Neutral Citation Number: [2007] IEHC 264

THE HIGH COURT

[2002 No. 923 P]

BETWEEN

JACK DONOHOE

PLAINTIFF

AND
IRISH PRESS PLC

DEFENDANT

Judgment of Mr. Justice McCarthy delivered on the 27th day of July, 2007

1. This is an action for damages for personal injury which was commenced by plenary summons issued on 23rd January, 2002. In as much as an appearance was entered on behalf of the defendant only on 18th April, 2002 one infers that this summons and the subsequently delivered statement of claim (on 4th April, 2002) was served on the defendant prior to that date. The defendant sought particulars of the plaintiff's claim on 26th June, 2002 (by notice) and a reply was delivered to it on 18th February, 2003. No procedural step was taken after the latter date until 15th December, 2004 when the plaintiff's solicitors served a notice of intention to proceed upon Messrs L.K. Shields, solicitors for the defendant, and a further notice on 23rd November, 2006. It appears, also, that further particulars of the plaintiff's claim were furnished on 2nd January, 2007. Subsequently, by notice of motion on 17th April, 2007 (returnable for 21st May, 2007) the defendant sought an order dismissing the plaintiff's claim for want of prosecution and/or for inordinate and inexcusable delay pursuant to the inherent jurisdiction of the court and under O. 122(11) of the Rules.

2. The general endorsement of claim on the plenary summons is of a high degree of generality. On perusal of the statement of claim the plaintiff alleges that between 1967 and 1994 he was employed by the defendant at their premises at Burgh Quay. In particular, at para. 4 he says that in the course of his employment he was

> "exposed to and inhaled on a regular basis quantities of dust and fibres including asbestos from asbestos pads on brake drums in the machine room of the plaintiff's premises"

whereby he suffered personal injury. The injury of which he makes complaint was diagnosed when he was under medical care in respect of a trapped nerve in his neck. In particular, on 12th January, 2001 and 29th January, 2001 respectively he was the subject of a chest x-ray and a CT scan. He pleads that these confirmed that he has "multiple calcified pleural plaque formation along his chest wall and diaphragmatic surfaces" but he has no symptoms and he accepts that there is "no evidence of asbestos related lung disease such as diffuse pleural thickening, mesotheliomar of asbestosis". Further, the plaintiff's doctor says that the symptoms found are related to exposure to asbestos and that it will be necessary to monitor him on a regular basis because of his increased risk of developing lung conditions related to the findings although, of course, there is "no evidence of function impairment on detailed pulmonary function testing" (see particulars of injury).

3. I might briefly dispose of one aspect of the submissions made on behalf of the defendant, namely, the reference to *Fletcher v. Commissioners of Public Works* [2003] 1 I.R. 465 in which the Supreme Court held that the employers of workers negligently exposed to health risks have no liability to the "worried well". Of course the plaintiff does not fall into that category because he has suffered injury, admittedly one which has not given rise to any symptoms or adverse consequences and which presumably would give rise, were he to succeed, to extremely modest damages, certainly, at least, not in excess of the jurisdiction of the Circuit Court.

4. In the reply to the notice for particulars the plaintiff casts his claim on a somewhat wider basis than the statement of claim, alleging exposure to asbestos (and airborne asbestos fibres and materials containing asbestos) in boilers and casting machines and, further, as a result, apparently, of the fact that asbestos was mixed with cement and sprayed onto girders and concrete ceilings; he asserts, however, that the vast majority of his work time with the defendant was spent in the machine room, basement and press room of the defendant's premises, the primary cause, or so I infer, of the plaintiff's exposure to the substance in question being the operation of machines in the machine rooms as referred to in the statement of claim (see paras. 5 and 7 of the reply). The plaintiff's employment history is also clarified by that document in as much as it appears that he was employed by a firm other than the defendant, at the defendant's premises, on a whole time basis between 1967 and 1979 and by the defendant from 1979 until 26th May, 1995. It appears that he believes that he may have been exposed to the substances in question from either 1970 or 1973.

