Neutral Citation Number: [2010] IEHC 465

THE HIGH COURT

2000 713 S

BETWEEN

RODENHUIS AND VERLOOP B.V.

PLAINTIFF

AND

HDS ENERGY LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered on the 10th December, 2010

1. Introduction

1.1 As the record number of these proceedings indicates, this case has a lengthy history having been commenced ten years ago. It will be necessary to refer in some more detail to the progress of the proceedings in due course. The plaintiffs ("Rodenhuis") sue for money said to be due and owing by the defendant ("HDS"). The proceedings commenced by summary summons but, HDS having filed an affidavit setting out a *prima facie* defence, the case was remitted to plenary hearing.

1.2 HDS now brings two motions before the court. In the first it is sought to have the proceedings dismissed for inordinate and inexcusable delay. In the second motion security for costs is sought. Logically the application to dismiss needs to be considered first, for the event that the proceedings are dismissed no question of security for costs could arise.

1.3 I, therefore turn to the dismissal motion.

2. The Dismissal Motion

2.1 There was no major dispute between counsel for the parties as to the legal principles to be applied. In *Desmond v. MGN* [2009] 1 I.R. 737, the Supreme Court recently had again occasion to consider the principles applicable to the exercise of he court's undoubted jurisdiction to dismiss proceedings on the basis of delay. In the course of her judgment in *Desmond*, Macken J. indicated that she was satisfied that the test which I had set out in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148, remained applicable being that the court should:-

1. Ascertain whether the delay in question is inordinate and inexcusable; and

2. If it is so established, the court must decide where the balance of justice lies."

2.2 There is only one question of emphasis that I need briefly to address. There have been a number of decisions of the Supreme Court in this area in recent years from which something of a difference of approach amongst the judges of that court can be identified. The judgment in *Desmond* was by a majority of two to one, with Geoghegan and Macken JJ. being the majority and Kearns J. dissenting. On the other hand the Supreme Court had, in *Stephens v. Paul Flynn Ltd* [2008] 4 I.R. 3 affirmed my decision in this Court in that case and had, it would appear, approved of the test applied by me. For the reasons set out by me in my judgment in *Stephens*, I had come to the view that, while the tests to be applied by the court remain the same as it set out in the long standing jurisprudence contained in cases such as *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, the weight to be attached to factors properly taken into account in applying that test needed to be recalibrated in favour of a greater strictness of approach. In so doing I had regard, amongst other things, to the judgment of Hardiman J. in another Supreme Court case being *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 ILRM 290, and in particular, the references by Hardiman J. in that case to the effect of the jurisprudence of the European Court of Human Rights, ("ECtHR"). Hardiman J. was, of course, speaking for the court in *Gilroy v. Flynn*. Kearns J., who was, it will be recalled, in the minority in *Desmond* also gave the unanimous decision of the Supreme Court in *Stephens v. Flynn*.

2.3 To the extent, therefore, that there may be a question as to the relevance of the case law of the ECtHR in this area, there does appear to be differences between individual judges of the Supreme Court and differently constituted divisions of that court.

2.4 To that debate I would add just one comment. It is important to start by recalling the precise way in which the European Convention on Human Rights ("ECHR") comes to have effect in Irish law. This matter was most recently analysed by Laffoy J. in *Byrne & Ors v. An Taoiseach & Ors* [2010] IEHC 353. As reiterated by Laffoy J. in *Byrne*, the ECHR does not have direct effect in this jurisdiction. That principle has been clear since the decision of the Supreme Court in *Re Ó Laighléis* [1960] I.R. 93. While the issue with which Laffoy J. was concerned in *Byrne* is very different to the issue with which I am concerned, it is important to note that Laffoy J., at para. 8.4 of her judgment, made clear that the question with which she was faced fell "to be determined in accordance with Irish law interpreted and applied, insofar as applicable, in accordance with s. 2 of the Act of 2003 and having proper regard to s. 4 of the Act of 2003". The references to the Act of 2003 are, of course, references to the European Convention on Human Rights Act 2003 ("the 2003 Act").

