



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 50

Record Number: 2014/1256

PEART J.  
HOGAN J.  
GILLIGAN J.

BETWEEN:

FELIX ROONEY

PLAINTIFF/RESPONDENT

- AND -

SLIGO COUNTY COUNCIL

DEFENDANT/APPELLANT

**JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 27TH DAY OF FEBRUARY 2018**

1. These proceedings are straightforward, and ought to have been disposed of years ago. The plaintiff had an accident at work on the 21st July 2005 as a result of which he sustained personal injuries and loss. Essentially the plaintiff's case is that he was electrocuted while standing adjacent to a JCB machine which came into contact with electricity cable. He simply seeks to be compensated for those injuries and losses.

2. The origin of the present appeal lies in the fact that on the 24th January 2011 the defendants sought and obtained an order in the High Court (DeValera J.) dismissing the proceedings for want of prosecution, namely the failure to have furnished further and better particulars of the plaintiff's claim on foot of a request for such particulars which was made on the 7th May 2009. That order was set aside some three years later on the plaintiff's application by order of the High Court (O'Hanlon J.) dated the 12th May 2014 on certain terms as to costs. The defendant's present appeal is against that order.

3. Prior to the defendant's request for further and better particulars the defendant had delivered a notice for particulars delivered in September 2008. That was replied to by the plaintiff on the 30th March 2009. It was arising from those replies that the defendant sought responses to four straightforward questions:

1. How does the plaintiff allege he was electrocuted?
2. What was the source of the electricity?
3. For what reason was the plaintiff allegedly in contact with a JCB?
4. Which parts of the plaintiff's body were in contact with the JCB?
4. That request for further particulars was accompanied by the defendant's defence and a letter seeking voluntary discovery of certain documents and records.

5. The defendant's solicitor sent a number of letters to the plaintiff's solicitor in an effort to get replies to the four questions asked, but without success. Eventually by letter dated the 1st December 2010 he wrote warning that if replies were not received, a motion would issue "seeking or compelling replies to particulars, or in the alternative for an order dismissing your client's claim for want of prosecution".

6. Not having received a response to this final warning letter, a motion was issued by the defendant's solicitor which sought:

"1. An order dismissing the above entitled *proceedings by virtue of the plaintiff's failure to reply to the defendant's further and better particulars dated 7th day of May 2009*, or for an order directing the plaintiff to furnish replies to the defendant's further and better particulars dated 7th day of May 2009." [Emphasis provided]

7. When that motion came before the High Court on the 24th January 2011 there was no attendance in court on behalf of the plaintiff. The motion was nevertheless moved by the defendant's counsel, and the order sought was granted by DeValera J.

8. The order as perfected states:

"IT IS ORDERED that this action be dismissed for want of prosecution by virtue of the non-compliance of the said plaintiff in respect of the said defendant's further and better particulars dated 7th May 2009 and that the said plaintiff do pay to the said defendant the costs of this motion and the proceedings to date when taxed and ascertained"

9. By letter dated the 28th March 2011 the plaintiff's solicitor wrote to the defendant's solicitor referring to the request for further and better particulars dated the 7th May 2009, and without making any reference to the delay in furnishing the information sought, or indeed the motion, provided answers to the four questions asked. As later explained the principal in the plaintiff's solicitor firm was personally unaware that this motion had issued. Unsurprisingly perhaps, the defendant's solicitor replied by firstly expressing surprise at receiving this response, and going on to explain that the proceedings had been dismissed by order of the High Court on the 24th January 2011. It went on to say that a bill of costs for the motion and the proceedings would be furnished. It also referred to the unanswered correspondence which had preceded the issuing of the motion.

10. In due course a bill of costs was drawn up and taxed by the Taxing Master in the amount of €11,869.15 on the 9th January 2013.

These costs have not been paid to date, despite numerous requests and reminders.

11. The plaintiff delayed again until the 20th November 2013 before finally issuing a motion seeking to set aside the order dated the 24th January 2011. The plaintiff's solicitor had sought to explain the failure to appear in the High Court on the return date for the dismissal motion, and had requested the defendant's consent to the setting aside of the dismissal order so that the plaintiff's action could proceed. That consent was refused. I would again mention that the responses to the request for better particulars had been provided by letter dated the 28th March 2011.