5. The defendant's motion is grounded on the affidavit of Susan Connolly and apart from summarising the sequence of steps in the proceedings and the plaintiff's allegations in respect of exposure and injuries, she deposes (at para. 5) to the effect that "much of the documentation which originally existed (in connection with the affairs of the company) had been disposed of during the course of a receivership, following which that company was placed in liquidation". On this basis Ms. Connolly says that the defendant is "heavily dependant on attempting to identify any relevant evidence which might be adduced from workers who are still alive and who could describe the conditions in the premises and deal with and refute the plaintiff's assertions": it appears (from para. 6) that it has been possible for the defendant to identify only one surviving employee (who I assume it is suggested might be in a position to offer relevant evidence) and that he is ill. Further, it appears (at para. 9) that the defendant has experienced difficulties in ascertaining whether or not, or with what insurers, it is insured in respect of periods relevant to the claim, against the background of documents inferred to be unavailable because of the receivership and the winding-up; there is no reason on the face of it to doubt that diligent efforts have been made to establish the identity of relevant insurers and that this has resulted only in the establishment of the identity of the insurers on risk for the years 1986, 1989, 1990, 1991 and 1995. Ms. Connolly also points out that the first letter indicating an intention to commence proceedings was on 27th February, 2001.

6. There is a replying affidavit of Mr. Patrick McMahon, of 30th May, 2007, on behalf of the plaintiff. In the first instance he addresses what is undoubtedly the relevant fact that the defendant did not put in a defence to the statement of claim within the time limited by the Rules for doing so and, indeed, did not do so notwithstanding a letter of 13th February, 2007 (the previous notice of intention to proceed having been served, as indicated above, on the previous 30th November, 2006). The defendant's response to this was a letter of 13th March, 2007 (plainly meaning, and intended to mean, that the defendant was considering whether or not to take some step because of the plaintiff's delay), and with a further letter of 10th April, 2007 legitimately seeking further time to consider its position. To this course the plaintiff's solicitors agreed and, indeed, they could hardly do otherwise having regard to the plaintiff's delay. I do not think that any of these factors are relevant to the application before me, since it was plain from the start of this chain of correspondence that the plaintiff was merely seeking to revivify the proceedings by seeking a defence and the defendant was considering his position in terms of the delay (and, by inference, whether or not it was appropriate to issue a motion of the present kind). At para. 10 of his affidavit Mr. McMahon says that the motion was issued in bad faith, without notice, and the defendant having obtained in writing the consent of the plaintiff to defer the issue of a motion in default of pleading. I do not think that an originating letter, or its like, was necessary before the issue of the motion or that the postponement of the motion for judgment was in bad faith having regard to the tenor of the correspondence received by the plaintiff's solicitors from those for the defendants but

even if I am wrong it does not appear to me to be relevant to the adjudication on this application. I take the opportunity in this context, also, of saying that default of pleading by the defendant in that context is not something which I regard as relevant to the defendant's contention that either in virtue of the inherent jurisdiction of the court or under the Rules since the gravamen of the defendant's case that it is at real and unavoidable risk of a fair trial and the delay in terms of pleading has not in any material way contributed to that risk.

7. Mr. McMahon also deposes (at para. 11) to his view that the issues raised by the defendant relating to the non availability of potential witnesses or insurance indemnification are matters more properly for the defendant's defence and not matters to be considered on an application of this kind; this is comment but for the avoidance of doubt whilst one may raise delay in one's defence it is perfectly proper to have it dealt with as a discrete issue on a motion such as the present (whether that delay is occasioned by prejudicial absence or unavailability of witnesses or otherwise); certainly the insurance aspect is not a matter for the defence.

