Neutral Citation: [2013] IEHC 513

THE HIGH COURT

[2010 No. 8021 P]

BETWEEN

EAMONN MURRAY

PLAINTIFF

AND

IRISH NATIONAL INSURANCE PUBLIC LIMITED COMPANY/COMHLUCHT NA HEIREANN UM ARACHAS CUIDEACHTA PHOIBLI TEORANTA (NEW IRELAND ASSURANCE COMPANY PLC)/NEW IRELAND AND IRISH NATIONAL PENSIONS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered on the 8th November 2013

1. Introduction

The plaintiff issued these proceedings by Plenary Summons dated the 24th August 2010 arising out of the alleged failure of the first, second and third defendants to process the arbitration of his claim for an illness pension that he applied for in 1994. In his Statement of Claim dated July 2010, the plaintiff pleads that he has been pursuing a claim for an ill-health pension from the first or second defendant since 1994. He says that the issue to be arbitrated is whether the first, second or third defendants were correct in deciding that his ill-health did not constitute serious ill-health in accordance with clause 17 of the plaintiff's pension scheme. He pleads that the defendants "have engaged in an arbitration process to resolve the dispute but over a considerable number of years they have negligently ignored the plaintiff and/or misrepresented their position to him." He alleges that the defendants wrongfully failed to participate in the arbitration process and bring it to a conclusion and that that constitutes negligence, breach of contract and a variety of other torts. The plaintiff seeks reliefs that include a declaration that the first and second defendants' conduct in the arbitration is a breach of the plaintiff's employment contract, a mandatory injunction and damages.

In further and better particulars the plaintiff gave details of the allegation that the second and third defendants misrepresented their position. Although their solicitors confirmed that they were defending the arbitration proceedings and had instructed counsel, they failed to progress the arbitration despite regular communications from the plaintiff or his solicitors.

In its defence dated 11th June 2012 the first defendant raised preliminary issues, as did the second and third defendants in their defence dated 2nd November 2012, as follows, which they pleaded in similar terms:-

a) that the claim is barred by the statute of limitations

b) that the pleadings disclose no cause of action and/or that the proceedings are frivolous or vexatious

c) that the claim is an abuse of process

d) the plaintiff is estopped from litigating because he invoked the arbitration process but did not prosecute it

e) that the question in issue in the case is the subject of the arbitration, namely, whether the plaintiff is entitled to a pension

f) that the plaintiff has been guilty of inordinate and inexcusable delay.

The defences go on to traverse the plaintiff's claims.

The defendants now seek Orders, pursuant to O.19, r. 28 of the Rules of the Superior Courts and under the Court's inherent jurisdiction, striking out the plaintiff's claim. They submit that the plaintiff's proceedings ought to be struck out on the grounds that they are procedurally flawed; disclose no cause of action and / or have no reasonable prospect of success; the facts pleaded do not support the case being made against the first defendant; they are an abuse of process; the proceedings are oppressive; there has been significant delay meaning the claim is time barred and prejudice has accrued by reason of the delay.

2. Factual Background and Chronology

The plaintiff, Mr. Eamonn Murray, commenced employment with the first defendant in 1979. In 1986, he was diagnosed with Ménière's Disease but continued to work. Following a road traffic accident on the 3rd July, 1992, the symptoms of his disease became exacerbated, resulting in his being absent for 61 working days during 1992. On 8th March, 1994, the first defendant wrote to the plaintiff, stating that he was being released from his employment due to illness and being permanently unavailable to resume his duties. The first defendant further outlined in that letter that the plaintiff could apply for a pension on the grounds of ill health. The plaintiff made this application on 24th March, 1994 and ceased employment on the 31st March, 1994. The plaintiff submitted medical reports from three separate practitioners with his application for an illness pension. The first defendant, by letter dated 10th May, 1994 was not satisfied that the evidence presented was of the level required to award a pension on the grounds of ill health and refused the claim under Rule 17 of the New Ireland-Irish National Superannuation Fund.

