Neutral Citation: [2016] IEHC 510

THE HIGH COURT

[2007 No. 1679 P.]

BETWEEN

PAT REYNOLDS & SONS LIMITED

PLAINTIFF

AND

ACC BANK PLC, T&F GILMORE LIMITED AND

DAIMLER CHRYSLER AG

DEFENDANTS

JUDGMENT of Mr. Justice White delivered on the 22nd of July, 2016

1. The third defendant issued a motion on 30th July, 2015, returnable for 12th October, 2015, seeking an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim for want of prosecution or in the alternative for delay. The second defendant issued a motion dated 21st September, 2015, returnable for 12th October, 2015, seeking an order dismissing the plaintiff's claim for want of prosecution and also on the grounds that the plaintiff had been guilty of inordinate and inexcusable delay.

2. The first defendant did not issue a motion but at the hearing of the motions of the third and second defendants, counsel sought a right of audience. The court directed the first defendant to issue a motion and abridged the time. A motion was issued on 25th February, 2016, returnable for that afternoon and the court heard submissions from the first defendant in support of it's motion.

3. The court considered the following affidavits,

- affidavit of Victoria Riordan, Solicitor for the third defendant sworn 30th July, 2015, together with exhibits.
- affidavit of Caroline McErlean, Solicitor for the first defendant sworn on 23rd September, 2015, in support of the application of the third defendant,
- affidavit of Ken Gilmore, Director of the second defendant company sworn on 14th September, 2015,
- affidavit of Frances X. Burke, Solicitor for the plaintiff sworn on 8th October, 2015, together with exhibits.
- further affidavit of Victoria Riordan sworn on 20th October, 2015,
- Supplemental affidavit of Laurence Ennis, Solicitor for the second defendant sworn on 21st October, 2015,
- Supplemental affidavit of Frances X. Burke Solicitor for the plaintiff, sworn on 19th February, 2016, together with exhibits.

4. The substantive proceedings were issued on 5th March, 2007, and claimed a contribution pursuant to sections 22 and 31 of the Civil Liability Act 1961, including a contribution amounting to a complete indemnity in respect of damages and costs paid by the plaintiff to one Vincent McBennett arising from an accident which occurred on 14th February, 2005.

5. The proceedings alleged that the accident was caused or contributed to by the negligence and breach of contract of the first defendant, its servants or agents and by the negligence and breach of contract by the second defendant, its servants or agents and by breach of statutory duty and breach of implied warranty by the third defendant, its servants or agents.

6. The essence of the claim was set out in the statement of claim delivered on 15th June, 2007, at paras. 7, 8 and 9, which stated:-

> (7) On or about 14th day of February, 2005, at or about Main Street, Castleblayney, Co. Monaghan, one Vincent McBennett was crossing the public highway and he was injured by the said lorry being driven by a servant or agent of the plaintiff, one Oliver Delaney.
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> (8) The said Vincent McBennett suffered severe injuries and both of his legs had to be amputated below the knee.
>
> (9) The accident was caused by the fact that Oliver Delaney did not see Vincent McBennett because of the absence of a proper Cyclops mirror on the said lorry manufactured by the third named defendant and leased to the plaintiff by the first named defendant and supplied to the plaintiff by the second named defendant.

7. The vehicle, the subject matter of these proceedings, is a Mercedes lorry model 2540LS Registration No. 00-MH-10244. The vehicle was manufactured by the third defendant in 2000, sourced by the plaintiff and purchased to order by the second defendant, second hand from Isaac Agnew in Northern Ireland, in 2003. The vehicle at the time of sale to the plaintiff had covered approximately 200,000km.

8. The road traffic accident involving the vehicle occurred on 14th February, 2005, on Main Street, Castleblayney, Co. Monaghan. The driver Oliver Delaney was turning right from the main street in Castleblayney towards the Dublin Road and collided with Mr. Vincent McBennett who was crossing the road. Mr. McBennett suffered serious personal injuries and was severely disabled and wheelchair bound as a result of the injuries received in the road traffic accident. He was an elderly man at the date of the accident aged in his 70s. He made an application to PIAB on 20th May, 2005, and had not issued proceedings when his claim was settled on 25th January, 2006. Subsequently, an O'Byrne letter was sent to the defendants on 9th November, 2006.

9. The legal principles to be considered as to the inherent jurisdiction of the court to dismiss proceedings on the grounds of inordinate and inexcusable delay have been very helpfully summarised in a recent Court of Appeal decision *McNamee v. Boyce* [2016] IECA 19.

