Neutral Citation: [2012] IEHC 206

THE HIGH COURT

[2004 No. 6779 P]

YVONNE FLOOD

PLAINTIFF

AND

DUNNES STORES (CORNELSCOURT) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Birmingham delivered the 27th day of April, 2012

1. At issue before the Court are two motions, one brought by the plaintiff for judgment in default of defence dated 18th March 2011, which was returnable for the 11th July 2011, and one brought by the defendant dated the 4th November 2011, returnable for the 16thJanuary 2012. The motion brought by the defendant is something of a hybrid in that it seeks to set-aside an order made by Peart J. *ex parte* on 22nd March 2010, renewing a plenary summons and it also seeks the dismissal of the proceedings by reason of inordinate and inexcusable delay. Ancillary reliefs are also sought. Although the motion brought by the defendant is later in time it is the motion that has been argued because it has the capacity to determine the other motion.

2. By way of background it should be explained that the plaintiff was employed as a restaurant worker at the Timepiece Restaurant in Cornelscourt, Dublin and it is her case that she was involved in an accident at work on 29th/30th May 2001. It appears, on her account, that on that occasion she was unloading a tray of crockery from a dishwasher when she suffered a wrenching type injury giving rise to a back injury.

3. On the 14th February 2002, the plaintiff consulted her solicitor, Mr. Gerard Lambe. On the 21st February 2002, he wrote to the defendant at Cornelscourt Shopping Centre. There followed an exchange of correspondence over the following months which concluded with a letter of the 6th June 2002 from Dunnes Stores' head office at St. Stephen's Street, Dublin which indicated that proceedings could be served on Dunnes Stores at its registered offices and that they would instruct solicitors to enter an appearance.

4. At that stage there was a break in activity and then on the 13th May 2004, a plenary summons was issued. This has been described as a protective writ. It was of course issued shortly before the statutory limitation period would have expired.

5. On the 22nd March 2010, there was an application to Peart J. to renew that summons, an application brought almost six years after the summons had been issued. Peart J. ordered the summons be renewed for six months.

6. In seeking to explain the delay in serving the plenary summons, there has been reference to a difficulty in obtaining a medical report. In that regard the plaintiff was first seen by an orthopaedic surgeon on 23rd May 2002, having been referred to him by her G.P. Prior to that, on the 21st February 2002, the plaintiffs solicitor wrote to the orthopaedic surgeon who was due to see her and requested a medical report. A medical report was ultimately received only in December 2006.

7. The plaintiff had an amount of contact with the orthopaedic surgeon between the 23rd May 2002, when she first saw him and February 2003, when an MRI scan was carried out which showed a small disc protrusion between the fifth lumbar and first sacral vertebrae. In May 2003, the orthopaedic surgeon discussed with the plaintiff the possibility of having an epidural but it appears that she was not called for one. She next saw the surgeon on 18th May, 2006, when, according to the report subsequently obtained, her signs and symptoms were unchanged from the picture seen in 2003.

8. It does not appear that there was any follow-up to the request for her medical report of February, 2002 to which there was no response. The next development on that front was that a letter seeking the report dated the 11th September, 2006, from her solicitor was sent, which he arranged for the plaintiff to hand deliver. Of interest is that the letter includes the following observation:-

> "Further as I did not hear further from my client until recently in the matter, I presumed that she either did not intend to proceed further or in the alternative that her condition was unrelated to the accident of which she complained to me".

9. When a medical report was obtained dated 20th November, 2006, which included an opinion that, given the mode of onset of symptoms, it would appear that the disc prolapse occurred when she was lifting the heavy tray laden with crockery, the plaintiff was already significantly out of time for serving the plenary summons as the time for serving it had expired in May, 2005. In those circumstances one might have expected an immediate application to renew but that did not occur. An affidavit was sworn by the plaintiff on the 22nd May, 2007, in preparation for such an application and, indeed, this affidavit was before the Court when the application was eventually moved on the 22nd March, 2010, but until then no application was moved.

