THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 52

Record No. 2016/226

Record No. 2016/227

Peart J.
Sheehan J.
Hogan J.

BETWEEN/

FIDELMA GAFFNEY

PLAINTIFFS /

APPELLANT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA , THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS /

RESPONDENTS

BETWEEN/

OWEN GAFFNEY

PLAINTIFFS /

APPELLANT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA , THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS /

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of February 2017

1. The plaintiffs (and appellants) in these proceedings are mother and son respectively. They both reside at 67 Basin St. Flats, Dublin 8. On the 17th February 2008 the plaintiffs were asleep in the house when they allege a number of Gardaí forcibly entered the dwelling, apparently without a valid warrant, and assaulted both plaintiffs. In particular, it is alleged that the Gardaí woke Mr. Owen Gaffney (then an 18 year old) and struck him on several occasions with batons while his mother, Ms. Fidelma Gaffney, was restrained and locked in a bathroom as all of this was happening.

2. Arising from this incident (or alleged incident) the present proceedings were issued on 13th May 2010. In those proceedings the plaintiffs allege negligence, assault and trespass, false imprisonment and damages for breaches of various constitutional rights. A statement of claim was delivered on 5th July 2010 and a defence followed on 4th April 2011.

3. In addition to these proceedings, however, a criminal prosecution was commenced against the members of the Force alleged to have participated in this incident following the lodging of an earlier complaint by the plaintiffs with the Garda Síochána Ombudsman Commission ("GSOC"). Following the completion of the GSOC investigation and the submission of a file to the prosecution authorities, the Director of Public Prosecutions directed that the Gardaí in question should be prosecuted. The first trial proceeded in the Circuit Court in October 2010 when the trial apparently collapsed. The accused Gardaí were acquitted by a jury following a re-trial in July 2011.

4. Returning to the civil proceedings, the plaintiff's solicitor made a request for discovery in March 2012 seeking voluntary discovery of the book of evidence and other matters arising from the criminal prosecution. The Chief State Solicitor's Office responded on 28th May 2012 informing them that the documents sought were held by both GSOC and the DPP. This discovery request was not progressed and no further steps had been taken by either plaintiff in those proceedings until the defendants issued a motion on 23rd November 2015 seeking to have both sets of proceedings struck out on the grounds of undue delay.

5. In an *ex tempore* judgment delivered on 26th April 2016 O'Regan J. acceded to this request and struck out both actions. The plaintiffs have now appealed to this Court against the order striking out the proceedings.

The judgment of the High Court

6. In her judgment O'Regan J. observed that the most relevant authority was perhaps the decision of this Court in *Gorman v. Minister for Finance* [2015] IECA. She then said:

> "It is clear in these cases it will be nine years between the injury and the trial and I note from Paragraph 1.1.3 of Delaney and McGrath the case of Collins is referred to and the Court said in that case nobody should have to wait ten years to clear their name. While the delay in this case is not ten years I believe a delay of nine years is a very significant delay between the date of the injury and the date of the trial. In the O'Gorman case there was an assertion made against the defendants that they were tardy and they were culpable for some of the delay. I note it is suggested by counsel on behalf of the plaintiffs there is no prejudice here however I feel litigation must be conducted in a timely fashion and I am conscious of Article 40.3.2 of the Constitution and that this is a reputation case. The ECHR is also applicable in that it is for the courts to ensure that litigation is concluded in a timely fashion. There is nothing to indicate an excuse in this case for the delay. The defendants in this case have not done anything to excuse the delay on the part of the plaintiff and in my view no issue arises against the Defendants for not moving until now. In the O'Gorman case Ms. Justice Irvine outlines in her decision that in her view it will be of very little assistance to a witness to have made statement when a manner comes on for trial after many year. While there was an earlier hearing in Gorman in relation to the delay, I am afraid in this case the delay is so close to the ten year referred to in the O'Gorman case that in my view the cases should be dismissed. I am acceding to the defendants' application in both cases."

Undue delay: the modern approach

7. Over the last decade or so the courts have become increasingly conscious of the adverse consequences for both the litigants and the legal system of what Hardiman J. memorably described as a culture of "almost endless indulgence" on the part of a minority of dilatory litigants: see *Gilroy v. Flynn* [2004] IEHC 98, [2005] 1 I.L.R.M. 290. Part of this has come about through the influence of Article 6(1) ECHR and the concomitant duty of the courts of the Contracting States to ensure that a hearing is had within a reasonable time: see, *e.g.*, the judgment of the European Court of Human Rights in *MacFarlane v. Ireland* [2010] IEHC 1272.

