THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA

Record No. 2017/293

Hogan J.
Whelan J.
McGovern J.

BETWEEN/

ROSITA SWEETMAN

PLAINTIFF/APPELLANT

- AND–

COILLTE TEORANTA

DEFENDANT/RESPONDENT

JUDGMENT of the Court delivered on the 1st day of October 2018 by Mr. Justice McGovern

1. This is an appeal from a judgment of the High Court (Moriarty J.) delivered on the 24th April 2017 (although the text of the judgment records in error that it was delivered on the 24th day of May 2017) on a motion which sought the following reliefs:-

> (i) an order under Ord. 122, r. 11, dismissing the plaintiff's claim for want of prosecution;
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> (ii) in the alternative, an order pursuant to the inherent jurisdiction of the Court, dismissing the plaintiff's claim on the basis of inordinate and inexcusable delay; and
>
> (iii) in the alternative, an order dismissing the plaintiff's claim for failure to comply with an order of the Court made on the 24th January 2011 which was an order requiring the plaintiff to deliver particulars in reply to a notice dated the 5th May 2010 within three weeks.

2. The judgment was given in respect of three related proceedings each with its own separate High Court record number. The proceedings were those involving the appellant and each of her two children. In his judgment Moriarty J. dismissed the claims on the grounds of inordinate and inexcusable delay. Although the appellant has appealed that decision no corresponding appeal has been brought by either of her children in the connected proceedings.

3. The appellant claims that from in or about 1982 and, in particular, from 1995 to 1998 the respondent, its servants or agents wrongfully caused and/or permitted a pesticide, known as Lindane, to be sprayed on lands adjoining her property and to enter her water supply. As a result of this the appellant claims that her health had been adversely affected. The appellant makes other complaints which arise out of forestry works alleged to have been carried out by the respondent. These involve reducing and damaging her water supply as a result of felling operations, obstructing her access to a water abstraction point making it impossible for her to replace a water filter, diverting a water course and causing flooding of her lands in 1999 and 2000. She claims that the flooding events were caused by the respondent's upstream felling of a large plantation in 1996 and subsequent failure to remove debris and the respondent's partial re-opening in 2000 of the upper end of a small stream leading from the appellant's water abstraction point towards her property.

4. At para. 13 of his judgment the High Court judge set out a chronology of the pleadings in this litigation as follows:-

> 20.07.2004: Plenary summons
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> 19.07.2005: Statement of claim (served with plenary summons one day before the summons was due to expire)
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> 02.08.2005: Defendant's appearance
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> 21.12.2005: Defendant's notice for particulars
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> 06.02.2007: Defendant's notice of intention to proceed
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> 05.07.2007: Defendant's motion to compel replies to notice for particulars dated 21.12.2005
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> 02.10.2007: Plaintiff's replies to defendant's notice for particulars dated 21.12.2005
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> 05.10.2007: Defendant's notice for further and better particulars
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> 17.10.2007: Plaintiff's replies to defendant's notice for further and better particulars of 05.10.2007
>
> 22.10.2007: Consent Order on motion relating to those particulars
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> 31.01.2008: Notice of change of solicitor for plaintiff
>
> 18.06.2008: Notice of motion for judgment in default of defence
>
> 26.06.2008: Defence

26.06.2008: Amended defence

14.07.2008: Order on motion for judgment with costs to plaintiff

22.01.2010: Defendant's affidavit of discovery

17.02.2010: Notice of change of solicitors for plaintiffs

05.05.2010: Defendant's notice for further and better particulars

14.12.2010: Plaintiff's affidavit of verification

13.12.2010: Defendant's notice of motion for discovery of documents

13.12.2010: Defendant's notice of motion seeking replies to notice for further particulars of 05.05.2010

24.01.2011: Order of court in relation to such particulars

22.03.2011: Order of Master requiring plaintiff to make discovery of documents within eight weeks

19.10.2012: Plaintiff's notice of intention to proceed

30.10.2012: Notice of change of defendant's solicitor

30.11.2012: Plaintiff's affidavit of discovery

06.06.2013: Notice of change of plaintiff's solicitor

26.02.2015: Plaintiff's notice of intention to proceed.

