THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 58

Appeal No.: 2014/80

Peart J.
Irvine J.
Mahon J.

Colm Granahan T/A C G Roofing and General Builders

Plaintiff/Appellant

and

Mercury Engineering

Defendant/Respondent

Judgment of Ms. Justice Mary Irvine delivered on the 12th day of March 2015

Introduction
1. This is an appeal against the judgment and order of the High Court (Kearns P.) delivered on 10th November, 2014 whereby he dismissed the plaintiff's claim on the grounds of inordinate and inexcusable delay.

Background facts
2. By Civil Bill dated 29th May, 2009 the plaintiff/appellant commenced proceedings in the Circuit Court, Western Circuit, in respect of an agreement allegedly made between the parties in 2008 whereby the plaintiff agreed to supply painting and labouring services to the defendant at the Corrib Gas project site at Bellanaboy, Co. Mayo. The defendant allegedly breached the terms of the contract and brought the arrangement to a premature end as a result whereof the plaintiff claimed an entitlement to recover damages confined to the jurisdiction of the Circuit Court.

3. A defence was delivered on 23rd November, 2009 wherein the defendant denied all of the plaintiff's allegations of wrongdoing, loss and damage. Thereafter, a notice for particulars was raised by the defendant on 4th December, 2009 and the replies thereto were delivered by the plaintiff on 13th January, 2010.

4. By order of the Circuit Court dated 31st May, 2011 the proceedings were, following a contested application brought by the plaintiff, transferred to the High Court. In that regard the plaintiff relied upon a report from his accountants, Messrs. Cahill and Trautt Ltd., which advised that, based on the contract terms alleged and the expected completion date of July, 2009, the plaintiff's claim for loss of earnings and bonuses arising from the defendant's alleged breach of contract could be stated to be well in excess of the jurisdiction of the Circuit Court.

5. By Order of the Master of the High Court made on 3rd November, 2011, the proceedings were formally adopted into the High Court. On 6th December, 2012 the plaintiff raised particulars arising from the defendant's defence and later on 17th January, 2013 issued a notice of intention to proceed.

6. The plaintiff changed his solicitors in November, 2013 at which stage his present solicitors, Claffey Gannon, came on record on his behalf. They served a notice of intention to proceed on 31st January, 2014 along with a letter seeking voluntary discovery. In response, the defendant issued a motion to dismiss the plaintiff's claim for want of prosecution and/or on the grounds of inordinate and inexcusable delay. At the hearing of that motion on 10th November, 2014 the relief sought was granted on the latter basis.

Judgment of the High Court

7. From the agreed note of the decision of the learned High Court judge it is clear that, following a consideration of the relevant case law pertaining to applications to dismiss proceedings on the grounds of delay, he was satisfied that the plaintiff had indeed been guilty of inordinate and inexcusable delay. He then proceeded to consider, as was his obligation, whether, notwithstanding such a finding, the balance of justice lay in favour or against the dismissal of the claim, an issue he resolved in the defendant's favour.

Principles to be applied
8. The principles which govern the circumstances in which proceedings may be struck out for delay are not in dispute on the present appeal and it is therefore unnecessary to set them out in great detail. Suffice to state that the relevant principles were first comprehensively described by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and later approved of by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where Hamilton C.J. stated as follows:-

> "The principles of law relevant to the consideration of the issues raised on this appeal may be summarised as follows: –
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> (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;
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> (b) 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;
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> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
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> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to:
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> (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 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 defendant's reputation and business."

9. There are innumerable other decisions of much more recent vintage which consider these principles and which express disquiet about the courts' heretofore excessive indulgence when dealing with stale claims and which advise of the need for much greater consideration to be given to the courts' own constitutional obligations and compliance with Ireland's obligations under Article 6.1 of the European Convention on Human Rights. An example of this type of approach to delay is to be found in the decision of Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.R.L.M. 290 where at pp. 293 – 294 he stated as follows:-

> "[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. ….[F]ollowing such cases as *McMullan v. Ireland* [ECHR 422 97/98. 29th July, 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."

