Neutral Citation Number: [2011] IEHC 103

THE HIGH COURT

2010 78 CA

BETWEEN

JOHN QUINN

PLAINTIFF

AND

FRANCIS FAULKNER TRADING AS FAULKNER'S GARAGE

AND MMC COMMERCIALS LTD

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 14th March, 2011

1. This appeal raises once again the question of the court's duty to ensure that proceedings are concluded within a reasonable time. The issue arises in the following way. The plaintiff is a hackney driver who resides in Buncrana, Co. Donegal. In March 1995 he agreed to purchase a brand new Mitsubishi Lancer diesel motor vehicle for his professional purposes from the first defendant ("Faulkner's Garage"), a garage based in Moville. The second defendant ("MMC") is a leasing company who appear to have financed the vehicle through a form of hire purchase.

2. The plaintiff contends that the vehicle contained so many defects that it was not of merchantable quality. His pleadings set out detailed and lengthy particulars of these defects which are said to include loss of power, defective central locking, heavy oil leaks from the engine and much else besides. To add insult to injury - at least from his perspective - the ignition fuse later blew and the wiring in the front of the car went on fire in August 1996. Having recited this long litany of defects, the plaintiff's endorsement of claim added, with pithy understatement, that "the car is presently not functioning". So far as MMC is concerned, counsel for the plaintiff, Ms. O'Grady contended at the hearing before me that it was liable by virtue of the provisions of s. 82 of the Consumer Credit Act 1995 which extends to the letting of a motor vehicle by hire purchase the implied conditions contained in s. 13 of the Supply of Goods and Sale of Services Act 1980, so that the owner (i.e., the finance company) is liable to the hirer for any breach of any implied conditions.

3. Those Circuit Court proceedings commenced in February 2001, almost six years from the date of the vehicle was purchased and some five years from the date of a comprehensive letter before action which was sent in March 1996 by the plaintiff's solicitors to Faulkner's Garage. A further letter of this nature was sent to MMC on 2nd September, 1996. MMC filed a notice for particulars on 6th June, 2001, and on 15th July, 2002, the Circuit Court made an order allowing the plaintiff three weeks to reply to this request. MMC were given liberty to re-enter the motion on notice to the plaintiff's solicitors. The plaintiff's solicitors replied to the request for particulars on 23rd January, 2003. It should be noted that Faulkner's Garage filed its defence on 19th October, 2001, and on the same day issue a notice of indemnity and contribution against MMC.

4. In contrast to the position adopted by Faulkner's Garage, it is striking that almost another four and one half years were to elapse before MMC filed a defence on 15th May, 2007. The filing of this defence appears to have been prompted by a reminder letter sent by the plaintiff's solicitors on 30th April, 2007. A notice for trial was issued on 22nd September, 2008. It would seem that at no stage was a notice of intention to proceed served in the manner required by the Circuit Court Rules.

5. Faulkner's Garage responded to this notice of trial by issuing a motion seeking to have the proceedings struck out on the grounds of undue delay. On 28th April, 2009 His Honour Judge O'Hagan struck out the proceedings as against this defendant on this ground. Having learned of the making of this order, MMC then sought to bring a similar motion before the Circuit Court. In her affidavit of 5th November, 2009, grounding that motion, Ms. Durkan, the solicitor for MMC, contended that "the considerations at issue in that application apply with equal force to this application." On this occasion, His Honour Judge O'Hagan took a different view of the matter so far as the case concerned MMC and by order dated 11th February, 2010, he refused the second defendant's motion to strike out the proceedings on grounds of inordinate and excusable delay. It appears, however, that Judge O'Hagan did give MMC liberty to issue a third party notice seeking indemnity and contribution as against Faulkner's Garage.

6. MMC now appeals to this Court against that decision. While no note or other record of Judge O'Hagan's decision has been produced before me, it would appear to be common case that he (very understandably) took the view that the circumstances of the two defendants were different, largely because MMC were in default of pleading between January, 2003 and May, 2007.

