Neutral Citation Number: [2011] IEHC 292

**THE HIGH COURT**

**2004 707 P**

**BETWEEN:**

**PATRICK MULCAHY**

**PLAINTIFF**

**ANA**

**CORAS IOMPAIR ÉIREANN**

**DEFENDANT**

**Judgment of Mr Justice Michael Peart delivered on the 14th day of July 2011:**

Before the court is an application by the plaintiff under Order 8, rule 1 RSC to extend the time for making an application to renew the Plenary Summons which issued on 20th January 2004, and for an order granting such renewal for a period of six months hence. In these proceedings of the plaintiff seeks damages for personal injuries, loss, damage and other expenses incurred by him arising from an accident at work on 4th November 2002 , on which date he was in the employment of the defendant company.

Also before the court is an application by way of Notice of Motion issued by the defendant in which the defendant seeks an order setting aside an order of this Court made on 27th February 2006 renewing the said summons for a period of six months from that date. That application is sought pursuant to the provisions of Order 8, rule 2 RSC.

It is immediately obvious that the injury is alleged to have been sustained by the plaintiff were sustained nearly 9 years ago and that his proceedings commenced over seven years ago, and still remain unserved upon the defendant company.

The grounding affidavits filed by the plaintiff's solicitor set forth a number of facts designed to explain and justify the delay in service of the proceedings which has occurred.

The plaintiff's solicitors informed the defendant's solicitor of their intention to make this application and those solicitors requested that they be given an opportunity to be heard on the application. I directed therefore that the application be heard on notice, rather than be dealt with on an *ex parte* application by the plaintiff, only to be met into course by an inevitable application by the defendant pursuant to the provisions of Order 8, rule 2 RSC to set aside any order that the Court might have made *ex parte*.

The defendant has filed a replying affidavit, and has had the opportunity of making submissions as to why this Court should decline to renew the said Plenary Summons.

Under Order 8, rule 1 RSC, where an application to renew the Plenary Summons has not been made within twelve months of the date of issue of the summons, the plaintiff may make an application to the High Court to extend the time for leave to renew the summons, and that the High Court may renew the summons for a period of six months from the date of such renewal if satisfied that reasonable efforts have been made to serve the summons on the defendant, or for other good reason.

On the facts of this case it is clear that in order to succeed in his application to renew the plaintiff must satisfy the Court that there is "other good reason" for doing so, as the Court cannot on the facts, which I will come to, be satisfied that reasonable efforts were made to serve the defendant either within the period of twelve months from the date of issue of the proceedings, or indeed thereafter. The delay in effecting service on the defendant has been extreme, and the Court must reach a conclusion as to whether or not the reasons given for that delay adequately explain and excuse same, and therefore constitute a "good reason".

The defendant has not submitted that any particular prejudice has been caused, other than a general prejudice given the effect of such a passage of time on the recollection of persons who may be required to give evidence at the trial of the case. Rather it is submitted that before there is any need for a defendant to show prejudice, the plaintiff must first of all come within Order 8, rule 1 RSC by satisfactorily explaining the reason why the delay occurred in the first place. It is submitted by the defendant that the reasons put forward by the plaintiff in this regard fall short of demonstrating any "good reason".

The plaintiff sustained an injury at work on 4th November 2002 and having consulted Messrs. O'Neill & Co. solicitors, these solicitors issued a Plenary Summons on the 20th January 2004.

In that Plenary Summons the defendant was at that time named as Córas Iompair Éireann.

Following the issue of the said summons in the Central Office, same was sent for the purpose of service by registered post to Córas Iompair Éireann, Group Investigations Office, Bridgewater Business Centre, Islandbridge, Dublin 8 on 30th January 2004 under a covering letter dated 29th January 2004.

By letter dated 2nd February 2004 that department of Córas Iompair Éireann informed the plaintiff's solicitor that the proceedings had been incorrectly served and that they should be served on The Secretary, Iarnród Éireann/Irish Rail, Connolly Street, Dublin 1.

