

THE HIGH COURT

[Record No. 2001/6863 P]

BETWEEN

DAVID CULLINANE

PLAINTIFF/APPELLANT

AND

PETER EUSTACE AND MARTIN COWLEY

DEFENDANTS/RESPONDENTS

Judgment of Mr. Justice Herbert delivered the 14th day of January, 2005

1. By an Order, made 7th October, 2003 on foot of a Motion on Notice by the second named Defendant and dated 24th March, 2003, taken pursuant to the provisions of Order 27 rule 1 of the Rules of the Superior Courts, the Master of the High Court dismissed with costs, the Plaintiff's action for want of prosecution in failing to deliver a Statement of Claim within the period of 21 days from the service of the plenary summons. The plenary summons was issued on 10th May, 2001 and was served on the first named Defendant on 29th May, 2001 and on the second named Defendant on a date prior to 10th August, 2001 when an Appearance was entered on behalf of the second named Defendant.

2. In an Affidavit sworn by Anthony O'Brien Solicitor for the Plaintiff, on 7th July, 2004, at paragraph 2 thereof he avers that by a letter dated 6th October, 2003 transmitted by telefax to Messrs Pearts, his Town Agents, at 2.57pm on 6th October, 2003, he referred to the matter of *David Cullinane v. Peter Eustace and Martin Crowley*, "which is listed before the Master's Court on tomorrows inst." This letter, a photocopy of which was exhibited with this Affidavit, then continues as follows, "This is a motion to dismiss for want of prosecution by reason of failure to file a statement of Claim. We would very much appreciate if you could apply to extend time as the Plaintiff is currently awaiting a further medical report from U.K."

3. In her Affidavit sworn in 2004 by Gemma Coady, Solicitor of Arthur O'Hagan, Solicitors for the second named Defendant, who is the nominated representative and chief executive officer of the Mater Misericordiae Hospital, she states that she was present in the Master's Court on 7th October, 2003 and exhibits her File Attendance and a photocopy of the Order of the Master of the High Court, both of which confirm that there was no appearance on the occasion on behalf of the Plaintiff even though the case was held over to a second calling.

4. In these circumstances, on the balance of probabilities, I am satisfied that the Court is entitled to infer that there must have been a breakdown in communication between Mr. O'Brien and his Town Agents. In the second paragraph of his Affidavit sworn on 19th April, 2004, Mr. O'Brien avers that the Plaintiff intended to appeal this decision of the Master of the High Court because his intention to proceed with his action was evidenced by his attending a consultation with a Consultant Ophthalmologist in Coventry on 10th October, 2003. At paragraph 3 of his Affidavit sworn on 19th April, 2004, Mr. O'Brien avers that he forwarded the Report received from the Consultant Ophthalmologist to the Plaintiff. At paragraph 4 of his Affidavit sworn on 7th July, 2004, Mr. O'Brien states that he received this report on 13th November, 2003. Mr. O'Brien does not state how or when he forwarded this report to the Plaintiff or to what address. The address given by the Plaintiff in his Affidavit sworn 21st June, 2004 is Creek House, Brownsmeills, Kinsale, County Cork. In this Affidavit Mr. Cullinane does not deal with these matters but does state that the Consultant Ophthalmologist report was received by his Solicitor on 13th November, 2003. At paragraph 3 of his Affidavit sworn on 7th July, 2004, Mr. O'Brien states that due to some breakdown in communication no appearance was entered by his Town Agents before the Master of the High Court on 7th October, 2003. No explanation as to what occurred between 7th October, 2003 and 4th November, 2003 appears in any of the three Affidavits of Mr. O'Brien. If he made contact with his Town Agents as to what occurred on 7th October, 2003 he makes no mention of this fact. It is clear on the face of the Order of the Master of the High Court, made on 4th November, 2003, that he heard submissions from Counsel and Solicitor for the Plaintiff on that day. When Counsel was instructed to appear on this Motion and by whom, does not appear in any of the Affidavits sworn by Mr. O'Brien. It is not stated whether Counsel was informed of the hearing before the Master of the High Court on 7th October, 2003 and, if so informed, what was said in relation thereto.

