THE HIGH COURT

[2007 No. 3868 P.]

BETWEEN

SHU ZHANG (A PERSON OF UNSOUND MIND NOT SO FOUND) SUING THROUGH HER AUNT AND NEXT FRIEND ZHAO WEI

PLAINTIFF

AND

BUS EIREANN AND BRENDAN WHYTE

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 16th day of March, 2018

1. The within application is a motion brought by the defendants to dismiss the plaintiff's claim for want of prosecution.

2. The plaintiff's claim arises out of a road traffic accident that occurred at about 7 pm on the 12th October, 2004 at Aston Quay in Dublin. The plaintiff, who is a 36 year old Chinese national, was at the material time a student studying in Dublin. As she endeavoured to cross the road at Aston Quay, she was struck by a single decker bus owned by the first defendant and driven by the second defendant.

3. As a result of the accident complained of, the plaintiff suffered a catastrophic acquired brain injury. This sadly has rendered her seriously disabled and incapable of giving instructions to her solicitors. She has no recollection of the accident. A Garda investigation was conducted in the immediate aftermath of the accident. A number of eye witnesses to the accident gave statements to the Gardaí including the second defendant a week post accident on the 19th October, 2004. A number of other witnesses who were passengers on the bus gave statements. Two pedestrians who witnessed the accident also gave statements, Mr. Dennis Doherty and Mr. Martyn Kirwan. Mr. Kirwan's statement is undated. In it he gives his address as "No. 3, King's Hall, Emerson Avenue, Salthill Upper, Salthill, County Galway". He gives his occupation as a chef/musician. It would seem that there has been some degree of confusion concerning this witness's correct name as the index of statements attached to the garda report describes him as "Martin Kinway", a name also noted by the defendants' inspector at the time.

4. The relevant chronology of events appears to be as follows:

> 12th October, 2004 – the accident happened.
>
> 6th October, 2006 - PIAB wrote to the defendants concerning a claim lodged on behalf of the plaintiff which the defendants say was the first notice they received of such claim.
>
> 22nd November, 2006 – PIAB issued an authorisation permitting the plaintiff to institute proceedings.
>
> 18th May, 2007 – a personal injuries summons was issued but not served.
>
> 26th January, 2009 – the High Court made an order renewing the summons.
>
> 2nd February, 2009 – the summons was served.
>
> 13th February, 2009 – the plaintiff's then solicitors came off record.
>
> 19th March, 2009 – the defendants issued a motion to set aside the summons.
>
> 21st September, 2009 – the plaintiff's current solicitors, Dillon Geraghty & Co. came on record.
>
> 14th June, 2010 – the High Court dismissed the defendants' application to set aside the summons.
>
> 20th October, 2010 – the defendants delivered their defence.
>
> 13th December, 2010 – the High Court made an order directing that the liability issue in the proceedings should be tried first.
>
> 10th May, 2011 – the plaintiff delivered further particulars of negligence.
>
> 22nd May, 2012 – the defendants swore an affidavit of discovery.
>
> 2nd July, 2012 – the High Court made an order for further and better discovery.
>
> 20th July, 2012 – the defendants swore a second affidavit of discovery.

5. Matters then appear to have lain in abeyance for several years until on the 4th March, 2015, a Notice of Intention to Proceed was served by the plaintiff. Thereafter the defendant's solicitors engaged in correspondence with the plaintiff's solicitors essentially complaining about the lengthy delays that had occurred to date in the proceedings which they described as being both inordinate and inexcusable. Further correspondence ensued in 2016 until on the 22nd September, 2016, the defendants' solicitors wrote to the plaintiff's solicitors, as set out in the grounding affidavit of Sean Coleman in the following terms:

> "Having regard to the nature of this case we are most reluctant to deal with this matter by way of a notice of motion. We would so much prefer if the matter can be brought to trial by cooperation on both sides. In the light of this we confirm that we will withhold the issuing of a notice of motion to dismiss for want of prosecution for a further period of 21 days from the date hereof."

6. The plaintiff's solicitors responded on the 27th October, 2016 saying that they were awaiting an engineer's report before submitting

the papers to counsel for a final advice on proofs.

