Neutral Citation Number: [2011] IEHC 10

THE HIGH COURT

1997 4837 P

BETWEEN

SIOBHAN DOYLE

PLAINTIFF

AND

GEORGE GIBNEY, IRISH AMATEUR SWIMMING ASSOCIATION LIMITED,

OLYMPIC COUNCIL OF IRELAND LIMITED AND

IRISH AMATEUR SWIMMING ASSOCIATION

(LEINSTER BRANCH) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 18th January, 2011

1. Should this Court permit the plaintiff to continue with proceedings which issued in 1997 and which relate to events which are alleged to have occurred in 1991 even though almost no steps have been taken by her to prosecute this litigation for the last thirteen years? This is the issue which now presents itself in the two motions whereby the second and third named defendants, while seeking slightly different relief, both effectively ask the Court to strike out these proceedings on the grounds of inordinate delay.

2. The plaintiff was born in January, 1972. She appears to have been a very promising swimmer and she was a member of prominent Dublin swimming club, Trojan Swimming Club. That club organised a training camp in Orlando, Florida in 1991. The essence of the plaintiff's case is that she was sexually assaulted by the first defendant while at that camp and that the others defendants were negligent in their role or supervision of the first defendant or the camp. In September 1997, the plaintiff's then solicitors wrote to both the Irish Amateur Swimming Association ("IASA") and to the Olympic Council of Ireland ("OCI") setting out the details of the claim. A month later, a plenary summons (which had issued on 27th April, 1997) was served on both IASA and the OCI. The respective solicitors for both organisations wrote to inform the plaintiff's solicitors that their respective clients were limited companies, so that the service was invalid. Both sets of solicitors suggested that the proceedings should be amended to reflect the corporate status of their respective clients.

3. As it happens, the plaintiff's solicitors took up this suggestion, with the result that the Master of the High Court made an order on 24th June, 1998, granting the plaintiff liberty to amend the title of the proceedings. That order was further amended on 11th November, 1998, whereby the time for the service of the summons was extended for a further three weeks. For reasons which are not easy to fathom, neither defendant was ever served - either at that point or at any stage thereafter - until December 2009, some eleven years later. It appears that in July, 2009 an application was made *ex parte* to this Court (Peart J.) to renew the summons and on 13th July, 2009, Peart J. made an order pursuant to O. 8, r. 1 renewing the summons for a six month period.

4. Following the service of the summons, the two defendants took a slightly different approach to this turn of events. IASA filed an appearance and then brought a motion in which the principal relief sought is that the proceedings should be struck out by reason of inordinate and inexcusable delay in both the commencement and prosecution of the proceedings. The OCI did not actually file an appearance, but they instead elected to bring a motion pursuant to O. 8, r.2 whereby they sought to have the order of Peart J. renewing the summons set aside. Nothing really turns on these different approaches, since the relevant principles are in many respects concurrent and overlapping. I propose to deal first with the application to set aside the order renewing the summons.

The OCI motion

5. As we have just seen, OCI move the court pursuant to O. 8, r. 2, which is in the following terms:

> "In any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

6. Order 8, r. 1 provides that the High Court may:

> "if satisfied that reasonable efforts have been made to serve such defendant, or other good reason, may order that that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons."

7. Apart from the fact of the order itself, as it happens I know very little about what transpired before Peart J. There is no note of what happened before him and the papers in this motion do not disclose the basis on which it was urged that a "good reason" existed which would have justified the renewal of the summons. This is relevant because even if I considered it appropriate to do so, these facts alone would make the test articulated by Morris J. in *Behan v. Bank of Ireland* (High Court, 14th December, 1995) difficult - if not altogether impossible - to apply in the present case.

8. In *Behan*, Morris J. held that any party moving the court under O. 8., r. 2 must demonstrate:

> "that facts exist which significantly alter the nature of the plaintiff's application to the extent of satisfying the court that, had these facts been known at the original hearing, the order would not have been made."