The plaintiff sought to challenge the rejection of his pension claim by referring the matter to arbitration but that never actually happened. He delivered Points of Claim in February 2000 but nothing further took place. His solicitor wrote a series of letters between 2001 and 2005 to Beauchamps Solicitors, who had been instructed to defend the claim but he got no reply. Then the plaintiff himself wrote letters between 2005 and 2009 following the death of his then solicitor but again he failed to achieve anything.

Chronology of relevant dates

1 October 1979 Plaintiff commenced employment with first defendant

1986 Plaintiff diagnosed with Meniere's Disease

3 July 1992 Plaintiff injured in RTA. Exacerbates his condition

24 March 1994 Plaintiff applies for illness pension under Rule 17

31 March 1994 Termination of plaintiff's employment

6 April 1994 Plaintiff notified application for pension refused

30 November 1994 Offer of Arbitration under Rule 57

9 February 2000 Points of Claim served

2 February 2001 -

21 June 2005 Letters to Beauchamps Solicitors from plaintiff's solicitor

1 July 2005 –

5 November 2009 Correspondence between plaintiff and second and third defendants

24 August 2010 Issue of plenary summons

14 September 2010 Letter to first defendant serving plenary summons and Statement of Claim

28 October 2010 Appearance entered by first defendant

30 March 2011 –

27 September 2011 Defence sought from first defendant

25 October 2011 Motion for judgment in default of defence issued

26 October 2011 Change of solicitor by first defendant

1 November 2011 Notice for Particulars by first defendant

9 May 2012 Replies to particulars

14 June 2012 Defence of first defendant

17 April 2013 Motion issued and served by first defendant

3. The Affidavits
John O'Connor, Director of Irish National Insurance plc, in his affidavit sworn on 10th April, 2013 says that the company decided and notified the plaintiff by letter of 10th May, 1994 that

> "Having regard to the medical evidence and the long-term nature of the pension benefit applied for, the company is not satisfied that your ill-health is sufficiently serious and long-term to justify payment of an ill health early retirement pension."

The deponent says that the plaintiff sought to challenge the refusal by way of arbitration but he delayed for almost six years before delivering Points of Claim dated 9th February 2000. He says that it is not clear whether the plaintiff wrote to the first defendant in the period between February 2000 and August 2005 or indeed contacted the first defendant at any point. Mr O'Connor asserts that the proceedings are misconceived.

Franklin O'Sullivan, Legal and compliance officer with the second defendant, in an affidavit sworn on 1st May, 2013, also deems the declarations sought by the plaintiff as inappropriate because he failed to prosecute his arbitration proceedings and has provided no explanation for the extraordinary delay.

Mr. O'Sullivan avers that the sole premise and basis of the plaintiff's claim against the second and third defendants is that they were negligent or otherwise culpable for not engaging with or progressing the arbitration process. The plaintiff wrote five letters to Beauchamps Solicitors, acting for the second and third defendants, in the five and a half year period between February 2000 and August 2005 but did not issue proceedings until 2010.

All the defendants argue that while the plaintiff seeks damages for alleged breaches of contract, misrepresentation, breach of warranty, negligence, breach of duty and the alleged infringement of his legitimate expectations, the pleadings do not make out a case in respect of any of those titles. The plaintiff's primary concern is the refusal of the pension in 1994.

Mr. O'Sullivan further argues that the second and third defendants would be prejudiced as a consequence of the delay, as employees who are likely to be witnesses and who originally dealt with the matter, are no longer available.

The plaintiff says in reply that in essence the case concerns the defendants' failure to pay him an ill health pension to which he was entitled in or around 1994 and their ongoing misrepresentations and prevarications. He engaged in an arbitration process to try to settle his pension claim but it stalled. He has been trying to pursue the case for a long time and has been exhausted by the manner in which the defendants have dealt with him. They have disregarded him for years and now seek to block him from having his case heard due to their delay.

