Neutral Citation Number: [2009] IEHC 505

THE HIGH COURT

1997 196 COS

IN THE MATTER OF WALSH WESTERN COMPUTER SERVICES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963-1990

AND

IN THE MATTER OF THE PETITION OF DENIS MEEHAN

BETWEEN

DENIS MEEHAN

PETITIONER

AND

WALSH WESTERN HOLDINGS LIMITED

AND MICHAEL ENRIGHT

RESPONDENTS

JUDGMENT of Mr. Justice John Hedigan delivered on the 19th day of November 2009

1. The petitioner herein issued proceedings against the respondents pursuant to s.205 of the Companies Acts 1963 to 1990, on 2nd October, 2007.

2. The first named respondent is a limited company, of which the second named respondent is a company director.

3. The respondents, by notice of motion dated 26th February, 2009, have sought an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts, and/or the inherent jurisdiction of the court dismissing, and/or staying the petitioner's claim for want of prosecution, and/or for inordinate and inexcusable delay.

Background

4. The proceedings were issued on 2nd October 1997. The petitioner made allegations of oppression and sought various remedies pursuant to s. 205 of the Companies Acts, relying on allegations of events taking place, at the latest, in September 1995, and in respect of events dating back to 1988.

5. An order for directions was made by Kelly J. on 30th March, 1998, directing the parties to exchange pleadings, including the points of claim, defence and reply thereto. The points of claim were directed to be delivered within three weeks of 30th March, 1998, the defence three weeks thereafter, and the reply a further three weeks thereafter.

6. The points of claim were delivered by the petitioner on 18th November, 1998. Particulars arising out of those points of claim were sought and the points of defence were delivered on 25th April, 2001. No reply was (or has) been delivered by the petitioner.

7. In April 2008, some seven years later, the petitioner delivered a notice of intention to proceed. No explanation was given for the seven-year delay, nor was there any indication of the next steps which the petitioner proposed to take in the litigation. Eight months later, a request of voluntary discovery was delivered on 23rd December, 2008, seeking twenty-eight categories of documentation covering periods from 1987 to 1996.

Submissions of the respondents

8. Mr. Ian Finlay S.C. appeared on behalf of the respondents (the moving parties in this motion), and Mr. Klaus Reichert B.L. made submissions in reply. Mr. Finlay submitted that the petitioner's claim should be struck out for inordinate and inexcusable delay. The proceedings had been issued by the petitioner on 2nd October, 1997, more than two years after the alleged events occurred in September 1995. It was now more than fourteen years since the alleged events had occurred.

9. Mr. Finlay submitted that the respondents were facing a trial in relation to the affairs of a company more than fifteen years after they occurred. The delays in the case were almost wholly due to the failure of the petitioner to take the appropriate initiatives with regard to commencing and pursuing his claim. He had failed to comply with Kelly J.'s order for directions.

10. The petitioner invoked settlement discussions and alleged impecuniousness as an excuse for not pursuing the litigation. It was submitted that these were not sufficient reasons to refuse the respondents the relief sought. The delay of seven years by the petitioner was both inordinate and inexcusable.

11. Mr. Finlay submitted that the delay in this matter would cause significant prejudice to the respondents. The solicitor for the respondents had reviewed the pleadings and affidavits exchanged more than ten years ago, and it appeared that

upwards of fifteen witnesses of fact would be required if a trial were to proceed. The second named respondent had had little or no contact with these potential witnesses for many years and did not know if they were still available to give evidence. The precise recollection of witnesses could not possibly have the same ease and perfection as might have been the case if the petitioner had moved on with his case as directed by Kelly J. in 1998.

12. Moreover, the petitioner's request for voluntary discovery sought twenty-eight categories of documentation covering periods from 1987 to 1996. This would involve an extensive trawl of documentation and many of the documents may no longer be retained. The respondents also alleged prejudice arising from the fact that the petitioner's claim made allegations concerning source codes and software programmes. It was not unreasonable to expect that both parties would be required to engage in technical examinations of such computer programmes and source codes at enormous cost and difficulty, having regard to the evolution of computers and software since the early to mid 1990s.

13. Mr. Finlay further submitted that the company at the heart of the petitioner's s. 205 petition, Walsh Western Computer Services Ltd., had been dissolved by the Companies Registration Office on 23rd May, 2008. The usual remedy in a s. 205 petition is an order for the purchase of the minority shareholder's shares in the company. This relief would now be impossible, even if the petitioner were to succeed in his claim.

14. In the course of his submissions, Mr. Finlay relied on the following authorities: *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459; *Kelly v. O'Leary* [2001] 2 I.R. 526; *Byrne v. Minister for Defence* [2005] 1 I.R. 577; *Mannion v. Bergin and O'Connor* (Unreported, High Court, 13th March, 2009); and *Draper v. Ferrymasters* (Court of Appeal, 10th February, 1993, Times Law Reports).

