Neutral Citation Number: [2007] IEHC 279

THE HIGH COURT

[2000 NO. 9508 P]

BETWEEN

FRANCIS JOSEPH HALPIN

PLAINTIFF

AND
MICHAEL SMITH

DEFENDANT

Judgment of Ms. Justice Dunne delivered on the 31st day of July 2007

The plaintiff in this case issued proceedings claiming damages for personal injuries as a result of the alleged negligence, breach of duty, breach of statutory duty and breach of contract on the part of the defendant. A plenary summons was issued herein on 16th August, 2000.

An appearance was entered on behalf of the defendant on 14th September, 2000. A statement of claim was delivered on 29th January, 2001. From the statement of claim it appears that the plaintiff claims to have suffered an injury on 30th March, 1998 when he was employed as a painter and decorator by the defendant. The main allegation made by the plaintiff is:-

> "The ladder upon which the plaintiff was standing collapsed whereby the plaintiff fell heavily to the ground and sustained severe personal injury, loss, damage, inconvenience and expense."

In the normal way, particulars of negligence breach of duty, beach of statutory duty and breach of contract were pleaded. Those particulars contained a number of what could be described as standard particulars of negligence and included the following specific particulars:-

> "(d) Providing a ladder that was in a dangerous and/or defective condition.
>
> (e) Using a ladder when it was not securely fixed near to its upper resting place and/or not securely fixed at is lower end.
>
> (f) Failing to ensure that the said ladder had a level and firm footing.
>
> (g) Failing to secure the said ladder in such a way to prevent it from collapsing.
>
> (h) Failing to support the ladder in a proper manner.
>
> (j) Allowing the said ladder to collapse."

The plaintiff, as a result of the matters complained of, suffered an injury to his right foot and ankle and it is not unfair to say that this was a significant injury. On 12th July, 2001 the solicitors for the defendant herein raised particulars arising from the statement of claim. Thereafter no steps were taken in the proceedings for a very considerable period of time. The next step in the proceedings was the delivery of a notice of intention to proceed, by the plaintiff's solicitors dated 18th January, 2006 and the delivery of a reply to the notice for particulars dated 18th January, 2006. It would be helpful to quote the question and answer given in relation to a number of the particulars.

> 4. Please identify specifically what the plaintiff was doing at the time of the alleged collapse of the ladder which allegedly gave rise to the plaintiff's injury.
>
> Response:- The plaintiff was painting the walls of the outside of the building. At the time of the collapse of the ladder the plaintiff was in the process of dropping the ladder down so that same could be moved to the next section to be painted.
>
> 5. Please identify the defect or danger which was allegedly present in the ladder.
>
> Response:- The "L" brackets were loose allowing the top section of the ladder to come away from the lower section."

The other particulars do not relate to how it is alleged the plaintiff was caused to suffer the injury complained of in the proceedings. It should also be noted that a second document headed Replies to Notice for Particulars was furnished to the solicitors for the defendant arising from the original notice for particulars. In the subsequent replies to notice for particulars dated 10th March, 2006 the answer to particular No. 4 was as follows:-

> "This is a matter for evidence to be adduced at the trial of the action. However without prejudice to this reply, the plaintiff was painting the walls of the outside of the building at the time of the accident."

The response to the particular raised at No. 5 was as follows:-

> "This is a matter for evidence to be adduced at the trial of the action. However the (L) brackets on the ladder were loose allowing the top section of the ladder to come away from the lower section thus causing the ladder to collapse."

Again there was no other particular that threw any light on the cause of the plaintiff's fall.

A notice of motion dated 9th March, 2006 came before me for hearing on 15th June, 2007. In the notice of motion the defendant sought an order dismissing the plaintiff's claim for inordinate and inexcusable delay prejudicial to the defence of the proceedings. A number of affidavits have been exchanged between the parties. It appears that the plaintiff was employed by the defendant as a painter and decorator in the course of work at a property then owned by the defendant which was being restored at the time. The plaintiff was engaged at the relevant time in painting the outside of that property.