7. Before proceeding further to analyse the substantive issues raised by this appeal, it behoves me to say at the outset that I cannot regard the affidavits filed by either side as being completely satisfactory. While the affidavits focus -understandably enough, perhaps - on questions of potential prejudice occasioned by these delays and a narrative of the relevant procedural history, neither address the reasons for the delay on their own side.

8. Thus, so far as the plaintiff is concerned, no explanation has been offered for the delay in instituting the proceedings. Nor has there been any adequate explanation for the further delay which took place from 2001 onwards. There is, for example, no explanation as to why the plaintiff failed to take any steps to compel MMC to file a defence during that period. Nor is there any explanation of their failure to set down the action for trial immediately the defence was filed, instead of waiting another fifteen months before taking such a step.

9. What is perhaps even more striking is that MMC have not explained at all the reason for its significant delay in not filing a defence for over 4 and one half years since the plaintiff replied to its notice for particulars on 23rd January, 2003. The affidavits filed in support of MMC's strike out motion certainly gloss over this critical question, almost as if it were a matter of no importance. In this respect, I fully agree with Judge O'Hagan that the position of the two defendants is very different, but, for reasons which I will now endeavour to set out, there is a further consideration independent of the parties which compels me to allow the appeal.

10. At all events, it is against this general background that I am required to consider whether these proceedings should be struck out on the grounds of inordinate delay.

Inordinate delay: restating basic principles
11. We may start our consideration of the question of inordinate delay by recalling some basic principles in this area. First, it is incumbent on a plaintiff who has waited towards the end of the limitation period to progress the litigation thereafter with some dispatch: see, *e.g.*, the comments of Henchy J. in *Sheehan v. Amond* [1982] I.R. 235 at 237 and those of Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27.

12. Second, while the tests articulated by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 are the conventional starting point in examining delay cases of this kind (namely, considerations whether there has been inordinate and inexcusable delay, coupled with the application of the balance of justice test), the Supreme Court's judgment in *McBrearty* confirms that these tests are not exhaustive and all encompassing and that the courts' constitutionally derived inherent jurisdiction can be exercised even though some elements of the *Primor* test may not have been established.

13. Third, in exceptional cases the courts can strike out proceedings by reason on undue delay, even though the third limb of the *Primor* test might not have been established, such as where, for example, no specific prejudice to the defendant has been shown: see, *e.g.,* the judgment of Peart J. in *Byrne v. Minister for Defence* [2005] IEHC 147, [2005] 1 I.R. 577 and my own judgment in *Donnellan v. Westport Textiles Ltd*. [2011] IEHC 11. While the *Primor* test remains the primary test, as I pointed out in my own judgment in *Donnellan*, the other parallel line of case-law from *O'Domhnaill v. Merrick* [1984] I.R. 151 onwards also stresses:

> "…..the inherent duty of the courts arising from the Constitution to put an end to stale claims in order to ensure the effective administration of justice and basic fairness of procedures and in order to secure compliance with the requirements of Article 6 ECHR."

14. Fifth, as illustrated by decisions such as *Byrne* and *Donnellan*, undue delay on the part of litigants can compromise the *public interest*, even if the *defendants* were not specifically prejudiced as a result. As Peart J. put it in *Byrne*:-

> "....there is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the Courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation, as well as increase the cost to the Courts Service, and through that body to the taxpayers, of providing a service of access to the Courts which serves best the public interest."

Application of these principles to the present case
15. If we start with the conventional *Primor* principles, it is plain that the delay here is inordinate. Putting some perspective on this matter, it should be recalled that this judgment is being delivered some fifteen years after the first letter before action was dispatched. Judged by any standards - and certainly measured by what ought to be a relatively routine Circuit Court action - a delay of this period is inordinate. It is equally plain that as the delay has not even being been explained - not to speak of being excused - it must be regarded as being inexcusable.

16. This brings us immediately to the question of the balance of justice. It is true that the plaintiff's case was fully and thoroughly set out in his solicitor's detailed letter before action which was dated 29th March, 1996. As Clarke J. noted in *Rogers v. Michelin Tyre plc* [2005] IEHC 294 this "is a factor which is properly taken into account and lies in favour of the plaintiff in that it makes the delay less likely to cause serious prejudice".

