

Neutral Citation No: [2017] NICH 25

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: McB10401

Delivered: 12/10/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

BRIAN FERRIS

Applicant;

-and-

**CHRISTINE MEYLER AS EXECUTRIX OF THE ESTATE OF
JOSEPH FERRIS (DECEASED), AS EXECUTRIX OF THE ESTATE OF
BRIGID FERRIS (DECEASED), JOSEPH FERRIS**

Respondents.

McBRIDE J

Application

[1] By summons dated 30 November 2016 the first named respondent applied to have the proceedings herein dismissed for want of prosecution pursuant to the inherent jurisdiction of the court on the basis the applicant was in breach of a court order dated 5 December 2013.

[2] The application was supported by a grounding affidavit sworn on 30 November 2016 by the first named respondent.

[3] The applicant originally appeared as a litigant in person but laterally was represented by Mr Clegg of counsel. The first named respondent was represented by Mr McHugh of counsel. I am grateful to both counsel for their detailed oral submissions supplemented by comprehensive and well researched skeleton arguments which proved to be of considerable assistance to the court.

Background

[4] Before turning to the substance of the application it is necessary to set out some detail of the background to and chronology of the present proceedings.

[5] On 15 August 2012 the applicant applied to the Land Registry to be registered with possessory title of lands contained in Folio 2974 County Tyrone and Folio 20044 County Tyrone together with a portion of unregistered land (“the lands”). At that time the applicant was a litigant in person. On 24 July 2013 the Deputy Registrar of Titles referred the application to the High Court pursuant to Section 6(2) of the Land Registration (Northern Ireland) Act 1970.

[6] The matter was then reviewed by the Chancery Judge on 18 September 2013 when the applicant appeared as a litigant in person and the court appointed a McKenzie Friend. The matter was listed for further review on 2 October 2013 when the first named respondent was added as a respondent, the case was listed for review on 20 January 2014 and trial on 22 May 2014.

[7] Subsequently, the court upon its own motion made an order administratively on 5 December 2013, which was amended administratively on 19 December 2013, requiring the applicant to serve a Notice of Motion on or before 14 January 2014.

[8] By letter dated 10 December 2013 the Chancery Court Office wrote to the applicant enclosing the orders dated 5 December 2013 and 19 December 2013 and advised him a Notice of Motion was to be served by him on or before 14 January 2014.

[9] The applicant replied on 17 December 2013 requesting a CD of the proceedings before the court on 5 December and 10 December together with certain other documentation. By letter dated 23 December 2013 the court office confirmed that the court orders were made administratively. On the same date the applicant wrote to the court office advising he had made a complaint against Land and Property Services which was the subject of an on-going investigation. In those circumstances he stated he believed it was premature to issue a Notice of Motion and asked the court to confirm that the case could be “filed pending receipt of a notice” from him to have the case listed. He further indicated that the review on 20 January 2014 could be vacated to avoid wasting court time.

[10] The court office replied by letter dated 10 January 2014 advising the applicant if he failed to file the notice he would be required to apply to the court for leave to extend time. He was further advised that the Chancery Judge had directed that the review on 20 January 2014 and the trial could both be vacated in the event he failed to file a Notice of Motion within the required time. The applicant failed to file Notice of Motion. On 4 February 2014 the court office wrote to the applicant advising him that the case had been removed from the High Court list on 14 January 2014 and the trial date was vacated and the court had made no further orders.

[11] In parallel with his correspondence with the High Court the applicant also engaged in correspondence with Land and Property Services. He sent a letter of

complaint on 4 October 2013. Thereafter there was extensive correspondence between the parties. On 29 January 2014 the Chief Executive of Land and Property Services advised the applicant that it would be inappropriate to comment further as the matter had been referred to the High Court.

[12] At this stage the applicant then applied to the Land Registry to register an inhibition against the lands. Initially the Land Registry refused to accept the application on the basis the dispute in respect of the lands was on-going in the High Court. On 16 January 2014 the applicant wrote to Land and Property Services. After setting out details of his correspondence with the High Court he advised Land and Property Services as follows:

“As there are no High Court proceedings pending, and to protect my interests in this land ... my instructions are that my application for the entry of inhibitions is processed without further delay.”