In his grounding affidavit, the defendant herein makes a number of complaints. The first complaint relates to the delay in issuing proceedings initially. As can be seen from the history of the matter referred to above, the plenary summons issued over two years after the date of the accident. Before the issue of the plenary summons the plaintiff was made aware that the defendant had been refused indemnity by an insurance company in respect of the potential claim. He complained that he would be at a disadvantage in dealing with a claim financially and from the point of view of investigating the accident. He pointed out that it would be difficult to

procure an indemnity from his insurer or to challenge the refusal of indemnity and he added that any complaint against his insurance brokers would by virtue of the passage of time be unlikely to be possible.

He complained also as to the nature of the replies to the particulars furnished on the basis that the same were incomplete and token in character. One of the points made in respect of the particulars was that the emphasis of the complaint made in the replies to particulars is at variance with the statement of claim in that the reply to particulars of 18th January, 2006 seem to suggest a somewhat different cause for the plaintiff's injuries. Now a suggestion was made that the brackets of the ladder were defective and that this had a role to play in causing the plaintiff's injury. The version given in the second reply to the notice for particulars is different again. On that basis, complaint is made that the plaintiff is now advancing what appears to be a different account of events some eight years of the accident. He noted that the emphasis is now squarely placed on the condition of the ladder and the defendant complains that if this had been obvious from the statement of claim it would have been possible to make an investigation of the complaint in relation to the ladder and the defendant would have been in a position to identify who organised the supply of the ladder. He pointed out that he was not personally engaged in the supervision of the building works and that there would be at this time difficulty in identifying the supplier of the ladder not to mention investigating the condition of the ladder.

The defendant identified a number of other complaints in relation to the delay. He pointed out that the property concerned had been sold by him in 1999. The person who was responsible for overseeing the work on site, Mr. Seamus Grealy is someone with whom the defendant has had differences and those differences include differences in recollection. Accordingly, he expressed a concern that as this is a case in which the parties are dependent on the recollection of various people at a remove of many years and as the potential witnesses are not people with whom the defendant has had any relationship or connection save and except Mr. Grealy with whom he has had differences, he complains that prejudice is inevitable.

He makes complaint also that it is now clear that the plaintiff intends to advance a substantial claim for loss of earnings extending back to the date of the accident.

A replying affidavit was furnished by the plaintiff herein. He dealt with his claim for loss of earnings in that affidavit and pointed out that he has now reached the stage where he has been left with a limited range of movement in his ankle and has been unable to go back to work and suffers from pain and discomfort in his ankle which will be permanent. He contradicts the suggestion made by the defendant to the effect that he was not fully aware of the circumstances of the accident. In that regard he referred to an affidavit sworn by his son Trevor Halpin. I will deal with that subsequently. He said that it was the defendant who suggested that the plaintiff go to a solicitor and make a claim. The plaintiff stated that after the accident Seamus Grealy came into hospital to see him and informed him of that. He stated that the defendant supplied Trevor Halpin with a copy of an insurance claim form which was given to the plaintiff's solicitor. He exhibited the form in which it was stated as follows:-

> "F. Halpin was lowering the ladder when it twisted and he fell from four to five feet."

Accordingly, he averred that the defendant knew the accident occurred when the plaintiff was lowering the ladder and not working upon it. Reference was also made in the course of the affidavit to an apparent approach through Seamus Grealy around Christmas 2001, from the defendant seeking to settle the proceedings. Nothing came of that apparent approach.

