Neutral Citation: [2017] IEHC 108

THE HIGH COURT

[No. 2009/1189 P]

BETWEEN

JAMES O'REILLY

PLAINTIFF

AND

O'NEILL AND BRENNAN LIMITED, MICHEAL LYNCH LIMITED AND MICHAEL LYNCH (GROUP) LIMITED

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered at 4.30pm on Monday the 6th day of February, 2017

1. This is an application by the first named defendant pursuant to O. 122 (11) of the Rules of the Superior Courts or in the alternative in the interests of justice pursuant to the inherent jurisdiction of the Court for the dismissal of the plaintiff's action against the first named defendant on the grounds of delay in the prosecution of the proceedings.

2. The Court appreciates the agreement by counsel concerning the applicable principles to be applied. It also notes that it is accepted that the delay on the part of the plaintiff has been inordinate.

3. The chronology of the proceedings from the accrual of the cause of action on 12th June, 2006 to 25th February, 2013 when the first motion to strike out by the first named defendant for delay was determined to the issue of this second motion by way of Notice of Motion on 15th July, 2016 is also uncontroversial.

4. So it is now over to assessing whether the delay was excusable. There certainly has been a great zeal on the part of the plaintiff's solicitor and counsel in seeking to accentuate the potential excuses which this Court could take into account. Effectively there are three potential excuses:-

> (i) The conduct of the two other defendants frustrated the prosecution of these proceedings by the plaintiff while the first named defendant knew or ought to have known of this position. Since the first defendant's defence was delivered in March, 2010, the plaintiff sought judgment in default against the other defendants in December, 2013 and October, 2015 leading to the delivery of a defence on the part of the other defendants on 19th November, 2015. Emphasis is laid on the apparent lack of insurance or refusal to offer indemnity by the insurers of the other defendants caused by the late notification of the claim. The plaintiff asks this Court to infer and attribute to the first named defendant some of the blame for the late notification by the other defendants to their insurers. It was submitted that that applicant first named defendant frustrated the plaintiff in notifying the other defendants. The Court notes the stress laid by Ms. Treacy (a solicitor in the firm on record for the plaintiff) in her affidavit of 13th January, 2017 on the fact that the first named defendant was the plaintiff's employer and that her firm was only instructed in March, 2008 about the involvement of the other defendants. Be that as it may I understand how lack of progress against the other defendants may have contributed to the delay but the plaintiff ought to have been chastened by the order of Gilligan J. in February, 2013 which granted a reprieve. Furthermore, I am not persuaded that the apparent absence of insurers for the other defendants is an issue which holds much, if any, weight in considering excuses. Such an approach asks this Court to assume matters about stances and arguments for the other defendants and their potential indemnifiers which it is not in a position to do.
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> (ii) The second potential excuse effectively asks this Court to determine whether the first named defendant should wait for the other defendants to be prosecuted to trial. This puts the onus on a defendant to look at a claim from the plaintiff's perspective and is quite novel. Section 35(1) of the Civil Liability Act 1961 is invoked by the plaintiff as it allows for the barring of a plaintiff's claim to the extent that other defendants or concurrent wrongdoers could have been responsible. This ingenious argument is flawed in my opinion for a number of reasons, not least that it was always open to the plaintiff to get on with prosecuting the proceedings and particularly after the order of Gilligan J. in 2013.
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> (iii) The third excuse relied upon was the absence of a clear prognosis for the plaintiff's spinal fusion which is alleged to have been caused by the accident in June, 2006. The Court has sympathy for the plaintiff's condition but there are many claims determined with such lack of definition even three and four years after an accident.

5. As for the excerpt taken from the website of the applicant by the first named defendant at an unknown date and exhibited in the plaintiff's affidavit sworn on 18th January, 2017, I find that nothing in that exhibit lends support to the suggested excuse for the delay in prosecution.

Balance of justice

6. Having found that the delay is inexcusable in the context that it is over a decade since the accident and three years since the first motion to strike out, I now proceed to consider the balance of justice principle. There is an abundance of case law which has been distilled and clarified most recently by the Court of Appeal where Irvine J. in *McNamee v. Boyce* [2016] IECA 19 allowed an appeal from the High Court. That application concerned the award of damages for sexual assault between 1972 and 1992. There, the defendant's wife who had been a witness in the successful prosecution of the defendant had died in 2005. The Statement of Claim was amended in 2012. The facts in that case are not similar to those arising in the present case which is prosecuted by the plaintiff. However, the relevant principles of law are concisely stated in that judgment:-

> *"35. Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test."*

7. I also mention para. 32 in particular of the judgment in *Millerick v. Minister for Finance* [2016] IECA 206 where Irvine J. further explained:-

> *"That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J.*

in Primor."

8. In short, the first named defendant applicant need only in this application establish moderate prejudice arising from that delay in order to succeed under the *Primor* test on an appraisal of all of the circumstances in the case.

