



July 2019

Professional negligence claim dismissed on grounds of delay

Noel Mulligan v Wilkie & Flanagan Solicitors [2019] IEHC 289 (3 May 2019)

The High Court (Barrett J.) dismissed the plaintiff's claim for professional negligence against the defendant solicitors in the interests of justice and on the grounds of inordinate and inexcusable delay and also for want of prosecution of the part of the plaintiff since the commencement of the proceedings.

Background

The claim concerned advice provided by the defendants to the plaintiff over a period of time between 2005 and 2006, following which the plaintiff alleged he was contractually obliged to purchase property without planning permission leaving him exposed to significant financial loss. A plenary summons was issued in early 2011.

Facts

In considering the delay that had taken place, Mr. Justice Barrett adopted a table which had been used by the defendants to summarise the timeline of the proceedings. Mr. Justice Barrett identified a number of significant periods of delay, including pre-commencement delay of 5-6 years, and four periods of post-commencement delay.

The Principles

For further information on any of the issues discussed in this article please contact:



Rachel Turner
Senior Associate, Litigation
DD: + 353 (0)1 673 1845
rachel.turner@dilloneustace.ie



John O'Riordan
Partner, Litigation
DD: + 353 (0)1 673 1792
john.oriordan@dilloneustace.ie

Niamh Tuohy
Trainee, Litigation
DD: + 353 (0)1 673 1845
niamh.tuohy@dilloneustace.ie

It is well established that a party seeking dismissal for want of prosecution on the grounds of delay must establish that the delay was inordinate and inexcusable. Even where the delay has been both inordinate and inexcusable, the court must still exercise its judgment to decide whether or not the balance of justice lies in favour of proceeding with the case.

Factors considered in determining balance of justice

It was not disputed that there had been inordinate and inexcusable delay by the plaintiff. The sole issue for the court was where the balance of justice lay in terms of whether or not this case should be allowed to proceed. In considering this issue, Mr. Justice Barrett noted the following factors:

1. The pre-service of summons delay (which was six years), without any intimation by the plaintiff of a complaint against the defendants or any intention to sue, had prejudiced the defendants by preventing them from gathering evidence in relation to the claim;
2. the defendants had complained of delay from the outset of the proceedings;
3. all progress in the proceedings had been forced by court order or in the context of a motion brought by the defendants, as opposed to the voluntary actions of the plaintiff;
4. the significant impact of the proceedings on the defendants' reputation and their professional indemnity insurance;
5. particular prejudice existed due to the fact that the evidence was almost exclusively oral;
6. the earliest the case would come on for hearing would be 14-15 years after the subject matter; and
7. actual prejudice existed due to the unavailability of witnesses whose evidence could have been heard had the proceedings been issued and progressed in a timely manner.

The court considered that the balance of justice lay in favour of granting an order pursuant to its inherent jurisdiction dismissing the proceedings in the interests of justice and on the grounds of inordinate and inexcusable delay and also for want of prosecution on the part of the plaintiff.

Comment

This decision is a clear statement from the court that actions of both parties and not just claimants will be considered in an application for dismissal for delay. The defendants highlighted the issue of delay from the outset and brought motions forcing the plaintiff to progress the matter. The court noted that the proceedings had a significant impact on the defendant's professional indemnity insurance and their reputation. This distinguished the matter from an earlier case of *Power v Creed* where, in spite of a similar claim of prejudice and delay, the court held that the defendant had not shown any difficulty in obtaining professional indemnity insurance to the extent that it was sufficient to strike out the case in its entirety.

Dillon Eustace
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DILLON  EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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