In his affidavit, Trevor Halpin, the son of the plaintiff said that at the time of the accident complained of, he and his father were working as painters and decorators for the defendant. He described the ladder in question as having been a sixty foot aluminium ladder divided into three sections. It had to be extended and lowered as the painting work progressed around the house. To secure each of the three sections the ladder had an "L" shaped bracket acting as a guide through which one section would be lowered in line with the next to enable the ladder to be conveniently carried and manoeuvred. He stated that the plaintiff was standing about three or four steps up the ladder and was in the process of releasing the second section onto the first when the bracket holding it in position gave way and "forty foot of aluminium ladder suddenly collapsed on top of the plaintiff". The plaintiff fell and received the injuries complained of. He stated that following the accident he examined the ladder and noted that the rivets holding the bracket together had been faulty and gave way when the middle section of the ladder was being lowered. He said that he informed Seamus Grealy who was directing works on the site on behalf of the defendant what had happened. He stated that a few days later Seamus Grealy returned the ladder to the hire company from which he believed it had been obtained.

He then described a lunch with the defendant in Aughrim. He stated that in the course of lunch he described in detail the events that had occurred and the condition of the ladder. Accordingly, he disagreed with the defendant's assertion that he was not aware prior to receiving the replies to particulars in January 2006 of the manner in which the injuries were caused. He was of the view from the conversation that he had with the defendant and from his earlier conversation with Seamus Grealy that the defendant was well aware of what had occurred and that the cause of the accident was the defect in the ladder.

An affidavit was also sworn by Sean Kenny the solicitor acting on behalf of the plaintiff. Relying on the affidavits of Trevor Halpin and of the plaintiff, he averred that the defendant did know about the circumstances of the accident shortly afterwards. He referred to the fact that the particulars in the statement of claim expressly pleaded that the defendant was under a duty to provide the plaintiff with safe equipment including a safe ladder and that the ladder provided was in a dangerous and/or defective condition. He made the point that if the defendant was prejudiced, it was because the ladder was returned by Seamus Grealy when he was aware of the circumstances of the accident. He contended there could be no further prejudice by reason of the delay in replying to the notice for particulars which were raised some three years after the accident.

Mr. Kenny also contests the defendant's claim to have been prejudiced by virtue of the delay in relation to the making of a complaint against his brokers or in respect of the refusal of his insurance company to provide indemnity. Mr. Kenny pointed out that the insurance company repudiated cover by letter dated 27th March, 2000 some months before the issue of the plenary summons. Therefore he stated that the defendant's decision not to pursue his insurance broker or his insurance company was not or could not have been in reliance upon any delay on the part of the plaintiff in pursuing the action. Mr. Kenny went on in the course of his affidavit to accept that there was substantial delay in this case and he stated that it was "through inadvertence and nothing more that the particulars were not replied to and the action not pushed on". He said it was unclear as to why the defendant would say that he believes the plaintiff had no genuine intention of proceeding with the case. He added that he could offer the court no good reason for not replying to the particulars sooner and ensuring that the plaintiff proceeded expeditiously. Nonetheless he denied that the defendant had been prejudiced in his ability to defend the action as a result of the delay.

Two short affidavits were filed subsequently, one by the defendant in which he explained that Seamus Grealy came to him after the accident and indicated that the plaintiff should be allowed to make a claim. He explained he would obtain a claim form from his brokers so that the plaintiff could set out the details of his claim. That form obviously was furnished to the plaintiff and sent to the defendant's insurers, but the defendant states that he did not return the form himself. He reiterated that he was still not fully aware

of the precise nature of the alleged accident given the differing accounts that had been furnished by Trevor Halpin, Seamus Grealy and the plaintiff. He added that he never authorised Seamus Grealy to propose a financial settlement to the plaintiff.

A final affidavit was sworn by the plaintiff herein. He explained in detail the nature of the relationship between his family and Seamus Grealy and between Seamus Grealy and the defendant. He said that he had never spoken to the defendant personally about the accident. He went on to add that the defendant was aware of the relevant facts concerning the accident and that he had sought out Trevor Halpin for the purpose of finding out exactly what had happened.

