

THE HIGH COURT

[2013 No. 1693 P]

BETWEEN

TOMMY BYRNE

PLAINTIFF

AND

AER LINGUS GROUP PLC

JUDGMENT of Mr. Justice Meenan delivered on the 19th day of December, 2019

Background

1. The plaintiff issued a personal injury summons on 20 February 2013 claiming that on or about 19 September 2010, in the course of his employment with the defendant working as an air steward, he was caused to suffer and sustain severe personal injuries, loss, damage and expense. The various steps taken in these proceedings are as follows: -
 - Issue of personal injury summons – 20 February 2013;
 - Appearance entered – July 2013;
 - Notice for particulars on the part of the defendant – 8 August 2013;
 - Replies to particulars – 15 November 2013;
 - Defence delivered – 11 February 2014;
 - Letter on behalf of defendant seeking discovery – 3 April 2015;
 - Letter from defendant concerning failure to respond to earlier letter of 3 April 2015 – 24 August 2015;
 - Letter from Solicitors for plaintiff confirming willingness to make discovery – 14 February 2015;
 - Letter from Solicitors for the defendant seeking outstanding discovery – 24 April 2017;
 - Further letter from Solicitors for defendant seeking discovery – 19 October 2017; and
 - Further letter from Solicitors for the defendant seeking discovery – 29 May 2018.
2. On 8 January 2019, the defendant issued a motion seeking to dismiss the plaintiff's claim for inordinate and inexcusable delay.

Principles to be applied

3. The principles which govern the circumstances in which proceedings may be struck out for delay are set out in the decision of the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* (1996) 2 I.R. 459 where Hamilton C.J. stated as follows: -

"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows: -

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
 - (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
 - (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceedings of the case;
 - (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,
 - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
 - (iii) any delay on the part of the defendant - because litigation is a two party operation, the conduct of both parties should be looked at,
 - (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
 - (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
 - (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
 - (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."
4. Over the past 20 years or so these principles have been considered and applied on many occasions by the Superior Courts. The principles have not altered but their application has. What may have been considered excusable ten or so years ago may no longer be considered to be excusable, for example: there is less indulgence on delay. So, the weight to be attached to various issues that are part of the "*balance of justice*" has changed. For example: there is much less tolerance of delay where the professional reputations of individuals are involved.

Application of principles

5. It is now over nine years since the alleged incident that gave rise to these proceedings occurred. The plaintiff alleges that whilst bending in the course of his employment as a flight attendant, he suffered a back injury. The facts surrounding the incident do not appear to me to be very complex.
6. Following an application to PIAB, the proceedings were issued, two and a half years after the event complained of. Matters proceeded at a reasonable pace, ending with the delivery of the defence in February, 2014. Thereafter, following a request for discovery from the defendant, the plaintiff effectively took no further steps to prosecute the action, now some four years ago. I am therefore satisfied that the delay on the part of the plaintiff has been inordinate.
7. The next issue which I have to address is whether this inordinate delay was excusable. In a replying affidavit on the part of the plaintiff, Mr. Jamie Sherry, Solicitor, stated that the plaintiff had been injured on other occasions in the course of his employment and that these injuries also resulted in the issue of proceedings. Mr. Sherry maintains that the existence of these other injuries complicated matters for the plaintiff and led to delay.
8. The plaintiff must have had medical reports in order to process his claims through PIAB and, in two of the cases, authorisations were issued which resulted in the issue of other personal injury summonses in 2015 and 2017. The fact that medical reports exist for each of these alleged incidents should have made the exercise of attributing injuries to each particular alleged incident possible. Further, the plaintiff has also suggested that some of the effects of these injuries are ongoing and this led to a delay in prosecuting the proceedings. I do not accept this as an excuse as medical experts are capable of giving a prognosis upon which a court can assess General Damages, both to date and into the future. Therefore, I conclude that the delay in prosecuting these proceedings was both inordinate and inexcusable.
9. The next matter I have to examine is the balance of convenience. The plaintiff describes the circumstances under which he sustained the alleged injury as follows: -

"4. On 19th September, 2010, the plaintiff, whilst working as an air steward, was serving a passenger on a flight from Boston to Dublin and while attempting to place a tray containing a meal on the foldaway table of a passenger at a window seat, he was caused to sustain an injury due to the angle at which he delivered the tray..."

This would indicate to me that the plaintiff will be the principal witness in his action. Passage of time between the event complained of and the trial of an action may well expose the plaintiff to being cross-examined on the accuracy of his recollection of the event. Particulars of negligence in the personal injuries summons refer to allegations of, *inter alia*, lack of training and breach of a statutory duty. There is no suggestion that the defendant, by reason of passage of time, is no longer in a position to adduce evidence in defence of these claims. Therefore, it seems to me, that the balance of justice lies in favour of allowing this action to proceed.

10. However, I have found that the delay in prosecuting these proceedings was both inordinate and inexcusable. There can be no further delay. I propose that the following steps be taken: -
 1. That the plaintiff make discovery in terms of the defendant's letter of 3 April 2015 on or before 21 February 2020;
 2. That notice of trial be served within 21 days after making discovery; and
 3. That the provisions of S.I. 391 of 1998 be complied with no later than 20 March 2020.
11. I propose to adjourn this matter to 31 March 2020 and, if the aforesaid steps are not taken, I will revisit the defendant's application.