8. In calculating the plaintiff's delay (one does not merely, of course, mechanically apply time limits – far from it) no substantive step was taken from the time when a reply was furnished to the defendant's notice for particulars on 18th February, 2003 until the provision of 2nd January, 2007 of additional particulars. I accept that in the intervening period notices of intention to proceed was served on 15th December, 2004 and 23rd November, 2006. Thus the delay between the receipt of the reply to the notice for particulars on 18th February, 2003 and the first notice of intention to proceed was approximately twenty two months with a further delay of approximately two years before the second notice was served being in all not far off four years. On the basis of the plaintiff's pleadings the action was commenced within the limitation period but any breach of duty of the defendant giving rise to loss could only have occurred prior to 31st July, 1995 between six and seven years before the issue of the summons and between five and six years after the discovery of the plaintiff's injury. More significantly, however, breach of duty giving rise to the loss could or did occur in 1970 and thereafter for a period of twenty five years, such that in excess of thirty years had elapsed between the commencement of such alleged breach and the issue of proceedings. It seems to me that the most significant feature of Mr. McMahon's affidavit is the fact that there is no explanation of any kind as to the reasons for the delay in the period from the diagnosis of the plaintiff's injury to the time when the proceedings were again pursued pursuant to the last notice of intention to proceed. I will turn to the significance of these notices below, but I now seek to deal with the applicable legal principles.

9. As is well known the leading authority on this issue is *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Hamilton C.J. summarised the relevant principles as follows:-

> "(1) that the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice so required;
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> (2) that the party who sought the dismissal on the ground of delay in the prosecution of the action must establish that the delay had been inordinate and inexcusable;
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> (3) 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 of or against the case proceeding;
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> (4) that when considering this obligation the court was entitled to take into consideration and have regard to —
>
> (a) the implied constitutional principles of basic fairness of procedures,
>
> (b) whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action,
>
> (c) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at,
>
> (d) whether any delay or conduct of the defendant amounted to acquiescence on the part of the defendant in the plaintiff's delay,
>
> (e) the fact that conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not, in law, constitute an absolute bar preventing the defendant from obtaining a dismissal but was a relevant factor to be taken into account by the court in exercising its discretion whether or not to dismiss, the weight to be attached to such conduct depending on all the circumstances of the particular case,
>
> (f) whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant,
>
> (g) the fact that the prejudice to the defendant referred to in (f) might arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

10. Apart from the principles referred to by the learned Chief Justice, in *Gilroy v. Flynn* (Unreported, Supreme Court, 3rd December, 2004) Hardiman J. for the court, said:-

> " … 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.
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> … 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."

11. While it is arguable that the extent of the duty of courts, contrary to the traditions of the common law, to enter into the arena, so to speak, to expedite the process of litigation (when ample procedural mechanisms exist for the benefit of the parties should delay arise) is limited and not applicable to all classes of litigation, this decision is, as pointed out by Hardiman J., of relevance in a case such as the present. In *O'Domhnaill v. Merrick* [1984] 1 I.R. 151 the plaintiff's cause of action arose on 5th March, 1961 and, because of her infancy, and as a result of *O'Brien v. Keogh* [1972] I.R. 144 (condemning as repugnant to the Constitution that provision of the Statute of Limitations 1957 which provided that the limitation period in respect of causes of action inhering in infants was three years if he or she was in the custody of a parent at the date of accrual) why cause of action became statute barred only

on 4th March, 1984 (twenty four years after the birth of the plaintiff). The plaintiff had sued earlier and that action was dismissed for want of prosecution in 1968, the instant case being one commenced by summons on 9th September, 1977. Thus, the plaintiff sued within what was (retrospectively, so to speak) the limitation period but the claim was dismissed for want of prosecution and an appeal by the plaintiff failed.

