THE HIGH COURT

[2008 No. 10045 P.]

BETWEEN

EDGAR JOHN HOLMES

PLAINTIFF/RESPONDENT

AND

KILDARE COUNTY COUNCIL

DEFENDANT/APPLICANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 10th day of October, 2017

Nature of the case

1. This case comes before the Court by way of application to set aside an order of the Master dated the 6th December, 2016, and to strike out the plaintiff's claim for want of prosecution and for inexcusable and inordinate delay. The Master refused to grant the relief sought by the defendant, namely to strike out the claim, and the present proceedings arise by way of appeal from that refusal.

Relevant chronology

2. The proceedings commenced by a plenary summons issued on the 26th November, 2008. The claim was for damages to the plaintiff's dwelling allegedly caused by the negligence and breach of duty of the defendants. An appearance was entered on the 11th May, 2009, on behalf of the defendant Council. A statement of claim was delivered on the 10th July, 2009. It indicated that the events the subject matter of the proceedings took place on the 24th-26th November, 2006, and relate to the flooding of sewage into the yard of the plaintiff's dwelling and, later, on the 27th November, 2006, into his dwelling. It is alleged that the sewage overspill was caused by a blockage in the defendant's main sewer, and the alleged negligence relates to the defendants having caused or allowed the main sewers in the town to become blocked so as to cause the overflow into the plaintiff's property. The particulars of damage and loss arising out of building works and renovation are alleged to be in the region of €106,000. There is also loss of apartment rent for 31 months, which is assessed at approximately €46,000, and contents damage in the amount of €1,700. The total of the damage and loss amounts to approximately €154,000. The plaintiff also seeks damages and interest in respect of the event. The plaintiff has indicated in his affidavit sworn in relation to the present motion that he did not have insurance for his property at the time.

3. A defence was delivered on the 5th November, 2009, on behalf of the defendant Council. This is a full defence, and contributory negligence is also pleaded, insofar as the defence alleged that the plaintiff was responsible for the defective construction of his connection to the public sewer, which rendered his property susceptible to flooding. The Council also alleges that there were sewage rods in fifteen drains and manholes, which were not placed there by the defendant but rather by the negligent acts or omissions of persons unknown without notice to them. It is therefore alleged that, if there was flooding, the defendant is not responsible for it.

4. By letter dated 29th January, 2010, the solicitors on behalf of the plaintiff requested a copy of CCTV footage, so that their consultant engineer could examine it. Apparently, a CCTV survey was carried out at the Dublin Road, Monasterevin, Co. Kildare, on the 27th, 28th and 30th November, 2006. It also appears that a subsequent CCTV survey was carried out at the same location and at the plaintiff's property on 30th March, 2011.

5. Correspondence ensued between the parties and lasted up until August 2012, at which point communications appear to have ceased. A number of themes emerge from the correspondence during this period (2010-2012), including (a) the question of the CCTV footage being seen by the plaintiff and whether a discovery motion would be required, and, later, whether the DVD(s) containing the footage should be inspected at the defendant's premises or copied to the plaintiff's expert; (b) the inspection of the plaintiff's premises by the defendant's expert; and (c) the issue of replies to particulars sought by the defendant. Each side now blames the other as being the cause of the lack of progress in this case. One way or another, communication appears to have ceased around the summer of 2012.

6. The Court has seen a medico-legal report prepared by a Dr. John Casey of Clifden, Co. Galway. Without going into too much detail of medical matters personal to the plaintiff, I note that he confirms that the plaintiff came to the attention of the psychiatric services in 2012, after being referred by his then G.P. He had some issues previous to that. He left work in 2012 and suffered from major episodes of depression. Dr. Casey says that the plaintiff has been under the care of a number of consultant psychiatrists in the Kildare area, where he lives some of the time, and is currently under the care of a consultant psychologist in Galway. He is also under the care of an addiction counsellor in Galway. He has not been hospitalised for his illness, but has been on a considerable amount of medication in respect of it. This is the explanation offered for the proceedings essentially becoming dormant for a period of approximately 4 years.

