[2018] IEHC 533

THE HIGH COURT

2012 No. 6105 P

Between:

PATRICK ROCHE

Plaintiff

– AND –
MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE IRISH PRISON SERVICE, IRELAND AND THE ATTORNEY GENERAL
– AND BY ORDER –
NICHOLAS O'DRISCOLL

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 1st October, 2018.

1. This is an application to strike out, for inordinate and inexcusable delay in the prosecution of the proceedings and/or want of prosecution, a personal injuries claim being brought by a prisoner in respect of a prison fight in which he was allegedly involved back in February 2005 and where the last activity in these proceedings, prior to the within application, was the issuance and service of a notice of trial in February 2013. The basis for the application is contained in a single affidavit sworn by a solicitor acting for the defendants which, to the extent relevant, is quoted hereafter:

> *"…2. I beg to refer to a bound book of pleadings to date when produced to include:*
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> *i. Personal Injuries Summons, issued on the 30th October, 2007;*
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> *ii. Entry of Appearance, dated 19th December, 2007;*
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> *iii. Notice for Particulars, dated 19th December 2007;*
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> *iv. Replies to Particulars, dated 1st August, 2008;*
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> *v. Order, Reply to Rejoinders, dated 2nd November, 2009;*
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> *vi. Defence, fated 10th June, 2010;*
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> *vii. Notice of Trial, dated 4th October, 2010;*
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> *viii. Order, Joinder of a Co-Defendant, dated 22nd June, 2011;*
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> *ix. Amended Ordinary Civil Bill, dated 7th July, 2011;*
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> *x. Entry of Appearance;*
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> *xi. Notice for Further and Better Particulars, dated 22nd July, 2011;*
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> *xii. Reply to Particulars, dated 9th November, 2011;*
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> *xiii Order, Transfer to the High Court, dated 3rd May, 2012;*
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> *xiv. Notice of Trial, dated 5th February, 2013.*
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> *3…. [T]he First Named Defendant is a Minister of State, the Second Named Defendant is a body incorporated pursuant to statute and the Third Named Defendant is the State. I say that the Defendants are the owners, occupiers and operators of those premises being Cork Prison in the City of Cork. The Fourth Named Defendant is the Constitutional Law Officer of the State.*
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> *4…. [B]y Order of the Circuit Court dated 22nd day of June 2011, the Fifth-Named Defendant was joined as a Co-Defendant to the proceedings.*
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> *5…. [T]hese proceedings arise out of a claim by the Plaintiff alleging that on or about the 23rd day of February 2005, while detained in Cork Prison, he was attacked by a number of fellow inmates, as a result of which it is alleged that the Plaintiff sustained personal injury, loss and other damage.*
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> *6….. [T]he Plaintiff sought in the Amended Ordinary Civil Bill damages for negligence, breach of duty and breach of statutory duty of the Defendants or any or all of them acting by themselves or through their servants or agents.*
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> *7…. [A] full Defence was delivered on the 10th June 2010, on behalf of the First, Second, Third and Fourth Named Defendants and all matters were put in issue.*
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> *8…. [T]here has been no activity whatsoever in these proceedings for many years [in fact since February 2013] and the Defendants herein seek an Order in these proceedings dismissing the proceedings for inordinate and inexcusable delay in the prosecution of the proceedings and/or want of prosecution pursuant to the RSC and the Court's inherent jurisdiction; and in addition seek such an Order on the basis that it would be fundamentally unfair and contrary to the rights enjoyed by the Defendants pursuant to the European Convention on Human Rights to permit the claim to proceed and put the Defendants in the unenviable position of endeavouring to defend these proceedings.*
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> *9. I say that the delay by the Plaintiff in this matter is inordinate; I also respectfully submit that it is inexcusable and that the balance of justice favours dismissal."*

2. When it comes to adjudicating upon an application such as that now presenting, there are two lines of potentially applicable authority, the *Primor* line of authorities (following on *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459) and the *O'Domhnaill* line of authorities (following on *O'Domhnaill v. Merrick* [1984] I.R. 151). There appears to be no dispute between the parties but that the *Primor* line of authorities is the appropriate line of authorities to apply in the context of the within application.