There is no doubt that there is some force in the argument made by counsel on behalf of the defendant to the effect that a perusal of the statement of claim herein and the two replies to particulars are not of great assistance to the defendant in knowing precisely what case is being made against him by the plaintiff. Reading the statement of claim one would conclude that there was a problem with the ladder and a suggestion that it was dangerous or defective, but the principle complaint seems to be to the effect that the ladder was not securely fixed either at its upper end or its lower end and complaints are made as to the footing of the ladder. The first notice for particulars suggests that the collapse of the ladder occurred in the process of dropping the ladder down and it is only in para. 5 that it becomes clear that the complaint being made relates to the "L" brackets which were allegedly loose, thus allowing the top section of the ladder to come away from the lower section. For some reason the second replies to notice for particulars is not as informative as the first set of replies to the notice for particulars. In truth, it has to be said that the only clear version of what is alleged against the defendant in respect of the defective ladder appears in para. 4 of the affidavit of Trevor Halpin. It is clear from that affidavit that there is no suggestion of any complaint in relation to the securing of the ladder or the footing of the ladder, rather the complaint relates to an actual defect in the ladder which caused it to collapse.

Submissions
Counsel on behalf of the defendant pointed out that there had been no attempt by the plaintiff or his solicitor to offer any explanation or give any reason for the delay in dealing with the matter between January 2001 and July 2006. A reference had been made by Mr. Kenny in his affidavit to a notice of intention to proceed which had apparently been intended to serve in 2003, but as is known, no notice of intention to proceed was served then.

He pointed out the conflicting accounts as to what had occurred. Even the claim form filled in prior to the proceedings by the plaintiff does not make clear what is alleged to have occurred. All of the assertions made in respect of how the accident occurred in the pleadings are expressed in very general terms. It was further submitted that in considering the question of delay in this case it was important to have regard to the fact that the proceedings issued some two years after the accident occurred at a time when the plaintiff was aware of the fact that there was no insurance cover. Accordingly, it was submitted that there had been inordinate and inexcusable delay and that for a period of five years since the commencement of the proceedings it was not clear what was being alleged against the defendant.

It is fair to say in this case that counsel on behalf of the plaintiff accepted that the delay that has occurred in this case is inordinate and it was further conceded that the delay was inexcusable. It was candidly accepted that no good reason or excuse has been offered by the plaintiff or his solicitor for the delay that has occurred and that the only issue between the plaintiff and the defendant is the question as to where the balance of justice lies in the circumstances of the case.

Counsel on behalf of the defendant referred to a number of authorities including *Gilroy v. Flynn* (Unreported, Supreme Court, 3rd December, 2004), *Stephens v. Flynn* (Unreported, High Court, 28th April, 2005) and argued that the authorities showed a trend or a changing landscape in relation to the issue of dismissal on the grounds of inordinate and inexcusable delay. He submitted that the defendant had no responsibility for any of the delay and did not contribute in any way to the delay. He argued that if the plaintiff had failed to take a step it was not practical or pragmatic to expect the defendant to do something to prompt the plaintiff to take steps in the proceedings. He argued that the court had to carry out a balancing exercise. In this regard he referred to the decision in the case of *Primor Plc v. Stokes Kennedy Crowley* [1996] 2. I.R. 459, in which the principles of law relevant to such an application were set out. In that case it was held that even where the delay had been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice was in favour or against the case proceeding.

Reference was also made to the decision, *Anglo Irish Beef Processors Limited v. Montgomery* (Unreported, Supreme Court, 31st July, 2002) in that particular case, Fennelly J. at p. 4 of his judgment commented:-

> "It is no exaggeration, in these circumstances to say that the respondents have not even made pretence of an attempt to explain, still less offered an excuse for their quite extraordinary delay in pursuing the claim."

He went on to say at p. 6:-

> "In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something 'akin to acquiescence' as indicated in the judgment of Henchy J cited above."

He then went on to comment at p. 7 of his judgment:-

> "He went on to express the view that it was 'understandable' that the personal defendants 'were content to let sleeping dogs lie rather than invite upon themselves litigation claiming damages which are now in excess of £2 million.' His conclusion was that this matter had to be taken into account but that he 'attached only little weight to it.' This approach was, in my view, perfectly correct."

