Neutral Citation Number: [2007] IEHC 371

THE HIGH COURT

[1998 No. 6782 P]

BETWEEN

MICHAEL FAHERTY

PLAINTIFF

AND

MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Feeney delivered on the 22nd day of October, 2007

1. This is an application brought by Notice of Motion by the Defendants for an Order pursuant to the inherent jurisdiction of the Court dismissing the Plaintiff's claim as against the Defendants on the grounds of inordinate and inexcusable delay in the prosecution of the proceedings.

2. The history and chronology of the proceedings and the nature of the claim can be ascertained from the grounding affidavit of Paula Burke and the replying affidavit of the Plaintiff and from the exhibits therein and from the Pleadings. The history and chronology of the individual case is, as always, central in considering an application to strike out for inordinate and inexcusable delay.

3. The first and central authority to assist and guide the Court is *Primor v. Stokes Kennedy Crowley* [1996] 2IR. That case makes it clear that the primary consideration for the Court is:

> "To deal with the essential justice of the case before them."

4. In that case the Supreme Court laid out and identified the general principles to be applied having reviewed the leading authorities and did so at pages 475 and 476 of the judgment of Hamilton CJ.

> The principles to be applied were identified as:
>
> (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 be 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 proceedings of the case;
>
> (d) in considering this latter obligation the Court is entitled to take into consideration and have regard to:
>
> 1. The implied constitutional principles of basic fairness of procedures;
>
> 2. 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;
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> 3. Any delay on the part of the Defendant because litigation is a two party operation, the conduct of both parties should be looked at;
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> 4. Whether any delay or conduct of the Defendant amounts to acquiesce on the part of the Defendant in the Plaintiff's delay;
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> 5. The fact and conduct by the Defendant which induces the Plaintiff to incur further expenses;
>
> 6. 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;
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> 7. The fact that the prejudice to the Defendant referred to in 6 may arise in many ways other than merely caused by delay, including damage to the Defendant's reputation and business.

5. This Court will apply those principles to the facts of this case. Those principles have been consistently applied. Even after the enactment of the European Convention on Human Rights Act 2003 as is stated in the judgment of Clarke J in *Stephens -v- Paul Flynn Ltd.*, an unreported judgment of 28 April 2005:

> "The basic questions which the Court has to address remain the same."

6. The two central tests are identified on the basis that the Court should: 1. Ascertain whether the delay in question is inordinate and inexcusable; 2. If it is so established the Court must decide where the balance of justice lies.

7. However, in addressing the second of those two issues it is clear that following a Supreme Court decision in *Gilroy v. Mary Flynn* [2005] 1ILRM 290 that the weight or emphasis to be given to the various factors in the assessment of the balance of justice and the actual length of time which might be excused must be viewed in the light of the conditions now prevailing. As Clarke J said in Stephens at page 8 of his judgment:

> "Delay which would have been tolerated may now be regarded as inordinate."
>
> And:
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> "Excuses which suffice may no longer be accepted."

8. As Clarke J concluded the balance of justice may be tilted in favour of imposing greater obligation of expedition.

9. Those developments arose not only from the 2003 Act, the European Convention on Human Rights, and the applicability of that Convention to Irish domestic law, but also from an amendment to Order 27 demonstrating a more critical approach to unexplained or unjustified delay. The European Court has emphasised the effect and importance of Article 6(1) of the European Convention on Human Rights and following on such decisions as *Barry v. Ireland* ECHR judgment of 15 December 2005, it is the case that the national courts, inspective of the approach of the parties, are obliged to ensure that all proceedings are completed within a reasonable time frame.

10. The approach of the European Court on human rights is succinctly set down and summarised in the textbook "Theory and Practice of European Convention on Human Rights" (4th Edition) by Van Dijk and others at paragraph 10.7.3. It is there stated in relation to reasonable time:

> "After the length of the relevant period has been established, it must be determined whether this period is to be regarded as reasonable. In many cases the Court only makes an overall assessment while in other cases it assesses the lapse of time in each stage of the proceedings. The reasonableness cannot be just judged in the abstract, but has to be assessed in view of the circumstances of each individual case. The interests of the person concerned in a prompt decision as possible will have to be weighed against the demands of a careful examination of the case and a proper conduct of the proceedings.
>
> According to established case law when assessing the reasonableness of the relevant period the Court applies in particular three criteria: (a) the complexity of the case, (b) the conduct of the Applicant and (c) the conduct of the authorities concerned. However, in an increasing number of cases the Court applies in connection with the conduct of the authorities a fourth criterion (d) the importance of what is at stake for the Applicant."