Submissions of the petitioner

15. Mr. Ronan Murphy S.C. appeared on behalf of the petitioner. Mr. Murphy submitted that the delay by the petitioner in bringing on the proceedings arose from his impecuniousness and as a result of without prejudice negotiations which he had entered into with the respondents. The petitioner had been excluded by the respondents from involvement in the company he worked for in September 1995. Thereafter, he struggled financially as a married man with four children in fulltime education. While he secured contract work in 1998, his financial position was precarious. In 2001, the petitioner was advised that the next stage in the proceedings would require significant input from his legal advisers and experts in Information Technology (having regard to the nature of the proceedings). It was submitted that the plaintiff was unable to proceed on this basi, having lost his job as a direct result of the actions of the respondents.

16. It was further submitted that the respondents had approached the petitioner with respect to settlement discussions in June 2005. Discussions continued, and the petitioner was requested in February 2006, to exclude his legal advisers from the efforts to reach an amicable resolution of the dispute. The petitioner had the clear impression that discussions would come to an end if he involved his legal advisers. These without prejudice negotiations continued until March 2007. The petitioner then consulted with his solicitor in April/May 2007. It was then necessary to furnish updated instructions and arrange meetings with counsel and solicitor to decide how best to proceed. During the remainder of 2007 and in the early part of 2008, the petitioner was engaged in meetings with counsel and his solicitor and was taking steps to arrange finance, thereby enabling notice of intention to proceed to be served.

17. Mr. Murphy submitted that the petitioner's financial difficulties were caused by the respondents. As a result, the petitioner had lost a major asset and a vital source of income, the effect of which was direct and immediate rendering it difficult to process High Court litigation.

18. It was submitted that the engagement of the petitioner in settlement negotiations amounted to conduct akin to acquiescence on the part of the respondents. Accordingly, the respondents were not now entitled to avail of that intervening period as suggestive of delay on the petitioner's part. It was further submitted that the respondents themselves had done nothing for upwards of the past eight years to advance the proceedings, and that this should be borne in mind in assessing where the balance of justice lay. The respondents had engaged the petitioner directly in negotiations and had lulled the petitioner into what now transpires to have been a false sense of security that the proceedings could be amicably resolved. It was submitted that the respondents were now estopped from invoking the inherent jurisdiction of the court to dismiss the proceedings.

19. It was also submitted that the s. 205 petition procedure had evolved and that a petitioner was not barred from obtaining remedies other than an order for the purchase of shares on foot of a s.205 petition. In his proceedings herein, the petitioner has also claimed damages.

20. In the course of his submissions, Mr. Murphy relied on the following authorities: *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459; *Hogan v. Jones* [1994] 1 ILRM 512; *O'Domhnaill v. Merrick* [1984] I.R. 151; *Doran v. Thompson* [1978] I.R. 223; and *O'Reilly v. Granville* [1971] I.R. 90.

The relevant law

21. The principles which apply to the court's assessment of delay by a plaintiff in advancing proceedings are well established in this jurisdiction and were not in contention between the parties herein. These principles were recently set out by this court in *Mannion v. Bergin and Others* [2009] IEHC 165, as follows:-

> "The test to be applied is the *Primor* test which was affirmed in the Supreme Court in *Desmond v. M.G.N. Limited* [2008] I.E.S.C. 56, (15th October, 2008). This test is as follows:-
>
> "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 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 pursing 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 of the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business".

The first half of this test deals with the determination of inordinate and inexcusable delay. The second deals with the determination of whether the balance of justice requires the dismissal or continuance of the action. In my view, to the factors set out for determining where the balance of justice lies must be added the requirement that the courts secure to the party claiming delay his right provided for in Article 6 of the European Convention on Human Rights to a trial within a reasonable time. It provides as follows:-

"In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

As has been noted by the European Court of Human Rights, this duty applies in legal systems where the procedural initiative lies with the parties. In such systems, of which the Irish legal system is one, the courts must maintain a supervisory jurisdiction to ensure that justice is done as expeditiously as possible. In *Price v. United Kingdom and Lowe v. United Kingdom* (Case Number 43186/98, 29th July, 2003), the Court stated as follows: -

"23. The Court has held on a number of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the State from complying with the requirement to deal with cases in a reasonable time (see *Buchholz v. Germany*, judgment of 6th May, 1981, Series No. 42, page 16, para. 50; *Guincho v. Portugal*, judgment of 10th July, 1984, Series A, No. 81, page 14, para. 32; *Capuano v. Italy*, judgment of 25th June, 1987, Series A, No. 119, page 11, para. 25; *Mitchell and Holloway v. The United Kingdom*, No. 44808/98, judgment of 17th December, 2002). The manner in which a state provides for mechanisms to comply with this requirement – whether by way of increasing the number of judges, or by automatic time limits and directions, or by some other method – is for the state to decide. If a state lets the proceedings continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay."

This obligation must be borne in mind by the Courts when considering as in this case where the balance of justice lies as to whether to dismiss for want of prosecution. The obligation is not merely to advance a case where necessary but may also be to prevent its continuance where, as here, it has lain dormant for a substantial period of time."

