THE COURT OF APPEAL

APPEAL NO. 2015 349

The President.
Peart J.
Irvine J.

BETWEEN

BRIAN MILLERICK

APPELLANT

- AND -

THE MINISTER FOR FINANCE

RESPONDENT

Judgment of Ms. Justice Irvine delivered on the 11th day of July 2016

1. This is an appeal against the order and judgment of the High Court (Binchy J.) made on 15th June, 2015, and perfected on the following day whereby he dismissed the plaintiff's claim by reason of inordinate and inexcusable delay. On this appeal the plaintiff ("Mr. Millerick") seeks an order setting aside that order on the grounds that the trial judge misdirected himself and erred in law in granting such an order.

Background
2. The following is a brief summary of the facts and dates relevant to the defendant's ("Minister's") application to dismiss Mr. Millerick's proceedings as being an abuse of process and for inordinate and inexcusable delay.

3. Mr. Millerick maintains that he sustained serious injuries to his right leg and left knee as a result of a road traffic accident on 28th March, 2007. Those injuries were sustained, according to the personal injury summons, when an unmarked garda vehicle, a silver Ford Mondeo, swerved in front of his motorcycle causing him to lose control and fall to the ground.

4. The following is a chronology of the relevant dates:

28th January, 2009: Mr. Millerick makes an application to the Personal Injuries Assessment Board indicating that he intends to issue proceedings against the Minister for Finance and also the Motor Insurers' Bureau of Ireland.

29th January, 2009: Originating letters sent to the Minister and the MIBI.

23rd September, 2009: Mr. Millerick issues a separate personal injuries summons against the Minister and the MIBI.

2nd February, 2010: The Minister enters an appearance and serves a notice for particulars.

6th May, 2010: Replies to particulars.

10th August, 2010: The Minister seeks further and better particulars.

26th August, 2010: Defence delivered.

18th January, 2011: Replies to the Minister's notice for further and better particulars.

4th March, 2015: The Minister issues motion to dismiss claim for abuse of process and delay.

12th June, 2015: Replying affidavit of Sinead Farrelly.

15th June, 2015: Hearing date.

5. As appears from the above chronology, Mr. Millerick instituted separate proceedings in respect of the same road traffic accident against the MIBI on 23rd September, 2009, wherein he claims that he was injured by the negligent driving of an unidentified driver of a silver Ford Mondeo motor vehicle.

6. The grounding affidavit supporting the Minister's application to dismiss the proceedings was sworn by Ms. Gillian Walsh on 4th March, 2015, in which she complained that since 18th January, 2011, the plaintiff had taken no steps to advance his claim. She maintained that more than eight years had elapsed since the date of the alleged accident and that the delay that had occurred would likely have a prejudicial effect on the defendant's ability to defend the claim. She also asserted that the balance of justice favoured dismissing the claim in circumstances where the defendant had not contributed to that delay. Finally, Ms. Walsh maintained that the within proceedings were an abuse of process insofar as Mr. Millerick claims that the offending vehicle was owned by the defendant and was driven by a member of an Garda Siochana, whereas in his claim against the MIBI he asserts that the identity of the driver and the owner of the vehicle are unknown.

7. In her replying affidavit sworn on 12th June, 2015, Ms. Farrelly, Mr. Millerick's solicitor, justified the issue of separate proceedings against the MIBI based upon the defence that had been filed by the Minister in the present claim which denies that the incident was caused by the driving of another vehicle and that if there was such another vehicle it was not an unmarked Garda car. It is to be inferred from her affidavit that should Mr. Millerick fail in the within proceedings that he might then pursue a claim for the same injuries against the MIBI.

8. As to the Minister's complaint that the proceedings ought to be dismissed by reason of inordinate and inexcusable delay, Ms. Farrelly advised that she considered that both actions should be listed to be heard together. Unfortunately, the MIBI had not delivered its defence and this was the reason why the within proceedings had not been advanced even though the pleadings were closed. As to when Mr. Millerick might be in a position to advance his claim, she stated that the solicitors on record for the MIBI had advised that they were waiting on counsel to prepare its defence. It should be noted that during the High Court hearing counsel for Mr. Millerick advised that a motion for judgment in default of defence was about to issue.

9. The only other excuse advanced by Ms. Farrelly for the delay in progressing the claim was that the MIBI had issued separate proceedings against Mr. Millerick in respect of a judgment which it had obtained against him for payments made on his behalf in yet another set of road traffic proceedings in which he was the offending driver. As a result she had been in negotiations with Messrs Mason Hayes and Curran, the solicitors on record for the MIBI, and had overlooked the fact that no defence had been delivered by the MIBI in those proceedings.