5. What is stated at paragraph 3 of the Supplemental Affidavit of Mr. O'Brien sworn on 19th April, 2004 offers no explanation as to why an Appeal to this Court from the Order of the Master of the High Court made on 7th October, 2003 and passed and perfected on 14th October, 2003 was not taken within the permitted period of six days from the latter date. As already indicated neither Mr. O'Brien nor Mr. Cullinane had received the report from the Consultant Ophthalmologist until 13th November, 2003.

6. At paragraph 6 of his Affidavit sworn on 21st June, 2004, the Plaintiff, David Cullinane, swears as follows:-

"6. I say that at all times in and about the making of the Orders of the Master of his Honourable Court I was intent on prosecuting my case. I say that I instructed my Solicitor to act on my behalf and to prosecute an action against the Defendants in relation to the injury I sustained on 20th May, 1998. My instructions were not limited and to the contrary extended to taking all steps necessary to include bringing any Application including this Application appealing from Orders made or any other legal step that was required in order to prosecute the claim to its completion. It was always my intention to prosecute the action from on or about the time the Originating Summons was first issued. I believe that I have a good cause of action but of course I was as already indicated, advised by my Solicitor that I needed expert evidence of a medical specialist before the action could be prosecuted to completion. I was not aware of technicalities such as the time allowed for Appealing Orders but my instructions to my Solicitor were at all times very clear that he take all steps including the Appealing of any Order made in proceedings which was against my interest. To that extent my instructions and my intention always was and still is to prosecute the claim in every aspect. My instructions were not qualified in any way."

7. I am satisfied on the Affidavit evidence and I find, that despite the considerable delay from 20th May, 1998 when the alleged incident giving rise to this action occurred, the Plaintiff in October and November, 2003 still intended to prosecute his claim if he could. At paragraph 7 of his Affidavit sworn on 20th February, 2004, Mr. O'Brien avers that the Plaintiff was notified, - he does not say when, - of the Motions dated 24th March, 2003 by the second named Defendant and 14th August, 2003 by the first named Defendant to strike out his action for failure to deliver a Statement of Claim. I accept the Affidavit evidence, that at considerable inconvenience and expense, the Plaintiff had obtained a consultation with a Consultant Ophthalmologist in Coventry on 10th October, 2003. In such circumstances, on the balance of probabilities, I am quite satisfied that the Plaintiff would have vigorously contested his claim being struck out and, would have insisted upon an appeal being taken to this Court from the Order of the Master of the High Court made on 7th October, 2003 until he had at the very least an opportunity of obtaining the Report and Opinion of the Consultant Ophthalmologist.

8. I am satisfied on the balance of probabilities that the only reason why an Appeal from the Order of the Master of the High Court made on 7th October, 2003 and passed and perfected on 14th October, 2003 was not taken within the six days allowed by Order 63 rule 9 of the Rules of the Superior Courts, was the breakdown in communication between the Solicitor for the Plaintiff and his Town Agents. This was not a mistake as to procedure or a mistake by the Solicitor as to the meaning of Order 63 rule 9 of the Rules of the Superior Courts. What happened here, on the balance of probabilities, was a simple though erroneous assumption by Mr. O'Brien that things were as they appeared on their face to be, followed, until it was too late, by an understandable but entirely mistaken further assumption on his part that the application to the Master to extend the time for the delivery of a Statement of Claim had been successful.

9. As the Order of the Master of the High Court made on 4th November, 2003 was not passed and perfected until 11th November, 2003, the letter by Mr. O'Brien to Junior Counsel dated 4th November, 2003 with instructions to draft an application to set aside both Orders of the Master is sufficient evidence in my judgment, of an intention to appeal formed within the appropriate time.

10. I have read the Report of Mr. Brett L. Haliday, F.R.C.S., F.R.C. (O.P.H.T.), Consultant Ophthalmologist, dated 11th November, 2003 and in particular the Opinion expressed at pages 19 and 20 thereof. I am satisfied, without in anyway purporting to express any opinion whatsoever as to the outcome of this action, that in the words of Lavery, J., in the case of *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170 at 175, "the proposed appeal has substance and is not merely intended to gain time and to postpone the day of reckoning."