22. The decision to dismiss proceedings on grounds of delay will not be taken lightly. The court is required to balance the right of the plaintiff to have his claim heard and vindicated with the defendant's right to a fair trial. As this court stated in *D. and Others v. O'K and the Brothers of Charity* [2009] IEHC 422:-

"No court wishes to strike out proceedings of any kind without good cause, much less proceedings where such cruel and egregious breach of trust is alleged as herein. Nevertheless, as the cases cited above show clearly, the courts have an obligation under both national and international law to ensure that parties who are sued have a trial of the issue within a reasonable time. Any trial that would now take place in this matter could not be said to have been within a reasonable time. Moreover, a trial conducted at such a distance in time from the events alleged could not in my view amount to a fair trial in the circumstances that I have found to prevail herein."

The court's assessment

23. The delay complained of in the within proceedings is lengthy. Proceedings were issued on 2nd October, 1997, in respect of events dating back to 1988. The proceedings came to a standstill after the petitioner's failure to deliver a reply to defence, in accordance with the directions of Kelly J., in 2001. Thereafter, no steps were taken in the litigation until the petitioner issued a notice of intention to proceed in April 2008. The petitioner's involvement in without prejudice negotiations, even giving him the benefit of the doubt in this regard, only explains a limited period of the delay. I have no difficulty in finding that the delay complained of, without more, amounts to inordinate delay. The pre-commencement delay, while not inordinate, placed an onus on the petitioner to act with due expedition, where the events giving rise to the proceedings occurred at their latest in September 1995, and involve facts and events going back to 1988. The inordinate nature of the delay was in fact conceded by counsel for the petitioner.

24. Two excuses were advanced by the petitioner for this delay. The first related to his impecuniousness, which he alleged arose as a direct result of the respondents' actions. The petitioner's lack of funds is, of course, regrettable. However, proceedings had been issued in 1997, and progress had been made until 2001. Thereafter, the proceedings were stalled. It was argued by counsel for the petitioner that the advancement of the proceedings would have involved considerable expense due to their complexity and the involvement of lawyers and technical experts. However, the lack of funds on the petitioner's part is not a sufficient excuse for taking no steps in the proceedings at all from 2001 to 2008. It appears to me that there would have been little expense involved in making a request for discovery in 2001, or thereafter. However, no such step was taken, though there was ample time to do so before the commencement of settlement negotiations in 2005. Again, the failure to take such a step must be seen in light of the fact that the petition was brought in 1997, and related to events going as far back as 1988.

25. The petitioner further argues that the delay is explained and justified by the fact of without prejudice negotiations, without the involvement of lawyers, from June 2005 to March 2007. It is the case that such without prejudice negotiations may "stop the clock" in terms of the delay of which a respondent can complain in a motion of this kind. However, it does not remove the significance of lengthy delay and its implications for the due administration of justice. It must be borne in mind that, pursuant to the State's obligations under Article 6 of the European Convention on Human Rights, there is an overall public interest in the conclusion of litigation within a reasonable time. In the present proceedings, it is, of course, the case that settlement negotiations only provide an explanation in respect of a limited period of the delay. A lengthy four-year period (2001-2005) remains for which insufficient excuse has been put forward by the petitioner. I therefore find that the delay in this case was inexcusable.

26. I must now determine whether, in the court's discretion, on the facts, the balance of justice is in favour of or against the continuance of the proceedings. Specific prejudice caused to the respondents by the petitioner's delay has been pleaded. It is evident from the petitioner's own request for voluntary discovery that a large volume of documentation of some antiquity is sought in respect of the proceedings. This documentation will have to be proved and oral evidence will be required. It is, of course, the case that the recollection of witnesses, in respect of events from which they are now considerably removed, will have diminished considerably with the passage of time. Some of these witnesses may no longer be in a position to give evidence. As I have stated above, the petitioner could have advanced the proceedings by seeking discovery at a much earlier stage, thereby avoiding some of the difficulties which now arise. In the circumstances, it is clear that the inordinate and inexcusable delay in bringing on the proceedings would cause significant prejudice to the respondents if the case were now to proceed.

27. A further factor influencing the court's discretion is that the company in respect of which the s. 205 petition was brought has now been dissolved. That renders the usual remedy under s. 205 of an order for the purchase of shares in the company inoperable. While the petitioner has sought damages in his claim, an action for damages is improbable in the context of s. 205 proceedings. I am also guided by the State's obligations under Article 6 of the European Convention on Human Rights to ensure that justice is done as expeditiously as possible. This legal duty is, of course, a facet of the public interest in the due administration of justice, which demands that litigation be concluded in a reasonable time. Having regard to the circumstances of the present case, I am satisfied that the petitioner failed to act with due expedition and that there would be a real risk of an unfair trial if the case was allowed to proceed. The balance of justice demands that it be dismissed on grounds of inordinate and inexcusable delay, though it is with due reluctance and consideration that the court does so.

28. For these reasons, I must grant the relief sought in this motion and dismiss the proceedings herein on the basis of inordinate and inexcusable delay, pursuant to the inherent jurisdiction of the court to control its own procedure.