THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 43

Appeal No. 2014/449

2014/450

Irvine J.
Baker J.
Kennedy J.

BETWEEN/

PAUL SWEENEY

PLAINTIFF/APPELLANT

- AND -

CECIL KEATING TRADING AS CECIL KEATING TRANSPORT AND MCDONELL COMMERCIALS (MONAGHAN) LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms Justice Baker delivered on the 20th day of February, 2019

1. These are two appeals brought by the plaintiff, Paul Sweeney, against orders made on 23 April 2012 following ex tempore rulings of Kearns P. on 16 April 2012 by which Mr Sweeney's proceedings were dismissed for want of prosecution on foot of motions brought by each of the defendants invoking the court's inherent jurisdiction and O. 122, r. 11 of the Rules of the Superior Courts ("RSC").

2. The background to the proceedings is that in the year 2001, nineteen years ago, Mr Sweeney was employed by the first named defendant as a lorry driver. At that time, the second defendant was running a commercial garage involved in the maintenance, servicing, and repairs of commercial vehicles.

3. In his statement of claim, Mr Sweeney claims that on 25 January 2001 he informed his employer, the first defendant, that the brakes on a lorry provided to him for the purposes of his work were not in proper working order. He claims that he was told to bring the lorry to the garage of the second named defendant to have it looked at. It is to be inferred from the statement of claim that, on the same date, the servants or agents of the second defendant inspected the lorry, and then returned it to Mr Sweeney or his employer. Mr Sweeney then claims that the following day, whilst he was driving the lorry in the course of his employment, the brakes failed when he was rounding a bend at Killydoon, a village in County Cavan. The lorry allegedly collided with a gate pier at the entrance to a farmyard causing Mr Sweeney to allegedly sustain serious injuries to his left foot, ankle, and leg.

4. Varying chronologies have been relied upon by the parties in their written submissions. The following are the dates most material to this appeal:

26 January 2001: Injuries sustained. Cause of action accrues.

22 December 2003: Plenary summons issues.

23 February 2004: Appearance for second defendant.

9 August 2006: Service of the statement of claim.

21 August 2006: Motion for judgment in default of appearance against first defendant.

25 September 2006: Second defendant serves notice for particulars.

10 January 2007: Appearance for first defendant.

25 May 2010: Letter from Shane Kennedy, plaintiff's now solicitor, to Legal Aid Board enclosing authority from Mr Sweeney requiring the Legal Aid Board to deliver up all files, documentation, correspondence and memoranda concerning his personal injuries claim.

16 June 2010: Letter from Stephanie Coggans of the Law Centre to Mr Kennedy referring to the proceedings and an engagement with the second defendant concerning potential compromise of the proceedings. The letter advised urgency on the part of Mr Kennedy.

29 July 2011: Motion issued by Legal Aid Board to come off record.

9 August 2011: Second defendant's motion to dismiss proceedings issues.

18 August 2011: Mr Kennedy serves notice of change of solicitor.

15 December 2011: First named defendant's motion to dismiss proceedings issues.

23 April 2012: Orders made dismissing Mr Sweeney's claim against both defendants.

14 May 2012: Notice of appeal to the Supreme Court.

5 November 2013: Plaintiff's motion to High Court to obtain recording of proceedings of 16 April 2012.

23 April 2014: Motion brought by second defendant to dismiss Mr Sweeney's appeal for want of prosecution.

16 May 2014: Books of appeal lodged in the Supreme Court.

23 October 2017: Mr. Sweeney issued his application for directions in the Court of Appeal.

Judgment of the High Court

5. In his brief *ex tempore* rulings of 12 April 2012, Kearns P. expressed himself satisfied that Mr Sweeney had been guilty of inordinate and inexcusable delay in the manner of his approach to his proceedings. It is also to be inferred from his judgment that he was satisfied that the balance of justice warranted the dismissal of the proceedings. It is clear that, in coming to that conclusion, he had regard to the evidence of Mr Kennedy in his replying affidavit of 8 November 2011. Kearns P. was satisfied, as a matter of law, that any difficulties between Mr Sweeney and his solicitors could not be relied upon to justify or excuse the delay that had occurred. Kearns P. considered it likely that the first defendant would be prejudiced in the defence of the action by reason of the death of Cecil Keating, the principal of the firm, and with whom Mr Sweeney apparently had had discussions concerning his accident. This was not, according to the High Court judge, a theoretical risk of unfairness or injustice. He considered it to be real prejudice.

