Neutral Citation: [2015] IEHC 242

THE HIGH COURT

[2005 No. 2924 P]

BETWEEN:

MARY DOHERTY

PLAINTIFF

AND

DAVID RYAN

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered the 17th day of April, 2015

Background

1. The defendant brings the within motion seeking an order dismissing the plaintiff's claim for want of prosecution pursuant to Order 122, rule 11 of the Rules of the Superior Courts and the inherent jurisdiction of the court.

2. In her statement of claim, the plaintiff alleges that on the 15th of May, 2004 at the Annual General Meeting of Ballinagare Community Centre, the defendant, who chaired the meeting which was attended by a large number of people, falsely and maliciously spoke of the plaintiff and published the words "she is nothing but a thief and a pilferer" or words to that effect. It is alleged that the words were published to those who attended the meeting and in particular, to two named individuals, Eamonn Ryan and Brian Morahan. Arising out of the foregoing alleged facts, the plaintiff instituted proceedings claiming damages for defamation.

Chronology

3. The following is the relevant sequence of events:

- 30th August, 2005 the plenary summons was issued.
- 21st September, 2005 the statement of claim was delivered.
- 7th February, 2007 the defendant delivered his defence after a delay of over 16 months which I shall refer to as Delay 1. The defence included a claim of qualified privilege.
- 24th April, 2007 the plaintiff's solicitors served a notice for particulars seeking particulars of the basis for the claim of qualified privilege. There was no response.
- 12th January, 2009 the plaintiff's notice of motion seeking the particulars sought came before the court, the result being a consent order deleting the relevant paragraph of the defence which had claimed qualified privilege. There was thus a delay of 21 months in dealing with the notice for particulars (Delay 2).
- 22nd September, 2011 the plaintiff served a notice of intention to proceed some 32 months after the last step in the action (Delay 3).
- 8th December, 2011 the plaintiff's solicitors wrote to the defendant's solicitors seeking voluntary discovery. There was no response to this letter.
- 25th May, 2012 the defendant issued the within motion to dismiss.
- 1st November, 2012 the plaintiff issued a motion for discovery.
- 18th March, 2015 the motion to dismiss came on for hearing some 34 months after its issue (Delay 4).

The Legal Principles

4. Although there have been a myriad of cases on the issue of delay in recent years, the guiding principles are still to be found in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. While there has been some recent judicial comment that there may be a requirement for a degree of reappraisal of the principles laid down in these cases, there can be no doubt that they still represent the law. The *Primor* principles are so well established that it seems almost unnecessary to refer to them in detail but to the extent that they provide an extremely useful departure point in any case of this nature concerning delay, I think they bear repetition:

> "(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 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." – per Hamilton C.J. at p. 475 – 476.

5. That this represents the current law was reiterated more recently by the Supreme Court in *McBrearty v. North Western Health Board* [2010] IESC 27 – see in particular the judgment of Geoghegan J. at p. 23 – 24. The issues were recently revisited by the High Court in *Cassidy v. Butterly* [2014] IEHC 203, in which Ryan J. (as he then was) characterised *Primor* in the following terms (at p. 10):

> "The Court set the bar high for a defendant applying for a dismissal, holding that the question of particular prejudice was central to the exercise of discretion. It also endorsed and emphasised the importance of the role of the defendant in relation to the plaintiff's delay."

6. He then went on to set out the principles as I have done above and having considered the relevant authorities said (at p. 12):

> "Any question of prejudice is therefore central to the court exercising its discretion. But the role of the defendant is also relevant and a defendant who has sat back and done nothing may, in some circumstances, be considered to have acquiesced in the plaintiff's delay. It follows that where there has been a long delay and the defendant is unable to demonstrate prejudice and/or where he has not taken active steps to bring the case forward, it may be difficult to succeed in an application to dismiss a plaintiff's claim for want of prosecution."

7. He then reviewed the necessary elements to be considered in reaching a conclusion as to where the balance of justice lay in a particular case. In the event, he dismissed the application clearly on the basis that he was significantly influenced that no actual prejudice to the defendant in defending the action had occurred.

8. I think it is also clear on the authorities that a distinction is to be drawn between what Clarke J. describes in *Rogers v. Michelin Tyre* [2005] IEHC 294 as "active delay" as against "inactive delay". He considered that active delay could arise on the part of the party charged with taking the next step in the proceedings with inactive delay being the converse. Thus, a party may be guilty of active delay when the ball is in that party's court, so to speak. The relevance of the distinction was felt by Clarke J. to be that where delay on the part of the defendant was active, that was a weighty factor to be taken into account in the assessment of justice.

The Affidavit Evidence

9. Two affidavits were each sworn by the plaintiff and defendant respectively. In terms of explaining delay, the plaintiff pointed to two matters. First, she said that she is a single mother and in addition had the burden of caring for her seriously ill mother up to her death on the 28th of September, 2008. She also averred that in 2011, her junior counsel took silk and this gave rise to some delays while another junior counsel was briefed in the matter.

