THE HIGH COURT

[2003 No. 9169 P]

BETWEEN

RICHARD GRANT, GURTEL LIMITED AND

LASTA MARA TEORANTA

PLAINTIFFS

AND

THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 26th day of June, 2019.

1. The defendants by motion dated 8 November 2018 seek the following reliefs; -

(a) An order pursuant to RSC O. 122 dismissing the plaintiffs' claim for want of prosecution.

(b) In the alternative, an order pursuant to the inherent jurisdiction of the court dismissing the plaintiffs' claims for want of prosecution and/or on the grounds of inordinate, unconscionable and /or excessive delays.

2. By way of a brief summary of this matter; the plaintiffs' business is that of ship operator at various locations off the Atlantic coast. Throughout its operations they have been obliged to apply for various licences and the like in respect of the operation of its vessels and business. Complaints are raised in relation to decisions affecting their vessels and business generally which have been taken by the first named defendant.

3. The plaintiffs' claim that the decisions of the defendants have been unlawful, unjust or unfair, a breach of European law amounting to, amongst other matters, misfeasance in public office, and /or a breach of the plaintiffs' rights, including breaches of constitutional rights. Issues are also pleaded regarding the transposition of the relevant EU directive into Irish law and breaches of Human Rights under the EU convention.

4. As much will turn upon the factual background of these proceedings commenced almost sixteen years ago on 1 August 2003, it is necessary to initially consider this factual background.

Background

5. The plaintiffs issued a plenary summons on 1 August 2003. The substantive reliefs sought run to 47 paragraphs in respect of events which appear to have taken place from about 1997/1998 up to 2003.

6. An appearance was entered on 11 August 2003 and a statement of claim delivered on the 30 July 2004. The statement of claim runs to some 32 pages and appears to seek 51 substantive reliefs.

7. A notice for particulars was raised on the 19th day of January 2005 and was replied to by the plaintiffs on the 23rd day of June 2006.

8. The defence was delivered on the 12th day of March 2007.

9. On the 28th day of March 2007, the plaintiffs delivered an amended statement of claim. It now runs to some 42 pages seeking some 71 substantive reliefs.

10. I understand that no objection was raised to the delivery of this amended statement of claim. It does appear that the bulk of this amended pleading seeks to amend any of the matters pleaded within the initial pleading but rather (from paras. 74 to 79 of the amended statement of claim) pleads in respect of matters which have occurred since the original statement of claim was delivered – in other words taking matters forward from 2004 onwards with additional pleadings and reliefs sought in respect of that additional time period.

11. In June 2008, the third named plaintiff filed a notice of discontinuance.

12. The amended defence was delivered on the 8th day of February 2013.

13. A notice for further and better particulars was raised by the defendants on 17 February 2015 and replies were furnished on 13 January 2016.

14. In addition, the plaintiffs have filed a number of notices of intention to proceed dated 18 February 2009, 2 November 2012 and 7 February 2018 respectively. There have also been two notices of change of solicitor dated 2 November 2012 and 6 May 2016 respectively.

15. In June 2016, an application was brought before the court pursuant to RSC O. 56 (A) where the plaintiffs sought a reference to use the ADR process or in the alternative to facilitate the convening of a mediation conference.

16. Costello J. delivered a written judgment in respect of that application on 14 June 2016 ([2016] IEHC 328). Within the judgment the learned judge confirmed that, in addition to the timetable of pleadings recited above, as at the date of her judgment she was informed that discovery was complete and the matter was ready to obtain a date for hearing. The judgment recites that the initial request for some form of ADR adjudication issued on the 16th February 2015, seven months thereafter the plaintiffs issued their motion pursuant to RSC O. 56 (A).

17. The court also invoked the judgments of Gilligan J. and on appeal Irvine J. in the case of *Atlantic Shellfish Ltd. & anor. v. The*

County Council of the County of Cork & ors. [2015] IECA 283 where Irvine J. stated as follows: -

> "Further, for my part, I do not believe it is unreasonable for the party against whom complex legal claims have been made, and which may have ramifications that extend well beyond the confines of the proceedings and their parties, to maintain their entitlement to have those issues resolved by the court…."