[13] On 10 February 2014 the applicant again wrote to Land and Property Services enclosing a letter from the court office dated 4 February 2014 and he again stated in his letter “As the above letter from the Chancery Office confirms there are no High Court proceedings pending ...”.

[14] Subsequently on 15 April 2014 Land and Property Services wrote to the applicant confirming they had now received confirmation from the Chancery Court that the case had been removed from the list and asked the applicant to re-lodge papers so they could process his application for an inhibition.

[15] On 16 September 2016 the applicant’s solicitors P J Flanagan and Company wrote to Land Registry asking for an update in respect of the applicant’s application to be registered with possessory title of the lands. There is no record of any response by Land and Property Services.

[16] The matter thereafter remained in abeyance until Meyler McGuigan solicitors e-mailed the court office asking whether the proceedings had been disposed of or whether the matter needed to be listed so it could be dismissed. In response to this e-mail the case was listed for review before the Chancery Judge on 17 November 2016. The applicant did not appear at this review hearing. The court made a number of directions.

[17] The matter was then reviewed on 19 December 2016 and the applicant had engaged legal representation and was thereafter represented by solicitor and counsel.

Evidence of the respondent

[18] In an affidavit sworn on 30 October 2016 the applicant sought the dismissal of the proceedings based on the applicant's failure to comply with the court order dated 5 December 2013 and on the basis of his inordinate and unexplained delay. The deponent averred that his delay had caused prejudice as the estate remained unadministered and tax liability was increasing as a result. She also referenced the fact other vexatious applications had been made and as a result of this application and those applications the estate had remained unadministered to date.

Evidence of the applicant

[19] In compliance with the court direction that he set out reasons for his non-compliance with the court order dated 5 December 2013 and the reasons for the delay in the case, the applicant filed an affidavit sworn on 5 January 2017. In this he avers that he initially appeared as a litigant in person at court reviews on 18 September 2013 and 2 October 2013. Thereafter he engaged in correspondence with the Chancery Court Office and also the offices of the Land and Property Services. The most relevant correspondence has been set out in the background chronology herein.

[20] The applicant's case is that he understood the letters dated 10 January 2014 and 4 February 2014 from the court office to mean that the case had been removed from the High Court list and that it would now be dealt with by the Land and Property Services. This view was strengthened by the correspondence from Land and Property Services and their agreement to accept his application for an inhibition. He accepts that the matter then remained in abeyance until July 2016 when he instructed solicitors to write to the Land Registry to ascertain the status of his application to be registered with possessory title of the lands. The applicant states he now only wishes to proceed with his application in respect of the lands contained in Folio 2974 County Tyrone and no longer wishes to pursue his application in respect of either the lands in Folio 20044 County Tyrone or the unregistered portion of land.

Relevant legal principles

[21] There are two circumstances in which an action may be dismissed for want of prosecution namely:

- (a) When a party has been guilty of intentional and contumelious delay. By this is meant disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court.
- (b) (i) Where there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and

(ii) Such delay will give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or 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 other or between them and a third party. These principles were approved by Lord Diplock in *Birkett v James* [1997] 2 All ER 801 at page 805A-C.

Ground A

[22] The first respondent submitted that this ground applied as the applicant was in breach of the order dated 5 December 2013 which was a peremptory order and also because the proceedings amounted to an abuse of the process of the court.

[23] A peremptory order is one which makes clear to the other party either from its terms or from the circumstances in which it was made, that exact compliance with no further argument, is required by the court within a stated time, and indicating expressly or by implication, that default will incur serious consequences (as per *The Supreme Court Practice*, 1999 25/L/3). The best practical form of peremptory order is the “unless” orders.