17. In the present case, however, this consideration is off-set by the fact that the plaintiff allowed another five years to elapse before commencing proceedings, thus bringing into play the comments of Henchy J. in *Sheehan* and those of Geoghegan J. in *McBrearty*. The delay in waiting towards the end of the limitation period while not acting with particular promptness thereafter in prosecuting the litigation is a factor which heavily tells against the plaintiff in the present case, particularly in the absence of an explanation for this delay. If the plaintiff's account of what happened to his vehicle is correct, the present claim really ought to have been a relatively straightforward and routine claim for damages in both contract and tort. It is thus somewhat puzzling that the plaintiff would wait almost a further full five years before issuing proceedings when his solicitor had already sent such a detailed letter before action on 29th March, 1996. There was likewise a further delay of some eighteen months before the notice for particulars was replied to in January, 2003 and then only in circumstances where the defendant had issued a motion the previous year in June, 2002.

18. Nor has the plaintiff explained his failure to take steps to compel the defendant to file a defence, so that a further four and one half years elapsed before such a defence was filed in May, 2007. Of course, I do not at all overlook the fact that MMC have themselves been guilty of gross delay in filing that defence. They are plainly and unambiguously guilty of active delay in the manner described by Clarke J. in *Rogers* and as the "ball was in the court of [this] defendant for a significant period of that time is clearly a weighty factor to be taken into account in the assessment of the balance of justice".

19. But the plaintiff was not without recourse to appropriate judicial remedies where that defendant was in default of pleading and, consistent with the obligations which rests on a plaintiff who waits towards the end of a (not ungenerous) limitation period to advance such proceedings, he could and should have taken steps in that regard.

20. At the same time, I am not persuaded that MMC have suffered particular prejudice or, even if they have, that they are in a position to assert it, given their own cavalier attitude to the proceedings by being in default of pleading for well over 4 years without having furnished any explanation for such delay to the court.

21. Turning now to the specific grounds of prejudice, the first argument is that as Faulkner's Garage were dismissed from the proceedings it would then be unfair to allow the burden of defending the entirety of the proceedings to fall entirely on the shoulders of MMC. It also contends that the effectiveness of the third party notice - which it only issued in 2010 - is prejudiced by reason of the plaintiff's delays because Faulkner's Garage will presumably successfully contend at some later that this order should in turn be set aside by reason of the intervening delays.

22. One can shortly dispose of these objections by saying that this situation has almost entirely been brought about by MMC's own failure to file a defence in a timely fashion. MMC is in no position to complain that it has been left alone as a defendant when Faulkner's Garage succeeded in its strike out motion, given that the latter filed a defence in a timely fashion whereas the former did not. Nor am I impressed by the argument based on the possibility frailty of the third party notice which was served in 2010, when

MMC could just as easily have taken a leaf out of Faulkner's Garage's book and served a notice of indemnity and contribution against its co-defendant some nine years earlier.

23. The second ground of prejudice is said to arise from the fact that various employees or agents of MMC who dealt with the plaintiff's complaints in 1996 can no longer be located or that they are not now in a position to secure an engineer's report. But it is clear from the affidavits sworn by the parties that a representative of Faulkner's Garage is available. It is likewise clear that the plaintiff's detailed letter before action of March, 1996 should have put MMC on their guard. They should have taken steps to secure witness statements from their own employees and agents at the time they received the letter in September 1996, not least given that litigation was expressly threatened and that the plaintiff's solicitors indicated that they had secured a report from their own engineer.

24. If, therefore, MMC are at a disadvantage in now defending these proceedings, it is a situation which is largely of their own making. If one were simply considering striking a balance based on the private interests of both parties, I would have been prepared to permit the action to proceed, given that these competing arguments more or less cancel each other out. While the plaintiff has been guilty of gross delay, the same is also true of MMC, albeit to a slightly lesser extent.

