

## THE HIGH COURT

[2001 No. 17590 P.]

BETWEEN

ANN VERNON

PLAINTIFF

AND

AIBP LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Barrett delivered on the 28th day of February, 2014**

1. AIBP Limited has applied in these proceedings to have Ms. Vernon's action against it dismissed for want of prosecution. AIBP contends that the delay arising on Ms. Vernon's part in the prosecution of her action is both inordinate and inexcusable and that the balance of justice lies against Ms. Vernon's case proceeding. Counsel for Ms. Vernon contends that while the delay arising is inordinate, it is not inexcusable. He has urged the court to have particular regard to Ms. Vernon's socio-economic background, as well as to certain personal and family misfortunes that she has endured, and to refuse to dismiss the proceedings.

2. The present case raises, amongst other matters, the question as to the extent to which the court, in determining what is inexcusable delay, can have regard to the socio-economic background of a plaintiff and perhaps apply a less rigorous standard of what is inexcusable than it would apply to those hailing from a more advantaged environment. Shortly put, to what extent can the court have regard to the fact that a plaintiff may hail from what Costello J. in *Guerin v. Guerin* [1992] 2 I.R. 287, at p. 293 described as:-

"...an economically and socially deprived world from which the world so familiar to lawyers in which people sue and are sued...[is] remote and arcane."

3. AIBP has contended that the jurisprudence as regards delay in the prosecution of proceedings has evolved since the decision in *Guerin*. However, it appears to the court that it is as true today as it was when *Guerin* was decided that so-called 'ordinary' people may be guilty of perhaps unordinary delay which is not inexcusable when attributable to them, but would be inexcusable if attributable to someone hailing from a more advantaged background. There is nothing in the jurisprudence of the Supreme Court to which the court was referred and which is applied in the present case, that contravenes this truth. Quite the contrary: the Supreme Court has recently shown itself receptive to the logic applied by Costello J. in *Guerin*. In *Comcast International Holdings Limited and Others v. Minister for Public Enterprise and Others* [2012] IESC 50, McKechnie J. refers, at para. 31 of his judgment, to Costello J.'s:-

"...powerful understanding of the disadvantaged and...deep insight of the deprivation under which they labour..."

At para. 33 he states:-

"My point is utterly simple. In the situation under discussion justice is best achieved by letting it react to given facts. The same period of delay, in different cases, may demand different treatment. Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned."

4. In the same case, Clarke J. states at para. 3.10 of his judgment:-

"...I should express my agreement with a number of the observations made...by McKechnie J. in his judgment in this case. First, I agree fully with the comments made by reference to *Guerin v. Guerin*....The circumstances of the parties and, in particular, any disparity in the resources available to the parties must always be a factor which the court takes into account. The degree of expedition and compliance with time limits which could properly be expected of large corporations involved in commercial disputes cannot reasonably be required of poorly resourced or otherwise disadvantaged litigants".

5. Although, on the facts as outlined to the court Ms. Vernon appears never to have endured deprivation to the extent that apparently pertained in *Guerin*, her background and circumstances, as impressed upon this court by her counsel, are not so radically different as to render redundant an application of the *Guerin* principles, as elaborated upon by the Supreme Court in *Comcast*.

**Facts**

6. Ms. Vernon alleges that she was injured in a factory accident on or about 14th December, 1999. Following that accident she commenced proceedings against AIBP. A plenary summons issued on 30th November, 2001. An appearance was entered on 6th February, 2002. A statement of claim was delivered on 8th February, 2002. AIBP raised particulars and thereafter delivered a defence on 16th October, 2002. Ms. Vernon's advisors raised particulars arising from the defence on 29th October, 2002 and AIBP replied to same on 30th June, 2003. A notice of intention to proceed dated 13th May, 2004, was delivered by the solicitors for Ms. Vernon. Thereafter, no further action was taken by Ms. Vernon or, it appears, by AIBP, until 27th November, 2012, when Ms. Vernon's solicitors served a second notice of intention to proceed, thus engendering the events that have led ultimately to the present application.

7. In the period between 2004 and 2012 it appears that Ms. Vernon suffered from ill-health and a variety of personal and family misfortunes. She was not in contact with her solicitors throughout this time, nor it appears were they able to contact her after Ms. Vernon changed address without advising her new address to her solicitors.

**Principles to be Applied**

8. The principles to be applied by the court in the present application are contained in the Supreme Court decisions in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at 475-476 and *O'Domhnaill v. Merrick* [1984] I.R. 151.

9. In *Primor*, Hamilton C.J., at p. 475, summarised the principles to be applied in an application such as that now before the court. These principles have been recited with approval in numerous subsequent cases and the court does not propose to repeat them here. Suffice it to note that in essence *Primor* establishes a three-limb test to be applied in cases of delay: (1) is the delay inordinate? (2) is the delay inexcusable? (3) even if inordinate and inexcusable, is the balance of justice in favour of or against the proceeding of the case? There is suggestion in recent case-law such as *McH v. H* [2004] 3 I.R. 385 that the decision in *Primor* ought to be viewed as concerned with post-commencement delay only and it is true that, on its facts, *Primor* was an application to dismiss based on post-commencement delay. However, there are other cases, such as *Guerin v. Guerin* that appear consistent with *Primor* and where regard has been had to the full backdrop of delay arising. In this case the nature of the delay that has occurred is exclusively post-commencement and so a consideration of any pre-/post-commencement dichotomy that case-law presents is moot for present purposes.

