

THE HIGH COURT

[2021] IEHC 187
[2007 No. 7687P]

BETWEEN

NOEL KENNEDY

PLAINTIFF

-AND-

WEXFORD COUNTY COUNCIL AND PRIORITY CONSTRUCTION COMPANY LIMITED

DEFENDANTS

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 12th day of March, 2021.

1. This is an application to dismiss the action against the second defendant on grounds of inordinate and inexcusable delay in prosecuting it. Up to the date on which this application was heard by me no notice seeking contribution or indemnity had been served by the first defendant on the second defendant. The attitude of the first defendant to this application is neutral.
2. The rules which are applicable are clear. The second defendant must establish that delay of the plaintiff in prosecution of his claim is both inordinate and inexcusable. Where these matters are established, the court must exercise a judgment on whether the balance of justice is in favour of, or against, the proceeding of the case. A plaintiff who is established to be guilty of inordinate and inexcusable delay in the prosecution of an action has an obligation to show that, notwithstanding this delay, the balance of justice is in favour of permitting the action to proceed to trial.
3. In considering where the balance of justice lies, I can consider any relevant matter. I am not confined to matters listed by Hamilton C.J. at para. (d) (i)-(vii) in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp. 475-476. Other matters may be relevant. I am not restricted to looking at "prejudice in the special facts of the case" in considering whether it is, on balance, "unjust" not to allow the action to proceed further. The balance of justice test does not require that I come to the view that because of delay it would not be possible to get a fair trial. This is one consideration within an overall assessment of where the "balance of justice" lies.
4. At the hearing of the application much argument focused on a complaint that the second defendant had delayed. It was also submitted that the second defendant participated in steps in the action on the basis that it was moving towards a hearing and that as a result it would be unfair on the plaintiff to order that the action be dismissed without a hearing.
5. All plaintiffs are taken to know that where an action is commenced long after the events giving rise to the cause of action, they have a positive obligation to advance proceedings to trial with expedition. Lack of attention and unjustifiable delay which might be overlooked or treated as not being inordinate, or which might be excused in other circumstances will not be tolerated. A defendant owes no positive duty to advance the proceedings to a hearing. Failure to proceed with diligence carries with it a risk that the claim will be dismissed. This obligation to proceed with expedition includes a duty to properly particularise the claim and take all steps to have the necessary evidence for trial.

6. I have concluded that there has been inordinate and inexcusable delay in the prosecution of this action and that the balance of justice lies with dismissing it. It follows that the application to compel Priority Construction to comply with requirements of the Practice Direction relating to expert reports will also be dismissed.
7. This action commenced in October 2007. It relates to events which took place in late 2001 and early 2002 and the cause of action would probably have become statute barred in May 2008. This claim is not comparable to an action based on trespass by occupation or a continuing nuisance. Any damage to the land occurred in 2001 and 2002. For the purposes of considering whether there was an obligation on the plaintiff to proceed with expedition the important point is that the action was started nearly six years after the events which gave rise to it. Had this action been started in the Circuit Court in Wexford in 2003 it is likely that it would have concluded in 2006. If it had begun in the High Court, it should have concluded in 2007.
8. The pleadings indicate that Noel Kennedy is owner of two fields beside the N25 near Oylegate, County Wexford. Priority Construction was engaged by Wexford County Council to carry out road works on the N25 beside these fields. Noel Kennedy was occupying one of the fields and Bridget Nolan was occupying the other field at the time. A Circuit Court order dated 11 April 2002 indicates that Bridget Nolan was also registered owner of the land until that date.
9. Noel Kennedy claims that he gave Peter Kane of Priority Construction permission to put material on the field which he occupied on terms which obliged Priority Construction to make good and finish the land with topsoil.
10. His solicitor's initial letter of complaint dated 4 April 2003, addressed to Wexford County Council only, describes this field as "marshy land." The letter states that he gave "your Clients authority to dump the spoil from the road into the land" and complains that other waste was also dumped on this land.
11. The letter also alleges that people on site working with Wexford County Council and Priority Construction went onto his lands, which presumably refers to the field then occupied by Bridget Nolan, and deposited material on that field. The letter complains that this field was damaged and made unusable and requests that it be re-top soiled and reseeded. It concludes with a threat of litigation against Wexford County Council. No mention was made of the involvement of Bridget Nolan.
12. At around the same time Wexford County Council responded to a complaint made by a local public representative on Noel Kennedy's behalf by indicating that the damaged field was outside the area acquired under a compulsory purchase order and that Wexford County Council had not entered into "any arrangement with Mr. Kennedy or any other party in relation to the field."
13. A copy of a map produced to me which appears to relate to an equity civil bill issued by Noel Kennedy against Bridget Nolan shows that some of what is described as "Field No. 2"

is marshy land and that much of "Field No. 1" was acquired from Bridget Nolan as part of the road widening.

