

THE HIGH COURT

[2021] IEHC 184
[2003 No. 9114 P]

BETWEEN

CORNELIUS FAULKNER, JOHANNA FAULKNER, JAMES FAULKNER (A MINOR), WILLIAM FAULKNER (A MINOR), LISA FAULKNER (A MINOR), MARTIN FAULKNER (A MINOR), CHRISTINA FAULKNER (A MINOR), MARY BRIDGET FAULKNER (A MINOR) AND TINA FAULKNER (A MINOR) SUING BY THEIR MOTHER AND NEXT FRIEND JOHANNA FAULKNER

PLAINTIFFS

AND

LIMERICK CITY COUNCIL

DEFENDANT

Judgment of Mr. Justice Meenan delivered on the 12th day of March, 2021

Background

1. By notice of motion, dated 10 January 2020, the defendant has applied to the Court for a number of reliefs, being: -
 1. An order pursuant to the inherent jurisdiction of the court dismissing the plaintiffs' claim for want of prosecution on the grounds of inordinate and/or inexcusable delay; and
 2. An order pursuant to O. 122, r. 11 of the Rules of the Superior Courts dismissing the plaintiffs' claim.
2. The Statement of Claim in these proceedings was delivered on 4 May 2005, following a motion by the defendant to dismiss for want of prosecution for failing to do so. The Statement of Claim states that the plaintiffs (who are members of the Travelling Community) reside at Longpavement Halting Site (the halting site) in the City of Limerick. It is alleged that the defendant was at all material times the owner of and/or responsible for the construction, maintenance and control of the halting site.
3. The substance of the plaintiffs' claim is that the defendant negligently and in breach of duty (including breach of statutory duty) provided a halting site which was "*grossly unfit for human habitation and which is not in accordance with any acceptable standards, including, but not limited to, any guidelines in respect of provision and/or maintenance of traveller accommodation*".
4. The Statement of Claim then sets out in detail particulars of the manner in which it is alleged the halting site was grossly unfit for human habitation.

Chronology of proceedings

5. I will not set out every step that was taken in these proceedings over the last seventeen years or so, but I will detail the material steps that were taken and when they were taken: -
 - (i) Plenary summons issued 31 July 2003;
 - (ii) Statement of Claim delivered 4 May 2005 (following a motion from the defendant);

- (iii) Particulars raised and replied to September, 2005 – March, 2007;
 - (iv) Defence delivered 7 October 2009 (following issue of a motion seeking judgment in default of defence);
 - (v) Further particulars and replies July, 2010; August, 2010; and August, 2011;
 - (vi) Notice of trial served July, 2010;
 - (vii) 21 May 2012 defendant granted liberty to deliver an amended Defence pleading the Statute of Limitations Act, 1957 (as amended);
 - (viii) September, 2012 and July, 2013, motion seeking an order compelling the plaintiffs to comply with the provisions of S.I. 391/1998 and an order directing them to do so;
 - (ix) September, 2012, notice of motion seeking discovery of the plaintiffs' medical records;
 - (x) Notice of motion, July, 2015, issued by the plaintiffs compelling the defendant to make discovery;
 - (xi) Order, July, 2015, directing the plaintiffs to make discovery;
 - (xii) Notice of motion, November, 2015, seeking to have the defendant's Defence struck out for failure to make discovery and an order of Court of 3 March 2016 striking out the plaintiffs' motion to have the Defence struck out for failure to make discovery; and
 - (xiii) An affidavit of discovery by the defendant was furnished on 24 May 2016.
6. In addition to the various steps in the proceedings, there was correspondence between the parties seeking to arrange an inspection of the halting site. This took place in the course of 2017. Ultimately, a joint inspection took place on 13 December 2017. The report was furnished by the plaintiffs' expert on 22 January 2018.
7. A notice of intention to proceed was served by the Solicitors for the plaintiffs on 28 August 2019, and this appears to have prompted the within motion.
8. In the many years since the initiation of the proceedings in July, 2003, the second named plaintiff died, on 27 October 2004. All seven of the plaintiffs who were minors at the time proceedings were initiated have reached their majority, the youngest plaintiff having reached her majority on 17 November 2012. No step has been taken to amend the proceedings to reflect these events.