10. In *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, the Supreme Court again considered the issues arising where dismissal of a claim for want of prosecution is sought. In the course of delivering judgment for the Supreme Court, Hardiman J., at p. 294, having made reference *inter alia* to *Primor*, made the following observations in the context of the obligation arising for the courts, following cases such as *McMullen v. Ireland* (Application No. 42297/98, 29th July, 2004) [2004] ECHR 42297/98, and the European Convention on Human Rights Act 2003, to ensure that rights and liabilities are determined within a reasonable time:-

"[C]omfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope....In particular the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."

11. AIBP has sought to rely on *Gilroy v. Flynn* [2004] IESC 98 in support of its present application. However, it does not appear to the court that the, possibly *obiter*, observations of Hardiman J. in *Gilroy* favour AIBP's present application. It does not appear that Ms. Vernon assumed that she would be afforded endless indulgence; she appears simply not to have been as attentive to the progress of her case as one might expect of a more advantaged person. She has sought no easy escape from the consequences of her dilatoriness and seeks merely to bring to a conclusion proceedings that were well advanced by 2004. She has made no allegations against her solicitors as to grave delay, nor does it appear from the evidence before the court that they are the cause of any delay arising. To borrow from the terminology employed by McKechnie J. in *Comcast*, Ms. Vernon's failure, if such it is, to match the gold standard of her opposite in society must not necessarily be condemned. Or, to paraphrase Clarke J.'s judgment in the same case, the degree of expedition that would be required of a large corporation in her place cannot reasonably be required of Ms. Vernon. This is not an indulgence of Ms. Vernon or of delay generally; it is recognition that the harsh realities which some people endure may demand less stringency in the administrative and procedural standards that the courts might otherwise require to be observed.

12. Applying the three-limb test propounded in *Primor*, the court finds as follows:

- *Is the delay arising in this case inordinate?*

Counsel for Ms. Vernon acknowledged before the court that the post-commencement delay arising in the present proceedings is inordinate and thus this issue is not in dispute.

- *Is the delay arising in this case inexcusable?*

Having regard to (a) the judgment of Costello J. in *Guerin*, (b) the judgments of McKechnie J. and Clarke J. in *Comcast*, and (c) the particular circumstances of Ms. Vernon, the court considers the delay arising on Ms. Vernon's part to be excusable.

- *Even if inordinate and inexcusable, is the balance of justice in favour of or against the proceeding of the case?*

This limb of the *Primor* test does not fall to be applied because the court has concluded that the delay arising is not both inordinate and inexcusable.

13. In *O'Domhnaill v. Merrick* [1984] I.R. 151 at 157, Henchy J. stated that the court needs:-

"to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend".

14. Given that the *Primor* test, provided one gets through the twin hoops of inordinate and inexcusable delay, essentially becomes a 'balance of justice' test, and the *O'Domhnaill* authorities require the court in all instances to discharge the balancing act referred to immediately above, it might perhaps be contended that ultimately there is not much of practical significance between the two tests in terms of outcome. Even so, the interaction and concurrent validity of the two lines of authority has been approved recently by the Supreme Court in *McBrearty v. North Western Health Board and Others* [2010] IESC 27. So, having considered the present application by reference to the *Primor* principles, the court now turns to apply the standard established in *O'Domhnaill*.

15. AIBP contends that the delay arising in this case means that it will be prejudiced in its defence of Ms. Vernon's claim. In its affidavit evidence, AIBP asserts that inherent prejudice arises because of the natural efflux of time which affects the proceedings as a whole, as well as specific prejudice arising from such factors as the closure of the relevant plant (*i.e.* the locus of the accident) and the consequent impossibility of obtaining an engineering inspection, the delay arising in obtaining pre- and post-accident medical records and in conducting a satisfactory medical examination, and procuring certain witnesses of fact and expert witnesses.

16. These difficulties may arise, though the extent to which they might arise was vigorously contested by counsel for Ms. Vernon who argued that AIBP is a going concern and thus must have retained some relevant records; it appears to this Court that this seems especially likely where, as here, there has been ongoing litigation which, while not vigorously pursued, remained extant and would have been known to AIBP to remain extant. Counsel for Ms. Vernon also contested that it should be possible to obtain the requisite medical records and, while this may prove time-consuming, this too appears to the court to be correct. To the extent that there are difficulties arising, these of course may also impede Ms. Vernon in advancing a successful case, a fact that was accepted by counsel for Ms. Vernon in argument. However, it does not appear to the court, given all the circumstances of the case, that the suggested

difficulties arising or the total delay which occurred between the serving of the first and second notices of intention to proceed is such that a fair trial between the parties cannot now be had.

17. Notably, AIBP did not, during the period between the service of the first and second notices of intention to proceed, bring any application seeking dismissal of Ms. Vernon's action for want of prosecution. The court does not accept the contention by Ms. Vernon's counsel that AIBP's failure to bring such an application amounted to acquiescence by AIBP in Ms. Vernon's delay. However, AIBP's inaction throughout this period is a matter to which the court can have regard and which, in all the circumstances of the case, is considered by the court to tilt the balance of justice against acceding to AIBP's application to dismiss Ms. Vernon's action for want of prosecution. To borrow from the phraseology of Henchy J. in *O'Domhnaill v. Merrick*, Ms. Vernon's case is not a claim that AIBP "could not reasonably be expected to defend".

### **Conclusion**

18. For the reasons stated above, the court rejects the application by AIBP for an order of the court dismissing Ms. Vernon's proceedings for want of prosecution.