11. In the circumstances, I find that the Plaintiff has succeeded in satisfying the conditions stated in the case of *Eire Continental Trading Company Limited v. Clonmel Foods Limited*, (above cited) at page 173 of the Report as necessary to be satisfied before this Court will allow an extension of time within which to appeal the Orders of the Master of the High Court made on 7th October, 2003 and 4th November, 2003. The Court will extend the time accordingly.

12. Both Defendants contend that the Orders of the Master of the High Court should be confirmed by this Court and that the Plaintiff's cross-motion seeking an extension of time for the delivery of a Statement of Claim in this action should be dismissed. The cross-motion is dated 20th February, 2004 and, was served on both Defendants on 2nd March, 2004. At paragraph 4 of his Affidavit sworn on 7th July, 2004, Mr. O'Brien avers that he wrote to Junior Counsel on 14th November, 2003 to draft an application to set aside both Orders of the Master of the High Court. He goes on to state that he did not receive a reply from Counsel until 17th December, 2003 in which Counsel indicated that he could not deal with the matter. Mr. O'Brien states that on the same day he briefed another Junior Counsel to deal with the matter and received the necessary papers from this Counsel on 15th January, 2004. No explanation is offered as to why the cross-motion was not issued until 20th February, 2004 and then not served on the Defendants until 2nd March, 2004.

13. There has been considerable delay in the prosecution of this action by the Plaintiff. The delay appears to fall naturally into a series of definite and distinctive periods.

14. The first period commences on 20th May, 1998, the date of the alleged incident and, continues until the start of the year 2000. I accept what is stated at paragraph 1 of the Affidavit sworn by the Plaintiff on 21st June, 2004 that during this period of approximately nineteen months he was hoping that his eye, despite indications to the contrary, might still improve. Mr. Robert Acheson, a Consultant on the staff of the Mater Misericordiae Hospital had performed a vitrectomy and, was monitoring the condition of the Plaintiff's eye on an on-going basis. The Plaintiff's wife, then his fiancée, was employed in the same Hospital and worked with the first named Defendant until the end of 1999. The Plaintiff states that in such circumstances he was most reluctant to commence proceedings against the Defendants. There is no suggestion that Mr. Acheson is not available as a witness or that the records of his treatment of the Plaintiff at the Mater Misericordiae Hospital after 20th May, 1998 are not available. In my judgment these are genuine and objectively reasonable explanations as to why the Plaintiff did not commence proceedings during this period.

15. The next period of delay extends from the start of the year 2000 until 18th September, 2001, a further period of 21 months. At paragraph 3 of his Affidavit sworn on 21st June, 2004 the Plaintiff avers that for much of the year 2000 he was engaged in stressfully urgent work in the Netherlands, so much so that he was able to return to Ireland only at infrequent periods. At paragraph 6 of his Affidavit sworn on 20th February, 2004 Mr. O'Brien states that the Plaintiff was unable to obtain a medical-legal opinion from any Surgeon in Ireland and was required to travel to the United Kingdom for that purpose. Mr. O'Brien points to no facts in support of this assertion, a situation which is altogether unsatisfactory. At paragraph 4 of his Affidavit sworn on 21st June, 2004, the Plaintiff states that he received a list of potential expert witnesses in the United Kingdom from Mr. O'Brien who, since it is not stated, I can only infer told him, that he had taken the advice of Senior Counsel and had consulted the Law Society of Ireland, of Northern Ireland and, of England and Wales in this regard.

16. At paragraph 11 of his Affidavit sworn on 23rd June, 2004, the first named Defendant states that the Irish College of Ophthalmologists at the Royal College of Surgeons in Ireland, maintains a list of Consultant Ophthalmologists in Ireland who are willing to give medical reports for the purpose of litigation. He expresses surprise that the Plaintiff, according to the Affidavit of Mr. O'Brien, was unable to obtain a medico-legal report in this jurisdiction. The first named Defendant states that any Consultant Ophthalmologist in the State approached on behalf of the Plaintiff for such a medico-legal report would have sought his permission to furnish such a report and he would have granted this permission willingly. He states that no such approach was made to him. On the Affidavit evidence, I am unable to resolve this problem. During the course of this hearing I afforded all the parties an opportunity of filing additional Affidavits. However, in the course of argument, Senior Counsel retained by Mr. O'Brien to represent the Plaintiff informed me that he had directed as part of his general preliminary advice of proofs that the Plaintiff be examined by a Consultant Ophthalmologist from outside the jurisdiction.