6. Kearns P. mentioned, in his concluding remarks, that Mr Sweeney was not necessarily without a remedy and noting that even "an unreasonable or difficult plaintiff" would be entitled to expect that "his lawyers will press something along" when a possible consequence of the delay had been pointed out in correspondence.

The jurisdiction of the appellate court

7. An appellate court when asked to set aside an order made by a High Court judge in the exercise of his or her discretion in relation to questions of mixed fact and law should do so only if the appellate court considers it necessary in order to avoid a serious injustice being visited upon the appellant.

8. Giving his judgment for the Supreme Court in *Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance Ltd* [2013] IESC 6, MacMenamin J. considered the circumstances in which an appellate Court might review an order made by the trial judge in the exercise of such discretion:

> "Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental."

9. MacMenamin J.'s dictum was later applied by Irvine J. in the Court of Appeal in *Collins v. Minister for Justice, Equality, and Law Reform* [2015] IECA 27. She considered that the High Court judge must be accorded a significant margin of appreciation as to the manner in which he or she may exercise discretion on an application such as one to dismiss a claim for inordinate and inexcusable delay. It is not for the appellate court to provide a rehearing of the High Court application and to substitute its discretion for that of the High Court judge. It is, accordingly, for the appellant to demonstrate that the decision made by the High Court judge was not, on the facts of the case, decided in accordance with the prevailing principles or was unjust to the point that it should be set aside on appeal.

Inordinate and inexcusable delay

10. The legal principles which apply to an application to dismiss a claim for want of prosecution or for inordinate and inexcusable delay are well established. The most frequently cited decision is that of Hamilton C.J. in *Primor Plc. (Under Administration) v. Stokes Kennedy Crowley* [1996] 2 IR 459.

11. It is for the moving party on any application to dismiss proceedings on the grounds of delay to establish that the plaintiff's delay has been both inordinate and inexcusable. The authorities require that the delay not merely be explained but that the explanation be one that excuses the delay. In *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. considered that the explanation must be scrutinised, must be supported by evidence, and must "legitimately excuse" the delay in pursuing the claim.

12. Having regard to the evidence available to this Court on affidavit, I am satisfied that the decision of the then President of the High Court, that the plaintiff had been guilty of inordinate and inexcusable delay, was well-founded.

13. The delay was inordinate, first, having regard to the fact that the proceedings were issued so close to the expiry of the statutory period with the result that the plaintiff was under an additional onus to pursue his proceedings with all due diligence (see the decision in *Cahalane v. Revenue Commissioners* (Unreported, High Court, McCracken J.,14 May 1999) and *McBrearty v. North Western Health Board* [2010] IESC 27). The proceedings were, in the legal sense, what I would describe as routine and straightforward. There was no evidence put before this Court to suggest that they involved any hidden complexity. This is not, for example, a case in which the plaintiff had any difficulty in obtaining expert reports or in locating critical witnesses.

14. Secondly, inactivity between the delivery of the statement of claim and the date upon which the defendants issued their motions to dismiss the proceedings, a period of more than five years, was, by the standard of even the most complex proceedings, inordinate.

15. No explanation was forthcoming as to why the statement of claim was not delivered for more than two and a half years following the delivery of the plenary summons which itself was not delivered until one year and 11 months after the accident.

16. No valid excuse has been advanced to explain why the action was not brought on for trial with all possible expedition having regard to the very belated statement of claim. For completeness, I should state the second named defendant warned the plaintiff of its intended application to dismiss the proceedings by letter dated 26 May 2011 following which, Mr Kennedy eventually came on record for the plaintiff, but did not move the action along.

17. It is also clear from decisions such as that of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 ILRM 290, at p. 7, that a party to litigation cannot avoid culpability for delay by relying upon the conduct of their legal advisors:

> "[T]he 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."

18. The fact that there was a change in Mr Sweeney's legal representation cannot be relied upon to excuse any part of the delay. Furthermore, Mr Kennedy's efforts to rely upon the circumstances in which he obtained Mr Sweeney's file from the Legal Aid Board for what he describes as the objective of providing him with a second opinion, is less than credible. Once the file had been transmitted to Mr Kennedy, the Legal Aid Board could not have processed Mr Sweeney's claim, furnished replies to particulars, or engaged counsel. What is clear is that Mr Kennedy was in sole control of the litigation file from 21 May 2010 and, having regard to the time that had elapsed since the accident, his delay in serving a notice of change of solicitor is hard to understand. Added to that is the warning contained in the letter of 16 June 2010 from Ms Coggans of the Legal Aid Board to Mr. Kennedy that the defendants were likely to move to seek dismissal in the light of the delay.