12. The plaintiff's motion to set aside the dismissal order was first returnable before the High Court on the 17th January 2014. It eventually came on for hearing before Ms. Justice O'Hanlon on the 12th May 2014. The motion was grounded on the affidavit of the principal of the firm acting for the plaintiff. He deposed to a series of misfortunes that occurred in his office at the times relevant to this appeal due to what he described as "an act of sabotage" by "an errant and disgruntled employee" which had led to an administrative and clerical error in the firm. It appears that the motion to dismiss the proceedings was not placed on the file when it was served on his firm, and was not entered in the office diary, and no counsel was briefed to attend court. The principal also explains that the defendant's solicitor did not send a copy of the order dated the 24th January 2011 until the 4th April 2011 after the further particulars had been provided by the plaintiff's solicitor's letter dated the 28th March 2011.

13. The delay in bringing the motion to set aside the order made by DeValera J. on the 24th January 2011 was explained in that grounding affidavit as being "a result of a change in personnel in this firm whereby the order and the subsequent motion that should have been brought were overlooked". The Court's indulgence was sought in seeking to have the order set aside. A second grounding affidavit was sworn in due course by way of reply to replying affidavits filed by the defendant's solicitor. Apart from some essentially legal submissions, this second affidavit stated that the plaintiff would be severely prejudiced by a dismissal of the proceedings in the light of the significant injuries which he suffered in the course of his employment, and that the defendant's ability to defend the proceedings has not been prejudiced in any way since at all times they were aware of the incident giving rise to the injuries, had fully investigated the circumstances, and all necessary witnesses were available. Reference was also made to the fact that the defendant had been in a position to deliver its defence before any of the delay had occurred that gave rise to the motion to dismiss. It was also averred that even the outstanding particulars sought by the letter seeking further particulars had been provided before the plaintiff's solicitor had been made aware that the order of DeValera J. had been made dismissing the proceedings.

14. When the application to set aside the order of DeValera J. came before Ms. Justice O'Hanlon she decided to grant the order but on strict terms that the costs which had been taxed be paid by the plaintiff's solicitor within a period of four weeks, and that thereafter the proceedings would be progressed to finality expeditiously. The requirement that the proceedings be progressed with expedition is not part of the order as drawn, but it was said by the judge as appears from the transcript of the hearing which has been made available to this Court.

15. On this appeal counsel for the defendant has pointed to the appalling series of delays that have occurred in this case on the plaintiff's part. Those delays have occurred at every stage since the request for further and better particulars. Reference is made to the additional delay from the 4th April 2011 when a copy of the order dismissing the proceedings was furnished to the plaintiff's solicitor, and the issue of the application to set aside that order which issued only on the 20th November 2013. Reference is made to the numerous letters set by the defendant's solicitor urging that the request for better particulars be replied to, and warnings that a motion would have to issue, all of which went unacknowledged and unanswered. It is submitted that the explanation for the reasons for these lengthy delays is unsatisfactory, and should not be considered adequate to explain and, in particular, justify same.

16. Counsel has submitted that the delays were inordinate and inexcusable, and that the trial judge (O'Hanlon J.) erred in failing to have regard to those features of the case when setting aside the order made by Mr Justice DeValera. Counsel has referred the Court to the well-known case-law on delay in the context of an application to dismiss on the grounds of inordinate and inexcusable delay. Given the basis on which I consider that the appeal should be dismissed, it is unnecessary to set out those submissions in detail.

17. The defendant accepts that the facts of the plaintiff's accident and injuries are uncomplicated. He accepts also that there is not the kind of prejudice to the defendant that is sometimes relied upon in matters of this kind due to the fact that on account of the delay certain witnesses are no longer available to give evidence. Nevertheless, the sheer length of the delay is relied upon due to the now recognised public interest in the courts not allowing claims that have not been brought in a timely fashion to take up the courts' time and resources, and the presumed prejudice that can result from lengthy passage of time as a result of witnesses' memories of events fading over time. In this regard, the defendant has referred to the judgment of Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.R. 577, the judgment of Clarke J. (as he then was) in *Rodenhuis and Verloop BV v. HDS Energy Limited* [2010] IEHC 465, and my own judgment in *Byrne v. Minister for Defence*, unreported, High Court, 26th April 2005.