8. In addition, however, the courts have also stressed the nature of relevant constitutional principles which they are obliged themselves to uphold, a point which a series of judgments of this Court have consistently emphasised. Quite apart from the inherent unfairness of any procedure which facilitated or tolerated very stale claims (a point which Henchy J. stressed as far back as 1984 in *Ó Domhnaill v. Merrick* [1984] I.R. 151, 157-158), the judicial obligation contained in Article 34.1 to administer justice presupposes "that the court itself will strive to ensure that litigation is conducted in a timely fashion": see *Millerick v. Minister for Finance* [2016] IECA 206, *per* Irvine J. In a judgment delivered a year earlier, *Gorman v. Minister for Finance* [2015] IECA 41, the same judge had also stressed the interaction of both Article 34.1 and the protection of a good name in Article 40.3.2:

> "If, as Henchy J. stated in *O'Domhnaill*, justice is put to the hazard as a result of undue and excessive delay, how then can the courts fulfil their constitutional mandate under Article 34.1? Moreover, where, as in the present case, the right to a good name of a number of members of An Garda Síochána has been put at issue by the plaintiff, the effective protection of that right as guaranteed by Article 40.3.2 requires that such claims be adjudicated upon within a reasonable time."

9. While it is probably not necessary in the context of these proceedings to rehearse the extensive case-law dealing with the undue delay, the conventional starting place in motions to dismiss of this kind is the three-prong test articulated by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, namely:

> (i) whether the delay has been inordinate;
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> (ii) if so, whether such delay is excusable; and
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> (iii) even if the delay has been inordinate and inexcusable, the court must nonetheless consider the balance of justice.

10. As it happens, as I pointed out as a judge of the High Court in *Donnellan v. Westport (Textiles) Ltd.* [2011] IEHC 11, there are really two strands to the *jurisprudence* dealing with undue delay in civil litigation. There is, on the one hand, the line of case-law deriving from the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151. This line of case-law stresses the inherent duty of the courts arising from the Constitution to put an end to stale claims in order to ensure the effective administration of justice and basic fairness of procedures and (especially in more recent years since the enactment of the European Court of Human Rights Act 2003) in order to secure compliance with the requirements of Article 6 ECHR.

11. The other line of authority derives originally from the judgment of Finlay P. in Rainsford *v. Limerick Corporation* [1995] 2 I.L.R.M. 561, but finds its full exposition in the seminal judgment of the Supreme Court in *Primor plc*. In *McBrearty v. North Western Health Board* [2010] IESC 27 the Supreme Court confirmed the primacy of the *Primor* test, although the judgment of Geoghegan J. also makes it plain that there are, in fact, two separate - albeit overlapping - strands of *jurisprudence* in this area, one the *Primor* three prong test and the other the inherent jurisdiction test. The former test tends to focus on potential injustice to a litigant while the latter test tends to focus on gross delay and the inability of the courts to discharge their constitutional mandate to administer justice as required by Article 34.1 of the Constitution.

The application of these principles to the present case

12. It is against this general background that the delay in the present proceedings falls to be considered. It is true that a delay of some three and a half years in which there was no activity in respect of the proceedings – *i.e.*, from the date of the reply to the discovery request in May 2012 to the issue of the notice of motion in November 2015 – is *prima facie* excessive and inordinate. Indeed, counsel for the plaintiffs did not strongly press to the contrary.

13. At the same time, the overall delay in the present case – while most undesirable - is not in itself so great that the capacity of the courts to render justice is wholly compromised. The present case is thus a far cry from the quite special facts of *Donnellan* where the High Court was required to deal in 2011 with events which were said to have taken place as far back as 1973. In contrast, therefore, to many other cases dealing with undue delay, there was, moreover, one single isolated period of delay. This is in contrast to the position in both *Collins v. Minister for Finance* [2015] IECA 27 and *Gorman v. Minister for Finance* [2015] IECA 27 where in both cases there were a myriad of delays stretching over 10 years.

