

THE HIGH COURT

[2022] IEHC 223

[Record No. 2008/10804P]

BETWEEN

MICHAEL MANSFIELD

PLAINTIFF

AND

ROADSTONE PROVINCES LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Bolger delivered on the 8th day of April, 2022

1. This is the defendant's application to dismiss the proceedings for delay. The court must establish: -

- (1) Has there been inordinate delay?
- (2) If so, is that delay excusable?
- (3) If the delay is both inordinate and excusable, does the balance of justice lie in favour of dismissing the proceedings?

Background to the proceedings

2. The plaintiff issued a personal injury summons in December 2008 arising from an accident at work that he claims took place when he was driving a forklift truck at the defendant's premises on 6 November 2006. In January 2009 the plaintiff's solicitor filed a notice for particulars and the defendant replied in March 2009. In April 2009 the defendant's solicitors filed a defence but did not attend to swearing or filing a verifying affidavit at that time.
3. There were no further pleadings filed until the plaintiff's solicitors filed a notice of intention to proceed in March 2019. In the meantime, the defendant had arranged for two medical appointments on 15 April 2009 and 16 October 2009. The plaintiff avers in his replying affidavit that he attended at University Hospital Waterford on each occasion to meet with the defendant's doctor but that the doctor did not turn up. The defendant did not reply to this affidavit and there is nothing in their affidavit to explain why the medical consultations did not take place. The defendant has not taken any further steps to have the plaintiff medically examined.
4. A joint engineering inspection took place on 16 October 2009. The plaintiff sought inspection of the forklift and the defendant's solicitors confirmed that it was not owned by the defendant but furnished the plaintiff's solicitor with the name and address of the owner. It seems that no further steps were taken by the plaintiff's solicitor in relation to that.
5. On 25 March 2019 the plaintiff's solicitor served a notice of intention to proceed. From that point onward there was considerable activity from the plaintiff's solicitor with some, albeit much less, from the defendant's solicitor.

6. The plaintiff's solicitor sent a request for voluntary discovery on 9 April 2019, filed a reply to the defendant's defence on 19 June 2019, and set the matter down for trial on 26 July 2019. The plaintiff's solicitor requested an affidavit of verification for the defence on 27 September 2019. The defendant had not responded to the plaintiff's request for voluntary discovery and the plaintiff's solicitor sent a warning letter on 27 September 2019 and served a notice of trial on 3 October 2019. The plaintiff's solicitor served updated particulars of personal injury on 29 October 2019 and made two further requests for the defendant's affidavit of verification on 30 October 2019 and 15 January 2020. The plaintiff's solicitor issued a motion seeking discovery on 5 November 2019 which came on for hearing before this Court on 13 January 2020 when an order for discovery was made against the defendant on a consent basis. The defendant has not yet complied with that order. In the course of the hearing before this Court the defendant said it was awaiting the outcome of this motion before having to make what it claims would be complex discovery. Arising from the defendant's failure to make discovery, the plaintiff issued a separate motion seeking to strike out the defence for failure to make discovery which has been adjourned pending the outcome of this application.
7. Jim Rea, the defendant's human resources manager, swore a verifying affidavit on 14 February 2020 which was filed on 27 February 2020 and served on the plaintiff's solicitors on 14 April 2020. Mr Rea avers that the assertions, allegations and information contained in the defence which are within his knowledge are true and that he believes that the assertions, allegations and information contained in the defence which are not within his knowledge are true.
8. The plaintiff contends that once the defendant makes discovery, that the matter is ready to be set down for hearing. The defendant disputes that as it has not had the plaintiff medically examined. The defendant does not appear to have made any attempts to do so since the two abortive appointments of 2009.

The defendant's submissions

9. The defendant contends that the delay is inordinate and inexcusable and points to a number of authorities including the recent decision of Meenan J. in *J. Heary (Joinery) Limited v. Grogan & Ors.* [2021] IEHC 820, where a lesser period of delay of four years between the defendant making discovery in February 2015 and the plaintiff delivering further particulars of negligence in December 2019, was found to be inordinate and inexcusable.
10. In relation to the balance of justice, the defendant's grounding affidavit refers to the defendant's solicitor's belief that there has been inordinate, inexcusable and culpable delay on the part of the plaintiff in prosecuting these proceedings and refers to the thirteen years, as of the date of the swearing of the affidavit, since the date of the accident complained of. The defendant's solicitor says that the defendant's facility at which the accident is alleged to have taken place was closed in 2009 and that the location manager there at the time of the accident no longer works for the defendant. That is the totality of what the defendant has put on affidavit as to the prejudice it will suffer in the

event that the proceedings are allowed to continue after such a long period of delay. The defendant sought to expand on the prejudice point during oral submissions by explaining that their former location manager, referred to in the defendant's solicitor's grounding affidavit, had been made redundant in 2009. The defendant's counsel in oral submissions also referred to the period of delay as a prejudice in itself as well as loss of memory on the part of witnesses and referred to the defendant's intention to call the owner of the quarry where the accident is alleged to have taken place and the defendant's engineer who furnished a report to give evidence at trial. The defendant's counsel submitted that the case was not a documents case.