9. On the fairness points I note as follows:-

> (i) The first named defendant cannot be blamed for the delays since the delivery of its defence nearly seven years ago now. It may have let sleeping dogs lie but Fennelly J. in *Anglo Irish Beef Processors* [2002] 3 I.R. 510 dealt with this issue in a way which does not assist the plaintiff.
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> (ii) I fail to understand how the plaintiff can get some support in his favour that he is now incurring expense as a result of an approach which the applicant defendant could take and which the plaintiff would have had to incur and possibly ought to have incurred long before now.
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> (iii) Mr. O'Brien, counsel for the applicant defendant, confined the prejudice arising to the effect of delay on recall and the quality of any evidence which may be adduced. This claim concerns a work accident at the Green Isle Hotel, Naas Road on 12th June, 2006 which was described as a "construction site" in the pleadings. Although the plaintiff may have been the employer of the first named defendant, it is alleged that the other defendants had obligations under the then applicable Safety Health and Welfare at Work Act Regulations for construction sites.

10. The Court therefore recognises that the locus of the accident which may have been inspected by an engineer reporting to the plaintiff's advisor in 2012 and the first named defendant's advisor has long since changed. No explanation which stands up to scrutiny has been offered for the plaintiff to wait until 2012 and more recently in 2016 to obtain advice from Tony O'Keeffe and Partners engineers. Although the plaintiff in his affidavit sworn last month, 18th January, 2017, avers that he was always engaged in the litigation process, the Court is left sceptical about the seriousness of the efforts made until the applicant defendant made moves. Lest there be any doubt there is no obligation on a defendant whether employer, contractor or driver of another vehicle to process a claim for a plaintiff.

11. Submissions were made by Mr. Treacy, senior counsel for the plaintiff, to the effect that the plaintiff was frustrated in his efforts to identify the other defendants. As long ago as and if not before 31st March, 2008, the plaintiff and his solicitor knew that a firm with a name like Lynch Builders could have had a liability. Reference was made by senior counsel to the fact that the plaintiff has named the correct corporate entities which may have some liability but he repeatedly relied upon the absence of insurance or indemnity for those companies by reason of the failure of the first named defendant applicant to identify those names. It is alleged that this resulted in a refusal or perhaps a repudiation of cover for the other defendants. I was urged to look at the whole situation and not to reward the first named defendant applicant for its alleged conduct in failing to reply to letters from the plaintiff's solicitor. Although I may have sympathy for the plaintiff and his solicitors, it strikes me that a claimant cannot rely on a defendant to do what a plaintiff must do – i.e. ferret out the required information which can be obtained by various means.

12. Section 35(1) (i) or (j) of the Civil Liability Act 1961 was also relied upon by Mr. Treacy for his submission that the plaintiff had no option but to wait for the other defendants to engage. According to the plaintiff those other defendants are the principal cause for the delay in the prosecution of these proceedings since the last motion of the first named defendant to strike out on 25th February, 2013.

13. Given the delay in starting and prosecuting it behoved the plaintiff to advance these proceedings to trial as soon as possible after February, 2013. There was an imperative from a witness' perspective, recall difficulties and potential prejudice which may arise.

14. Returning to s. 35(1) of the Civil Liability Act it was acknowledged by counsel that:-

> (i) The other defendant would have to seek leave to amend their defences to rely on this section. Without adjudicating upon that in the absence of those defendants, it appears that those defendants may be precluded from relying on that section due to their conduct in not engaging in the litigation.
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> (ii) The other defendants may still seek an indemnity and contribution from the first named defendant under the Civil Liability Act 1961 and again the Court is not asked to make a determination in this regard at this stage.
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> (iii) The argument that the first named defendant's contention that it was only an employer on paper was baseless, may be for another day. I do not favour the submission for the plaintiff under this heading. It may be that the first named defendant had a duty to the plaintiff, that that duty was breached and that the plaintiff would have succeeded. However, weighing up all the matters and taking account of the fact that the plaintiff's claim is not at a zero percent chance of success against the other defendants, I find it impossible to find in favour of the plaintiff in this motion and to overcome the repeated views of the Court of Appeal, that:-
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> 1. delay in prosecuting which is inordinate and inexcusable only requires the applicant defendant to establish moderate prejudice;
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> 2. there is a constitutional imperative to bring an end to the all too long outstanding culture of delays in litigation;
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> 3. the factors outlined in the *Primor* judgment are for this Court to apply.

15. Despite the strenuous efforts of Mr. Treacy, I am satisfied that applying those principles to the presenting facts does not allow the plaintiff the latitude which he now seeks.

16. Therefore, I strike out the plaintiff's claim against the first named defendant on the grounds of inordinate and inexcusable delay in the prosecution of these proceedings having regard to the constitutional imperative to bring claims to an end and taking into account all of the factors which this Court may consider according to the established principles.