10. In his judgments in *Stephens v. Paul Flynn Ltd.* [2005] IEHC 148 and *Rodenhuis & Verloop BV v. HDS Energy Ltd.* [2011] 1. I.R. 611, the latter decision being one relied on by the High Court judge in reaching his conclusions in the present case, Clarke J. also questioned whether there should be a recalibration of the criteria by reference to which the actions of the parties might be judged. He stated that while the overall test and applicable principles remain the same, the application of those principles might require some tightening up to avoid excessive indulgence. At para. 11 of his judgment he advised as follows:-

> "It seems to me, therefore, that it is necessary, in a system where the initiative is left largely up to the parties to progress proceedings, for the courts to make clear that there will not be an excessive indulgence of delay, because if the courts do not make that clear, it follows that the courts' actions will encourage delay and, thus, will encourage a situation where cases will not be completed within the sort of times which would be consistent with compliance with Ireland's obligations under the European Convention on Human Rights."

11. It is accordingly now well accepted that the Irish courts are under a Convention based obligation to ensure that all proceedings, including civil proceedings, are concluded within a reasonable time. This means that any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its consideration, not only its own constitutional obligations but Ireland's obligations under Article 6 of the Convention.

The Appellate Jurisdiction of the Court of Appeal

12. There is no dispute on this appeal as to the jurisdiction of the Court when engaged upon an appeal concerning a decision made by a judge of the High Court in the exercise of his discretion. As was recently stated by this court in *Collins v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2015] IECA 27, another case in which the Court was asked to dismiss proceedings on the grounds of inordinate and inexcusable delay. While the Court is obliged to give due consideration to the conclusions of the High Court judge, it is nonetheless entitled to decide, should the interests of justice so dictate, to exercise its own discretion as to whether or not a claim should be dismissed on the grounds of inordinate and inexcusable delay.

Submissions on behalf of the plaintiff/appellant:

13. In addition to the oral submissions made on the hearing of the appeal, the Court also received helpful written submissions from the parties and all of these have been fully considered. What follows is no more than a skeletal account of the principle arguments advanced by the parties on the hearing of the appeal.

14. Counsel for the plaintiff submitted:–

> (i) that by the standards of delay in other cases where the court has dismissed claims on the grounds of delay, the delay in this case ought not to have been classified as inordinate and inexcusable, and;
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> (ii) that the High Court judge should not, on the evidence before him, have concluded that the balance of justice favoured the dismissal of the action. Counsel submitted:–
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> (a) that the prejudice alleged on the part of the defendant did not withstand scrutiny;
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> (b) that the nature of the claim, not being one concerning the reputation of the defendant, was one to which greater latitude could be afforded, and;
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> (c) that the defendant's own conduct weighed heavily against the dismissal of the action. First, it had acquiesced in the delay. Secondly, it had added to the delay in the proceedings in failing to respond at all to the plaintiff's notice for particulars and in failing to respond promptly to his letter seeking voluntary discovery.

Submissions on behalf of the defendant/respondent
15. Counsel for the defendant submitted:-

> (i) that the present appeal was not properly before the Court. It was an expedited appeal in respect of an interlocutory order and the notice of expedited appeal had not been lodged within the requisite ten day period as provided for by Order 86 (A) of the Rules of the Superior Courts. An application ought to have been brought seeking an extension of time to lodge the appeal.
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> (ii) from the chronology of the proceedings, the delay had to be classified as inordinate and no excuse had been forthcoming to explain it. The trial judge could not accordingly be faulted in concluding that the delay in the prosecution of the proceedings had been both inordinate and inexcusable.
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> (iii) as to the balance of justice counsel submitted:–
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> > (a) that the defendant had established prejudicial delay of a specific nature arising from the facts deposed to in Mr. Lacey's affidavit;
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> > (b) that the defendant must be considered to be at risk of general prejudice in its ability to defend the claim due to the delay, particularly in circumstances where the action would not, if permitted to proceed, be heard for some considerable time;
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> > (c) that the claim which the plaintiff now wished to make, as was apparent from the draft statement of claim exhibited, was one which would impugn the integrity of the defendant and its employees thus taking it into the category of case which the Court should ensure is dealt with promptly;
> >
> > (d) that the defendant's conduct could not be classified as acquiescence. The plaintiff could have brought a motion to direct the delivery of replies to its letter seeking particulars. Further, the plaintiff had not sought to expedite the proceedings following the delivery of the letter of voluntary discovery. The motion to enforce compliance with that letter was, he submitted, issued as a tactical response to the defendant's motion to dismiss the claim on the grounds of inordinate and inexcusable delay.

