THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 80

Appeal No. 2014/582

[Article 64 Transfer]

Finlay Geoghegan J.
Peart J.
Mahon J.

ANTOINETTE MCLOUGHLIN

PLAINTIFF/APPELLANT

- AND –

PATRICK GARVEY

DEFENDANT/RESPONDENT

Judgment of Mr. Justice Mahon delivered on 22nd April 2015

1. This is an appeal and cross appeal against an order of the High Court of 24th July 2012, which was perfected on 1st August 2012. Judgment was delivered by Hogan J. on 5th July 2012. The plaintiff's appeal is, essentially, against the decision of Hogan J. to strike out the plaintiff's proceedings for want of prosecution because of inexcusable and inordinate delay in the prosecution of these proceedings. In her written legal submissions of 27th June 2013, the plaintiff acknowledged that the delay was inordinate and thereby withdrew that aspect of her appeal as had been originally filed.

Background

2. The plaintiff was born on 10th December 1966, and is now forty six years of age. She and the defendant are sister and brother. The plaintiff grew up in Balbriggan with her parents and seven siblings. It is alleged by the plaintiff that approximately between the age of eight and twelve she was sexually abused by the defendant, which included oral sex and sexual intercourse. During this period the defendant was living at home on an intermittent basis, and it is alleged that the abuse took place in the family home most days when the defendant was in the house. The abuse normally took place in an upstairs bedroom, and at various times of the day. At the time, the plaintiff was unaware of any knowledge of the abuse on the part of her parents or siblings.

3. The defendant strenuously denies the allegations of sexual abuse by the plaintiff. He maintains that he lived away from home on a regular basis from 1974 (the alleged abuse commenced in 1976).

4. The plaintiff maintains that she told her father, Mr. Peter Garvey, about the abuse at the time when it was occurring. She alleges that when she told him, he beat her and told her she was 'dangerous'. Mr. Garvey, who is now seventy nine years old, denies that the plaintiff ever told him of the alleged abuse. The plaintiff also maintains that she told her mother and her two sisters and a friend of the abuse in October 2004, and that she reported the abuse to the gardaí on 3rd March 2006, the day following the date on which she commenced the proceedings. .

5. The plaintiff attributes a number of personal and medical difficulties with the alleged abuse by her brother. These include difficulties in her relationship with her partner. She has received psychiatric treatment on an intermittent basis since the late 1990's. Her consultant psychiatrist, Dr. Denis Murphy, has diagnosed a post traumatic stress disorder *"following a severe and prolonged sexual abuse during her childhood by her brother Patrick".* He identified suppressed memories of the abuse for many years until 2004. She has also attended the Dublin Rape Crisis Centre for counselling. She has a teenage son with a serious and debilitating medical condition.

The High Court Proceedings

6. The plaintiff commenced proceedings in the High Court by plenary summons dated 2nd March 2006, approximately twenty eight years after the alleged abuse by the defendant had ceased. The defendant entered an appearance on 7th April 2006, and a statement of claim was delivered on 28th December 2006. In her statement of claim the plaintiff alleged that she was, *inter alia*, physically assaulted and falsely imprisoned by the defendant, that she was raped by the defendant and that she was repeatedly sexually assaulted by him over a period of four years. The plaintiff claimed that she sustained injury as a consequence of the defendant's behaviour including psychological and emotional damage. Following the delivery of the statement of claim, the defendant immediately served a notice for particulars. This was promptly replied to by the plaintiff, and approximately two months later, the defendant served a notice for further and better particulars, and this was replied to within weeks. Very soon thereafter, on 27th March 2007, the defendant delivered his defence. Voluntary discovery was sought from the plaintiff on 5th June 2007. A motion to compel the plaintiff to make discovery was struck out on consent on 30th October 2007, and a second motion seeking discovery was issued on 11th February 2008. This was struck out on 18th April 2008, the plaintiff having furnished an affidavit of discovery on 10th April 2008. Approximately eighteen months later the plaintiff served a notice of intention to proceed on 2nd October 2009. A significant period of inactivity then occurred until 6th March 2012, when some two and a half years later, a second notice of intention to proceed was served on behalf of the plaintiff. This prompted a reaction from the defendant when, on 27th April 2012, he brought a notice of motion seeking:-