11. The defendant disputed it had caused or acquiesced in any delay. In relation to its delay in filing its verifying affidavit, the defendant referred to the plaintiff's delay in filing his verifying affidavit. In relation to the delay from service of the plaintiff's notice of intention to proceed on 25 March 2019 to issuing this motion to dismiss over a year later on 26 March 2020, the defendant referred to their solicitor's difficulty in recovering the file and the onset of the Covid-19 Pandemic.

The plaintiff's submissions

12. The plaintiff's solicitor's replying affidavit referred to the plaintiff having attended two appointments in 2009 to meet with the defendant's doctor and on both occasions the doctor did not turn up. He also referred to the plaintiff having gone to Kilmacow to inspect the forklift but that when he arrived he was shown a different machine and the plaintiff considered this to be wasted time. The plaintiff also went to the location of the accident but claimed that the area had been resurfaced and levelled and the plaintiff's solicitor averred that that journey was a further waste of the plaintiff's time. The plaintiff's solicitor averred that the plaintiff was disheartened by the actions of the defendant. The plaintiff's solicitor also referred to the plaintiff focussing on nursing his injury back to full health at that time. The plaintiff laid heavy emphasis on the defendant's delay in swearing an affidavit verifying its defence in breach of the statutory time period of ten days as per s.14(4)(a) of the Civil Liability and Courts Act 2004 and of O.10(2) of the Rules of the Superior Courts, and contended that this went to both excusability and the balance of justice.
13. The plaintiff's primary submissions related to the balance of justice test which the plaintiff argued was in favour of allowing the proceedings to continue having regard to the defendant's acquiescence in the plaintiff's delay along with the defendant's own delay and/or failure to comply with this Court's discovery order of January 2020. The plaintiff also relied on the defendant's delay in issuing this motion, which the plaintiff contended constituted countervailing circumstances tipping the balance against dismissal of the proceedings. The plaintiff relied on the decision of Ferriter J. in *McGuinness v. Greaney* [2021] IEHC 769, where the court found delay on the part of the defendant in failing to comply with a discovery order constituted acquiescence in the delay on which the defendant relied in seeking to dismiss the proceedings. The plaintiff also relied on the decision of Ferriter J. in *O'Reilly v. The National Document Management Group Limited & Deloitte* [2022] IEHC 37, where the court considered the defendant's own conduct in

leaving it so late with its discovery request and its application to dismiss, that a trial date was lost, to have been a very important factor in the consideration of the balance of justice. Ferriter J. cited Irvine J. in *Connolly's Red Mills v. Torc, Grain & Feed Limited* [2015] IECA 280 that conduct on the part of a defendant that leads a plaintiff to believe that the defendant would meet the plaintiff's claim on its merits, and caused the plaintiff to spend time and money on engaging with the litigation long past the point at which the application to dismiss ought to have been made, is conduct which can be relevant to the exercise of the court's discretion in determining where the balance of justice lies.

14. The plaintiff disputed that the defendant had identified any prejudice suffered as a result of the delay. Whilst the plaintiff accepted the defendant's averment that the quarry had closed and the location manager no longer works for them, the plaintiff contended that neither issue constituted prejudice to the defendant or that the defendant had outlined any prejudice, specific or otherwise, that it had suffered. In contrast the plaintiff pointed to the very real prejudice that he would suffer if his proceedings were struck out and he was unable to litigate his claim.

Was the delay inordinate?

15. This issue was, quite correctly, not pressed by the plaintiff. The delay of ten years from 2009 when the last steps were taken until a notice of intention to proceed was served by the plaintiff's solicitor in March 2020 was, on any analysis, inordinate.

Was the delay excusable?

16. Whilst the plaintiff's solicitor sought to identify why the plaintiff had not progressed his case, the point was not pressed by counsel and for good reason. There was an attempt to rely on the defendant's delay in swearing and filing their verifying affidavit and whilst I consider that to be relevant in determining the balance of justice, in which I comment on further below, I see no basis on which this delay could be excusatory of the plaintiff's inordinate delay in progressing his litigation from 2009 until 2020.