7. The defendant's solicitors again wrote on the 7th December, 2016 stating:

> "While we do understand the difficulties you may have in dealing with this case we nevertheless believe that our clients have been enormously patient and cooperative herein. Our clients are seriously concerned that the massive delays in relation to progressing this case will fundamentally prejudice the defendants' ability to properly defend these proceedings. For the avoidance of doubt, therefore, we confirm that in the event of this matter not being progressed by or on behalf of the plaintiff by Monday, the 16th January, 2017 it will be our intention to issue a notice of motion."

8. Further toing and froing occurred between the parties and on the 7th February, 2017, the defendants' solicitors again wrote to the plaintiff's solicitors saying:

> "Our clients have instructed us that they are prepared to allow a further period in order to give the plaintiff an opportunity to prepare her case for trial. You will appreciate that this constant delay is causing considerable prejudice to our clients. We reserve our position in that regard. We will diary the matter forward for a month and we look forward to hearing from you within that period."

9. This letter appears to suggest therefore that up until the 7th March, 2017, the defendants were willing to agree to the matter proceeding to trial. For various reasons however, explored in the affidavits of the plaintiff's solicitor, the matter did not in fact progress to trial. The essential reason proffered by the plaintiff's solicitor for this is that he was awaiting an expert report from a consulting engineer in the United Kingdom in relation to the tachograph in the bus involved in the accident.

10. The next relevant event that occurred is dealt with in the affidavit of Tom Fahey of the CIE Group Investigation Department. Mr. Fahey is a claims manager with responsibility for dealing with this litigation. In the affidavit he swore on the 3rd August, 2017, he avers that on the 12th May, 2017, he attempted to call to 3 Kings Hall, Emerson Avenue, Salthill, Upper Salthill, County Galway for the purpose of speaking to Mr. Martyn Kirwan. However, when he investigated the matter, he found that there was no complex called "Kings Hall" but two other apartment blocks on Emerson Avenue, one called "Century House", and the other "Emerson Court". He spoke to somebody in Emerson Court who directed him to another apartment complex called "Kings Hill" which was not on Emerson Avenue but rather on Salthill Road. On arrival there he spoke to a resident who indicated that she had never heard of a Martyn Kirwan.

11. Mr. Fahey also made enquiries in Salthill post office and was told that they were unaware of any address known as "Kings Hall" but only of "Kings Hill". Mr. Fahey also telephoned the Gardaí in Salthill but they were unable to assist. Mr. Fahey also avers that an inspector at the scene of the accident took details of a "Martin Kinway" with an address at 50 River Oaks, Claregalway, County Galway whom Mr. Fahey believes to be the same individual as "Martyn Kirwan". Mr. Fahey also checked this address and got no answer to his call. A neighbour advised him that he didn't think that a gentleman named "Martyn Kirwan" or "Martin Kinway" lived there. Mr. Fahey therefore concludes his affidavit by saying that despite his best endeavours, he has not been able to locate the witness known as "Martyn Kirwan" or "Martin Kinway".

12. The evidence before the court therefore indicates that the defendants made one attempt on one date over twelve and a half years after the accident to track down Mr. Kirwan, if indeed that is his correct name. There is no evidence before the court to suggest that the position would have been any different if the same enquiries were conducted six months or a year after the accident. There is certainly no evidence to indicate that the lapse of time in this case caused or contributed to the defendants' apparent inability to trace Mr. Kirwan. Given his stated occupation, it might not be unreasonable to assume that he may be a gentleman who moves around quite a bit and indeed a person who might be likely to have a social media profile or some detectable digital footprint. It has been commonplace for many years now for investigators seeking to obtain information about individuals to conduct internet searches including on social media for any relevant information in relation to the individual concerned.

13. One would have thought that a person describing himself as a chef and musician would be precisely the sort of person who would wish to have a media profile readily accessible by the public. It is therefore somewhat surprising that there is no evidence before the court of any of these avenues having been explored by the defendants.

14. It seems to me therefore that the evidence put before the court by the defendants in relation to the availability of this witness falls far short of establishing as a matter of probability that he will not in fact be available to the defendants for the trial, or if he is not, that that has anything to do with any putative delays on the part of the plaintiff.