2.5 Amongst other things, the 2003 Act requires that this Court should, insofar as it may be possible, when interpreting any legislative provision or rule of law, do so in a way which is compatible with Ireland's obligations under the ECHR. In addressing such compatibility Irish courts must have regard to judgments of the ECtHR. For those purposes I am satisfied that the exercise by the court of its inherent jurisdiction to dismiss proceedings for delay and the principles applicable to the exercise by the court of that jurisdiction is a "rule of law" in the sense in which that term is used in the 2003 Act. It follows that the law in this area should, where possible, be interpreted in a manner so as to bring it into conformity with the ECHR so that the interpretation is compatible with the State's obligations under that Convention. I do not understand any of the judgments of the Supreme Court to disagree with that proposition at the level of principle. However, it also needs to be acknowledged that, as Geoghegan J. pointed out in *Desmond*, there does not appear to be any relevant case of the ECtHR which deals with the circumstances in which an action should be struck out for delay. The obligation on a State which subscribes to the ECHR is to provide for a timely disposition of court proceedings. The ECHR does not,

of itself, therefore, necessarily require that proceedings be struck out for delay as such.

2.6 However, it does seem to me that the ECHR is of some relevance in this area. The relevant obligation is one of the member state. It is clear from the jurisprudence of the ECtHR that the fact that, in some jurisdictions, the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the relevant state from complying with the requirement to ensure that cases we dealt with in a reasonable time. See, for example, *Price v. United Kingdom and Lowe v. United Kingdom* (Case No. 43186/98, 29th July, 2003). As pointed out by the ECtHR at para. 23 of the judgment in that case:-

> "The manner in which a state provides for mechanisms to comply with this requirement – whether by way of increasing the number of judges, or by automatic time limits and directions, or by some other method – is for the state to decide. If a state lets the proceedings continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay."

Exactly how a state deals with its obligations is, therefore, a matter for the state. However, in countries which follow a broadly common law process which leaves it largely up to the parties to progress the proceedings, the state concerned (and by implication its courts) still retains an obligation to ensure that the proceedings are completed within a reasonable period of time. It may be that measures such as case management may need to be adopted in appropriate cases to ensure that such cases are concluded within a reasonable period of time irrespective of the extent to which the parties may co-operate. However, it seems to me that there is a further matter that needs to be taken into account.

2.7 In the context of compliance with procedural directions given in the course of case management, I had occasion to consider the proper approach of the court in *Moorview Developments Ltd & Ors v. First Active* [2008] IEHC 274. For the reasons set out in section 2 of that judgment, I came to the view that the fact that a culture of endless indulgence in relation to failure to comply, to a material extent, with procedural directions could only have the affect, across the range of cases, and to the ultimate injustice of the parties in all cases, of ensuring that the desirable ends of case management were not achieved was at least a factor which the Court had to take into account in deciding what to do about a significant failure to comply with such directions.

2.8 It seems to me that like considerations apply in relation to the delay jurisprudence. As long as it remains the case that the procedure in this jurisdiction is left largely in the hands of the parties, then it follows that the pace at which litigation will progress will be highly dependent on the initiative shown by those parties. To the extent that it becomes clear that parties will be significantly indulged even though they engage in delay, then that fact is only likely to encourage delay. If parties feel they can get away it, and if that feeling is justified by the response of the courts, then there is likely to be more delay. 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 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 ECHR.

2.9 As pointed out it is correct to say that there is no jurisprudence of the ECtHR dealing with the circumstances in which proceedings must be dismissed, for delay. However, it does seem to me that if the courts in a common law jurisdiction, and in the absence of case management for any particular category of case, to use the words of Hardiman J., "endlessly indulge" delay then that fact is only likely to increase delay and increase a failure to comply with Ireland's Convention obligations. It seems to me that that analysis justifies the view which I expressed in *Stephens* (and which was approved of by the division of the Supreme Court which heard the appeal in that case) which was to the effect that there needed to be a tightening up or recalibration of the application of the long established principles in the delay jurisprudence without altering the tests to be applied.

2.10 For those reasons it seems to me that the tightening up to which I referred in *Stephens* is an appropriate course of action for the courts to adopt. It does not seem to me that there is any clear or authoritative view from the Supreme Court which would bind me to take a different view. I, therefore, propose to apply the test which I identified in *Stephens* and which was approved of by Macken J., speaking for the majority in *Desmond*, but with the tightening up to which I referred in the very next paragraph of my judgment in *Stephens*.