Thereafter, it would appear that on the 6th February 2004 the plaintiff's solicitor wrote to his Town Agent asking him to "re-issue" the Plenary Summons with Iarnród Éireann/Irish Rail named as the defendant. There must have been some response from the Town Agent to that request, since on the 10th March 2004 the plaintiff's solicitor wrote to him stating "we enclose for your attention original Summons as requested". Nothing appears to have happened thereafter, and on the 10th September 2004 the plaintiff's solicitor wrote again to his Town Agent noting that he had not heard further following the said letter dated 6th February 2004.

More time passed before the plaintiff's solicitor wrote again on the 15th June 2005 to his Town Agent referring to the said letter dated 6th February 2004 and to what is described as being a request therein to amend the Plenary Summons to read "Iarnród Éireann/Irish

Rail" as opposed to a request to re-issue the proceedings against the correct defendant.

On a copy of that letter dated 15th June 2005 there is a hand-written note which indicates that the plaintiff's solicitor spoke to the Town Agent and was informed that an order had been obtained amending the name of the defendant, but that a further order was then required in order to amend the address of the defendant also, and that this would be attended to "next week".

There is a second hand-written note on that letter dated 15th June 2005 which indicates a further telephone conversation with the Town Agent on the 20th July 2005 and that he was informed that the application had been made and the order was awaited from the Central Office.

A copy of the order made by the Master of the High Court on 30th November 2004 amending the name of the defendant has been produced to the Court on the present application, but it would appear that it was not until 27th February 2006 that in fact an application to amend the address of defendant was made, and this was on the occasion of the first application to renew the Plenary Summons which was made on that date also, and granted.

That application to renew the Plenary Summons and amend the defendant's address appears to have followed upon attempts by the plaintiff's solicitor to get information from his Town Agent as to what was happening in relation to the matter, as there had been no response to several letters in that regard. It can be inferred that whatever telephone conversation took place between the Plaintiff's solicitor and the Town Agent towards the end of January 2006 resulted in the Town Agent obtaining the necessary two orders from this Court on the 27th February 2006.

One could reasonably have expected that to have been the end of the delay, and that the renewed and amended summons would then have been served correctly and by post on the correct defendant. But alas, and for reasons which are attempted to be explained on this application, the position remains that some four years and five months later the summons remains unserved. In fact, to make matters worse, not only has the original Plenary Summons been lost (believed by the plaintiff's solicitor to have been lost by the Town Agent) but his Town Agent has in the meantime sadly died. A search of his offices has failed to locate the original Plenary Summons. I do not know the exact date of death, but from my own knowledge it is certainly a few years ago.

Apart from the delay occurring up to this point in the narrative, the plaintiff's solicitor must also try and explain in a satisfactory way the delay since February 2006 when at least he had succeeded in putting himself in a position to serve a correct and renewed Plenary Summons. He attempts to do this in his grounding affidavit.

A reasonable summary of what the plaintiff's solicitor states in this regard is that during the period of time referred to above, the majority of the work done on this file was undertaken by a highly experienced legal executive of over 30 years service in the plaintiff's solicitor's office, but that she was on sick leave from the beginning of February 2006 following a road traffic accident. At that time it was thought that she would return to his office within a couple of months, but this did not happen and he goes on to state that for a period of about 12 months following February 2006 she would collect files that she had been dealing with and deal with them from her home. The plaintiff's solicitor states that he relied upon her assurances that this file was being dealt with and kept up-to-date during that first 12 months following her road traffic accident, and he states also that he had meetings with the plaintiff during that time when he informed the plaintiff that all matters were being dealt with. However he goes on to state that during 2007 he became concerned that the files which his legal executive was dealing with were not being progressed satisfactorily, and also that it became clear to him at that stage that she was unable to handle work due to her ongoing health problems. During 2007 he took steps to take control of the files in question, and in relation to the file for this particular case, he discovered that the action had not been progressed as he had thought, and in fact discovered that the original file was missing.