Judgment
10. From the transcript of the hearing before the High Court and what is recorded on the face of the order itself, it would appear that the High Court judge dismissed Mr. Millerick's proceedings on the grounds of inordinate and inexcusable delay. He concluded that if the delay was due to the failure of the MIBI to deliver its defence in the second set of proceedings steps should have been taken "long ago" to remedy that situation. It was unacceptable that five years after the delivery of a personal injuries summons the plaintiff in those proceedings was only contemplating the issue of a motion for judgment in default of defence.

Submissions of the Appellant
11. Mr. McGovern S.C. does not seriously contend that the plaintiff's delay in prosecuting this action is one which can be ignored. However, he maintains that the delay ought to have been excused by the trial judge having regard to the judgment which had been obtained against his client by the MIBI for approximately €348,000 in March, 2012. Knowledge of this judgment had taken his solicitor by surprise and on learning of its existence she had become embroiled in seeking to negotiate a settlement of that claim in the context of his claim against the MIBI.

12. Counsel further argues, based upon the decision of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, that even if the plaintiff's delay might be considered inordinate and inexcusable, the balance of justice could not be said to have favoured the dismissal of the proceedings. The defendant had not demonstrated the existence of any actual prejudice arising from the delay. He had filed a defence which was only consistent with his having fully investigated the involvement, if any, of An Garda Siochana in Mr. Millerick's accident. There was no suggestion that any witnesses that the defendant might wish to call to give evidence had become unavailable because of the passage of time or that their evidence might be unreliable by reason of the delay. Further, the Minister had given no notice of his displeasure concerning the delay or of his intention to bring the application to dismiss. Finally, he had taken no steps to ensure that the action was progressed with diligence and had not, as he might have done, himself served a notice of trial following the delivery of his defence.

Submissions of the Respondent
13. Ms. Gayer S.C. submits that the delay of almost five years following the delivery of the defence in August, 2010 was both inordinate and inexcusable. This was particularly so in circumstances where the plaintiff had issued his proceedings close to the limitation period provided for by statute for proceedings of this nature. As a matter of fact and as a matter of law the delay could not be excused by reference to any negotiations that may have been taking place in relation to Mr. Millerick's claim against the MIBI and/or those proceedings in which the MIBI had obtained summary judgment against him.

14. As to whether the balance of justice favoured the dismissal of the proceedings, counsel submitted that for Mr. Millerick to have issued two separate sets of proceedings wherein conflicting claims were made arising from the same events was an abuse of process, and as such was a matter to be considered by the Court when dealing with this issue. It was not correct as a matter of law, that Mr. Millerick was obliged to issue proceedings against both the Minister and the MIBI. That was to misunderstand the MIBI agreement.

15. In considering the balance of justice issue, counsel urged the Court to place weight upon the fact that the Minister had delivered his defence promptly and while he had not positively intervened to ensure that the proceedings obtained a trial date, he ought not be faulted in that regard.

16. While Ms. Gayer was not in a position to point to any evidence on affidavit to demonstrate that the defendant would sustain actual prejudice if the action were allowed to proceed to trial, she submitted that the Court ought to assume some prejudice would likely result to the defendant by reason of delay on the particular facts of this case. In this regard she relied upon the uncertainty expressed by the plaintiff in his pleadings as to the identity of the driver and owner of the vehicle implicated in his accident of 2007. Such evidence as might be given by him ten years later concerning how the accident occurred and who was involved was bound to be unreliable and to allow him do so would be to put justice to the hazard.

Relevant legal principles
17. The principles which apply on an application brought to dismiss proceedings for inordinate and inexcusable delay are fully explored in the written submissions that have been delivered by the parties. The most oft cited decision is that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where guidance is given concerning the proper approach to be adopted by the court when met with such an application.

18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay.

Decision
20. Having regard to the evidence that was before him, I am quite satisfied that the High Court judge was correct in concluding that the delay on the part of Mr. Millerick in advancing his claim against the Minister was inordinate. A claim in respect of a road traffic accident of the nature described in these proceedings is relatively straightforward and is one which, once placed in the hands of a

solicitor, ought to be capable of being advanced in relatively short order. Ms. Farrelly, on the plaintiff's behalf, does not seek to contend that there was anything troublesome from an evidential perspective in the present case that might reasonably justify any period of delay.