Taking account of the public interest

25. The matter does not, however, simply end there, since the public interest must also be considered. Here it must be recalled that the function of the courts which they have been assigned by Article 34.1 of the Constitution is to administer justice. As I ventured to suggest in my own judgments in *Donnellan* and in *O'Connor v. Neurendale Ltd*. [2010] IEHC 387, this constitutional requirement pre-supposes that the courts are under a duty to ensure the timely administration of justice. For good measure, this duty is also reflected in Article 6 ECHR: see, *e.g.*, *McFarlane v. Ireland* [2010] ECHR 1272.

26. I should digress here to note that, of course, the ECHR does not have direct effect in the State: see the judgment of the Supreme Court in *McD v. L.* [2009] IESC 81. It is likewise clear that as the courts are not an "organ of the State" for the purposes of s.3(1) of the European Convention of Human Rights Act 2003 in view of the definition of that term in s. 1(1) of the Act, it must remain an open question as to whether the judicial branch is required (or even, it might be more correct to say, permitted) to re-fashion judicial remedies so as to secure effective compliance with the requirements of both Article 6 ECHR (hearing within a reasonable time) Article 13 ECHR (effective remedy), not least if this had the consequence of creating a form of horizontal direct effect for the ECHR in litigation in litigation such as the present involving two private parties.

27. As it happens, having regard to the view which I take of the effect of Article 34.1 of the Constitution, it is not necessary to address this question, save, perhaps, to observe that it could scarcely be in the public interest if the courts did not adequately control and regulate the administration of justice so as to expose the State to claims that it had not adequately secured these Convention rights.

28. At all events, the constitutional duty to which I have referred also reflects a public interest in the efficient and proper use of the legal process, as well the reflecting a proper concern for the individual rights of litigants. That constitutional mandate simply could not be effectively discharged if the courts were regularly required to hear cases which one or both of the parties had allowed to become stale by reason of inordinate and inexcusable delay.

29. While as Charleton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common: see, *e.g.,* the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 ILRM 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd*. [2010] IEHC 465. As Clarke J. observed in *Rodenhuis* and *Verloop:-*

> "As long as it remains the case that the procedure in this jurisdiction is left largely in the hands of the parties, then it follows that the pace at which litigation will progress will be highly dependent on the initiative shown by those parties. To the extent that it becomes clear that parties will be significantly indulged even though they engage in delay, then that fact is only likely to encourage delay. If parties feel they can get away it, and if that feeling is justified by the response of the courts, then there is likely to be more delay. It seems to me, therefore, that it is necessary, in a system where the initiative is left largely up to the parties to progress proceedings, for the courts make clear that there will not be an excessive indulgence of delay, because if the courts do not make that clear, it follows that the courts actions will encourage delay and, thus, will encourage a situation where cases will not be completed within the sort of times which would be consistent with compliance with Ireland's obligations under the ECHR."

30. The public interest thus requires that the courts take active steps in relation to undue delay, since a failure to do so will simply encourage delay across the legal system. A further consideration is that, as Peart J. pointed out in *Byrne*, delays of this kind create additional burdens for the legal system by detracting from their general efficiency and effectiveness. That is certainly the case here where twelve years were allowed to elapse before a notice of trial was served in respect of a relatively routine claim for damages.

31. Of course, there may be exceptional cases where by reason of unusual and special circumstances - such as where there has been concealed fraud on the part of a defendant or if the case presents as one with particularly complex facts or where (as in *Guerin v. Guerin* [1992] 2 I.R. 287) one of the litigants is a minor or suffers from acute social or personal disadvantage - different considerations would apply. But in a case such as the present one where proceedings were commenced so late, the plaintiff must show that he took all reasonable steps to bring the case to trial within a reasonable period thereafter. While not absolving MMC in any way of responsibility for their delay, the fact is as that the plaintiff cannot show that he has taken all such steps, the public interest in the timely administration of justice - which, after all, is the very constitutional mandate which the courts are required to discharge - is thereby compromised.

32. As this court has a duty to ensure that these constitutional values are upheld, I consider that I am thereby coerced in the circumstances to allow the appeal and to strike out the proceedings on this ground.