constitutes moderate prejudice is of course always, as here, a matter of debate but as I have said, it must be prejudice sufficient to make it unfair to call on the defendant to meet the case at trial. If such unfairness is not established, it is difficult to see how the balance of justice could favour dismissal.

26. The second point that warrants comment in the submissions is that in looking at the defendant's conduct, only culpable delay is relevant, and in this context, the defendants suggest that this means procedurally culpable delay. So, it is said by the defendants that where the ball is not in their court to take some procedural step, any inactivity on their part is to be disregarded. It is true that there are some statements to be found in the jurisprudence which appear to support this submission. However, acquiescence as distinct from culpable delay is long recognised as a relevant factor, for example in *Flynn v Minister for Justice* [2017] IECA 178, relied upon by the defendants. *Flynn* identifies three aspects of a defendant's conduct that may be relevant being culpable delay, acquiescence and implicitly encouraging the plaintiff to pursue the claim. It might be thought that acquiescence is therefore something different from implicit encouragement and other authorities, most notably *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2012] IESC 50, appear to support such an approach.

27. I sought to address this to some extent in the judgment of this Court in *McCarthy v The Commissioner of An Garda Síochána and Ors* [2023] IECA 224 in the section of the judgment captioned *"Sleeping dogs"*. I referred to the judgment of McKechnie J. in *Comcast* where he said (at para. 36):

> *"Whilst there can be no doubt but that the moving party has the greater obligation of expedition overall, nonetheless the defendant's interaction or lack of it, as the case may be, with the delay of which he later complains, whether active or purely inactive, to use such phrase, may rightfully attract condemnation by virtue of many other circumstances ..."*

28. In his judgment, McKechnie J. cited with approval the Australian judgment in *Calvert v Stollznow* [1980] 2 N.S.W.L.R. 749, McKechnie J. commenting (at para. 37):

> *"...In that context reference was made to Calvert v. Stollznow [1980] 2 N.S.W.L.R. 749, where the issue as to how far a defendant should go to compel a plaintiff 'to progress the outstanding litigation' is discussed. Cross J., in his unreported judgment, but which was affirmed on appeal as stated, disagrees with the suggestion found in some English cases, that a defendant is entitled to 'let sleeping dogs lie' in the hope that the action will expire. If he chooses this route and if his tactical gamble, for that is precisely what it is, should not come to pass, then surely he should not be allowed to subsequently rely on that delay to advantage himself? To so permit seems unattractive and unfair."*

29. In *McCarthy*, I noted in referring to this judgment that:

> *"34. In Comcast, the Supreme Court returned to the theme of litigation being a 'two way street' and this means that the conduct of the defendant must also be looked*

at, whether properly described as blameworthy or 'active' in the procedural sense or not."

30. *McCarthy* is of some relevance in the context of the present appeal because in that case, the plaintiff had sought discovery of CCTV footage from the defendant and one of the most significant periods of delay arose following a complaint by the plaintiff of non-compliance by the defendant with his discovery obligations. In the relevant letter, the plaintiff's solicitors had said that the plaintiff was anxious to proceed with the matter but needed clarification from the defendant about the CCTV footage before he could do so. The defendant's solicitors never replied to this correspondence and a period of three and a half years elapsed before any further steps were taken by the plaintiff.

31. The defendants argued, as in the present case, that this was a period for which they bore no responsibility and it could not therefore be weighed in the balance against them. I disagreed with that proposition in the light of the *Comcast* jurisprudence, holding that this was a factor to be taken into account in assessing the balance of justice. In that context, I noted (at para. 43):

"It will by now be clear that I find myself unable to agree with the trial judge's conclusion that the only relevant conduct on the part of the defendant to be considered in weighing the balance of justice was where the defendant was guilty of some culpable delay. I think the authorities when taken as a whole demonstrate that a wider assessment is called for and factors such as the nature of the case and the identity of the parties are, as McKechnie J. suggested in Comcast, relevant to that assessment. In that context, the defendant's failure to move from 2017 [when the plaintiff requested clarification of the CCTV] *at least onwards is in my view material."*

32. Commenting also on *Comcast*, Collins J. in *Cave* said (at p. 36):

> *"• The authorities increasingly emphasise that defendants also bear a responsibility in terms of ensuring the timely progress of litigation: see, for instance, the decision of the Supreme Court in [Comcast]. The precise contours of that responsibility have yet to be definitively mapped, but, it is clear at least that any 'culpable delay", on the part of a defendant - delay arising from procedural default on its part, will weigh against dismissal."*

33. One of the most significant periods of delay in the present case, at no. 3 above, arose following a failure on the part of the defendants to respond to the plaintiffs' request for discovery and subsequent reminders with the sole exception of a holding reply on the 6th December, 2016 saying they were taking instructions and would revert in early course. Unfortunately matters went into abeyance for a very lengthy period thereafter but, as in *McCarthy*, it seems to me that had the defendants reverted as they said they would, the case might well have taken a different course and the subsequent delay not happened.