10. For his part, the defendant complained of general delay-based prejudice in his affidavits. He referred to the fact, by way of example only, that a member of Ballinagare Community Centre who was in attendance at the meeting on the 15th of May, 2004, Mr. Peter Finnerty, had died recently. However, counsel for the defendant properly conceded that it was not being suggested that Mr. Finnerty's death had led to any specific prejudice. Indeed, there was no evidence that the matter had ever been discussed with Mr. Finnerty, that he had any recollection of events or what he might say in evidence.

Analysis

11. It is beyond argument that the delay in the prosecution of these proceedings has been very significant. It is now almost eleven years since the cause of action accrued. Delay may be viewed as particularly significant in defamation proceedings. In *Desmond v. M.G.N. Ltd* [2009] 1 I.R. 737, the Supreme Court noted that there was a particular onus on a plaintiff who institutes defamation proceedings to advance them without delay in order to restore any alleged damage to his reputation. Kearns J. (as he then was), in delivering the judgment of the court, referred to the dicta of Keane C.J. in *Ewins v. Independent Newspapers (Ireland) Ltd* [2003] I I.R. 583 to the effect that there is a particular onus on a plaintiff to institute proceedings "instantly" in such cases and said that, while the case before the Supreme Court was not one in which there had been a delay in issuing proceedings, he saw no distinction between a requirement to institute proceedings speedily and to prosecute them vigorously and expeditiously. In *Desmond*, Macken J. said (at p. 759) that it was "axiomatic that in the case of a claim to vindicate the reputation of a person, the rule is that proceedings such as those for defamation must be progressed with extra diligence."

12. By any standards, these proceedings have pursued a very leisurely course, particularly in the context of the subject matter. It is difficult to see how the delays that have occurred could be viewed as other than inordinate. However, both sides have been guilty of such delay. Delay 1 and Delay 2, cumulatively amounting to in excess of three years, are instances of active delay on the part of the defendant. No effort has been made by the defendant to explain these delays, less still excuse them.

13. Delay 3 must however be laid at the door of the plaintiff. A period of 32 months was allowed to pass when nothing at all was done to advance the case. In my view, Delay 3 was undoubtedly inordinate. The plaintiff has sought to excuse her delay on two grounds, the first relating to the period up to the death of her mother in 2008. It will immediately be seen that this predated Delay 3 and therefore can have no relevance to it.

14. The second ground advanced relates to her junior counsel taking silk in 2011. The first point to note in that regard is that this was already two years after the last step in the action being the motion heard on the 12th of January, 2009. Secondly, I cannot accept the proposition that the delay involved in briefing another junior counsel in this matter could ever be more than minimal. The facts and issues in this case are relatively simple, the papers are not voluminous and it is difficult to see how any competent junior counsel would not come to grips with it in very short order.

15. It seems to me therefore that the plaintiff has offered no credible excuse for Delay 3 which must be regarded as both inordinate and inexcusable.

16. With regard to Delay 4, no explanation for this delay has been put before the court on affidavit. Prima facie, it must be assumed that since the defendant had carriage of the motion, any culpable delay that arose ought not to be laid at the door of the plaintiff. I was informed during the course of the hearing that the matter had been adjourned on a number of occasions by mutual consent to facilitate the convenience of the parties and further that it had not been reached in the list on one or more previous occasions. In those circumstances, I propose to disregard this delay for the purposes of the within application.

Conclusion

17. In considering where the interests of justice lie in this case, it seems to me I must have particular regard to two factors. The first is that the majority of the delays that have occurred to date in these proceedings have been occasioned by the defendant. The second is that the defendant has not been able to establish that he has suffered any actual prejudice as a result of the delays that have occurred. Although I have found that a significant part of the delay to date, Delay 3, is to be laid at the door of the plaintiff and is both inordinate and inexcusable, the defendant's failure to react in any way to that delay is indicative of an attitude of acquiescence already evident by his own delays prior to that point in time. Coupled with this is the fact that the defendant has not made any attempt to suggest that the delays which have occurred will now render a fair trial impossible. Therefore, it seems to me that in undertaking the required balancing exercise in this case, I must have particular regard to the undoubted prejudice that will accrue to the plaintiff if her claim is dismissed as opposed to no actual demonstrable prejudice to the defendant if it is not.

18. In those circumstances, and with, it has to be said, a degree of reluctance, I am driven to the conclusion that the interests of justice require that the plaintiff be permitted to proceed with her claim. Having said that, I am quite satisfied that the court has a duty to ensure in the interests of the public and those who seek to exercise their right of access to the courts that litigation proceeds expeditiously and the lackadaisical attitude shown by both sides in this case should not as a general rule be tolerated.

19. Whilst I will therefore dismiss this application, I will discuss with counsel a time scale for ensuring that this matter comes to trial without further delay and I will undertake such case management measures as are necessary to ensure that outcome. I should also add that in the event of the defendant suffering any actual prejudice as a result of the delay in the matter ultimately coming to trial, nothing in this judgment should be taken as precluding reliance by the defendant on such a prejudice in defending the action.