3. As is clear from the decision of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74, the *Primor* test requires the court to assess whether the delay presenting is inordinate, whether the delay presenting is inexcusable, and whether the balance of justice requires the dismissal of the proceedings. The court applies this three-limbed test hereafter. However, in passing, the court notes that the within proceedings were commenced just inside the limitation period, thus bringing into play that "*obligation of expedition*" referred to in *Millerick v. Minister for Finance* [2016] IECA 206, para.21.This obligation, as the Court of Appeal notes in Millerick, also at para.21, "*has been consistently endorsed in recent judgments of the Superior Courts*". Nonetheless it might, perhaps not unreasonably, be contended to be a somewhat unusual obligation. One does not say to the last driver through a green light that he is under an especial obligation to get to the far side of a junction as quickly as possible; provided he drives through a green light at a speed that is within the applicable limit that is an end of matters. Yet a person who avails of the full limitation period established by statute, and thus does no more than is allowed to him by statute enacted by our elected lawmakers, has been recognised by the Superior Courts as being under an increasing obligation to proceed expeditiously depending on the point in time when he acts within a statutorily-established limitation period, even where the relevant statute itself establishes no such obligation. Regardless, the obligation has been found to exist and the court is obliged to have regard to it in its consideration of the application at hand.

4. *Inordinate Delay*? It is not contended that the delay arising (with nothing occurring since February 2013) is anything other than inordinate; and it clearly is inordinate. (A breach of the obligation of expedition also clearly presents).

5. *Inexcusable Delay*? It is contended that the delay arising is excusable. Thus it is contended for Mr Roche that: (i) after being (again) sent to prison in mid-2013, he was depressed and the within proceedings went out of his mind, (ii) he is still awaiting surgery for fusion of his ankle, and (iii) he was unaware of efforts by his solicitor to contact him in and since 2013. As to (i), certain of the applications that come before this Court would suggest that Mr Roche is not alone within the prison population in being bedevilled, at least for a time, by depression. However, the court cannot but respectfully note that a person who is suffering from depression but who is also suffering from what is contended to be serious pain in the ankle every day has, in effect, an ongoing daily reminder of the alleged events of 2005 and hence of the claim that he is bringing in respect of the injury which has caused that ongoing pain. As to (ii), the court does not see the relevance of this. A court is entirely capable of awarding damages for future pain and suffering. That pain and suffering may be ongoing is not generally, and here is not at all, an excuse for delay in the prosecution of proceedings. As to (iii), the court must admit to being unpersuaded that Mr Roche's apparent unawareness of efforts to be contacted by his solicitor offers an excuse for delay. (Had there been efforts by Mr Roche to contact his solicitor and a failure by his solicitor to respond – and nothing of the sort is alleged to have occurred – that would perhaps have been a more convincing excuse for delay). Having regard to the foregoing, the court considers that the delay presenting is inexcusable.

6. *Where Does the Balance of Justice Lie*? In *O'Connor v. John Player and Sons Ltd* [2004] 2 ILRM 321, 336, Quirke J. helpfully elaborates as follows upon the principles laid down by Hamilton C.J. in *Primor*:

> *"Having found, as I have, that the delay by the plaintiff in prosecuting her claim has been both inordinate and inexcusable, it is now necessary to decide whether, on the facts, the balance of justice is in favour of or against the plaintiff's case proceeding.*
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> *The determination of that issue requires consideration of the following:*
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> *(1) the conduct of the defendants since the commencement of the proceedings for the purpose of establishing, (a) whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and (b) whether the defendants were guilty of any conduct which induced the plaintiff to incur further expense in pursuing the action,*
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> *(2) whether the delay was likely to cause, or has caused, serious prejudice to the defendants, (a) of a kind that made the provision of a fair trial impossible or, (b) of a kind that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action and*
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> *(3) whether, having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against the defendants should be allowed to proceed or should be dismissed."*

7. As regards point (1) made by Quirke J., the plaintiff bears the responsibility for the prosecution of his case. Although litigation is a two-party operation and the conduct of both parties requires to be looked at (see *Dowd v. Kerry County Council* [1970] I.R. 27 and *Lismore Builders Ltd (in receivership) v. Bank of Ireland Finance Ltd and ors* [2013] IESC 6), and although the court can have regard to whether a defendant has been culpable as regards any delay (see *Rogers v. Michelin Tyre plc and anor* [2005] IEHC 294) or even guilty of acquiescence (see *Muchwood Management Limited v. McGuinness* [2010] IEHC 185), in the within case the fault for the delay since February 2013 lies exclusively with the plaintiff. The defendants are guilty of neither delay nor acquiescence. They are not obliged to 'jig' the plaintiff into action. Nor is there anything untoward in the fact that they have now brought the within application, an application that they are perfectly entitled to bring.