Principles to be applied

9. There have been numerous authorities on the jurisdiction of the courts to dismiss actions for want of prosecution. I will refer to only two authorities. Firstly, the oft cited passage of

Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where it is stated: -

“The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:—

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,
 - (ii) 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,
 - (iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,
 - (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
 - (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
 - (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
 - (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.”

10. Secondly, I will refer to one further authority being the judgment of Irvine J. (as she then was) in the Court of Appeal decision of *Flynn v. The Minister for Justice* [2017] IECA 178, at para. 19, where she referred to the following principles that had been identified in the High Court decision under appeal: -

“...

- (5) Even when delay has been inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the case proceeding.
- (6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.
- (7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.
- (8) In culpable delay cases the defendant 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.

..."

Application of principles

11. In reaching its conclusion, there are three steps which the court must take: -
 - (a) Consider whether there was inordinate delay on the part of the plaintiff;
 - (b) If there was such inordinate delay, was it inexcusable?; and
 - (c) Even if the delay was both inordinate and inexcusable, does the balance of justice lie in favour of striking out the proceedings?
12. It is manifestly clear in this case that the delay was inordinate. Proceedings were initiated in July, 2003, in excess of 17 years prior to the hearing of this motion.
13. The excuse for this delay is referred to in a replying affidavit by the Solicitor instructed by the plaintiffs. The plaintiffs are all members of the Travelling Community and have "*limited education and very limited means*". She stated that "*those factors have impacted upon the prosecution of the proceedings*". She also maintains that it is "*a complex case*" not arising from a single incident but rather has been an ongoing situation for many years and is continuing. I have to say that these excuses do not come close to explaining a delay of some sixteen years (to the date of service of the notice of intention to proceed). I cannot comment if it be the case that the plaintiffs have "*limited education and very limited means*". However, it is the case that the plaintiffs instructed Solicitors in this matter who are tasked with bringing these proceedings to a conclusion in a timely way. No credible explanation has been given as to why this has not happened. Indeed, it is of

note that not even the basic steps were taken to amend the proceeding given the death of the second named plaintiff and the attainment of majority by the other plaintiffs. I therefore conclude that the delay in these proceedings was both inordinate and inexcusable.

14. The next matter which I have to consider is "*the balance of justice*". In doing so the conduct of the defence of the proceedings is directly relevant. In the Grounding Affidavit, the Solicitor for the defendant has identified a number of matters which she maintains makes a fair trial no longer possible. Reference is made to the absence of a number of witnesses: -
- (a) Mr. Pat O'Sullivan and Mr. Paul O'Sullivan of BHP, Chemical and Environmental Monitoring Laboratory, are authors of a soil analysis report on the halting site, dated 11 November 2003. These individuals are no longer employed by BHP;
 - (b) White Young Green Ireland Ltd were appointed as Consulting Engineers to the defendant in or about April, 2005 for the purpose of undertaking an environmental assessment study on a proposed new halting site. This entity no longer exists and the defendant has been unable to trace any of the personnel involved in compiling the report;
 - (c) Mr. Joe Harte was employed as Senior Executive Engineer by the defendant, and retired in December, 2008;
 - (d) Mr. Pdraig Ryan was employed as a Social Worker with specific responsibility for Travellers. He left his employment with the defendant in February, 2007;
 - (e) Mr. Pat Dowling was previously employed as Director of Service Housing and Social Policy with the defendant and is no longer in the employment of the defendant, but has been employed with Clare County Council since September, 2016;
 - (f) Mr. Michael O'Floinn was the in-house Solicitor and Law Agent with the defendant and retired in July, 2004 and is now deceased;
 - (g) Ms. Mary O'Keeffe, Staff Officer with the defendant, retired on 30 July 2004;
 - (h) Ms. Alison O'Reilly, who was employed as a Social Inclusion Officer with the defendant, has emigrated to Australia and has not been employed by the defendant since March, 2006;
 - (i) Mr. Paddy Meenaghan was employed as a Roads Superintendent with the defendant. He retired in December, 2009;
 - (j) Mr. Clement Reynolds was employed as a Water/Sanitary Services Superintendent with the defendant and retired on 18 August 2011;
 - (k) Mr. Oliver O'Loughlin was employed as a Director of Services with the defendant;