> *(1) An order pursuant to Order 122 rule 11 of the Rules of the Superior Courts dismissing the plaintiff's claim for want of prosecution;*
>
> *(2) An order pursuant to the inherent jurisdiction of the court dismissing the claim on the grounds of inordinate, inexcusable, undue and/or prejudicial delay;*

(3) Such further or other orders as this honourable court shall deem meet;

(4) Costs

The plaintiff served notice of trial on 15th May 2012. This application was heard by the High Court on 4th July 2012.

7. The notice of motion was accompanied by an affidavit sworn by the defendant in which he referred to a number of matters, including an incident which he said occurred in 2001 when the gardaí found illegal drugs in the plaintiff's home in Balbriggan, and which he said prompted him to sever all contact with her from that time. He also made reference to his becoming aware in 2005/2006 that unfounded allegations had been made about him by the plaintiff. This prompted him to instruct his solicitors in February 2006 to write to the plaintiff requesting her undertaking not to repeat the allegations. The defendant maintained that the response to this letter was a letter from the plaintiff's solicitor's on 3rd March 2006 indicating her claim for personal injuries, and the commencement of these proceedings shortly afterwards.

8. A replying affidavit was filed on behalf of the plaintiff sworn by her solicitor, Ms. Kathrin Coleman. In that affidavit it is averred:-

> *"...In support of the fact that by reason of her injuries caused by the abuse which she sustained at the hands of the defendant, her will to bring proceedings earlier was impaired and that the fact that the plaintiff did not report the abuse which occurred between 1976 and 1980 to the gardaí until 2006 (more or less concurrent with the issue of the Plenary Summons herein) is a matter which will be addressed by way of oral evidence at the hearing of the within motion and at the hearing of the substantive matters herein.…The plaintiff addressed all matters expeditiously… The defendant is not prejudiced by recent delay as the defendant has been on notice of the proceedings since April 2006 when an appearance was entered on his behalf by Sheridan Quinn solicitors. "*

9. The said affidavit referred to difficulties with which the plaintiff had had to contend in her life including her full time commitment to the care and welfare of her own family since 2008, and, in particular, caring for her teenage son who has a serious medical condition since birth and which, it is averred, *…"has precluded the plaintiff from turning her attention to addressing other matters".*

10. A further affidavit was sworn by the defendant on 27th June 2012. In that affidavit, the defendant referred to an incident which occurred in 2002 when his sister, Linda, informed him that the plaintiff had told her that from that day forward she intended to make his life a misery. He said that he had first heard of the plaintiff's allegations of sexual abuse when informed by members of his family that she informed them of these allegations in October 2004. The defendant also referred to an occasion in December 2005 when he said he was informed by his sister, Susan, and another relative that the plaintiff had advised them that because the defendant had refused to speak to the plaintiff, she intended to speak to the gardaí. The plaintiff maintains that his defence of the action is prejudiced because since then, both his sister, Susan and the other relative have died.

The High Court Judgment

11. Hogan J. expressed his view that the delay in these proceedings on the part of the plaintiff was both inordinate and inexcusable. He referred to the fact that approximately twenty six years had elapsed between the end of the alleged sexual abuse and the commencement of the proceedings in 2006, so that in 2012, a court would have been required to adjudicate on events which had occurred thirty six years previously. In his view, having regard to the test in *Primor plc v. Stokes Kennedy Crowley* [1996] 2I.R.459, this delay was inordinate. He went on to emphasise the fact that the plaintiff was openly speaking about her allegations to members of her family by late 2004, and had made a complaint to the gardaí in early 2006. He expressed the view that having regard to the fact that the allegations were by then nearly thirty years old there was an obligation on the plaintiff, if she wished to issue proceedings in relation thereto, to process those proceedings with reasonable haste. He acknowledged that while the plaintiff's preoccupation with her son's medical difficulties was *completely understandable*, she *"was not objectively entitled to allow the claim to just hang over the defendant."*