14. The dispute between Noel Kennedy and Priority Construction and Wexford County Council involved no complicated issues of fact or law. The issues were easy to identify. Did Priority Construction dump waste other than material from the road on the marshy field without permission and did they dump material on the other field without permission? Did Bridget Nolan when she was registered owner and in possession give permission? Did Priority Construction fail to comply with an agreement to put topsoil over material deposited? What damage was suffered as a result of putting material on the fields in excess of permission? Did Wexford County Council have involvement in placing material on the land which would result in liability, given that Priority Construction was an independent contractor?
15. On 27 February 2007 Noel Kennedy's solicitors wrote to Priority Construction enclosing a copy of the letter dated 4 April 2003 to Wexford County Council. The 2007 letter threatened legal action against Priority Construction and Wexford County Council and stated as follows:

"Despite requests being made by our Client to you and meetings held with you, since the writing of this letter, no satisfaction has been received or offer of settlement or offer to carry out works to rectify and repair the damage caused by your trespass has been made."
16. It is unlikely that there was in fact any contact with Priority Construction after April 2003. While para. 6 of Noel Kennedy's affidavit refers to discussions as per the letter dated 27 February 2007, this is at odds with information provided by his solicitors in particulars in 2009.
17. Replies dated 29 June 2009 to letters from both defendants seeking particulars of allegations made in the statement of claim assert that "the full extent of the damage" did not become apparent until test holes were dug in connection with a planning permission application in 2007 and that this discovery prompted the letter dated 27 February 2007. I infer that the plaintiff was considering putting some sort of structure on the infilled land and that material was found beneath the surface. No expert reports were sought at that time on damage to fields or cost of steps to ameliorate any damage.
18. An initial delay of Priority Construction and its solicitors in dealing with this action arose from the fact that the solicitors for Wexford County Council accepted service of the plenary summons and entered an appearance on their behalf without authority. The plenary summons claimed damages for trespass and nuisance. The core allegation in the statement of claim delivered in January 2008 was of trespass to the plaintiff's land and that the defendants had been requested to remove material and reinstate the land but had failed to do so.

19. The statement of claim did not make mention of Bridget Nolan or any agreement for deposit of material and pleaded that the defendants unlawfully entered the land without Noel Kennedy's consent and deposited material on it. The statement of claim gave no detail of special damage under the headings of "cost of removing debris and reinstating the lands" and "loss of income from the lands."
20. The defendants sought particulars by letters dated 9 April 2008 and 3 September 2008. These particulars were provided on 29 June 2009. This followed a reminder and an application to court by Priority Construction. At that stage the claim changed somewhat to reflect the alleged agreement with Peter Kane and was more in line with the complaint made in the 2003 letter that "field No. 2" was not finished with topsoil as per the agreement. The particulars alleged that some material was moved in late 2002 over a period of two to three days and the amount left was uncertain as much of the material was buried. The particulars also referred to the dispute with Bridget Nolan and provided copies of the equity civil bill and the order dated 11 April 2002 which resolved that dispute by directing that Noel Kennedy be registered as owner of the land.
21. In response to questions asking for details of any reinstatement and the cost of such, the particulars stated that the plaintiff had not been able to reinstate the land and "will claim the estimated costs thereof". The particulars given to Wexford County Council advised that a detailed survey by an expert was required to finalise the estimate of the costs of the remedial works necessary. Both defendants were invited to attend and inspect.
22. The plenary summons and statement of claim made no mention of any claim for breach of contract in failing to restore or topsoil the land. Any claim for breach of contract arising from this element of the complaint in the particulars was statute barred at this stage.
23. Following the particulars nothing happened for well over a year. The plaintiff served a notice of intention to proceed on 15 March 2011 and at the same time the solicitors for Noel Kennedy reminded the solicitors for both defendants that they were in default in delivering defences.
24. Priority Construction delivered its defence on 26 May 2011. This pleaded that Priority Construction deposited material on the land with consent and denied that it had been asked to remove any material or reinstate the land. Alternatively, Wexford County Council was responsible for any negligence or nuisance in the road works. A preliminary plea asserted that the claim was statute barred and also that there was unconscionable and inexcusable delay in pursuing the claim.
25. Following two applications for judgment in default of defence, Wexford County Council eventually delivered a defence on 27 November 2012. This defence also denied trespass or any liability. It stated that Priority Construction was an independent contractor and that Wexford County Council had no involvement in depositing material on the land. Any material put there by agreement was a matter for Noel Kennedy and Priority Construction. This defence also asserted that Noel Kennedy was guilty of gross and

