THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 66

Appeal No. 2016/201

Irvine J.
Sheehan J.
Hogan J.

BETWEEN/

CHARLES CARROLL

PLAINTIFF / APPELLANT

- AND -

SEAMUS KERRIGAN LIMITED

FIRST NAMED DEFENDANT

- AND -

MICHAEL CRAWFORD (TRADING UNDER THE STYLE AND TITLE OF MICHAEL CRAWFORD AND CO. SOLICITORS)

SECOND NAMED DEFENDANT / RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 3rd day of March 2017

1. This is the plaintiff's appeal against the order of the High Court (O'Regan J.) made on 11th April, 2016, whereby she dismissed the within proceedings against the second named defendant, on the grounds of inordinate and inexcusable delay.

2. The proceedings arise out of an injury allegedly sustained by the plaintiff ("Mr. Carroll") while in the employ of the first named defendant on the 25th January, 2001. He maintains that on that date he was struck in the jaw by a pellet from an air rifle discharged by a fellow employee.

3. When he commenced his proceedings by personal injuries summons on the 1st April, 2008, Mr. Carroll claimed negligence on the part of his employer for permitting a loaded air rifle to be present on its premises and in allowing it to be deployed by a fellow employee, Mr. Rory Fallon. Fearful of the possibility that his action against his employer had become statute barred, he also joined as a defendant to the proceedings Michael Crawford (trading under the style and title of Michael Crawford and Co. Solicitors), on the basis that he was negligent in failing to issue the proceedings against his employer, so as to ensure that his claim for personal injuries was not defeated by virtue of the application of the provisions of the Statute of Limitations. His concerns in this regard were well founded in that by order of the High Court made on 21st January, 2011, his claim against his employer was dismissed on the grounds that the claim was statute barred.

4. For the purposes of the within proceedings Mr. Carroll retained the services of Damien Tansey Solicitor, of Damien Tansey and Associates, Sligo. The respondent has at all times been represented by Patrick McEllin & Son of Claremorris, Co. Mayo.

5. It is unnecessary to rehearse in any great detail the facts deposed to in the affidavits which were before the High Court at the time it dismissed Mr. Carroll's claim against the respondent, Mr. Crawford. However, the following chronology sets out the dates which are most material to the decision of the High Court under consideration on this appeal.

The chronology
25th January 2001: Mr. Carroll injured at work

1st March 2002: Mr. Carroll moves to the U.S.A.

March 2005: Mr. Damien Tansey comes on record for Mr. Carroll

12th July 2006: Mr. Carroll returns from the U.S.A.

1st April 2008: Personal injury summons issues

17th June 2008: Respondent enters an appearance

24th July 2008: Respondent's notice for particulars

1st December 2008: Replies to particulars

17th April 2009: Defence delivered

11th March 2010: Appellant sets the case down for trial

21st January 2011: Appellant's claim against the first named defendant dismissed

1st October 2013: Notice of trial struck out as no appearance by the appellant at the call over.

31st March 2014: Respondent issues motion to dismiss for delay.

28th July 2014: Respondent's motion refused.

Directed to set the case down and progress with expedition

30th January 2015: Mr. Carroll's solicitor, Mr. Damien Tansey, leaves Callan Tansey solicitors.

2nd February 2015: Respondent's solicitor writes to Mr. Carroll's solicitors enquiring as to when they propose filing a certificate of readiness and seeking a hearing date.

21st October 2015: Respondent issues a notice of intention to proceed.

23rd December 2015: Respondent issues second motion to dismiss for delay.

6. As is apparent from the aforementioned chronology, by notice of motion issued on the 31st March, 2014, the respondent brought a motion to dismiss the appellant's claim for want of prosecution or alternatively on the grounds of inordinate and inexcusable delay. That application was heard by Cross J. on the 28th July, 2014, ("the 2014 motion") at which stage the Court held that Mr. Carroll had been guilty of inordinate and inexcusable delay in the manner in which he had progressed his action. However Cross J., having considered the detailed affidavit sworn by Mr. Tansey on behalf of Mr. Carroll, was satisfied that the balance of justice nonetheless favoured permitting the action proceed to trial and declined the relief sought. It is however pertinent to note that at paragraph 10 of his affidavit, sworn for the purpose of resisting the application to have his client's proceedings dismissed, Mr. Tansey stated as follows:-

> "I further say and confirm that in the event that the reliefs sought by the said Defendant being refused, the Plaintiff shall proceed with all due expedition and shall ensure that the within proceedings obtain a hearing date as soon as is reasonably possible."

