Neutral Citation Number: [2011] IEHC 46

THE HIGH COURT

2000 11091 P

BETWEEN

DE BRAAM MINERAL WATER COMPANY LIMITED

PLAINTIFF

AND

BHP WORLD EXPLORATION INC, PRIORITY DRILLING LIMITED, THE MINISTER FOR THE MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Hedigan delivered on the 15th day of February, 2011.

1. In these proceedings the defendants seek orders dismissing the plaintiff's claim for want of prosecution.

2. The plaintiff herein is a limited liability company incorporated within the State and having its registered office at Fordestown, Rathmoylan, County Meath. It is in business as producers and bottlers of natural mineral water for sale. The plaintiff operated a factory located beside their two wells in County Meath and had been drawing water from that source since in or around 1983. They claim that their water was exceptionally pure and was bottled and sold without pre-treatment other than being carbonated and without additives. In or about the month of November 1998 (the plaintiff initially pleaded it was in January 2000) the second named defendant acting on the instructions of the first defendant and with the permission of the other defendants, drilled a deep mineral exploration borehole approximately thirty metres from the plaintiff's wells. The drilling in question was carried out pursuant to a prospecting licence granted by the Minster to the first named defendant. It was for the purpose of ascertaining whether there were workable deposits of zinc ore below the surface of the ground at that location. It is alleged that as a result of the drilling the plaintiff's well was contaminated.

3. Against the first and second named defendants the plaintiff alleges a failure to conduct the drilling in such a way as to avoid causing the damage that it alleges. It also alleges a failure to disinfect the said borehole prior to abandoning the same and generally failing to conduct the works in accordance with the guidelines for good environmental practice and mineral exploration published by the Department of Marine and Natural Resources. As against the State defendants the plaintiff alleges that the Minister as the body responsible for granting the prospecting licence was negligent in allowing such drilling so close to a commercial source of mineral water, failing to insert or append conditions with a view to protecting such a mineral water source, failing to warn the plaintiff of the impending work, failing to inspect or supervise the drilling works that were carried out and failing to disinfect and seal up the said deep mineral exploration borehole when the work was concluded.

4. The chronological order of events in this case is as follows:

(a) the plenary summons issued on the 18th June, 2000,

(b) the statement of claim was delivered on the first named defendant on the 20th October, 2000 and on the other defendants on the 14th March, 2001,

(c) notices for particulars were served by the solicitors for the first defendants on the 12th of September 2001, by the second defendants on the 25th of May 2001 and for the state defendants in September 2001.

(d) the second named defendant delivered its defence on the 23rd May, 2001,

(e) notice of intention to proceed was served by the first defendant on the 11th September, 2006,

(f) replies to particulars were furnished on the 22nd November, 2006,

(g) the defences of the remaining defendants were delivered in June 2007,

(h) a letter seeking voluntary discovery was sent to the solicitors for the second named defendant on the 11th March, 2010,

(i) on the 31st May, 2010 a notice of motion seeking an order for discovery was served on the second named defendant, and

(j) on the 15th November, 2010 the notice of motion in respect of this application was issued.

5. The defendants base their claim to dismiss on the length of delay and claim it is inordinate and inexcusable. They further claim that the balance of justice requires they should not, more than twelve years after the events, now be required to defend an action which they allege is in any event, on the only evidence provided to them, highly speculative. They point out that the second named defendant who actually did the drilling in fact did furnish a defence. Notwithstanding this, the plaintiff failed to progress their proceedings against those defendants to exactly the same measure as the others. They argue the claim set out in the statement of claim was so vague as to require replies to particulars in order to enable the first, third and fourth defendant properly defend the case. The first defendant required, *inter alia*, details of how it was alleged the contamination occurred, of the losses allegedly incurred, how the first defendant "knew or ought to have known" that the drilling would contaminate the plaintiff's well. No objection was taken to the notice for particulars nor was a defence demanded. It was therefore legitimately expected that replies would be forthcoming. No steps whatever were taken to reply until October 2006, five years later, and just after the first defendant's notice of

intention to proceed was served on the plaintiff. Until then the defendants had every reason to believe that the plaintiffs were not proceeding with their case. No reason other than vague references to difficulties and lack of resources have been proffered to explain the delay of five years involving complete silence on the part of the plaintiff and ended only by the action of the first defendant in 2006. No disability has been alleged.

6. The second defendant's notice for particulars sought fairly precise details of the plaintiff's business activities and its ownership of the land at the locus in quo. It further sought details of loss. It received no replies until October 2006 despite the fact that it had filed a defence.