inordinate delay in pursuing proceedings and was statute barred in relation to the matters first pleaded in the particulars.

26. In January 2013 Noel Kennedy's solicitors served a notice to produce and on 1 February 2013 they served a notice of trial for the High Court sittings in Waterford. This was not a personal injuries action. Notice of trial should have been served for trial in Dublin. The matter was transferred to the Dublin list. The action was never set down for trial. At that stage no reports had been sought with a view to providing or proving particulars of loss and damage.
27. Replies to the defences were delivered on 14 May 2014. On the same date the solicitors for Noel Kennedy began corresponding with the solicitors for the defendants looking for voluntary discovery. The solicitors for Priority Construction did not reply with agreement to the voluntary discovery requested. This looked for documents relating to the road works contract and inspections, any document having a bearing on permission to deposit material on the land and any documents relating to deposit of the material, to include any documents relating to complaints by the plaintiff and communications with the plaintiff on this. This letter was followed up by reminders requesting that the discovery requested be agreed.
28. On 11 September 2014 the solicitors for Priority Construction advised that they were awaiting to hear from Wexford County Council "in relation to whatever discovery is available for production and upon hearing from them, we will be in touch further." Following a warning letter, an application was brought to compel discovery in May 2015. An affidavit of discovery on behalf of Priority Construction sworn in August 2015 disclosed that it had no documents in any of the categories sought and did not refer to any documents formerly in existence in any of these categories. An affidavit of discovery on behalf of Wexford County Council around the same time disclosed no documents relating to depositing of material on the land.
29. No further step was taken until a notice of intention to proceed dated 28 February 2018. This was not followed up by any action until service of a document dated 24 February 2019 described as "Notice updating particulars of loss and damage". This was accompanied by a letter dated 25 February 2019 inviting the defendants' solicitors to exchange expert reports and advising of an intention to call as experts a consulting engineer, an agricultural consultant, an auctioneer and a representative of Kearns Plant Ltd to prove a quotation for €700,201 as the cost of remedial work.
30. The notice advised that as this was in excess of the value of the land, a claim would be made for 7.8 acres at a value of €10,000-€12,000 per acre in good agricultural condition in 2008 on the basis that the land was rendered valueless as a result of the material deposited, plus loss of rental of €1,200 per annum from 2008. The solicitors for Priority Construction responded eventually on 5 June 2019 advising that the proceedings had issued over twelve years previously and that an application would be brought to have the action dismissed.