7. This assurance notwithstanding, the plaintiff nonetheless took no further steps in the matter, despite having survived the earlier strike out motion. By notice of motion dated the 23rd December, 2015, the respondent then brought its second application to dismiss the claim for want of prosecution under O. 36, r. 12 of the Rules of the Superior Courts 1986 and in the alternative pursuant to the court's inherent jurisdiction on the grounds of inordinate and inexcusable delay.

8. As has already been made clear by the order of O'Regan J. made on the 11th April, 2016, Mr. Carroll's claim was dismissed for inordinate and inexcusable delay. The High Court judge expressed herself satisfied that the delay in the prosecution of the proceedings was such as to "put justice to the hazard" and that in such circumstances the justice of the case warranted the dismissal of the claim against the respondent.

Submissions

9. Mr. Mulloy S.C., on behalf of the appellant, accepts that the appellant's delay was inordinate but he does not accept that it was inexcusable. The fact that Cross J. made such a determination in July, 2014 does not bind this Court. It is entitled to make its own assessment as to whether the delay was inexcusable. Some allowance, he submits, should be made for the fact that Mr. Tansey left the partnership of Callan Tansey in January, 2015 and his vast caseload had to be reassigned. However, if this Court is satisfied that the trial judge was correct in her conclusion that the delay has not been excused, then he submits that the balance of justice favours allowing the action to proceed. The proceedings are very far advanced and are ready for trial. Furthermore, the respondent has not identified any particular prejudice as a result of the delay. This was not a case, for example, where due to the passage of time witnesses could not be located. It could not therefore be said that the delay has in fact, as was held by the trial judge, put justice to the hazard.

10. Mr. Walsh S.C., on behalf of the respondent, maintains that the trial judge was correct in her finding of inordinate and inexcusable delay. Cross J. had given the appellant one final opportunity to get his house in order. He was under a particular obligation to expedite his claim having regard to the first motion to dismiss for want of prosecution. No explanation had been furnished to justify the absence of activity between July, 2014 when the first motion came before the Court and January, 2015 when Mr. Tansey left the firm. Further, a letter was written by Mr. McEllin, the respondent's solicitor, on the 2nd February 2015, asking when the appellant proposed filing a certificate of readiness and seeking a date for the hearing had been left unanswered. This was unacceptable conduct having regard to the earlier court order, as was the subsequent delay of ten months leading up to the issue of the respondent's second motion. Mr. Walsh relies upon the entitlement of defendants to have actions pending against them dealt with in a reasonably expeditious manner. They should not have claims of this nature hanging over them. The fact that his client had not identified any particular prejudice arising from the delay was not fatal to his entitlement to have the claim dismissed.

Principles

11. The principles governing the court's inherent jurisdiction to dismiss a claim for inordinate and inexcusable delay are well established. The most frequently cited decision is that of Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 which expanded upon the decision of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561. This sets out a three step test which involves the court first considering whether the plaintiff's delay can be described as inordinate and if it is then deciding whether that delay has been excused by the plaintiff. If the delay is not both inordinate and inexcusable the application by the defendant will fail. However, even if the court decides that the delay is both inordinate and inexcusable the court must then consider whether the balance of justice would favour the dismissal of the action in all of the relevant circumstances.

12. Hamilton C.J. set out, at pp. 475 to 476, matters 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.

13. It is not in my view, necessary, in the context of the relatively straightforward facts of this case, to engage with the ever-growing body of jurisprudence concerning the circumstances in which a court is justified in dismissing a claim in the exercise of its discretion, on the grounds of inordinate and inexcusable delay. It is, however, material to remember that when a court comes to consider whether the balance of justice favours allowing the action proceed in the light of its finding of inordinate and inexcusable delay, the author of that delay is not to be absolved of their fault, unless they can point to some countervailing circumstances which the court considers sufficient to negate the effect of such behaviour: see, e.g., the comments to this effect of Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R 510.

Decision

14. Having considered fully the submissions of the parties, I am entirely satisfied that the High Court judge cannot be faulted for her conclusion that the appellant's delay in these proceedings was both inordinate and inexcusable. That was a finding which was, in my view, wholly supported by the evidence. Indeed, on the facts before him some twenty months earlier Cross J. had come to the same conclusion.

