Neutral Citation Number: [2009] IEHC 95

THE HIGH COURT

2006 1448 P

BETWEEN

J.S.

PLAINTIFF

AND

A.M. McD. AND J.K.

DEFENDANTS

JUDGMENT delivered by Ms. Justice Dunne on the 20th day of February, 2009

The first named defendant is sued as a nominee of the Christian Brothers. The second named defendant is a Christian Brother and was at all relevant times a teacher/principal in a primary school run by the Christian Brothers.

The plaintiff herein issued proceedings by way of a personal injury summons on the 30th March, 2006, claiming damages for severe trauma, personal injury, loss and damage on the basis that the plaintiff whilst a fourth, fifth and sixth class pupil at the school was systematically and regularly physically, psychologically and sexually abused by the second named defendant. Particulars of the alleged abuse are set out in the personal injury summons.

A defence on behalf of the second named defendant was delivered on the 13th June, 2006, in which it is denied that the second named defendant systematically and regularly physically, psychologically and sexually abused the plaintiff. The second named defendant makes certain admissions in the course of his defence – namely, that he administered corporal punishment to the boys in his charge; to using a leather strap on palms of boys hands and on occasion being out of control when doing so; finally, to having pulled boys by the locks of their hair. Whilst these admissions are made they are expressed in general terms and no admission is made of any kind in respect of the plaintiff.

A notice for particulars was raised by the second named defendant and replies were furnished dated the 24th November, 2006. A notice of motion dated the 5th April, 2007, and returnable for the 31st May, 2007, was issued on behalf of the second named defendant seeking discovery. A reply to the defence of the second named defendant was delivered on the 9th August, 2007. An affidavit of discovery was sworn herein by the plaintiff on the 9th November, 2007. Further and better particulars of loss and damage were furnished on behalf of the plaintiff on the 3rd January, 2008. A notice of motion was issued on the 26th February, 2008, returnable for the 7th April, 2008, on behalf of the second named defendant. The relief sought was as follows:-

> "1. An order dismissing the plaintiff's claim for inordinate, inexcusable and unreasonable delay on the part of the plaintiff in prosecuting and maintaining the claim herein.
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> 2. Further or in the alternative an order dismissing the plaintiff's claim for want of prosecution."

That motion came before me for hearing on the 22nd January, 2009. The motion was grounded on an affidavit sworn herein by the second named defendant identifying the period in respect of which the allegations are made as being 1977 to 1979. It is noted in the affidavit that the plaintiff in replies to particulars maintained that he "made a formal complaint to An Garda Síochána in November 1996" in respect of these matters. The second named defendant then went on to say:-

> "I did not abuse the plaintiff as alleged or at all save for the admissions made in the personal injuries defence filed by me the 13th day of June, 2006."

There is some ambiguity on the part of the second named defendant in relation to the admissions made by him. In the defence as delivered it is clearly the case that no specific admission is made in relation to the plaintiff. Paragraph 8 of the affidavit sworn by him on the 25th February, 2008, as set out above, clearly appears to contain an admission as to some degree of abuse on the part of the second named defendant towards the plaintiff. In paras. 5 and 6 of the affidavit of the second named defendant sworn herein on a date in January, 2009 the second named defendant expressly stated that he made no admission in relation to the plaintiff. Counsel on behalf of the second named defendant at the hearing before me confirmed that that was indeed the position of the second named defendant notwithstanding the apparent ambiguity that arose from the terms in which his first affidavit was sworn. I proceeded to deal with the matter on that basis.

The second named defendant in his first affidavit then goes on to assert that there has been inordinate and unreasonable and inexcusable delay on the part of the plaintiff in commencing, prosecuting and maintaining his claim. It is also asserted that the delay is prejudicial to the second named defendant, i.e., the delay between 1977 and today's date and the delay between 1996 and today's date. The prejudice relied on is the length of time which has elapsed since the dates of the matters complained of. It is also stated that the second named defendant does not know of any witness who would be in a position to assist him by giving evidence in this action.

A replying affidavit was sworn by Emmet Halley, Solicitor, on behalf of the plaintiff. He pointed out that the plaintiff was aged between 8 and 11 at the time of the alleged abuse. He added that the conduct of the second named defendant has had a detrimental effect on the entire course of the plaintiff's life and psychological/psychiatric well being. He also

referred to correspondence sent to the second named defendant prior to the commencement of the proceedings and stated that the plaintiff has since the date of issue of the proceedings, proceeded expeditiously. He added that the nature of the abuse was such as to render such delay as occurred excusable and justifiable and that bringing civil proceedings as opposed to being involved in a prosecution by An Garda Síochána was a significantly and more challenging proposition. It was also pointed out that the plaintiff has since 1996 laboured with an alcohol dependency and psychiatric/psychological *sequelae* referable to the abuse alleged in the proceedings. Mr. Halley proceeded to consider the issue of prejudice. In this context, he referred to the complaint about the effect of the lapse of time on memory relied on by the second named defendant and contrasted it with the admissions made by him in his defence.

A further affidavit was sworn by the second named defendant stating that while he had made admissions in his defence, he made no admission in relation to the plaintiff. He added that he had no memory of the plaintiff.