Having regard to that authority, Mr. Devally on behalf of the defendant said that in this case, in conducting the balancing exercise little weight ought to be attached to fact that the defendant took no steps to compel the plaintiff to reply to particulars or indeed to take any steps to advance the proceedings.

Reference was also made to the decision in *O'Connor v. John Player and Sons Limited* (Unreported, High Court, 12th March, 2004). In that case which was a case in which the plaintiff sought damages for personal injuries in exposing the plaintiff to the risk of injury by causing or permitting her to smoke cigarettes. The plaintiff's claim was dismissed by the Master of the High Court on the grounds that the plaintiff had been guilty of inordinate and inexcusable delay in prosecuting her claim. At p. 24 of his judgment Quirke J. commented:-

> "On behalf of the defendants, it is argued that the law does not impose upon defendants the obligation to encourage the prosecution of claims initiated against them, whether by calling upon the claimant to proceed or in any other manner. It

was argued that, by collecting the medical records of the persons who had initiated claims against them, the defendants were simply ensuring the preservation of evidence that was relevant to the defence of the claims and that this was done in the interests of the defendants and with the view to enabling them to defend the claims.

I accept the contention that, in general, there is no obligation upon a defendant to expedite the prosecution of the claim made against him or her."

Mr. Devally then went on to quote a passage from the judgment of Hardiman J. in the case of *Gilroy v. Flynn* (Unreported, Supreme Court, 3rd December, 2004). In that case Hardiman J. commented as follows:-

"It is important to make the point that there have been significant developments in this area since the decision of the High Court in *Rainsford or in Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. By statutory instrument 63 of 2004, Order 27 of the Rules of the Superior Courts has been significantly amended in particular by the following provision:-

(1) If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, subject to the provision of rule 1A, at the expiration of that time apply to the Court to dismiss the action, with costs, for want of prosecution; and on the hearing of the first such application, the Court may order the action to be dismissed accordingly, or may make such other order on such terms as the Court shall think just; and on the hearing of any subsequent application, the Court shall order the action to be dismissed as aforesaid, unless the Court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure…"

Secondly, the Courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as *McMullen v. Ireland* [ECHR 422 97/98. 29 July, 2004] and the European Convention on Human Rights Act, 2003 the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.

These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one.

In the circumstances of this case, and in particular because of the uncontradicted assertion that it will be an assessment, I would allow the appeal, set aside the order of the High Court and substitute for it an order giving the plaintiff one week from today's date to file a statement of claim."

Counsel also referred to a lengthy passage from the judgment of Clarke J. in the case of *Stephens v. Paul Flynn Limited* (Unreported, High Court, 28th April, 2005). In his judgment in that case, Clarke J. set out the principles in enunciated in the case of *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561. He went on to consider a number of authorities including *Gilroy v. Flynn*. He pointed out in his judgment that there have been significant developments in the area of delay since the decision in *Rainsford* and the judgment in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Those developments he indicated, included the change to the Rules of the Superior Courts referred to by Hardiman J. in his judgment in *Gilroy v. Flynn* referred to above.

Clarke J. then pointed out as follows:-

"Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore:-

1. Ascertain whether the delay in question is inordinate and inexcusable; and

2. If it is so established the court must decide where the balance of justice lies.

However it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

Clarke J. went on further in his judgment to consider certain matters as relevant to the consideration of the balance of justice. They were the degree of delay, the excuse tendered, the prejudice contended for by the defendant and the inaction of the defendant.

Counsel on behalf of the plaintiff in his submissions conceded that in this case the delay was inordinate and inexcusable. Therefore he submitted that the only issue before the court was the assessment of where the balance of justice lies. There were two headings to be considered by the court in that regard. The first was the issue of prejudice and the second was the conduct of the defendant and whether it amounted to acquiescence.