He states also that a search for a file was undertaken but that this was complicated by the fact that he had moved offices in late 2005 and was not sure how this file was lost during the course of that move or whether his legal executive retained the file in her possession. He goes on to state that after extensive searches the file was located in late 2008 and that it had become attached to another unrelated file, whereupon he discovered that the original plenary summons was not within the file when it was located. But he still assumed at that point in time that the summons had been renewed, amended and had been served.

The plaintiff solicitor goes on to state that matters were further complicated by the sad death of his Town Agent, and that further enquiries were made "throughout 2009" to locate the original plenary summons and that these enquiries included contacting the office of his Town Agent and also contacting his legal executive to enquire whether she knew anything about it. He states that searches in his Town Agent's office did not locate the original summons and his enquiries of his legal executive informed him that to the best of her knowledge the plenary summons had been sent to his Town Agent.

That is the extent of the explanation for the long delay which has occurred both since the institution of these proceedings themselves, and the delay from February 2006 when the plenary summons had been renewed and amended.

A final paragraph in the plaintiff's solicitors grounding affidavit states that this delay has not caused prejudice to the defendant, as the defendant has been aware of the accident which gave rise to the plaintiff's claim and has been aware of this claim from the very outset. He makes the point that the defendant was served with a plenary summons (albeit that the incorrect defendant was named) and that despite the flaws therein regarding the name and address of the named defendant, the reality is that the correct defendant has at all times been aware that proceedings were instituted in 2004, and goes on to state further that the defendant had the plaintiff medically examined on 11th July 2003. In all the circumstances it is submitted that no prejudice arises by the present application to again renew the summons.

The plaintiff himself has also sworn an affidavit in support of the application to renew these proceedings. Apart from outlining the fact that he sustained an injury at work on 4 November 2002 and that he subsequently instructed his solicitor is to institute proceedings, he also asserts that no prejudice would be caused to the defendant by the renewal of the plenary summons as a number of named individuals who would be likely to have evidence to give on behalf of the defendant when this case comes to trial are still available to give that evidence. In this regard, he states the following paragraphs 6 and 7 of his affidavit:

> "6. I say that at any likely hearing of this matter the witnesses that the defendant is likely to require are as follows: the Safety Officer Roger O'Loughlin who was not in attendance at the scene at the accident the subject matter of these proceedings at the time of the accident; Tim Hartigan a fork lift driver who was in the vicinity at the time of the accident but who would not have witnessed the same; Jim O'Brien who was driving a van which was being loaded by me at the time of the accident; and Jim Roche the Pay Master at the depot and who would have dealt with accident reports at the time of the accident.

> 7. I say that to the best of my knowledge each of these individuals would be available to the defendant to give evidence on their behalf if so requested at the hearing of any trial."

The defendant's solicitor has sworn a replying affidavit. Having referred to the attempt to serve the plenary summons at the end of January 2004, she states that since that date no Statement of Claim has been delivered and that at no time has the plaintiff set forth the claim which he is making in these proceedings. I should say of course that until the proceedings are served properly on the correct defendant the delivery of a Statement of Claim is impossible. Nevertheless the defendant's solicitor makes the point that in the absence of any such details being provided the defendant has not been put in the position of being able to investigate the circumstances of the incident alleged to give rise to the plaintiff's claim. She goes on to state that the plaintiff has failed to adequately explain and excuse the lengthy delay which has occurred. At paragraph 5 of her affidavit she states:

> "5 when considered in conjunction with the passage of time, the associated likelihood of the destruction of any relevant documentation, and the inevitable fading of witnesses' memories, any further investigation of this matter at this point would be practically futile. The ineffectiveness of such an investigation would tend to produce an insurmountable prejudice to the defendant."

The defendant's solicitor refers to the fact that no application to renew the plenary summons was brought within the period of 12 months following the issue of the said summons, and that such an application was not in fact made until February 2006. She refers to the various explanations for the delay which are set forth in the plaintiff's solicitor's grounding affidavit, and suggests that none of these explanations are sufficient to justify the delay which occurred.

