[2005 IEHC 294]

THE HIGH COURT

[1997 No.2633P]

BETWEEN

RODERICK ROGERS

PLAINTIFF

AND

MICHELIN TYRE PLC AND MICHELIN PENSIONS TRUST (NO 2) LIMITED

DEFENDANTS

Judgment of Mr.Justice Clarke delivered 28th June, 2005.

1. Both defendants in these proceedings have brought applications before the court seeking the dismissal of the plaintiff claim.In the case of the first named defendant ("Michelin") it is sought to have the plaintiff's claim dismissed on the basis of a want of prosecution.

2. In the case of the second named defendant ("The Pension Trust") it is sought to have the plaintiff's claim dismissed both on the basis of a want of prosecution and also on the basis that, as against the Pensions Trust, the plaintiff's claim must fail.

3. As both applications are similar insofar as they seek dismissal for want of prosecution I would propose dealing with that aspect of the case first.

Want of Prosecution

(a) The case

4. The sequence of events material to a consideration of this aspect of the case is relatively straight forward.The plaintiff is now 58 years of age and commenced employment with Michelin in 1973 as a sales man in the car tyre industry.He remained in that capacity as an employee of Michelin for 22 years until September 1995.It is common case that as a result of a physical injury to his back (which was unrelated to his employment) the plaintiff became unable to work.It is also common case that there were certain discussions which appear to have occurred on 15th September, 1995 between on the one hand the plaintiff and on the other hand Michelin represented by his immediate superior and the Human Resources Manager of that company.It would not appear to be disputed that as a result of that meeting the plaintiff accepted a lump sum of IR£12,000 in relation to a termination of his employment.

5. It is also common case that for a considerable period of time Michelin has operated a pension scheme for the benefit of employees into which was paid various sums properly deducted from employees wages in accordance with the terms of that scheme and, it would appear, additional sums contributed by Michelin itself also in accordance with the scheme.All such sums were paid to the Pensions Trust who hold the money so received under the terms of the various deeds which from time to time specified the trust upon which the funds are to be held.It is not in dispute but that, in certain circumstances, a person taking early retirement by virtue of disability may be entitled to obtain an early and immediate pension under the terms of that scheme.The controversy between the parties in this case is as to whether the plaintiff is entitled so to benefit either because:

> (a) representations were made to him at the meeting of the 15th September, 1995 to that effect in order to induce him to accept a termination of his employment for the sum of IR£12,000; or
>
> (b) because, it is said, he objectively qualifies for such a payment and is legally entitled to enforce a claim to such payment.

The Sequence of Events

6. On the evidence before me it would appear that an application by the plaintiff for the payment of such a pension was refused on the grounds that the plaintiff, it was said, did not qualify under the scheme.It would appear that the plaintiff first notified Michelin of his concerns in relation to that refusal by letter dated 16th November, 1995.There followed a series of letters from solicitors acting for the plaintiff both to Michelin and to a Dr.Hobson who had, it would appear, acted as medical advisor to Michelin in respect of the plaintiff's case.It has to be said that the difficulty which the plaintiff had in receiving any response from Michelin in relation to his concerns does not reflect any credit on the company.The first reply of any substance was contained in a letter of 29th July, 1996 (which is just short of nine months after the original letter had been sent).It also has to be said that the letter of 29th July simply referred the matter to the Legal Department of the Pension Trust.The first substantive reply came on 9th September, 1996 from a solicitor in that legal department which enclosed a copy of the pension booklet and so far as the substantive matters raised in the correspondence are concerned simply confirmed that the "principal employer" (who was Michelin) "stands by its original decision to dismiss Mr.Rogers on the grounds of his incapacity".In the light of the detailed concerns expressed in the correspondence, the letter of the 9th September is particularly bald especially since it was, apparently, written by a solicitor.