18. Based upon the above Costello J. was satisfied that it was not unreasonable for the state defendants to maintain their entitlement to have the claim, involving as it does allegations of misfeasance of public office against a number of named department officials, resolved in court where their actions may be tested and (if the defendants' argument was accepted) vindicated in public. Finally, the court stated: -

> "In my opinion the issues in dispute between the parties are not amenable to being disposed of by the type of ADR proposed. The defendants' opposition to the plaintiffs' application is one which is entirely *bona fide*. I am therefore aware that any invitation issued from this court will be refused for good reason. In those circumstances, following the approach adopted by Gilligan J. in the High Court and that set out in the Court of Appeal in *Atlantic Shellfish*, I exercise my discretion under O. 56A, r.2 to refuse the relief sought in the notice of motion herein."

The present application

19. One unusual feature of this matter is that the second named plaintiff was in fact dissolved in February 2018. It appears the dissolution took place some 21 days after the notice of intention to proceed was filed. I was informed by counsel for the plaintiffs that it was restored in November 2018. The reason for this oversight is unexplained but certainly unfortunate for plaintiffs seeking to resist an application of this type and where within their own correspondence, they assert their willingness to set this matter down for trial within time periods when the second named plaintiff was dissolved.

20. In respect of the defendants' application seeking a strike out of proceedings the grounding affidavit of Brian Hogan is sworn on 8 November 2018, that of the first named plaintiff on 28 November 2018 and a replying affidavit of Brian Hogan sworn on 6 December 2018.

21. Within the grounding affidavit of Brian Hogan, he avers that in his view the tenor of the plaintiffs' claim is to be found at paragraph 10 of the initial statement of claim. His affidavit then quotes extensively from paragraph 10 as follows: -

> "The plaintiffs, each and/or one of them had been subjected to a series of decisions by the first named defendant, its servants or agents, which were made either unlawfully or unjustly and/or unfairly discriminatorily and/or in breach of European law (including the law of the European Union and/or the European Convention on Human Rights and Fundamental Freedoms) and/or for the improper purpose of damaging the business of the plaintiffs each and/or any one of them and/or aiding the business of their competitors. Arising from the said decisions, the plaintiffs, each and/or any one of them, have suffered severe loss, damage (including special damage) inconvenience and expense. Further (and/or without prejudice to the aforementioned) the said decisions constitute and/or amount to misfeasance in public office and/or a tort and/or a breach of the plaintiffs (each and/or any one of them) rights in law and/or constitutional rights, (including inter alia their right to earn a livelihood and/or Article 40.4) and/or rights in European Law (including the law of the European Union and/or the inadequate transposition of an EU Directive which caused the plaintiffs to suffer severe loss, damage, inconvenience and/or expense) and/or the European Convention on Human Rights and Fundamental Freedoms and/or amounted to unlawful acts which had caused damage to the business of the plaintiffs each and/or any one of them hereby amounting to an intentional interference with the economic interests of the plaintiffs each and/or any one of them."

22. Mr. Hogan then avers that by letter dated 14 June 2018 the defendants' solicitor wrote calling for the proceedings to be set down for trial. The response from the plaintiffs was a letter of 2 July 2018 contending that they were ready for trial (somewhat unusual given that the second named plaintiff was at that point dissolved). There was then an exchange of correspondence between July 2018 and September 2018. Thereafter by letter dated 2 October 2018 the solicitor for the defendants write to the plaintiffs' solicitor putting them on notice that they were maintaining an action for the dismissal of proceedings in the manner set out above.

23. The plaintiffs place emphasis upon a letter written by the defendants' solicitor on 30 July 2018 requesting that the plaintiffs not seek a hearing date as the papers were with counsel for the purpose of seeking an advice on proofs.

24. On 19 September the defendants were again called upon to agree the hearing date and that was replied to by letter dated 20 September 2018 indicating that an advice of proofs was being sought. This then culminated in the letter dated 2 October 2018 in the form above.

25. The plaintiffs' solicitors replied on 4 October 2018 indicating the steps they had taken between February and September 2018 seeking to have this matter set down for trial (the points I make with regard to the second named plaintiff would again appear apposite here), they then deny that any delay (which they say is balanced between both parties in any event) has not been inordinate and/or inexcusable and that the balance of justice must favour dismissal of any such application. They also point to any failure to identify any prejudice on the part of the defendants.

26. One specific prejudice identified by Mr. Hogan within his affidavit arises in part from the allegations regarding those specific identifiable persons detailed (and named) within the amended statement of claim against whom misfeasance in public office is alleged. The defendants point to the fact that these witnesses may be required to give evidence in respect of matters, by the time any trial is reached, which took place from the late 1990s onwards. They say that they are prejudiced by having to adduce such evidence at this remove and also the ability of these witnesses to recall matters over time. None of the named persons remain within the employ of the defendants, the majority are now retired and of advanced years.