While this list is somewhat abridged from a chronology of pleading set out in an affidavit of Ms. Margaret M. Carey, a solicitor on behalf of the plaintiff, on the 13th March 2015 it nonetheless contains all the relevant dates for the purpose of this application.

5. Although the grounds of appeal purport to challenge the High Court judge's finding that the plaintiff's delay was inordinate and inexcusable, these grounds were not advanced at the hearing of the appeal. When the hearing commenced counsel for the appellant informed the Court that the appellant was "hanging her hat" on the judgment of this Court in the case of *Connolly v Torc Grain and Feed Limited* [2015] IECA 280. In that case this Court held that, although the plaintiff had been guilty of inordinate and inexcusable delay in the prosecution of the proceedings, special circumstances existed to satisfy the court that the balance of justice was served by not making an order dismissing the proceedings. Therefore, the only issue which arises on this appeal is whether the balance of justice favours the refusal of the order sought by the respondent on the motion and whether or not the High Court judge's judgment on that issue should stand.

6. In *Connolly* the judgment of the Court was delivered by Irvine J. who reviewed the evolving jurisprudence in this jurisdiction on the topic of delay. She cited the words of Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290 at p. 293 where he said:-

> "…[T]he 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…[F]ollowing 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."

7. At para. 25 of her judgment Irvine J. referred to the duty of the Courts to ensure that litigation is despatched with efficiency and within a time frame that will ensure that justice will not be put to the hazard. She referred to the constitutional mandate of the courts to ensure that litigation is completed in a timely fashion notwithstanding the views of the parties to the litigation. She added that:

> "…by virtue of its constitutional mandate to administer justice under Article 34.1, [the Court] has a duty to ensure that litigation is dispatched with efficiency and within a time frame that will ensure that justice will not be put to the hazard, as may happen if cases are left to be decided at a substantial remove from the events in dispute. If the courts were to renege on their constitutional obligations in this regard, given that the rules of court leave it largely to the parities themselves to progress litigation, their ability to administer justice would be truly cast in doubt."

8. In *Quinn v. Faulkner t/a Faulkners Garage & Another* [2011] IEHC 103 Hogan J. said at para. 29:-

> "While as Charleton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the Courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common: see, *e.g.*, the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd.* [2010] IEHC 465."

9. In *Connolly* Irvine J. was careful to point out that the judgment was one which was particular to its own facts. In reaching the conclusion that those proceedings should not be dismissed she stated that it was "not without considerable misgivings…". The events complained of in *Connolly* occurred in September 2002. The plenary summons issued on the 17th September 2008 at what was described at Irvine J. as "…at the very outside limit of the six year statutory period permitted for this type of claim". The statement of claim was delivered three years and three months later. A period of six years had elapsed before the commencement of the proceedings and a further five and a half years elapsed by the time the motion was heard. In all that was a period of eleven and a half years since the events complained of. The defence raised a preliminary objection of "inordinate and unconscionable" delay. Although the defendant argued strongly that it would be prejudiced because it was a case where the recollection of witnesses would determine the outcome of the proceedings, there was no evidence before the court that any relevant witnesses had died or were

unavailable. Irvine J. also noted that there had been periods of sustained inactivity on the part of the defendant which could be said to amount to acquiescence.

10. While there are undoubtedly some parallels between the present case and Connolly, there are a number of distinguishing features between the two cases. In the first place, there was cogent evidence before the High Court in this case that a number of witnesses are unavailable because they had died and in the case of one witness there is evidence that he is living in Greece at an unknown address. Other witnesses are now retired or elderly and only two witnesses are still in the employment of the respondent. The plenary summons was issued on the 20th July 2004 which is some twenty two years after the events complained of in 1982 and between six and nine years from the period 1998 or 1995 respectively. These are the dates pleaded in para. 5 of the statement of claim, when it is alleged Lindane was sprayed on lands adjoining the plaintiff's property and were thereby caused to enter the plaintiff's water supply. The defence pleads that the claim is statute barred apart from the alternate plea in the amended defence that the plaintiff was guilty of inordinate and inexcusable delay.

