Neutral Citation Number: [2005] IEHC 283

THE HIGH COURT

Record Number: 1998 No. 13452P

BETWEEN

PRECISION LASER CARE LIMITED, TRADING AS MEDILASER

PLAINTIFF

LAMDA PHOTOMETRICS LIMITED AND WOODCHESTER FINANCE LIMITED

DEFENDANTS

Judgment of Mr Justice Michael Peart delivered on the 10th day of August 2005

1. The first named defendant ("the defendant") submits that the plaintiff is guilty of such inordinate and inexcusable delay in the prosecution of this claim, that the Court should dismiss the proceedings for want of prosecution, since it has, as a result of that delay, suffered a serious prejudice to its ability to properly and adequately defend against the claims made. The prejudice, it says, is that the only person who can refute the claims made by the plaintiff as to certain representations and warranties allegedly made to the plaintiff by the defendant about a machine purchased by the plaintiff has died.

2. The application to dismiss is made pursuant to O.122, r.11 of the Rules of the Superior Courts, 1986 as amended ("RSC") which provides, as relevant herein:

> *" ……In any cause or matter in which there has been no proceeding for two years form the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just ……"*

3. All parties are agreed, as must be correct in the case of post-commencement delay, that the principles to be applied by this Court to the exercise of its discretion, are those set forth in the judgment of Hamilton CJ in Primor plc. V. Stokes Kennedy Crowley [1996] 2 IR 459, which I will hereafter refer to as the Primor principles.

Background to the claim:

4. The plaintiff alleges in its Statement of Claim delivered on the 31st December 1998 (just two weeks after the commencement of these proceedings) that in February 1997 it expressed an interest to the applicant in purchasing a specialised machine described as *"a ruby laser to be used for the treatment of human hair removal"*. It is pleaded also that further to these enquiries *"and specifically on foot of representations and warranties made by the first named defendant, its servants and agents"*, a sale agreement was entered into between the parties for the purchase of the ruby laser. In fact the second named defendant purchased the machine and leased it to the plaintiff at an agreed cost of Stg.£56870.

5. It is pleaded also that the sale comes within the Sale of Goods and Supply of Services Act, 1980, and that at all material times the defendants represented and warranted to the plaintiff that the ruby laser was "of merchantable quality, reasonably fit for its purpose, complied with its description and was free from any defect which would render it a danger to consumers."

6. It is further pleaded that in addition to these representations and warranties, certain others were made by the defendant to the plaintiff in respect of the machine, and one such which appears to be of particular significance in the claim is one at paragraph 5(ii) of the Statement of Claim that *"the flashlamp in the ruby laser had an operational capacity of approximately 250,000 shots when used in the treatment of hair removal"*. All the alleged representations and warranties are fully set forth in the Statement of Claim and there is no need to set them out in this judgment.

7. The defendant raised particulars in relation, inter alias, to who in the defendant company had made these representations and warranties about the ruby laser, and the plaintiff in its Replies to these Particulars has indicated that all were made by Mr Ray Forshaw both orally during telephone calls, and in face to face meetings, and it is he who is the person who has unfortunately died since the commencement of the proceedings.

8. In any event the machine is alleged to have given a great deal of trouble and it is alleged that on numerous occasions the defendant sent out personnel to deal with the breakdowns as they arose. It is claimed in the Statement of Claim that the machine was inherently unreliable, repeatedly broke down, that the defendant was unable to provide a proper repair service as they were obliged to do, or properly carry out repairs, all of which has resulted in financial loss to the plaintiff. Those losses are set forth in the Statement of Claim as amounting as of 31st October 1998 to "£551,498.69". In addition, damages are claimed under a number of different headings.

Chronology of pleading:

9. The Plenary Summons was issued and the Statement of Claim was delivered in December 1998. Four months later the defendant delivered a very comprehensive Notice for Particulars in April 1999, which was replied to by the plaintiff on the 1st September 1999 - some three months later. The defendant served a Notice for Further and Better Particulars in November 1999, to which the plaintiff replied in May 2000, but I note that in that Reply to Particulars the plaintiff states at the outset that it only received this request for further particulars on the 4th May 2000. In any event the defendant delivered its Defence and Counterclaim on the 6th January 2000, and the Plaintiff delivered a Reply and Defence to Counterclaim on the 26th May 2000. The Plaintiff also raised Particulars on the 30th March 2000, to which the defendant replied on the 8th June 2000. Affidavits of Discovery were sworn by each party in August and September 2000 respectively. By March 2001 the plaintiff was seeking further and better discovery, and the defendant swore such an affidavit of further discovery on the 23rd May 2001. In June 2001 the plaintiff sought yet further discovery from the first named defendant, and by letter dated 11th October 2001 the defendant sought further and better discovery from the plaintiff. There matters rested until some two years and six months later on the 8th April 2004, and just two months after the death of Mr Ray Forshaw, the defendant's sales manager and the person alleged to have made the oral warranties and representations to the plaintiff at the time of the sale of this laser machine, died.

