Neutral Citation No: [2018] NICh 6	*Ref:* **McB10568**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **28/02/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

WILLIAM DENIS HORNER

Plaintiff;

-and-

ALASTAIR RANKIN
AND
CLEAVER FULTON RANKIN

Defendants.

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McBRIDE J

Application

[1] This is an application brought by the defendants to:

(a) Dismiss the plaintiff's action for want of prosecution pursuant to:-

(i) Order 3 Rule 6(2) of the Rules of the Court of Judicature in Northern Ireland 1980.

(ii) The inherent jurisdiction of the court.

(iii) Article 6 of the European Convention on Human Rights.

(b) Strike out the statement of claim pursuant to:

(i) Order 18 Rule 19(1)(a) on the basis it discloses no reasonable cause of action.

(ii) Order 18 Rule 19(1)(b) on the grounds it is scandalous, frivolous or vexatious.

(iii) Order 18 Rule 19(1)(c) on the grounds that it may prejudice, embarrass or delay the fair trial of the action.

(iv) Order 18 Rule 19(1)(d) on the grounds that it is an abuse of the process of court.

(v) Order 18 Rule 7(1) on the grounds that it does not comply with this rule.

(c) Extend time for service of the defence.

[2] The application was grounded on the affidavit of Lester Doake, solicitor, sworn on 9 October 2017.

[3] The plaintiff issued a Notice of Motion dated 26 September 2017 seeking, inter alia, leave to issue a Khanna subpoena upon the Lord Chief Justice, Declan Morgan, the former Lord Chief Justice Sir Brian Kerr, and Mr Justice Girvan and to strike out the defendant's defence.

[4] The plaintiff was a litigant in person who had the assistance of a McKenzie Friend, Mr Morrow. The defendants were represented by Mr Colmer of counsel.

Background

[5] Thomas Joy Horner ("the deceased") died on 11 April 1995. On 31 March 1995 he executed a Will in which he appointed his daughter Caroline Anderson as sole executrix. His other daughter Maureen Hall was a beneficiary under the terms of the Will. The plaintiff, who is a son of the deceased, was not a beneficiary under the Will.

[6] On 17 October 1996 Higgins J pronounced in favour of the deceased's Will dated 31 March 1995 and granted liberty to the executrix to apply for a grant of probate of the said Will.

[7] The plaintiff initially issued proceedings against the Executrix and Maureen Hall. These proceedings were struck out by Sheil J on 19 November 1998.

[8] Related proceedings were brought by the plaintiff's mother Marion Horner against the executrix and Maureen Hall. These proceedings were struck out by Girvan J on 11 November 1998.

[9] The plaintiff issued the present writ on 25 August 1999. An appearance was entered thereto on 14 September 1999 and a statement of claim was served on 26 September 1999. A further statement of claim was then served on 26 April 2000. A defence was entered thereto on 23 October 2000 and the matter was set down for trial on 13 February 2001. Thereafter lists of documents were served by both the plaintiff and the defendant. On 15 March 2002 Kerr J made an order joining three defendants to the action, namely Conor Wylie, Caroline Anderson and Maureen Hall. Thereafter, the writ and statement of claim were amended to reflect the joinder of these parties.

[10] On 27 June 2002 the defendants applied by summons to have the proceedings struck out. The Plaintiff issued a summons dated 18 July 2002 to 'strike out and set aside the defendants demands'. In connection with these applications various steps were taken by each of the parties. The last step taken in the proceedings was taken by the plaintiff when he filed an affidavit sworn on 8 October 2002.

[11] On 30 January 2003 Kerr J made an order striking out the plaintiff's pleadings against Conor Wylie, Caroline Anderson and Maureen Hall.

[12] Thereafter no action was taken by the plaintiff until he received a letter from the court office dated 3 March 2017 informing him that the case would be reviewed on 22 March 2017 for the purpose of striking out the proceedings. In response to this the plaintiff filed an affidavit sworn on 20 March 2017 and thereafter a further statement of claim dated 7 June 2017 and a further statement of claim dated 29 August 2017. On 26 September 2017 he issued a Notice of Lis Pendens together with a summary to all his statements of claims and an affidavit in support of the statement of claim and notice of motion.