7. In any event there followed some further correspondence which led to the issue of a plenary summons on 7th March, 1997.The proceedings progressed with commendable expedition by the filing of a statement of claim on 19th March, 1997, the raising of and replying to of a notice for particulars which was completed by July 1997 and the filing of a defence by October 1997.

8. Unfortunately no further step appears to have been taken in the proceedings until they were reactivated in excess of six years later.It would appear on the evidence that certain steps towards that reactivation occurred in the early part of 2004.however it was not until March or April of that year that there was a communication to the defendants of the fact the plaintiff was in the course of reactivating the proceedings.

9. Thereafter both defendants brought the applications now before the court seeking to have the plaintiff's claim dismissed for want of prosecution.

The Delay

10. In relation to the delay of in excess of six years during which nothing of any substance occurred in the case it should be noted that the plaintiff's solicitor has, with commendable forthrightness, accepted the blame for that state of affairs.In evidence he indicated that due to pressure of work he did not take any steps in relation to the case until such time as a new solicitor was recruited to deal specifically with this case and other files in the relevant practice.That new solicitor commenced practice in January

2004 and during February 2004 sought and obtained an advice on proofs from senior counsel and also gave instructions to town agents to set the matter down for trial.Because of the lapse of time since the last action in the proceedings the solicitors then acting for both defendants had moved office and the necessary notice of intention to proceed was sent to their old office under cover of a letter dated 23rd February, 2004 but which would appear to have been sent on 8th March, 2004.

The Law
11. It seems clear that despite recent developments in the law in this area the basic questions which the court has to address remain those originally set out in *Rainsford v.Limerick Corporation* [1995] 2 I.L.R.M.561 (which was decided by Finlay P.in 1979).The questions are as follows:-

(a) has there been inordinate delay;

(b) if there has been inordinate delay is that delay excusable; and

(c) if the delay is both inordinate and inexcusable where does the balance of justice lie.

12. he first two questions do not, in reality, give any great difficulty on the facts of this case.

13. A delay of over six years during which time no step was taken towards progressing the plaintiff's claim must be regarded as inordinate.

14. Similarly there was no good external reason for the delay (such as the need to obtain additional advices, evidence or the like).In those circumstances it is not possible to excuse a delay of the length which occurred.While the Court is entitled to have regard to the fact that responsibility for the delay has been accepted by the plaintiff's solicitor it remains the case that there is no evidence that the plaintiff took any direct steps to seek to move matters along.

15. Given that the delay was both inordinate and inexcusable I must then determine where the balance of justice lies.

The Balance of Justice
16. As I indicated in *Stephens v.Paul Flynn Limited* (Unreported, High Court, Clarke J., 28th April, 2005) the weight to be attached to the various factors relevant to the exercise of the court's discretion under the consideration of the balance of justice may require to be altered by reason of the developments identified by the Supreme Court in *Gilroy v.Flynn* (Unreported judgment of Hardiman J.delivered 3rd December, 2004).

17. That is not to say, however, that there has been any change in the factors which the court should properly take into account in assessing where the balance of justice lies.It is simply that the weight to be attached to such factors may need to be reconsidered.With particular reference to this case less weight should, as a result of *Gilroy*, be attached to the fact that the delay is accepted as being attributable to the plaintiff's solicitors.The following factors are put forward on behalf of the plaintiff as matters which should be taken into account in assessing the balance of justice and which, it is said, favour that balance being determined on the side of the plaintiff.

