[2019] IEHC 586

THE HIGH COURT

2015 No. 7052 P

BETWEEN:

PATRICK CARPENTER

PLAINTIFF

– AND –

THE GOVERNOR OF MOUNTJOY PRISON, THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE & EQUALITY, IRELAND

AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2019.

1. These proceedings are one of a number (it seems in the region of a thousand) cases brought by onetime prisoners against the State in relation to alleged breaches of constitutional and European Convention rights. The essence of the claims is that imprisonment in circumstances in which prisoners were held in cells without in-cell sanitation constituted inhuman and degrading treatment and/or breach of the right to dignity and/or breach of the right to privacy. The proceedings also concern whether the practice of 'slopping out' (the revolting process of chamber pots being emptied in communal facilities) is a breach of the aforementioned rights. It is a feature of many of the cases that plaintiffs claim to have suffered physical and/or psychological injuries as a result of their imprisonment in such circumstances.

2. In a previous case (*Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269) a failed claim in relation to in-cell sanitation was brought in respect of Mr Mulligan's detention in single-cell accommodation. By contrast, in *Simpson v. Governor of Mountjoy Prison* [2017] IEHC 561, a partly successful claim was brought by Mr Simpson in respect of in-cell sanitation in the context of shared cell occupancy. The decision in *Simpson* has been appealed to the Supreme Court, the appeal has been heard and, at the time of writing, judgment is awaited. Each *Simpson*-like case will have to be litigated individually and determined on its own merits; however, the court understands that, pending the issuance by the Supreme Court of its decision in *Simpson*, few steps have been taken in the various other *Simpson*-like cases that have been commenced.

3. The plenary summons in the within proceedings issued on 31.05.2015 and was not served before its expiry, 12 months later. *Ex parte* application was made on 22.05.2017 for renewal of the summons pursuant to O.8, r.1, RSC. That renewal was granted for a further 6 months. The defendants have now brought the within application, pursuant to O.8, r.2, RSC seeking to set aside the renewal order of 22.05.2017. An O.8, r.2 application falls in effect to be treated as a *de novo* hearing of an O.8, r.1 application (*Moynihan v. Dairygold Co-Operative Society Ltd* [2006] IEHC 318). In passing, the court notes that this particular application falls to be adjudicated upon by reference to the text of O.8 RSC as it stood before the changes effected thereto by the Rules of the Superior Courts (Renewal of Summons) 2018 (SI 482 of 2018), which text empowers the court, *inter alia*, to order renewal "*if satisfied that reasonable efforts have been made to serve* [the]…*defendant or for other good reason*".

4. Mr Carpenter's solicitor avers, *inter alia*, as follows, in an affidavit sworn for the *ex parte* application, which affidavit, disappointingly, was only belatedly supplied to the defendants following multiple requests:

> *"…3 The Plaintiff's claim is for declarations and damages for breach of his constitutional rights to dignity, privacy and to protection from inhuman and degrading treatment while detained in the custody of the defendants, their servants or agents.*
>
> *4. I say that a Plenary Summons in the within proceedings was issued on 31 July 2015 and expired on 31 July 2016 without being served, owing to an administrative error. I say that a statement of claim had been drafted by Counsel, for service along with the plenary summons.*
>
> *5. I say that the Plaintiff's claim relates to a period of detention in 2009 and 2010. I say that having regard to the 6 year limitation period for breach of constitutional rights, the Plaintiff's claim will be statute-barred if the herein summons is not renewed.*
>
> *6. I say that I erroneously believed that the herein summons had been served. The error was not noticed by me until recently.* [The affidavit was sworn on 22 May 2017].
>
> *7. I say and believe that there are a very large number of similar claims….*
>
> *8. I say and believe that in the vast majority of cases, a plenary summons has merely been filed or else filed and served, but no further step taken by either side thereafter. This goes some way to explaining why the failure to serve the said summons was not noticed sooner by your Deponent. I say that the Defendants could not realistically suggest that there is any prejudice by reason of the delay, since none of these cases have progressed."*

5. The defendants claim that they have suffered prejudice, *e.g.*, in being asked to defend a claim of some antiquity and also in terms of raising the Statute of Limitations if the summons is renewed.