11. The relevant chronology in this case is as follows:

> 1. The Plaintiff worked as a member of An Garda Síochána from 1965 to 1995 when he retired;
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> 2. He claims that he was exposed on unidentified dates during such employment to "high, excessive and injurious noise levels" and has suffered personal injuries in the form of hearing loss and tinnitus in both ears;
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> 3. The Plaintiff issued a Plenary Summons on 9 June 1998 making a generalised and entirely unspecific claim for personal injuries arising out of the alleged wrongs occasioned to him during his employment;
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> 4. It appears from the Statement of Claim which was forwarded in February 2007 that the Plaintiff attended a consultant ortholaryngologist on 27 June 1998;
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> 5. The Plenary Summons was served on 19 February 1999 and an appearance was entered on 28 May 1999;
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> 6. On 27 June 2006, over seven years after the last proceeding within the case, a letter was sent consenting to the delivery of a Statement of Claim within 21 days from that date;
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> 7. There was no proceeding within the case until September 2006 when new solicitors came on record for the Defendants and a letter was sent by registered post;
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> 8. There was no response until an undated Statement of Claim was sent by letter of 15 February 2007. That document for the first time identified the claim as being in relation to hearing loss, but still did not identify when during the period of employment the Plaintiff was exposed to the alleged excessive noise and merely stated that the particulars provided were the best available until Discovery;
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> 9. The Plaintiff endeavours to explain the delay by stating that an appointment was made with an audiologist for July 2001 and after that test and examination the Plaintiff's solicitor told him in January 2002 that the test results were available if payment was made. In fact, no payment was made and no test results were available. Nothing happened thereafter until the Defendant's solicitors wrote in June 2006. Even then payment for the results was not made until October 2006 and the Statement of Claim was not available until February 2007.

12. The above chronology demonstrates the clearest case of inordinate and inexcusable delay. Indeed, no attempt has been made to argue otherwise. In addressing the application the Plaintiff relies and identifies a number of factors which it is suggested are salient:

> (a) the consequence of the proceedings being struck out;
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> (b) the explanation for delay, such as it is;
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> (c) the letter of June 2006 allowing three weeks for the delivery of a Statement of Claim;
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> (d) it is also the case that no express prejudice is identified or relied upon by the Defendants.

13. None of these reasons are sufficient to persuade the Court that the interests of justice do not require that in this case the proceedings should be struck out for delay. The Court itself must be mindful of ensuring a fairly, orderly and timely disposal of claims. Whereas in this case the claim was somewhat distant, even when proceedings commenced, dating back at the earliest to the end of the Plaintiff's employment in 1995, and potentially back as far as the commencement of his employment in 1965, there is clearly an increased obligation on the Plaintiff to proceed with such antique proceedings in a timely and speedy manner. That is all the more so given the medical examination which was carried out in 1998. To allow stale proceedings to remain inactive for seven years and to have failed to identify the nature of a claim relating to past employment over twelve years after that employment has terminated is clearly a case not only of inordinate and inexcusable delay, but is a case where the Court is satisfied that the delay and the consequent inevitable prejudice is such that it is appropriate to strike out the proceedings.

14. The Court of its own volition must be mindful to the proper and due administration of justice and when dealing with antique cases where there has been no identification of the particular precise nature of the claim and where the Court will be required to investigate back matters of ten, twenty and thirty years the obligation to proceed is such that if that obligation is not complied with then the

interests of justice require that the proceedings be struck out.

15. The current approach of the Courts in supervising litigation cannot permit the continuance of proceedings such as these where delay is so excessive and so inordinate as to be a cause of a real risk to justice and where stale proceedings are allowed to fester and where no real excuse has been offered, even in circumstances where there was a voluntary offer of an extension of three weeks made in June of 2006, the Court of its own volition must ensure the timely disposal of the proceedings. Indeed, it is to be noted that even when made that offer in June of 2006 the Plaintiff chose not to comply with the proffered extension and did not respond in any way other than for the delivery of an undated Statement of Claim the following February.

16. The overall circumstances of this case are such that applying the tests laid down by the Supreme Court in *Primor v. Stokes Kennedy Crowley* this is a case where the delay was both inordinate and inexcusable. The Court must then look to see whether in exercising its judgment and its discretion that on the facts of this particular case the balance of justice is in favour or against proceeding with the case. In this case, the delay has been so excessive, the inaction so glaring that it is clearly a case where the balance of justice is in favour of granting the relief sought by the Defendant and in those circumstances the Court proposes to strike out the proceedings on the basis of inordinate and inexcusable delay.