Neutral Citation: [2013] IEHC 391

THE HIGH COURT

[2005 No. 3112P]

BETWEEN/

YVONNE CASSERLY

PLAINTIFF

AND

MARY O'CONNELL, PRACTISING AS O'CONNELL & CO., SOLICITORS

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 9th May, 2013

1. This application to strike out the present proceedings on grounds of undue delay raises once again the difficult question concerning the balance which must be struck between two constitutionally inspired interests, namely, the right of access to the courts on the one hand and the right to have proceedings determined within a reasonable time on the other. The issue in the present case arises in the following way.

2. On the 10th May, 2000, the plaintiff was involved in what appears to have been a serious traffic accident in Majorca while in Spain. Upon her return to Ireland, her case is that she retained the defendant solicitor to pursue a personal injury claim arising from this accident. There seems little doubt but that such a claim would have to have been pursued in the Spanish courts, not least as the putative defendant was then domiciled in Spain for the purposes of Article 2 of the Brussels Convention (which was the then applicable legal regime). It also seems clear that the Spanish limitation periods are shorter than ours – typically one year for a case of this kind – and that no such proceedings were brought within time in Spain.

3. The present claim is for professional negligence, in that the plaintiff, Ms. Casserly, contends that her erstwhile solicitor and defendant, Ms. O'Connell, failed to take steps to have the claim processed in the Spanish courts in a timely fashion. In her defence Ms. O'Connell contends that she engaged Spanish lawyers in Madrid for this purpose and that any claim the plaintiff might have for negligence lay against those lawyers.

4. That, however, is not the issue directly before me now. I am rather instead required to consider whether, by reference to the defendant's motion of 19th September, 2012, the proceedings should be struck out by reason of undue delay. The proceedings were actually commenced on 19th September, 2005, but were not actually served on the defendant until 3rd August, 2006. A statement of claim was then served in December, 2006.

5. The defendant immediately served a notice for particulars. It appears from the affidavit sworn in December, 2012 by the plaintiff's solicitor, Ms. Breslin, that replies to this notice for particulars had been prepared in July 2009 (*i.e.*, some two and half years after the notice for particulars was first served), but through what appears to have been an oversight, they were not then served on the defendant's solicitors. Certainly, the first time when these replies were received by Mr. Houlihan, solicitor for the defendant, was when they were exhibited to Ms. Breslin's affidavit in December, 2012.

6. Delays of this kind were, regrettably, all too representative of the plaintiff's conduct of the litigation. Thus, while a defence was delivered in April 2008, a reply was not furnished until November, 2011. A notice to admit facts was served with the defence, but this was also not replied to until November, 2011.

7. An order for discovery was made by the Master of the High Court on 30th June, 2009. Eight letters were sent by Mr. Houlihan between March, 2010 and February, 2012 reminding the plaintiff of her obligation to make discovery, but despite assurances this was only done in February, 2012. The failure to make discovery in a timely fashion severely handicapped the defendant's endeavours to have the case set down for trial. The plaintiff could, moreover, be in no doubt of the defendant's intentions to seek to have the proceedings struck out on grounds of undue delay, as Mr. Houlihan had frequently warned of this very possibility in his correspondence with the plaintiff's solicitors.

8. In fairness to the plaintiff's solicitors, I think it clear that they have been embarrassed by the on-going delays which they regard as unacceptable. Many of these problems - certainly in the period from September, 2009 onwards – were complicated by considerable difficulties involved in securing the plaintiff's medical records from a particular hospital and securing a medical report from the consultant orthopaedic surgeon who treated her for these injuries on her return from Spain. Ms. Breslin's affidavit chronicles a long litany of correspondence, telephone calls and disappointed assurances as she endeavoured to secure such a report. The plaintiff was ultimately seen by the surgeon in question in November, 2012 and the report was finally received in December, 2012. Subject to the outcome of this motion, it is clear that this case is ready for trial.

Some general considerations

9. While the legal principles governing undue delay are by now well established in the light of the copious case-law which has followed in the wake of the Supreme Court's decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, the *application* of these principles often rests on the special facts which are peculiar to the case at hand. The present case is no different. What, then, are the facts particular to the present case which call for special attention so far as the application of the *Primor* principles are concerned?

10. First, if we accept that the relevant Spanish limitation period could not have expired prior to May 2001 (*i.e.*, within one year of the accident), it follows that the six year limitation period governing professional negligence could not have expired prior to May, 2007. It follows, therefore, that the present proceedings, even if delayed, were nonetheless commenced well within time.

11. Second, the defendant has been on notice that a claim would or might be brought against her since at least July, 2005 (when the defendant received a letter before action alleging negligence from the plaintiff's present solicitor). While it might be thought that this

makes the fact that the claim has still not been heard almost eight years later all the more unacceptable, it is, I think, important that the defendant has been on notice of the claim for some period. No suggestion has been made that she could not defend the claim on its merits or that the delay has appreciably hampered her ability to defend the proceedings.

12. In this regard the present case is very different from *Adamson v. North Eastern Health Board* [2013] IEHC 191. In *Adamson*, a medical consultant successfully applied to have an *ex parte* order joining him to medical negligence proceedings set aside. The claim related to events which occurred in January, 2000 and the proceedings were commenced outside the relevant limitation period, even if by reference to factors such as disability and state of knowledge, they were not necessarily statute-barred. More pertinently, the first notice the consultant in question had received of the proposal to join him to the proceedings was in June, 2011 (*i.e.*, more than eleven years later). The consultant had no recollection whatever of the case and apart from two entirely passing references to him in the medical notes, there was nothing to suggest that he had been actively involved in the patient's care.