27. Mr. Hogan's affidavit also makes it clear that the plaintiffs' allegations go back to events in at least 1998 and points to the prejudicial effect having to adduce evidence at this remove would have on the defendants seeking to defend such a claim.

28. In his replying affidavit the first named plaintiff avers: -

> (a) That the acts of the defendants have in essence caused him many of the difficulties attendant upon this litigation – in particular a difficulty in raising the funds to deal with it which lack of funds he directly attributes to the actions of the defendants against him.

(b) That the circumstances of the litigation have necessitated instructing fresh solicitors and on occasion having to put matters in abeyance for limited periods owing to a lack of financial resources to continue. Following the judgment of Costello J. on 14 June 2016, he avers at paragraph 24 that he thereafter instructed his solicitor to take no further steps in the interim as he had no funds at that stage to continue the matter for trial. Thereafter having sold certain assets he instructed his solicitor (he contends nineteen months later, not two years) and that a notice of intention was then served thereafter.

(c) He further deals with the 2018 correspondence as above.

(d) In respect of the strike off of the second named plaintiff, the first named plaintiff confirms it was dissolved in February 2018 and restored on 16 November 2018. Beyond confirming that he has 'instructed his accountant to restore...' he provides no explanation as to why he took no steps to prevent its dissolution in the first place, nor why letters were written by those whom he instructs confirming the plaintiffs case was ready for trial when, owing to the dissolution, it clearly was not. That is unsatisfactory to say the least.

(e) The first named plaintiff also contends that whilst there has been delay that the delay has been rather equally shared between periods of inactivity on behalf of the defendant which equals or exceeds his own.

(f) With regard to the persons named within the pleadings whom the defendants contend will be required to give evidence as above, the first named plaintiff (who clearly knows them from working in the industry for many years) states that no evidential deficit has been highlighted by the defendant in not having these persons available but to the extent that they have it is exaggerated. Only one of the former employees named lives outside the jurisdiction.

(g) The first named plaintiff reiterates his complaint that some delay on his part (not inordinate or inexcusable he claims) was due to financial constraints which he has been under which has been caused by the very actions of the defendants in respect of which he has been obliged to maintain these proceedings.

29. A short supplemental affidavit of Brian Hogan sworn on 6 December 2018 reiterates the relevance of the witnesses that are no longer available and the impact of their recollection over time. He avers that the plaintiff has not adequately dealt with the scrappage of vessels where an examination to clarify compliance with regulation(s) is no longer possible. He also points out that the financial impecuniosity of the plaintiff has not been substantiated. He also deals with the company restoration matter as set out above.

30. Counsel for both of the respective parties accept the authorities and therefore the legal principles that are to be applied in applications such as this. They are well known.

31. In the case of *Rodenhuis & Verloop B.V. v. HDS Energy Ltd*. [2010] IEHC 465, Clarke J. stated: -

> "…while the tests to be applied by the court remain the same as set out in the long standing jurisprudence contained in cases such as *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 ('*Primor*'), the weight to be attached to factors properly taken into account in applying that test needed to be recalibrated in favour of a greater strictness of approach."

32. That approach was in essence in cases of delay grounding an application for the dismissal of proceedings the criteria is: -

> (a) Whether the delay in question is inordinate and inexcusable; and
>
> (b) If it is so established, the court must decide where the balance of justice lies (see in particular *Stephens v. Paul Flynn Ltd* [2005] IEHC 148).

33. With regard to the issue of delay in the context of to the European Convention on Human Rights Act 2003, the court in that case pointed that the "obligation on a State which subscribes to the ECHR is to provide for a timely disposition of court proceedings. The ECHR does not, of itself, therefore, necessarily require that proceedings be struck out for delay as such."

34. Clarke J. continued: -

> "It seems to me, therefore, that it is necessary, in a system where the initiative is left largely up to the parties to progress proceedings, for the courts make clear that there will not be an excessive indulgence of delay, because if the courts do not make that clear, it follows that the courts' actions will encourage delay and, thus, will encourage a situation where cases will not be completed within the sort of times which would be consistent with compliance with Ireland's obligations under the ECHR."

35. In considering the balance of justice in the circumstances of any delay being inordinate and inexcusable (and also I would suggest in exercising the discretion of the court pursuant to its inherent jurisdiction) in the case of *Millerick v. The Minster for Finance* [2016] IECA 206, the Court of Appeal on the facts of that case stated as follows: -

> "It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind."