In a further affidavit in response to the defendant solicitor's replying affidavit, the plaintiff's solicitor, while accepting that the plaintiff did not institute his proceedings until the 20th January 2004, states that the summons was issued well within the three-year period provided under the Statute of Limitations, in 1957 (as amended), and he goes on to state that the reason why there was a 14 month period between the date of the accident and the date of issue of the plenary summons was because the plaintiff was undergoing medical examinations arising out of the injuries sustained, and furthermore that the medical condition of the plaintiff was somewhat complicated by the development of a heart problem which, though now under control, nevertheless prevented the plaintiff from returning to work. He again refers to the fact that the defendant company arranged to have the plaintiff medically examined on 11th July 2003. He also makes the point that his initial letter to the defendant in which the plaintiff's claim was set out briefly and in a general way made it clear that the plaintiff's cause of action was due to the unsafe system of work at the defendant's premises.

The plaintiffs' solicitor refers to the averment in the defendant's replying affidavit to the effect that the delay has prevented the defendant company from investigating the claim, and in that regard states that in fact the defendants did carry out an investigation as to the circumstances of this incident, and he refers to letters dated 27th May 2003 and 28th of May 2003 from the defendant which acknowledge receipt of the initiating letter of claim sent on 23rd May 2003 and indicated that "the full circumstances of the accident are being investigated". It is for this reason that he states that it is clear from the correspondence that an investigation was carried out by the defendant company.

The plaintiff's solicitor also refers to paragraph 5 of the replying affidavit and to the statement that the passage of time has caused an "associated likelihood of the destruction of the relevant documentation", and he makes the point that this averment falls short of referring to an actual destruction of any documentation and states that since the defendant appears to have carried out an investigation into this incident, the results of that investigation are such that the documentation is still in existence. He refers also to the fact that all potential witnesses that the defendant is likely to rely upon at any hearing of this case are still available, and he disputes the statement that any further investigation at this point in time "would be practically futile". In all the circumstances he submits that it is not correct for the defendant to state that there would be an insurmountable prejudice to the defendant company.

The remainder of this further affidavit by the plaintiff's solicitor refers again to the reasons set forth in his first affidavit for the delays which occurred, and submits that in all the circumstances the delay is properly explained and the reasons constitute good reasons for the purpose of renewing the plenary summons, and that in all the circumstances, the lengthy passage of time since the accident occurred is not inordinate and unusual.

Those are the facts upon which this Court must reach a conclusion on whether the plaintiff has brought himself within the provisions of Order 8, rule 1 RSC in order to achieve another renewal of the plenary summons.

I have no difficulty whatsoever in concluding on those facts that the delay which has occurred since the issue of these proceedings is inordinate – in the sense that it is out of the ordinary, unusual and excessive. It requires explanation to the point where the Court can be satisfied that the reasons for the delay from February 2006 constitute "good reason".

As to whether the delay has unfairly prejudiced the defendant, the position in my view is that, as a general rule, the shorter the length of the delay the greater is the onus on a defendant to demonstrate actual prejudice; and conversely, the greater the length of the delay, the lesser is that need. Indeed, as has been submitted by the defendant, there comes a point where so great is the delay that prejudice to the defendant can be presumed, given the inevitable fact that the recollection of relevant witnesses will be impaired, and that any further investigations as to the circumstances of the incident itself, or any medical examinations of the plaintiff so long after the injuries were sustained will inevitably be hampered by such a lengthy passage of time, and these factors may be presumed to give rise to an unfair prejudice to the defendant. One must also bear in mind of course that even if the plenary summons is renewed and served, there will be an inevitable further passage of time before pleadings are closed and the case achieves a hearing date. One could anticipate that a further year could easily pass before the case would be heard.

