Neutral Citation: [2014] IEHC 304

THE HIGH COURT

[2000 No. 7865 P]

BETWEEN

WILLIAM McCLEAN

PLAINTIFF

AND

SUNDAY NEWSPAPERS LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Barrett delivered on the 30th day of May, 2014

1. The key issue arising in this case is the extent to which delay of prosecution will be tolerated in defamation proceedings before an order for stay and/or dismissal of those proceedings will issue.

Facts

2. On 16th April, 2000, the Sunday World newspaper, which is published by the defendant, Sunday Newspapers Limited, published an article that alleged, amongst other matters, that the plaintiff, Mr. McClean, had sought to sell compromising photos of a woman whom he knew and who had attained a certain notoriety in the media. On 6th July, 2000, the plaintiff issued a plenary summons seeking damages for alleged libel contained in the article. At first, the proceedings commenced at a relatively normal pace. On 27th June, 2000, a statement of claim was delivered. On 19th July, 2000, an appearance was entered by the defendant. On 20th March, 2001, the defendant's notice for particulars issued. On the same date the defendant's defence was delivered, raising *inter alia* the defence of justification. On 9th August, 2001, the plaintiff's replies to particulars issued. On 7th December, 2001, a notice of trial was served. On 9th January 2002, further particulars of the justification were provided. On 15th January, 2002, the plaintiff issued a notice to produce. On 12th July, 2002, the plaintiff's notice for particulars issued. On the same date the plaintiff made request for voluntary discovery. On 2nd October, 2002, the defendant's replies to those particulars issued. On 25th November, 2002, an affidavit of discovery was sworn by the editor of the Sunday World newspaper. At this point, when the parties were teetering on the trial of the action, everything stopped until the plaintiff, on 14th April, 2010, issued a notice of intention to proceed. Then again everything stopped. Finally, on 15th August, 2013, more than 13 years after the purportedly libellous article was published, the defendant's solicitors issued a letter requesting that the plaintiff serve a notice of discontinuance. When this was not done the defendant brought the present application seeking, *inter alia*, an order pursuant to O.122, r.11 of the Rules of the Superior Courts staying and/or dismissing the plaintiff's claim for want of prosecution and further, or in the alternative, an order staying and/or dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay in the prosecution of his action.

3. In his affidavit evidence the plaintiff offers the following by way of explanation for the initial seven-year and then further three-year delay arising in the proceedings:

> *"[1] Following the commencement of the within proceedings the defendant desisted from publishing articles concerning me. I took comfort from this fact and to an extent I was happy to let sleeping dogs lie…However, the matter was reactivated by the publication by the defendant of a further defamatory article on the 21st of March, 2010, which made it clear to me that the defendant was intent on destroying my reputation…Accordingly, I instructed my solicitors to serve a notice of intention to proceed in these proceedings…[2] I would also like the Court to note that during the period in which it is alleged that I delayed in prosecuting the within proceedings, I suffered from considerable ill health…While this did not stop me from prosecuting these or other proceedings it certainly interfered with my ability to do so."*

4. The court does not accept that the unfortunate bout of ill-health that Mr McClean suffered can be relied upon to explain the delay arising in these proceedings. This is because it appears from Mr McClean's own affidavit evidence that such ill-health as he suffered was not such as entirely to impede him from prosecuting the instant proceedings, nor indeed did it stop him from commencing and settling substantial litigation against another newspaper publishing group during the period in question. The court's conclusion in this regard means that the only surviving explanation for the delay is that Mr McClean, having commenced these proceedings, took the tactical view that so long as the defendant desisted from publishing articles about him, he was satisfied not to prosecute matters further or, as Mr McClean himself puts it in his affidavit evidence, he was satisfied "*to an extent…to let sleeping dogs lie*", at least for a time. Whether this explanation combined with such other factors as may be relevant suffices to defeat the instant application will be considered further below.