9. This view, has, however, fallen into disfavour since the judgment of Finlay Geoghegan J. in *Chambers v. Keneflick* [2005] IEHC 402, [2007] 3 I.R. 526 where she stated ([2007] 3 I.R. 526 at 529) that this test:

> "does not set out the full set of circumstances in which the court may consider an application under O. 8, r.2. It appears to me that, in addition to the approach set out by Morris J., it is open to a defendant, by submission, to seek to demonstrate to the court that, even on the facts before the judge hearing the *ex parte* application, upon a proper application of the relevant legal principles the order for renewal should not be made."

10. Finlay Geoghegan J. went on to add that O. 8, r. 2 must be regarded as giving effect to the constitutional principle of basic fairness of procedures and that, accordingly, the rule was required to be construed in that fashion.

11. I respectfully agree with this analysis and I note that similar views were also expressed by Feeney J. in *Bingham v. Crowley* [2008] IEHC 453, by Peart J. in *O'Keeffe v. G & T Crampton Ltd*. [2009] IEHC 366 and by Clarke J. in *Moloney v. Lacey Building and Civil Engineering Ltd*., 21 January 2010. I would merely add that, in my opinion, the approach taken by Morris J. in *Behan* cannot be regarded as having survived two separate Supreme Court decisions, *Adam v. Minister for Justice* [2001] 3 I.R. 53 and *DK v. Crowley* [2002] 2 I.R. 744.

12. *Adam* was concerned with the status of the *ex parte* grant of leave in judicial review proceedings. The judgments of McGuinness and Hardiman JJ. both stress the provisional nature of any orders made *ex parte* and how, in the interests of fair procedures, a person affected by such orders must have the right to apply to the High Court have such orders set aside. The judgment of the Supreme Court in *DK* is, perhaps, even more in point. In *DK* the Supreme Court held that s. 3 of the Domestic Violence Act 1996, was unconstitutional, chiefly because the section empowered the District Court to make a barring order *ex parte* without any of the necessary safeguards, such as would attend the grant of an interim injunction in the High Court. Specifically, the Court considered that the fact that the barring order was open-ended was itself an objectionable factor which pointed to the existence of a disproportionate interference with the right to fair procedures. It was true that a person affected by the order could apply to discharge such an order, but even then this effectively reversed the burden of proof. As Keane C.J. explained ([2002] 2 I.R. 744 at 760):

> "It is undoubtedly the case that the respondent may apply to the court at any time to have the interim order discharged or varied. No reason has been advanced, however, presumably because there is none, as to why the legislature should have imposed on respondents in this particular form of litigation, with all its draconian consequences, the obligation to take the initiative in issuing proceedings in order to obtain the discharge of an order granted in his or her absence which, it may be, should never have been granted in the first place. It has not been demonstrated that the remedy of an interim order granted on an *ex parte* basis would be in some sense seriously weakened if the interim order thus obtained were to be of a limited duration only, thus requiring the applicant, at the earliest practicable opportunity, to satisfy the court in the presence of the opposing party that the order was properly granted and should now be continued in force."

13. On this basis, therefore, any order made *ex parte* renewing a summons must, in the words of Hardiman J. in *Adam*, be regarded as being in the nature of a provisional order. Perhaps just as importantly, if O. 8, r. 2 is to be construed - as it must be - in the light of *East Donegal* principles (*East Donegal Co-Operative Ltd. v. Attorney General* [1970] IR 317) and if it is given a construction which conforms with that basic constitutional guarantee, then it follows as a minimum that a judge hearing a matter *inter partes* cannot be bound or constrained by any view formed by the judge who granted the order *ex parte*.

