

THE HIGH COURT

[2013 No.10479P]

BETWEEN:

E.A.O.

PLAINTIFF

AND

THE DAUGHTERS OF CHARITY OF ST VINCENT DE PAUL

AND

THE SISTERS OF CHARITY REFUGE

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Kearns P. delivered on 13th day of February, 2015

By notice of motion the first named defendant seeks an order pursuant to the inherent jurisdiction of the Court dismissing the plaintiff's claim for want of prosecution on the grounds of inordinate and inexcusable delay. The first defendant further asserts that the plaintiff's claim is bound to fail by reason of having been instituted outside the time limit for doing so as set out in the Statute of Limitations Act 1957 (as amended).

BACKGROUND

The plaintiff was born in 1947 and from the age of six years old was placed in the care of various institutions and industrial schools. In or about June 1968 the plaintiff was in the care of an institution operated by the second defendant located at High Park, Drumcondra when, while absent from the institution for a time, she was raped by a person unknown and became pregnant. Upon discovering that she was pregnant, the plaintiff contends that she was sent to reside at a so-called 'mother and baby home' known as St. Patrick's on the Navan Road, Dublin 7. The plaintiff submits that this institution was managed and operated by the first defendant, a religious order.

On the 2nd March 1969 the plaintiff gave birth to a son at St. James' Hospital (formerly St. Kevin's) and shortly thereafter returned to St. Patrick's. The plaintiff alleges that she was separated from her son and was only allowed to see him for the purposes of feeding. She claims that she was precluded from bonding with her son or developing any natural relationship with him. In or about May 1969 the plaintiff contends that the servants or agents of the first named defendant informed her that her son was being put up for adoption. While the plaintiff maintains she strongly expressed her desire to keep her son, she states that he was taken away from her at the beginning of July 1969 and she was not afforded an opportunity to say goodbye. Documents received following a request pursuant to the Data Protection Act after the plaintiff's claim had been commenced indicate that the plaintiff signed various relevant consent documents on the 5th May, 1969 and the 1st October, 1969.

The plaintiff subsequently returned to the care of the second defendant in Drumcondra and continued working in the 'Magdalene laundries'. Some months later, the plaintiff submits that she was presented with adoption papers and was informed by a Sister Columba that should she fail to sign them she would be "put out on the street". She states that due to the undue influence and duress she was placed under, she felt compelled to sign the documents. Subsequently, the plaintiff left the institution in Drumcondra and went on to marry and have seven other children.

The plaintiff's Statement of Claim refers to a medical report prepared by Dr. Mairead O'Leary, consultant psychiatrist, which states that the plaintiff was institutionalised in very harsh environments throughout her life until she was approximately twenty two years old and has limited insight into how appalling her life was. She had no freedom, was physically abused and frightened, and was forced to work very hard for no remuneration. It is submitted that the plaintiff feels deeply ashamed and embarrassed by the adoption of her first son and thinks about him regularly. Some time during 2008 the plaintiff, with the assistance of one of her children, set about trying to locate her son. She subsequently discovered that he had passed away in 2004.

STATUTORY PROVISIONS

At the time of the institution of the plaintiff's claim, the relevant limitation period for a personal injury action was six years. This has since been reduced to two years by the Civil Liability and Courts Act 2004.

The plaintiff relies on section 71 of the Statute of Limitations 1957 (as amended) ('the Statute'). Section 71 relates to the postponement of a limitation period in cases of fraud and provides as follows –

"71.—(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—

(a) the action is based on the fraud of the Defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

Also of relevance to these proceedings is the Adoption Act 1952 ('the Act').

Section 14 of the Act deals with consents to adoption –

"14.—(1) An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with any such consent in accordance with this section.

(2) The Board may dispense with the consent of any person if the Board is satisfied that that person is incapable by reason of mental infirmity of giving consent or cannot be found.

(3) The consent of a ward of court shall not be dispensed with except with the sanction of the Court.

(4) A person may give consent to the making of an adoption order without knowing the identity of the applicant for the order.

(5) A consent shall be given in writing in the prescribed form.

(6) A consent may be withdrawn at any time before the making of an adoption order."

Section 15(1) of the Act relates to the validity of consent –

"15.—(1) A consent shall not be valid unless it is given after the child has attained the age of six months and not earlier than three months before the application for adoption."

SUBMISSIONS OF THE PLAINTIFF

Counsel for the plaintiff refers the Court to section 15(1) of the Adoption Act 1952 which provides as follows –

"A consent shall not be valid unless it is given after the child has attained the age of six months and not earlier than three months before the application for adoption."