Decision.
16. While it is technically correct that the present appeal was not properly before the Court by reason of the fact that the appeal was not lodged within the 10 day period required for an appeal against an interlocutory order, the Court is well satisfied that had such an application been brought the plaintiff would in all likelihood have been in a position to satisfy the necessary criteria to obtain that relief as advised in *Eire Continental v. Clonmel Foods* [1955] I.R. 170. The Court has accordingly decided that, in the exercise of its discretion, it will deal with the appeal on its merits.

Inordinate delay.
17. Having considered all of the evidence that was before the High Court and the submissions made on behalf of the parties on this appeal, I am satisfied that the conclusion of the High Court judge to the effect that the plaintiff had been guilty of inordinate delay in the prosecution of the proceedings was well founded.

18. While there was no delay in the commencement of the proceedings, there were several significant periods of inactivity thereafter.

19. The defendant's defence was delivered on 23rd November, 2009. This was followed swiftly by the defendant's letter seeking particulars dated 4th December, 2009 which was promptly replied to on 13th January, 2010. For whatever reason no step was taken thereafter for well over a year, at which stage the plaintiff brought an application to transfer the proceedings to the High Court.

20. A second significant period of delay commenced on 3rd November, 2011, that being the date upon which the proceedings were formally adopted into the High Court. It was some thirteen months later before the next move in the proceedings occurred. That was a request for particulars raised by the plaintiff's solicitors by letter dated 6th December, 2012. In this regard it is significant that the particulars sought related to a defence which had been delivered more than three years previously.

21. A third and very significant period of delay, concerns the period between 17th January, 2013 and 31st January, 2014, the later date being that upon which the plaintiff's solicitors issued a notice of intention to proceed and served a letter seeking voluntary discovery.

22. I am satisfied that each of the aforementioned periods of delay when assessed individually was unsatisfactory, but when taken cumulatively can only be considered to be inordinate, as was correctly found by the High Court judge.

23. I am also satisfied that the conclusion of the High Court judge to the effect that the delay was inexcusable was entirely justified based upon the evidence that was before him. Indeed, no explanation whatsoever was put forward in the affidavits seeking to explain it. It would have been open to the plaintiff's present solicitors, from their perusal of the file, from their engagement with their client or indeed their own predecessors, to have advanced some explanation for the delay, but none was forthcoming. While counsel submitted that it could be inferred that there had been a breakdown in the solicitor client relationship, the delay could just as easily have been referable to lethargy on the part of the plaintiff or indeed his then solicitors.

24. At p. 518 of his judgment in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, Fennelly J. criticised the failure of the plaintiff on an application such as the one under consideration on this appeal, to provide any excuse for the delay that had occurred. He also referred to the many types of complications which may delay litigation in the following passage which is of material significance to the facts in the present case:

> "It is no exaggeration in these circumstances to say that the plaintiffs have not even made pretence of an attempt to explain, still less offered an excuse for their quite extraordinary delay in pursuing the claim. There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of claim. No comparable misfortune has been advanced in the present case. The claim is of a purely commercial character. On the plaintiffs' own version of it, it is perfectly straightforward."

25. From the aforementioned decision it is clear that relevant to the court's consideration of whether delay is excusable is whether or not the plaintiff faced any particular hurdles in terms of moving the action forward for trial. No such difficulties were advised in the present case. This is not a case, judging from the pleadings, of any particular complexity. There was no assertion that the plaintiff had encountered any of the litigation hazards described by Fennelly J. above.

26. The lethargic and inexcusable approach to the prosecution of the proceedings is most clearly demonstrated by reference to the delay of three years in the raising of a letter seeking particulars of the defence and the postponement of his application for voluntary discovery until some four years had elapsed after the delivery of that defence.

27. In all of these circumstances I am satisfied that there was ample evidence for the trial judge to conclude that the delay on the part of the plaintiff in the prosecution of the action was inexcusable.