- (l) Mr. Stewart Roche, Temporary Assistant Scientist with the defendant is "untraceable" having left his employment of the defendant in July, 2007. It is stated that he would have been in a position to adduce evidence pertaining to the allegations made by the plaintiffs in relation to the alleged emissions of gases at the halting site, the disposal of waste and issues of pest control; and
- (m) Ms. Ann O'Donnell was an employee of the defendant and was employed as an acting Senior Executive Officer with the defendant. She had responsibility for Traveller accommodation and it is stated that she was possessed of a detailed knowledge of the provisions made at the material time and any discussions held with the plaintiffs regarding their accommodation. It is stated that her evidence "would have been essential to the defendant's ability to defend the claims being made against it". Ms. O'Donnell died in November, 2019.
15. In addition, it is stated in the Grounding Affidavit that there was a total redevelopment of the halting site in 2008/2009, so evidence will be required concerning this.
16. What is striking about this list of potential witnesses on behalf of the defendant is that, save for the late Ms. Ann O'Donnell, they retired or left their relevant employment on dates between November, 2003 and August, 2011. Thus, any steps that were taken by the defendant in these proceedings since, at the latest, August, 2011, were taken with the knowledge of the non-availability of these witnesses.
17. Two significant steps were taken in the proceedings in 2015 and 2017. The defendant failed to comply with an order for discovery, and, on 6 November 2015, a motion was issued seeking to strike out the defendant's Defence for failure to do so. This motion was adjourned on consent of the defendant on several occasions between November, 2015 and January, 2016. The defendant made discovery on 17 February 2016 and the documents were furnished to the plaintiffs' Solicitors on 24 May 2016.
18. The discovered documents were reviewed, and, on 1 March 2016, the Solicitors for the plaintiffs requested inspection facilities at the halting site. On 14 April 2016, the Solicitor for the defendant stated that they were taking their client's instructions. Further correspondence ensued. The inspection was delayed due to the unavailability of the engineer retained by the defendant. This engineer made contact with the engineer instructed by the plaintiffs on 12 October 2017 and a joint inspection of the halting site took place on 13 December 2017.
19. It seems to me that by both engaging in the discovery process and arranging a joint inspection of the halting site, the defendant induced the plaintiffs to incur further expense in pursuing their action. This was at a time, many years, after a number of witnesses for the defendant were no longer available. I therefore reach the conclusion that the defendant itself was guilty of delay in bringing this application, acquiesced in the plaintiffs' delay and encouraged the plaintiffs to incur further expense.

20. It is also noteworthy that the defendant delivered an amended Defence on 30 May 2012 pleading the Statute of Limitations Act, 1957 (as amended). Given this plea was made at a time when certain witnesses were no longer available to the defendant, not to have sought the trial of a preliminary issue on the Statute of Limitations and, indeed, issued a motion seeking the reliefs herein was culpable delay on the part of the defendant.
21. The only prejudice identified by the defendant of recent origin is the death of Ms. Ann O'Donnell. As referred to earlier, Ms. O'Donnell had responsibility for Traveller accommodation and thus would have knowledge of the provisions made at the time in respect of the plaintiffs' accommodation. In a replying affidavit, the Solicitor for the plaintiffs states that Ms. O'Donnell did send some correspondence and was in attendance at a meeting in October, 2004. The Solicitor states that a Ms. Caroline Curley is available to give evidence and would have access to the defendant's relevant records.

Conclusion

22. By reason of the foregoing, I am satisfied that, though there has been both inordinate and inexcusable delay on the part of the plaintiffs in prosecuting their action, the balance of justice lies against granting the relief sought by the defendant. In reaching this conclusion I take into account that the Solicitor for the plaintiffs has stated, on affidavit, that the "*plaintiffs are open to agreeing to the admission of documents recording works done and surrounding matters*" and are agreeable to admitting the reports set out para. 11 (b) of her affidavit.
23. Though I am not granting the relief sought by the defendant, it seems to me that no further delay in the prosecution of these proceedings ought to be permitted. Were it not for the current circumstances that arise from the Covid-19 pandemic, I would direct that a number of steps be taken to have these proceedings ready for hearing in a number of months. I propose to adjourn this application until 16 November 2021 and on that date I will review what steps have been taken in the prosecution of these proceedings.
24. Given my findings, and the reasons for them, I will adjourn the matter of costs until 16 November 2021.