The plaintiff's child was born on the 2nd March 1969. However, it is submitted that only after the present proceedings were commenced did a document become available to the plaintiff following a request under the Data Protection Act which indicates that the first defendant, despite claiming to have played no role in arranging adoptions, did play a key role in the adoption process. It is submitted that the first defendant was a fundamental component in an informal procedure designed to 'bridge' the six month requirement as set out in section 15(1). The document referred to is headed "FORM 34.E" and is described as "Mother's Consent to Adoption". The plaintiff signed this form on 5th May 1969, some two months after the birth of her child. The form lists the details of the mother and child and reads as follows –

"I freely and fully consent to the adoption of the child by adoptive parents approved by the Health Authority.

I undertake to complete in due course the statutory consent required by the Adoption Board and, until that is done, to keep the Sister-in-Charge of St. Patrick's Home informed of my place of abode."

The form is witnessed by 'Sister Austin', who was a member of the first defendant's order and was employed by the third defendant as a social worker at St. Patrick's.

Counsel submits that this form makes clear that the adoption procedure, and the consent given by the plaintiff, was not valid as it breached the requirements of section 15(1) of the Adoption Act. It is submitted that this breach of section 15(1) was concealed from the plaintiff and that Sister Austin, who is referred to in the first defendant's grounding affidavit, is available as a witness but neither she nor the first defendant has offered any information in relation to this informal 'bridging' system whereby the mother remained answerable to the first defendant until such time as she could give valid consent to the Health Authority. It is submitted that this concealment causes section 71 of the Statute to be operative and the clock was therefore stopped for the purposes of the plaintiff instituting a claim.

In relation to delay, counsel refers the Court to the principles set out in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. It is submitted that the Court must first consider whether or not the delay was inordinate or inexcusable and that the onus of establishing this lies with the party seeking to dismiss the claim. Counsel for the plaintiff contends that the first defendant, while having made a number of assertions in relation to prejudice, has failed to establish that the delay was inordinate or inexcusable. It is submitted that even if the Court finds the delay to have been inordinate, it is excusable on the basis of the plaintiff having been diagnosed with Recurrent Depressive Disorder, as detailed in the report of Dr. Mairead O'Leary, which has caused her to suffer from an emotional disorder resulting in recurrent nightmares and flashbacks and feelings of shame and guilt.

It is further submitted that even where a delay is found to be inordinate and inexcusable, the Court retains an inherent jurisdiction to allow a claim to proceed by applying a balance of justice test and, in the present case, the balance of justice favours allowing the case to proceed.

SUBMISSIONS OF THE FIRST DEFENDANT

The defendant's application is grounded on the affidavit of Sr. Goretti Butler, Provincial of the first named defendant. It is submitted that the first defendant was not responsible for arranging any adoptions at St. Patrick's, including that of the plaintiff's son. Sr. Bolger states that while members of the first defendant worked at St. Patrick's in a variety of roles, they acted as employees of the third defendant (or its predecessors in title) and that the institution was operated and managed by the health authority. It is submitted that the responsibility for adoptions lay with the St. Louise Adoption Society, which was established by the third defendant and registered for the purposes of the Adoption Acts. Sr. Bolger further states that the first defendant has no record of a member at the Order named 'Sister Columba' at the relevant times.

Counsel for the first defendant submits that the plaintiff's claim is barred by operation of the Statute of Limitations 1957 (as amended). At the time the plaintiff instituted the proceedings the relevant limitation period for a personal injury action was six years. Counsel submits that the plaintiff's cause of action arose in or about July 1968 when her child was put up for adoption or at the latest in 1969 when she signed adoption papers. Therefore, the Statute requires that the plaintiff was *prima facie* required to have commenced proceedings not later than 1975.

It is submitted that the onus lies on the plaintiff to establish that she is entitled to rely on the provisions of section 71 of the Statute in order to have the clock stopped from running against her for the purposes of instituting a claim. It is submitted that even where there is fraud on the part of a Defendant, time starts running once the fraud has been discovered or could, with reasonable diligence, have been discovered. Counsel submits that there is no evidence that the plaintiff was ever unaware of the circumstances giving rise to her cause of action, or that there was any form of fraudulent concealments on the part of the first defendant. Counsel contends that all of the documents relied upon by the plaintiff could have been discovered much sooner with reasonable diligence and therefore no exception pursuant to section 71 arises. It is further submitted that any alleged fraud, undue influence, or duress in the plaintiff's claim in relation to the adoption process or the signing of the adoption forms does not relate to the actions of the first defendant as it had no role in arranging adoptions and that formal consent was provided to the third defendant Health Authority by a form dated the 1st October, 1969.

The defendant submits that even if the Court does not determine that the plaintiff's claim is statute barred, her claim should nonetheless be struck out on the grounds of inordinate and inexcusable delay. The inherent jurisdiction of the Court to strike out proceedings was set out in *O'Donnai v. Merrick* [1984] 1 IR 151 –

"Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where, as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the Defendant, or inability on the part of an infant Plaintiff to control or terminate the delay of his or her agent. In all cases the problem of the court would seem to be to strike a balance between the Plaintiff's need to carry on his or her delayed claim against the Defendant and the Defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend."