12. The learned High Court judge having found that the delay was inexcusable went on to consider whether the balance of justice required the dismissal of the claim. In this part of his judgment, Hogan J. stated as follows:-

> *"It is true that the plaintiff does not say that she complained to her father of the abuse during this period. While the litigant's father is in advancing years, the defendant has averred, without contradiction, that his father has told him that he will deny at trial that such a complaint was ever made to him by the plaintiff. While I agree that it might possibly have been preferable if the father had sworn a separate affidavit in this regard, the evidence suggests nonetheless that the father will not accept the plaintiff's version of events.*
>
> *This denial of course is not dispositive of the matter, and naturally, cross examination might demonstrate a completely different picture. Yet the picture which emerges is that the plaintiff's case largely rests on bald assertion. If this action where to proceed to trial, one would be faced with the real possibility that the jury would be forced to choose as between two different narratives, so that the party who came across as more appealing, sympathetic and credible was more likely to be believed. However, a trial of this kind would certainly put "justice to the hazard" (see O'Domnhaill v. Merrick [1984] I.R.151, 158 per Henchy J.), since it puts a premium on a party to give a skilful performance as a witness."*

13. Hogan J. also criticised the lack of detail of the alleged abuse, and commented as follows:-

> *"Yet without such detail the defendant cannot possibly hope to defend the claim beyond denying it. He would be thus deprived of the opportunity of contraverting her testimony by reference to objective facts…."*

14. In conclusion, the learned High Court judge expressed his view that the delay was inherently prejudicial. He referred to, in particular, the fact that two witnesses had died some fourteen months previously.

The delay in this case

15. Undoubtedly, there have been delays in these proceedings since their commencement in 2006. A reasonable degree of efficiency in the prosecution of these proceedings might have resulted in a trial of the action in 2009, or at the latest, 2010. The alleged assaults which are the subject matter of these proceedings were said to have occurred over twenty five years previously. It is long accepted that a plaintiff who has delayed in bringing her action in the first place is obliged to pursue her claim with diligence and reasonable haste thereafter. In *Sheehan v. Almond* [1982] IR 235, Henchy J. stated that:

> *"When … the period of limitations for instituting proceedings has been all but allowed to expire, the plaintiff's solicitor should thereafter be astute to ensure that he is not dilatory in regard to any of the further procedural steps that are necessary to avoid the taint of prejudicial delay."*

16. In *Quinn v. Faulkner* [2011] IEHC 103 (Unreported High Court, 14th March 2011). Hogan J. stated the following:

> "It is incumbent on a plaintiff who has waited towards the end of the limitation period to progress the litigation thereafter with some despatch…the delay in waiting towards the end of the limitation period, while not acting with particular promptness therefore in prosecuting the litigation, is a factor which heavily tells against the plaintiff in the present case, particularly in the absence of an explanation for this delay."

17. In this case therefore, having regard to the very significant delay in the commencement of the proceedings, there is clearly a very definite obligation on the plaintiff to show that following the commencement of the proceedings there has been no undue or unreasonable delay in their prosecution. It is, of course, the case that the onus of proof on an application to dismiss a claim on the grounds of inordinate and inexcusable delay lies on the party who seeks that relief, the defendant in this instance (see Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561).

18. The proceedings in this case were prosecuted without undue delay until 27th March 2007, the date of delivery of the defence. Thereafter, there was some delay. Discovery was furnished by the plaintiff in April 2008 and then nothing occurred for approximately one and a half years, whereupon the plaintiff served a notice of intention to proceed on 2nd October 2009. Some two and a half years later, a second notice of intention to proceed was served on the plaintiff, representing approximately four years since the completion of discovery. Within the two and a half year period between the two notices of intention to proceed no step, such as a motion to dismiss for want of prosecution, was taken by the defendant. Neither did the defendant, during this period, or indeed subsequently, himself serve a notice of trial. Eventually, on 27th April 2012 some six weeks after the second notice of intention to proceed was served, the defendant brought the motion which is the subject matter of this appeal. While it is appropriate and necessary for a court to consider the overall delay in proceedings when dealing with an application to dismiss for want of prosecution, the period of delay which I believe should properly be the focus of a court in its consideration of this application to dismiss for want of prosecution is the period of approximately four years prior to the date of the defendant's application to dismiss for want of prosecution. If the plaintiff had served a notice of trial in late 2008, or early 2009, the defendant would probably have had to face a trial of the action in 2009. It is difficult to envisage a basis upon which an application for a dismiss for want of prosecution would have succeeded at that time.