10. The affidavit sworn by the plaintiff on the 22nd May 2007 was furnished to the defendant some days later. Then in December 2007, the plaintiff informed the defendant of an intention to seek the extension of time for service on 21st January, 2008. Dunnes Stores' headquarters raised the point that correspondence was being addressed to the manager of the Cornelscourt store when all such communication relating to personal injury claims should be directed to the registered offices and sought copies of earlier correspondence. A copy of an earlier letter was furnished as requested. A letter from the solicitor for the plaintiff dated 21st January, 2008, concluded "I look forward to hearing further from you herein and in the interim will withhold Application to Court pending same and further notification to you". On 5th February, 2008, the Head oflnsurance for Dunnes Stores in a letter commented that they were taking legal advice in the matter. At this stage there was a further break in activity until 15th February, 2010, when the solicitor for the plaintiff again wrote to the Head of Insurance indicating that if liability was in dispute that he would proceed with an application to extend the time for service. The application to extend time was, as we have seen, made on 22nd March, 2010.

11. Thereafter the plaintiff sought a defence and when this was not forthcoming, following a number of requests, brought the motion returnable for the 11th July 2011. On that day counsel for the defendant appeared in Court and sought to defer the motion as it was intended to bring an application to set-aside the extension of time that the plaintiff had obtained. That this might be how the defendant would respond if an extension of time was obtained on an *ex parte* basis had been flagged in earlier correspondence.

12. I have indicated that there are two legs to the motion brought by the defendant. I propose to deal first with the question of the

renewal of the plenary summons. The approach that a court should take to this issue has been concisely stated by Finlay Geoghehan J. in *Chambers v. Kenefick* [2007] 3 I.R. 526. At para. 8 of her judgment she commented:-

> "Firstly, the court should consider is there a good reason to renew the summons. That good reason need not be referable to the service of the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."

13. There are therefore three elements to the task in hand:

> (1) Identifying whether there is good reason to renew the summons;
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> (2) Considering whether the interests of justice are served by providing for renewal of the summons and;
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> (3) Considering whether it is appropriate to renew the summons having regard to a determination of where the balance of hardship applies for both sides, if the order for renewal is or is not made. This is really a sub-issue of issue two.

Dealing with the question of whether there is good reason to renew the summons, the first matter that strikes one is that it is sought to renew the summons almost six years after it was issued and almost five years after the period for service had expired. I find the explanation offered, that there was difficulty in obtaining a medical report to link the plaintiff's symptoms with the incident, less than convincing. The correspondence in 2002, makes clear that the plaintiff was unequivocally linking the immediate onset of symptoms with an incident at work. That might have been regarded as sufficient to serve the summons which had been issued just before the statutory period expired. If a medical report was required one might have been obtained from her general practitioner or, if it was felt necessary to have an opinion from a surgeon a reminder could have been sent, following up on the letter of February, 2002. I am not convinced that there was any good reason why the summons could not have been served before it expired. In addition, I do not believe that the time lapse between the 20th November, 2006, the date of the medical report, and the application to the High Court on 22nd March, 2010, can be justified. I accept that there was an amount of contact with the defendant between May 2007, and February 2008, but I cannot see this really provides any explanation for the extent of the delay. In the circumstances I am driven to the conclusion that there is no good reason for extending the time for service of the summons and for renewing the summons.

14. Lest I be wrong, I propose to address the question of where the interests of justice lie. However, before doing so, I want to turn to the aspect of the application that seeks to dismiss or strike out the proceedings by reason of inexcusable and inordinate delay. The test to be applied on an application to strike out is well established. In *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, Finlay P., as he then was, held that it should be determined first whether there has been an inordinate and inexcusable delay on the part of the plaintiff. Where such a delay has been established the court must then go on to consider how to exercise its discretion as to whether to dismiss or not. In this regard, the court should have regard to whether the balance of justice favours allowing the action to proceed or the dismissal of the action. In the case of *O'Domhnaill v. Merrick* [1984] 1 I.R. 151, the Supreme Court clarified that where there has been inordinate and inexcusable delay the plaintiff is required to identify countervailing circumstances if the case is not to be dismissed. The matter was put in the following way:-

> "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."