14. As O'Regan J. herself correctly noted, perhaps the case with the closest similarity to the present one is the judgment of this Court in *Gorman*. In *Gorman* the plaintiff alleged that in January 2001 he had been assaulted by members of An Garda Síochána. Proceedings were duly commenced and continued in a slightly leisurely fashion, with the last event being the delivery of third party discovery in May 2006. Thereafter nothing happened until October 2011, when the defendants refused to consent to a re-instatement of a notice of trial and when they in turn issued a notice to dismiss for want of prosecution. In the High Court, Hedigan J. struck out the proceedings and that decision was upheld by this Court. It may be noted that the delay in that case between the last

event in May 2011 and the attempted re-instatement of the notice of trial (October 2011) was 5 years and five months and was in respect of an alleged event which happened 10 years and nine months previously.

15. *Collins* was also a rather similar case where the plaintiff alleged that she had been subjected to a false arrest in 2001 under the Misuse of Drugs Acts and an unlawful internal examination by a medical practitioner acting on behalf of An Garda Síochána. Again, the proceedings had proceeded in a very leisurely fashion, so that even by 2012 the matter had not been set down for trial at which point a second notice to dismiss for want of prosecution issued. The defendants had previously endeavoured in 2009 to have the proceedings struck out. While Quirke J. agreed that the delays had been inordinate and inexcusable, he nonetheless effectively gave the plaintiff one last chance.

16. After encountering further delays on the part of the plaintiff, the defendants then brought a further strike out motion in 2012. That second motion to dismiss for want of prosecution was issued in May 2012, *i.e.*, 11 years and four months after the alleged incident and after repeated delays on the part of the plaintiff.

17. While Cross J. had refused to strike out the proceedings on the grounds of undue delay, that decision was in turn reversed by a decision of this Court. In her judgment Irvine J. first held that the delay was inordinate and inexcusable, thus satisfying the first two limbs of the *Primor* test (*Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459). She then went on to consider the third limb of that test, namely, the balance of justice. She noted that the medical practitioner who (it was alleged) had conducted the unlawful medical examination had died in 2007, so that it was clear that the defendants had suffered prejudice by reason of the delay.

18. Irvine J. then concluded her judgment by observing:

> "Finally, in considering where the balance of justice lies in this case, it is important to recognise that in dismissing a claim such as the present one the court is, in effect, revoking the plaintiff's constitutional right of access to the courts. However, that is not an unqualified right and is one which must be considered against the backdrop of the other competing rights in the case, namely; the right of the defendants to protect their good name as is their entitlement under Article 40.3.2 and the court's own obligation to administer justice in a fair and timely manner as is to be inferred from Article 34.1. Nobody against whom serious allegations of the nature at the heart of these proceedings are made, particularly where their professional reputation is at stake, should have to wait 10 or more years before being afforded opportunity to clear their good name. Neither should they have to do so in circumstances where a court is satisfied that a fair trial and a just outcome can no longer be assured."

19. This was a passage which quite understandably weighed heavily with the trial judge. She was quite correct to emphasise the fact that these claims involved serious allegations of wrong-doing meant that the courts were under a particular duty to ensure that the claims were heard with particular expedition if the constitutional rights of the individual Gardaí to their good name were to be upheld in a meaningful fashion. In addition to the judgment in Collins, this Court has frequently stressed the importance of this particular consideration if "the substance and reality of that express constitutional guarantee" in Article 40.3.2 is not to be undermined: see, *e.g., Tanner v. O'Donovan* [2015] IECA 24.

20. In the present case, however, while the delays were unacceptable, the overall delay between the incident in question (February 2008) and the issue of the notice of motion seeking to dismiss for want of prosecution (November 2015) was nonetheless still well less than 8 years. Contrary to what O'Regan J. seemed to think, the delays in the present case – while excessive and inexcusable – were nonetheless comfortably less than the repeated delays in either *Collins* or *Gorman*.

21. It is true that in *Millerick v. Minister for Finance* [2016] IECA 206 this Court struck out a personal injuries case against one of the defendants where the delays were not dissimilar to the present one. But even in *Millerick* the motion to dismiss was issued on what was virtually the 8th anniversary of the alleged accident and over 4 years and two months had elapsed since the plaintiff had taken any step in the proceedings. The present case must be regarded as being just marginally on the other side of the line in terms of the delay.