7. In September 2001, the third to fifth defendants served their notice for particulars on the plaintiff. The basis of the plaintiff's claim against these defendants is that the Minister knew or ought to have known that drilling carried out on foot of the prospecting licences granted was likely to cause damage to the plaintiff's mineral source. It is alleged against them that there was an absence of appropriate protective conditions in the licence, a failure to provide any warning to the plaintiff of the proposed drilling and an absence of any inspection of the site or supervision thereof. In their notice for particulars these defendants sought details as to how the contamination alleged had occurred. They further sought details as to how it was alleged the Minister knew or ought to have known such drilling would cause the damage alleged. The particulars sought were not provided for five years and then only in outline form, thereby greatly hampering the ability of these defendants to have experts on their behalf assess the case. The defendants claim that this delay also must result in grave difficulty in dealing with these issues especially those regarding to levels of knowledge and the extent of supervision or inspection.

8. To summarise the grounds for this application, the defendants argue that the delay in respect of all the defendants is clearly inordinate. No attempt is made to excuse the delay in relation to the second defendant who actually did furnish a defence in 2001. The only excuse offered in relation to the other defendants is that there were difficulties in relation to financial resources and in obtaining expert advice in relation to liability and quantum. They also blame the first and the state defendants for themselves delaying by not bringing motions to compel them to reply. The defendants accept they did not furnish their defences within the time provided by the rules. They reject however the argument that the delay was caused either substantially or completely by them. They also point out that although the second defendant's defence was filed in 2001 there was no progress against that defendant either. They also point out that even after the proceedings were sparked back into life in September 2006, the plaintiff continued to delay. They waited for two and a half years more before moving again. The defendants argue the claim set out in the statement of claim is highly speculative as the K. T. Cullen expert report of the 31st May, 2000 clearly shows. That report indicates little more than the possibility the mineral exploration well drilled by the second defendant could have caused contamination of the plaintiff's aquifer. The delay therefore is inordinate and inexcusable. The Court must therefore consider whether the balance of justice requires that the plaintiff's case be dismissed because of this delay. It would not be in the interests of justice that they should be required to defend the case at this stage because the case alleged against them is dependent on evidence as to how the contamination occurred, what actually were the losses incurred, how they knew or "ought to have known" that damage would be caused to the plaintiff's well. They note that the man who actually did the drilling has left the second defendant's employment and now lives abroad. A great part of the case relies on oral evidence and memories are inevitably weakened by the time that has elapsed. No disability is claimed and by no stretch of the imagination could the case be said to have been heard within a reasonable time even were it to be heard this year.

9. The plaintiff defends itself firstly on the ground that the real delay was of five years initially and of two years of the two and a half years after the revival of the case in 2006. This delay it is denied is inordinate. If this is not accepted then addressing the issue of excusability, the plaintiff argues that the blame lies in the court of all defendants bar the second who did file a defence. Relying on the decision of Herbert J. in *Bord Fáilte Éireann v. Castlefinn Multi-Activity Holiday Centre Ltd. and Ors.* [2005] IEHC 387, it argues that the real cause for delay lies with the defendants because they did not bring motions to provide particulars nor did they, save for the second defendant, file defences. The ball, it argues, was in the defendants' court and they did nothing. They claim they were overwhelmed by the circumstances in relation to the first period of delay and in relation to the two year delay period, they say they were consulting experts. As to the balance of justice, they argue that the plaintiff's business was very seriously damaged and the claim is therefore a very large one. They claim there is no real evidence of prejudice, no reference to destruction of documents and save for Mr. Jardine (the man who actually did the drilling), no evidence of absence of witnesses. They concede the delay in relation to the second defendant is inordinate and inexcusable.

10. The decision
The principles applicable have been outlined in the Supreme Court in the case of *Desmond v. MGN* [2009] I.R. 737. The test is whether the delay was inordinate and inexcusable. Where this is established the Court must determine where the balance of justice lies having regard to the effect of the delay on and the likely prejudice to the defendants and the prejudice which would arise in precluding the plaintiff from proceeding further with his claim.

11. It is to be noted that Kearns J. stated in that case that the period of delay of approximately seven years since the institution of proceedings was unacceptable having regard to the requirements of the European Convention on Human Rights. It was further noted that there was an obligation on the parties, in particular on the plaintiff, to progress proceedings. The role of the Convention in this regard is stated by Kearns J. at paragraphs 24 and 25 i.e. it is one of the relevant factors to be considered in determining where the balance of justice lies.