Submissions
Mr. Fitzgerald, S.C. on behalf of the second named defendant relied heavily on the Supreme Court judgment in the case of *Stephens v. Paul Flynn Limited* [2008] I.E.S.C. 4. That was a case in which the application was to dismiss for want of prosecution. Kearns J. in his judgment quoted with approval the principles identified by Clarke J. a being applicable to applications such as this:-

> "The learned High Court judge, by reference to the judgment of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, determined that the following general legal principles applied to an application to dismiss a claim for want of prosecution:-
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> > '(1) In deciding whether to dismiss proceedings for want of prosecution, the court should inquire as to whether the delay on the part of the person seeking to proceed has been first inordinate and, even if inordinate, whether it has been inexcusable. The onus of establishing that the delay has been both inordinate and inexcusable lies upon the party who is seeking a dismissal and opposing a continuance of the proceedings.
> >
> > (2) Where a delay has not been inordinate and inexcusable there are no real grounds for dismissing the proceedings.
> >
> > (3) Even where the delay has been both inordinate and inexcusable, the court must further proceed to exercise a discretion, as to whether on the facts, the balance of justice is in favour of, or against the proceeding of the case. Delay on the part of a defendant seeking a dismissal of the action and, to some extent, a failure on his part to exercise his right to apply at any given time for the dismissal of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion.
> >
> > (4) While a party acting through a solicitor must, to an extent, be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the court's discretion.'"

Relying on the principles identified by Clarke J. in the High Court and approved by Kearns J. in the Supreme Court, it was submitted that there was both inordinate and inexcusable delay on the part of the plaintiff and that the balance of justice favoured the second named defendant such that the action should be dismissed at this stage.

Mr. Delaney, S.C. on behalf of the plaintiff contended that so far as the application to dismiss for want of prosecution was concerned, there had been no delay on the part of the plaintiff since the institution of proceedings. It was accepted that there was inordinate delay in the commencement of the proceedings. However, it was argued that the appropriate test to apply was that derived from the Supreme Court decisions in *O'Domhnaill v. Merrick* [1984] I.R. 151, *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135 and *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140. Reference was also made to the High Court decisions in the cases of *Kelly v. O'Leary* [2001] 2 I.R. 526 and *J. McH. v. J.M.* [2004] 3 I.R. 385. He submitted that the onus rested on the second named defendant to show that there was prejudice caused by the delay such that the action should be dismissed. On the facts of this case, he contended that the second named defendant had not done this and he made the following points:-

> 1. The second named defendant does not allege that any witness who might have been in a position to assist him is deceased or no longer available;
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> 2. It is apparent from the particulars given in the pleadings that most of the incidents of abuse in respect of the plaintiff occurred in the presence of other members of the plaintiff's class. Accordingly, every other member of the plaintiff's class is potentially a witness for the second named defendant. There is no reason to suppose that these former pupils cannot be identified and traced from school records.
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> 3. Having referred to the admissions made by the second named defendant in his defence and that in his second affidavit sworn herein in January 2009, the second named defendant asserts that the admissions relate to other boys and not to the plaintiff and that he does not have a memory of the plaintiff, the point was made that it is evident from the foregoing that the second named defendant does have a general recollection of the period in question and the manner in which he conducted himself and administered corporal punishment during that period.

In those circumstances it was submitted that the extent of any prejudice to the second named defendant by reason of delay was limited and not such as to warrant the dismissal of the action.

Application of principles to the facts
I accept the submission on the part of the plaintiff that there has not been any delay on his part since the commencement of the proceedings herein. The real issue between the parties is whether the pre-commencement delay in this case is such as to prejudice the second named defendant to such an extent that the plaintiff's claim ought to be dismissed. As mentioned above there was some debate in the argument before me as to the appropriate test to be applied to an application such as this. The traditional jurisprudence in relation to actions to dismiss for want of prosecution is that derived from *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, as was noted by Kearns J. in

Stephens v. Paul Flynn Limited at p. 14 of the judgment. Assuming for the moment that that is the appropriate test to be applied then it is clear that the onus rests on the second named defendant of establishing that the delay on the part of the plaintiff is both inordinate and inexcusable. In this case there is no doubt that the delay is inordinate. That much is conceded on behalf of the plaintiff. The issue therefore is whether the delay is also inexcusable. It is clear from the pleadings herein and from the affidavit of Emmet Halley referred to above that:-

> "The plaintiff suffered from features of post traumatic stress disorder, with nightmares and flashbacks to what happened at S . . . . L . . . . National School. From in or around the age of 14 he began to drink heavily and to excess and progressed to develop a full blown alcohol dependency syndrome under which he laboured for a period of in or around 23 years. The plaintiff suffered from significant self doubt, lack of confidence and bouts of depression. These bouts became more severe in or around 2002 and 2003. The plaintiff at that point in time was prescribed anti-depressants. He has had suicidal ideation. He remains depressed. The plaintiff has tried and continues to try to avoid memories of the abuse in childhood . . . the plaintiff's life has been permanently marred and distorted by the events, the subject matter of the proceedings herein. The psychological *sequelae* continued to affect him and are unlikely to abate. His life has been permanently damaged . . . ."

