

THE HIGH COURT

[2011 No. 10320 P.]

BETWEEN

ANITA CAULFIED

PLAINTIFF

AND

FITZWILLIAM HOTEL GROUP LIMITED

AND

KENNETH SHERIDAN

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 29th day of March, 2019**Background**

1. This is an application by the first named defendant to dismiss the plaintiff's claim for want of prosecution and/or an order pursuant to the inherent jurisdiction of the Court to strike out the plaintiff's claim on the grounds of inordinate and inexcusable delay in the prosecution of the proceedings. The personal injuries summons in these proceedings issued on 16 November 2011. The plaintiff is seeking damages for personal injuries alleged to have been caused by the bullying and harassment of the second named defendant while she was working on a premises owned by the first named defendant, the Fitzwilliam Hotel ("the Hotel").

2. The plaintiff was employed by Oceantree Limited, a company which provided certain housekeeping services to the hotel. At the relevant time, the second named defendant was employed by Ampleforth Limited, a related company of the first named defendant, and was the operations manager in the hotel.

3. The events which the plaintiff complains of are alleged to have taken place between April and July 2009, nearly ten years ago. The following are the relevant dates of the various steps taken in the proceedings thus far: -

5 November 2010 - a letter of claim is delivered;

31 March 2011 - an application is made to the Personal Injuries Assessment Board ("PIAB");

7 April 2011 - authorisation is granted from PIAB;

16 November 2011 - personal injuries summons issued;

14 February 2012 - the first named defendant enters an appearance;

22 March 2012 - the first named defendant delivers a defence and a notice for particulars;

10 February 2014 - the plaintiff replies to the notice for particulars;

13 March 2017 - the plaintiff serves a notice of intention to proceed;

2 June 2017 - the first named defendant's new solicitor writes regarding the delay;

13 July 2017 - the plaintiff serves a further notice of intention to proceed;

14 July 2017 - the plaintiff seeks discovery.

4. It can be seen from the above dates that there are two lengthy periods within which no steps were taken to prosecute the plaintiff's claim: -

(i) There are nearly two years between the delivery of a defence and notice for particulars and the replies to same (March 2012 - February 2014)

(ii) There is nearly three years between receipt of the replies to particulars and service of the notice of intention to proceed (February 2014 - March 2017)

This amounts, in effect, to a delay of some five years between the first named defendant delivering its defence and notice for particulars and service by the plaintiff of a notice of intention to proceed. All that occurred in that five-year period was the plaintiff's reply to the notice for particulars. These delays must be seen against a background of a delay of just short of two years between the events complained of and an application to PIAB.

5. There were other proceedings involving the plaintiff taken under the Unfair Dismissals Act 1977, which included hearings before the Employment Appeals Tribunal (the "EAT"). The second named defendant was dismissed from his employment following complaints made by the plaintiff. His claim was determined by the EAT in January 2014 and the plaintiff gave evidence in those proceedings.

6. The plaintiff was dismissed by Oceantree Limited in November 2009. She subsequently brought an action for unfair dismissal and received an award from the EAT in September 2011.

Notice of motion to dismiss for want of prosecution

7. The application is grounded upon an affidavit of Mr. Tom Mannix, solicitor instructed by first named defendant. This affidavit set out the various stages in the proceedings and when they took place. Mr. Mannix states that: -

"24. Furthermore, the first named defendant has, as a result of the plaintiff's delay, been prejudiced in its defence of the proceedings. The lapse of time will tend to reduce the potential of witnesses to give meaningful assistance or to act as a witness in relation to the events which occurred over eight years ago."

8. Mr. Mannix also makes reference to the non-availability, due to ill health, of the then Managing Director of Oceantree Limited. It is to be noted, however, that this ill health pre-dated the issuing of proceedings.

9. There is a replying affidavit from Mr. Emmet Butler, solicitor instructed on behalf of the plaintiff, and I will refer to this affidavit later in the judgment.

