Neutral Citation [2012] IEHC 413

THE HIGH COURT

[2001 No. 8109 P.]

BETWEEN

JOSEPH MCCARTHY

PLAINTIFF

AND

BRANDON CONSTRUCTION COMPANY LIMITED AND HALINNAN CONSTRUCTION LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered the 31st July 2012

This is a motion to strike out the proceedings for want of prosecution. The action is for damages for personal injuries sustained by the plaintiff in a trip and fall accident on the 7th June 1998, when he was aged 16 years. The question concerns inordinate and inexcusable delay and the balance of justice.

The relevant dates are as follows:-

14th August, 1980 Plaintiffs date of birth.

7th June, 1998 Date of accident as in the statement of claim.

31st May, 2001 Plenary summons.

12th September, 2002 Appearance for second defendant, Hallinan Construction.

14th August, 2003 Notice for particulars issued by second defendant.

13th December 2004 High Court order directing the plaintiff to reply within four

weeks.

15th March, 2005 Reply to notice for particulars.

27th August, 2007 Defence of the second defendant.

The plaintiff did not serve notice of trial on the second defendant and has not taken any other steps in the proceedings since that date, according to the affidavit of Mr. Peter Dineen, solicitor of the firm Harrison O'Dowd, solicitors for the second defendant.

The plaintiff filed an affidavit dated 20 of June 2012 in which he sets out his opposition to the motion to strike out the proceedings. He says that he instructed his solicitors to write to the Midwestern Regional Hospital seeking details of treatment that he received in the Ophthalmology Department between the 9th June 1998 and 30th September 1998. However, the hospital was unable to locate the records. In the meantime, the plaintiff had moved to the United States in about the year 2000. He kept in touch with his solicitors. He was disappointed that the hospital had no record of his attendance other than on the day of the accident. He returned to Ireland in 2009 and in January 2012 he became aware of the motion to dismiss the claim. His solicitors again wrote to the hospital and ultimately they received the relevant medical records about the plaintiff's attendance at the ophthalmology department. The reason that they were not found earlier was that they were retained under the name Joseph Carrig McCarthy, which appears to be his correct name because that is how he signed the affidavit.

The plaintiff's solicitors first wrote to the Midwestern Regional Hospital on the 19th February 2003 seeking information as to his attendance at the ENT Department, using the name Joseph McCarthy for their client. On the 18th June 2004 they wrote again, this time stating that their client might also go under the name Joseph Michael Carrig. The hospital was not able to find any relevant records. On the 22nd March 2012, long after this motion had been issued, the solicitors wrote once more and the hospital replied by e-mail of the 16th April2012 to the same effect. It appears that some time after that again the hospital discovered the relevant records.

It is not obvious why the ophthalmic records of the hospital constituted an insurmountable obstacle to bringing the case to trial. It seems to me in the circumstances that the plaintiff has not furnished an adequate explanation for the long delay, which must be considered inordinate and inexcusable.

The balance of justice test

As to the second limb of the test, whether it is in the interest of justice that the plaintiffs action should be dismissed, the decided cases reveal differences of approach. The traditional mode focuses on the conduct of the defendant and the impact of the delay on his position: see *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor Pic v. Stokes Kennedy* Crowley [1996] 2 I.R. 459.

The second approach looks at the plaintiffs conduct and circumstances, on the basis that the case ought to be dismissed if there is inordinate and inexcusable delay unless the plaintiff is able to adduce some exceptional countervailing argument or circumstances to avert that consequence: *Ó Dómhnaill v. Merrick* [1984] I.R. 151

More recently, the Court itself has expressed concern in the public interest to see to the efficient dispatch of litigation. This has at its heart a conception of the court's function in litigation that is to ensure that cases are brought to expeditious conclusion. Litigation is not simply a matter for the parties and "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." Per Hardiman J. in *Gilroy v. Flynn* [2005] I.L.R.M. 290 at 293/4. This proposition has its source in Article 6(1) of the European Convention on human rights. In this Court in *Stevens v Paul Flynn Limited* [2008] 4 I.R. 31, Clarke J. expressed the view that a radical re-appraisal might now be necessary in determining the balance of justice and it might even extend to the appraisal of the elements of inordinacy and inexcusability.

Geoghegan J. in *Desmond v. MG.N Limited* [2009] 1 I.R. 737 did not agree that the jurisprudence in relation to when an action should be struck out for delay needed to be modified having regard to the incorporation into domestic law of the European Convention on Human Rights by the Act of2003. The views of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 were *obiter dicta*. He held that the basic principles in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 still represent the law.

This brief discussion illustrates that there is probably no universal test. There may be circumstances that are outside the existing jurisprudence in which the courts will nevertheless accede to dismissal applications. There may be cases in which the stated criteria in the legal authorities are not met but in which the court may nevertheless exercise its discretion in order to achieve justice. As with other common law rules, the general principles as laid down in the cases are not to be considered as exhaustive and comprehensive expositions of the circumstances in which long delay cases may be rejected as if the rules were contained in legislation.

It seems to me that Geoghegan J.'s comments represent the current orthodoxy but the conception of justice in legal thinking is tending to shift the balance.

In *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, the Supreme Court focused on whether the delay resulted in prejudice to the defendant in meeting the claim. The Court set the bar high for a defendant applying for a dismiss, holding that the question of particular prejudice was central to the exercise of discretion and it also endorsed and emphasised the importance of the role of the defendant in relation to the plaintiff's delay. The Supreme Court held that the principles of law relevant to an application to dismiss an action for want of prosecution were that:-

> 1. the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice so required;
>
> 2. the party who sought the dismissal on the ground of delay in the prosecution of the action must establish that the delay had been inordinate and inexcusable;
>
> 3. even where the delay had been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice was in favour of or against the case proceeding;
>
> 4. when considering this obligation the court was entitled to take into consideration and have regard to -
>
> (a) the implied constitutional principles of basic fairness of procedures,
>
> (b) whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action,
>
> (c) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at,
>
> (d) whether any delay or conduct of the defendant amounted to acquiescence on the part of the defendant in the plaintiffs delay,
>
> (e) the fact that conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not, in law, constitute an absolute bar preventing the defendant from obtaining a dismissal but was a relevant factor to be taken into account by the court in exercising its discretion whether or not to dismiss, the weight to be attached to such conduct depending on all the circumstances of the particular case,
>
> (f) whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant,
>
> (g) the fact that the prejudice to the defendant referred to in (f) might arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.

O'Flaherty J. held that whilst the Court had inherent jurisdiction to dismiss a claim in the interests of justice where the delay in the proceedings was in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself, it was a jurisdiction which should not be frequently or lightly assumed.

Application of the principles to this case
Applying these principles to this application, I am of the view that the action should not be dismissed for three reasons. First, althought he proceedings were instituted only days before the third anniversary of the plaintiffs fall, he was under age for most of the period. Second, there was an explanation for the delay that had some basis in fact, even though it was inadequate. Third, the defendant was itself responsible for substantial delay and default by its own conduct in taking more than two years to deliver its defence.