36. The court having considered that the primary focus of attention is initially the conduct of litigation by the plaintiff and thereafter if there was any behaviour on the part of the defendant to constitute acquiescence, states that the point in assessing the balance of justice criteria must consider whether the defendant caused or contributed to the plaintiffs delay either by leading the plaintiff to understand a certain situation specifically that the defendant was acquiescing in the delay (mere silence or inactivity being insufficient to constitute such a communication).

37. The court continued: -

> "…it is the plaintiff who commences legal proceedings and draws the defendant into the legal process. No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise….
>
> Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed

regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?

For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words, a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

38. In the case of *McNamee v. Boyce* [2016] IECA 19, the Court of Appeal considered initially whether there had been inordinate and inexcusable delay on the part of the plaintiff and carrying out the balancing exercise identified in *Primor*. Within that case, the court also identifies the other strand of jurisprudence emanating from *O'Domhnaill v. Merrick* [1984] IR 151, 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 the *O'Domhnaill* case, Mr. Justice Henchy stated: -

> "While justice delayed may not always be justice denied, it usually means justice diminished, and in a case such as this, it puts justice to the hazard to such an extent that to allow the case to proceed to trial would be an abrogation of basic fairness. 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 issues of liability or the issue of damages, or both. Consequently, the defendant, who has not in any material or substantial way contributed to the delay, should in my opinion be freed from the palpable unfairness of such a trial."

39. In *Comcast International Holdings Inc. & ors. v. Minister for Public Enterprise & ors.* [2012] IESC 50, the court in dealing with the proposition that in some instances a circumstance may arise in which it is in the interest of justice to strike proceedings out by virtue of the inherent duty of the court under the constitution and to ensure basic fairness of procedures in the administration of justice. In that case, Clarke J. observed that the "threshold to be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff must necessarily be more onerous than that which applies in cases of culpable delay" (McKechnie J. endorsed the view stating that such cases must be exceptional).

40. Baker J. in *O'Leary v. Turner & ors*. [2018] IEHC 7 in respect of the other circumstances set out by the plaintiff in that case which she contended prevented her from properly expediting proceedings stated as follows: -

> "Her personal circumstances were most unfortunate but I cannot excuse her delay on account of circumstances which became less acute in the years after the service of the summons, and her personal difficulties were not at a level that caused her to be incapable of instructing solicitors to commence the proceedings, to engage the intermediary and to engage other litigation and continue, albeit in a limited way, her business interests. No authority has been identified that permits a court to excuse culpable and otherwise unexplained delay on account of personal and financial circumstances of the type identified."

41. In the case of *Millerick v. Minister for Finance* [2016] IECA 206, quoted above the Court of Appeal also stated: -

> "A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material."

42. In assessing the balance of justice criteria as mandated by the courts since the *Primor* decision, the court in *Tanner v. O'Donovan & ors*. [2015] IECA 24, stated in assessing that criteria that: -

> "…regard must be had to two further considerations, namely, the obligation on the plaintiff who starts late to proceed with expedition and the fact that the allegations in this case directly impact on the professional reputation and good name of the defendants. So far as the former consideration is concerned, I have already made it clear that I do not consider that the plaintiff proceeded with the necessary expedition which would have been required where (as here) there was, in fact, a late start.
>
> So far as the second consideration is concerned, while the details of the adverse impact on the defendants' professional reputations are admittedly sparse, it is nonetheless plain that the very existence of such proceedings could in itself potentially impact on those reputations, possibly even in a far-reaching way…. All of this is to recognise that proceedings of this is not simply about the recovery of a monetary award, but may well have significant reputational implications."

43. The court continued: -

> "To this I would add that the effective protection of the right to a good name expressly guaranteed by Article 40.3.2 of the Constitution necessarily implies that claims of this kind - with obvious implications for the good name of a professional defendant - should be heard and determined within a reasonable time. Any other conclusion would undermine the substance and reality of that express constitutional guarantee."

44. On the facts of this case, it must be noted that claims of individual misfeasance in public office have been expressly pleaded against named persons.

45. In broad procedural terms, it appears that certainly up to, or immediately prior to, the application before Costello J. in 2016 regarding a potential reference by the plaintiffs to mediation, that the defendants had engaged within the procedural process leading to trial. I am unaware of the precise dates whereby the discovery was exchanged, but Costello J. notes in her judgment that the

process of discovery was complete and the matter was ready to obtain a date for hearing. That position was not gainsaid in any submission before this Court.