13. In my judgment setting aside the order joining the consultant I then noted that in *McBreaty v. North Western Health Board* [2010] IESC 27 the Supreme Court had confirmed that there existed a distinct jurisdiction (*i.e.*, independently of the *Primor* principles) to strike out for undue delay which can be exercised "even in the absence of fault on the part of the plaintiff" where such delay had compromised the fair resolution of the proceedings. I then proceeded to hold that as that was the case here, the consultant was on that account entitled to have the order joining him to the proceedings set aside:-

> "The plain fact of the matter, nevertheless, is that if Dr. O'Connor were now forced to defend the allegations of personal negligence in these proceedings, he would be obliged to do so in circumstances where through no fault of his, the first notification of this came after eleven years and where he could not realistically be expected to defend the negligence claim on its merits.
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> It might, perhaps, be different if there was objective evidence which would have chronicled his actual involvement in some detail and which allowed for an independent evaluation of the extent to which his clinical performance met appropriate professional standards. There is, however, no such evidence in the present case. Indeed, as we have just noted, it is not even clear that Dr. O'Connor was ever involved in the active treatment or management of Mr. Adamson. All that is known from both the clinical notes and the nursing notes is that in the late afternoon and evening of 3rd January, 2000, Dr. O'Connor was informed of the deterioration in Mr. Adamson's condition and that the treating clinician – probably a hospital registrar – discussed the case with him, even if this fact is taken to suggest that he was the most senior consultant on duty in the hospital on the evening in question
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> In these circumstances, it is all but impossible to see how Dr. O'Connor could fairly defend the claim on the merits. How could a court properly assess whether Dr. O'Connor had properly examined the patient or reached a correct diagnosis? How could the court possibly evaluate whether Dr. O'Connor had recommended the correct course of treatment in this case? These questions answers themselves and show that an assessment of this questions would be little better than pure conjecture or speculation."

14. The present case is quite different in that, as we have just noted, the defendant has had notice of the existence of a claim (or, at least, a potential claim) for the best part of nine years. In contrast to *Adamson* – where I found that the risks to a fair trial caused by the delay were especially acute - it has not, moreover, been said that the defendant's ability to defend the proceedings has been significantly comprised.

15. Third, a striking feature of the present case is that much of the recent delay has been caused by factors entirely outside the plaintiff's control, namely, the huge practical difficulties and bureaucratic delays which were encountered in securing both the relevant hospital records and an up to date medical report from the consultant surgeon who treated her upon her return from Spain.

16. Finally, an important factor pulling in the opposite direction must also be emphasised, namely, that the defendant has had allegations of professional negligence hanging over her for the best part of eight years. As I observed in *Adamson*:

> "Here it must also be observed that allegations of professional negligence impact on the good name of the practitioner concerned, which right is, of course, expressly protected by Article 40.3.2 of the Constitution. Even if the allegations do not attain the level of gravity which was at issue in *II v. JJ* [2012] IEHC 327 (where the plaintiff had alleged that she had been sexually abused by a sibling over twenty-five years previously), I venture nonetheless to suggest that the principle I articulated in that case equally applies to the present one:
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> > 'If the State's obligation to defend the defendant's constitutional right to a good name in Article 40.3.2 is to be meaningful, it must in turn imply that the procedures contained and operated in our legal system are framed in such a way such that a claim of this gravity is heard and adjudicated within a reasonable period of time.'"

17. Counsel for the plaintiff, Mr. Counihan S.C., has sought to emphasise the fact that the defendant has retired from practice, so that – or so the argument runs – an allegation of this kind does not present the same serious implications for the defendant's personal and professional reputation (and, hence, her constitutional right to her good name) as if she were presently in practice. But even if that is so, it is nonetheless a reproach to the legal system that a claim of this kind should remain in being without effective resolution for the best part of eight years.

Application of the *Primor* principles

18. Since the delay in the present proceedings has not appreciably compromised the ability of the defendant to defend the case on the merits, it falls accordingly to be evaluated by reference to the *Primor* rather than the *McBreaty* principles. The *Primor* principles require the court to ask: (i) was the delay inordinate?; (ii) if the delay was inordinate, was it excusable? and (iii) even if the delay was inordinate and inexcusable, where does the balance of justice lie?

19. The first two questions can be readily answered, since quite plainly the delay was by any standards both inordinate and inexcusable. The entire proceedings were characterised by inactivity and delay and by an unaccountable failure to attend to even the most straightforward matters, such as the preparation of a reply and the service of replies to particulars. This delay was especially grievous given the implications which these proceedings had for the defendant's constitutional right to a good name.

20. It remains to consider the balance of justice. Not without hesitation I have come to the conclusion that the balance of justice requires that the proceedings should not be struck out at this stage. Judged by the particulars contained in the statement of claim, the plaintiff appears to have been seriously injured in the road accident. Moreover, the delay, while significant, has not appreciably compromised the defendant's ability to defend the proceedings on their merits or has otherwise impeded what I described in *Adamson*

as the courts' ability "to arrive at a fair determination of the case based on objective evidence which lends itself to independent scrutiny".

21. But in arriving at this conclusion, I shall do so only on terms which are designed to ensure that there is no further delay of any kind on the part of the plaintiff. In the first place, I will simply adjourn the defendant's motion to strike out the proceedings for a period of two months so that the plaintiff's further conduct of the litigation remains under intense scrutiny. In sporting terms, she has been shown the equivalent of a yellow card. But that colour might easily turn red if there were to be any further delay.

22. Second, it is a condition of this adjournment that the plaintiff must apply within a short period (to be measured in weeks) for a date for the hearing of the claim. She must also offer the defendant the option of separate hearings on liability and damages and the choice in this regard will be at the election of the defendant.

23. Finally, the plaintiff will be required to pay the costs of this motion, as it was entirely proper and appropriate that such a motion was brought.