11. At the hearing in the High Court Moriarity J. concluded at para. 28 of his judgment that while the defendant did contribute to the delay it was to "…a very significantly lesser extent" than the plaintiff. The defendant admits that it failed to deliver its defence for approximately eight months after receiving replies to a notice for particulars and only after a motion for judgment. But in the context of the chronology of the pleadings and various steps taken in this litigation and referred to in para. 4 above, this delay is, on the whole, insignificant.

12. In *Sheehan v. Amond* [1982] 1 I.R. 235, Henchy J. stated at 238:-

> "There was a want of speed on both sides; but it needs to be remembered that it was the plaintiff's claim that was being litigated, and it was for his solicitor to see that it did not run the risk of dying of inanition."

And in *McNamee v. Boyce* [2017] IESC 24, Denham C.J. stated at para. 78 of her judgment:

> "…the onus lies on the plaintiff to prosecute his or her claim, an onus which is particularly heavy where there is a significant lapse of time between the events complained of and the initiation of the claim."

13. The respondent claims that it will suffer significant prejudice if this case were to proceed to trial. Mr. Sean Hayes who was an environmental officer with the respondent, had a number of dealings with the appellant and had first hand knowledge of the use of pesticides by the respondent during the 1990s is now dead. Mr. Tom Lyng, a district manager for the respondent, is also deceased. It seems clear that Mr. Lyng had received complaints from the plaintiff and could have given evidence of the nature of those complaints and when they were made. Mr. Aeneas Higgins was the environment manager for the regional area which included the Hollywood forest adjacent to the appellant's property. He is now seventy nine years old, lives in Greece and his address is unknown. The respondent maintains that his evidence would be crucial to the defendant's contention that it did not spray the pesticide, Lindane, on any of its lands adjoining the plaintiff's property or carry out the felling of trees in a way which would damage in any material way the plaintiff's access to water or the quality of the water. Furthermore, he could have dealt with issues such as the investigation undertaken by the respondent following complaints by the plaintiff in or around May of 2000 (which is now more than eighteen years ago). While other witnesses are referred to, the evidence was unclear as to whether they would be unable to give evidence but what cannot be denied is that they would be asked to recall events which occurred many years ago and this is entirely unsatisfactory.

14. In *Donnellan v. Westport Textiles Limited* [2011] IEHC 11, Hogan J. referred to the constitutional imperative deriving from Article 34.1 to put an end to stale claims so as to ensure the efficient administration of justice and basic fairness of procedures. In *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50, Denham C.J. likewise referred to the requirement that courts ensure that cases are progressed reasonably.

Discussion

15. The appellant argues that the respondent acquiesced in the appellant's delay in proceeding. She also argues that the respondent engaged with the merits of the claim in the defence, and that the filing of an affidavit of discovery of the 22nd January 2010 by the respondent is indicative of its attitude in this case where it was plainly engaging with the issues. It needs to be said that the affidavit of discovery was filed eight and a half years ago and six and a half years before the hearing of the motion in the High Court. That in itself represents a considerable lapse of time.

16. The defence is a full denial of the plaintiff's claim including the allegations concerning the spreading of Lindane. In an affidavit sworn by the appellant on the 7th August 2015, in opposition to the respondent's claim to dismiss on the grounds of delay, the appellant exhibited an e-mail dated the 14th July 2003 from the respondent in which it stated that "…Lindane was last used at Knocknaboley Wood in May and June 1998". While the appellant maintains that spraying continued after that date, this is an issue in the proceedings. In fact, it is fair to say that if these proceedings ever progressed to trial that there are a myriad of issues that arise on the question of liability and also quantum.