18. It is contended that:-

(i) the proceedings were issued promptly and fully pleaded in early course so that the defendants have been fully aware of the claim that they were likely to meet from an early stage.On this basis, it is said, the defendants are not in the position which certain other defendants may find themselves in whereby the detail of the plaintiff's claim only becomes known some significant period of time after the events giving rise to the claim and at a time when it is difficult to carry out appropriate enquiries;

(ii) there is no significant prejudice on the part of the defendants.As this matter is contested I will return to it in due course;

(iii) the court should have regard to the importance of the case to the plaintiff and the relative financial strength of both defendants;

(iv) the defendants did not take any step during the six year period when the case lay dormant so as to seek to have the plaintiff's claim dismissed for want of prosecution or otherwise reactivated;

(v) the court should take into account the manner in which the defendants dealt with the plaintiff's initiating correspondence up to the 9th September, 1996;

(vi) additional cost and expense was incurred on behalf of the plaintiff in the re-activation of the case by the plaintiff's solicitors in late 2003 and early 2004 and prior to the receipt of a letter dated 12th May, 2004 when the threat of an application to dismiss for want of prosecution was first raised;

(vii) there are the two different ways in which the plaintiff can seek to make his claim as set out earlier in this judgment.A distinction, it is said, can be drawn between the two.As that distinction arises as part of a consideration of the potential prejudice to the defendants it is an issue to which I will return when dealing with that aspect of the case.

19. In relation to those aspects of the balance of justice other than prejudice the following seems to me to be the appropriate approach to each of the items raised.

Item (i)
20. It is correct to state that the defendants were given an early opportunity to know with some precision the case being made against them and in particular to know of the contention that certain representations were allegedly made at the meeting of 15th September, 1995.That is a factor which is properly taken into account and lies in favour of the plaintiff in that it makes the delay less likely to cause serious prejudice.

Items (iv) and (v)
21. I will consider these matters together.While it has often been commented that litigation is a two way process (see for example the comments of Ó Dalaigh C.J.in *Dowd v.Kerry County Council* [1970] I.R.27 at p.42) it seems to me that the weight to be attached

to any delay which, it might be said, should be attributed to the defendant is significantly dependent on whether, on the one hand, the defendant is guilty of what I might call active delay in the sense of itself failing to take steps required of it in the course of the proceedings (such as replying to particulars, filing pleadings, dealing with discovery and the like), or, on the other hand is guilty of inactive delay.In circumstances such as the former it is necessary for the court to assess the extent to which the respective parties may have contributed to the length of time it has taken for the proceedings to reach the stage which they are at as of the hearing of the application to dismiss.The extent that it might be said that the ball was in the court of the defendant for a significant portion of that time is clearly a weighty factor to be taken into account in the assessment of the balance of justice.

22. While the authorities (such as *Dunne v.ESB* (Unreported, High Court, Laffoy J.19th October, 1999) make it clear that inactivity on the part of a defendant (such as a failure, as here, to move the court to dismiss for want of prosecution while the action lies dormant for a significant period of time), is a factor it seems to me that it is a factor to which much less weight attaches.On the facts of this case there has been no material delay on the part of the defendant in the active sense of the word.Just as delay which is required to justify dismissal of an action for want of prosecution must relate to the time which the plaintiff allows to lapse unnecessarily after the proceedings have been commenced (*Hogan v.Jones* [1994] 1 I.L.R.M.512) it seems to me that any delay on the part of the defendant prior to the issuing of the proceedings is not really, in itself, relevant save to the extent that it may equally be incumbent upon a defendant who has caused some delay in the issuing of proceedings to move with all appropriate expedition (insofar as it is within his control) in the conduct of proceedings just as (as is clear from *Hogan*) a similar obligation lies upon a plaintiff.Furthermore to the extent that there may be some delay in the issuing of proceedings because of the conduct of the defendant (but only to that extent) it may not be appropriate for the defendant to place reliance on that element of the lapse of time between the events which give rise to the proceedings to the likely date of trial.

23. Applying those principles to the facts of this case it does not seem to me that there is anything in the conduct of the defendant which can be regarded as being of any great weight in the balance save to the minor extent that it can properly be said that the defendants remained passive during a six and a half year period when the plaintiff allowed the proceedings to remain dormant and delayed the issue of proceedings by some months.