46. In my view, the defendants were engaged within what I loosely describe as the procedural/litigation process up to 2016. Thereafter, the correspondence exhibited before this Court indicates that the first intimation that any action was being contemplated against these plaintiffs on the grounds advanced within this motion was in their correspondence of October 2018. Indeed, in previous correspondence they had sought a certain degree of time (over the summer months) in order that an advice on proofs might be obtained in advance of setting down the matter for hearing. Correspondence indicating that an advice on proofs was being sought is suggestive (at the very least) that the defendants intended to proceed with their defence of these proceedings. I accept the plaintiffs' submission that the first intimation of this motion was in the letter by the defendants in October 2018.

47. I reiterate that these proceedings are now ready for trial. In my view, where a case is ready for trial, the difficulty on the part of the party seeking to have the proceedings struck out is more onerous (particularly where there has been a process of discovery).

48. In considering the criteria advanced in *Primor*; initially as to whether there has been inordinate delay on the part of the plaintiff and whether that delay is excusable, in my view it would be difficult to advance a contrary proposition in circumstances where these proceedings were issued in 2003. I reject any suggestion advanced by the plaintiffs that there has been an 'equivalence' in so far as delay is concerned. The law is clear as reiterated by the Court of Appeal in *Millerick v. The Minister for Finance* (as quoted above) that it is for the plaintiff to prosecute its action; the onus is upon it and not the defendant.

49. Nor as in *O'Leary v. Turner* (quoted above) has the first named plaintiff adequately set out his personal and financial circumstances as a cause or factor in excusing or explaining this delay. The personal circumstances of the plaintiff which prevented him from expeditiously dealing with these matters have only been alluded to in his affidavit which lacks sufficient specificity in order to properly appraise or consider that criteria.

50. Cases such as *Tanner v. O'Donovan* (quoted above) have asserted that proceedings which commence long after the events upon which they are based have an inherent obligation to proceed with greater expedition than those commenced immediately after the wrongs of which they complain. In my view, this case comes within the first category. No one has contradicted the averments of Mr. Hogan, that the initial events complained of took place in 1997/1998. That will mean that, with regard to certain aspects of this case, persons will be required to give evidence of events that happened in excess of 20 years ago. The proceedings, as set out above, were only issued in 2003.

51. It has been suggested forcibly by counsel for the plaintiff that these proceedings should have been commenced by way of judicial review, but given the statutory time limits that such reliefs were not available to the plaintiffs who were then obliged to bring the proceedings in their present form.

52. I can find nothing on the facts of this case to find the delay excusable. I particularly note the dissolution of the second named plaintiff which coincided, particularly in the correspondence in mid-2018, with the plaintiffs' solicitors writing to confirm that they were ready to have this matter set down for hearing. Counsel for the plaintiffs said that that position could not be stood over and I agree. It is reprehensible.

53. In turning to then assess the balance of justice criteria, I primarily have regard to two matters: -

> (a) That the defendants appear to maintain their defence of these proceedings up to and including advising the plaintiffs' solicitors that they were seeking an advice on proofs. Their intimation of seeking the reliefs that they now seek was at variance with that previous correspondence. In *Millerick v. Minister for Finance*, in considering the balance of justice criteria, the Court stated that consideration of any conduct by the defendant which would amount to a positive acquiescence or reassurance to the plaintiffs that they intended to defend the claim are matters to which this court should have regard. In my view asking the plaintiffs' solicitors not to seek a hearing date whilst they procured an advise on proofs is such a positive acquiescence or reassurance to the plaintiffs.
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> (b) The fact that discovery is now completed and the matter is ready for trial, in my view, favours the plaintiffs' case that the litigation be allowed to continue. There is much that is regrettable in the plaintiffs' conduct of this litigation to date. However, it has now advanced to this stage, with the only intimation of this application by the defendants in their correspondence of October 2018 (at which point the matter was ready for trial). In my view, the defendants have failed to satisfy this court that the interests of justice do not lie in this matter now proceeding to an actual hearing.

54. In my view this case is one where the *Primor* criteria can be applied to the facts of this case and I do not consider that the criteria to seek a strike out of these proceedings within *O'Domhnaill v. Merrick* (and the jurisprudence following that decision) has been satisfied.

55. Accordingly, in my view whilst I find, adopting the *Primor* criteria, that the plaintiffs have delayed in their prosecution of this litigation, that this delay is both inordinate and inexcusable, and for the reasons set out above the balance of justice lies in refusing the defendants' application.