Principles to be applied

5. Order 122, r.11 of the Rules of the Superior Courts, 1986 provides that:

> *"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the court to dismiss the same for want of prosecution, and on the hearing of such application the court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the court may seem just…".*

Order 122, r.11 is one of a number of provisions in the Rules of the Superior Courts that enable a defendant to bring an application to dismiss proceedings for want of prosecution. In addition, as Hamilton C.J. stated in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at 475:

> *"[T]he courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so."*

6. Regardless of whether the court invokes a jurisdiction to dismiss a claim for want of prosecution under the Rules of the Superior Courts or by reference to its inherent jurisdiction, it appears that the same principles apply to the court in its deliberations. Thus the court must have regard to the two lines of authority that arise respectively from the Supreme Court decisions in *Primor* and the earlier case of *O'Domhnaill v. Merrick* [1984] I.R. 151. In the context of defamation proceedings it is also important to bear in mind the special considerations referred to by Keane C.J. in his judgment in *Ewins v. Independent Newspapers (Ireland) Ltd. & Anor.* [2003] 1 I.R. 583 at 590 to the effect that:

> *"A plaintiff in defamation proceedings, as opposed to many other forms of proceedings, is under a particular onus to institute his proceedings instantly and without delay and, of course, not simply because he will be otherwise met with the response that it cannot have been of such significance to his reputation if he delayed so long to bring the proceedings but also in his own interests in order, at once, to restore the damage that he sees to have been done to his reputation by the offending publication."*

7. In *Primor*, Hamilton C.J., at 475, summarises the principles to be applied in an application to dismiss proceedings for want of prosecution. These principles have since been recited with approval in a number of later cases and the court does not propose to repeat them here. In essence, the *Primor* case establishes a three-limb test to be applied in cases of delay:

> (1) is the delay inordinate?
>
> (2) is the delay inexcusable?
>
> (3) even if inordinate and inexcusable, is the balance of justice in favour of or against a case proceeding?

8. There is suggestion in recent case-law such as *J. McH v. J.M. & Ors.* [2004] 3 I.R. 385 that the decision in *Primor* ought to be viewed as concerned with post-commencement delay only and it is true that, on its facts, *Primor* was an application to dismiss based on post-commencement delay. However, there are other cases, such as *Guerin v. Guerin* [1992] 2 I.R. 287 that appear consistent with *Primor* and where regard has been had to the full backdrop of delay arising. In the present case the nature of the delay that has occurred is exclusively post-commencement and so a consideration of any pre-/post-commencement dichotomy that case-law presents is moot in the context of these proceedings.

9. Separate to the *Primor* line of authorities is the line of authorities commencing with the decision of the Supreme Court in *O'Domhnaill v. Merrick.* In that case, Henchy J. referred, at 157, to the need:-

> *"to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend."*

10. The interaction and concurrent validity of the *Primor* and *O'Domhnaill* lines of authority has been approved recently by the Supreme Court in *McBrearty v. North Western Health Board & Ors.* [2010] IESC 27. Thus this Court is required to consider the present application specifically by reference to the *Primor* principles and also the standard established in *O'Domhnaill* and proceeds now to do so.

Is the delay arising in this case inordinate?

11. It appears to the court that it cannot reasonably be contended that the delay arising in these proceedings is not inordinate. The proceedings are grounded on a plenary summons that is dated 6th July, 2000, and concern a newspaper article that was published on 16th April, 2000. Thus they are concerned with a matter that occurred about 14 years prior to the hearing of these proceedings. Moreover, it seems to the court that the inordinacy of the delay is compounded by the fact that when the notice of motion to proceed belatedly issued on 14th April, 2010, over seven years after the previous step had been taken in the proceedings, no formal steps were taken by the plaintiff to progress matters any further thereafter. Even if the court were minded, and it is not, to consider that the near ten-year delay between the issuance of the plenary summons and the issuance of the notice of intention to proceed was not inordinate, the additional and unexplained delay that followed the issuance of the notice of intention to proceed appears to the court to place the delay arising within these proceedings firmly within the category of inordinate delay.

Is the delay arising in this case inexcusable?

12. As mentioned above, two excuses are offered by the plaintiff in his affidavit evidence, *viz.* his health and the tactical decision to "*let sleeping dogs lie*". For the reasons stated above, the court does not accept the plaintiff's unfortunate bout of ill-health as a valid excuse for the delay arising. So what of his tactical decision to "*let sleeping dogs lie*", a decision which, it might be noted, was not communicated to the defendant and appears for the first time in an affidavit sworn by the defendant on 28th February, 2014? In this regard it is useful to consider the decision of the Supreme Court in *Desmond v. M.G.N. Limited* [2009] 1 I.R. 737. In that case, Mr. Dermot Desmond, a prominent businessman, issued proceedings for libel in May 1998 concerning certain newspaper articles that alleged he had made various corrupt payments. However, a notice of intention to proceed was only issued in February 2005. The reason offered by Mr. Desmond for the significant delay in the proceedings was that he had acted on legal advice. All of the Supreme Court judges considered that the delay arising was both inordinate and inexcusable but a majority was satisfied that the balance of justice required that Mr. Desmond's action should be allowed to proceed. Referring to Mr. Desmond's decision to "*park*" his defamation proceedings pending the determination of certain issues by an ongoing tribunal of inquiry into certain payments to politicians (the 'Moriarty Tribunal'), Kearns J., as he then was, observed, at 752, that:

> *"An approach whereby a litigant in a defamation action opts to await to see which way the ball hops in the course of a tribunal of inquiry is not proceeding with his litigation in the manner outlined…[by Keane C.J. in Ewins]…In fact the approach adopted by the plaintiff is the complete antithesis of that to which Keane C.J. was referring…[In addition,] the defendant was never informed of the plaintiff's decision to 'park' the case nor was it invited to acquiesce in it. The lengthy delay almost certainly gave them reasonable grounds to believe that this litigation had simply 'gone away' and would never be brought before any court."*

13. Having regard to these twin factors, *i.e.* the plaintiff's failure to advance the defamation proceedings without delay and his tactical decision, on legal advice, to park the defamation proceedings without notice to the other party of the motive underlying that decision, Kearns J., in common with the other Supreme Court judges in *Desmond*, concluded that the delay arising in the case before him was inexcusable.

14. The parallels between *Desmond* and the instant proceedings are striking. In these proceedings, as in *Desmond*, it cannot be contended that the plaintiff has advanced his cause without delay so as to restore the alleged damage occasioned to his reputation by a Sunday World article that was published fourteen years ago. Moreover, in these proceedings, as in *Desmond*, the plaintiff's

tactical decision, never communicated to the defendant, to "*let sleeping dogs lie",* for the longest of sleeps, from November 2002 to April 2010 and thereafter, inexplicably, for another three years, leads inexorably to the conclusion, that in these proceedings, as in *Desmond*, the delay arising is not just inordinate but inexcusable. With the benefit of hindsight, it may be that the defendants ought to have brought their application to dismiss sooner than they did. However, there was no acquiescence by them in the plaintiff's delay, the rationale for which was never conveyed to, or accepted by, them and the duration of which was such as would have justified them in concluding, if they did, that the plaintiff's litigation, though not formally discontinued, had, to paraphrase Kearns J. in *Desmond*, gone away and would never be brought before any court.

Where does the balance of justice lie?

15. Turning to the third limb of the *Primor* test, the court must consider whether the balance of justice is in favour of or against a case proceeding. In this context, the court has had particular regard to the plaintiff's contention that if his proceedings are dismissed for want of prosecution a situation will pertain in which an allegedly defamatory article will have been published and a defence of justification raised which will go unchallenged. In *Desmond*, Geoghegan and Macken JJ. were sensitive to a similar line of argument raised in those proceedings. Thus Geoghegan J. states at 741, that:

> *"I entirely agree with Macken J. that as she puts it 'in assessing where the balance of justice lies as between the parties, …the scope and ambit of the defence…is a factor which, in an appropriate case, may be taken into account'. The plea of justification in a defamation action has always been considered to be a most serious plea and certainly not one to be made lightly. In this case, the defendant pleaded that the words in their natural and ordinary meaning were true in substance and in fact….If the action was to be struck out now the plea of justification would remain on the record and it could never be disproved….[F]or the reasons which I have indicated and especially in light of the plea of justification, I am satisfied that there are just reasons for allowing the action to go ahead in the absence of serious prejudice to the defendant."*

16. In a not dissimilar vein, Macken J. states, at 765, that

> *"As for the plaintiff, a plea of justification now lies against his claim for damages for libel. The libel, according to the statement of claim is serious…In the ordinary course of events, if the proceedings are struck out his claim for defamation falls. However, the plea of justification included in the defence, although it will never be litigated, remains unchallenged. That is, on any view, a serious injustice to a person seeking to vindicate his good name and reputation, even after a delay. If he is prevented from doing so where a defence of justification is pleaded…the taint of clear wrongdoing of a very serious nature, would remain."*

17. Of course if justification, though pleaded, is not to be litigated this is hardly the fault of the defendant in the present proceedings. After all, the plaintiff has had every opportunity since 2002 to litigate these proceedings and has declined to do so, being apparently content "*to let sleeping dogs lie*". Notably, Kearns J. in *Desmond* favoured just such a form of logic, albeit that he was in the minority in this regard. Thus, per Kearns J. at 756:

> *"[W]hile I recognise that it is most unsatisfactory that the plea of justification is left hanging in the air…I am also of the view that the inclusion of this plea equally imposed a particular obligation to prosecute his claim vigorously and expeditiously [i.e. in the manner contemplated by the Supreme Court in Ewins] if it was his intention to avail of these particular proceedings to vindicate his reputation."*

18. The approach adopted by Kearns J. in this regard is consistent with the constitutional imperative, recently referred to by Hogan J. in *Donnellan v. Westport Textiles Limited* [2011] IEHC 11 at para. 24, that the courts put an end to stale claims so as to ensure the effective administration of justice and basic fairness of procedures, and also with Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms which states, *inter alia*, that:-

> *"In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

19. How is this Court to resolve, on the one hand, the need for relative speed in defamation proceedings as identified by the Supreme Court in *Ewins*, the constitutional imperative that the courts put an end to stale claims as identified in *Donnellan*, and the 'reasonable time' requirements in Article 6(1) of the European Convention on Human Rights, with, on the other hand, the potential injustice identified by the majority of the Supreme Court in *Desmond* that could be occasioned to the victim of alleged defamation where his defamation proceedings are dismissed for want of prosecution and a plea of justification is allowed to stand? In the present case, the answer is perhaps clearer than it would be in other cases. This is because in this case, the plaintiff in effect had two bites at the cherry of litigation. He pursued his defamation proceedings with relative despatch until 2002 and then allowed them to subside. He issued a notice of intention to proceed in 2010 and again allowed matters to subside. To paraphrase Wilde, for the plaintiff not to continue with his proceedings once was perhaps misfortunate; not to do so twice seems little short of carelessness. Certainly it does not appear consistent with the mind-set of a man who is determined vigorously to protect his reputation and to dispel any claim of justification that might be raised. As a result, the court does not find that the balance of justice favours the plaintiff's being allowed to continue with the instant proceedings.

The test in O'Domhnaill v. Merrick

20. Having considered the present application by reference to the *Primor* principles the court now turns to consider the issues arising by reference to the decision of the Supreme Court in *O'Domhnaill v. Merrick*. It will be recalled that in that case, Henchy J. referred, at 157, to the need:-

> *"to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend."*

21. It might perhaps be queried, given that the *Primor* test, when inordinate and inexcusable delay are established, boils down ultimately to a decision based on the balance of justice, and the *O'Domhnaill* approach requires the court in all instances to discharge the balancing act referred to immediately above, whether there is in truth much if any practical distinction between the two approaches, at least as regards the ultimate outcomes that they both yield. In this case, the court concludes that the plaintiff's "*need*" to carry on his claim rests on the natural desire of any person who has been defamed to see their good name restored and not to allow any defence of justification to stand. However, the court has concluded that the actions of the plaintiff in these proceedings are not consistent with those of a man who is genuinely desirous of defending his good name or seeing a plea of justification defeated. The plaintiff commenced and progressed his action with relative speed until 2002, allowed matters to drop until 2010 and then allowed them to drop again for a further three years, only to resist the present application. He has not acted with that special

degree of despatch which Keane C.J. in *Ewins* identified as appropriate in defamation proceedings. Conversely, if one looks to the rights of the defendant, there has to come a time when, consistent with the constitutional imperative that the courts put an end to stale claims and the 'reasonable time' requirements in Article 6(1) of the European Convention on Human Rights, the defendant ought not to be subjected to the continuance of the instant proceedings. The court is also conscious in this regard of the special importance of the media in our open society. A free press is hardly free if trammelled by litigation that, once commenced, neither proceeds nor ends. Fourteen years after the publication of the offending article in the Sunday World newspaper, this Court considers that in any event the balancing act referred to by Henchy J. in *O'Domhnaill* requires that this Court incline towards an outcome that favours the defendant in these proceedings.

Conclusion

22. For the reasons stated above, the court is satisfied to accede to the application made by Sunday Newspapers Limited and thus, pursuant to Order 122, r.11 of the Rules of the Superior Courts, 1986 and to its own inherent jurisdiction in this regard, to dismiss Mr. McClean's claim on the grounds of inordinate and inexcusable delay in the prosecution of his action.