10. No steps were taken by the plaintiff following the closure of pleadings to either set the matter down for hearing, or pursue any outstanding discovery so that the case could be certified as being ready to be heard. Equally the defendant to pursue its request dated 11th October 2001 for further and better discovery from the plaintiff.

Inordinate and inexcusable delay ?:

11. There is no doubt in my mind that the delay in the progress of these pleadings up to October 2001 can certainly be fairly described as pedestrian, given that it was almost two years since the proceedings had been instituted in December 1999. But I would

not categorise that period of delay as being "inordinate" given that it is not that unusual, and there was no one period of gross delay between pleadings or in the requesting and replying to particulars. Certainly in any ideal world matters could and indeed should proceed at a less leisurely pace, but there were matters of discovery to be dealt with, and on the whole that period up to October 2001 was not inordinate. However, in respect of the period of total inactivity between October 2001 and April 2004, inordinate delay occurred. James Connolly SC for the plaintiff has sought to avoid that categorization on the basis that a delay of two years can easily and often is incurred through no fault of a plaintiff, simply by a case languishing in a list to fix dates and not being allocated a date for hearing, and that a period of two years is not therefore such as to be inordinate. He has also referred to the fact that under O.122 RSC a period of one year is recognised as being a length of time after which a plaintiff is simply permitted to serve one month's Notice of Intention to Proceed.

12. The plaintiff's solicitor has sworn a replying affidavit in order to deal with, inter alia, the delay from October 2001 to April 2004. He says that this occurred *"for a number of very substantial reasons"*. Firstly, he seeks to lay some blame at the defendant's door for a delay of five weeks from the date of the Notice of Intention to proceed before issuing the present motion to dismiss the plaintiff's claim. However, not only do I think that it ill behoves the plaintiff to seek to off-lay some of the blame for the delay in the prosecution of this claim, but the reality is that the defendant would not have been permitted to issue his motion without allowing the month's notice under the plaintiff's Notice of Intention to Proceed to expire, or alternatively to issue and serve his own Notice of Intention to Proceed. The reason for this is that under O. 122 RSC any party wishing to proceed, be it plaintiff or defendant, must serve such a notice if more than one year has elapsed since the last step in the action. So there is no reality to the argument that the defendant delayed from the date of service of that notice by the plaintiff.

13. Secondly, he avers that the defendant did not communicate the news of the death of Mr Forshaw to the plaintiff's solicitors until the 10th May 2004 which is over three months after his death, and on this basis he avers that the inescapable conclusion is that the prejudice which the defendant alleges is not very substantial or significant in terms of the defendant being in a position to properly and fully defend the plaintiff's claim.

14. The substantial reasons for non-prosecution of the proceedings during October 2001 to April 2004 are stated to be that at the same time the plaintiff was prosecuting another set of proceedings arising out of the purchase of another laser machine, those proceedings commencing in December 1998. He says that the plaintiff "for practical considerations made the decision to prosecute one set of proceedings to a hearing prior to prosecuting the second set of proceedings to a hearing. He goes on to say that it was in these circumstances "and through a lack of activity on the part of the first named defendant in prosecuting the present proceedings since October 2001" that the plaintiff took no further step by having Senior Counsel advise proofs.

15. The next matter put forward, though not sought to be relied upon as a justification, is stated to be that "the plaintiff" (by that I take him to refer to a Mr Monahan, a director of the plaintiff company) was also involved in High Court proceedings involving a property dispute with his late father's executor over a house. That dispute appears to have lasted from November 2000 until April 2004.

16. None of these reasons in my view serves the plaintiff well at all. There is absolutely no chance that a unilateral decision by a plaintiff to postpone bringing one case on for hearing so that he can devote his time and resources to one or two other sets of proceedings, without as much as communicating with or consulting the defendant in that regard, can be a justification for any ensuing delay. It cannot excuse it.

