

THE HIGH COURT

[2022] IEHC 369
[Record No. 2009/1913P]

BETWEEN

AIDAN MC DONALD

PLAINTIFF

AND

A Z SINT ELIZABETH HOSPITAL

DEFENDANT

DECISION of Ms. Justice Bolger delivered on the 17th day of June, 2022

1. This is an application by the defendant for an order, pursuant to the inherent jurisdiction of the court, dismissing the plaintiff's claim for inordinate and inexcusable delay or further in the alternative dismissing the plaintiff's claim for want of prosecution. The defendant contends that periods of inordinate delay have taken place in this case which they say are not excusable and in those circumstances contend that the balance of justice favours the proceedings being dismissed.
2. For the reasons set out below, I am refusing the defendant's application.

Background

3. The plaintiff's claim is for damages for medical negligence claimed as arising on foot of a medical procedure carried out at the defendant's hospital in Belgium on 6 March 2007. A personal injury summons was issued on 27 February 2009 and between then and October 2015, a number of complex procedural matters were addressed. The proceedings were instituted against both this defendant and two other defendants. Ultimately the other two defendants were taken out of proceedings, one by order of the court and the other apparently by agreement. In any event, the defendant accepts that up to October 2015, the length of time the litigation was taking was explained by the complexity of the jurisdictional issues that had arisen and does not seek to move on that delay.
4. Therefore, the periods of delay on which the defendant seeks to move commenced in October 2015. A notice of intention to proceed was filed by the plaintiff's solicitors on 14 October 2016 but it is accepted by the plaintiff that this is not a relevant step in terms of neutralising what might otherwise be described as an inordinate delay. Nothing further occurred until 2 November 2016 when the defendant's solicitor furnished replies to the particulars that had been raised by the plaintiff's solicitor in 2014. A further period of delay then ensued until the plaintiff's solicitor issued a motion on 13 October 2017 to compel the defendant to reply to particulars. That motion was determined by the court on 2 May 2019 and thereafter a short period of delay followed until the plaintiff's solicitors served a notice of trial on 3 September 2019. No further steps were taken in relation to

the proceedings until the defendant filed the within application to dismiss in December 2020.

5. The relevant periods of delay can be summarised as follows:
 - i. October 2015 to October 2017.
 - ii. A short period from May 2019 until September 2019 when the plaintiff's solicitor filed a notice of trial.
 - iii. The period from September 2019 until the defendant issued its motion in December 2020.
6. The defendant also relies on what it anticipates will be a further period of delay pending the case being ready to be set down for hearing, as it is a case that must be determined under Belgian law (in accordance with orders previously made by Hogan J.) and the defendant maintains that this will require significant additional work to be done by the plaintiff which it believes has not yet been done in either securing an expert report from the Belgian lawyer or filing an affidavit of laws.
7. The plaintiff seeks to excuse the delay between October 2015 and October 2017 by reference to the fact that it was waiting for the defendant to furnish replies to particulars which it did in November 2016. He seeks to excuse the delay from September 2019 until the motion issued in December 2020 by reference to the covid-19 pandemic and the fact that the hearing of personal injury claims was stalled from March 2020 and throughout the entirety of the period up to when the defendant issued the within motion. The defendant accepts that lockdown prevented the case from being set down for hearing but criticises the plaintiff for not having engaged in pre-trial steps such as filing its S.I. 391.

Defendant's submissions

8. The defendant maintains that the balance of justice favours dismissing the proceedings. Counsel for the defendant concedes that any prejudice which the defendant has suffered as a result of the delay falls within the moderate level of prejudice, but he does emphasise that prejudice is only one of the factors that the court should consider. The defendant's affidavit submits, in relation to the balance of justice, that "it is unreasonable and unrealistic to expect a Belgian hospital to locate relevant witnesses to incidents of thirteen years passed and to defend such an action in Ireland. Furthermore, I say that the consultant who appears to have carried out the procedure the subject matter of these proceedings is not 'an employee' of the defendant hospital but was using the premises on terms." The defendant's deponent also expresses doubt that the plaintiff, who he claims has not yet engaged an expert in Belgian law, will ever do so. The defendant does not seek to rely on any additional tangible evidence of prejudice and does not identify any difficulties with the availability of witnesses due to death, illness etc.
9. The defendant urges on the court that this is a case not resolvable by document only, unlike many medical negligence claims, and refers to averments made in previous motions about the circumstances in which the contract the subject matter of the