[13] The writ and various statements of claim have been drafted by the plaintiff, who is a litigant in person. Not only are the proceedings in unconventional form but they are poorly crafted. The Plaintiff makes excessive use of a number of legal terms in a meaningless way so that the pleadings consist of legal mumbo jumbo and gobbledygook. As a result they are largely incomprehensible and it is impossible to be clear as to what is actually being pleaded. Doing the best I can, having read all the lengthy pleadings and affidavits filed by the plaintiff and having heard the plaintiff who appeared in person it appears that the plaintiff is making a professional negligence claim against Mr Rankin, solicitor who was formerly employed by Cleaver Fulton and Rankin solicitors. It would appear that the plaintiff's case is that he had an equitable interest in land and property owned by his father. This equitable interest arose as a result of promises made by his father to him that he would inherit these assets. As a result of these promises he acted to his detriment. The plaintiff claims that the defendants acted negligently and in breach of contract as they failed to protect his equitable interest in the property which formed part of the estate of deceased father. The particulars of negligence and breach of contract are not elegantly drafted and it is difficult to understand what is being pleaded but it

would appear that the plaintiff's case is that the defendants permitted the Will to be pronounced in solemn form before they negotiated a concluded settlement on behalf of the plaintiff. He further avers that the defendants failed to attend court or to enter an appearance on his behalf; failed to give any or adequate advice about the content and effect of a Deed of Variation, failed to detect errors in the grant of probate; permitted court orders to be made which were adverse to the plaintiff's interests, and falsely led the plaintiff to believe that a settlement had been concluded thereby causing the plaintiff to act to his detriment upon this assurance.

[14] In addition the various statements of claim each make complaints against other 'defendants' namely Conor Wylie, Caroline Anderson and Maureen Hall. As appears from the order of Kerr J dated 30 January 2003 the pleadings against these 'defendants' were struck out. The statements of claim also make complaints against and seek relief from other persons who are not and never were named as defendants in the proceedings. The other persons include members of the judiciary, former members of the judiciary and former members of the Bar of Northern Ireland.

Relevant legal principles

[15] In *Birkett v James* [1978] AC 278 at page 318F Lord Diplock held that the inherent jurisdiction of the court to dismiss for want of prosecution:

> "…should be exercised only where the court is satisfied either:
>
> "(1) That the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of court; or
>
> (2)(a) That there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and
>
> (b) That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or as such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each or between them and a third party."

[16] The delay that must be shown to have caused such risk or such likelihood of prejudice is the delay after the issue of proceedings – see *Birkett v James* at page 322G.

[17] In the instant case the court is only concerned with the application of principle 2 as contumelious default is not relied upon by the defendants.

[18] Therefore, if the court is satisfied that the defendants have established inordinate and inexcusable delay and either prejudice caused by the delay to the defendant or that a fair trial is no longer possible, this gives rise to a discretion to strike out the plaintiff's action.

Consideration

Inordinate delay

[19] In *Allen v Sir Alfred McAlpine and Sons Limited* [1968] 2 QB 229 Salmon LJ when explaining the meaning of inordinate delay said at page 268D:

> "(1) … It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs."

The Supreme Court Practice 1999 Volume 1 at paragraph 25/L/5 states:

> "Inordinate delay means 'materially longer than the time usually regarded by the profession and courts as an acceptable period'."

[20] I am satisfied that the period of inaction by the plaintiff to prosecute this action is inordinate. Almost all the members of the legal profession and the judges who were involved in this case and the related cases have now retired. The writ in the instant case was issued in 1999. Therefore some 17 years have now elapsed since the date of issue. 15 years have elapsed between the date of the last step taken by the plaintiff in the proceedings and the date the court office wrote to the plaintiff. All of this indicates that the passage of time is a very significant period of time indeed and points to the conclusion that the period of inaction by the plaintiff is indeed inordinate.

Inexcusable delay

[21] In addition to proving inordinate delay the burden is upon the defendant to establish that the delay is also inexcusable. In determining whether the delay is inexcusable the court should consider this from the defendant's point of view. In considering whether delay is inexcusable the court will give reasonable allowance, for example, for delay caused by; illness, accidents, legal aid authorities, the defendant agreeing not to take certain steps and otherwise by difficulties created by

the defendant. In *Allen* Salmon LJ , when considering whether delay is inexcusable stated at page 268 D as follows:

> "(2) … As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable."

[22] The plaintiff was given an opportunity by the court to explain the reasons for the delay in this action. In particular he was given an opportunity by the court Order dated 13 October 2017 to file a replying affidavit to, inter alia, set out reasons for the delay.