22. There are also some further special features to the present case which serve to distinguish it from *Millerick*. First, unlike any of the recent undue delay cases, the key witnesses have already given evidence in respect of the February 2008 incident in two separate criminal trials in the Circuit Court in October 2010 and July 2011. It is, accordingly, hard to see how any civil litigation could realistically have been disposed of prior to the conclusion of those proceedings, so that the delay up to July 2011 was more or less inevitable.

23. Second, it must also be presumed that a transcript of these trials is either available or can be obtained without too much difficulty. The very act of preparing for these trials will have served to refresh the memories of the witnesses and the defendants will also presumably have access to the plaintiffs' statements contained in the original book of evidence. All of this will serve to mitigate the potential prejudice in terms of the general loss of memory and familiarity with the detail of events which is an inevitable feature of lengthy delays in the civil litigation process.

24. Third, it is also striking that no specific item of prejudice has been identified by the defendants. In this context it should be noted that, as Irvine J. observed in *Millerick*, even modest prejudice can be sufficient to tip the balance on the third limb of the *Primor* test. It is, of course, true that, as I pointed out in Donnellan, the Supreme Court's decision in *McBrearty* expressly confirmed that the Primor principles were not to be regarded as exclusive or all-encompassing and, second, that the Court's constitutionally derived inherent jurisdiction could be exercised even though some elements of the *Primor* test had not been established. I then continued by stressing that such cases would have to be exceptional:

> "If this is correct, then it follows that in an appropriate case this Court can strike out proceedings, even though the third limb of the *Primor* test might not have been established, where, for example, no specific prejudice to the defendants has been established. ….Of course, such cases would have to be exceptional. But this is surely an exceptional case where the delay between the events complained of in 1973-1974 and (even assuming that the case could come to trial in this calendar year) a hearing date in 2011 is simply so great that this court can no longer fulfil its own constitutional mandate contained in Article 34.1, namely to administer justice."

25. Even allowing for the extraordinary facts of *Donnellan*, it cannot be said that the delays here were so gross or exceptional that the Court should take the step of striking out the proceedings by reference to the inherent jurisdiction identified by the Supreme Court in cases such as *Ó Domhnaill* and *McBrearty*, even in the absence of any established or even presumed prejudice. Yet, this, in effect is what the Court has been invited to do.

26. Fourth, it must also be acknowledged that one of the plaintiffs was himself in prison up to December 2011. The other is a recovering heroin addict who suffered from depression. While viewed objectively neither of these factors can properly be regarded as excusing in themselves, they should nonetheless be weighed in the overall balance in assessing the reasons for the delay, just as, for example, as in *McLoughlin v. Garvey* [2015] IECA 80 where the fact that the plaintiff's time and attention was consumed in attending for several years to her very seriously ill child was itself regarded as such a factor and, indeed, was actually regarded as an excusing factor

Conclusions

27. In summary, therefore, I believe that the balance of justice favours permitting the plaintiffs to proceed with their respective actions and, to that extent, therefore I would allow these appeals. There is, however, no doubt but, that as O'Regan J. observed, the delay of some three years and five months between May 2012 and November 2015 on the part of these plaintiffs was inordinate and inexcusable. It is only because of the absence of any specific prejudice to the defendants, the fact there have already been two criminal trials arising from this alleged incident, and taken together with the fact that the overall delays in the present proceedings have not been as long as some of the other delays which manifested themselves in other cases such as *Collins* and *Gorman* that I have come to the view that this is not a case where the third limb of the *Primor* test has been satisfied.

28. It should be clear, however, that there is absolutely no room at all for any further delay. To that extent, therefore, I would propose that the Court allow the appeal and would make the following orders:

> (i) the plaintiffs must serve a notice of intention to proceed within two weeks of the perfection of the Court's order;
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> (ii) at the expiration of the period of one month envisaged by Ord. 122, r. 11 following the service of the notice of an intention to proceed, the plaintiffs must within 21 days of the expiration of that notice period then issue and serve a motion returnable before the judge having charge of the jury list in the High Court within one further month of that date seeking directions as to an early trial and for case management of the proceedings (including any necessary applications for discovery) so that the present proceedings can proceed without any further delay to a speedy trial in the High Court.

29. In the event that the plaintiffs do not comply with these requirements, or if there is any further avoidable delay on their part, they may then anticipate that the defendants will then issue a second motion to dismiss the proceedings for want of prosecution to which it is hard to see they would have any effective response.