In looking at the issue of prejudice he pointed out that the plaintiff in this case alleges that he has suffered a significant injury. There would be clear prejudice to him if the action were to be dismissed at this stage. He also looked at the prejudice contended for on behalf of the defendant. So far as the issue of prejudice in relation to the insurance status of the defendant was concerned he pointed out that the plaintiff had been informed prior to the issue of proceedings that there was no indemnity. If there were a difficulty in relation to insurance it was a matter for the defendant. It appears that there was never going to be an indemnity in respect of the plaintiff and the defendant therefore was not deprived of any indemnity by reason of the delay. He submitted that the question of litigation or arbitration with his insurance company or insurance broker could have been taken up by the defendant at any stage after the proceedings had issued. The defendant chose not to do so and no delay on the part of the plaintiff contributed to that decision by the defendant; he added that if there was any prejudice by the fact that the defendant was not covered by

insurance in respect to any liability to the plaintiff that that was a matter that could have been dealt with by the defendant at the outset by taking out appropriate insurance cover.

In looking at other aspects of prejudice that might be contended for on behalf of the defendant, he pointed out that there was nothing to show that there was actual prejudice on the part of the defendant. There was nothing in the affidavit of the defendant to indicate that any witness who might have been available had become unavailable as a result of the delay. The only complaint made is that there is a difference of recollection as to what occurred between the defendant and Mr. Grealy. It is also clear that since the incident complained of, there has been some degree of falling out between the defendant and Mr. Grealy. Apart from that, no actual prejudice is pointed to.

So far as the circumstances of the accident are concerned he disputed the assertion of Mr. Smith to the effect that the circumstances of the accident are unclear. He pointed out that it appears that the accident was discussed with Mr. Grealy. He also pointed out that the plaintiff's son stated that he discussed the circumstances with the defendant. Finally he contended that the defendant could have kept the ladder and examined it when he became aware that the accident had occurred. As it was the defendant took no steps to investigate the accident and accordingly, no prejudice has occurred because of the delay.

Mr. Buckley accepted that the criticism of the pleadings was well founded but he added that the rules of court are there to provide an answer to a defendant where this is so. He noted that the position of the plaintiff changed in respect of the various replies furnished to particulars. He accepted that there were apparent contradictions in the pleadings.

He complained of the fact that it was only when the replies to particulars were delivered unprompted in January 2006 that the defendant made any move to have these proceedings dismissed. He made the point that if anyone was in default it was the defendant who failed to deliver a defence following the delivery of the statement of claim. Thus he argued that so far as the balance of justice lies, the balance tilted against the defendant by virtue of the fact that the last contact from his solicitors was the delivery of the notice for particulars. In this regard he referred to the decision in the case of *Rogers v. Michelin Tyre plc and Michelin Pensions Trust (No. 2) Limited* (Unreported, High Court, 28th June, 2005). Mr. Buckley referred to a number of passages from the judgment in that case. It would be useful to refer to a passage from the judgment of Clarke J. where he stated at p. 8 as follows:-

> "While it has often been commented that litigation is a two way process (see for example the comments of Ó Dalaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 at p. 42) it seems to me that the weight to be attached to any delay which, it might be said, should be attributed to the defendant is significantly dependent on whether, on the one hand, the defendant is guilty of what I might call active delay in the sense of itself failing to take steps required of it in the course of the proceedings (such as replying to particulars, filing pleadings, dealing with discovery and the like), or, on the other hand is guilty of inactive delay. In circumstances such as the former it is necessary for the court to assess the extent to which the respective parties may have contributed to the length of time it has taken for the proceedings to reach the stage which they are at as of the hearing of the application to dismiss. The extent that it might be said that the ball was in the court of the defendant for a significant portion of that time is clearly a weighty factor to be taken into account in the assessment of the balance of justice.
>
> While the authorities … make it clear that inactivity on the part of a defendant (such as a failure, as here, to move the court to dismiss for want of prosecution while the action lies dormant for a significant period of time), is a factor it seems to me that it is a factor to which much less weight attaches. On the facts of this case there has been no material delay on the part of the defendant in the active sense of the word. ….
>
> Applying those principles to the facts of this case, it does not seem to me that there is anything in the conduct of the defendant which can be regarded as being of any great weight in the balance save to the minor extent that it can properly be said that the defendant remained passive during a six and a half year period when the plaintiff allowed the proceedings to remain dormant and delay the issue of proceedings by some months."