Authorities

10. There have been numerous authorities on the jurisdiction of the courts to dismiss actions for want of prosecution. A starting point is the following passage from the judgment of Hamilton C.J. in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459: -

"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows: -

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,
 - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
 - (iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,
 - (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
 - (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
 - (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
 - (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

11. More recently, Irvine J. in the Court of Appeal decision of *Flynn v. The Minister for Justice, Equality & Law Reform* [2017] IECA 178, at para. 19, referred to the following principles which had been identified in the High Court decision under appeal (Barrett J.) and included an additional factor from the judgment of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510: -

"(1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.

(2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.

(3) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.

(4) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.

(5) Even when delay has been inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the case proceeding.

(6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.

(7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.

(8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk

of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.

(9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.

(10) All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name.

(11) The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its considerations, not only its own constitutional obligations but the State's Convention obligations.

(12) The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations.

(13) There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence).

(14) The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action.

(15) As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them.

(16) Where a plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed."

12. Some of the above principles are particularly applicable to the instant case. I refer to (4), (8), (9), (13), (15) and (16).

Response of the plaintiff

13. The plaintiff relied on an affidavit sworn by her solicitor, Mr. Emmet Butler. This affidavit sets out the background to the claim as I have outlined earlier in my judgment. It refers, in particular, to the plaintiff's mental condition. At paragraph 39 he states:

"I say that a number of factors have contributed to this delay including:

- Parallel proceedings;
- The state of the plaintiff's health. The plaintiff has suffered from chronic depression;
- The plaintiff's economic circumstances;
- False and baseless allegations by the second named defendant caused the plaintiff to be interviewed by the gardai, which added to her stress and trauma;
- Failure to respond to my letter of March, 2017."

14. In response to this averment, I would like to make the following observations. I presume that the "[p]arallel proceedings" is a reference to the proceedings taken before the EAT. I cannot see how such proceedings would in any way have prevented the timely prosecution of this action. Further, the plaintiff's claim before the EAT was dealt with in September 2011 and the second named defendant's claim in January 2014. It should be noted that between February 2014 and March 2017 the plaintiff took no step to prosecute her action. If the plaintiff's ill health is the reason for the delay, one would, at a minimum, have expected a medical report in support of this. As to the plaintiff's economic circumstances one would have thought that this would have been a reason to bring this action to as speedy a conclusion as possible. It is correct that the plaintiff served a notice of intention to proceed in March 2017. This does not, however, explain the lapse of time of some three years that occurred since the plaintiff replied to the notice for particulars. It is accepted that there has been delay on behalf of the plaintiff which I would classify "inordinate" (see *O'Carroll v. EBS Building Society* [2013] IEHC 30). As per the previous paragraph I do not accept that the reasons put forward by the plaintiff for this delay are satisfactory or reasonable. Thus I conclude that the delay in these proceedings has been both inordinate and inexcusable.

15. It is now necessary to consider "the balance of justice". The first matter to be considered is that the nature of the claim which is one for bullying and harassment. Claims of this nature necessarily require the testimony of those who were present or who witnessed the alleged events. These events are alleged to have occurred some ten years ago. A lapse of time of this order must impinge upon the accuracy of those who may give evidence concerning the alleged events. This must amount to prejudice for the first named defendant in defending the claim. I also take into account the delay that elapsed between the events complained of and the application to PIAB, which was in the order of some two years.

16. I must also consider any delay on the part of the first named defendant. When faced with a claim of this nature I would not criticise a defendant for failing to take steps in the proceedings when the plaintiff has not done so. I think that it was reasonable for the defendant to consider that the claim was not being pursued in circumstances where they had engaged with the plaintiff by way of delivery of a defence and a notice for particulars and received no response for a number of years. Taking a step in the proceedings after a lapse of a number of years risked reactivating proceedings which otherwise might have been abandoned. I therefore conclude that not only has there been inordinate and inexcusable delay on the part of the plaintiff in prosecuting these proceedings but that the balance of justice lies in favour of striking out these proceedings for want of prosecution.

17. By reason of the foregoing, I will make an order in terms of (i) of the notice of motion.