10. The test is that laid down in *Primor plc v. Oliver Freaney and Company* [1996] 2 I.R. 459.

The Principles to be Considered
11. Irvine J. stated:-

> "29. The rationale which underpins the inherent jurisdiction of the court to dismiss proceedings on the grounds of inordinate and inexcusable delay was explained by Diplock L.J. in the following simple terms in *Allen v. Sir Alfred McAlpine and Sons Limited* [1968] 2 Q.B. 229 at p. 255 where he stated:-
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> > 'The chances of the court being able to find what really happened are progressively reduced as time goes on. This puts justice to the hazard.'
>
> 30. That said, there are two slightly differing lines of jurisprudence which deal with the circumstances in which a court may consider dismissing an action on the grounds of delay. The first of these emanates from the decision of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and which was later expanded upon by Hamilton C.J. in his judgment in *Primor* . The *Primor* decision requires the court to engage with a three strand test. The nature of this test is comprehensively set out by Hamilton C.J. at pp 475 to 476 of his judgment where he states as follows:-
>
> > 'The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:
> >
> > (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
> >
> > (b) it must, in the first instance, be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
> >
> > (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
> >
> > (d) in considering this latter obligation the court is entitled to take into consideration and have regard to:
> >
> > > (i) the implied constitutional principles of basic fairness of procedures,
> > >
> > > (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
> > >
> > > (iii) any delay on the part of the defendant – because litigation is a two-party operation, the conduct of both parties should be looked at,
> > >
> > > (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
> > >
> > > (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
> > >
> > > (vi) whether the delay gives rise to substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
>
> (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to defendant's reputation and business."

31. As can be seen from the above, the court must first decide if there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting their action. It is only if the court so finds that it is required to decide whether the balance of justice rests in favour of dismissing the case or in allowing it to proceed. When considering this issue the court must carry out a balancing exercise based on a consideration of all of the relevant circumstances and in particular the factors identified in Primor and to which I have just referred. Prejudice resulting in unfairness to the defendant, or the risk that a fair hearing is not possible, are just two such factors. Further, the court must have regard to the actions of the defendant and their contribution to or acquiescence in the delay.

32. The other strand of jurisprudence emanates from the *O'Domhnaill* decision whereby the court, when deciding whether or not to dismiss a claim on the grounds of delay, is not required to find the plaintiff guilty of inordinate or inexcusable delay but merely must be satisfied that it is in the interests of justice to dismiss the case because the passage of time has resulted in a real risk of an unfair trial or unjust result. In order to dismiss proceedings in the absence of inordinate and inexcusable delay, the defendant must establish a somewhat higher level of potential prejudice than that required under the third leg of the Primor test and must be in a position to demonstrate that in defending the action he would be placed under an unfair burden. In *O'Domhnaill* Henchy J. remarked, in the course of his judgment at p. 158 that:

> 'While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985 of a claim for damages for personal injuries sustained in a road traffic accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant who has not in any material or substantial way contributed to the delay should be freed from the palpable unfairness of such a trial.'

33. In *Stephens v. Flynn* [2008] 4 I.R. 31, Kearns J. concluded that a defendant need only establish moderate prejudice

arising from delay as justification for dismissing the proceedings on the third leg of the *Primor* test. In the following brief passage at p. 38 para. 22, he summarised the findings that had been made by Clarke J. in the court below in the following manner:-

> 'In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the defendant in exercising his right to apply for the dismissal of the action for want of prosecution.'

34. In my own decision in *Cassidy* I set out in some small degree of detail the difference between the *Primor* and *O'Domhnaill* tests and in doing so stated why I considered it appropriate that the burden on a defendant who seeks to have the claim against them dismissed in the absence of any inordinate or inexcusable delay on the part of the plaintiff should rightly have to establish nothing short of a real risk of an unfair trial or unjust result. At para. 37 I stated as follows:-

> 'Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill* jurisprudence . If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* Test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceeding if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend a claim?'

35. Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the *Primor* test.

36. Yet another principle which has emerged from many recent judgments of the superior courts dealing with the issue of delay is that in considering whether or not the post commencement delay has been inordinate, the court may have regard to any significant delay prior to the issue of the proceedings: (see *Cahalane and Another v. Revenue Commissioners and Others* [2010] IEHC 95 and *McBrearthy v. North Western Health Board* [2010] IESC 27). These decisions support the proposition that where a plaintiff waits until relatively close to the end of the limitation period prior to issuing proceedings that they are then under a special obligation to proceed with expedition once the proceedings have commenced.