15. The law in relation to applications of this nature is by now so well rehearsed in so many cases that I do believe it is necessary for me to restate it in any detail for the purposes of this judgment. Suffice it to say that the onus is on the defendants to establish that the delay on the part of the plaintiff has been both inordinate and inexcusable and if such is established, that the balance of justice requires that the case be dismissed.

16. In relation to the first issue, counsel for the plaintiff has conceded that the delays that have occurred are inordinate. There is a dispute as to whether they have been inexcusable and there is lengthy evidence from the plaintiff's solicitors concerning the difficulties he has encountered in trying to take instructions from the plaintiff and her parents, who are people of very limited means, and who cannot speak English. This has involved the intervention of translators, obviously at a not insignificant cost although in fairness to the defendants, this is not really relied upon by the plaintiffs as excusing the delay. The bulk of the delay appears to have occurred, in more recent times at any rate, as a result of an endeavour on the part of the plaintiff to obtain expert evidence supportive of the plaintiff's case. There have been several litigation engineers involved in the case who were obviously not in a position to assist and this ultimately led to the search for an appropriate expert in the U.K. who has finally delivered a report apparently as recently as September 2017.

17. At the end of the day, I do not think any of these matters can excuse a delay of almost 13 years between the date of the accident and the issuing of the motion now before the court on the 16th August, 2017. I am therefore prepared to hold that the delay that has occurred in this case is both inordinate and inexcusable.

18. I must therefore turn to the balance of justice. In this regard, it was strongly urged on the court by the solicitor for the defendants that the main prejudice suffered by his clients is the unavailability of Mr. Kirwan although he also places emphasis on the fact that the recollection of other witnesses in this case has to be very significantly impaired by virtue of the sheer passage of time. I do not doubt that the authorities make clear that such a lapse of time in itself must be assumed to be prejudicial to the defendants but that prejudice has to be weighed against the undoubted prejudice to the plaintiff if she loses her cause of action which in terms

of damages is potentially very substantial indeed.

19. The authorities demonstrate that it is appropriate to examine the conduct of not only the plaintiff but also the defendants in applications of this nature. In that regard, I am struck by the fact that up until March 2017, the defendants were willing to proceed to trial in this matter irrespective of the fact that by then, they appear to have made no attempt to contact Mr. Kirwan. It is notable that the subsequent attempt came shortly before the issuing of this motion. I must also have regard to the fact that the evidence of the witnesses to be relied upon by the defendants are by and large all contained in contemporaneous statements which are available to those witnesses to refresh their memory. There is also the fact that Mr. Kirwan was by no means the only eye witness to the accident.

20. It also has to be said that this is not a case where there is going to be a very serious conflict of fact between witnesses on both sides which the court will be required to resolve at trial and could obviously only do so if the evidence of those witnesses were to be available. In fact, it seems to me that the evidence concerning the circumstances of this accident are largely uncontroversial. There is no real dispute about what happened nor could there be in circumstances where the plaintiff has no memory of the event. In those circumstances, it seems to me that the non availability of Mr. Kirwan, even were it proven and it did have anything to do with the delays in this case, works only a relatively modest prejudice to the defendants.

21. To a degree, the defendants themselves appear to have accepted this as recently as March of 2017 in circumstances where they indicated to the plaintiff's solicitors a willingness to proceed with the case without at that stage knowing whether Mr. Kirwan was or was not available to them.

22. It seems to me that the authorities also indicate that in considering where the justice of the case lies, I should also have regard to the fact that by virtue of her injury, the plaintiff is personally blameless in relation to any issues of delay and also to the fact that the claim if successful would be a very significant one.

23. In all the circumstances therefore, I am satisfied that the justice of the case requires that the plaintiff should be permitted to proceed. However given the delays that have occurred to date and in order to ensure that there is no further delay, I propose to ensure by way of case management that the matter now proceeds to an expeditious trial of the preliminary liability issue. Accordingly I will dismiss the defendants' application and adjourn the matter for mention into the case management list in Dublin on the 18th April, 2018.