17. However, what is described as "a critical and vital factor" put forward for not getting on with this action is one set forth by the plaintiff's solicitor at paragraph 14 et seq. of his affidavit, namely that the plaintiff's expert engineer, a Dr Richard Farrar, who has carried out extensive examinations of the ruby laser, and who prepared a lengthy report in 1998 in relation to the defects in the machine, was involved in an accident which has rendered him quadriplegic due to dislocation of the spine. This accident is said to have occurred in July 2000, resulting in Dr Farrar being hospitalised for nine months, and being unable during 2001, 2002 or 2003 to give evidence for the plaintiff. It is stated that it was only in the later stages of his rehabilitation that he indicated to the plaintiff that he would be in a position to give evidence. It is averred that if Notice of Trial had been served at any time prior to that, Dr Farrar would not have been in a position to give evidence. Again it is noteworthy that neither the plaintiff nor the plaintiff's solicitors ever communicated this difficulty to the defendant or the defendant's solicitor.

18. The plaintiff's solicitor avers that in his view the fact that the defendant sat back after the 11th October 2001 Request for Further Particulars and did not press for replies, or seek to dismiss the plaintiff's claim for want of prosecution is indicative of the fact that it was content to delay and wait, in the hope that the plaintiff would not proceed with the action to a hearing, and believes that the present application is simply opportunism, and that it ignores the fact that the defendant can adduce evidence from a number of engineers who on its behalf attended at the plaintiff's premises to examine and repair the ruby laser when it broke down, and that these people can contest the merits of the plaintiff's claim in the absence of Mr Forshaw, whose evidence is relevant only to the representations and warranties given orally at the time of purchase. It is averred that the interests of fairness and justice between the parties lies in favour of allowing the claim to proceed and that the Court should dismiss the present motion.

19. I do not, as I have said, feel that the plaintiff is in any position to criticise the defendant in the matter of delay. While both parties share the obligation to ensure as far as they can that matters progress to a hearing as quickly as possible, it is not a burden to be shared equally. The defendant must not hold matters up, and if he does, the plaintiff has remedies available to press a reluctant defendant into action or proceed by default. A defendant on the other hand who has delivered his Defence and complied with any orders for Discovery and who has replied to any Notice for Particulars served, is entitled to wait for the plaintiff to get the case on for hearing. I do not believe that simply because the defendant in this case served a Notice for Further Particulars to which he failed to evince a reply within the specified time, the plaintiff can feel absolved from blame for not serving Notice of Trial and setting the action down for hearing, and certifying same as ready so that a date can be fixed for hearing. Something much more is needed by way of excusing circumstances so that the Court would not dismiss the action in the light of prejudice suffered by the delay by the defendant.

20. The only circumstance in my view in the present case which can avail the plaintiff is the unfortunate and undisputed catastrophic injury suffered by the plaintiff’s expert, Dr Farrar. He is the one man who examined this machine for the Plaintiff, and is in a position to give expert evidence to the Court. Hew has prepared a lengthy report and is clearly crucial to the plaintiff’s case. However, the fact is, and I cannot understand why the plaintiff did not bring his unfortunate injury to the attention of the defendant. If that had been done in a timely manner, the defendant would at least have had some options open to it, such as for example agreeing that Dr Farrar’s report might be agreed, or perhaps at an appropriate time having his evidence taken on commission and soforth. The defendant in this case was kept in the dark, and I have no idea why that is so. The defendant was also kept in the dark about the other factors which the plaintiff seeks to rely on at least to some extent, namely the existence of other proceedings about another machine, and the other piece of litigation of a personal nature involving Mr Monahan.

21. I am prepared to find that the unavailability of Dr Farrar is an excusing circumstance for the purpose of this motion, and if this had been brought to the attention of the defendant in a responsible way, that would in all probability have been an end of the matter. But the failure to bring the matter to the defendant's attention, and the fact that some prejudice has been suffered by the defendant – a matter to which I shall return shortly – means that the plaintiff cannot simply be permitted to proceed with this claim as if nothing had happened. The prejudice to the defendant must be taken into account by the Court, especially bearing in mind the requirement that the Court exercises a judgment as to the balance of justice between the parties. In this regard, Mr Connolly has referred the Court to a passage from the judgment of McCracken J. in *Keogh v. Wyeth Laboratories Inc*., Supreme Court, 12th July 2005 where the learned judge stated:

> *"The tests laid down in the Primor case are of their nature very general. In seeking to apply these tests, the Court must look closely at the particular facts of the case before it. However, the central thread running through these principles is the concept of fairness and prejudice which should be at the forefront of the Court's consideration as to where the balance of justice lies."*