6. A few points might usefully be made:

> (a) default on the part of one's solicitor resulting in a failure to serve a summons does not constitute a satisfactory explanation for delay (*Allergan Pharmaceuticals (Ireland) Ltd v. Noel Deane Roofing* [2006] IEHC 215).
>
> (b) a plaintiff is vicariously responsible for the action/inaction of his solicitor (*O'Keeffe v. G&T Crampton Ltd* [2009] IEHC 366).
>
> (c) a striking delay has arisen here in terms of service.

(d) the court accepts the contention of counsel for Mr Carpenter that people are prone to human error and that some toleration of error is necessary in a human system of justice; however, once such error occurs the court cannot, in an application brought under O.8, r.2 RSC, simply absolve such error (much though it may understand it); rather it must undertake the type of analysis contemplated by O.8 RSC and the case-law relating thereto.

(e) the court is mindful that the clear objective of the Statute of Limitations in terms of setting a statutory time limit beyond which a party subject to that time-limit cannot lightly be allowed to tread, though it is mindful too that the potential for renewal of a summons exists at law.

(f) the court notes that Mr Carpenter may have a legitimate complaint against his solicitor for what has occurred, a factor of relevance to its considerations (*Moloney v. Lacey Building & Civil Engineering Ltd* [2010] IEHC 8).

7. Notwithstanding the various points referred to in the previous paragraph, the court considers that this is a case in which "*other good reason*" does present in the form of the following four factors:

(i) there is recent precedent (in the form of the decision of the High Court in *Simpson*) which suggests that there may be real substance to Mr Carpenter's claim, though that is not to say that his claim will ultimately be successful. (The court understands from the affidavit evidence of Mr Carpenter's solicitor, paras.7-8, that this claim, the claim in *Simpson* and the thousand or so claims stacked up behind it are "*similar claims*").

(ii) Mr Carpenter is alleging breaches of constitutional and ECHR rights, a serious allegation to make and clearly most serious if true. Of course, it is easy to allege something, and the court does not mean to suggest that the seriousness of an alleged wrong will necessarily yield a renewal order under O.8 RSC. Here, however, there is precedent, in the form of the recent High Court decision in *Simpson* which suggests that there may be real substance to Mr Carpenter's claims of constitutional and human rights breaches. While that does not mean that Mr Carpenter's claim will ultimately be successful, the court is hesitant to exclude such serious allegations from being heard and adjudicated upon in all the particular circumstances presenting. An alternative claim against Mr Carpenter's solicitor, were it to be brought and even perhaps were it to be successful, does not seem to the court to offer a meaningful alternative, given the profound seriousness of the claim that Mr Carpenter seeks to bring and for which there is recent precedent to suggest that it may be a claim possessed of substance (though again that is not to say that Mr Carpenter is sure to succeed in the within proceedings). In passing, the court does not read *Moloney* to suggest that the possibility of such alternative application will in every case be a complete answer to an application for renewal, rather that such possibility is a factor to be considered (and here it has been considered).

(iii) the thousand or so cases that are presently queued up awaiting a decision from the Supreme Court in *Simpson* have not proceeded in any meaningful way. So in a sense this is adding but a '1,001st' case that likewise has not proceeded, but adding it in the very particular circumstances identified at (i) and (ii).

(iv) there is no evidence before the court which indicates that there are other applications in addition to those of Mr Carpenter that are 'out there' waiting to be brought; however, each case falls to be judged on its own facts and here the factors identified at (i)-(iii) present and to the court's mind comprise "*other good reason*" for renewal.

8. For the reasons aforesaid, the court declines to grant the set-aside order sought by the defendants.