The arbitration never got up and running and it would be unjust, in the absence of hearing oral evidence, to determine where the fault lies. The defendants are responsible for the delay and the evidence must be heard and challenged to determine this matter. The

plaintiff argues that he was repeatedly led to believe that the arbitration would progress and, despite his efforts, was continually ignored. He further argues that if the defendants are seeking to rely on an argument that he is statute barred from bringing the within proceedings, this is a matter that they can only seek to rely on in their defences at hearing but not at this stage of the proceedings.

Mr Murray refers to a book of correspondence that he exhibits, from which he says it is clear that he has been in regular contact with the defendants throughout the years seeking to progress the matter.

4. The Submissions
The first defendant argues that the entire shareholding of the defendant was bought by Eagle Star Insurance Company (Ireland) Limited in 1997, which was subsequently purchased by Zurich Insurance Plc. Due to the significant delay and lapse of time since the plaintiff initiated his claim, scant records are available.

This defendant rejects the allegation that it delayed or failed to progress the arbitration process, noting that no allegation has been made that it is responsible for the delay between the date of the original claim in March 1994 and the delivery of the Points of Claim in February 2000. The plaintiff did not allege that the first defendant received any of the five letters which he sent to the second and third defendants between August 2000 and August 2005. Letters were also sent between the plaintiff's solicitor and the second and third defendants' solicitor between 2006 and 2009. There is no allegation that the first defendant was involved with this or was requested to do anything by the plaintiff. The first defendant further argues that more than 16 years elapsed from the time the plaintiff's pension claim was rejected to the issuing of these proceedings.

It is submitted that the circumstances of the case give the first defendant a ground in estoppel or abuse of process following the authority in *Henderson v. Henderson* (1843) 3 Hare 100. The plaintiff is attempting to litigate the subject matter of the arbitration, namely, the refusal of an illness pension, under the guise of alleged delay on the part of the defendants in progressing the arbitration, meaning therefore that the court would have to determine the validity of the plaintiff's claim before it could assess whether any damage arose.

The defendant argues that the claim must fail. The arbitration has not been discontinued and the current proceedings represent a clear abuse of the process of the Court.

The proceedings should be dismissed on the grounds of inordinate and inexcusable delay. The plaintiff was not in contact with the company between 2000 and service of the proceedings in 2010.

The court, in addition to O. 19, r. 28, also has an inherent jurisdiction to strike out proceedings which are vexatious, frivolous or bound to fail in accordance with the principles laid down in *Barry v. Buckley* [1981] IR 306. The court has authority to strike out proceedings where the pleadings disclose no cause of action and/or there is an abuse of process.

Mr. Quirke, counsel for the first defendant, submits that *Riordan v. Ireland* [2001] 4 IR 463, is authority which lays down a number of factors which the court may have regard to when deciding whether proceedings are vexatious.

The first defendant also relied on *Primor Plc v. Stokes Kennedy Crowley* and submits that it would be unjust and unfair to have to defend a case after such an extraordinary lapse of time and in circumstances where the ownership of the company has changed on two occasions, the personnel have changed and there appears to be a deficit in the documentation available. Further, the plaintiff's claim is time barred by virtue of the Statute of Limitations 1957, having failed to issue the summons within six years.

Mr Brennan, Counsel for the second and third defendants adopted the arguments of Mr Quirke and cited the points made by Mr O'Sullivan in his affidavit.

Mr. Kennedy, counsel for the plaintiff, relied on the decision of Denham J. (as she was then) in *Aer Rianta cpt v. Ryanair Ltd* [2004] 1 IR 506, where it was held that the court's jurisdiction under r. 28 is one which will be used sparingly unless it is clear that the claim will fail. The plaintiff argues that the defendants breached their duties by failing to pay him an illness pension and failing to engage in the arbitration process. There is a reasonable cause of action in which the defendants must answer why there was such ambiguity in the carrying out of the arbitration process and the interpretation of the pension scheme in respect of arbitration. The plaintiff relies on the authority in *Lawlor v. Ross* (Unreported, Supreme Court, 22nd November, 2001) where Fennelly J. held:-

> ". . . the court should be willing to assume in favour of the plaintiff that an appropriate amendment of the pleadings might save his case."