Balance of justice

19. If the delay is found to be both inordinate and inexcusable, the court is then obliged to consider what is frequently described as the third leg of the *Primor v. Stokes* test, whether the balance of justice favours the dismissal of the action. The onus of proof shifts to a plaintiff to establish the existence of countervailing circumstances which would warrant permitting the proceedings to proceed to trial (see the judgment of Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 IR 510). This is because the scales of justice at that point are weighed against the plaintiff who has been found guilty of inordinate and inexcusable delay. If the position was otherwise, there would be no point in a court engaging in an assessment as to whether the plaintiff had been guilty of inordinate and inexcusable delay. The court might just as readily commence its analysis of the application by deciding whether the justice of the case would favour permitting the action proceed to trial.

20. In deciding where the balance of justice is to be found for the purposes of the third leg of the *Primor v. Stokes* test, the court should have regard, *inter alia*, to those factors identified by Hamilton C.J. in the course of his judgement. Included amongst that list are the conduct of the parties, acquiescence, and possible prejudice. The relevant factors for the present appeal are as follows:

> (a) the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (b) in considering this latter obligation the court is entitled to take into consideration and have regard to:
>
> (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 to make it unfair to the defendant to allow the action to proceed and to 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,
>
> (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 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 to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to defendant's reputation and business.

21. Counsel for Mr Sweeney says that the first and most relevant factor in weighing the balance in his favour is the fact the he suffered severe and debilitating injuries in the accident which impacted his ability to work and that these proceedings "probably also represent his last chance to provide for himself and his family". In *Rainsford v. Limerick Corp* [1995] 2 ILRM 561, cited as a relevant authority, at pp. 13-14 of his judgment, Finlay P. said as follows:

> "In my view the first material consideration in the exercise of the discretion is the nature of the case itself. It is clear from the statement of counsel that the injuries to the plaintiff are very severe and that his chance if he has a good cause of action of being compensated for those injuries probably represents the last major opportunity notwithstanding an extreme handicap to provide for himself and his dependents".

22. Counsel for the first respondent contends that no medical evidence whatsoever has been adduced in respect of the alleged injuries, further particulars of personal injuries have not been served, nor has a medical report been sought or exhibited.

23. I agree with counsel for the first respondent's contention, and I am not satisfied that the plaintiff has shown that this factor weighs in his favour as it did in *Rainsford v. Limerick Corp and in Daly v. Limerick Corp* (Unreported, Supreme Court, Keane C.J., 7 March 2002).

24. Counsel for the plaintiff further submits that the conduct of both defendants is relevant in that the first defendant took a "very much 'back-seat' approach" to the second defendant. He also points to delays on the part of the second defendant.

25. There is no obligation on a defendant to progress proceedings or to take steps to pressurise a plaintiff to pursue an action with diligence. Every step taken by a defendant is one which is financially costly and a defendant may never recover that expenditure even if the action is successfully defended.

26. Material also to an application to dismiss proceedings for inordinate and inexcusable delay is the fact that the court itself is obliged, in furtherance of its constitutional obligations to administer justice and its obligation to have regard to the European Convention on Human Rights ("ECHR"), to ensure that litigation is concluded in an expeditious manner (see, for example the decision in *Quinn v. Faulkner* [2011] IEHC 103). A *laissez faire* attitude to the progress of litigation by the plaintiff cannot be tolerated given that delay may constitute a violation of Art. 6 ECHR rights.

27. Apart from what I have already noted regarding the straightforward nature of these proceedings in terms of evidence and proofs,

for the sake of completeness, I would also observe that this is not a claim which became bogged down in interlocutory disputes concerning matters such as discovery, particulars, *etc*., as often happens in more complex disputes, and that the plaintiff had nonetheless not advanced his claim beyond service of a statement of claim.

28. In his affidavit sworn for the purposes of opposing the application brought to the Supreme Court to strike out Mr Sweeney's appeal, Mr Kennedy mentions the "complexity of the proceedings", the difficulty of his researches, and his engagement with potential experts. However, these are no more than bald averments unsupported by any evidence or details concerning these difficulties. He talks of "expending" a great amount of time on "research and making enquiries of experts". He furnishes no dates, copy correspondence, *etc*. to establish his engagement with any of these experts or indeed junior counsel. His only references is to advices from junior counsel of 4 July 2011, 13 months after he obtained the file from the Legal Aid Board. Furthermore, these averments are inconsistent with his assertions that he was merely "looking at the file" on Mr Sweeney's behalf, (affidavit of 8 May 2014, para. 6).