17. At paragraph 4 of his Affidavit sworn 21st June, 2004, the Plaintiff states that because of his work commitments in the Netherlands it was 12th March, 2001 before he could arrange to see a Consultant Ophthalmologist in the United Kingdom. He states that on 3rd May, 2001 he flew to the United Kingdom where he was examined by a Consultant Ophthalmologist who advised him that nothing could be done to improve the condition of his eye which would not recover. The Plaintiff then goes on to state as follows:-

"...my Consultant could not provide a medical report until such time as I was able to obtain copies of my medical files from the Defendants and from the Isle of Man Hospital where I had been previously treated. I say that my solicitors ultimately received a medical report from my consultant on 18th September, 2001. I say that this report was inconclusive and I was advised by my Solicitor and Senior Counsel that I should seek a report from another U.K. Consultant."

18. The Plenary Summons in this action was issued on 10th May, 2001, prior to the receipt of this, "inconclusive report". No information was furnished by the Plaintiff or by Mr. O'Brien in their Affidavits as to when or for what purpose the Plaintiff had been treated in an Isle of Man Hospital or by whom or with what effect.

19. This is most unsatisfactory. The purpose of an Affidavit is to put sworn evidence in the form of facts before a Court from which that Court may then reach a just conclusion. Assertions of alleged consequences flowing from undisclosed facts are of little or no assistance to a Court in determining an issue. However, despite the shortcomings in the Affidavits filed on behalf of the Plaintiff I am satisfied that there was a genuine and objectively reasonable explanation for this additional delay on the part of the Plaintiff in prosecuting his action. At this stage, the limitation period of three years within which an action of this nature must be commenced, and within which this action was in fact commenced, had been exceeded by only four months.

20. The next delay covers the period from 18th September, 2001 to 14th November, 2003 when Mr. O'Brien, according to the Affidavit evidence to which I have already adverted, requested Junior Counsel to draft an application to this Court to set aside both Orders of the Master of High Court. This additional delay of almost two years and two months is difficult to explain or excuse. At paragraph 5 of his Affidavit sworn on 21st June, 2004, the Plaintiff states that he became unemployed as a freelance computer consultant in the latter part of 2001 due to adverse conditions in the computer industry and it was not until the middle part of 2002 that he was able to obtain temporary employment with Permanent TSB. He married his fiancée on 26th April, 2002. Prior to this he states that he spent time and approximately €82,500.00 in renovating a house which he had purchased at the end of 1999. From mid 2002 to mid 2003 he states that he was involved in a dispute with his insurers arising out of a subsidence claim in respect of this house the remedying of which cost €70,000 and in respect of which he recovered €65,000.00 from the insurers. The Plaintiff asserts that as a result of time and financial constraints arising from these matters he was unable to afford to travel to the United Kingdom for a further medical examination prior to mid 2003 and obtained an appointment to see Mr. Haliday on 10th October, 2003.

21. On 3rd May, 2001 the Plaintiff had been advised that, to use his own expression, he would be effectively blind in his left eye for the rest of his life. The Court may infer, though it is not positively stated in his Affidavit or in the Affidavits sworn by Mr. O'Brien, that the Plaintiff was informed by Mr. O'Brien that the Plenary Summons in this action had been issued on 10th May, 2001. It is clear from paragraph 4 of his Affidavit sworn 21st June, 2004 that the Plaintiff was aware that the initial medico-legal report received on 18th September, 2001 was inconclusive and, he had been advised by Mr. O'Brien and by Senior Counsel that he should seek another report from a Consultant Ophthalmologist in the United Kingdom. It is very difficult to understand, how in such circumstances he allowed a further two years to go by without obtaining this medico-legal report without which a statement of claim could not be delivered in the action. This is especially so having regard to the statement of Mr. O'Brien at paragraph 7 of his Affidavit sworn on 20th February, 2004, that he had notified the Plaintiff of the applications by the Defendants dated 24th March, 2003 and 14th August, 2003 to strike out his action for failing to deliver a statement of claim. In my Judgment the reasons advanced for this delay by the Plaintiff do not amount to an objectively justifiable explanation for his failure to progress this action during this period. However, in my judgment a delay of two and a half years beyond the statutory limitation period would not in itself be sufficient to entitle this Court in the absence of specific proof to assume that the Defendants had thereby suffered some material detriment. I would wish to reserve my opinion on the question of whether delay by a party wishing to proceed must be determined to be inordinate before a Court should consider exercising its discretion to strike out the matter. In any event, in my judgment the delay in this case could not be so described.