12. In *Kelly v. O'Leary* [2001] 2 I.R. 526, the plaintiff sued by plenary summons on 26th March, 1998 in respect of wrongful acts (with consequent loss in the nature of personal injuries) which were alleged to have taken place between 1934 and 1947 and Kelly J., in dismissing the claim, held that the test to be adopted in deciding whether or not the action should be dismissed in virtue of the courts inherent jurisdiction, on the grounds of delay, was whether or not there had been an inordinate and inexcusable delay and if so, whether, on the facts the balance of justice was in favour of, or against, the proceeding of the case. Further, it was held that (in the instant case):-

> "Constitutional principles of fairness of procedure required dismissal of an action in circumstances where there was a clear and patent unfairness in asking the defendant to defend the action after the lapse of time involved. In the instant case actual prejudice had occurred and the defendant had not contributed to the delay."
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> (see headnote para. 4)

13. Earlier, in *Toal v. Duignan and Others (No. 1)* [1991] I.L.R.M. 135, the plaintiff was born in June 1961 with an undescended right testicle, a condition which was not detected at the time and in respect, whereof, of course, no treatment was thereby afforded. Amongst the defendants was the personal representative of a consultant paediatrician who had attended the plaintiff after his birth and the Coombe Hospital where he had been born. The first defendant was the Master of the Coombe Hospital at the time the action was commenced and the fifth was a general practitioner who had been consulted in 1971. As regards the second and fourth defendants it was held that there was an absolute and obvious injustice in permitting the case to continue *inter alia* in the absence of detailed clinical notes and records and the death of both the gynaecologist dealing with the birth and the paediatrician. As regards the first defendant, there was no prima facie claim and as regards the fifth (the general practitioner) it was held that it would be "equally unjust and unfair" having regard to the lapse of time between the proceedings and the consultation (sixteen years) to expect that that defendant could properly defend herself. In subsequent related proceedings namely, *Toal v. Duignan and Others (No. 2)* [1991] I.L.R.M. 140, proceedings were dismissed against several of the defendants therein (I need not go into the matter in greater detail) due to delay or lapse of time.

14. I have also been referred to *Rainsford v. Limerick Corporation* [1995] I.L.R.M. 561 and *Southern Mineral Oil Limited (in Liquidation) v. Cooney* [1997] 3 I.R. 549, the latter having been considered in *Primor*. In *Southern Mineral Oil Limited*, it was sought to dismiss certain proceedings by a liquidator in respect of the respondents; on the appeal to the Supreme Court it declined to dismiss this action. The court applied *Primor* in holding that there must be inordinate and inexcusable delay on the part of the plaintiff before a court would consider whether the proceedings should be struck out against a defendant and that the court will exercise its discretion to strike out proceedings where there had been delay, even though the proceedings had been instituted within the relevant limitation period, in circumstances where the delay gave rise to substantial risk that it would not be possible to have a fair trial or that it was likely to cause or have caused serious prejudice to the plaintiff.

15. The issue was canvassed in *Kelly v. O'Leary* as to whether or not separate tests applied between, on the one hand, delays between the (wrongful) acts complained of and the commencement of proceedings as, and, on the other, the test which deals with delays post the institution of proceedings. It was suggested that in *O'Domhnaill v. Merrick* and *Toal v. Duignan (No. 1)* dealt with the former and that *Primor plc v. Stokes Kennedy Crowley* dealt with the latter class. Counsel for the plaintiff in that case accepted that *O'Domhnaill v. Merrick* and *Toal v. Duignan* did not require the establishment of both inordinate and inexcusable delay before considering the balance of justice but contended that in accordance with *Primor plc v. Stokes Kennedy Crowley* the defendant had to satisfy the more stringent threefold test there described before the order sought could have been granted in that case. Whether or which, it is clear that a jurisdiction exists to dismiss proceedings in virtue of the inherent jurisdiction of the court when there was an unavoidable and real risk of an unfair trial, notwithstanding the fact that proceedings were commenced within the limitation period as is well established in *O'Domhnaill v. Merrick* and *Toal v. Duignan*. The delay in those cases was of the order of a quarter of a century from the time when the cause of action arose, as pointed out by Keane C.J. in Southern Mineral Oil Limited. Irrespective of the answer to the issue canvassed (as referred to above) in Kelly v. O'Leary, I think that it is proper to say that Keane C.J. merely distinguished *O'Domhnaill v. Merrick* and *Toal v. Duignan* from *Southern Mineral Oil Limited v. Cooney*, on the facts. I do not hesitate to say that this is a case which ought to be dismissed in the inherent jurisdiction of the court by virtue of the unavoidable and real risk that the defendants would not obtain a fair trial, having regard to its history, as referred to above, including the delay from the initiation of the proceedings, but primarily because the cause of action may have arisen as early as 1970 and any breach of duty (being an essential component of the cause of action) continued until 1995.