29. Mr Keating died on 12 February 2008. Counsel for Mr Sweeney says that the loss of his evidence is irrelevant as the case concerns the breach of obligations under health and safety legislation and EU law. He further says that these personal injuries proceedings can be largely determined on documentary evidence and cites *Carroll Shipping Ltd v. Mathews Mulcahy & Sutherland Ltd* (Unreported, High Court, McGuinness J., 18 December 1996) as a relevant authority.

30. Counsel for the first respondent argues that specific prejudice arises from the death of Mr Keating as he was the principal of the first defendant business, involved in the day-to-day management and operations and the person notified of the occurrence of Mr Sweeney's accident and who filled out the report form. It is the first respondent's contention that there are no other witnesses on behalf of the first defendant. Conversations had taken place between Mr Keating and Mr Sweeney about the accident and its possible reasons and the defendant's evidence of these is now lost.

31. The prejudice arising from Mr Keating's death is real and, in my view, not negated by the fact that the second defendant's garage foreman is still available to give evidence. That the outcome of the proceedings could turn upon a conversation alleged to have taken place almost twenty years ago, between a lorry driver and a garage man, whose job is to deal with defective vehicles on a daily basis, concerning the brakes of a particular lorry, in my view, would put justice to the hazard. It is undoubtedly the case that the death of Mr Keating would have an adverse effect on the ability of the first defendant to defend the proceedings. It would also likely have an effect on the first defendant's ability to defend an application for contribution and/or indemnity by the second defendant. Kearns P. was entitled to factor into his consideration that memories of the alleged conversation would further fade in circumstances where the action, if allowed to proceed, might not be heard for at least a further 12 months, now nineteen years after the accident.

32. Furthermore, it is well established law that the court, when considering an application to dismiss proceedings for inordinate and inexcusable delay can assume prejudice once there has been an extensive period of time between the events complained of and the likely date of trial (see, for example, *Gorman v. The Minister for Justice, Equality and Law Reform* [2015] IECA 41). Memories fade with time and justice is put to the hazard.

33. The argument made at the hearing of the appeal that the matter is complex and that the dispute is likely to be primarily one of law, is not borne out by the pleadings and the case as pleaded is a straightforward personal injuries claim with no reference to the allegedly relevant and complex EU Regulations to which counsel for the plaintiff referred in his oral submissions. Even taking this argument at its height, the case now sought to be made is not ready to proceed and will, at the least, require to be reformulated, and the statement of claim amended. That factor was relevant to the Court of Appeal in *Farrell v. Arborlane Ltd* [2016] IECA 224, where the fact that the case was not particularised and was, therefore, some distance from being ready for trial was a relevant factor. That factor alone would weight against the continuation of the present action.

34. Finally, the jurisprudence makes clear that, in a case where a defendant has established inordinate and inexcusable delay, even moderate prejudice can tip the balance in favour of the dismissal of the action (see, for example, *Stephens v. Flynn* [2008] IESC 4, [2008] 4 IR 31).

35. I am satisfied that the justice of the case does not permit the continuation of the action and Mr Sweeney has established no good reason why this Court should interfere with the orders made by the High Court.

36. Further, given that these appeals seek to invoke the discretion of this Court, a factor to be taken into account and one which weighs heavily against the plaintiff is the three-year delay between the order of the Supreme Court of 20 May 2014 and the date upon which directions were sought from this Court concerning the appeal.

37. It was, in my view, incumbent upon the plaintiff, in light of the overall delay in the proceedings to apply, as soon as was practicable, to the Court of Appeal for directions and a hearing date. As it happens, his application for directions was only made on 23 October 2017. This delay has visited a further three-year delay upon the proceedings.

Conclusion and summary

38. For the purposes of defending the applications brought by the defendants to dismiss these proceedings, the onus is on Mr Sweeney to establish some countervailing circumstances to show that the balance of justice favoured allowing the action proceed to trial notwithstanding his inordinate and inexcusable delay in advancing his claim.

39. Nothing was advanced, in my view, sufficient to warrant this Court readjusting the scales of justice in his favour.

40. On a review of the evidence available to this Court, I am not satisfied that Mr Sweeney has established that the decision of the High Court judge was not in accordance with the prevailing principles or was unjust or unfair such that the orders made should be reversed by this Court in the exercise of its own discretion.

41. I would therefore dismiss both appeals.