21. In assessing whether the High Court judge correctly classified the delay in the present case as inordinate it is relevant to note that the proceedings were issued very close to the expiry of the limitation period prescribed for claims of this nature. In such circumstances there is a special obligation of expedition on a plaintiff to move matters forward once proceedings are commenced. This proposition has been consistently endorsed in recent judgments of the superior courts. (see: *Cahalane and Another v. Revenue Commissioners and Others* [2010] IEHC 95 and *Quinn v. Faulkner t/a Faulkner's Garage and Another* [2011] IEHC 103).

22. It is quite clear that Mr. Millerick failed in his obligations in this regard. Nothing was done to advance the proceedings once replies had been delivered to the defendant's notice seeking further and better particulars. Those replies were delivered on 18th January, 2011. That being so I'm quite satisfied that the High Court judge was correct in concluding that the delay had to be classified as inordinate.

23. I am also satisfied that the High Court judge was correct when he concluded that the delay was inexcusable. Only two excuses were offered to explain the delay and neither was supported by any evidence. As to the first, namely the delay on the part of the MIBI in filing its defence in Mr. Millerick's alternative proceedings, that delay simply cannot excuse his failure to progress the within proceedings even if it was hoped that the two actions might be tried together. In this regard it is also relevant to note that the personal injuries summons in Mr. Millerick's claim against the MIBI, was not, as was maintained by Ms. Farrelly, issued in response to the defence delivered in the within proceedings. It was issued on the same date as the personal injuries summons in the present proceedings, namely 23rd September, 2009. Particulars were then sought by the MIBI on 19th January, 2010, and were replied to on 11th May, 2010. Over the following five year period, no step was taken to procure the delivery of a defence in those proceedings. As was advised by the High Court judge, that defence could have been procured by the issue of a motion for judgment in default of defence at any time.

24. Neither, in my view, can the delay be reasonably excused by the fact that Ms. Farrelly may have been negotiating with the MIBI in respect of a judgment which it had obtained against Mr. Millerick in yet another set of proceedings. First, whatever about those negotiations impacting upon Mr. Millerick's claim against the MIBI, such negotiations could never have had any impact upon his claim against the Minister. The Minister was a stranger to those negotiations and stood to derive no benefit therefrom. Neither was he on notice of the existence of such negotiations and in such circumstances cannot be stated to have acquiesced in any resultant delay. Further, it is difficult to see how the existence of any such negotiations could legitimately excuse even a small portion of the four to five year delay in pursuing a claim which, to all intents and purposes, appears to have been ready for trial in January, 2011.

25. For the aforementioned reasons I am quite satisfied that the High Court judge was correct in concluding that Mr. Millerick had failed to excuse his delay.

26. It is not clear from the *ex tempore* judgment of the High Court judge as to the factors he took into account when considering the third leg of the test in *Primor* namely, whether in all of the circumstances the balance of justice favoured the dismissal of the proceedings.

27. It would appear from the transcript that no oral submissions were made concerning this issue even though it was briefly addressed in Ms. Walsh's affidavit wherein she first asserted that the defendant had not been culpable in respect of the delay and secondly that the lapse of time would likely have a prejudicial effect on the availability of witnesses and the reliability of their testimony.

28. As was advised by Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] IESC 60, [2002] 3 I.R. 510, where delay has been found to be inordinate and inexcusable the author of that delay will not be absolved of fault unless they can point to some countervailing circumstances as may be considered sufficient to cancel out the effect of such behaviour. For my part, having considered the evidence before the High Court, I cannot find any countervailing factors sufficient to resolve the balance of justice issue in the plaintiff's favour. This is particularly so in circumstances were Mr. Millerick has commenced separate proceedings against different defendants concerning the same road traffic accident and has done so based upon inconsistent claims concerning the ownership and driving of the offending vehicle. He was not, as was asserted on his behalf, obliged by the terms of the MIBI Agreement 2004 to issue two separate sets of proceedings. While the Bureau may require a claimant, subject to the provision of an indemnity, to pursue another party against whom they may have a remedy in respect of the same injury, there was no evidence that the MIBI had required him to issue these proceedings against the Minister. The relevant clause in the agreement i.e. clause 3.10 is one which is intended to cover, for example, a scenario in which a claimant may be injured while travelling in an uninsured motor vehicle and that collision may have been caused, in whole or in part, by the negligent driving of a second motor vehicle. The Bureau in such circumstances may demand that the claimant pursue the driver of that vehicle to ensure that its own liability will be reduced to reflect any responsibility on the part of that driver for the claimant's injuries. The Agreement does not require or permit a claimant who believes they have been injured by the negligent driving of a Garda car to pursue that claim and if they fail to claim against the Bureau on the basis that the offending vehicle was not a Garda car.