31. It is clear from this history that there has been inordinate and inexcusable delay on the part of Noel Kennedy in pursuing this action. As the action was started more than five years after the events which are relied on as the cause of action and was nearly statute barred, Noel Kennedy had a self-serving duty to advance it to a trial with all reasonable expedition. If he had started the action some eight months later the claim would have been statute barred. The policy of the law, as enacted by the Oireachtas, that defendants should not be troubled to meet such stale claims on the merits, would have applied to the claim.
32. The statements in the defences objecting to delay served as timely warning to the plaintiff of possible consequences of delay in instituting and prosecuting this action. The fact that the defendants were delayed in putting in their defences and might not for that reason have merit on their side if they chose to apply at that stage to have the action dismissed on grounds of delay does not alter this.
33. I do not agree with the argument that participation by seeking to compel a reply to particulars sought or by delivering a defence and responding belatedly to an application for discovery in some way excuses the plaintiff's delay in prosecuting the action or should be regarded as a factor in his favour in an assessment of whether the balance of justice is in favour of, or against, permitting this action to proceed. Nothing in the behaviour of Priority Construction in defending this action could have misled Noel Kennedy into thinking that, come what may and irrespective of whatever delay was involved, it was agreeing to dispose of the claim in an eventual trial on the merits. Priority Construction had no duty to bring applications to have the claim dismissed on delay grounds or flag an intention to do so at some earlier point. Priority Construction did not acquiesce in delay of the plaintiff by providing discovery or delivering a defence. These were steps required of it to defend the claim.
34. The long periods of time when little or nothing was happening to actively pursue this claim involved inordinate and inexcusable delay on the part of the plaintiff. There was no effort to particularise damage to the defendants until 2019. These particulars were provided by reference to reports obtained very late in the day. No expert was engaged to inspect the land until 2014. Whatever any expert needed under the Freedom of Information Act could not relate to the liability of Priority Construction which depended on whether deposit of material was a trespass in excess of an oral agreement. Priority Construction was not responsible for delays in obtaining reports to prove damage and delays in quantifying losses claimed. It would appear that a valuer was not engaged on behalf of the plaintiff until after July of 2018 when the report of Kearns Plant Ltd became available.
35. The only identifiable periods of culpable delay on the part of Priority Construction relate to failure to deliver a defence in the period between the end of June 2009 when the particulars became available and the end of May 2011, and the period of delay in responding to the request for discovery. Part of the latter delay was attributable to seeing if Wexford County Council had anything relevant and this is excusable to some extent.

36. The elements of delay by Priority Construction add up to about two and a half years. Priority Construction should have delivered a defence one and half years earlier than the date when that defence was delivered. Priority Construction should have completed discovery one year earlier than it did. In the light of delay on the other side of the litigation up to the end of February 2019, Priority Construction had no duty to engage with the process of exchanging expert reports prior to June 2019.
37. Turning to the balance of justice, the evidence is that Peter Kane, the Priority Construction quantity surveyor and foreman for the project, who was involved in the agreements for the deposit of material on the land and the then managing director of Priority Construction are now dead. Both of these men were on site at the time of the road works and it is clear that their evidence would be central to what was agreed with Noel Kennedy or Bridget Nolan and central to allegations that material other than that relating to the road contract was dumped on the land. Such evidence would also be central to the claim that communication took place between Noel Kennedy and Peter Kane in late 2002 and that as a result some material was removed.
38. I am not convinced by the claim that Priority Construction is hampered by possible loss of relevant documentation. It is unlikely that any documents in relation to agreements or arrangements which were entered into by Peter Kane with Noel Kennedy or Bridget Nolan to deposit material from the road construction on the land ever existed and there is no suggestion of any correspondence with Priority Construction in 2002 or 2003 which might have given rise to any such documents.
39. If there were such documents in existence when this claim surfaced in 2007, it is unlikely that they would have been destroyed in circumstances which Priority Construction could rely on as amounting to prejudice. At that stage, Priority Construction had legal advisers and ought to have known that any relevant documents should be preserved. The discovery affidavit does not identify any document of relevance which is no longer held because it has been destroyed.
40. However, my overall assessment is that the balance of justice does not lie in permitting this action to go to a hearing on the merits. Key elements of the defence cannot be proved because Priority Construction are deprived of two witnesses who were on site and involved in the matters in dispute through contact with the plaintiff and possibly with Bridget Nolan and in managing the project.
41. The events which gave rise to the claim happened nearly twenty years ago. It is difficult to see how a court could now be expected to do justice between the parties on these issues involving agreements with Peter Kane or on issues such as the value and state of the land before materials were deposited, the impact of any extent to which material was deposited in excess of permission, the amount of material put on the land or losses which relate to alleged failure to cover material with topsoil. The circumstances here are not comparable to those considered in authorities opened to me where courts were persuaded that the balance of justice lay with allowing a hearing on the merits. Delay by Priority Construction in complying with litigation obligations and other matters relied on by the

plaintiff are not sufficient to persuade me that the balance of justice lies with allowing the action to proceed.