The plaintiff's reasons for the delay in the prosecution of her case

19. The plaintiff's son, Michael, who is now about twenty years of age, has suffered from a very serious and debilitating medical condition all his life, namely congenital hydrocephalus. He has a vp shunt in situ and has had multiple shunt revisions over the years to deal with shunt blockages and malfunctions. He began to have epileptic seizures in 2005. These very serious medical difficulties became worse in 2008 (a fact noted by the learned High Court judge) because of increasingly frequent epileptic seizures. In October 2011 the plaintiff's son underwent a craniotomy and left occipital lobe resection. Further neurological surgery was required in June 2012. It is quite clear that the plaintiff's son has had very serious medical difficulties over many years and it is perfectly understandable that the plaintiff has devoted a great deal of her time and energy to looking after him. It is also understandable that the extent of care required for her son has very significantly occupied the plaintiff's mind and time to the exclusion of many other activities and interests in her life. The issue for this court is whether the extent of the care of her son required so much of her time and energy over the past few years and was so significant as would justify a delay of approximately four years up to the date of the service of the notice of motion seeking the dismissal of proceedings for want of prosecution, and having due regard to the overall delay in the bringing of these proceedings in the first place.

20. In his judgment, the learned High Court judge, although recognising and acknowledging the extent of the difficulties which face the plaintiff in the care of her son, did not believe that these were sufficient to excuse the delay in the proceedings. He stated (at para 26):

> *"While the plaintiff's complete preoccupation with the plight of her child during this period was completely understandable, she was not objectively entitled to allow the claim just hang over the defendant. Put another way, one cannot make an allegation of this seriousness against another family member for the first time after an interval of twenty four years and then take eight years to prosecute the proceedings".*

21. The reference in this passage to eight years was probably a typographical error, as the period in questions was in fact six years (2006 – 2012). While the learned High Court judge did appear to focus on a four year period (2008 – 2012) as being the primary period of delay, it is apparent that the full period of time which had elapsed between the commencement of the proceedings and the motion to dismiss for want of prosecution, struck him as being unduly lengthy, rather than any shorter or specific period within that six year span.

Appeal

22. As stated at the outset of the judgment the plaintiff's appeal was pursued on the grounds that the delay was excusable and if necessary that the balance of justice required the claim not to be dismissed. The jurisdiction of the Court of Appeal in hearing an appeal such as this has recently been considered in a judgment of the Court, *Collins v. Minister for Justice, Equality and Law Reform and Others* [2015] IECA 27. That considered prior decisions of the Supreme Court indicating that the High Court decision should only be interfered with where an error of principle was disclosed. The conclusion reached was that whilst the Court of Appeal will pay great weight to the views of a trial judge, it retains the jurisdiction of exercising its discretion in a different manner in an appropriate case, untrammelled by any a *priori* rule that would restrict the scope of the appeal to interfere with the decision of the High Court. That is the jurisdiction being exercised on this appeal.

Is the delay excusable

23. In *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, Hamilton C.J. identified a three stage test for the consideration of applications to dismiss for want of prosecution, namely:-

> (i) Whether the delay has been inordinate;
>
> (ii) If so, whether such delay is inexcusable;
>
> (iii) Even if the delay has been inordinate and inexcusable, the court must nonetheless consider the balance of justice.