The balance of justice

17. Having found the delay to be both inordinate and inexcusable, the court must assess whether the balance of justice lies in favour of dismissing these proceedings.
18. The jurisprudence in this area is well established in particular by *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 and *Millerick v. Minister for Finance* [2016] IECA 2006. Both decisions confirm that the court can take into account, *inter alia*, the potential prejudice resulting from the delay; whether any delay or conduct on the part of the defendant amounts to acquiescence by the defendant in the plaintiff's delay; and whether the plaintiff has been induced by the defendant's conduct to incur further expense in pursuing the action.
19. The court will consider firstly whether the defendant has identified prejudice, specific or otherwise, that it will suffer in the event that proceedings continue and will then consider the defendant's conduct that the plaintiff contends constitutes delay and/or acquiescence.

20. The defendant has identified prejudice in very general terms at paragraph 11 of its grounding affidavit where it highlights the passage of thirteen years (which was the delay at that time) since the date of the accident. It is now almost fifteen and a half years since the accident and it will be over sixteen years by the time the case comes to trial if the proceedings are not dismissed. The defendant pleads more specific prejudice at paragraph 11 of its grounding affidavit where it says that the facility at which the accident took place in 2009 is closed and the location manager there at the time of the accident no longer works for the defendant. No other difficulties in relation to the availability of witnesses or their ability to recall what happened are referred to in the affidavit. In oral submissions the defendant's counsel confirmed that the defendant had made the location manager redundant in 2009 which would confirm the defendant's involvement in the termination of his employment but it seems the defendant did not attend to taking a witness statement from the manager at that time or pay any attention to keeping in touch with his current whereabouts, or at least no such averment is made on affidavit. The situation is therefore reminiscent of what took place in *Reilly v. the National Document Management Group Limited v. Deloitte* [2022] IEHC 37 where Ferriter J. accepted that a particular individual would have been a potentially relevant witness for the defendants but that it did not appear that the defendants regarded him "as such an important witness that they took the step of taking any statement from him either at the time of the accident, or at any stage following institution of the proceedings." (At para. 41).
21. Counsel for the defendant did refer, in his oral submissions, to the possibility of a loss of memory on the part of witnesses and difficulties in locating witnesses due to the delay, though no such concerns are averred to on affidavit. Counsel mentioned the owner of the quarry and the defendant's engineer as possible witnesses whose testimony could be adversely affected. Counsel claimed that it was not a documents case. I consider that these submissions, unsupported by evidence, fall well short of the factual matrix in theory in *J. Heary (Joinery) Limited v. Grogan & Ors.* [2021] IEHC 820 on which the defendant sought to rely, where there was evidence on affidavit of the actual prejudice the defendant would suffer namely that the second defendant had died and the first defendant's memory had diminished as confirmed by a medical report exhibited to the affidavit.
22. I consider it significant that the defendant had no difficulty in having an affidavit verifying the defence sworn by the defendant's human resources manager on 14 February 2020, only a few weeks before the defendant issued this motion to dismiss the proceedings. Mr. Rea on behalf of the defendant confirmed that the assertions, allegations, and information contained in the defence within his knowledge are true and confirmed his honest belief that the assertions, allegations, and information contained in the defence which are not within his knowledge are true. Those assertions, allegations, and information as set out in the defence include a denial of the narrative description of the circumstances of the plaintiff's accident, a denial that the defendant was negligent or in breach of duty, a denial that the plaintiff suffered the alleged personal injury, and that if, which is denied, he suffered the alleged personal injury that this was caused or contributed to by reason of his negligence arising from a number of specific matters. These include a failure to take

care for his own safety in carrying out a routine task, driving the forklift truck with the bucket elevated contrary to training instructions, failing to wear the seatbelt provided in the forklift truck, and causing the forklift truck to stop suddenly when it was unnecessary and dangerous to do so, particularly with the bucket in the elevated position. Mr. Rea swore that affidavit verifying the defence over fourteen years after the accident. Counsel for the defendant confirmed that Mr. Rea was able to rely on an accident report form and the engineer's report. That would suggest that at least some of the defendant's case will be based on documentation that is still available to the defendant.