34. I accept entirely that there was no procedural obligation on the defendants to progress discovery at that time but their failure to respond meaningfully in accordance with their correspondence is in my view clearly something to be taken into account in weighing the balance, as it was in *McCarthy*. Accordingly, I reject the defendants' submission that the judge was wrong to consider that this was a factor that counted against dismissal and I agree entirely with the view she expressed in that respect.

35. Another recent judgment of this court that is of relevance to this appeal is *Walsh v Mater Hospital and Anor* [2023] IECA 276. While that was a medical negligence case against the hospital and a consultant doctor, it bears certain analogies with the present case.

There, as here, it was argued by the plaintiff that it was a quasi-documents case where all the medical notes were still available to the defendants in relation to the plaintiff's treatment and it could not reasonably be argued that the consultant's particular recollection was likely to have been impacted by the passage of time given that doctors see many patients on a daily basis and have no reason to specifically recall most of them even after a relatively short period of time.

36. Speaking for this Court, Binchy J. noted that medical negligence cases are, in the main, determined on the basis of expert evidence assessing the medical notes and the doctor's recollection of events will normally play little or no role. He observed that the plaintiff's evidence of events not recorded in the medical notes would have to be particularly convincing to be accepted by a court where any particular relevant fact would be expected to be recorded by the doctor in the notes.

37. In another similarity with the present case, the doctor concerned in *Walsh* complained of prejudice arising from reputational damage in having the case hanging over him for many years. However, no particular evidence was advanced on this point other than a bald assertion by the solicitor for the defendant who swore the grounding affidavit. The doctor himself swore none.

38. Commenting on this absence of evidence, Binchy J. said (at para. 76):

> *"... In my view where an applicant wishes to rely heavily upon reputational damage in support of an application to dismiss proceedings on grounds of delay, it is necessary for the applicant to provide at least some evidence of damage to his or her reputation, and not simply assert it by way of submission. While the authorities do indeed refer to the potential for damage to a person's reputation by reason of the issue of proceedings, (in the case of professional defendants in particular, although*

Collins J. in Cave makes it clear that defendants who are professionals do not enjoy any privileged status) there is no presumption that a person's reputation is damaged by the mere issue of proceedings. Very often nobody other than the parties and their legal representatives and others associated with or involved in the proceedings will even be aware of proceedings. But even where others are so aware, damage to the reputation of the defendant does not follow inexorably just by reason of the issue of proceedings … Some evidence of damage to reputation must be provided for consideration by the court."

39. In his judgment, Binchy J. also cited (at para. 77) an observation that I made in *McCarthy* (at para. 4):

"Although reputational damage is referred to as a prejudice to be considered in an assessment of the balance of justice in several cases, particularly where professional defendants are concerned, it has rarely, if ever, sufficed on its own to warrant dismissal."

40. In the present case, the suggestion of reputational damage is no more than that and constitutes a bare assertion by the solicitor for the defendants which is unsupported by any concrete evidence of prejudice and there is no reason to assume such, as Binchy J. points out.

41. Accordingly, the alleged impact on the defendants' reputation is not, in my view, something relevant to the assessment of the balance of justice in this case, as there is simply no evidence of it. As regards prejudice from delay amounting to fair trial prejudice, again I am in agreement with the view of the trial judge that this is really in substance a documents case where the defendants' liability will stand or fall on the assessment of the relevant documents by equivalent experts called on both sides. It is telling in my opinion that there

is no allegation in the affidavits sworn on behalf of the defendants which suggest that there is an absence of recollection on their part which will have any, or any significant, bearing on the question of liability in this case.

42. Accordingly, although the judge found that there was moderate generalised prejudice as a result of delay, in my view the defendants have failed to establish moderate prejudice in this case in the sense of prejudice that would render it unfair to call on them to further defend the case.

43. I am therefore satisfied that while, as the judge held, there has been both inordinate and inexcusable delay on the part of the plaintiffs in this case, the balance of justice lies squarely in favour of refusing dismissal. Having said that, the failure of the plaintiffs and their lawyers to significantly progress this case over a period of almost a decade from the institution of proceedings to the issuing of this motion is worthy of significant criticism. It behoves them now to proceed with the case as a matter of considerable urgency.

44. For these reasons therefore, I would dismiss this appeal.

45. [Binchy J.]: I have listened to the judgment just delivered by Mr. Justice Noonan and I am in full agreement with it.

46. [Meenan J.]: I am also in agreement with the judgment of Mr. Justice Noonan.