24. As already indicated, the plaintiff has belatedly accepted that there was inordinate delay in the prosecuting of her proceedings. In my view, the appropriate period of delay that ought to be considered for the purposes of applying the second of the tests in *Primor* is the period of approximately four years between the plaintiff's affidavit of discovery on 10th April 2008 and the filing of the notice of intention to proceed on 6th March 2012, with due regard to the fact that the subject matter of the proceedings concerned events which had taken place twenty five years prior to the commencement of the proceedings in 2006. There was however no significant delay in the prosecution of these proceedings prior to the plaintiff's affidavit of discovery on 10th April 2008, although it is noteworthy that, within a seven month period, the defendant found it necessary to bring two notices of motions to compel the plaintiff to make that discovery. The issue therefore is, was this four year post 2008 delay excusable?

25. I have already referred to the reasons given by the plaintiff to explain and excuse the inordinate delay in the prosecution of these proceedings. The severity of the plaintiff's son's medical condition and its deterioration between the years 2008 and 2012 is dealt with in some detail in the Medical Report of Dr. Susan Keenan dated 12th June 2012, which was exhibited with the plaintiff's affidavit of 28th June 2012. Dr. Keenan's report also makes reference to the impact which the plaintiff's son's severe medical condition has had on her ability, as her son's primary carer, to apply herself to her legal proceedings. Dr. Keenan states:

> *"As was cited in my previous letter, it would have been impossible for Ms. McLoughlin to have pursued any legal case in recent years. Her priority and focussed attention was on her son, Michael, at all times. He, as you can see from above, has suffered from severe medical complications with epileptic seizures and shunt blockages, not to mention the enumerable surgical procedures to unblock his shunt and then most recently his extensive craniotomy and occipital lobe resection".*

26. In her earlier medical report, dated 11th May 2012, Dr. Keenan states the following (in the context of the deterioration of the plaintiff's son's medical condition in the period 2008 – 2012):-

> *"Under absolutely no circumstances could the family, in particular Ms. Antoinette McLoughlin, have committed to anything else other than the immediate care of her family in that time. From a practical time commitment point of view, not to mention the emotional exhaustion, stress and worry, her focus had to be her family's welfare. It is beyond the realm of possibility that she would have been able to partake, either physically or psychologically, in any court proceedings in that time".*

27. Dr. Keenan has expressed very strong views as to the impact of her son's condition on the plaintiff's ability to apply her mind to her legal proceedings during the four year period between 2008 - 2012. It is quite clear that the plaintiff was enormously consumed during this period with the care of her very ill son, and it is understandable that the prosecution of her proceedings against the defendant was of secondary importance to her during this time.

28. I am satisfied that in the particular circumstances which apply to this case, the very serious medical condition of the plaintiff's son, and more particularly the extent to which that medical condition deteriorated in 2008, provides a satisfactory explanation for the four year delay between 2008 and 2012. I accept therefore that this period of delay is excusable. That is not to say that these reasons could reasonably justify prolonged or unlimited delay. There must be a balance between, on the one hand, delay which is permissible and has occurred for good reason, and on the other hand, the effect of that delay on a defendant and his anxiety to bring proceedings against him to a conclusion, especially proceedings in respect of which the subject matter involves allegations of serious sexual misconduct.

29. It is also important to bear in mind that both the Constitution and the European Convention of Human Rights require the expeditious conclusion of legal proceedings. There is a significant public interest in the efficient prosecution of legal proceedings, and the avoidance of undue and excessive delay. Such efficiency is required by Article 34.1 of the Constitution and by Article 6.1 of the Convention of the Protection of Human Rights and Fundamental Freedoms. There is also the guarantee to citizens of the right to protect their good name in Article 40.3.2 of the Constitution. This could be said to be particularly relevant to the position of a defendant who (as in this case), is facing allegations of serious criminal sexual misconduct which, if upheld, would result in grave reputational damage to him. Hogan J. very distinctly referred to these considerations in his judgment when he stated:-