15. The proceedings were commenced in April, 2008, the pleadings closed in April, 2009 and the action was set down for trial in March, 2010. Yet as of December, 2015 the appellant had not brought the action on for hearing. While in many cases a plaintiff may be in a position to justify significant periods of delay, such as where witnesses cannot be located or difficulties have been encountered in obtaining expert evidence etc., no such factors arise for consideration in this case. Nothing was advanced on affidavit to justify the delay in circumstances were Mr. Carroll first instructed Mr. Tansey as far back as March, 2005.

16. In light of her finding of inordinate and inexcusable delay the final question to be answered by the High Court judge was whether the balance of justice nonetheless favoured allowing the action proceed. That required her to consider, *inter alia*, whether Mr. Carroll had advanced any countervailing circumstances such that he should be absolved of his delay. That being so, it is necessary to look briefly at the evidence put before the High Court judge to assess, particularly in light of the earlier court order of July, 2014, whether the balance of justice favoured allowing the action proceed.

17. The affidavit relied upon to resist the application of the respondent to dismiss the proceedings was that sworn by Mr. Brian Gill, solicitor of Callen Tansey. At paragraph 4 of that affidavit Mr. Gill accepts that Cross J., when refusing the first application to dismiss the claim, stated that the appellant was under an obligation to have the action set down and progressed with all due expedition. He then records the fact that Mr. Carroll first instructed Mr. Tansey in March, 2005 and that three years later his firm merged with that of C.E. Callan & Company. During all of that period Mr. Tansey managed Mr. Carroll's file and that position continued until he left the firm in January, 2015. Mr. Gill then refers to the fact that, not unsurprisingly, following the departure of Mr. Tansey a review of all of his files – which, doubtless, was an arduous task - was necessary. However, it is what is not addressed in Mr. Gill's affidavit that is, in my view, fatal to this appeal.

18. One must assume that when the first motion to dismiss the claim was brought in July, 2014, Callan Tansey had instructions from Mr. Carroll that he wished to pursue his action, as they otherwise would hardly have defended the application. Why then was no step taken in the months that followed to obtain a trial date? The fact that no step was taken is surprising in light of Mr. Tansey's affidavit promising all due expedition if the Court could see its way to overlooking what the Court found at that time amounted to inordinate and inexcusable delay. After all, Mr. Tansey did not leave the firm until the 30th January, 2015.

19. It is understandable that the retirement of a solicitor having carriage of a large number of litigation files may cause some delay in those proceedings. For example, letters that might otherwise have been replied to by return may get postponed for a week or perhaps even a couple of weeks. The odd file might well have been overlooked or otherwise escaped attention for a short period. Viewed objectively, however, the failure to expedite the proceedings in the weeks and months following the first order of Cross J. is inexcusable.

20. In my view, this is not a case where Mr. Tansey's departure can be relied upon to justify or explain the failure of Mr. Carroll's advisors to certify the case as ready for hearing and to obtain a hearing date. It is not disputed that the letter of the 2nd February, 2015, sent by Mr. McEllin asking when the appellant would provide a certificate of readiness and seek a date for the hearing was received. Assuming this letter was opened and read it is difficult to understand why it did not prompt immediate action. Not only did it not trigger the filing of a certificate of readiness or an application for a trial date, the letter appears to have been ignored. Somewhat surprisingly, however, the letter is not addressed at all by Mr. Gill in his affidavit. In light of the fact that no step was taken in relation to this claim for a period of almost twelve months following the departure of Mr. Tansey it is difficult not to conclude that, were it not for the issue of the motion in December, 2015, Mr. Carroll's case would likely have remained in limbo for some further considerable period of time.

21. Consistent with the manner in which the court obliges a plaintiff who issues proceedings close to the period limited by statute for the bringing of that type of claim to proceed with particular expedition once they commence proceedings (see, for example, *Cahalane v. Revenue Commissioners* [2010] IEHC 95), a plaintiff who has once been found guilty of inordinate and inexcusable delay, must surely be under a similar if not even greater obligation to progress their claim with exceptional diligence, particularly where such a commitment is given on affidavit. On this view it would follow that where a party is found guilty of inordinate and inexcusable delay for a second time, they should not be absolved of that fault unless they can advance very significant countervailing circumstances to offset the nature and extent of the delay between the first and second applications. Here, I regret to say that not only was there a lack of urgency following the Court's order of July, 2014, but no step appears to have been taken subsequently to progress matters. Further, no countervailing circumstances have been advanced for the purposes of seeking to excuse this additional period of delay. This is not a case where, for example, immediately following upon the order of Cross J. papers were sent to counsel, either to prepare an advice on proofs or to furnish a certificate of readiness, and that notwithstanding promises from counsel that the same would be provided with immediate effect, the same had not been forthcoming.