In the present case, if the defendant was required to demonstrate actual prejudice in this case, it has not in fact done so, since there is in the affidavit filed in response to the present application only a speculation or assertion of possible prejudice. No actual prejudice is demonstrated. The affidavit falls short of establishing that the investigation has not been carried out, or that files have gone missing or have been destroyed, or that relevant witnesses are no longer available.

But I am satisfied that the delay in this case, particularly that from 27th February 2006, is of such length that despite the fact that an initial letter of claim was sent to the defendant company on the 23rd May 2003, which set out the basis of the claim in very general terms only, and despite the fact that the defendant's letter in response indicated that the incident would be investigated, there can be presumed to be an unfair prejudice to the defendant.

However, it is not on the basis of such presumed prejudice that the decision in his case will be made, as before the question of prejudice arises at all, the reasons for the delay must constitute a "good reason". In the absence of such "good reason" on the facts of this case, the plaintiff will not bring himself within the provisions of Order 8 rule 1 RSC and will not be entitled to an order for the

renewal of the plenary summons.

A factor to take into account in a case of these facts is the extent to which any blameworthiness for delay attaches to the plaintiff personally. In his affidavit he says nothing about what efforts he made during the years after his accident to ensure by inquiry to his solicitor that his case was being progressed. The only evidence before the Court is a statement in the first affidavit sworn by the plaintiff's solicitor that while his legal executive was handling this and other files from her home he relied on her assurance that the file was being dealt with and was up to date and that he had meetings with the plaintiff and informed him that "all matters were in hand". I suppose that a plaintiff upon being given such an assurance would be reasonably entitled to accept that assurance from his solicitor at that time, which one can infer was at some time or times in 2006. But thereafter, and as more and more time passed without any apparent progress, the plaintiff cannot be absolved completely of personal blame, particularly in the absence of any statement in his affidavit that he was constantly in touch with his solicitor urging that the case progress to a hearing, or at least inquiring why this did not seem to be occurring.

I choose not to take account of the delay, in so far as there was any culpable delay up to the second application for renewal of the summons on the 27th February 2006, since that was something which the Court will have considered on the occasion that application was granted.

Thereafter, however, there is a litany of culpable delay. The fact that the plaintiff's solicitor relied upon his legal executive's assurances cannot excuse the delay. She was merely his employee, albeit one for whom he had a high regard. He must be regarded as being in overall charge of the case, and it would be incumbent upon him to ensure, while the matter was being handled outside his office, that it was being delay with properly.

The fact that in 2007 he realised that the file was lost or misplaced cannot excuse the further delay. It was not until some date in 2008 that he says the file was located attached to some unrelated file. But at any time in 2007, upon not being able to locate the file, he could have and ought to have brought an application to replace the lost plenary summons with a sealed duplicate as provided for in Order 8, rule 4 RSC. On that application, as often occurs, an application for a further renewal of the summons could have been attempted also. He ought not to have waited until 2009 before concluding that the summons was either lost or misplaced. That delay is not excused by the reasons given by the plaintiff's solicitor. Neither can the unfortunate death of his Town Agent come to his aid. If anything it ought to have induced more action on his part to ascertain the position and retrieve the situation.

Matters are made worse by the fact that even though, according to his affidavit, it was in 2009 that inquiries were made of his Town Agent's office to try and locate the summons, it was not until the 9th December 2010 that the present application for a renewal of the summons was sworn.

Apart from the initial letter of claim sent in May 2003 and the fact that the defendant had the plaintiff medically examined in July 2003, and the correspondence from the original defendant named on the summons as to the named defendant being incorrect, there has been no contact between the parties. Iarnrod Eireann, the correct defendant, was not as such, at any time aware of these proceedings, even though Coras Iompair Eireann was. One way or another, the claims department of either or both those entities were entitled to presume that they would not be troubled with this claim after the 4th November 2005 since the limitation period expired at that date.