[23] When the matter was heard I again invited the plaintiff to provide reasons for the delay. The plaintiff, who was clearly very emotionally involved in the proceedings, proceeded to engage in what can only be described as a "rant" to the court about the injustices he had received at the hands of the legal profession and the judiciary in Northern Ireland. He did not answer the question posed to him, namely the reason for the delay. In these circumstances the court rose to allow the plaintiff some time to reflect upon whether he could provide any explanation for the delay in the case. When the court resumed the plaintiff referred the court to his affidavit sworn on 20 March 2017 and in particular paragraphs [3] – [5]. The Plaintiff further stated to the court that he had had a heart attack in 2006 and a quadruple bypass in 2006-2007. Thereafter, the plaintiff proceeded to subject the court to a tirade of abuse shouting in an aggressive manner that it could not give him a fair trial. He then threatened the court that if it struck out the proceedings he would *inter alia* "go to the press", have a documentary made about the case and he would bring it to the attention of a parliamentary committee and leap frog the Court of Appeal and go to the Supreme Court.

[24] Having read the various affidavits filed by the plaintiff since the date of the issue of the instant application and having listened to the representations made by him in person before the court, I am unable to find any excuse or explanation proffered by the plaintiff for the delay in this case since the issue of the writ.

[25] Paragraphs [3] – [5] of his affidavit explain how he felt at the end of the proceedings in the Commercial Court. The reference to the Commercial Court relates to the hearing before Higgins J on 17 October 1996 when the Will was pronounced in solemn form. At that date the plaintiff avers that he was stressed, had no money, was unable to afford proper legal representation and he had no knowledge of the law and no knowledge of the facts. I am not satisfied that this explains the delay in the present case. Whilst the Plaintiff may have laboured under some disadvantages in 1996, by 1999 he was able to issue the writ and thereafter prosecute it with much enthusiasm until 2002. From 2002 until 2017 there was a period of inactivity which the plaintiff has completely failed to address. I accept that his ill-health in 2006-7 may have caused some delay but it does not explain the

inordinate delay of some 15 years. I am therefore satisfied that there has been both inordinate and inexcusable delay by the plaintiff.

Prejudice to the defendant

[26] In *Allen* Salmon LJ noted at page 268D :

> "(3) ... As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

A survey of the authorities indicates that prejudice caused to a defendant arising from delay by a plaintiff, may take a variety of forms. By way of example, a defendant can suffer prejudice arising from the death or unavailability of witnesses; fading memories, destruction of records; difficulties in conducting his affairs due to an action hanging indefinitely over him (as per Gibson LJ in *Shtun v Zalejska* [1996] 3 ALL ER CA at page 417), prejudice to his business interests (as per D*epartment of Trade v Chris Small (Transport) Limited* [1989] AC 1197) or exceptional prejudice due to anxiety which accompanies litigation. This arose in *Biss v Lambeth Southwark and Lewisham Health Authority* [1978] 1 WLR 382 where the action was struck out on the basis there was prejudice to the defendants given a delay of 11½ years in a case where professional reputations were at stake. In *Antcliffe v Gloucester Health Authority* [1992] 1 WLR 1044 the court held that there was prejudice to the defendants because the inordinate delay meant that any award for damages would now have to be borne by the defendant. If the matter had proceeded expeditiously, any damages award would have been borne by the Medical Defence Union.

[27] In the present case the defendants set out details of the alleged prejudice at paragraph 8 of the grounding affidavit. In particular they rely on prejudice caused by fading recollections due to a delay of over 20 years since the date of the matters complained of and 18 years since the date of the issue of the writ; the exposure of the defendants to substantial and increased insurance costs covering the period the proceedings have remained unresolved, the fact the defendants' professional reputations remain under challenge with the associated distress and anxiety this causes and the fact the first defendant has now retired from practice as of 30 April 2015.

[28] Mr Colmer on behalf of the plaintiff submitted that the plaintiff's claim for professional negligence would require not only an investigation into the actions and inactions of the defendants in or around 1996 when the plaintiff asserts they were instructed to act on his behalf but also requires an investigation in respect of the value of the claim lost by the plaintiff namely his claim to have an equitable interest in property owned by the deceased. In respect of the liability question the central evidence would relate to what was said and done by the defendants and also what was said and done by solicitors who were previously on record for the plaintiff. Whilst it was accepted that the defendants had retained their 'solicitor's file' the

other solicitors have not retained their files given the lapse of time. The value of the plaintiff's lost claim relates to whether in fact he had an equitable interest in the assets of his deceased father. For the court to ascertain the strength and the value of the plaintiff's lost claim it would have to conduct an investigation into events which took place in the 1990s. Mr Colmer submitted that the plaintiff's proposition that he had an equitable interest rested not on documentation that rather was based on what was said and done by various family members. The claim therefore required the court to consider the evidence of lay witnesses who did not have documentary records. He submitted that given the lapse of time since the issue of the writ the memories of these witnesses would have faded and many witnesses may not now be available.