Item (vi)
24. I am not satisfied that there is any evidence to suggest that there was acquiescence on the part of the defendants.While it is true to state that the plaintiff must undoubtedly have incurred some additional expense when the matter was reactivated at the very end of 2003 and in the early months of 2004 it would appear on the evidence that all of that expense was incurred prior to the defendants being informed that the proceedings were to be reactivated.Whatever may be the case in relation to whether the original notice of intention to proceed posted on 8th March, 2004 actually reached the defendants then solicitors it is clear that all (or almost all) of the additional expense had in fact been incurred by that time.The expense therefore occurred at a time when, from the defendants perspective, the proceedings had been dormant for well over six years and where they had had no intimation that anything was about to change.In those circumstances it does not appear to me that this is a factor which I should take into account at all.

Item (iii)
25. Finally before moving on to the question of prejudice it is necessary for me to consider the submission on behalf of the plaintiff that the court should look at what are described in the plaintiff's written submissions as "the respective and disparate positions of both parties".In that regard reliance is placed upon *Rainsford* and also the decision of the Supreme Court in *Primor plc v.Stokes Kennedy Crowley* [1996] 2 I.R.459.It was undoubtedly the case that Finlay P.in Rainsford had regard to the fact that the dismissal of the plaintiff's claim would have "dire consequences" for the plaintiff in that case.

26. It is also true that the Supreme Court in *Primor* had regard to the fact that the existence of the proceedings in that case had the potential to effect the reputation of the defendants (it being a claim alleging professional negligence) and that that too is a factor to be taken into account in an appropriate case.Accepting both of those propositions it does not, however, seem to me that it is proper for the court to include in the balance in the exercise of its discretion a test which amounts to a consideration of the deepness of the pockets of the respective parties.

27. I am happy to accept that 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.It should also be noted that there does not appear to be a special factor such as present in *Primor* concerning the reputation of the defendants.

Prejudice
28. This leads to the issue of prejudice which, on all the authorities, is a factor to which significant weight needs to be attributed.

29. Under this heading it is necessary to consider separately the different aspects of the plaintiffs claim.

The Misrepresentation Claim
30. Insofar as the plaintiff makes a claim based on representations then it would appear, from the pleadings, that any such representations were made at the meeting on 15th September 1995.On the evidence it would appear that that meting was attended by a Mr.Pat Leonard and a Mr.Colm Baker on behalf of Michelin.It is not suggested that either of those two witnesses will not be available.However it is suggested that they are now both retired (for in excess of three and four years respectively) and will be required to give evidence concerning a meeting which, from their perspective, was relatively routine and which will have occurred at least ten years prior to any likely date of trial.In that context my attention is drawn to the comment of Finlay Geoghegan J.in *Manning v.Benson and Hedges Limited* [2005] 1 I.L.R.M.190 to the effect that:

> "Delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or act as a witness".

31. Obviously the extent to which a comment such as the above may be true will depend on the nature of the evidence which is likely to be given and other relevant circumstances.In this case the plaintiff has criticised the defendants for failing to put before the court any evidence as to the specific manner in which the relevant witnesses might find themselves impaired in giving evidence.I do not find that the absence of such evidence is a matter for which the defendants can properly be criticised.A defendant, in bringing an application such as the one now before the court, will be faced with a dilemma.The defendant is entitled to rely on what might reasonably be called general prejudice, that is to say the prejudice which could reasonably be expected to occur in any case of the

type concerned and having regard to the delay involved.A defendant will also be entitled, if it wishes, to put before the court any special or additional prejudice.If it does so, it will necessarily have to draw the court's attention by means of evidence to a specific or additional prejudice which has occurred by reason of the absence of a witness, the difficulty of a witness in being able to give full evidence, the absence of documents or any other material fact.Clearly if a defendant does bring to the court's attention any such special prejudice the court must take that fact into account.However it would also be naïve to ignore the fact that by so doing the defendant will draw the plaintiff's attention to the difficulty which the defendant would incur in properly defending the proceedings in the event that their application for a dismiss is unsuccessful.In those circumstances it seems to me that it is perfectly appropriate for a defendant (if it wishes) to rely simply on general prejudice.