7. On the 19th February, 2016, signs of revival in the case occurred. On this date, the plaintiff served a notice of change of solicitors on the defendant and also served a notice of intention to proceed. However, no formal step in the proceedings was taken in the subsequent months.

8. Some months later, the defendant responded by way of motion dated the 25th July, 2016, returnable for the 25th October, 2016, seeking an order dismissing the plaintiff's action for want of prosecution pursuant to O. 122, r. 11 of the Rules of the Superior Courts and/or pursuant to the court inherent jurisdiction, on the basis of alleged inordinate and inexcusable delay. In an affidavit grounding this motion sworn by Ms. Anne MacSharry dated 22nd July, 2016, the deponent stated, *inter alia*, that the facts relating to the proceedings would have to be ascertained from the evidence of witnesses whose recollection of events would necessarily have become less certain and less reliable due to the intervening ten years since the date of the alleged accident. She also averred that one witness on behalf of the defendant may no longer be in a position to attend court to give evidence, due to impending retirement. She submitted on that basis that the delay had created a substantial risk that a fair trial of the case would be impossible.

9. On the 20th October, 2016, the defendant responded to the plaintiff's notice for particulars, which had been sought six years previously.

10. On the 25th October, 2016, the first return date of the defendant's motion to dismiss, the plaintiff sought and was granted an adjournment of the motion by the Master of the High Court. On the 15th November, 2016, the defendant applied for an adjournment

of the motion, in circumstances where they had received an affidavit from the plaintiff shortly before the motion came on for hearing, which contained references to "without prejudice" correspondence. The motion came up again on the 29th November, 2016. The motion was adjourned for a third time in circumstances where the plaintiff's legal representative failed to attend. The defendant consented to the adjournment but the Court was informed that this was done as a matter of courtesy to counsel in circumstances where the date had been overlooked. On the 6th December, 2016, the defendant's motion to strike out the plaintiff's proceedings for want of prosecution was heard and dismissed by the Master. As noted at the outset of this judgment, the present case comes before this Court by way of an appeal from that order.

11. The plaintiff, Mr. Holmes, swore an affidavit on 15th November, 2016. The plaintiff deposed, *inter alia*, that, shortly after the flooding event complained of, a local area engineer represented to him that there would not be any dispute in relation to the fact that the blockage in the sewage drains occurred in the main sewer out in the public street. The plaintiff accepted that there had been a substantial delay in providing the replies to particulars. He averred that he had provided significant further information to his previous solicitors at the time, but now realised that there had been some breakdown on the progress of this aspect of the case. He says that it appeared from the file that replies to particulars had in fact been prepared in or around June 2012 but were not delivered to solicitors for the defendant at that time. He said that given the defendant's contemporaneous involvement in dealing with the flooding episode and the fact that their engineers attended for joint inspection as far back as April 2009, they were not hampered in the preparation of their defence or any assessment of their liability. He says his attempt to disengage from his former solicitors commenced in July 2015, but that although the new solicitors wrote to the former solicitors on 29th July, 2015, it was not until 29th January, 2016 that the litigation file was released.

12. The plaintiff in his affidavit goes on to refer to what he describes as his "personal sensitivities and social background". He says that he is a carpenter by trade and that his work had suffered greatly due to both the economic downturn and an adverse interpersonal relationship with a superior within his workplace. He said that he had suffered from various serious and debilitating episodes of depression. He said that the floodings (4 in 2006 alone) had caused him tremendous stress and anxiety as he had expended huge amounts of money refurbishing this property, which had been in his family since the last century. He exhibited a medical report from his general practitioner (referred to above) and said that he genuinely believed that his low mood and other matters set out in the medical report rendered him incapable of taking the necessary action to prompt a more positive, proactive pursuance of his claim. He said that he felt "paralysed through depression and lacked any energy or mental clarity to take action and tackle the failure to progress his proceedings". He said that it was only following an improvement in his own personal health that he felt more psychologically equipped to deal with the litigation.