[24] I have considered the terms of the order dated 5 December 2013. I am satisfied that it cannot be described as a peremptory order in accordance with the definition set out above. In particular neither the order nor the subsequent correspondence from the court made it clear to the applicant that its effect would be to dismiss his application to be registered with possessory title of the lands.

[25] Mr McHugh on behalf of the first named respondent further submitted that Ground A was established as the proceedings amounted to an abuse of the court process.

[26] The court can strike out proceedings on the grounds of abuse in a wide variety of circumstances. Examples include when the real purpose of the proceedings is some other than satisfying the plaintiff’s civil rights; when proceedings are commenced with no intention of bringing them to a conclusion or when the plaintiff is seeking to re-litigate an issue which has already been decided substantially against him in previous litigation. Another example of abuse of process appears in the case of *Wallersteiner v Moir* [1974] 1 WLR page 991. In that case the plaintiff had used the issue of a writ for libel to stop investigation into his conduct at company meetings by claiming the matters were sub judice. The court dismissed the proceedings on the basis the plaintiff’s delay in prosecuting the writ amounted to intentional and contumelious delay as the proceedings were in effect an abuse of the process of the court and had prejudiced the course of justice.

[27] In the present case Mr McHugh submits that the applicant’s proceedings are an abuse of the court process as the applicant’s real motive in issuing the

proceedings is to frustrate the administration of the estate as evidenced by the applicant's unexplained delay between 15 May 2014 and 16 September 2016. He further submitted that the applicant was seeking to re-litigate matters which had already been determined.

[28] To assess whether the true motive of the applicant is to frustrate the administration of the estate as opposed to vindicating his legal right to claim possessory title to the lands it is necessary to consider whether there has been inordinate and unexplained delay. I have carefully considered the delay in this case and the reasons given by the applicant for the delay. I am satisfied that there has been very substantial delay in this matter. The applicant in his affidavit has I consider, given a reasonable explanation for the delay between 15 August 2012, when proceedings were issued and the 15 May 2014. He has not given any explanation for the delay between 15 May 2014 and September 2016 when he instructed his solicitors to write to Land Registry to ascertain the state of the proceedings, save that he understood the matter was in the hands of Land Registry and it was processing his claim.

[29] Having regard to the confusing nature of the correspondence sent by both the Court office and Land and Property Services I am satisfied that the applicant, a litigant in person, was confused about where and how his case was being dealt with. His belief that Land and Property services were dealing with his application is supported by the correspondence they sent to the applicant. I further note that the applicant took the initiative in September 2017 to instruct solicitors to write to Land and Property Services to ascertain how matters were progressing. If his true motivation had been to frustrate the administration of the estate by ensuring the matter was never brought to a conclusion it is difficult to understand why he took the initiative to engage solicitors to write to Land and Property services. I am satisfied his actions demonstrate that he was seeking to satisfy his legal rights rather than to delay proceedings in a bid to frustrate the administration of the estate.

[30] The first respondent further advised the court that there had been a large amount of litigation in respect of the lands and details of this were provided to the court on 25 August 2017. It appears from the documents lodged that the applicant has made the following applications:-

- (a) In respect of the unregistered land the applicant applied to the Land Registry to be registered with possessory title on 7 August 2007. This application was dismissed on 11 March 2008.
- (b) In respect of lands in Folio 20044 County Tyrone the applicant applied to Land Registry in February 2008 to be registered with possessory title. This application was abandoned by the applicant.
- (c) In respect of Folio 2974 County Tyrone the applicant applied to Land Registry in September 2008 to be registered with possessory title. This matter was referred to the County Court by the Land Registry. The

application was not heard by the County Court as the applicant failed to lodge the appropriate papers.

[31] In addition to applications made by the applicant, Christine Meyler, on behalf of the estate brought proceedings against the applicant in respect of Folio 20044 County Tyrone and the unregistered lands whereby she sought an injunction in relation to his alleged unlawful occupation of the lands and a declaration that the Plaintiff had full unencumbered title to the lands ownership. On 28 August 2009 the County Court made an order in favour of the estate and granted the injunction and the declaration. This order was affirmed on appeal by the High Court and the Court of Appeal. Application for leave to the Supreme Court was refused.