> *"…The duty to ensure the efficient despatch of litigation within a reasonable time forms an important part of the judicial constitutional mandate to administer justice under Article 34.1 of the Constitution… This duty must also be viewed in the context of the State's distinct obligation to safeguard the right to (a person's) good name in Article 40.3.2..*
>
> *These constitutional obligations are further underscored by the State's commitment to the right to a hearing within a reasonable time under Article 6 E.C.H.R. and the incorporation of the E.C.H.R. (admittedly at sub constitutional level) by the European Convention of Human Rights Act, 2003. Moreover, the Supreme Court has made it clear that an earlier culture of tolerance of and indulgence towards otherwise unacceptable delay in the conduct of litigation must come to an end: cf. here the comments of Hardiman J. in Gilroy v. Flynn [2004] I.E.S.C. 98, [2005] 1 I.L.R.M. 290".*

The balance of justice

30. In his judgment, the learned High Court judge, having found that there was both inordinate and inexcusable delay, went on to consider the issue of the balance of justice. He found against the plaintiff in relation to this third test also. To the extent that I have found the delay in this case to be excusable, it is not necessary for me to consider the balance of justice argument. However, as I have formed the view that even if the delay was inexcusable I would have considered that the balance of justice favoured the continuance of the proceedings, I believe it is appropriate to briefly mention my reasons for so stating in the following paragraphs.

31. Of particular importance to any defendant, and very much a concern of the defendant in this case, is the extent to which the delay in the prosecution of these proceedings prejudices him in his ability to defend the proceedings. As is the case with many historical sex abuse claims (both civil and criminal), evidential difficulties often arise because of the long passage of time and the fading of memories, as well as important witnesses dying, or indeed, emigrating or becoming too old to testify. In this case, even if these proceedings had been prosecuted with reasonable haste and efficiency after their commencement in 2006, a period of close to thirty years would have passed since the acts complained of occurred before a trial of the action might reasonably have taken place, and fading memories were always going to be a feature in the case. In his judgment, the learned High Court judge stated:

> *"…Yet the picture which emerges is that the plaintiff's case largely rests on bald assertion. If this action were to proceed to trial, one would be placed with the real possibility that the jury would be forced to choose as between two different narratives, so that the party who came across as more appealing, sympathetic and credible was more likely to*

be believed."

32. However, in this case, the position was always going to be that a jury *"would be forced to choose as between two different narratives"*. This fact did not alter because of any delay on the part of the plaintiff after the commencement of the proceedings. It was also a feature in this case that the evidence of the plaintiff's (and the defendant's) father would be particularly relevant. It is the plaintiff's case that she complained to her father of the abuse in question, while her father will apparently deny this contention. Although it is a fact that, as the learned High Court judge noted in his judgment, the plaintiff's father is in advancing years, it is nevertheless the case that he is still in his seventies and it has not been suggested that he suffers from any particular cognitive difficulty, or that his memory of events has deteriorated in any measurable or accelerated manner in recent years.

33. The learned High Court judge in his judgment also refers to the detail of the events complained of, and the plaintiff's failure to provide *"at least a general account of how and (even if allowing for more latitude in this regard) when these events occurred".* He goes on to observe that *"specifically, one might have expected a suggested explanation as to how these events happened over a long period of time in a suburban dwelling with a large family without the defendant being detected"*. However insofar as these are criticisms of the plaintiff's case, such have not arisen because of any delay in recent years on the part of the plaintiff. They were always relevant to the case, and certainly so since its commencement. Furthermore, the defendant did raise a notice for particulars from the plaintiff, which was replied to, and he could have sought further or better particulars in relation to such matters. .

34. The case was also made by the defendant that he was prejudiced because of the fact that one of his sisters and a cousin who could have given important and relevant evidence in his defence have both died in the period 2011/2012. However it is the case that other family members are available to give evidence.

Conclusion

35. While I entirely agree with the learned trial judge's finding that the delay in the prosecution of these proceedings is inordinate, I have concluded, on the evidence before the High Court and this Court, that such delay was excusable for the reasons stated and hence that the proceedings should be not be dismissed, and I would therefore allow the appeal. I note that a notice of trial was served by the plaintiff nearly three years ago. It is now imperative that the case proceed to a trial without further delay.