3. Application to the Facts of this Case

3.1 I have no doubt but that there was inordinate and inexcusable delay on the facts of this case. As pointed out earlier, the proceedings were commenced by summary summons. The ordinary procedure in such a case requires that a motion for judgment be brought before the Master when an appearance is filed. A period of eighteen months elapsed before any such motion was brought and no explanation is given for that delay. Having regard to the summary nature of the proceedings such a delay is, in itself, in my view, inordinate. After the motion for judgment was brought, there was a period where it is at least open to the view that HDS were more at fault. It seems that it took three months to put in a replying affidavit and when the matter was quite quickly adjourned to plenary hearing and a statement of claim filed on behalf of Rodenhuis in a timely fashion, a further period of approximately six months elapsed before a defence was filed during which time it was necessary for Rodenhuis to bring a motion for judgment in default of defence. The 11 months which elapsed from the bringing of the motion for judgment to the filing of the defence were largely down to HDS although it should be acknowledged that such a process would have taken three or so months in any event and even if HDS had acted expeditiously.

3.2 However, the period since the filing of the defence has also been characterised by significant delay. It can be said that the actions of HDS in relation to discovery contributed to the delay during that period. However, in at least partial exoneration of HDS, it does have to be noted that it became apparent to the advisers of HDS that Rodenhuis had gone into a form of receivership in the Netherlands. HDS's solicitors wrote to Rodenhuis's solicitors inquiring as to the consequences of that fact for the progress of the proceedings. It seems to me that that was a reasonable thing to do. It appears that the receivership is being conducted in accordance with the law of the Netherlands. However, it was reasonable for HDS not to incur further costs in the defence of these proceedings until reasonable clarity was given as to the status and capacity of Rodenhuis to maintain and continue with these proceedings. Little or no real response was given to those requests for quite some time.

3.3 In all the circumstances it seems clear that at least a significant portion of the delay must be laid at the door of Rodenhuis and that while there may be some partial explanations for some of that delay, those explanations fall a long way short of making the delay excusable. Finally, under this heading, it is necessary to note the case made on behalf of Rodenhuis which placed reliance on the fact that there were parallel proceedings in being which, it is said, at least provided a partial explanation for the delay. In that context it is necessary to say just a little about the nature of these proceedings. Rodenhuis claims for work done in the context of the design and installation of certain boilers. There are two issues in the case. First, there is a dispute about the precise terms of the contract and the question of whether the work now sought to be charged for was, in fact, part of the original contract price and not legitimately separately charged for. That question seems to turn on the precise terms of the contract entered into. The second issue concerns an

allegation of defective work on the part of Rodenhuis. In that context there appears to have been two separate sets of proceedings for damages in which the same issue was raised. However, it would appear that those proceedings arose in one case when HDS was sued itself and joined Rodenhuis as a third party and in the other case where HDS brought proceedings, it would appear, on the instigation of insurers who had paid out on foot of a claim.

3.4 While there was undoubtedly a connection between the matters, it does not appear to me that the existence of those parallel proceedings provided any legitimate basis for Rodenhuis in not progressing these proceedings or, at least at a minimum, in not raising the question of whether it might be appropriate to stay these proceedings pending a resolution of either or both of the parallel cases. It does not seem to me that it is open to a party to take the unilateral action of allowing one set of proceedings to go asleep because of the existence of another set of proceedings and then use the connection between the two sets of proceedings as an excuse for having allowed the proceedings concerned to go to sleep. If it is truly felt that it is inappropriate for some reason not to progress a set of proceedings because of the existence of other proceedings, then it is at a minimum incumbent on the party who holds that view to raise the issue in correspondence and seek to reach agreement. If agreement cannot be reached, then it is incumbent upon the party either to progress the proceedings or make some appropriate application to the court for directions. In those circumstances, I was not satisfied that the existence of the parallel proceedings provided any significant excuse for the delay.

3.5 It follows that there was inordinate and inexcusable delay on the facts of this case and it is next necessary to consider where the balance of justice lies in accordance with the jurisprudence. In that context, it is appropriate to consider the matters which were identified in the judgment of Hamilton C.J. in *Primor* as being appropriate to take into account which are as follows:-

> "(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 of the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business."