15. How the court will set about its task was addressed by the Supreme Court in the case of *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, where Hamilton C.J. referred to the factors that will be taken into account in determining where lies the balance of justice in the following terms:-

> "In considering this latter obligation the court is entitled to take into consideration and have regard to
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> (i) the implied constitutional principles of basic fairness of procedures,
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> (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 plaintiffs 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 plaintiffs delay,
>
> (v) the fact the 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 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."

In this case I am in no doubt but that there has been delay that is inordinate. That the case is only at statement of claim/motion for judgment in default of defence stage, almost eleven years after the occurrence of the alleged incident is, by any standards, inordinate. As to whether the delay is also inexcusable, I take the view that the delay has not been excused by reason of the delay in obtaining a medical report or by reason of the contact that the plaintiffs solicitor was having with the defendant in 2007.

16. However, it remains necessary to consider where the balance of justice lies. As I have pointed out, that is relevant to both legs of the application brought by the defendant.

17. At the outset I should say that I do not believe that any countervailing circumstances as contemplated by cases such as *O'Domhnaill v. Merrick* have been identified. I do not believe there is any basis for suggesting that the defendant has acquiesced in the delay. Such delay as has occurred is not attributable to the acts or omissions of the defendant but to the plaintiffs conduct of

the litigation. I would add just one qualification, I do not believe that the defendant was justified in failing to respond to correspondence seeking delivery of a defence, and the failure to deal with this correspondence contributed to a situation where a motion for judgment issued which involves some element of costs. However, I do not see this as a matter that disentitles the plaintiff to relief, though it is an issue that might be considered in the context of an application for costs.

18. The affidavit as sworn by the solicitor for the defendant has raised the question of prejudice. However, at least one staff member who may be a possible witness is still employed by the defendant and no specific witness has been positively established to be unavailable. On the other hand, how sharp or reliable memories will be at this stage must be open to serious question. In that regard, it is of significance that we are not dealing with a dramatic and traumatic incident which might be expected to be seared on the memory of all who witnessed it. So far as the medical aspect of the case is concerned, the defendant must be disadvantaged in seeking to explore whether the link between the incident and ongoing symptoms of the plaintiff is established. It is true that the defendant might have chosen to have the plaintiff medically examined when proceedings were first intimated by the plaintiff's solicitor but it is not surprising, and indeed I would have thought that it accorded with normal practice, that this did not take place until proceedings were served. Overall the plaintiffs delay makes it considerably more difficult for the defendant to engage in any meaningful way with the case that it faces. This may not be a case where the evocative language of some of the older cases about "justice being put to the hazard" is appropriate, but the defendant's capacity to defend has been affected; it is a case of justice being impaired and diminished.

19. On the other side of the equation, the plaintiff on the evidence to date has had a difficult time, and her symptoms have persisted for a significant period. The findings of two MRI scans suggest a relatively significant injury. In these circumstances it would clearly be preferable if she could litigate her complaints to a conclusion. However, the fact that has not happened is not the fault of the defendant. It is the case that if the plaintiff now seeks to serve fresh proceedings, it is likely she will be met with a plea that the case is statute barred. However, since *Roche v. Clayton* [1998] 1 I.R. 596, it is clear that it is not a good reason to renew a summons simply to prevent the defendant availing of the statute of limitations for, as the Supreme Court pointed out, the statute of limitations must be available on a reciprocal basis to both sides in any litigation. Such a situation in my view could not be consistent with the interests of justice. In these circumstances I propose to set aside the order that was made *ex parte* and decline to renew the summons. In these circumstances, it is strictly speaking not necessary to decide the question of whether the proceedings ought to be dismissed by reason of delay, however, it will be apparent from what I have stated that I would be minded to dismiss the proceedings if that situation was reached.