[2018] IEHC 636

THE HIGH COURT

[2006 No. 4301 P]

BETWEEN

DERMOT CARTER

PLAINTIFF

AND

THE GOVERNOR OF CORK PRISON, THE GOVERNOR OF MOUNTJOY PRISON, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 7th day of November , 2018

1. This is an application on behalf of the defendants, by notice of motion issued on 21st October, 2015 for:

> 1. An order, pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court, dismissing the plaintiff's claim against the defendants on the grounds that it is statute barred.
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> 2. An order pursuant to O. 122, r. 11 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court dismissing the plaintiff's claim against the defendants for want of prosecution on the grounds of inordinate and inexcusable delay on the part of the plaintiff in the commencement and prosecution of the proceedings, which delay has prejudiced the defendants such that the balance of justice requires that the claim be dismissed.
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> 3. Further and alternatively (but strictly without prejudice to the foregoing) an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim against the defendants on the basis that the maintenance of the claim is contrary to the interests of justice and infringes the rights of the defendants under the Constitution and, in particular, their right to a fair and expeditious trial.
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> 4. Alternatively, and without prejudice to the foregoing, an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim against the defendants on the grounds that it would be contrary to the defendants' right to a trial within a reasonable time under Article 6 of the European Convention for the Protection of Fundamental Freedoms and Human Rights.

2. There is a claim in the further alternative for an order pursuant to the inherent jurisdiction of the court and/or O. 26, r. 1 and/or O. 36, r. 7 directing the trial as preliminary issues of the issues as to whether the action is statute barred; whether the plaintiff is entitled to rely on the European Convention on Human Rights Act, 2003, the enactment of which post-dated the alleged events the subject of the claims; and whether, in view of the inordinate and inexcusable delay in bringing the proceedings it would breach the defendants' constitutional rights for the court to entertain them.

3. The court is not asked to consider these further issues, in particular the issue as to whether the action is statute barred, on this application but rather to decide first whether by reason of the delay in the commencement and prosecution, it ought to be dismissed.

4. It was conceded by counsel for the plaintiff (and in light of the chronology, to which I shall come, it was no great concession) that there has been inordinate delay but it is contended that the delay was not inexcusable and, if it was, that on the balance of justice the case ought not to be dismissed.

5. By this action the plaintiff claims damages and declarations arising out of the conditions in which he was allegedly imprisoned in Mountjoy Prison and Cork Prison in 1993, 1994 and 1995. The plaintiff claims to have been kept in a single cell in Mountjoy with a single bed, a locker, and a pot, and to have been kept in Cork Prison, in a cell measuring approximately nine feet by nine feet, with five other inmates, three sets of double bunks, no lockers, and between six and eight pots. The plaintiff's case is that his detention in these conditions violated his human and constitutional rights and he claims damages for the alleged negligence, breach duty, breach of statutory duty, and breach of duty of care of the defendants and for the defendants' alleged failure to vindicate his personal rights.

6. The Plaintiff claims to have been detained in Mountjoy Prison between 9th December, 1993 and about August 1994 and in Cork Prison between then and about May 1995. This is contested. The defence pleads that the dates of the plaintiff's imprisonment are incorrect and are not admitted. The defence pleads that the plaintiff was in Mountjoy Prison on remand overnight on 2nd December, 1993; brought back to Mountjoy on 9th December, 1993; transferred to Shelton Abbey on 26th January, 1994; transferred back to Mountjoy on 28th January, 1994; and released on temporary release on 21st March,1994. The defence pleads that the plaintiff was imprisoned in Mountjoy on various dates in 1997; in Cloverhill Prison in 2001; and in Mountjoy, Cork and Midlands Prisons in 2002.

7. The affidavit of Ms. Maria Connolly, Assistant Governor of Mountjoy Prison, on which this application is grounded, sets out a chronology of proceedings and correspondence. This is accepted by counsel for the plaintiff as correct, with the caveat that the court should also take account of some correspondence between the plaintiff's solicitors and the prison governors directly.

8. The defendants' chronology is:

> 1. The plaintiff complains about prison conditions and in particular slopping out in respect of events between 1993 and 1994.
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> 2. The proceedings were commenced by plenary summons dated 15th September, 2006.
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> 3. An appearance was entered on behalf of the defendants on 17th October, 2006.
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> 4. By order made on 25th June, 2007 the plaintiff was given liberty to amend the name of the first two defendants.
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> 5. A statement of claim was delivered on 21st May, 2009.