3.6 In applying those considerations to the facts of this case, it seems to me that the following conclusions can properly be reached. There has been some prejudice to the defendants because of the delay. While it is true to say that the meetings at which the contractual arrangements between the parties were entered into are documented in the sense that there are minutes of same, it seems likely that the dispute between the parties as to the precise contractual terms which are applicable will turn on narrow questions as to the precise discussions held between the parties. While the minutes may well be of assistance in establishing the broad nature of the discussions, there is every risk that the case will turn on precisely what was said by whom and when and those matters will need to be assessed by reference to events which will have occurred thirteen or fourteen years before the trial. While the documents will undoubtedly be of assistance, it does not seem to me to be correct to regard that aspect of the case as being a documents case in the pure sense. There are cases which turn on the interpretation of documents themselves. There are also cases where parties will never have any recollection of the events other than by reference to contemporaneous records. However, there are cases, such as this, where the parties may be assisted in their recollection by documentation, but whether issues which will need to be determined by the court may depend on precisely what was said. In such cases, while documents will make the task of the parties and court easier, it will not necessarily be the case that the documents will be decisive.

3.7 Furthermore, In addition to the general prejudice which any party might be likely to suffer by significant delay, it seems to me that there is specific prejudice on the part of HDS established in this case. So far as the workmanship issue is concerned, there is likely to be some prejudice in attempting to establish matters that happened between ten and thirteen year ago. In particular, there is one witness who is now deceased. As was fairly conceded by counsel for HDS, a second witness who is now deceased unfortunately died very soon after the proceedings were commenced and while HDS is undoubtedly prejudiced by the absence of that witness, it cannot be said that the unfortunate absence of the witness concerned is any way due to delay on the part of Rodenhuis. It should also be noted the Rodenhuis argued that the death of the witness who is no longer available only occurred in relatively recent times such that, on the basis of Rodenhuis's argument to the effect that HDS had itself significantly contributed to the delay, it was open to a reasonable conclusion that HDS was at least significantly at fault in the unavailability of that witness. However, for the reasons already analysed, I am not satisfied that any significant portion of the delay in this case, other than that which occurred between the bringing of the motion for summary judgment and the filing of the defence, can truly be laid at the door of HDS. Taking an overall view I am, therefore, satisfied that there is a material prejudice to HDS, although not one which can be placed at too high a level having regard to the partial documentary nature of these proceedings.

3.8 Next it is appropriate to have regard to any delay on the part of the defendant. For the reasons already analysed there is some delay on the part of HDS but not, for the reasons which I have set out, a delay to which particularly heavy weight should be attached. It does not seem to me that any such delay can be said to amount to acquiescence. Nor can it be said that there was any conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action such as to weigh in the balance in accordance with item (v) of the considerations referred to in *Primor*.

3.9 Taking those factors in particular into account, it seems to me that the balance of justice favours the dismissal of these proceedings. The presence of a very significant delay which is only legitimately explained in a very limited way and where the contribution of the defendant to such delay is itself limited is a factor which coupled with the prejudice to HDS as earlier analysed leads me to that view.

3.10 Strictly speaking, therefore, the question of security for costs does not arise however, lest I be wrong in that conclusion, I propose dealing with that issue.

4. Security for Costs

4.1 While the matter did arise somewhat late in the day, it does seem now to be clear that, under Dutch law, the costs of any proceedings maintained by a company in receivership, such as Rodenhuis, rank in priority to all other claims (even preferential claims) which may be proved in the receivership. It also appears that there is a more than ample sum standing to the credit of the receivership. In those circumstances, it does not seem to me that there would have been any practical reality in there being a risk to HDS in recovering their costs in the event that they should succeed. There would not, therefore, seem to me to be any factual basis for making an order for security for costs.

4.2 Therefore, the various interesting jurisdictional issues which were raised in debate between the parties do no seem to me really to arise. If I had not been satisfied that it was appropriate to dismiss the proceedings for delay I would not, therefore, have been prepared to order security in favour of HDS.

5. Conclusions

5.1 For the reasons which I have sought to analyse, I am satisfied that it is appropriate to dismiss these proceedings on the basis of inordinate and inexcusable delay.

5.2 If I were wrong in that conclusion and the proceedings were to continue, it would not have seemed to me to be appropriate to order security for costs.