16. It seems from *Primor* that before the action may be dismissed for want of prosecution either in virtue of the inherent jurisdiction of the court or otherwise, where the delay is both prior to and subsequent to the issue of proceedings a party seeking to end the proceedings must show that the delay is inordinate and inexcusable and that even where this is so the court must, on the facts, and in its discretion, decide the balance of justice in favour or against continuance and, thereafter, (and of special relevance in this case), *inter alia* consider the rights of the defendant to a fair trial. Apart altogether from any inherent jurisdiction to dismiss proceedings due to delay having regard to a real and unavoidable risk of an unfair trial for a defendant I am of the view that the delay since the commencement of the proceedings was inordinate. And, literally, no excuse, much less an explanation, is advanced for such delay. In the context of what constitutes inordinate delay Keane J., in *Southern Mineral Oil Limited* referred to *Birkett v. James* [1978] A.C. 297 where it was held that:

> "It behoved a litigant who delayed in issuing his writ until close to the expiry of the limitation period to demonstrate diligence in getting on with proceedings once they were issued" (per Keane J. at page 558) and, later, (at 563), with approval, the words of Diplock L.J. at page 332 of the report) –
>
> > "A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

This was cited in *Primor plc v. Stokes Kennedy Crowley* (as again pointed out by Keane J.).

17. Having regard to the provisions of the Statute of Limitations (Amendment) Act, 1991, s. 2 it seems to me that there was not, in the present case, a "late start" as contemplated in *Birkett v. James* but the principle underlying that proposition, namely, that what might be described as special expedition is required the older the claim (or the later in the day in which it has been sued upon) must, I

would have thought, apply equally to a case such as the present. Even if this were not so, I cannot see how the delay could be described as other than inordinate.

18. In respect of the factors which must be balanced before a decision is made to dismiss proceedings there cannot be any doubt, on the facts as set out above, that the defendants are gravely prejudiced to the point where I believe that there is a real and unavoidable risk of an unfair trial. Constitutional principles of basic fairness of procedures would of course be offended by an unfair trial. As to whether or not the defendants' delay (with respect to default of pleading) is a factor of significance, I do not think that it is, having regard to the length of the post commencement delay and in the light of the lengthy period from the first accrual of the cause of action, nor, again, do I consider that the time for consideration sought by the defendant (when the case was reactivated), after a demand had been made for the defence and a motion for judgment in default of defence was threatened, constituted acquiescence. Furthermore, I do not see that any significant expense was occasioned to the plaintiff. I am also influenced by the injuries alleged by the plaintiff; they are not catastrophic in the sense of *Rainsford v. Limerick Corporation* and even though the plaintiff, by dismissal of the action, loses his opportunity to be compensated, that compensation must be modest; he is a person who appears to be living a completely normal life (so far as physical health is concerned) in all respects. I have had regard, of course, also to the difficulties which have been encountered by the defendants in the matter of insurance: there can be no doubt but that there is considerable prejudice in this respect. Such a thing might well arise in many cases commenced, even within the limitation period, but many years after the accrual of a cause of action where, in the particular circumstances, the delay was not inordinate or was excusable or the balance of justice would, *prima facie*, indicate that the action should proceed. Nonetheless, it is a relevant factor indicative of prejudice of the defendants position.

I therefore dismiss this action for want of prosecution and or in the alternative for inordinate and inexcusable delay pursuant to the inherent jurisdiction of the court.