6. A full defence was delivered on 29th July, 2010, pleading the Statute of Limitations and delay as preliminary objections.

7. Following delivery of the defence, nothing was heard from the plaintiff for almost four years until a letter seeking voluntary discovery was sent on 7th April, 2014. By letter of 15th April, 2014 the defendants' solicitor noted that nothing had been heard for four years and queried whether the plaintiff intended to give notice of intention to proceed.

8. In a letter of 9th May, 2014 the plaintiff's solicitors took the positon that notice of intention to proceed was not necessary before a discovery request but said that they would give such notice.

9. A notice of intention to proceed dated 10th July, 2014 was served under cover of a letter of 21st July, 2014.

10. On 30th July, 2014 the defendants' solicitor suggested that the discovery request was too wide, but said that they would try to facilitate it and asked for time due to the vacation. That letter was written expressly without prejudice to any issues that might arise by reason of the four year delay between delivery of the defence and the notice of intention to proceed.

9. The additional correspondence which counsel for the plaintiff asks the court to take into account consists of letters dated 3rd February, 2010 to the Governors of each of Mountjoy Prison and Cork Prison asking for copies of the plaintiff's prison and medical records and the prompt reply on 5th February, 2010 of the Governor of Cork Prison that he had no record of the plaintiff being in Cork Prison in 1994. The Governor of Cork Prison indicated that he had a record of the plaintiff being in Cork Prison between 7th July, 2002 and 13th August, 2002 but no medical records. By letter dated 16th February, 2010 the plaintiff's solicitors noted that the Governor of Cork Prison had no medical records but suggested that it might be of assistance if he would send them a copy of all records other than medical records. Again the Governor of Cork Prison promptly replied on 23rd February, 2010 to confirm that following a further check there was no record of the plaintiff having been in Cork Prison in 1994.

10. I do not understand counsel for the defendants to contest that the plaintiff's solicitor's efforts to obtain records directly from the prison governors is something that ought to be taken into account and I do so. This effort by the plaintiff's solicitors to advance the case is to some extent material but this effort was made in the fourteen-month period between delivery of the statement of claim and delivery of the defence, for which the plaintiff is not responsible. I will return to the materiality of this correspondence.

11. The case made on behalf of the defendants is that the plaintiff has been guilty of inordinate and inexcusable delay in the commencement and prosecution of the action; that the defendants have been gravely prejudiced; and that there cannot be a fair trial. It is said that there is no meaningful way in which the defendants can be expected to defend a claim of this antiquity. It is said that the trial would require the evidence of a large number of witnesses, some of whom may have died and others of whom may have an incomplete or fading recollection. It is suggested that the plaintiff's discovery request calls for a huge volume of material, much of which has nothing to do with the case. The discovery request is said to illustrate the unfocused nature of the claim.

12. The affidavit grounding this application was sworn on 12th October, 2015. On 9th December, 2015 (which was within a reasonable time) the plaintiff swore a replying affidavit.

13. In his affidavit the plaintiff did not engage with the issue of the dates and places in which he was imprisoned but repeated that his claim arises out of the conditions of his imprisonment in Mountjoy and Cork Prisons between about December, 1993 and August, 1994 *(sic.).*

14. In his replying affidavit the plaintiff avers that the sanitation regime in Mountjoy and Cork prisons caused him long term psychological and psychiatric injury but at the time he was not aware that he had suffered injury as a result of the conditions in the prisons. It is unclear whether the plaintiff's case is that he was unaware of the fact that he had allegedly suffered injury, or unaware of the alleged link between the injury (of which he was aware) and the conditions in the prisons.

15. The plaintiff avers that he was fit and healthy entering Mountjoy Prison in December 1993 but became depressed and began to abuse heroin in prison. He avers that he was not a regular drug user prior to his imprisonment and was not a heroin user. He avers that he abused heroin constantly from the time he was first sent to Mountjoy in 1993 until about October 2015.

16. The plaintiff avers that at some time "*much later*" than his release from prison, he heard a media discussion on the topic of slopping out from which, he says, he realised that his rights might have been infringed.

17. The plaintiff avers that he spent a number of terms in prison but, save as to the period between 1993 and 1994, does not say when. The defence pleads that he was in various identified prisons on various specified dates, the last of which was 7th November, 2002, when he was released on temporary release to the date of expiration of a seven-month sentence imposed on 15th April, 2002.