Submissions of Counsel

13. Counsel on behalf of the appellant/defendant ("the Council") referred to the two-year rule set out in O. 122, r. 11, as well as the inherent jurisdiction of the court to strike out for inordinate and inexcusable delay. In the first instance, he relied on the delay between 28th June, 2012 (the date of the last letter from the plaintiff seeking inspection of the CCTV) and the 19th February, 2016, (when the plaintiff served a notice of intention to proceed). This, in itself, was a period of three years and eight months. Counsel pointed out that in *Anglo Irish Beef Processors Limited v. Montgomery & Ors* [2002] 3 I.R. 510 at 517, it was held that the service of a notice of intention to proceed is not a "step in the proceedings". He then went on to enumerate the further delays that took place even after the notice of intention to proceed. For example, although the defendant served a notice of motion at the end of July 2016, returnable for 25th October, seeking to strike out the plaintiff's proceedings, this motion was not ultimately heard until 6th December, 2016, by reason of the three adjournments granted in the circumstances as described above. He also questioned how it could have taken so long for the old solicitors to come off record and the new solicitors to come on record as between July 2015 and February 2016. He referred to the replies to particulars being ultimately served on 20th October, 2016, being the first formal step of the plaintiff in years. He referred to the issue of prejudice and referred to the averments on affidavit that witness memories would have faded with time, and also that there was one particular witness who had now actually retired and may no longer be available to give evidence. Counsel referred to a number of authorities for the proposition that the courts are very intolerant, particularly in recent times, of lengthy delays, and that it is not necessary to show prejudice before a case may be struck out, if the delay is sufficiently inordinate and inexcusable.

14. Counsel on behalf of the plaintiff/respondent questioned whether there was any prejudice in reality to the defendant in circumstances where the case was not one primarily reliant on witness memory, and in which the engineers had actually inspected the scene shortly after the flooding had taken place in 2009. She also questioned the reliance on the mere possibility that a witness who is now retired might not be able to give evidence and suggested this was not sufficient to establish a prejudice. She referred to the background of correspondence between 2010 and 2012, and the manner in which proceedings had stalled by reason of the fact, she alleged, that the Council had refused to comply with a simple request to produce a copy of the CCTV footage and send it to the plaintiff. She also relied upon the fact that there had been without prejudice settlement discussions at various points along the way, a matter to which the appellant/defendant strenuously objected being brought into evidence. She said that the case was essentially ready for trial and could be proceeded with in the near future, if the court permitted it to proceed. Counsel also placed heavy reliance upon the medico-legal report furnished on behalf of the plaintiff to explain the delay in the period between 2012 and February 2016.

Relevant Legal Authorities

15. The fundamental principles in this area were set out in Rainsford v. Limerick Corporation [1995] 2 ILRM 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Accordingly, the party seeking dismissal on the ground of delay in the prosecution of the action must establish that the delay has been inordinate and inexcusable, and 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 or against the case proceeding. The Court must have regard to the matters set out in *Primor*, which include but are not limited to whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant.

16. In the last 13 years or so, there has been somewhat greater emphasis on the importance of litigation being conducted in a timely fashion. In *Gilroy v. Flynn* [2004] IESC 98, Hardiman J. referred to S.I. No. 63 of 2004, which dealt with applications to dismiss cases where a plaintiff is out of time for delivery of a statement of claim, as well as the influence of the European Convention on Human Rights Act 2003, and *McMullen v. Ireland*, ECHR (29th July, 2004), which emphasised the obligation of the courts, independently of the parties, to ensure that rights and liabilities are determined within a reasonable time.

He went on to say:-

> "These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an

appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."