12. The delay
In this case the plaintiff issued its proceedings on the 18th September, 2000. The events giving rise to these proceedings having occurred between November 1998 and January 1999. The possible link between the defendants drilling and the contamination of the plaintiff's well was not discovered, they claim, until 2000. Accepting this as I must for the purposes of this motion, the only period of delay to be considered therefore is the post-commencement delay. The initial phase of activity in 2000/2001 concluded on the 12th September, 2001 when the first defendant delivered a notice for particulars. The second phase commenced on the 11th September, 2006 when notice of intention to proceed was served by the first defendant. This second period of activity ended with the delivery of defences in June 2007. The third period of activity commenced on the 26th January, 2010 with the request by the plaintiff for voluntary discovery. The first period of delay therefore was five years and the second period was two and a half years. It seems to me that by any measure both periods of delay are inordinate even if I accept that the plaintiff was responsible for only two years of the second period of delay. This is because although shorter, the second period is possibly equal to the first in regard to delay since one might have considered that having been sparked back into life in 2006 by one of the defendants, the plaintiff would have proceeded with particular expedition. Where considerable delay has already occurred there is a particularly heavy onus to proceed with expedition; see *Stephens v Flynn* [2005] IEHC 148. No sense of urgency however can be identified in the following two and a half years. In my judgment the two periods on their own may be considered separately and together as inordinate.

13. Excusability
The plaintiff lays the blame for the delay on the defendants' failure to bring motions to force him to reply to particulars. This may well

go some way toward excusing the delay in a very narrow sense. It does not however excuse the delay when one applies the tests outlined and explained in *Desmond v. MGN* [2009] I.R. 737. Whilst the onus lies on both parties to litigation to move the proceedings forward expeditiously, a particular onus lies on a plaintiff. This is because in the first place it is the moving party and secondly because, if the proceedings are ultimately dismissed for want of prosecution, it is the plaintiff who is *ipso facto* the most prejudiced. Moreover, were the Court to accept that the proceedings should proceed even after inordinate delay is found and where both parties were at fault this would render nugatory the supervisory jurisdiction of the Court to ensure the conduct of proceedings in an expeditious manner. Other than blaming the defendants, the plaintiff has been able to advance only the vaguest reasons to excuse the delay that has occurred. No disability is claimed only vague references to lack of resources and difficulty finding experts to report. I find that no satisfactory excuse has been furnished in this case for the inordinate delay that has occurred.

14. The balance of justice
In the above cited case of *Desmond v. MGN Ltd*. [2008] IESC 56, the Supreme Court affirmed the Primor test in relation to the ascertaining of the balance of justice. In considering this obligation the Court is entitled to take into consideration and have regard to the following factors:

> *"(i) the implied constitutional principles of basic fairness of procedures,*
>
> *(ii) whether the delay and consequent prejudice in the special facts of the case are such as make it unfair to the defendant to allow the action to proceed and make it just to strike out the plaintiff's action,*
>
> *(iii) any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,*
>
> *(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
>
> *(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
>
> *(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*
>
> *(vii) the fact that the prejudice of the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business."*

15. Applying these principles to the present case the Court must first ask is it fair to dismiss the proceedings or to allow them to continue. Against the plaintiff's right to have its case determined is both the defendants' right to a trial within a reasonable time and the public interest in the expeditious conduct of legal proceedings. Included in the defendants' right must be the second consideration, i.e. prejudice. In *Stephens v. Flynn* [2005] IEHC 148, Clarke J. dealt with prejudice alleged on the basis of a ten year delay between the events and any likely trial date. No absence of a witness was alleged. Credibility of available witnesses was considered to be difficult in the light of their trying to recollect events of ten years ago in that case. Taking account further of a lower level of prejudice in relation to quantum, Clarke J. assessed the degree of prejudice as moderate. Weighing the inaction of the defendant with the delay of the plaintiff in that case even in the context of the traditional test, such inaction may apply to "some extent" but in the current context should be given an even lower weighting. Clarke J ordered the dismissal of the proceedings. The Supreme Court upheld this decision and confirmed the test that had been applied was correct. In this case I would consider that the prejudice is of a somewhat higher order than moderate. The case revolves around the level of knowledge by the defendants of the nature of the plaintiff's activities at the *locus in quo*. It will require evidence of appropriate investigations made and of what exactly happened during the drilling of the borehole by the second defendant. It seems clear that this is a case that will rely upon the evidence of certain of the defendants' employees not the least of these being Mr. Jardine. He has left the employment of the second defendant and is now living abroad. I think a substantial risk does exist as to whether the defendants would be able at this juncture to defend the case as they would wish. Difficulties of recollection over a period of more than twelve years are self evident. As to delay on the part of the defendants and acquiescence on their part, I think my views expressed in relation to excusability overlap in this regard. There has been a measure of both in this case but not so as to restrain the Court from exercising its supervisory function. To these considerations must also be added the international obligations of the State to ensure the expeditious conduct of proceedings, see *Stephens v Flynn* (cited above) and *Henry Mannion v. David Bergin and Ors*. [2009] IEHC 165.

16. For all these reasons it seems to me that the delay involved herein has been inordinate and that no satisfactory excuse has been forthcoming. Moreover, the balance of justice in this case requires that the Court grant the order dismissing the plaintiff's claim for want of prosecution. By reason of the fact that there has been delay on the part of the defendants herein and that they are at least in that regard in part responsible for the delay that has occurred, there will be no order for costs in their favour either in respect of these motions or the action itself.