Balance of justice

28. Having concluded that the delay in the proceedings was both inordinate and inexcusable, I must now consider whether or not the trial judge's conclusion that the balance of justice lay in favour of the dismissal of the claim was, having regard to the evidence, one which was just in the prevailing circumstances.

29. Relevant to that decision 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, as was stated by Fennelly J. in *Anglo Irish Beef Processors Ltd.*

30. Having considered the evidence that was before the High Court, I reject the plaintiff's contention that the defendant had been guilty of culpable delay. Its defence was delivered promptly on 23rd November, 2009 and was followed up by a letter seeking particulars on 4th December, 2009. However, the plaintiff did not assert that the defendant's failure in that regard impeded his ability to progress his claim. Further, when considering whether the defendant's delay in this respect was culpable, it must be remembered that the primary responsibility for moving a case forward rests with the plaintiff and he could have applied at any time to have had the defence struck out by reason of such default, a step that would, almost as a matter of certainty, have produced the desired response.

31. Insofar as the defendant failed to respond to the plaintiff's letter for voluntary discovery of 31st January, 2014, it is not clear when the defendant ought to be considered to have been in default of that request as the time frame within which the discovery was to be provided has not been advised. However, in light of the fact that the defendant had, as early as 8th May, 2014, issued the motion to dismiss the claim for want of prosecution, it is reasonable to assume that the combined effect of the service of the notice of intention to proceed and the request for voluntary discovery stimulated some consideration of the strategy to be adopted which in turn led to a decision to postpone dealing with discovery pending an application to dismiss the claim on the grounds of delay.

32. In the circumstances as they emerged, I am satisfied that the defendant was not in any respect culpable in respect of this brief period during which it failed to respond to the discovery request. Further, it goes without saying that the plaintiff might have moved to enforce its request for discovery if he felt that the defendant's non-response was unacceptable. As it happened, the plaintiff only issued such a motion after the defendant issued its motion to dismiss the claim on the grounds of delay.

33. A matter which also goes to the defendant's credit when considering its conduct in the context of delay is the fact that when met with the plaintiff's motion to transfer the action to the High Court it offered its consent to the action being determined in the Circuit Court with unlimited jurisdiction. Had the plaintiff agreed to such a proposal a great deal of time and expense would have been saved and the action capable of being disposed of with much greater expedition.

34. Having considered the overall conduct of the defendant in the course of these proceedings, I am satisfied that it was not guilty of any conduct which ought to have adversely affected its interests when the High Court Judge came to consider where the balance of justice lay. Further, I reject the submission made that the defendant should be deemed to have acquiesced in the delay because it did not put the plaintiff on notice of its dissatisfaction regarding the rate at which the claim was being processed.

35. One of the principal questions that the Court is obliged to consider when dealing with the balance of justice, as per the decision of the Supreme Court in *Primor,* is whether or not the defendant has been prejudiced as a consequence of the delay complained of. It was for this reason that the High Court judge initially adjourned the defendant's application so as to allow it set out on affidavit any prejudice upon which it wished to rely.

36. As to the extent of the prejudice to be established by the moving party, in delivering the judgment of the court in *Stephens v. Flynn Ltd.* [2008] IESC 4 Kearns J., as he then was, accepted that the defendant need only establish moderate prejudice as justification for seeking to have an action dismissed on the grounds of delay. In the following brief passage he summarised the findings that had been made by Clarke J. in the court below:-

> "In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the defendant in exercising his right to apply for the dismissal of the action for want of prosecution".

37. In the present case the defendant contended that it would suffer significant prejudice if the action was to be allowed to proceed based upon an assertion that a number of witnesses that it would wish to call were no longer in its employment, their addresses unknown and in several cases were out of the jurisdiction.

38. Mr. Lacey in his affidavit of 31st October, 2014 named five such witnesses whom he stated might not be available to give evidence:-

> (a) Mr. John McDonnell, safety manager, whose whereabouts were stated to be unknown;
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> (b) Mr. Ralph Hanlon, safety and environmental advisor, who had left the company in September, 2011;
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> (c) Mr. David Doyle, safety adviser, who was now working for the defendant in Sweden;
>
> (d) Mr. Mark Gibbons, the quality manager who left the defendant in June, 2010, and;

(e) Mr. Jim Oysten, who had also left the company and whose whereabouts were stated to be unknown.