This decision was followed in the case of *Toal v. Duignan (No.1)* [1991] ILRM 135 –

"It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a Defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that Defendant has not himself contributed to the delay, irrespective of whether the Plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."

It is submitted that *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, while relating to cases involving delay post-commencement of proceedings, makes clear that the Courts have an inherent jurisdiction to control their own procedures and can dismiss a claim in the interests of justice. In *Primor*, the Supreme Court set out the following principles to be applied in the exercise of this jurisdiction –

"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 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 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 to the Defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a Defendant's reputation and business."**

These principles were reiterated in *Comcast International Holdings v. Minister for Enterprise* [2012] IESC 50.

Counsel for the defendant submits that at no time prior to the institution of the within proceedings did the plaintiff make any complaint to the first defendant in relation to the matters now complained of. Furthermore, as set out in the affidavit of Sr. Butler, almost all of the members of the first defendant's order whom it was possible to identify as having worked in St. Patrick's at the relevant time and who might therefore have been in a position to give evidence had the plaintiff commenced proceedings sooner are now deceased. Sr. Butler identifies one witness, Sister Austin, who worked at the institution as a social worker, who is now 84 years

old and is stated to have no recollection of the plaintiff.

In those circumstances, the first defendant submits that the plaintiff's claim should be struck out on the grounds of inordinate and inexcusable delay and in the interests of justice.

DISCUSSION

In her substantive claim the plaintiff alleges that her infant son was taken away from her and given up for adoption without her consent. The tragic details of the case as presented by the plaintiff are unfortunately not unique and bear resemblance to a number of well publicised cases which have in recent years caused the role of various State and religious institutions in the adoption process, as it operated in this country in the past, to be closely scrutinised. However, it is not the function of this Court at this stage to offer any view on the merits or veracity of the plaintiff's claim. The first matter which the Court must consider is whether or not the plaintiff's claim is barred by operation of the Statute of Limitations 1957 (as amended).

The plaintiff's claim was instituted some forty four years after the events complained of allegedly occurred and is, therefore, *prima facie* statute barred. However, counsel for the plaintiff seeks to rely on section 71 of the Statute in order to postpone the relevant limitation period. It is submitted that the first defendant concealed details of an informal system which operated in breach of the requirements of section 15(1) of the Adoption Act 1952 in order to prematurely obtain consent from mothers for the adoption of their children. The plaintiff submits that the first defendant's role in this process only became known to the plaintiff through third party disclosures. Counsel for the defendant, on the other hand, submits that valid consent for the adoption was given to the Health Authority on the 1st October, 1969 and that this was within the terms of section 15(1). Any consent documents purported to be relied upon by the plaintiff did not permit any adoption to occur and, in any event, were known to the plaintiff.

The Court is satisfied that an informal process operated in this case whereby the plaintiff, described on various documentation by the defendants as an 'illegitimate' mother, was asked to provide interim consent for the adoption of her child until such time as valid consent could be obtained pursuant to the requirements of the Adoption Act. I am also satisfied that in the plaintiff's case the first defendant was an active participant in this highly questionable process. However, it is clear that the plaintiff, who was an adult at the time these events occurred, was fully aware of all of the matters now complained of including the alleged undue influence and duress. She signed an 'interim' consent form in May 1969 and provided formal consent in October 1969. In my view there is no indication that the first defendant perpetrated a fraud or fraudulently concealed anything from the plaintiff such as would cause section 71 of the Statute to become operative. I am satisfied that, even had this system not been known to the plaintiff, with reasonable diligence the documents and details of the procedure now sought to be relied upon by the plaintiff could have become known to her before they were finally obtained from TULSA on the 13th November, 2014.

For that reason, I am satisfied that the plaintiff's claim was commenced out of time and is statute barred.

Having made such a finding, the question of delay does not fall to be considered in any great detail. However, applying the well established principles in relation to delay as set out above, I am satisfied that the delay in commencing the proceedings was both inordinate and inexcusable in all the circumstances. The Court has had regard to the fact that the plaintiff was institutionalised at a very young age and has endured a considerable degree of hardship throughout her life. I have considered the submissions made in relation to Dr. O'Leary's medical report and am satisfied that instituting a claim of this nature was undoubtedly a very difficult decision for the plaintiff to make. However, while the Court sympathises with the plaintiff's predicament, the matters complained of were known to her from the outset yet no complaint of any kind was raised against the first defendant until the personal injuries proceedings were commenced some forty four years later.

Furthermore, as so much time has elapsed from the time these events occurred, and as various persons who would have been in a position to provide important evidence are now either deceased or likely to have a limited recollection of events, had it been required to do so the Court would have dismissed the claim on the balance of justice having regard to the first defendant's inability to defend the proceedings.

DECISION

For the reasons outlined above, the plaintiff's claim is dismissed.