22. No replying Affidavit has been filed by or on behalf of the second named Defendant sued as the nominated representative of the Mater Misericordiae Hospital. This is scarcely surprising having regard to the pleading in the draft statement of claim exhibited at paragraph 9 of the Affidavit of Mr. O'Brien sworn on 26th February, 2004.

23. In his Affidavit sworn on 23rd June, 2004, Professor Eustace, avers that he was obliged to retire from hospital practice in the year 2000 because of ill health but has continued to see patients on two mornings each week. He states that these are mostly persons who have been patients of his for many years and who still require regular check-ups. The only proper inference to be drawn from this evidence is that fortunately Professor Eustace, though physically somewhat infirm, has not suffered any degree of memory or mental impairment and clearly remains fully competent to defend this claim.

24. At paragraph 9 of this Affidavit Professor Eustace states that he advised his secretary that she could destroy the original medical records relating to the Plaintiff as part of the winding up of his practice but only after he had been informed that the Plaintiff, "could not continue his claim against me". He then goes on to state as follows:-

"A copy of the records are held in the offices of McCann Fitzgerald, Solicitors, and while I can no longer compare the copy with the original, I believe the copy is complete."

25. These copy documents would be admissible in evidence in the circumstances. It may be also possible to compare them with the medical files which the Plaintiff, at paragraph 4 of his Affidavit sworn 21st June, 2004 states were furnished to him prior to 18th September, 2001. Professor Eustace does not make a case that the natural lessening in the acuity of recall which occurs with the passage of time as been such over the period of six years prior to the date of swearing of his Affidavit that it would be unjust and unreasonable, even with the assistance of medical records, to expect him to be able to properly defend this claim. Professor Eustace avers at paragraphs 8 and 10 of his Affidavit sworn on 23rd June, 2004, that he has never previously had proceedings taken against him in relation to his professional practice and this claim has consequently caused him considerable stress and worry particularly since he believed that it had been dismissed by the Courts. Unfortunately, involvement in any form of litigation must for almost all persons carry with it a greater or lesser degree of stress, concern, annoyance and anxiety. While I have no reason to doubt anything of what Professor Eustace states in this regard. I do not believe that the Court would be justified in concluding that this stress and worry is solely referable to the delay in progressing this case and is not in any part due to the fact of the existence of proceedings and to their most unfortunate timing in his career. On the Affidavit evidence it would not in my judgment be open to the Court to find that the stress and worry was such and had continued for such a prolonged period as to amount to an illness which so impaired the capacity of the sufferer to defend himself as to render it unjust and oppressive in the Court to permit the action to proceed further.

26. Having examined the details of the case as they appear from the Affidavit evidence and taking a careful overview of that evidence, in my judgment the potential injustice to the Plaintiff in dismissing this action for want of prosecution, despite the delay in the delivery of a statement of claim, exceeds the potential prejudice to the Defendants in allowing the claim to proceed despite the passage of more than six years since the date of the alleged incident giving rise to the claim. I find no evidence of any undue acquiescence on the part of either of the Defendants in any delay on the part of the Plaintiff. The Court will therefore reverse the Orders of the Master of the High Court made respectively on 7th October, 2003 and 4th November, 2003 dismissing this claim. The Court will hear the parties on the question of costs and any other consequential orders.

Other cases referred to in argument:

Rainsford v. Limerick Corporation [1995] 2 ILRM. 561

Hughes v. O'Rourke [1986] ILRM. 538

Sheehan v. Amond [1982] I.R. 235

Primor Plc. v. Stokes Kennedy Crowley [1996] 2 I.R. 459

Anglo Irish Beef Processors Ltd. v. Montgomery & Others [2002] 3 I.R. 510

Dowd v. Kerry County Council [1970] I.R. 27

Celtic Ceramics Ltd v. Industrial Development Authority [1993] ILRM. 248

DALTM v. The Minister for Finance [1989] ILRM. 519