14. While accepting that the decision to renew a summons may not be strictly comparable in all respects with a decision to grant an injunction, as it happens the question of whether the summons in this case should be renewed is a decision of immense importance to all parties to this litigation. It may equally be instructive to observe that where an interim injunction is granted *ex parte* by this Court, it has never been the case that at the subsequent hearing of the application for interlocutory relief the Court would be somehow bound to continue the injunction unless it were shown that new material had come to light which would have affected the original decision to grant the interim relief. For all the reasons expressed in cases as different in their own way as *Chambers*, *Adam* and *DK*, I believe that the same must be true - at least by way of analogy - so far as applications under O.8, r.2. It follows that, with the benefit of an *inter partes* hearing, it falls to me to consider the matter afresh.

15. In the light of this, one may thus again pose the question starkly: what "good reason" could there possibly be for renewing a summons after an interval of eleven years? It is important to note here that *no steps whatever* were taken by the plaintiff in the interval. I do not overlook the fact that there may possibly have been difficulties in serving the first defendant (who appears to reside in the United States). But none of this could excuse the pall of inactivity which appears to have descended on this case from a relatively early stage.

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 an inherent feature of the court's jurisdiction under Article 34.1 if. As I ventured to suggest in my own judgment in *O'Connor v. Neurendale Ltd.* [2010] IEHC 387, this constitutional imperative means that the courts have a jurisdiction (and, in an appropriate cases, 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 Article 6 ECHR: see *Gilroy v. Flynn* [2005] 1 ILRM 290 and *McFarlane v. Ireland* [2010] ECHR 1272.

17. Against that background, it would be almost impossible to envisage circumstances in which the courts could or should be prepared to resurrect this litigation by renewing the summons after such a remarkable lapse of time, not least given that nothing at all has happened in the interval between November, 1998 and July, 2009. Certainly, nothing by way of explanation has been offered.

18. To make matters even worse, it should be recalled that the events complained of were said to have occurred in July, 1991 at a time when the plaintiff was of full age. The plenary summons was issued in April, 1997 towards the end of a (not ungenerous) limitation period. By virtue of O.8, r.1 the plaintiff had 12 months in which to serve the summons and the first intimation which the OCI had that a claim was to be made was in September 1997, some two months after the limitation period had *already* expired, even if the summons had already issued some five months earlier. These considerations made it all the more incumbent on the plaintiff to proceed with speed: cf. the comments of Henchy J. regarding the duties imposed on a plaintiff who has commenced the litigation towards the end of a limitation period in *Sheehan v. Amond* [1982] I.R. 235 at 237.

19. As it happens, therefore, the renewal of the summons in November, 1998 meant that the time for service was extended at time when the limitation period had already expired some seventeen months earlier. Of course, once the summons has been issued *within* the limitation period, the plaintiff has twelve months within which to effect service: see O. 8, r.1. In other circumstances, one might

however query whether it was even appropriate to have sanctioned a further extension of the time permitted for service at a time when the limitation period had expired. As Clarke J. put it (at para. 5.11) in *Moloney*:

> "It seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected, amounts at least to a stretching of the principles behind the existence of a statute of limitations in the first place. Such considerations should, in my view, inform decisions relating to both the question of what might be taken to be a 'good' reason for the renewal of a summons and also in weighing the factors that might be put in the balance in considering whether the balance of justice lies."

20. Whatever reservations one might have about the renewal of the summons in November, 1998 at a time when the limitation period had expired over a year previously, a further subsequent delay of over eleven years for the service of a summons is plainly unsustainable if the courts are not to permit the legislative policy choices underpinning the Statute of Limitations indirectly to be set at naught.

21. For all of these reasons, in view of this striking delay, I find myself coerced by fundamental constitutional (and, for that matter, ECHR) principles to set aside the order of Peart J. which renewed the summons. Any other conclusion would be manifestly at odds with the courts' fundamental duty under Article 34.1 to ensure the timely administration of justice. Nor could the OCI be realistically expected to defend a case on the merits after a lapse of well nigh twenty years. In any event, no obvious "good reason" for renewing the summons under O. 8, r.1 has been advanced.