32. In relation to this aspect of the case it does seem to me that there is the potential for significant prejudice on the part of the defendants.

33. In a case where it is likely to be common case that the relevant meeting occurred and that it discussed generally the circumstances surrounding the plaintiff's potential departure from Michelin it is probable that the factual issues between the parties will be as to subtle aspects of what occurred at the meeting.In those circumstances it is frequently the case that minor aspects of the surrounding circumstances can play an important part in influencing the court's decision as to which account to accept.In those circumstances a party who is being required to give an account of events which occurred over ten years ago, which were not, at the time, apparently likely to prove controversial and where the relevant witnesses would have spent much of the intervening period under the reasonable apprehension that the proceedings had been allowed to wither will be at a significant disadvantage.If questioned as to the minutia of the meeting the witnesses are unlikely to be able to recall.If these proceedings had come on for hearing within a reasonable period of time then the relevant witnesses would have been asked to deal with the minutia of such a meeting in circumstances where each witness would, at virtually all material times since the meeting, have been aware that he was likely to have to give evidence about it.In those circumstances I am satisfied that Michelin will suffer at least a moderate degree of prejudice in defending this action insofar as it relates to the alleged representations made at the September 1995 meeting.

The Objective Claim
34. The second leg of the plaintiff's claim concerns a contention that independent of what may have been said at the meeting of 15th September the plaintiff is nonetheless entitled to succeed by virtue of his medical position as documented in 1995.It is fair to state that the principal drift of the claim as made out in the statement of claim on behalf of the plaintiff is very much based upon contentions which derive from the representations to which I have already referred.However it does appear that para.10 of the statement of claim is open to the construction that there is an independent claim to the effect that the defendants wrongfully refused to allow the plaintiff to obtain the appropriate early pension on the basis of the medical evidence submitted by him.

35. In that regard it is important to note that that the defendants will, apparently, rely upon the evidence of Dr.Hobson who assessed the plaintiff's case from a medical perspective and made recommendations to the Michelin upon which it acted.However it became clear in the course of the hearing that Dr.Hobson did not, himself, carry out any personal assessment of the plaintiff.Rather he considered the medical reports furnished on the plaintiff's behalf, formed conclusions based on those reports, and made recommendations based upon his conclusions to Michelin.

36. While there may, obviously, be some difficulty for Dr.Hobson (who is, happily, still alive and continues to work as a consultant for Michelin) in recollecting his precise thought processes at the time it nonetheless seems to me that the prejudice in respect of this aspect of the claim is significantly less than applies in relation to the representation claim.

37. It would seem likely that for the plaintiff to succeed he will have to show that Michelin could not reasonably have come to the view that he did not qualify for an early pension on the basis of the medical evidence submitted.If the defendants are able to persuade the court that the judgment which they were entitled to exercise is one to which absolute discretion applies then they will succeed in any event.This is a matter of law and no prejudice exists as to that aspect of a possible defence.If the court is satisfied that a reasonableness test applies then such a test is likely to be applied objectively having regard to the evidence available to Dr.Hobson.If Michelin are entitled, absolutely, to rely upon the opinion expressed by Dr.Hobson then they will again be entitled to succeed in that there seems little doubt but that Dr.Hobson gave the relevant advices which caused Michelin to decline an early pension to the plaintiff.No prejudice will exist in relation to establishing that Dr.Hobson actually gave the relevant advice.If, however, as a matter of law and contract the court is satisfied that Dr.Hobson's opinion can only be relied upon to the extent that it was reasonable having regard to the medical evidence submitted by the plaintiff then it is difficult to see how there would be any significant prejudice in calling evidence as to the reasonableness of Dr.Hobson's view in the light of the proper test to be applied under the pension trust documentation and the medical evidence available at the time.