22. I am also fully satisfied that the decision of the learned High Court judge is consistent with the growing body of jurisprudence

which acknowledges the obligation of the Court itself, deriving from Article 34.1 of the Constitution, to ensure that litigation is conducted in a timely fashion. In particular, in *Quinn v. Faulkner t/a Faulkner's Garage* [2011] IEHC 103 Hogan J. at para 29 of his judgment criticised the court's prior tolerance to inactivity on the part of litigants when he stated:-

> "While as Charlton J. pointed out in Kelly v. Doyle [2010] IEHC 396 it will be wrong for the Court to strike out proceedings because of judicial disapproval, it must be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common: see, e.g., the comments of Hardiman J. in Gilroy v. Flynn [2004] IESC 98, [2005] 1 ILRM 290 and those of Clarke J. in Rodenhuis and Verloop BV v. HDS Energy Ltd. [2010] IEHC 465."

23. It is true to say, as was advised by Mr. Mulloy S.C. in his submission, that one of the factors often considered by the court when addressing the third leg of the *Primor* test is whether the defendant has likely suffered prejudice by reason of the delay sought to be relied upon by the defendant. However, delay is only one of the factors relevant to the court's consideration as to where the balance of justice lies. In many cases defendants rely heavily on prejudice, often times when the period of delay is not particularly great. Mostly this arises where witnesses die or evidence goes missing over a period of delay. However, in other cases a defendant may not need to rely upon establishing any specific prejudice in order to have the court conclude that the balance of justice would favour the dismissal of the proceedings. In my view, this is one such case given the relatively straightforward nature of the claim, the period of the delay, the undertaking to expedite the claim as of July, 2014, the failure to respond to Mr. McEllin's letter of February, 2015 and the failure to advance any countervailing circumstances to absolve Mr. Carroll of inertia for the period August, 2014 to December, 2015.

24. There is, in any event, a long line of authority to support the dismissal of actions in the presence of moderate prejudice where the court has found the plaintiff guilty of inordinate and inexcusable delay. In *Stephens v. Paul Flynn Ltd* [2008] 4 I.R. 31 Kearns J. concluded that a defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the Primor test. He summarised the findings that had been made by Clarke J. in the Court below in the following manner at p. 38:-

> "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."

25. This must be true, *a fortiori*, in a case such as the present one where the High Court has been obliged to make such a finding for a second occasion. Not only was the delay up to the order of Cross J. objectively inexcusable, but there had, so to speak, been further delay upon that delay, as no active steps had been taken in the eighteen months between the order of Cross J. and the filing of the appellant's replying affidavit, the existence of a warning letter from February 2015 notwithstanding.

26. While the respondent has not asserted any particular prejudice, it would be wrong in my view, for this Court not to infer some prejudice as a result of the appellant's delay in prosecuting his claim against the respondent. First, the court will have to make findings of fact concerning the circumstances in which the appellant was allegedly injured over 15 years ago and in circumstances where neither his employer, nor the person who allegedly perpetrated the assault remain a party to the proceedings. Second, having regard to the pleadings wherein Mr. Carroll maintains he instructed the respondent to institute proceedings within a very short period of time after the assault on 25th January, 2001 - facts denied by the respondent - the court will have to make findings of fact as to what, if any, instructions were given by the appellant to his solicitors over 15 years ago.

27. While in many cases, the potential prejudice arising from this type of delay has to be overlooked by the court in the interests of justice because the plaintiff has not been guilty of any inordinate or inexcusable delay, such as in child sex abuse cases, this is not such a case. Any potential prejudice for either party has been authored by the delay on the part of the appellant. That being so, I do not believe it fair to criticise the High Court judge, for coming to a conclusion that the delay in these proceedings has put justice to the hazard.

Conclusions

28. Having regard to (i) the finding of Cross J. in July, 2014 that Mr. Carroll was guilty of inordinate and inexcusable delay in the manner in which he had progressed his proceedings, (ii) Mr. Tansey's promise to progress the proceedings thereafter with all due expedition, (iii) the failure on the part of Mr. Carroll to take any step to progress his action between August, 2014 and December, 2015 (particularly in light of the letter written by Mr. McEllin in February, 2015) and (iv) the failure on the part of Mr. Carroll to advance any countervailing circumstances which might reasonably absolve him of that delay, I am satisfied that the trial judge was correct when she determined that the balance of justice favoured the dismissal of these proceedings. Accordingly, I would dismiss the appeal.