



LITIGATION AND DISPUTE RESOLUTION

Case Dismissed: A 5 Year Delay in Furnishing Discovery Found to be both Inordinate and Inexcusable

by **Shane Neville**

Case Dismissed: A 5 Year Delay in Furnishing Discovery Found to be both Inordinate and Inexcusable

1st October 2019 | by Shane Neville

On Wednesday, 19 June 2019, the High Court handed down a decision in *Walsh and Another v Blasco and Others* which will be of considerable interest to both litigants and legal practitioners who find themselves involved in court proceedings that are not progressing with sufficient speed.

In dismissing the plaintiffs' claim against their former solicitor, Ms Justice Burns held that the plaintiffs had been guilty of inordinate and inexcusable delay in progressing the proceedings. The judge reached the additional finding that the plaintiffs' case was doomed to failure.

The proceedings, which bear a resemblance to the landmark case of [Walsh v Jones Lange LaSalle](#), related to the 2008 purchase by the plaintiffs of lands described at auction as comprising 11.7 acres.

A binding and unconditional contract was entered into at auction between the first-named defendant (the vendor) and the second-named plaintiff (as purchaser). The second-named plaintiff agreed to pay the vendor a purchase price of €610,000 and paid a 10% upfront deposit. It would appear that the second-named plaintiff agreed to purchase the lands on his own behalf and on behalf of his co-plaintiff.

The plaintiffs did not appear to obtain a survey of the lands prior to the auction nor, it seems, did they engage a solicitor until after the auction.

The contract for sale signed at auction described the lands by reference to the Land Registry folio number and did not contain any reference to the area of the lands.

It subsequently transpired that the lands purchased comprised only approximately 7.7 acres, 4 acres fewer than had been indicated at auction.

In 2011, subsequent to the completion of the transaction, the plaintiffs instituted proceedings against the vendor, the sales agents and auctioneers who handled the sale, and also the solicitor firm which acted for the plaintiffs (the solicitor firm).

There followed significant periods of apparent inactivity in the proceedings.

Following the Supreme Court's decision in *Walsh v Jones Lang LaSalle Limited*, which narrowed the instances in which a sales agent or auctioneer would be held liable for errors in the description of a property, the plaintiffs consented to orders being made in 2018 releasing the sales agents and auctioneers from the proceedings. The vendor and the solicitor firm remained as defendants.

Inordinate and Inexcusable Delay

The solicitor firm brought a motion in late 2018 seeking to dismiss the proceedings. The motion was

grounded on two principal arguments: firstly, the delay by the plaintiffs in prosecuting their claim against the solicitor firm was “inordinate and inexcusable”; and secondly, there was no reasonable cause of action in circumstances where the plaintiffs were contractually bound to purchase the lands prior to engaging the solicitor firm. The solicitor firm argued that a five-year delay in making discovery was inordinate and inexcusable. The plaintiffs’ justification for this delay was the difficulty they had incurred in obtaining relevant documentation from their bank.

Judgment

In dismissing the plaintiffs’ claim against the solicitor firm, Ms Justice Tara Burns relied on the principles enunciated in the seminal decision of *Primor plc v Stokes Kennedy Crowley* and held that a five-year delay by the plaintiffs in furnishing discovery was both inordinate and inexcusable. The judge held that it was inconceivable that it should have taken five years to obtain the required documentation to enable the plaintiffs to make discovery. The judge said this was particularly so in circumstances where it was open to the plaintiffs to submit a straightforward data subject access request to their bank to obtain the required documentation.

In deciding where the balance of justice lay for the purposes of the *Primor* principles, the judge noted:

... The [principal of the solicitor firm] asserts that she has suffered prejudice in various guises already cited in this judgment. Whether memories fading with the passage of time really is a prejudice is questionable, as the issue in this case in reality is a legal question and a file is obviously in existence. However, the [principal of the solicitor firm], as a professional, will have suffered stress and anxiety as a result of these proceedings and as averred to by her, will have suffered a significant effect on her professional indemnity insurance premium arising from this claim against her. This is a specific prejudice which will have been ongoing since the time of the institution of the proceedings.

I am of the view that this is a very real prejudice, which is continuing, which I have to have very serious regard to, particularly having regard to the strength of the case against her. In the particular circumstances of this case, I am of the view that the nature of the case made against her is a proper consideration for me to have regard to in considering where the balance of justice lies, within the application to dismiss on the grounds of delay, rather than on a separate standalone basis...

Doomed to Failure

In concluding her judgment, the judge also expressed the view that the plaintiffs’ case against the solicitor firm was doomed to failure. The plaintiffs had entered into a binding and unconditional contract to buy the lands and they did so without any advice from the solicitor firm and without having inspected the lands. The judge held that no subsequent advice received from the solicitor firm could have released the plaintiffs from their contractual obligation to purchase the lands, even if their subject area was less than that described at auction. The judge stated that the most the plaintiffs could have done at that point was refuse to complete the sale, leaving them open to an action for specific performance by the vendor, which they ultimately would have lost.

The judgment will no doubt be welcomed by professionals and their professional indemnity insurers, who often have the unenviable task of defending claims brought many years after their subject events, when memories have faded, and documents have been lost or destroyed. It acts as a crucial reminder to plaintiffs to prosecute their claims in a timely manner.

About the Author



Shane Neville
Partner

Shane acts for national and international companies operating in the insurance, technology and professional sectors in a wide variety of commercial disputes.

T: + 353 1 638 5853 **E:** sneville@lkshields.ie