38. In those circumstances I am not satisfied that the level of prejudice which the defendants would suffer in respect of this aspect of the claim is anything other than mild.

The European Convention on Human Rights
39. The defendants do not rely on the Convention for any substantive right but merely as an aid a consideration of the obligations of all parties.The lack of any retrospective effect of the European Convention on Human Rights Act, 2003 (as argued by the plaintiff) is not, in my view, therefore relevant.The jurisprudence under the Convention is one of the factors identified in Gilroy as requiring a re-assessment of the balancing of factors in cases such as this.However that possibility was identified as far back as 1984 when *O'Domhnaill v.Merrick* was decided.

Conclusions
40. Having regard to all of the above factors it seems to me that in respect of that aspect of the plaintiff's claim which relies upon the contended for representations made at the meeting of 15th September, 1995 the balance of justice, having regard, in particular, to the prejudice referred to above and the length and lack of excusability of the delay, lies in favour of granting the defendants the relief sought.

41. However in respect of that aspect of the plaintiff's claim which is based upon a contention that Michelin could not reasonably have come to the conclusion that the plaintiff did not qualify it seems to me that the absence of significant prejudice tilts the balance in the opposite direction and I would not, therefore, propose making an order dismissing the plaintiff's claim, notwithstanding the inordinate and inexcusable nature of the delay, in respect of that aspect of the case.

No Stateable Case
42. That leads to the separate application made on behalf of the pension trust which is based upon a contention that the plaintiff's claim must fail and that the proceedings, as against the second named defendant, should be dismissed under the authority of *Barry v.Buckley* [1981] I.R.306.It has not been doubted since that case that the court has a discretion, in the exercise of its inherent

jurisdiction, to strike out a plaintiff's claim where the court is satisfied that the plaintiff's claim must fail.As is clear from the judgment of Costello J.in *Barry v.Buckley* the jurisdiction is one which should be exercised sparingly but it is particularly relevant in cases whose outcome depends on the interpretation of a contract or agreed documentation.

43. In essence the position of the Pension Trust is that under the clear terms of the relevant trust deed the determination as to whether an individual qualifies for an early pension is a matter solely for Michelin and not for the trustees of the Pensions Trust.As is pointed out by counsel for the Pension Trust at para.31 of the written submissions filed "if the court were at the conclusion of these proceedings to order Michelin to afford the plaintiff this benefit the trustee would, of course be bound by the terms of the trust to follow Michelin's directions in this regard".It is pointed out, correctly in my view, that on the clear wording of the trust deed the decision as to whether someone is a qualifying pensioner or not is one which is taken by Michelin rather than the trustees.The trustees simply implement the decision Michelin makes and, in the event of that decision being in favour of the employee concerned, make appropriate payments out of the trust fund in accordance with the scheme, to the employee concerned.If the plaintiff has, therefore, a legitimate complaint concerning the refusal to admit him to the benefits set out in the scheme same is a complaint as against Michelin and not against the trustees.

44. In the circumstances it seems to me that this is a case of the type identified by Costello J.in *Barry v.Buckley* which turns upon the construction of documents and where the answer is clear and such that the plaintiff must necessarily fail.It would seem to me that I should, therefore, make an order staying the proceedings as against the Pension Trust in their entirety.In coming to that view I have taken into account the fact that the plaintiff has urged that some regard should be had to the fact that a motion of this type was threatened immediately prior to the proceedings going dormant but was not, in fact, brought for six years.However having regard to the fact that the plaintiff allowed the Pension Trust to take the view that the proceedings were not being pursued, it does not seem to me to be appropriate to criticise the Pension Trust for not bringing this application until such time as the proceedings were reactivated.

45. In summary, therefore, I propose dismissing the proceedings in their entirety as against the Pension Trust but in part only as against Michelin allowing to continue that aspect of the claim which is dependent upon the plaintiff establishing, independent of the representations made at the meeting of the 15th September, 1995, an entitlement.