The IASA motion

22. Similar considerations apply in the case of IASA motion. So far as this motion is concerned, the application is to strike out the proceedings pursuant to the Court's inherent jurisdiction on the grounds of inordinate and inexcusable delay. For the reasons already set out, it is self evident that the delay has been inordinate and no excuse could plausibly be advanced by way of explanation.

23. In these circumstances, I can move immediately to the third limb of the *Primor* test (*Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459) and consider the balance of justice as between the parties.

24. The risk of injustice and prejudice to IASA is obvious. Quite apart from the inherent unfairness of being required to defend a case on the merits after the passage of a remarkably long period of time which was entirely caused by the inaction of the plaintiff, the affidavit of Ms. Sarah Keane sets out concisely the particular prejudice which IASA are likely to suffer as a result. Specifically, IASA has been re-structured during the intervening years and it is plain that the present members of the IASA Board knew nothing of this claim prior to the receipt of the plenary summons in December, 2009.

25. Further prejudice is likely to be caused by reason of the fact that IASA could not now realistically seek to join a potential third party, the Trojan Swimming Club, to the proceedings. Moreover, while many abuse claims arising from the sexual abuse of female swimmers were settled in 2008, IASA also reached a settlement at the same time with its insurers in respect of these claims. The consequence of this is that IASA has no insurance cover which would be available to meet a new claim of this kind. Quite obviously, IASA is prejudiced by reason of the fact that had it been aware of this existing claim in 2008 it might have been able to factor this issue into the settlement equation, but this opportunity has now vanished.

26. The plaintiff will naturally suffer prejudice if the summons is not renewed. Thus, if her substantive case is correct, she has been the victim of reprehensible conduct which cannot now be the subject of an adjudication by this court. Of course, it has been clear for some time that merely because the proceedings would otherwise be statute-barred cannot *in itself* be a ground for holding that a plaintiff has suffered such prejudice such that the third limb of the *Primor* test must be resolved in her favour. As Clarke J. said in *Rogers v. Michelin Tyres plc* [2005] IEHC 294:

> "…..it is proper to take into account the extent to which these proceedings are important to the plaintiff. However in weighing that factor I have also have to have regard to the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151 where at page 159 it is implicit that the court took into account "that it has not been submitted on behalf of the plaintiff that it would not be possible for her to take an alternative course to this action for the purposes of recovering damages or compensation." It seems clear, therefore, that in a case where the entire responsibility for delay rests upon a professional advisor the court can and should take into account the fact that the plaintiff may have an alternative means of enforcing his or her rights."

27. As it happens, I know nothing of the reasons why the plaintiff's case made absolutely no progress for this eleven year period from November, 1998 to July, 2009. She has chosen to put no explanation before the court for such gross delay, save to say in the most general way that by reason of the delay on the part of her former solicitors she was obliged to instruct a new firm of solicitors and that in March, 2008 she commenced separate proceedings her former solicitor for professional negligence. The pleadings in those proceedings have closed and a notice for trial has been served.

28. One may therefore look at the question of prejudice in the following way. If the plaintiff was personally culpable for the delay (by, for example, not giving appropriate instructions to her solicitors), then she is not in a position to complain if the third limb of the *Primor* test is resolved against her. If, on the other hand, the fault is that of her legal advisers, then the fact that she is pursuing a professional negligence action against her former solicitors is a factor which, as both *O'Domhnaill* and *Moloney* make clear, I am entitled to take into account in assessing the question of prejudice. Thus, the fact that she may have an alternative remedy significantly mitigates the potential prejudice which she would otherwise suffer.

29. Whichever way one looks at the matter, it is plain that the prejudice which IASA will suffer significantly outweighs the prejudice which would be visited on the plaintiff by reason of a gross delay which - it must again be recalled - she has not explained.

Conclusions

30. It was for these reasons that I acceded to the application of the OCI to set aside the renewal of the summons under O.8, r.2 and to the application of IASA to strike out the proceedings on the grounds of inordinate and inexcusable delay.