

THE HIGH COURT

[2014 No. 7379 P]

BETWEEN

MICHAEL JOSEPH BARRETT

PLAINTIFF

AND

GERARD HOGAN

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 13th day of November, 2020

Introduction

1. The defendant brought an application seeking to have the plaintiff's claim struck out for want of prosecution and/or delay. The matter was heard before this Court at the end of November, 2019. Judgment was prepared and due to be delivered in January, 2020. However, prior to the delivery of the judgment, the Court was informed that the defendant had died. Subsequently, the parties made submissions to the Court as to the consequences, if any, that resulted from the death of the defendant. I should add that the proceedings were not re-constituted.

Background

2. The plaintiff was born on 24 July 1943 and so is now some 77 years of age. In these proceedings, by personal injuries summons issued 15 August 2014, the plaintiff claims damages for personal injuries arising out of alleged sexual assaults perpetrated on him by the defendant in or about the years 1949 to 1951. These assaults are alleged to have taken place in a deserted premises adjacent to the plaintiff's home at Strand Road, Tralee, Co. Kerry.
3. The endorsement of claim sets out, in detail, the nature of these alleged sexual assaults and their effects on the plaintiff. It is alleged that this sexual abuse continued for approximately two years and occurred weekly or thereabouts. The plaintiff states that he never spoke to anyone about these events until he confronted the defendant in the summer of 2013. The plaintiff alleges that the defendant admitted to the abuse on that occasion. Further details of the circumstances of this alleged sexual abuse are deposed to in an affidavit of the plaintiff prior to the hearing of the defendant's motion herein.
4. The defendant delivered his Defence on 14 April 2016. The Defence denies various allegations made by the plaintiff and pleads that the plaintiff's claim is barred by reason of the provisions of the Statute of Limitations Act, 1957 (as amended), that the plaintiff has been guilty of inordinate and inexcusable delay and that a fair trial is no longer possible by reason of a lapse of time between the events complained of and the date of a trial.
5. The issue before the Court is the defendant's motion seeking to dismiss the plaintiff's proceedings pursuant to the inherent jurisdiction of the Court by reason of the plaintiff's inordinate and inexcusable delay in the institution and prosecution of these proceedings. The issue on the Statute of Limitations is not before the Court.

The Principles to be applied

6. The plaintiff is 77 year of age, the defendant, when this matter was heard, was 86 years of age, and the alleged sexual abuse took place between 69 and 71 years ago. Can a court in 2020 fairly and justly reach a conclusion as to whether, as a matter of probability, the serious alleged events occurred?
7. This Court is concerned with the circumstances under which an action can be dismissed on grounds of delay. The Court has two separate, but often overlapping, jurisdictions. Firstly, the jurisdiction to dismiss proceedings for want of prosecution. Though proceedings have been issued within the time allowed by the Statute of Limitations, regard may be had to how much of the statutory period had elapsed before the action commenced. Here, what is in issue is the delay in prosecuting those proceedings. The authority most cited for this jurisdiction is *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.
8. The second jurisdiction arises from the inherent jurisdiction of the court to dismiss proceedings where a fair trial is no longer possible because of the lapse of time between the events complained of and the date of the trial of the action. Proceedings may be dismissed even though they have been commenced within the statutory time limit and each step in the proceedings were taken within the time limited by the Rules of the Superior Courts. The authorities most often cited for this jurisdiction are *Toal v. Duignan* (No. 1) [1991] I.L.R.M. 135 and the following passage from the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151: -

“While justice delayed may not always be justice denied, it usually means justice diminished, and in a case such as this, it puts justice to the hazard to such an extent that to allow the case to proceed to trial would be an abrogation of basic fairness.”
9. The application before the Court invokes both of these jurisdictions so it is necessary to consider how they interact. This was considered comprehensively in the judgment of Irvine J. in the Court of Appeal in *Cassidy v. the Provicialate* [2015] IECA 74, as follows: -

“The difference between the Primor and O’Domhnaill Tests

33. Many of the more recent decisions which have considered the *O’Domhnaill* jurisdiction have been delivered in what may be described as historic sexual abuse cases in which proceedings were commenced very many years after the acts of abuse were alleged to have been perpetrated. Three such decisions are those of Kelly J. in *Kelly v. O’Leary* [2001] 2 I.R. 526, Hardiman J. in *Whelan v. Bridget Lawn and Others* [2014] I.E.S.C. 75 and Hogan J. in *I.I. v. J.J* [2012] I.E.H.C. 327.
34. It is clear from the relevant case law that a defendant may be able to rely upon the *O’Domhnaill* jurisprudence where it might otherwise fail the *Primor* test due to its inability to establish culpable delay on the part of the plaintiff. For example, in a case of alleged sex abuse where for all of the period of delay a plaintiff may maintain that they lived under the dominion of their abuser, the defendant would be unlikely to succeed in a *Primor* application, particularly if the plaintiff had

evidential support for the allegation regarding dominion. However, that defendant could nonetheless maintain that, regardless of the absence of any culpable delay on the plaintiff's behalf, they should not be required to defend the claim because the period of delay since the events complained was such that it was at real risk of an unfair trial or an unjust result.

35. Having reflected upon many of the authorities in relation to the 'delay' *jurisprudence*, I am satisfied that the third leg of the *Primor* test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the *O'Domhnaill* test.
36. While the *O'Domhnaill* test, *i.e.* is there a real risk of an unfair trial or an unjust result, is one of the factors which may be relied upon by a defendant in seeking to prove the third leg of the *Primor* test, the defendant relying on that test does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay. ..."

and: -

- "37. Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill* jurisprudence. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. ..."

Application of Principles

10. As mentioned, the defendant's plea that the plaintiff's claim is statute barred is not before the Court. What I am concerned with is whether, by reason of lapse of time between the events complained of and the date of a trial, there is a real risk of an unfair trial. Given the nature of the allegations of sexual abuse, it must be almost certain that there were only two witnesses: the plaintiff and the defendant. There was no suggestion that there was any other corroborating evidence of any nature. I cannot see how a fair trial is now possible given the death of the defendant. Although the plaintiff, notwithstanding the passage of time, may well have a clear recollection of the events which he alleged took place, the legal representatives of the defendant (or his estate) are no longer in a position to challenge the plaintiff. It is difficult to see how the cross-examination of the plaintiff could now realistically take place. The court hearing the action would not be in a position to reach a decision as to the veracity or not of the plaintiff's claim.

11. In his submissions to the Court, the plaintiff states that as the death of the defendant occurred well outside any period of delay for which the plaintiff can be held responsible, the Court had to exercise its discretion in the plaintiff's favour and refuse the application. There might well have been merit in the plaintiff's submission in circumstances where other evidence might have been available to the defendant to defend these proceedings. However, this does not appear to be the case here. In my view, I have to consider the consequences for a fair trial resulting from this death irrespective of whether it occurred during a period of culpable delay on the part of either party. I refer to the judgment of Irvine J. in *Cassidy v. The Provicialate* where she stated: -

"...it would be hard for a defendant to demonstrate greater prejudice than that which arises for the defendant in this case, by reason of the fact that PD [the alleged abuser] is believed to be dead."

Conclusion

12. By reason of the foregoing, I will dismiss these proceedings by reason of lapse of time between the events complained of and a date of trial whereby a fair trial is no longer possible. I will hear the parties on further or other orders as may be required. As this judgment is being delivered electronically, the parties have fourteen days within which to file written submissions in respect of same.