There is no need to set forth and further analyse the body of case-law that has accumulated over the last number of years in the area of delay and renewal of summonses. It is clear from it however that the Courts are required to be more stringent in the manner in which these applications are considered. I would, however, usefully refer to a passage from the judgment of Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM. 290, where at issue was whether or not the plaintiff's claim should be dismissed for want of prosecution. While on the facts of that case the action was not dismissed, he made the following comments at pages 293-294:

> "... The courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to and allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as McMullan V Ireland ECHR 422 97/98, July 29, 2004 and the European Convention on Human Rights Act 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.
>
> These changes, and others, mean that comfortable as sanctions 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 and escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciated may themselves be revisited in an appropriate case. 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."

These comments are echoed by Clarke J. in his judgment in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148 when he stated:

> "Notwithstanding the fact that the Supreme Court in that case [*Gilroy v. Flynn* ...] permitted the continuance of the action, it seems clear that the court was of the view that there may be a need to reconsider the previously established principles in the light of those recent developments.
>
> Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore: --
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> > "(1) ascertain whether the delay in question is inordinate and inexcusable; and
> >
> > (2) if it is so established the court must decide where the balance of justice lies.
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> However it seems to me that for the reasons set out by the Supreme Court in *Gilroy v. Flynn* ... and the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go excuse such a delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

I appreciate of course that these comments have been made in the context of applications to dismiss proceedings for want of prosecution. However, they are apposite and of equal relevance and force on an application to renew a plenary summons, particularly when the length of the delay to be explained and excused is of great length, as in the present case.

It is clear therefore that cases of this kind fall to be considered with less indulgence than perhaps is evident in older cases such as *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 - a case where it seems evident from the judgment of Finlay P. (as he then was) that some account was taken of the catastrophic nature of the plaintiff's injuries, as well as the fact that the solicitor originally handling the plaintiffs filed had left the firm's employment, and the serious illness of the solicitor who took over the case thereafter.

I would refer also to a passage from a recent judgement delivered by Mr Justice Hogan in *Doyle v. Gibney and others* [2011] IEHC 10 at paragraph 16 thereof he states as follows:

> "16. Article 34.1 of the Constitution assigns the Administration of Justice to the courts. Quite apart from any considerations of the personal rights contained in Article 40, the speedy and efficient dispatch of civil litigation is of necessity and inherent feature of the courts jurisdiction under Article 34.1. As I ventured to suggest in my own judgement in *O'Connor v. Neurendale Ltd* [ 2010] IEHC 387, this constitutional imperative means that the courts have a jurisdiction (in an appropriate case, a duty) to exercise their powers in a way which will best ensure that a litigant's right to a hearing within a reasonable time is best vouchsafed. In any event, and for good measure, the same right is guaranteed by Articles 6 ECHR: see *Gilroy v. Flynn* [2005] 1 ILRM 290 and *McFarlane v. Ireland* [2010] ECHR 1272."

In the light of this body of case law, reflected in other recent decisions also, it is impossible to conclude in the present case that the plaintiff or the plaintiff's solicitor have put forward any good reason for the very lengthy delay which has resulted from inactivity in relation to the prosecution of the plaintiffs claim from the end of February 2006 in order to meet the requirement clearly set forth in Order 8, rule 1 RSC to demonstrate a good reason why an order for renewal should be made. In the circumstances of this case, it seems to me that the question of whether the defendant has been in any specific way prejudiced by the delay is not now a relevant consideration.

The defendant is entitled to expect a plaintiff to prosecute his claim with reasonable expedition so that he achieves a hearing of that claim against him with reasonable expedition. The Court is obliged to protect and vindicate that entitlement in appropriate cases by making the type of order sought herein. There are no circumstances in which a hearing with reasonable expedition can be achieved in the present case, and this Court would be failing in its obligations if it were to allow the present proceedings to proceed further by renewing the plenary summons, thereby removing from the defendant the statutory protection otherwise afforded to it under the Statute of Limitations.

In the circumstances, I refuse the application by the plaintiff for a renewal of the plenary summons.