

High Court Rejects Applications to Dismiss

February 2024

The High Court has refused an application to strike out proceedings against an architect defendant, holding that where an expert report has established that there is a basis for arguing negligence, the claim could not be considered one that was bound to fail. An application to dismiss the proceedings on the grounds of delay was also refused, despite other defendants in the action obtaining the relief in an earlier application.

Background

The plaintiff, in *Egan v The Governor and the Company of the Bank of Ireland & Ors* [2024] IEHC 26, purchased commercial units in 2004, which he subsequently discovered did not

accord with the relevant planning permission and which extended beyond the lands that he owned. While the plaintiff issued proceedings against a number of parties, including his solicitors, he claimed that the fourth defendant, an architect, was negligent in providing him with a certificate of compliance in 2008, which annexed a map outlining the boundary within which the relevant buildings were contained. The plaintiff claimed that the architect had failed to inform him that the buildings extended beyond the folios that he owned. The architect, in his defence, argued that the certificate was expressly limited in scope, namely, to certifying in his opinion that retention planning permission had been complied with.

Architect Applications

The fourth defendant issued an application seeking to have the proceedings struck out on the grounds of delay, noting that the plaintiff had been aware of issues since 2010 but only





initiated proceedings in February 2014 and that a request for the proceedings to be set down for trial was made by the fourth defendant in 2018 but nothing substantive had been done in the interim to progress the action against him. The proceedings against the solicitor defendants had been dismissed on the basis of delay by the High Court, a decision which was upheld by the Court of Appeal in 2022.

The fourth defendant also sought to have the proceedings struck out pursuant to Order 19 Rule 28 of the Rules of the Superior Courts ('RSC'), namely that the proceedings were bound to fail on the basis that the fourth defendant's only retainer was to certify whether the building complied with retention planning permission and he had never been retained to 'identify the property', meaning that he was not concerned with the boundaries to the folios. The plaintiff argued that a professional liability report provided in 2020 included the expert opinion that there was negligence by the fourth defendant in and about the provision of the certificate in 2008.

Court's Decision

Bound to fail

The court held it could not strike out the proceedings as being bound to fail or failing to disclose a cause of action given the content of the expert report. The court noted that where a plaintiff has a report from an expert supporting his claim in professional negligence against a professional defendant, it cannot be said that he does not have a stateable cause of action. Further, the court could not decide the extent of the fourth defendant's retainer and in particular, whether he was not required to "identify the properties" on an application pursuant to Order 19 Rule 28 RSC. These matters could only be resolved at the trial of the action.

Delay

The court refused to dismiss the proceedings on the grounds of delay. It held there was no culpable pre-commencement

delay, noting the plaintiff's medical issues and involvement in other litigation. The court was satisfied that the case initially moved quite quickly and while there was a delay in making discovery (which was agreed in 2015 but not completed by the plaintiff until 2018), the fourth defendant could not complain of this delay, as he had similarly defaulted in his discovery obligations.

It was noted that the fourth defendant had reasonably sought to have the matter set down for trial in November 2018 but motions that issued in 2018 and 2019 by other defendants for the proceedings against them to be dismissed prevented the plaintiff from progressing against the fourth defendant. The court noted that where a plaintiff has sued multiple defendants, he cannot set the action down for hearing until all the defendants have been accounted for. One of these motions remained in existence until judgment was given by the Court of Appeal in December 2022. In addition, the fact that the fourth defendant's application for the proceedings to be dismissed issued some 3 years after motions by the other defendants has also contributed to the hearing of the action being delayed.

The court found that in any event, the balance of justice favoured the action being allowed to proceed as the fourth defendant had not suffered any forensic prejudice; there was no assertion that any critical witnesses would be unavailable and it is largely a documents case. Some prejudice in the form of reputational damage, increased insurance premiums and loss of work could not on their own be sufficient to tilt the balance of justice in favor of striking out the action.

The court was cognisant that it was making a different finding of fact, to that made by the Court of Appeal in the application brought by the solicitor defendants but it considered that it had the benefit of a considerable volume of additional evidence including GP records, a GP report from July 2023 and two psychiatrist reports. Further, the sole solicitor who had dealt with the plaintiff's affairs would be unable to give

evidence or instructions at any trial on account of medical conditions. Such considerations were not relevant in this application.

Conclusion

This judgment illustrates the high threshold which a defendant must reach to have proceedings dismissed as being bound to fail. It also demonstrates that a court's consideration of an application to dismiss on the basis of delay will go beyond the particular chronology of key dates in the litigation itself, to also include the prevailing circumstances underpinning any given application. As seen here, this can lead to different outcomes in similar applications in the same proceedings.



CONTACT US

Our Offices

Dublin

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

Cayman Islands

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

New York

33 Irving Place
New York
NY 10003
United States
Tel: +1 646 770 6080

Tokyo

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

CONTACT POINTS

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.



Rachel Turner
Partner | Dublin

E rachel.turner@dilloneustace.ie
T + 353 1 667 0022



Anthony Quinn
Legal Counsel | Dublin

E anthony.quinn@dilloneustace.ie
T + 353 1 667 0022

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2024 Dillon Eustace. All rights reserved.