[29] The plaintiff replied to the affidavit of Mr Doake on 12 January 2018 by way of a document entitled Affidavit and he further filed a skeleton argument. In these documents the plaintiff repeats what he has said in other documentation and then avers that the complaints made by the defendants are "unintelligible, scandalous, frivolous and an abuse of process, inter alia". At paragraph 5 of his skeleton argument the plaintiff accepted that evidence has been destroyed, lost or contaminated and he makes the case that it is impossible for him to have a fair trial in these circumstances. He further accepts in his submissions that the case made by him in relation to his claim for an equitable interest rests on what was said and done by family members and accepts there is no documentation to support his claim. At the hearing before me, in response to this ground of prejudice, Mr Horner submitted that the parties would still have a good memory of the events in question.

[30] I am satisfied that as the present proceedings will require the court to consider whether the plaintiff had an equitable interest in assets owned by the deceased it will therefore be required to hear the evidence of a number of lay witnesses and the solicitors who were previously instructed in this case. The determination of the dispute will turn on the recollection by these various witnesses. I am therefore satisfied that the evidence of central importance in this case will relate to what was said and what was done rather than what was recorded in documentation. Given the lapse of time in the present case I am satisfied that the memories of these witnesses will have deteriorated.

[31] In addition to the prejudice caused by fading memories of witnesses Mr Colmer submitted that the defendants have been exposed to increased insurance costs whilst the proceedings have remained unresolved and that this position has existed for a very lengthy period of time. He further submitted that the court should also take into account the anxiety caused to the first named defendant as the proceedings relate to his professional reputation and they continue to hang over his head even though he is now retired.

[32] The plaintiff in response denies these matters amount to prejudice to the defendant and alleges that, in contrast, he is the person who has suffered prejudice.

He avers that the defendants have the benefit of the professional insurance and keep records and therefore would not suffer prejudice with the case being allowed to proceed. He further submits, without giving reasons, that the defendants have been guilty of delay and that the court is responsible for the delay as it failed to take steps to prevent the case "going to sleep".

[33] I accept that these additional grounds of prejudice have been made out by the defendants. I accept that the first named defendant has had the stress and anxiety of litigation hanging over his head for a large number of years in respect of matters which affect his professional reputation. Even though he is now retired he continues to have the stress of proceedings hanging over his head. I accept that this would have caused him much anxiety. I further accept that although the second named defendant has professional insurance, as a result of these proceedings continuing for a very lengthy period of time without conclusion, they have remained exposed to substantial and increased insurance costs over a protracted period. Whilst each of these grounds of prejudice, in isolation may not be sufficient to justify striking out the action I am satisfied that when they are considered collectively they constitute prejudice. When added to the prejudice caused by fading memories the prejudice caused by delay in this case is substantial.

[34] In my judgment having regard to the issues involved and the evidence which is needed to resolve them, there is substantial prejudice caused to the defendants by the delay in this case, due to fading memories of witnesses, the stress caused by the delay and the impact delay has on the likelihood of a fair trial. I therefore find it is proper to draw an inference that substantial prejudice arises from the inordinate and inexcusable delay of the plaintiff.

[35] I am therefore satisfied that all the factors are present to enable the court to strike out the proceedings for want of prosecution. In these circumstances the court must then consider whether to exercise its discretion by assessing whether the balance of justice lies in dismissal or allowing the action to proceed. In *Allen v Sir Alfred McAlpine and Sons Limited* [1968] 2 QB 229 at page 259E Diplock LJ put the matter thus:

> "What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been

> responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago."

[36] In light of my findings I am satisfied that there is a substantial risk that a fair trial is no longer possible due to the delay in the present case. This is also a case in which the assets which formed the estate of the deceased have long since been distributed. For all these reasons I find that the balance of justice lies in striking out the plaintiff's claim for want of prosecution.

Conclusion

[37] In light of my determination it is unnecessary for the court to consider the other grounds of relief sought by the defendants or to consider the plaintiff's Notice of Motion.

[38] Accordingly, I strike out the action and I will hear the parties in respect of costs.