18. Counsel referred also to the provisions of Ord. 27, r. 14(1) of the Rules of the Superior Courts which provide:

"Any order dismissing the plaintiff's action for want of prosecution, whether under this Order or any other of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the failure *special circumstances (to be recited in the order) existed which explain and justify the failure.*" [Emphasis provided]

19. It has been submitted that the special circumstances for the failure must relate to the failure to furnish the replies to the request for further particulars sought by letter dated the 7th May 2009, and which has even now not been the subject of explanation. It is submitted that the concatenation of events and circumstances that is explained by the plaintiff's solicitor by reference to the alleged acts of sabotage by the errant and disgruntled employee which resulted in the non-attendance on the motion to dismiss, and in the further delay in issuing the motion to set aside the order of DeValera J. does not explain the delay in furnishing the further particulars for a period of some twenty two months, and that it is that particular delay that needed explanation before Ms. Justice O'Hanlon so that if it was considered to constitute a special circumstance, it could as required by the rule be stated in the order setting aside the dismissal order.

20. In circumstances where the delay in furnishing the particulars sought in May 2009 was not explained for the purpose of the application to set aside the said order, it is submitted that no special circumstance as envisaged by Ord. 27, r. 4 of the Rules of the Superior Courts was before O'Hanlon J. and that she had no jurisdictional basis to set aside the dismissal of the proceedings. It is submitted that in addition to that substantive argument, the order is bad on its face as it does not state any special circumstance justifying the delay in furnishing the replies, and for that reason alone should be set aside.

21. In response, counsel for the plaintiff/respondent, in my view quite rightly, accepted that the delays that have occurred on the plaintiff's side both in relation to the provision of the further particulars and in bringing an application to set aside the order made on

the 24th January 2011 have been lengthy and unacceptable. He does not shy away from that undoubted aspect of this case. Nevertheless, and as was submitted in the High Court, counsel submits that there was no jurisdiction to make the order dated the 24th January 2011. That order was sought on the specified basis, namely that there had been non-compliance with the defendant's request for further and better particulars dated the 7th May 2009. The application to dismiss was not brought on the basis of inordinate and inexcusable delay up to that point in the prosecution by the plaintiff of the proceedings. It is submitted that there was no obligation on the plaintiff to reply to such a request, and that the defendant's remedy was to seek an order from the High Court to compel the plaintiff to provide replies.

22. Counsel has referred to Ord. 19, r.7 of the Rules of the Superior Courts which provides at:-

(1) that further and better particulars may in all cases be ordered, and at

(2) that before an application for such an order is made, a party may apply for particulars by letter, and at

(3) that particulars shall not be ordered to be delivered before defence or reply, as the case may be, unless the court considers that they are necessary or desirable to enable the defendant, or the plaintiff, as the case may be, to plead or ought for some other special reason to be so delivered.

23. There was never such an order made pursuant to Ord. 19, r. 7(1) in the present case. It can be seen that such an order was an alternative relief to a dismissal of the proceedings sought in the defendant's motion that issued on the 13th December 2010. It is submitted that absent an order requiring the plaintiff to furnish replies, and non-compliance with it, the motion to dismiss on the basis of the failure to reply to the request was erroneous, and that it must be set aside on the basis that regardless of the merits arising from delay, the High Court simply had no jurisdiction to make it.

24. I find myself in agreement with the plaintiff's submissions. In my view it is clear that in its motion issued on the 13th December 2010 the defendant sought either of two reliefs, a dismissal on the basis that the plaintiff's failure to furnish further and better particulars, or an order directing the plaintiff to furnish such replies. There was, however, no obligation on the plaintiff to furnish the replies to particulars being sought as, to repeat, there was no order in existence pursuant to Ord. 19, r. 7(1) requiring him to do so. The only relief that the High Court could give in these circumstances on foot of the motion issued would have been that as alternatively claimed, namely, an order pursuant to Ord. 19, r. 7(1) requiring replies to be furnished within a specified period. Having sought such replies some twenty two months previously, and having issued several reminders without result, there is little doubt that the High Court would have been minded to grant such an order, and would have had the necessary jurisdiction to do so. But it had no jurisdiction in these circumstances to make the order dismissing the proceedings precisely because there had at that point been no default of pleading on the part of the plaintiff, notwithstanding that the plaintiff did not attend court to resist the application for a dismissal of the proceedings. The situation would have been different had, of course, an order been made by the High Court pursuant to Ord. 19, r. 7(1) requiring the plaintiff to furnish replies to particulars and the plaintiff had not complied with that order.

25. The subsequent delays to which the defendant has referred does not cure the lack of jurisdiction to make a dismissal order. It will be a matter entirely for the defendant to consider now whether at this point in time there are grounds to seek an order to dismiss the plaintiff's proceedings on the basis of inordinate and inexcusable delay.

26. For all these reasons I would dismiss the appeal.