17. In *Stephens v. Flynn Limited* [2005] IEHC 148, Clarke J. (as he then was) having referred to Gilroy v. Flynn, went on to say as follows:-

> "Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore:
>
> 1. Ascertain whether the delay in question is inordinate and inexcusable; and
>
> 2. If it is so established, the court must decide where the balance of justice lies.
>
> However, it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

18. In *Byrne v. Minister for Defence* [2005] IEHC 147, Peart J. considered the situation arising where pre-commencement delay was inordinate and inexcusable, but where no prejudice had been made out to justify a dismissal. He went on to say:-

> "In addressing that interesting question, I believe that it would be proper to consider what interests are there to be considered and protected by the court's inherent jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay. Certainly, there are competing interests. There is first of all the plaintiff's undoubted right of access to the courts. There is also the defendant's right to an expeditious hearing of any claim brought against him and to finality. Linked to this consideration is the defendant's right not to be adversely prejudiced in such defence by delay for which he bears no responsibility. Finally, 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.
>
> It is really the final interest which is relevant to consider in the present case since I have already found that the defendant has not been prejudiced by the plaintiff's delay. The question is whether the public interest which I have identified trumps the plaintiff's right of reasonable access to the courts in the present case."

19. In *McBrearty v. North Western Health Board* [2010] IESC 27, Geoghegan J. comprehensively addressed the authorities in this area. Geoghegan J. comprehensively addressed the authorities in this area. Geoghegan J. considered whether it was in the interests of justice to the defendants to defend the case, in circumstances where two doctors would rely heavily, if not entirely upon medical records. Geoghegan J. held that it was not fundamentally unfair to require a doctor defending a medical negligence claim to rely upon medical records where they could not recall the event in question.

20. More recently, two Court of Appeal decisions have been delivered in this area of law. In *Mannion v. Brennan & Ors* [2016] IECA 163, the appeal concerned orders dismissing the plaintiff's action as against the third named defendant, the Legal Aid Board, by reason of inordinate and inexcusable delay. At para. 34 onwards of the judgment of Mahon J., the Court considered whether the balance of justice favoured dismissing the claim or allowing it to proceed to trial, notwithstanding the inordinate and inexcusable delay that it had earlier found. Mahon J. said that one of the questions the court was obliged to consider in this regard was whether a defendant had been prejudiced as a consequence of the delay, such as by reason of the non-availability of important witnesses because of death or immigration, destruction of documentation, lack of or reduced recollection because of the passage of time or a belief that the proceedings had long since been abandoned. The court should also consider, where witnesses are still available to give evidence, whether the quality of such evidence may have deteriorated because of the passage of time. He went on to say that in the case before him, there was little evidence that the Legal Aid Board would suffer prejudice of any consequence in the event that the plaintiff's action was permitted to continue. The case against the Board was in respect of alleged professional negligence concerning the manner in which it had represented the plaintiff's interest in her earlier Circuit Court proceedings. As a statutory board, they had access to all their own historical correspondence and records and there was no suggestion that her file in respect of those proceedings was no longer available or that for any reason the board was not in a position to retain an expert to give evidence to the court as to whether or not it had complied with its obligations as the solicitor acting on behalf of the plaintiff at the relevant time. It was not a case that appeared to be particularly "witness-dependent" from the perspective of the Board. Further, reference had been made to the fact that a Legal Aid Board solicitor who had represented the plaintiff in the Circuit Court action had died in 2003. However, as the court pointed out, not only was it not averred that this witness was an essential witness, but additionally, the witness had died just two years after the institution of the present High Court proceedings so that any prejudice that might result from his absence as a witness at this point in time was equally a factor at a very early stage in the proceedings. In all of the circumstances, the court decided to allow the continuance of the proceedings notwithstanding that there had been inordinate and inexcusable delay on the plaintiff's behalf.

21. In the second of these Court of Appeal decisions in 2016, *Millerick v. Minister for Finance* [2016] IECA 206, the Court of Appeal considered the issue of inordinate and inexcusable delay in the context of road traffic proceedings. Having found that there was inordinate and inexcusable delay, the court went on to say at para. 32 (Irvine J.):-

> "In light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the *Primor* test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay, even marginal prejudice may justify the dismissal of the proceedings. (See *Cassidy v. The Provincialate* [2015] IECA 74). That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head-note of the *Primor* decision."