18. The plaintiff avers that he consulted his solicitors on 29th May, 2006 and the plenary summons was issued on 15th September, 2006. The plaintiff avers that his solicitors were concerned about the length of time which has elapsed since his imprisonment and that the proceedings issued prior to his examination by a consultant psychiatrist. The plaintiff does not say when, or even approximately when, he was examined by the consultant psychiatrist. In particular, it is not apparent whether this examination took place, or whether any report was made available, prior to delivery of the statement of claim on 21st May, 2009.

19. The case made by the plaintiff in his replying affidavit is that he was not in a position to advance his case due to his addiction.

20. In his affidavit sworn on 9th December, 2015 the plaintiff averred that he "now" believed that his addiction arose directly out of the conditions of his imprisonment: but not when or how he came to that belief. As counsel for the defendant points out, any claim that the plaintiff's addiction was caused by slopping out is no part of the case pleaded.

21. It is submitted by counsel for the defendants that the evidence falls short of establishing any incapacity on the part of the plaintiff to advance the litigation. I accept that submission.

22. On the plaintiff's case he was addicted to and abusing heroin from late 1993 or 1994 until October 2015. It is not suggested that there were any periods in that time during which he was not abusing heroin, still less that this explained why such steps as were taken were taken when they were taken. There is no evidence that the plaintiff's solicitors were seeking but unable to get instructions. If the plaintiff's addiction or abuse was no impediment to the taking of such steps as were taken, I cannot see how it could have been an impediment to the taking of such further or other steps as ought to have been taken, when they ought to have been taken.

23. In argument it was said that the fact that the plaintiff was imprisoned between the commencement of the action and the bringing of this application was an impediment to progress. But there is no evidence of when the plaintiff was in prison and when he was out. If, as was argued, the plaintiff was or would have been unable to attend his solicitor while he was in prison, he would have been in the periods in which he was not in prison. In any event, it does not follow from the mere fact that the plaintiff was in prison that he was not, or would not have been, in a position to communicate with his solicitors, whether by them visiting him, or by letter.

24. I find that what is put forward as explaining the acknowledged inordinate delay does not explain it, and that the delay in prosecuting the action is accordingly inexcusable.

25. This is an action which was commenced by plenary summons and will be tried (if it is to be tried) on oral evidence.

26. The first and fundamental issue is the time and place of the plaintiff's imprisonment. After the statement of claim was delivered some attempt was made to obtain the records of the plaintiff's imprisonment but this was never followed up. There appears to have been no attempt to engage with the pleas in the defence as to the times and places of the plaintiff's imprisonment. Specifically, there was no application to amend the statement of claim. On the pleadings, then, there is an issue as to the time during which the plaintiff was detained in Mountjoy and a clear issue as to whether he was imprisoned in Cork at all. I find that the issue as to when the plaintiff was imprisoned is material. Even more so, the prison in which the plaintiff was detained is material because the alleged regime in Mountjoy was that the plaintiff was kept in a single cell while the alleged regime in Cork was six prisoners to a cell. The alleged lack of privacy is a significant element of the claim.

27. The defendants, of course, have records of the dates and places of the plaintiff's imprisonment but on the pleadings, the plaintiff does not accept that those records are correct.

28. The fundamental basis of the plaintiff's case is that he was kept in cells without a flushing toilet and running water but he goes on to complain that the pots were constantly full; that he was not (while in Cork) provided with water for washing his hands and food utensils; and that in both prisons the sinks used for washing were frequently used by other prisoners for urinating.

29. It is well established that the court on an application such as this is not in a position to decide disputed issues of fact but even if the court were to assume that the times and places of the plaintiff's imprisonment would likely be established by the prison records, the issues as to the regimes followed and the practices adopted would fall to be determined solely, or certainly mainly, on the basis of oral evidence taken upwards of 25 years after the events complained of.

30. Apart from the issues as to the conditions in which the plaintiff was imprisoned, it is clear that there are fundamental issues as to the alleged effect of those conditions on the plaintiff.

31. The plaintiff would now make the case that his heroin addiction was caused by the conditions of which he complains. As counsel for the defendants correctly points out, this is not part of the case pleaded and the suggestion was first made in the affidavit of the plaintiff sworn on 9th December, 2015: upwards of twenty years after the alleged event. The plaintiff avers that he was not, before he was first sent to Mountjoy, a regular drug user and that he was not a heroin user. I find it impossible to contemplate how, at this remove, the defendants might meet that case. If the plaintiff was, on his own case, an occasional drug user, the question arises as to what drugs other than heroin the plaintiff was taking, and how often, and for how long.