29. Of additional relevance is the fact that, unlike in most other cases where a claim is dismissed, Mr. Millerick will remain entitled to pursue his claim in respect of his injuries against the MIBI. That is not to say that his claim in those proceedings might not be met with an application that they be dismissed for inordinate and inexcusable delay. However, without expressing any view on the likely outcome of such an application, it appears likely that Mr. Millerick would be on somewhat firmer ground if asked to meet such an application than he finds himself in the present case. It is to be noted that the fact that a plaintiff may have a potential alternative method of recovery available to them, should their proceedings be dismissed, is something that may be factored into the Court's consideration as to where the balance of justice lies.

30. Based on the submissions made to this Court and the evidence that was before the High Court, I have no hesitation in concluding that the balance of justice indeed favoured the dismissal of the proceedings having regard to the guidance to be found in the decision of Hamilton C.J. in *Primor*.

31. First, the defendant was not responsible for any part of the delay. Second, the two excuses earlier referred to, neither of which was supported by any evidence, fail to provide any justification for even a modest portion of that delay. Third, the defendant did not, for reasons which I will later outline, acquiesce in the delay. The Minister was not, for example, advised that Mr. Millerick was anxious to have both actions heard together and having been so informed made no objection when told that the proceedings against him would be postponed to await a defence in his claim against the MIBI. Fourth, during the period of delay the defendant engaged in no conduct which might reasonably have led the plaintiff to conclude that he was unconcerned about and might not later complain of delay. Fifth, during the period of delay the defendant did not directly or implicitly encourage the plaintiff to incur further expense in

pursuing his litigation, costs which he might otherwise have avoided had the application to dismiss been brought at an earlier point in time. For example, the defendant did not make an application for discovery or raise any further notice for particulars from which conduct it might have been inferred that the Minister had condoned or acquiesced in the delay.

32. In light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the *Primor* test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See *Cassidy v. The Provincialate* [2015] IECA 74). 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. which are conveniently summarised in the head note of the *Primor* decision.

33. As to Mr McGovern's reliance on the defendant's inaction to support his contention that that the balance of justice would favour permitting the claim proceed, the decision of Fennelly J. in *Anglo Irish Beef Processors Limited* is of some relevance. In his judgment he draws a distinction between culpable delay on the part of a defendant, such as where they fail to comply with time limits for the delivery of pleadings, and mere inaction such as where a defendant simply does nothing to advance the claim or seek to have it dismissed. In distinguishing mere inactivity on the part of a defendant from actual delay or acquiescence he concludes that it is the plaintiff who bears the primary responsibility for prosecuting the action expeditiously and that lesser blame should be apportioned to a defendant where they have been guilty of mere inactivity as opposed to actual delay.

34. In the course of his judgement Fennelly J. referred to the decision of O'Dalaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 at page 41 where he stated:-

> "...in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution…. the adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will "get by" without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at."

35. Having referred to this decision Fennelly J. went on to say as follows:-

> "In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him it would have to amount in the particular circumstances to something "akin to acquiescence."

36. It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind. Having said that, the judgment of Fennelly J. in *Anglo Irish Beef Processors Limited* makes clear that it is the conduct of the litigation by the plaintiff, that is the primary focus of attention. A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate and inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court.

37. In my view, the Minister in the present case cannot be deemed culpable for mere inactivity. After all, it is the plaintiff who commences legal proceedings and draws the defendant into the legal process. No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise. In many cases the plaintiff has no valid claim and they may be no mark for any award of costs that a defendant may obtain following a successful defence of the proceedings. Often times, a defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to a claim.

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 damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?

39. For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay.

40. Finally, recent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures. These decisions have emphasised the constitutional provisions contained in Article 34.1 which requires the courts to administer justice. This constitutional obligation presupposes that the court itself will strive to ensure that litigation is conducted in a timely fashion. In particular, in Quinn *v. Faulkner t/a Faulkner's Garage and Another* [2011] IEHC 103 Hogan J., at para. 29, criticised the court's prior tolerance to inactivity on the part of litigants when he stated:-

> "While as Charlton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common: see, *e.g.*, the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 IIRM 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd* [2010] IEHC 465."

41. The proceedings before this Court are, in my view, of the type that Hogan J. had in mind when he authored the aforementioned

passage criticising the judiciary for indulging delay in litigation when it was clear that delay had adverse consequences for the proper and efficient administration of justice.

Conclusion

42. I am satisfied that the High Court judge was correct when he concluded that the plaintiff's delay in prosecuting his claim in these proceedings was both inordinate and inexcusable. Further, on the evidence before him, I have no doubt but that the balance of justice favoured the dismissal of the proceedings. For these and for the other reasons earlier set forth, I would dismiss the appeal.