17. On the question of liability there is the very significant issue as to the period of time for which Lindane was sprayed in the forest adjacent to the appellant's lands. While the defendant in its defence denies spraying Lindane, the e-mail referred to in para. 16 above would suggest otherwise. That e-mail also stated that "the use of Lindane was discontinued voluntarily by Coillte in 1999 and since then has not been used at all in Coillte forests or associated facilities". In an affidavit sworn by the appellant's solicitor, Ms. Orla Clark, on the 5th day of May 2015 in opposition to the motion to dismiss she stated at para. 8 "…since the defendant's defence was delivered, the plaintiff has obtained some discovery from the defendant which indicates that an average of approximately 50 litres of Lindane were sprayed in the Hollywood area each year between 1991 and 1998 and that some 264 litres of Lindane were used for such spray between 5th January 1998 and 3rd January 1999...". While this is somewhat at variance with the e-mail of the 14th July 2003 it is broadly speaking consistent with the assertion that the respondent discontinued using Lindane in 1999. This is a significant issue of fact which will have to be addressed by witnesses if a trial were to proceed.

18. Furthermore, there are issues concerning felling works carried out in 1996 which are alleged to have affected the plaintiff's water supply by reducing it and damaging it and making access to a water abstraction point impossible, so as to prevent the appellant replacing a filter. Other issues of fact in dispute will be whether or not there was flooding in October 1999 and November 2000 and the cause of and the extent of that flooding and the damage (if any) caused to the appellant's land or water supply.

19. So far as quantum is concerned the plaintiff has numerous complaints going back over a long period of time. She claims that in 1997 she suffered from a persistent cough and colds and from allergies. In 2000 she claims to have had a shingles type outbreak. Also in the same year she suffered a cut, after which she claimed to have developed a fever and a rash. She claimed that in 2003 she suffered a toxic rash and developed a tooth abscess. In February 2004 she said that blood tests showed the presence of Lindane.

20. The range of her complaints are quite diverse and it is obvious that if the defendant wished to dispute those claims it would require not only to have access to her medical reports but also to be in a position to call medical evidence on its own behalf. It is very difficult to see how the cause and extent of her various complaints could be tested in a meaningful way at this remove.

21. In summary the issue of the Statue of Limitations, the extent and duration of the spraying of Lindane, the nature and extent of other forestry works complained of and the cause and extent of the plaintiff's personal injuries are all dependant on oral evidence, the recollection of witnesses and the retention of medical experts. In the case of the latter, they will not have had an opportunity to examine the plaintiff until many years after the onset of the injuries of which she complains.

22. The appellant claims that the High Court judge erred in not taking into account the difficulty associated with getting a case of this nature ready for trial and that this significantly contributed to the delay. While he referred to the appellant's argument that the delay was not inordinate on account of the difficult nature of the case, he did not make any specific finding on this point although he concluded the delay was inordinate. For my part I am satisfied that this case is not of such complexity that could justify the delay that has taken place. It is a relatively straightforward claim albeit one with some unusual features requiring some scientific evidence.

23. The appellant also urged this Court and the High Court to accept that the case was one which could be largely determined on documentary evidence. The High Court judge disagreed and I think he was correct in that assessment for the reasons set out earlier in this judgment. He also referred to the fact that four firms of solicitors have acted for the appellant over many years of this litigation and while making some adverse observations in respect of some of these solicitors, correctly observed that the appellant as a litigant must accept vicarious responsibility for what is done or neglected by an agent including her solicitors and that the courts have not historically looked kindly on the defence of blaming one's solicitors.

Conclusions

24. I am satisfied that the High Court judge correctly set out the principles to be applied in a motion to dismiss on the grounds of inordinate and inexcusable delay and that he correctly applied the principles which have been established particularly in the more recent *jurisprudence* of the Superior Courts. I find no error in the manner in which he applied the "balance of justice" test to the particular facts of this case.

25. The proper administration of justice is the legitimate concern of the courts as this is the mandate with which they have been entrusted by Article 34.1 of the Constitution. A necessary part of the proper administration of justice includes ensuring a hearing within a reasonable time. In the particular circumstances of this case, this Court would be failing in its duty if it were to allow these proceedings to continue as it would give rise to a serious prejudice by reason of such delay in respect of one of the parties, namely the respondent. If the Court were to decide otherwise it would, in effect, be reversing the recent jurisprudence of the Superior Courts which has been directed towards ensuring the efficient and orderly administration of justice.

26. In these circumstances, I would accordingly dismiss the appeal.