proceedings was made. That was a matter of some controversy between the plaintiff and the defendant. The defendant refers to the affidavit of the then second named defendant Dr. Joost Van Der Sypt sworn on 5 July 2012 prior to Dr. Van Der Sypt being removed from the proceedings, in which the doctor set out the circumstances in which the contract was made between the plaintiff and the first named defendant following on from a number of telephone conversations he had with the plaintiff to discuss the procedures. Dr. Van Der Loos states that the plaintiff attended by appointment at the first named defendant's premises in Belgium on 7 March 2007, that he met with him on that date, and that the plaintiff signed a document headed "informed consent" and made a cash payment of €6,000 in respect of the procedure. Dr. Van Der Loos says that the "informed consent" which he exhibits contains evidence of the payment and he says that the contract between parties was concluded at that point.

10. Counsel for the defendant relies on these averments to support his case that the case is not a purely documents case and that oral testimony will be required which he says will cause difficulties for the defendant at this point in time, given the prospect of diminished recollection of witnesses. Counsel for the defendant also relies on the reputational damage both to the hospital but also to the surgeon who is no longer a party to the proceedings. He also urges on the court that it should take account of the plaintiff's future plans in getting the case ready for hearing and, for the reasons set out above, he says this is going to take a lot more time, and argues that this is a factor falling within what the court should consider in determining where the balance of justice lies.
11. The defendant contends that evidence of moderate delay, in accordance with the decision of Irvine J., as she was then, in *Millerick v. Minister for Finance* [2016] IECA 206 and relatively modest prejudice in accordance with the decision of Irvine J., as she was then, in *Cassidy v. Proviciale* [2015] IECA 74, is sufficient. He contends that the prejudice as identified by the defendant is sufficient in this case. He distinguishes the decision of the Supreme Court in *Mangan v. Dockeray & Ors.* [2020] IESC 67 as applying to its own particular facts where the plaintiff was a person of unsound mind so found who had suffered catastrophic injuries following his birth. Counsel for the defendant maintained that any prejudice this plaintiff would suffer if the proceedings were to be dismissed were of a far lesser level than that which would have been suffered by Mr. Mangan and that, on the facts of this case, the prejudice that would be sustained by the defendant along with the other factors the court should take account, outweigh any prejudice which this plaintiff would suffer if he was not allowed to pursue his claim.

Plaintiff's submissions

12. The plaintiff relies heavily on the decisions of the Supreme Court in *Mangan* as well as the decision of Barr J. in *Walsh v. Mater Misericordiae University Hospital & Ashley Poyton* [2022] IEHC 126 and maintains that the plaintiff is on all fours with both claims, particular that of *Walsh* where the plaintiff claimed to have suffered an orthopaedic type injury of a much lesser severity than the injury suffered by the plaintiff in *Mangan*. Both decisions emphasise the reliance that would be placed on the documentary medical records at trial in ultimately determining that the balance of justice favoured allowing the

proceedings to continue in spite of periods of delay that the court had found to be inordinate and inexcusable.

13. The plaintiff was critical of the defendant for its delay in serving the within motion a number of months after it had issued, and also sought to blame the defendant for some of the delay between 2015 and 2017 during which time the plaintiff was waiting for the defendant to furnish its replies to particulars. Whilst the plaintiff's counsel fairly conceded that there were periods of delay between 2015 and 2017 which could not be explained, he disputed that they were inordinate periods of delay. In respect of the delay from September 2019 when the plaintiff's solicitor served a notice of trial to December 2020 when the defendant's solicitor issued the motion to dismiss, the plaintiff's counsel relies heavily on the onset of lockdown in March 2020 which, he said, brought the hearing of personal injury claims such as this to a standstill.
14. In relation to the plaintiff's future plans to get the case ready for hearing, the plaintiff's counsel made the point that progress had been stalled by the issuing of the motion to dismiss, as the plaintiff was reluctant to incur further expenditure in getting his case ready for hearing if there was a prospect that the proceedings might be dismissed. In spite of that, his counsel confirmed that the plaintiff had obtained the services of a Belgian expert witness and had been advised that there is no real difference between proceeding with this claim pursuant to Irish law and Belgian law. In those circumstances, once outstanding discovery and updating of medical evidence has been attended to, the plaintiff expects to be in a position to set the case down for hearing. The plaintiff's counsel did fairly concede that this may take some further time and that this is not a case that is going to be ready to be heard in the very near future. The plaintiff's counsel contended that whilst the defendant has been critical of the plaintiff for not pursuing its investigation vis-à-vis Belgian law, that neither had the defendant progressed its investigations, and indeed it appears from what the defendant's counsel indicated that the defendant will need to take further steps before the case is ready for hearing as it has yet to have the plaintiff medically examined.
15. The plaintiff submitted that this is a case in which liability will be decided primarily by expert evidence and in those circumstances, that the defendant will not suffer prejudice by any delays that have occurred and in any event, highlights the defendant's failure to identify any specific prejudice in relation to availability of witnesses.