8. As regards point (2) made by Quirke J., the court cannot but note the very great weakness of the contentions made by the defendants in this regard. When it comes to prejudice, all that is averred to in the above-quoted affidavit is that "*there has been no activity whatsoever in these proceedings for many years* [in fact since February 2013] *and…it would be fundamentally unfair and contrary to the rights enjoyed by the Defendants pursuant to the European Convention on Human Rights to permit the claim to proceed and put the Defendants in the unenviable position of endeavouring to defend these proceedings.*" The just-quoted text seems to be in the nature of a submission more than anything else. And counsel for the State did not (in truth he could not on the evidence before the court) go further than contending that the human memory is prone to frailty over time. Doubtless the human memory can be frail; however, it can also sometimes be surprisingly resilient. But whatever may be the nature of human memory, what the court is being asked to rule in this case (i) absent any evidence from e.g., the prison governor or relevant prison staff, (ii) absent any discovery (which may yield contemporary records that evidence what occurred), (iii) absent any evidence that witnesses are unavailable or dead, (iv) absent any evidence that records are unavailable, but (v) in the presence of *e.g.*, a detailed summons and also replies to particulars, is that the mere elapse of time *simpliciter* necessarily yields sufficient concrete and real prejudice, however moderate, on which to strike out the within proceedings. The court does not see how it could safely conclude on the balance of probabilities, in the context of the just-mentioned points (i) to (v) and the evidential deficit which therefore presents, that the delay arising in this case is likely to cause, or has caused, prejudice to the defendants.

9. If the court is correct in the foregoing, then an issue presents as to what extent – concomitant with *Primor* - there is an obligation under the Constitution/the European Convention on Human Rights (ECHR) to ensure that proceedings are concluded within a reasonable time. This issue, it seems to the court, comes rather to the fore in the within proceedings because, to deal with point (3) made by Quirke J. in *O'Connor*, it seems to the court to follow inexorably from its conclusions in the last paragraph of this judgment that this is not a case where "*having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against* [the defendants]…*should be dismissed*". That said, it has been clear since at least the time of the decision of Hogan J. in *Donnellan v. Westport Textiles Ltd* [2011] IEHC 11, echoed by the Court of Appeal in, *e.g., Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 that there is another overlapping but not identical constitutional obligation in play, viz. that of securing the administration of justice in a timely and efficient manner. In addition, the Court of Appeal, in a series of judgments, including *Gorman v. Minister for Justice, Equality and Law Reform* [2015] IECA 41, *Granahan v. Mercury Engineering* [2015] IECA 58, has made clear that a consequence of Art.6/ECHR is that the Irish courts are obliged to ensure that proceedings are concluded within a reasonable time, Irvine J. stating in *Granahan*, para.11, that "*any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its consideration, not only its own constitutional obligations but Ireland's obligations under Article 6 of the Convention*". Whether these constitutional/ECHR obligations presenting are viewed as a stand-alone obligation or some sort of 'add-on' or 'wrap-around' to *Primor*, it seems to the court that notwithstanding its conclusions as to the 'balance of justice' limb of the *Primor* test (and the implications for the application of same that derive from the evidential deficit considered above) one is, in the within proceedings, in a situation where the said constitutional/ECHR obligations fall to be applied to the benefit of the defendants. These are proceedings where (i) the plaintiff's alleged injury happened almost 13½ years ago, in February 2005 (ii) there is nothing unusual about the nature of the injury suffered (it is, with every respect to the plaintiff and without wishing in any way to diminish the extent of his suffering, a not untypical personal injury), and (iii) quite remarkably, nothing at all has been done by the plaintiff since the notice of trial issued and was served almost 5½ years ago, in February 2013. The court does not see how, in circumstances where it has concluded that there has been inordinate and inexcusable delay, it would be discharging properly the constitutional/ECHR obligations aforesaid were it not now to accede to the within application. The court's view in this regard is buttressed by the fact that were it to refuse the within application, there would be a still-further delay before the matter came on for trial. All of the foregoing being so, the court will accede to the application now made.