Mr. Halley in his affidavit further stated that the plaintiff:-

> "…since November 1996, he laboured with an alcohol dependency and/or certain psychiatric/psychological *sequelae* referable to and suffered consequent upon the abuse and assaults the subject matter of the proceedings."

On the facts of this case it is my view that the delay on the part of the plaintiff in commencing these proceedings is excusable, notwithstanding that the plaintiff was in a position to make a complaint to the gardaí in 1996 about these matters. That complaint did not require the plaintiff to take any further steps. What occurred subsequently in respect of a criminal complaint would have been in the hands of the Gardaí and ultimately, the Director of Public Prosecutions. The position in respect of civil proceedings is different. It is for a plaintiff to furnish instructions to his Solicitor and to direct the course of such proceedings. That is a more onerous proposition. In my view, the second named defendant herein has not demonstrated that the delay on the part of the plaintiff was inexcusable. Clearly the plaintiff was in no position to take proceedings having regard to his psychological/psychiatric problems combined with alcoholism - all matters attributable to the conduct of the second named defendant. Accordingly if the appropriate test to be applied to this application was the test derived from the *Primor* principles that would be an end to the matter. It would not be necessary to carry out the exercise of assessing where the balance of justice lies.

I am of the view that the appropriate test in a case involving pre-commencement delay is somewhat different to that derived from *Primor.* The decision in the case of *Stephens v. Paul Flynn Limited* is a seminal decision in respect of applications to dismiss for want of prosecution. There has been no want of prosecution in relation to the conduct of these proceedings since instituted. The real complaint is in respect of pre-commencement delay. So far as pre-commencement delay is concerned, I find myself in agreement with the judgment of Peart J. in the case of *J.McH. v. J.M*. referred to above where he said at p. 395 of his judgment:-

> "I am of the view that there are two separate and distinct tests, one the test set out *in Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in respect of post-commencement delay, and the other, the *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140 test, if I can so describe it, in respect of pre-commencement delay. First of all, the distinction reflects the different and respective contexts in which the delay took place in each case. But besides that, I am of the view that there are sound and logical reasons why the test in each case ought to be different."

In the course of that case, Peart J. went on to conclude that the delay on the part of the plaintiff in that case was excusable but nonetheless he went on to consider the issue of prejudice to the applicant/third named defendant in that case as a result of the delay.

In *Toal v. Duignan (No. 1)* Finlay C.J. at p. 139 of his judgment stated as follows:-

> "In the High Court it was held by Keane J. that the case was governed by the decision of this Court in *O'Domnhail v. Merrick* [1984] I.R. 151. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but there may be summarised in the application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."

I therefore propose to consider the question as to whether there is a clear and patent unfairness in asking the defendant in these proceedings to defend this action given the length of time that has elapsed since the matters complained of. This is a case in which the outcome of any proceedings would be determined on the findings of fact as opposed to the determination of any issue of law. As such it is clear that the evidence of the plaintiff and the second named defendant will be central to the issues to be determined. The second named defendant's position on affidavit is that he does not remember this plaintiff. It is clear however that he has a good recall of the events of the time period that is of relevance in this case. He has made a number of admissions in respect of his conduct towards a number of boys under his care at the relevant time. This is not a case in which the second named defendant is saying that he has no memory of the events around the relevant time. It is not a case in which the second named defendant is saying that there was a witness available to him who is not now available. What the second named defendant has said is somewhat different, namely that he does not know of any other witness apart from himself who would be in a position to assist by giving evidence in the action. By contrast the plaintiff has stated that a number of the events of which he complains, took place in the presence of others. In particular an incident is outlined which involved not just the plaintiff but his classmates who were with him on a school trip. It seems to me that it would be a relatively straightforward matter to ascertain the names and addresses of those boys from school records with the view to calling them to give evidence on that point. Indeed given that a number of the other incidents complained of also are alleged to have taken place in the presence of others, it is

hard to understand why it would not be possible to call classmates of the plaintiff to contradict the plaintiff's evidence in this regard.

In many cases the difficulty caused to a defendant seeking to defend proceedings such as this may include the death of witnesses who could have been in a position to give evidence to assist a defendant; the absence or destruction of relevant records which may go to establish, for example, whether a particular individual was teaching a particular class at the relevant time; the effect of the passage of time on a defendant's memory of the events involved and so on. In this case, while the second named defendant has stated that he has no memory of the plaintiff, it is quite clear that he has a memory of his conduct during that period of time and he has made certain admissions in relation to his behaviour towards the boys in his charge at that time. It does not appear to me therefore that the lapse of time has had such an effect on his memory that he would not be in a position to deal with the allegations of the plaintiff. It is important to bear in mind that it is nowhere suggested by the second named defendant that the pre-commencement delay has led to the situation where he does not know of any other witness who can assist him.

On the facts of this case, I cannot see that there is a clear and patent unfairness in asking the second named defendant to defend these proceedings notwithstanding the length of time that has elapsed since the matters complained of.

Accordingly I am refusing the application herein.