Decision

i. Is the delay inordinate?

16. There are two lengthy periods of delay, one between October 2015 and October 2017 and the second between September 2019 and December 2020. In relation to the first period of delay there is an intervening event in that replies to particulars were filed in November 2016. While both periods of delay are not particularly long, cumulatively they come to almost three and a half years.
17. That is an unsatisfactory delay for any party to proceedings to allow to develop, particularly in circumstances where the proceedings were issued close to the Statute of

Limitation period, thereby putting the plaintiff under a particular obligation to ensure that the proceedings are progressed as expeditiously as is possible. However, it is difficult to condemn that period of delay as inordinate particularly given that it comprises of two separate periods of delay and in relation to one of them, there was the intervening event of the filing of the defendant's replies to particulars.

18. On balance I do not consider the delay is quite serious enough to be fairly described as inordinate. However, in the event that I am incorrect in that, I will proceed to consider whether the period of delay can be excused and where the balance of justice might be considered to fall.

ii. Is the delay excusable?

19. The plaintiff seeks to excuse the first period of delay by reference to the fact that he was waiting for the defendant to file its replies to particulars. Nevertheless, even after that happened there was a further period of delay before the plaintiff issued his motion to compel the defendant to furnish its replies. Whilst that is an excuse, it is not a particularly good excuse.

20. The second period of delay is excused by the plaintiff almost exclusively by reference to the onset of the covid-19 pandemic in March 2020 and the fact that the entire system of hearing personal injury cases effectively stalled. The defendant is somewhat dismissive of that as an excuse as it criticises the plaintiff for not having engaged in pre-trial steps such as filing his SI391. I do not consider the defendant's criticisms in that regard to be well founded. It is undoubtedly the case that the conduct of personal injury litigation changed dramatically almost overnight from when the country went into lockdown on 12 March 2020. What had previously been a busy area of litigation evaporated and other than particular types of claims, no personal injury cases were being heard or being listed for hearing. I consider that to be a reasonable excuse for the plaintiff's delay in taking any steps to proceed to setting his case down for hearing following on the serving of a notice of trial in September 2019. I do not consider the plaintiff's failure to attend to pre-trial matters in itself removes what is clearly a valid excuse for the plaintiff not having taken any steps during this period of time.

21. In those circumstances, in the event that the period of delay is inordinate, I am satisfied that the second period of delay permitted to occur is excused by the circumstances that applied during the relevant periods of delay.

iii. The balance of justice

22. In the event that I am incorrect in relation to the excusability of the periods of delay and in relation to the first period of delay, I will consider where the balance of justice lies. The court has discretion in determining the balance of justice and, in accordance with the jurisprudence in the area, must take account of a wide range of factors identified by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, as clarified by the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206 and *Cassidy v. Provinciate* [2015] IECA 74. The Supreme Court had the opportunity to consider the particular criteria to be applied to a claim arising from the catastrophic injury suffered by

a plaintiff on his birth in the case of *Mangan v. Dockeray*, and in determining that the plaintiff should be allowed to continue with his claim, McKechnie J. in the Supreme Court had particular regard to the crucial importance for the plaintiff in continuing with the action, the availability of medical records surrounding the birth and the likelihood that irrespective of the passage of time, the evidence of the defendant and any expert called on their behalf would be heavily if not almost entirely reliant on those medical records. In those circumstances McKechnie J. concluded that there was not a serious risk of an injustice being done to the second and third defendants in allowing the action to proceed whereas the undoubted prejudice to the plaintiff would be enormous. McKechnie J. specifically referred, at para. 146, to the “continuing obligation on a trial judge to ensure that fair procedures and constitutional justice is always adhered to”.