37. In a number of recent decisions (see Hogan J. in *Quinn v. Faulkner Trading as Faulkners Garage and Another* [2011] IEHC 103), the court has emphasised the constitutional imperative to end stale claims so as to ensure the effective administration of justice and basic fairness of procedures. The court itself, by reason of the obligations created by Article 34.1 of the Constitution, is obliged to ensure that proceedings are dealt with in an expeditious manner. Indeed in *Quinn* Hogan J. criticised the court's prior tolerance of inactivity on the part of litigants when he stated at para. 29 as follows:-

> 'While as Charleton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which lead to a culture of almost 'endless indulgence' towards delays led in turn to a situation where inordinate delay was all too common: see, e.g. the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98 , [2005] ILRM 209 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd* [2010] IEHC 465 .'"

12. It is appropriate to consider the specific delay attributed by the Court to the plaintiff in the conduct of the litigation, and particularly because it is a contribution action pursuant to the Civil Liability Act 1961, to attribute the delay from the date of settlement of the claim against the Plaintiff on the 25th January 2006. There were considerably more pleadings involving the Plaintiff and the third defendant, and I will deal with those first.

- 25th January, 2006 – date of settlement of Mr. McBennett's action to

17th April, 2007 – date of service on third defendant, - one year and three months

- 17th May, 2007 – entry of appearance by third defendant to 15th June, 2007, service of the statement of claim, - one month

- 14th April, 2008 – defence of third defendant to 28th May, 2008, replies to particulars by plaintiff, - one month

- 1st September, 2008 – further notice of particulars of third defendant to 16th October, 2008, replies to particulars, - one month

- 16th October, 2008 – replies to particulars to 11th February, 2009, motion for discovery of plaintiff,- four months

- Swearing and filing of third defendant's affidavit of discovery – 16th July, 2009 to 26th October, 2011, third defendant's motion to amend defence, - two years and three months

- 16th January, 2012 – filing of amended defence to 10th October, 2012, plaintiff's reply to defence, - ten months

- 10th October, 2012 – plaintiff's reply to defence - to 30th July, 2015, the plaintiff's notice of intention to proceed and third defendants motion to dismiss - two years and nine months

13. The court attributes a total delay to the plaintiff in the conduct of litigation against the third defendant of seven years and eight months.

14. The delay in respect of the pleadings against the first and second defendants was greater. There were no relevant pleadings after the delivery of their respective defences. The first Defendant delivered its defence on the 24th July 2007, and the second Defendant delivered its defence on the 4th of July 2007. Accordingly giving the Plaintiff the benefit of the time from the date of issue of the Plenary Summons on 5th March 2007 to delivery of defences I attribute a delay to the Plaintiff against the first and second defendants of 9 years. The discovery motion between the second and third defendants is not relevant to the delay to be attributed to the Plaintiff.

15. The delay is inordinate.

16. Mr. Frances X. Burke, the solicitor for the plaintiff, in his affidavits of 8th October, 2015, and 19th February, 2016. sets out at paras 15, 16, 17, 18, of the first affidavit and paras 8, 9, 1011, 12,13,and 14 of his second affidavit, the reasons for the delay.

17. The court accepts that the plaintiff's solicitor, Mr. Burke, has at all times acted *bona fide* and that these are complex proceedings and required extensive research and investigation, however, the averments in his affidavits lack specificity. He has not set out the specific research carried out or the timeline for it, not has he exhibited any correspondence to convince the court that the delay could be excused.

18. I cannot see how the amended defence of the third defendant delivered on 16th January 2012, would have any impact on the primary issue of negligence alleged against the defendants, the failure to have appropriate mirrors fitted to the vehicle. The amended defence contained and additional plea of caveat emptor because the vehicle was bought by the Plaintiff second hand. The Plaintiff has claimed that this prompted further investigations.

19. I do not consider it appropriate to delay while awaiting the decision of any Superior Court required for legal precedent.

20. The court finds that the delay was inexcusable.

21. In exercising its discretion, the court has to consider a number of factors:-

(i) general prejudice;

(ii) specific prejudice;

22. The court also considers it relevant to take into consideration the nature of these proceedings and also some other factors in respect of the plaintiff's knowledge.