32. On this application the plaintiff makes the case that since his initial imprisonment in 1993 he requires "memory aids" in the way of detailed records, including records of treatment for medical issues and drug addiction, in order to recall the precise details of his life and relies on the alleged failure of the defendants to provide the requested records. If the plaintiff needs these records to advance his case, it follows that the defendants will need them to defend the case. There is no evidence that the plaintiff has made any attempt to obtain his medical records beyond the letters written in February, 2000 which yielded nothing. I do not believe that the criticism of the defendants for having allegedly failed to provide these records is warranted. The Governor of Cork Prison said that he had no medical records and this appears to have been accepted. When the request for voluntary discovery eventually came in 2014, what was sought was all records of persons placed on disciplinary report for urinating in sinks and all complaints recorded about the practice of slopping out in each of Mountjoy and Cork Prisons between, respectively, December, 1993 and August, 1994 and August, 1994 and December, 1994.

33. The plaintiff focusses on the need for his medical records going back to at least 1994. He does not address the fact that if he is to bring his case to trial the medical records are only the starting point. The medical records may identify the doctors and others who saw and treatd the plaintiff over the years and may summarise the findings on examination and treatment: but at any trial the plaintiff's case would have to be proved by the oral evidence of the various professionals. It seems to me that it is not realistic to contemplate that the issues as to whether the plaintiff's alleged addiction and psychological injury which are alleged to have arisen in 1994 could be fairly tried twenty five years and upwards after the event.

34. The summons in this case was issued on 15th September, 2006, about twelve years after the events complained of. On the plaintiff's evidence, his solicitors at the initial consultation, expressed concern about delay. There was a delay of 32 months in delivering the statement of claim. There was a significant delay in the delivery of the defence but after that was eventually delivered the plaintiff did nothing for nearly four years. Following the request for voluntary discovery the defendants' solicitor did not address the substance of the request but neither did the plaintiff's solicitors press for a reply.

35. On applications such as this the clock will often stop on the issue of the motion to dismiss. In this case the plaintiff is not to be held responsible for the delay between the issue of the motion on 21st October, 2015 and the filing of the supplemental affidavit of Maria Connolly on 22nd January, 2016 and beyond that for such time as it would have taken to get a hearing date for the motion. There was, however, further significant delay caused by the adjournment of the motion from time to time over about eighteen months to allow the delivery of a supplemental affidavit on behalf of the plaintiff. The defendants acquiesced in those adjournments expressly on the basis, acknowledged by the plaintiff, that the clock was ticking against him. In the event no such supplemental affidavit was filed and eventually the plaintiff acquiesced in the fixing of a hearing date. It was explained in argument that counsel for the plaintiff was anxious to file a supplemental affidavit, if this could be done. The issue of the motion coincided with the plaintiff ceasing to abuse heroin and it was hoped that the plaintiff's memory would improve with his recovery.

36. The plenary summons in this case was issued in 2006, upwards of twelve years after the events complained of. It was recognised at the outset that there had already been a long delay but the action was not progressed. At the date of issue of the summons the action was at least *prima facie* statute barred. The defendants pleaded the statute but the plaintiff did not deliver a reply. It is now said that the plaintiff was unaware at the time of his imprisonment that he had been injured or that the injury was significant so that his date of knowledge for the purpose of the Statute of Limitations was some later date. The plaintiff does not point to any particular

date but if, as is argued on behalf of the defendants, the relevant knowledge is knowledge of attribution, that knowledge can only have come from medical advice. The problem with this argument is that on the plaintiff's evidence, the medical advice was sought and obtained after the commencement of the proceedings in which case the action pre-dated his date of knowledge: either that he had been injured or that the injury was referable to the conditions in which he had been imprisoned.

37. This is an action which in truth has gone nowhere since 2010. Even if it was ready for trial I do not believe that there could be a fair trial. In fact, it is far from ready for trial.

38. I find that the plaintiff has been guilty of inordinate and inexcusable delay in the institution and prosecution of these proceedings and that the defendants have been prejudiced in their ability to meet the case such that the balance of justice requires that the action be dismissed.