It was submitted that in this case there was active delay by the defendant in not filing a defence. Therefore it was submitted by Mr. Buckley that in assessing where the balance of justice lies there was acquiescence by the defendant in allowing the proceedings to lie dormant for a considerable period of time. He also emphasised the fact that he relied on the absence of real prejudice having regard to the facts of the case.

Finally I should refer very briefly to the decision in the case of *Hogan v. Jones* which was also relied on by Mr. Buckley. In that case there had been a delay of some four years in delivering a defence. At p. 519 of his judgment, Murphy J. considered the difficult issue of determining how far a defendant is bound to take steps to compel a plaintiff to process outstanding litigation and he noted that that difficulty had been the subject matter of judicial conflict between the courts in England and the courts in Australia.

Decision

As pointed out in a number of the authorities opened to me, in considering an application to dismiss for want of prosecution, the principles set out in the decision in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, remain the underlying principles guiding the determination of any such application. In this case there is no dispute that there has been (1) inordinate delay and (2) that that inordinate delay has been inexcusable. Accordingly the question to be assessed by the court is where the balance of justice lies. In the case of *Gilroy v. Flynn,* Hardiman J. as noted above referred to the significant development since those decisions. Clarke J. in *Stephens v. Paul Flynn Limited* indicated that the weight to be attached to the various factors relevant to the exercise of the court's discretion under the consideration of the balance of justice may require to be altered by reason of those developments identified by Hardiman J. As indicated above he did not identify a change in the factors the court should take into account, but rather the weight to be attached to those factors. Having said that I think it is necessary to look at the facts of this case and to consider the various matters relied on by the plaintiff and the defendant respectively.

The first matter relied on by the plaintiff in relation to this case is the fact that he is not covered by insurance in relation to any claim for damages brought by the plaintiff herein. He was refused indemnity. The plaintiff pointed out that this was known to the defendant before the commencement of the proceedings. I have to say that I cannot see any basis for the contention on the part of the defendant that the delay on the part of the plaintiff in bringing these proceedings has had any effect on the defendant in considering whether or not to challenge the decision of his insurance company or in bringing any proceedings that might have been open to him against his insurance brokers in respect of insurance liability. Once the proceedings issued against him in August 2000, the defendant then knew that he was facing a claim from the plaintiff and he could have taken such steps as he considered appropriate at that time to deal with any dispute between himself and his insurance brokers or insurance company. Subsequent delay in prosecuting the proceedings did not have any bearing that I can see on this issue, good, bad or indifferent. The position of the defendant in this regard was not changed for the better or worse by reason of the delay on the part of the plaintiff.

2. Prejudice by reason of the changing nature of the plaintiff's case. In the course of his submissions, Mr. Buckley on behalf of the plaintiff very fairly conceded that the criticism of the pleadings made by the defendant were well founded. He accepted that there were apparent contradictions between the replies to particulars and the case as pleaded in the Statement of Claim. However, as referred to above he submitted that the rules of court were there to deal with issues arising from the pleadings. I do not think that it can be gainsaid that there is a measure of prejudice caused to the defendant in this case by virtue of the fact that the plaintiff has been less than clear in setting out the nature of the case being made against the defendant. This contrasts with the position described by Clarke J. in the case of *Rogers v. Michelin Tyre Plc and Michelin Pensions Trust (No. 2) Limited* referred to above in which he noted at p. 7 of his judgment as follows:-

> "It is correct to state that the defendants were given an early opportunity to know with some precision the case being made against them and in particular to know of the contention that certain representations were allegedly made at the meeting of 15th September, 1995. That is a factor which is properly taken into account and lies in favour of the plaintiff in that it makes the delay less likely to cause serious prejudice."