39. While at face value the averments contained in Mr. Lacey's affidavit contend for significant prejudice, and clearly the trial judge was impressed that this was so, I am inclined to agree with counsel for the plaintiff that the prejudice alleged is much more likely to be illusory than real.

40. First, any defendant faced with litigation should know what witnesses it is likely to need to counter the allegations made. Accordingly, it should ensure that it obtains contact details for any such witness as may, for whatever reason, leave its employment. Thus, I place little weight upon the fact that a number of the defendant's potential witnesses are no longer in its employment.

41. Secondly, Mr. Lacey does not state what steps, if any, were taken to ensure that these witnesses would remain available to give evidence at the trial when they left. Neither does he state what efforts, if any, he had made to trace their whereabouts prior to swearing his affidavit. Did he, for example, consult professional registers, social media, former colleagues *etc.?*

42. Thirdly, even if this action had been brought on for trial as early as 2012 at least three of the five witnesses mentioned by Mr. Lacey would at that stage already have left the defendant's employment. Further, given that Mr. David Doyle is working for the defendant company in Sweden it can hardly maintain it is prejudiced by reason of the fact that he is no longer working in Ireland.

43. Fourthly, Mr. Lacey does not state that any of these witnesses, if contacted, would be unlikely to be available to travel to Ireland for the trial. Even if they had, the fact that a witnesses is out of the jurisdiction and may have difficulty, due to work commitments seeking time off to return to give evidence, this no longer poses the same type of problem that used to exist in times before the court could direct that evidence be taken by way of video link.

44. For the aforementioned reasons I am not satisfied that the defendant is likely to suffer even moderate prejudice due to the potential unavailability of witnesses. Its concerns in this regard cannot be equated to the type of prejudice that potentially arises for a defendant who, as a result of delay, has lost, through death or illness, the evidence of some crucial witness.

45. As to whether the defendant is likely to suffer general prejudice due to delay, this is a matter of significant concern to the Court on this appeal. Regrettably, if the appeal is allowed the proceedings may not be heard for some considerable period of time as the plaintiff appears intent on making an application to amend his statement of claim to plead new allegations of fraud, forgery and possibly defamation. If that application is successful, regardless of due expedition on the part of both parties, it will be some time before the action is heard.

46. I am mindful of the fact that the greater the time interval between the events in question and the date upon which an action is heard the more fragile and unreliable the evidence is likely to be with the ever increasing chance of an unjust result. However, that said, many cases of great complexity are, for reasons unconnected with any default on the part of the parties, heard at a significant remove from the events concerned and the Court is left with the task of trying to achieve a just result, regardless of the ensuing complications. In this case there is some small amount of comfort afforded by the fact that the defendant maintains that its agreement with the plaintiff came to an end when various tradesmen whom he supplied failed certain trade tests and there is no suggestion that the evidence pertaining to these tests, which the men were obliged to undergo, will not be available if the matter is allowed to proceed to trial.

47. What I have to ask myself is whether the balance of justice in this case is best served, as was found by the learned High Court judge, in the dismissal of the action. Having weighed in the balance the terminal prejudice to the plaintiff in having his claim dismissed and his constitutional right of access to the court revoked against the prejudice likely to be visited upon the defendant if the action is to be allowed proceed, I believe that the balance of justice is not achieved in the dismissal of the plaintiff's claim. While mindful of its constitutional obligations to bring to an end the culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of proceedings, as advised by Hogan J. in *John Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11 and Ireland's obligations which arise by reason of Article 6 of the Convention, I am nonetheless satisfied that, at this point in time, the balance of justice favours allowing the claim proceed.

48. While I am satisfied that the plaintiff should be permitted to proceed with his action, at this time, there is nothing to preclude the defendant from moving for a second time, as happened in *Collins,* to dismiss this claim on the grounds of inordinate and inexcusable delay should any further unnecessary delay or prejudice to its potential defence emerge. In this regard, the Court is now advising the plaintiff to proceed with all due expedition to protect himself against a further like application.

Conclusion

49. Having paid due regard to the decision of the learned High Court judge I am nonetheless satisfied for the reasons stated that the appeal should be allowed.