22. At a later point in her judgment, Irvine J. also referred to the obligation on the courts to be vigilant with respect to delays in

litigation, saying as follows:-

"Finally, recent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long-standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures. These decisions have emphasised the constitutional provisions contained in Article 34.1 which requires the courts to administer justice. This constitutional obligation presupposes that the court itself will strive to ensure that litigation is conducted in a timely fashion."

She then went on to refer to the comments of Hogan J. in the case of *Quinn v. Faulkner* [2011] IEHC 103 in this regard.

23. In *Rodenhuis and Verloop B.V. v. HDS Energy Limited* [2010] IEHC 465, Clarke J. observed:-

> "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 with 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 to 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 European Convention on Human Rights."

Decision

24. There is no doubt that the time limit in Order 122, rule 11 was breached, but the Court has a discretion as to whether the proceedings should be struck out in that eventuality, and it seems to me that both reliefs sought (relief pursuant to Order 122, rule 11, and relief pursuant to the Court's inherent jurisdiction to strike out for inordinate and inexcusable delay) should be addressed together.

25. In considering the lapses of time in the present case, I have considered it helpful to divide the progress of the case into three broad periods: (1) 26th November 2008-June 2012, being the period between the commencement of proceedings and date of the last letter from the plaintiff to the defendant before the matter became dormant; (2) June 2012-April 2016, the period of dormancy of the proceedings; and (3) April 2016 and December 2016, the period starting with the change of solicitor (although it was not a formal step in the proceedings) and culminating in the dismissal of this motion by the Master.

26. Insofar as the first period was characterised by a lack of expedition in the matter moving forward, it seems to me that blame should be equally shared by the parties insofar as something of a stalemate appears to have emerged, with one side insisting that they see the CCTV footage before matters could progress, and the other side insisting on the particulars being replied to.

27. The second period appears to have been one of complete inactivity on both sides. The plaintiff has put forward medical and personal evidence to explain that the reason for this was essentially because of the depression and other personal problems being suffered by him. The period was lengthy, but it seems to me that the debilitating effects of the depression suffered by the plaintiff is a convincing explanation as to why he did not take steps to progress his case. Further, the defendant simply sat back and took no steps to progress the proceedings during that period. No effort was made to prod the plaintiff into a resumption of activity, and the authorities emphasise that the duty to conduct proceedings in a timely fashion rests on both parties to the proceedings.

28. As regards the third period, there was, in my view, inexcusable delay on the part of the plaintiff and/or his legal team, having regard to the timeline of events described above. Having served a notice of intention to proceed in April 2016, itself not a formal step in the proceedings, the replies to particulars were not served until October 2016. Meanwhile, the defendant had issued the present motion, and instead of responding with alacrity to this, the response was sluggish to say the least, with the motion having to be adjourned on several occasions.

29. As regards the issue of prejudice, this does not appear to me to be a case which is heavily dependent on the memory of witness regarding factual events; on the contrary, it is likely to be determined primarily on the basis of expert evidence about drainage and sewage systems. It also appears from the evidence before the Court that the defendant's experts had an opportunity to view and report on the scene in the immediate aftermath of the events complained of and that there are reports already in existence from 2010 and 2011, as well as relevant CCTV footage. As regards missing witnesses, the averments go no further than to say that there is one witness, whose relevance is not explained, who has retired and 'may' be unavailable to give evidence,

30. In all of the circumstances, and despite the overall delays in the case, and in particular what I consider to be inexcusable delay in the third period as described above, it seems to me that the balance of justice is in favour of this case being allowed to proceed. The most important delay was one of essentially 4 years, which in my view cannot be characterised as 'inexcusable' on the evidence before the Court. Further, I am not persuaded that there is prejudice to the extent of a real risk of an unfair trial. While the Court should be vigilant to ensure that parties to proceedings are not given 'endless indulgence', to use the words of Hardiman J., this appears to me to be a case where there was a genuine medical problem on the part of the plaintiff, which was likely to have a direct impact upon the plaintiff's mental capacity.

31. Accordingly, I dismiss the appeal against the order of the Master and refuse the relief sought.