22. Without going into the matter in great detail, I am satisfied that the defendant has been prejudiced by the plaintiff's delay. Even though I have found that the delay has been inordinate, but excusable on the basis of the injury to Dr Farrar rendering him unavailable for the hearing until quite recent times, nevertheless I find the plaintiff culpable by not having taken what I would consider to be the responsible and appropriate step of communicating this difficulty in a timely manner to the defendant. This is a factor to be taken into account by the Court in considering where the balance of justice lies. Because it must also be borne in mind that it is not simply the justice of the situation from the plaintiff's view in not having his claim dismissed too easily, but also justice from the defendant's point of view in not being required unreasonably and unfairly to defend a claim in circumstances where through no fault of his own, some of the weaponry which would have been at his disposal is no longer available to him.

23. I am also satisfied that no action or the lack of it by the defendant can be deemed to have been an acquiescence by the defendant of the plaintiff's inactivity.

24. The plaintiff submits that the prejudice alleged by the defendant is not as real as is being made out, since the defendant's engineers who attended at the plaintiff's premises to carry out examinations and repairs to this machine can be called to give evidence on its behalf. The plaintiff also submits that there is also the claim by reference to the Sale of Goods and Supply of Services Act, which is independent of any claim based on representations and warranties allegedly made by MR Forshaw at the time of this purchase. The defendant on the other hand says that Mr Forshaw was central to the whole transaction as the sales manager at the relevant time, and Mr Klaus Reichert BL on its behalf has also pointed to the record of some communication in June 2001 between a Dr Johan Sallstrom of Sweden and Mr Monahan in which the former makes some allegations about Mr Forshaw related to difficulties which Dr Sallstrom had with a similar laser machine, and there is also a record of a phone call between Mr Monahan and Mr Forshaw in May 1998 which contains matters which would be in dispute. Mr Reichert points to the fact that the defendant is now no longer in a position to call Mr Forshaw as a witness to refute or otherwise deal with this evidence which the plaintiff will no doubt wish to rely upon.

25. The Court is naturally seeking to avoid any situation where because of the plaintiff's delay, though excused subject to the criticism of not having notified the existence of the problem for the plaintiff about Dr Farrar, there is a substantial risk that by not acceding to the defendant's motion, that it is not possible to have a fair trial from the defendant's perspective. Equally, the Court ought not lightly or too easily dismiss a plaintiff's claim.

26. It seems to me that a fair compromise, or fair balancing of these competing interests is achieved if the plaintiff is permitted to proceed with its claim, but in a manner in which the prejudice to the defendant by not having Mr Forshaw's evidence is neutralised. This in my view can be achieved if the plaintiff's claim and any evidence adduced by it is limited to matters in respect of which Mr Forshaw's evidence is not required. In other words, the plaintiff will not be permitted to relay on any pleading in their Statement of Claim which relies upon any representation or warranty allegedly made by Mr Forshaw either orally or in writing, and will not call any evidence which could be contested by the defendant only by calling Mr Forshaw, such as the evidence which might have been given by Dr Sallstrom to whom I have referred in relation to the letter to Mr Monahan dated 5th June 2001, or in relation to the telephone conversation on the 12th May 1998. The plaintiff will be required to limit their claim and their evidence to matters in respect of which the evidence of Mr Forshaw is not required if it was to be refuted or contested. The conditions and warranties under which this machine was sold or would be deemed to have been sold are not confined to those allegedly made by Mr Forshaw. There will be an issue to be dealt with about whether the plaintiff is a "consumer" for the purpose of the Sales of Goods and Supply of Services Act, but the evidence available to the defendant through its engineers who attended this machine from time to time will be available to the defendant to deal with any claim by the plaintiff which is based on the machine not being of merchantable quality and not meeting its specifications, but in so far as Mr Forshaw may have given or has been alleged to have given any warranty or made representations over and above those contained in the machine's specifications, the plaintiff ought not now be permitted to rely on such allegations because of the delay by them having disadvantaged the defendant in meeting these allegations.

27 I therefore refuse the relief sought by the defendant, provided that an appropriately worded undertaking is given to the Court to meet the situation as I have described. I propose to adjourn the motion for mention to a date next term, so that, hopefully, a suitable undertaking can be drafted which has the approval of both the plaintiff and the defendant. In the absence of agreement, the Court will draft an appropriate order to reflect the terms on which the relief sought is being refused.