

**THE HIGH COURT**

**1999 4890 P**

**BETWEEN**

**HENRY MANNION**

**PLAINTIFF**

**AND**

**DAVID BERGIN, MARK M. BERGIN AND CATHERIN BRADLEY PRACTISING AS O'CONNOR AND BERGIN, SOLICITORS**

**DEFENDANTS**

**Judgment of Mr. Justice Hedigan delivered on the 13th day of March 2009.**

1. This is an application brought by the defendants herein for the following relief:-

- (1) An order dismissing the proceedings herein on the grounds of inordinate and inexcusable delay and for want of prosecution.
- (2) Further or in the alternative, an order pursuant to Order 122, rule 11 of the Rules of the Superior Courts.
- (3) Such further or other orders as to the Court may deem fit.

The application is grounded on the affidavit of Geraldine Clarke, solicitor. There is a replying affidavit of Thomas J. Colgan and a further affidavit on behalf of the defendants by Sarah Galligan.

**2. The Background**

The defendants acted for the plaintiff in family law proceedings culminating in a hearing in judicial separation proceedings on the 12th February, 1997. Arising from these proceedings the plaintiff herein issued a plenary summons against the defendants for negligence in their conduct of the proceedings on the 12th May, 1999. He further served a statement of claim on the 28th April, 2000. On the 20th June, 2000, a notice for particulars was served and on the 2nd February, 2001, replies were delivered thereto by the plaintiff. A defence was served on the 31st May, 2001. On the 16th July, 2001, the defendants brought a motion for discovery. The plaintiff swore an affidavit for discovery on the 11th December, 2001. Following correspondence from the defendant seeking further and better discovery, the plaintiff on the 9th May, 2003 promised a response. No further action occurred in the case until the 6th March, 2008, when the plaintiff sent a letter to the defendants seeking voluntary discovery.

3. This motion was issued by the defendants on the 7th July, 2008. On the 11th July, 2008 the plaintiff issued a motion for discovery.

4. The plaintiff has attempted to explain the delay by claiming that his family law proceedings did not terminate until 2004. His attention was, accordingly, focussed on those proceedings until then. Since then he had been trying to ascertain how to obtain evidence from a solicitor as to the extent of the duty of a solicitor conducting family law proceedings. He further argues that there is no prejudice, hardship or any unfairness due to the defendants.

5. The defendants argue the reasons given neither explain nor justify the delay that has occurred.

6. The test to be applied is the *Primor* test which was affirmed in the Supreme Court in *Desmond v. M.G.N. Limited* [2008] I.E.S.C. 56, (15th October, 2008). This test is as follows:-

*"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:*

- (a) The 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.
- (b) It must in the first instance be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof that the delay was inordinate and inexcusable.
- (c) Even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion on the facts the balance of justice is in favour of or against the proceeding of the case.
- (d) In considering this latter obligation the court is entitled to take into consideration and have regard to:
  - (i) The implied constitutional principles of basis fairness of procedures.

- (ii) Whether the delay and consequent prejudice in the special facts of the case are such as to 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".

7. The first half of this test deals with the determination of inordinate and inexcusable delay. The second deals with the determination of whether the balance of justice requires the dismissal or continuance of the action. In my view, to the factors set out for determining where the balance of justice lies must be added the requirement that the courts secure to the party claiming delay his right provided for in Article 6 of the European Convention on Human Rights to a trial within a reasonable time. It provides as follows:-

*"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."*

8. As has been noted by the European Court of Human Rights, this duty applies in legal systems where the procedural initiative lies with the parties. In such systems, of which the Irish legal system is one, the courts must maintain a supervisory jurisdiction to ensure that justice is done as expeditiously as possible. In *Price v. United Kingdom* and *Lowe v. United Kingdom* (Case Number 43186/98, 29th July, 2003), the Court stated as follows:-

"23. The Court has held on a number of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the State from complying with the requirement to deal with cases in a reasonable time (see *Buchholz v. Germany*, judgment of 6th May, 1981, Series No. 42, page 16, para. 50; *Guincho v. Portugal*, judgment of 10th July, 1984, Series A, No. 81, page 14, para. 32; *Capuano v. Italy*, judgment of 25th June, 1987, Series A, No. 119, page 11, para. 25; *Mitchell and Holloway v. The United Kingdom*, No. 44808/98, judgment of 17th December, 2002). The manner in which a state provides for mechanisms to comply with this requirement – whether by way of increasing the number of judges, or by automatic time limits and directions, or by some other method – is for the state to decide. If a state lets the proceedings continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay."

This obligation must be borne in mind by the Courts when considering as in this case where the balance of justice lies as to whether to dismiss for want of prosecution. The obligation is not merely to advance a case where necessary but may also be to prevent its continuance where, as here, it has lain dormant for a substantial period of time.

9. As to the first wing of the test, I am satisfied that the delay in question is inordinate and inexcusable. Nothing submitted on behalf of the plaintiff has convinced me that there were any defensible grounds for the plaintiff's delay. He had solicitors on record in these proceedings to progress them whilst his family law proceedings came to conclusion. His claim of difficulty in obtaining a professional witness to prove the standards required of a solicitor in conducting family law proceedings seems to me to be quite hollow.

10. As to the second wing – the balance of justice, were the case to proceed, the defendants would have to remain awaiting the next move of a highly dilatory plaintiff in a case impugning their professional credibility. Whilst I do not attribute any greater weight to this aspect, because all cases are of great importance to the parties involved, the general stress caused thereby is nonetheless something to weigh in the balance. Added to this is the nature of the claim as set out in the particulars of negligence alleged. This seems likely to me to involve considerable dispute on what actually happened in terms of instructions and, to the extent it may be admissible, the actual conduct of proceedings. The difficulty of revisiting such issues more than twelve years after the date of the hearing must also weigh in the balance.

11. Finally, as noted above, were the case to proceed and conclude in its originating jurisdiction, i.e. the High Court, more than twelve years after the events giving rise to the case and more than ten years after the issue of the plenary summons, could the defendants possibly be said to have had a trial within a reasonable time in accordance with Article 6. I think not. Such a delay in proceedings would in my view amount undoubtedly to a violation of the defendant's right under this article of the Convention. Such a consideration must weigh very heavily with the court in considering a motion of this nature. Whilst a violation of Article 6 does not *ipso facto* create a bar to continuing proceedings, nonetheless it would require strong countervailing factors to justify the court allowing the proceedings to continue.

12. For the reasons set out above, I will grant an order in terms of the notice of motion herein dismissing the proceedings on the grounds of inordinate and inexcusable delay and on the basis that the balance of justice including the right of the defendants' to a trial of the case within a reasonable time requires it.