[32] Christine Meyler on behalf of the estate also brought proceedings against Joseph Ferris in respect of Folio 2974 County Tyrone. Joseph Ferris issued a defence and counterclaim claiming an interest in the said Folio. Judge McFarland dismissed the counterclaim and made a declaration that the Plaintiff was entitled to 7/9ths of any interest Charles Ferris (senior) had in the lands and the defendant was entitled to 2/9ths of any interest Charles Ferris Senior had in the lands. The Court refused to make any declaration as to full ownership as Charles Senior's interest in the land was either by virtue of adverse possession or proprietary estoppel and other family members who may be entitled to object had not been given an opportunity to do so and therefore the court left open this avenue to enable these persons to assert such rights as they believed they may have. This decision was appealed to the High Court which dismissed the appeal on 8 April 2008 and affirmed the orders made by Judge McFarland. The defendant applied to the High Court to state a case to the Court of Appeal. Hart J acceded to this request. The Court of Appeal dismissed the appeal.

[33] In the circumstances the first named respondent submits that the applicant is seeking to re-litigate matters which had already been determined.

[34] I accept that in respect of the unregistered lands and Folio 20044 County Tyrone the court has already adjudicated on the ownership of these lands and therefore insofar as the applicant's present application relates to these lands I find that it would amount to an abuse of the process of court and I dismiss that part of his application. I note, in his affidavit, the applicant indicates that he no longer wishes to pursue his application in respect of these lands in any event. He does however wish to continue to prosecute his claim in respect of the lands contained in Folio 2974 County Tyrone. The applicant has previously issued proceedings in respect of these lands which could not proceed as he failed to lodge the appropriate papers. In addition there has been litigation in respect of this folio but it has been between Joseph Ferris and the estate. The litigation between Joseph Ferris and the estate did not make a determination as to any interest the applicant may have in the lands in Folio 2974. Therefore whilst there has been litigation in respect of Folio 2974 I do not find that the present proceedings amount to an abuse of the court process as the extent, if any, of the interest the applicant has in Folio 2974 has never been

determined on the merits. For this reason I refuse to dismiss the proceedings relating to lands in Folio 2974 County Tyrone on the basis of Ground A.

Ground B

[35] In *Birkett v James* the House of Lords considered whether Ground B could be established in a case where the limitation period had not expired by the time the application to dismiss for want of prosecution was heard. Lord Diplock held at page 808C:

“I am of the opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff was involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending.”

Further Lord Edmund Davies at page 817J:

“Such being the law as I understand it, I respectfully concur with my noble and learned friend, Lord Diplock, that, where there appears any likelihood that a plaintiff will issue a second writ, the case must be quite exceptional (and difficult to imagine) where the court should within the limitation period dismiss an action simply for want of prosecution.”

[36] The plaintiff’s application is to be registered with possessory title of the lands. By virtue of the nature of his application the limitation period has not expired. I am further satisfied in light of the steps already taken by the applicant to engage a solicitor to write to Land and Property Services about the progress of his application and his engagement of solicitor and counsel to act in defence of this application; it is likely that he would issue fresh proceedings in the event these proceedings were dismissed. I have not been made aware of any exceptional circumstances which would indicate that, notwithstanding the fact the limitation period had not expired and the Plaintiff is likely to issue further proceedings if these were to be dismissed, the court should nonetheless dismiss the present proceedings. Therefore in line with the dicta of Lord Diplock and Lord Edmund Davies I am satisfied that the action should not be dismissed for want of prosecution on the basis of Ground B.

Conclusion

[37] I dismiss the proceedings insofar as they relate to the unregistered lands and Folio 20044 County Tyrone. Otherwise I refuse the application.

[38] This is a case which has been characterised by much delay and I therefore direct that unless the applicant files a Notice of Motion within 7 days of the date hereof the proceedings shall be struck out.

[39] I shall hear the parties in respect of costs.