23. More recently, Barr J. in *Walsh v. Mater Misericordiae University Hospital and Ashley Poynton* [2022] IEHC 126 applied similar criteria to the plaintiff’s claim for injuries she claimed to have suffered as a result of the defendant’s medical negligence. Her injuries, while serious, were certainly not at the level of the injuries sustained by Mr. Mangan but nevertheless the court declined to dismiss the proceedings. The court had particular regard to whether or not liability would turn exclusively or to a large extent on oral evidence and pointed out that if liability would turn on expert evidence rather than the evidence of witnesses as to fact, that the prejudicial effect of delay would be lessened. Barr J. also stated that the court is entitled to have regard to the question of whether all relevant witnesses and documents remain available to give evidence or to use at the trial of action (at para. 43). He concluded that oral evidence would have a very minor role to play in that case, and that the issues would largely turn on the expert evidence given in relation to the notes and records, and therefore found there was not sufficient prejudice to tip the balance in favour of striking out the action notwithstanding that there had been inordinate delay in prosecuting the proceedings.
24. The defendant in this case maintains that it is not a purely documents case and highlights that oral testimony will be required in relation to the circumstances in which the contract was formed. In support of the significance of that issue, counsel for the defendant highlighted the affidavit sworn by Dr. Van Der Sypt in July 2012 in which he set out the circumstances in which he contended that the plaintiff entered into a contract with the first named defendant at the first named defendant’s premises in Belgium on 5 March 2007. The defendant has not sought to make any case in this application that any of the defendant’s witnesses, including Dr. Van Der Sypt, are no longer available to them or that their recollection has been affected by matters such as the onset of poor health. Indeed, the first named defendant has the benefit of Dr. Van Der Sypt’s affidavit sworn in 2012 in which he gives a very clear recollection of the circumstances in which a contract was entered into by the plaintiff in 2007. In those circumstances, to the extent that this is not a documents case and a case in which some oral evidence may be required, I do not consider that the defendant has established sufficient prejudice that it will suffer by virtue of the passage of time in relation to the oral evidence which it may wish to call.

25. There are undoubtedly issues in this case which will fall to be determined by the medical records and in relation to those issues, the defendant cannot have been prejudiced by the passage of time and no such prejudice was identified by it on affidavit.
26. The defendant has clearly confirmed that it is going to take some further time for this case to be ready for hearing. The plaintiff has sought to alleviate some of those concerns by confirming that he has engaged a Belgian expert and anticipates that the claim under Belgian law will be largely similar to the claim formulated in the proceedings essentially under Irish law. Whilst I accept that the court should have regard to the likely date in which the case will be ready for hearing in determining the balance of justice, I do not think it is fair or appropriate to speculate on how long it may take a plaintiff in a case of considerable complexity such as this, to be ready for hearing. It is of course incumbent on the plaintiff both as a plaintiff who issued their proceedings close to the statutory limitation period and a plaintiff who has been involved in litigation for many years, to progress his litigation as expeditiously and efficiently as is possible. If he fails to do that it is open to the defendant at a future date to bring a further motion for delay if the defendant can identify a period of inordinate and inexcusable delay and can satisfy the court that the balance of justice lies in favour of the proceedings being dismissed. However, I do not think it appropriate for this Court to pre-empt whether there may be further periods of significant delay before this case is ready for hearing, and I do not therefore consider the defendant's concerns and speculation in this regard to be a factor which should tilt the balance of justice in favour of dismissing the proceedings.
27. In all of the circumstances if it is the case that the delay was both inordinate and inexcusable, I am satisfied that the balance of justice, having regard to the importance of the claim for the plaintiff and the absence of any specific prejudice identified by the defendant in running its defence after such a long period of time, favours allowing these proceedings to continue despite the risk of reputational damage under which the Belgian hospital and its servants or agents continue to exist by virtue of the existence of the proceedings.
28. I therefore refuse the defendant's application to dismiss these proceedings.

Indicative view on costs

29. My indicative view on costs is that costs should, in accordance with s.169 of the Legal Services Regulation Act, follow the cause and that the plaintiff should be entitled to the costs of this motion. However, I will hear the parties in relation to any further submissions they wish to make in relation to costs and any final orders to be made. I will fix the matter for hearing at 10.00am on 5 July I am not requiring written submissions but if the parties do wish to make them they should be lodged with the court at least 24 hours before the matter is back before me.