The plaintiff further submitted that the principles in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 assist his case in rebutting the defendants' motion to strike out the proceedings insofar as it held that where delay is inordinate and inexcusable, the court must consider the balance of justice. The plaintiff contends that the delay in the within proceedings is attributable to the defendants as they failed to engage in the arbitration process, despite repeated attempts by the plaintiff to correspond with them.

6. Conclusion
There is no answer to the defendants' application to dismiss this action. The arguments in support of the motion are compelling and the plaintiff's reply is an *ad misericordiam* appeal that cannot counter them.

The fact that a case is weak or unlikely to succeed or may require some amendment of pleadings is not a sufficient ground for dismissal. If the plaintiff can demonstrate a rational basis of claim that is sound in law, assuming the facts he asserts were to be established, the case cannot be dismissed. But that is not the situation here.

Mr Murray's real complaint was that he was not awarded an ill-health pension on his cessation of employment in 1994. That question is still the subject of arbitration that has never been brought to a conclusion. It was open to him to take measures under the arbitration legislation to bring about a hearing of the dispute, but he did not do that. While such process is in existence, it is not permissible for a claimant to bring parallel proceedings in this court. It may be that the only course open to a disappointed applicant is arbitration under the terms of the particular scheme but that is not something that arises on this application.

Mr. Murray provided no explanation for his failure to take any steps under the provisions of the Arbitration Acts to secure the appointment of an arbitrator or progress the arbitration. What occurred during the period 1994 to 2000 is unaccounted for. The plaintiff has not alleged any of the defendants are responsible for the delay during this period. The only action taken by the plaintiff between 2000 and 2005 was to have one letter per annum sent to the second and third defendants' solicitors. He took no steps to bring on the arbitration.

I think it is correct to say that this court would have to adjudicate on the validity of Mr Murray's claim if this action were to proceed and the question of damages to be addressed. That I think is another confirmation that the court action however expressed is actually a replication of the original pension claim.

The plaintiff is in difficulty in seeking to establish a factual basis for this claim against the first defendant that it failed to respond to correspondence. I think that Mr O'Connor is correct in questioning whether the plaintiff is even claiming that his company was in default in this regard. But there is a more fundamental point, which is that the Statement of Claim does not actually disclose a cause of action even if all the facts as alleged are assumed to be correct and also assuming that each of the defendants is equally responsible. Failing to reply to correspondence may give rise to criticism, it may be bad business practice, it may be impolite or a host of other social infractions but it does not give rise to a cause of action. It is of course possible to envisage some hypothetical legislative obligation that might be imposed on a party so as to give rise to some legal liability but nothing of that kind arises in this case. On this ground alone, the claim cannot succeed against any of the defendants.

The plaintiff's delay in this case is indeed inordinate and inexcusable and I do not think that it can be saved by an appeal to the interest of justice. The defendants have claimed prejudice, not surprisingly in view of the quite extraordinary length of time that has elapsed and the alterations in corporate ownership affecting the first defendant. Recent jurisprudence on the question of delay highlights not only the interest of the parties in having disputes expeditiously determined but also the obligation on courts to ensure that their procedures achieve a measure of efficiency consistent with justice. Those concepts are not in conflict. Indulgence of delay on one side imposes a burden on the other of having to endure the strain of litigation for longer than necessary or of having to make long-term financial provision for a stale claim.

I propose therefore to make an Order striking out the plaintiff's claim pursuant to O. 19, r. 28 of the RSC and under the inherent jurisdiction.