23. The court is entitled to infer some general prejudice to the defendants in these proceedings due to the delay. The accident occurred on 14th February, 2005, ten years and five months prior to the issue of the third defendant's motion to dismiss. The court is entitled to imply some restriction on the ability of relevant witnesses to recall events exactly at such a distance in time.

24. The injured party, Mr. Vincent McBennett, died on 21st April, 2011. There is controversy between the parties whether his absence as a witness causes any specific prejudice. The plaintiff argues that the other witnesses to the accident who are referred to in the garda abstract are cogent and clear as to the circumstances of the accident and that Mr. McBennett, if he were alive, would not be in a position to advance the matter any further. The Plaintiff goes as far as asserting that the circumstances of the accident and its causes cannot be disputed. The defendants disagree.

25. I do not agree that the death of Mr. McBennett causes no prejudice to the defendants. He was a relevant witness, his path to contact with the vehicle and his state of alertness are relevant and material to the determination of liability. The extent of the prejudice, if any, is very difficult to quantify. I certainly cannot rule it out.

26. It is also relevant that this is a contribution claim. The plaintiff through his insurers without any proceedings issued or the present defendants being joined as third parties settled Mr McBennetts claim thus depriving the opportunity to the defendants to participate in the defence and settlement of that claim.

27. If proceedings had issued, the Plaintiff would have had an obligation under Section 27(1)(b) of the Civil Liability Act 1961 to issue a third party notice against any contributor "as soon as reasonably possible"

28. In The Board of Governors of St Laurences Hospital v Staunton [1990] 2 I.R. 31 Finlay CJ (Hederman and McCarthy JJ agreeing) it was held by the Supreme Court that section 27(1)(b) created a definite obligation on a concurrent wrongdoer who is sued for damages and wishes to make a claim for contribution against a party not already a party to the action to do so as soon as is reasonably possible

29. I accept the third defendant's submissions that there was an equivalent obligation upon the plaintiff after settlement of the claim to commence its own proceedings as soon as reasonably possible and to prosecute such proceedings with expedition. In Ericson v Moloney Enterprises 2016 IEHC 66 Gilligan J in an action where he had found that a Third Party engineer was deprived of the opportunity to participate in the defence and settlement of the defendants case, having placed great emphasis on the prejudice caused by this stated "There would not be, in the particular circumstances that pertain, a fair trial within a reasonable period of time"

30. In addition, the plaintiff was aware of the age of Mr. McBennett and the serious injuries he suffered and also as the purchaser of the vehicle, knew it was acquired second hand in 2003 and manufactured in 2000. Because of this knowledge, there was a duty on the plaintiff to proceed with expedition. The fact that the allegation of negligence was that a Cyclops mirror should have been retro fitted, does not exclude the possible relevance to the Defendants of the date of manufacture of the vehicle and that it was a second hand purchase by the Plaintiff.

31. The Plaintiff alleges acquiescence on the part of the Defendants in particular in not moving sooner to apply for dismissal and also the second Defendant consenting to the case being set down for trial.

32. In Framus v CRH plc and others 2012 IEHC 316 Cooke J distinguished between what he termed active and culpable delay of a defendant and inactive conduct.

33. He stated

"When a proceeding has stalled at a point where the next step to be taken in a case lies with a defendant, that party has a greater burden of explanation to discharge when seeking to have the action dismissed as compared with the case where failure to proceed lies entirely with a plaintiff. Furthermore in the latter situation a defendant has a delicate judgment to make. If the motion to dismiss is brought too soon it may fail and bring on a case, which might otherwise have been abandoned by the plaintiff. The action or inaction of a defendant is, as Clarke J in the High Court held in AIBP, a factor to be taken into account but one to which less weight will be attached where the defendant has merely let the matter lie and has not contributed to the delay by foot-dragging on the delivery of pleadings or other interlocutory steps."

34. The court cannot criticise the defendants for not issuing the motion to dismiss earlier as the onus was on the plaintiff to progress the claim and get it on for hearing.

35. I refer also to the supplemental affidavit of Laurence Ennis solicitor for the second defendant sworn on 21st October 2015. The court accepts his explanation as to why the second defendant initially consented to the action proceeding. The court also considers that the primary defendant in the action is the third defendant, and it would be logical and not unusual that the second defendant would have tried to keep in step with the primary defendant, who initially decided to initiate the motion to dismiss.

36. Having already decided that the delay was inordinate and inexcusable, considering the combination of factors, there is more than moderate prejudice to the Defendants, in allowing this action to proceed. The Plaintiff's claim should be dismissed.