

THE HIGH COURT

[2009 No. 8787P]

BETWEEN:

PAUL KENNY

PLAINTIFF

-AND-

MOTOR NETWORK LIMITED t/a JENNINGS TRUCK CENTRE

AND

J HARRIS ASSEMBLERS

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 7th day of November, 2017.**Summary**

1. This is a motion by the second named defendant, J Harris Assemblers ("Harris"), to strike out the plaintiff, Mr. Kenny's, claim for want of prosecution and/or for inordinate and inexcusable delay pursuant to the Court's inherent jurisdiction. There is a period of 6 ½ years between the close of the pleadings and the bringing of this motion by Harris to strike out the proceedings.

2. In reliance upon the judgement of Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206, this Court finds that the delay in this case was inordinate, inexcusable and the balance of justice favours the striking out of the proceedings. It also finds that the 'endless indulgence' towards such delays in the past is not a victimless indulgence as defendants suffer from having litigation hanging over them interminably and in addition that there is a duty upon the courts to ensure that there is a proper and efficient administration of justice, which means litigation being conducted in a timely fashion.

Background facts

3. The case involves a claim by the plaintiff that the mixer vehicle which he purchased on the 22nd September, 2005, was defective, the vehicle having been purchased from the first named defendant but supplied by Harris.

4. Mr. Kenny used this vehicle for his business dealings with Kilsaran Concrete and his claim is therefore for loss to his business arising from the defective mixer not being available to him, as well as for the cost of the vehicle. He alleges that the defects in the vehicle were evident almost from the first day. Nonetheless, proceedings were not issued in this case until some four years later, the 30th September, 2009.

5. Thereafter, matters progressed relatively quickly. An appearance on behalf of Harris was filed on the 30th October, 2009, and the Statement of Claim was filed on the 9th November, 2009, with a Notice of Particulars issued by Harris on the 24th November, 2009, and the defence was filed by Harris on the 3rd February, 2010.

6. On the 8th February, 2010, the solicitor for Mr. Kenny wrote to the solicitor for Harris stating that the replies to particulars would be delivered shortly to Harris. However, it was not until the 9th February, 2012, two years later, that replies to particulars were delivered by Mr. Kenny. The excuse provided by Mr. Kenny for this two year delay is that he was at that stage working as a driver in continental Europe and it took his accountant and himself a long time to finalise the figures for the losses incurred by his business as a result of the unavailability of the mixer.

7. While Mr. Kenny's working on the continent might lead to an excusable delay of some months, this Court does not accept that this is a valid excuse for a delay of two years in replying to particulars.

8. After the particulars had been delivered, there was nothing further from Mr. Kenny for a period of two years and two months. His solicitor at this stage sent a letter dated 10th April, 2014, to the effect that he hoped to issue a certificate of readiness shortly. However, no certificate of readiness was ever issued.

9. Then over two years later, on the 9th September, 2016, Mr. Kenny's solicitor stated in correspondence that he needed to amend the pleadings and would revert shortly, but again nothing further occurred.

10. Then on the 30th November, 2016, this motion for strike out was issued by Harris.

11. In summary therefore we are dealing with a claim about a sale of an allegedly defective vehicle, which Mr. Kenny knew very shortly after the sale was allegedly defective, some 12 years after the cause of action arose. More importantly, it is now 6 ½ years since the pleadings have closed.

Delay is inordinate

12. There is nothing special about the nature of the claim, i.e. a defective product claim, which impacts upon this Court's consideration of the delay in this case. It is clear to this Court that the delay of 6 ½ years, between the close of pleadings on the 3rd February, 2010 and his motion on the 30th November, 2016, is inordinate.

Delay is inexcusable

13. The next question is whether the delay is excusable. Mr. Kenny did not offer any excuse for the delay between 9th February, 2012, when the replies for particulars were delivered, and the date of this motion, on the 30th November, 2016, a period of 4 ½ years. Thus, this Court has little hesitation in finding that this delay was both inordinate and inexcusable.

14. This Court has earlier found that the delay of 2 years between February 2010 (when the plaintiff's solicitor indicated that the replies would be delivered shortly) and their actual delivery in February 2012 was not properly excusable by the fact that Mr Kenny was working in continental Europe and by the nature of the losses to be particularised, namely alleged losses suffered by his business.

15. Thus, this Court finds that the delay of circa 6 years was inordinate and inexcusable.

Balance of justice

16. As regards the balance of justice, it is clear from *Millerick v. Minister for Finance* [2016] IECA 206, that where the delay is inordinate and inexcusable, if there are not countervailing factors sufficient to resolve the balance of justice matter in favour of the plaintiff, then the matter should be struck out. This Court can find no countervailing factors in favour of Mr. Kenny in relation to a straightforward claim for defective products, which would justify this Court in deciding not to strike out the plaintiff's claim.

Prejudice to the defendant

17. Even if this were not the case, this Court concludes that the defendant would suffer prejudice in seeking to defend a claim relating to matters which arose over a decade ago, where certain staff have retired from Harris, the co-defendant in these proceedings has gone into liquidation and the time-lag alone will render the recall of details and evidence more difficult.

Duty on defendant to progress the trial?

18. For the sake of completeness, this Court would also find that Mr. Kenny cannot attach any responsibility to Harris for the delay, since as noted by Irvine J. in *Millerick*, it is the conduct of the litigation by the plaintiff which is the primary focus of attention. In addition, Harris' silence or inactivity is not material since Harris did nothing which caused or contributed to the plaintiff's delay or led Mr. Kenny to believe that Harris was acquiescing in the delay. In particular, this Court rejects the claim by Mr. Kenny that Harris could have sought to bring the matter on for trial. In the words of Irvine J. at paragraph 38:

"Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damned for failing to embrace potential additional costs of ensuring the proceedings which might otherwise wither and die advance to a trial?"

19. For all of these reasons, this Court would dismiss the plaintiff's claim for inordinate and inexcusable delay.

Duty on court to ensure that litigation is conducted in a timely fashion

20. This Court is also conscious of the need to bring to an end the long standing culture of delays in litigation so as to ensure the effective administration of justice. It is to be noted that the granting of, what Hardiman J. (in *Gilroy v. Flynn* [2004] IESC 98) and Clarke J. (in *Rodenhuis and Verloop B.V. v. HDS Energy Ltd* [2010] IEHC 465) have described as, '*endless indulgence*' towards such delays, is not a victimless indulgence. This is because defendants who have court proceedings hanging over them interminably, suffer the undoubted reputational damage of being identified as being defendants in court proceedings and all that entails. In addition to this reputational damage, litigation which takes years to come to hearing, can also lead to real economic loss to defendants e.g. where insurance premiums are immediately raised because of claims against an insured, even though many years down the line the claim may be unsuccessful. There are good reasons therefore why, as noted by Irvine J. at paragraph 40 in *Millerick*, the constitutional provisions contained in Article 34.1 require the courts to administer justice, but that they must do so in '*a timely fashion*'.

21. In this Court's view the proceedings in this case fall comfortably outside any notion of litigation being conducted in a timely fashion and so for this reason also, namely this Court's duty to ensure the proper and efficient administration of justice, this Court would dismiss the plaintiff's proceedings.