In this case the defendant knows and has always known that the plaintiff's case concerned a ladder, that the ladder was supposed to be in a dangerous or defective condition but having regard to the various particulars in the statement of claim and the replies to notice for particulars I think it is fair to say that it was difficult for the defendant to assess precisely what case was being made in respect of the ladder. A first reading of the statement of claim would certainly lead to the view that the problem related to securing the ladder or the footing of the ladder. The first replies to notice for particulars suggested a different issue, namely that the "L" brackets were loose, thus causing the collapse of the ladder. The plaintiff himself indicated in his replying affidavit that the version of events given on the insurance claim form was "not entirely accurate" and there is the final version given in the affidavit of Trevor Halpin. This demonstrates to me that there has been a difficulty for the defendant in understanding precisely the case that has been made against him. Of itself that seems to me to demonstrate prejudice to the defendant. There is some dispute in the affidavits as to the precise extent of the defendant's state of knowledge of the circumstances of the accident but it is accepted that there are contradictions in the way in which the Plaintiff's case has been pleaded.

The apparent contradictions in the various accounts given by the plaintiff to the defendant as to the cause of the accident seems to me to give substance to the defendant's complaint as to the difficulty of recollection for the various witnesses particularly when it is clear that there are already differences of recollection among the potential witnesses in these proceedings. That is a further factor amounting to prejudice. On the other hand, I accept that an order dismissing these proceedings for want of prosecution would cause significant prejudice to the plaintiff.

Another factor to be considered in this case is the delay/acquiescence on the part of the defendant. As has been pointed out, the defendant having delivered the notice for particulars took no further steps to advance matters. It was open to the defendant to bring a motion to compel the plaintiff to reply to the notice for particulars. In his judgment in the *Rogers* case to which I have referred previously a distinction was drawn by Clarke J. between active delay and inactive delay. In this case it has been contended by counsel on behalf of the plaintiff that the defendant has been guilty of active delay in failing to deliver a defence following the delivery of the statement of claim. Clarke J. pointed out:

> "The failure to take steps required of a party in the course of the proceedings it is necessary for the court to assess the extent to which the respective parties may have contributed to the length of time it has taken for the proceedings to reach the stage which they are at as of the hearing of the application to dismiss."

In weighing up that issue it seems to me that little weight should be attached to this aspect of the matter. It has been suggested in this case that the defendant could have brought a motion to compel replies to particulars. Equally the plaintiff could have brought a motion against the defendant for judgment in default of defence. For that reason I do not think that much weight should be attached that issue.

In bringing together the various factors that have to be taken into consideration, there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting these proceedings. The plaintiff has not clearly set out on the pleadings precisely the case being made against the defendant. The fact that this is a case which will rely on the recollection of a number of witnesses will make it more difficult for the defendant to deal with the issues arising given the fact that the precise nature of the case being made against the defendant was not made clear until the affidavit of Trevor Halpin was sworn herein. The delay has not caused any prejudice to the defendant in respect of the issue of insurance cover in respect of this matter. The fact that the defendant is not covered by insurance on its own would not be a significant factor in assessing where the balance of justice lies but it is a matter which should have prompted an expeditious approach to this litigation. There was some delay on the part of the defendant amounting to what could be described as inaction on the part of the defendant in not bringing a motion to dismiss for want of prosecution at an earlier point in time and there was also some active delay in filing a defence but I do not think that great weight should be attached to that delay in that there is nothing to suggest that the delay in delivering a defence did not contribute in any significant delay to the plaintiff's inactivity.

In all the circumstances, I am satisfied that in this case, having regard to all the matters I have referred to, the balance of justice lies in favour of the dismissal of the proceedings herein. Accordingly I will make an order dismissing the proceedings of the plaintiff herein.