23. The Supreme Court held in *Mangan v. Dockeray* [2020] IESC 67 that the availability of documentation such as medical records can lessen the prejudice that delay could otherwise cause to a defendant.
24. The authorities of *J. Heary (Joinery) Limited v. Grogan & Ors.* and *Maxwell v. Liam Lysaght & Co. & Ors.* [2019] IEHC 551, on which the defendant relied, were both claims of professional negligence in which the court highlighted the prejudice actually caused to the defendants' reputation by the existence of the proceedings. I consider the prejudice that this defendant claims to have suffered to be at a far lower level, if any prejudice from the delay has been identified at all. I appreciate that a delay of nearly sixteen years since the accident presents a challenge to the defendant's defence but a challenge that I believe could have been ameliorated by the defendant taking appropriate steps to ensure that the witnesses that it intended to call would be available for the trial and would have had the opportunity to refresh their memory by reference to their witness statements taken closer in time to the alleged accident. The defendant had ample time to attend to that up to 2009 when the litigation was progressing at a normal pace. The defendants cannot now seek to rely on having chosen not to do as constituting prejudice to them, particularly in the absence of specific prejudice such as the death of a witness or medical evidence as to the impaired memory of an identified witness. There is no evidence before this Court of the delay having caused any such specific prejudice to the defendant. The defendant's averments to the effect that the facility has closed and the location manager is no longer working for them does not constitute evidence of specific prejudice or at least of sufficient severity to tip the balance of justice in favour of the defendant's application to dismiss, when set against the prejudice to the plaintiff of being denied the opportunity to litigate his claim.
25. The court must also consider any delay and/or acquiescence by the defendant. The plaintiff highlights the defendant's delay in filing its verifying affidavit and in issuing this motion and their acquiescence and/or delay in their engagement with the plaintiff's request for voluntary discovery culminating in a consent order for discovery of January 2020, which has not yet been complied with by the defendant. The defendant seeks to minimise its delay in filing its affidavit of verification, in spite of having breached its statutory obligation to do so within a certain timeframe of filing its defence. It seeks to rely on the plaintiff's delay in filing his verifying affidavit. However one does not neutralise the other.

26. The defendant is also accused of delay in not bringing this motion until 26 March 2020, over a year after the plaintiff's solicitor served a notice of intention to proceed. The defendant says their delay was due to the solicitor recovering his file and the onset of the Covid-19 Pandemic. I note their solicitor was able to consent to making discovery in January 2020 and to attend to the swearing of a verifying affidavit on 14 February 2020 for which he would presumably have had his file. The pandemic cannot be blamed for any delay that occurred prior to 12 March 2020.
27. The defendant engaged in at least some of the steps taken by the plaintiff's solicitor since the filing of the notice of intention to proceed most notably in relation to discovery in January 2020. The defendant's counsel claimed that the defendant now regretted having agreed to make discovery. I do not consider any regret the defendant may now have about agreeing to make discovery in January 2020 to be relevant in determining where the balance of justice lies.
28. I consider that the defendant's conduct in their delay and acquiescence comes within the matters identified by Hamilton C.J. in *Primor* and *Millerick*, discussed above, that can be taken into account in determining where the balance of justice lies. I note that Ferriter J. in *McGuinness* was critical of the defendant's failure to comply with a discovery order which he considered constituted acquiescence by the defendant in the delay. Similarly, in *O'Reilly & McGuinness*, Ferriter J. considered the defendant's conduct in leaving it so late to deal with the discovery request to be relevant to the balance of justice. Ferriter J. in that case also had regard to the fact the matter was, at that time, ready for hearing. I note in this case that the plaintiff contends the matter is ready for hearing as soon as the defendant complies with the discovery order of January 2020. The defendant maintains that it is not ready for hearing as the plaintiff has not yet been medically examined. However, on the basis of what has been put on affidavit, the responsibility for that seems to lie with the defendant as there is no denial on affidavit of the plaintiff's version of events that he turned up twice in 2009 for a medical appointment with the defendant's doctor and the doctor did not attend.

Conclusions

29. The delay in this case has been both inordinate and inexcusable. The plaintiff will suffer prejudice if the case is dismissed and he is denied his opportunity to litigate his claim. The prejudice that the defendant would suffer has not been adequately identified and there is, therefore, very little basis for the court to find that the defendant's prejudice in having to defend a claim after so many years, outweighs the plaintiff's prejudice. In all of the circumstances of this case and given the defendant's approach to the litigation since the plaintiff's solicitor resurrected his file in March 2019, and the fact that the matter is very close to being ready for trial, I am satisfied that the balance of justice is in favour of allowing the plaintiff to proceed to trial. I am therefore refusing the defendant's motion to dismiss on grounds of delay.

Indicative view on costs

30. As the defendant has not succeeded in securing the relief it sought and the plaintiff has succeeded in the matter to go to trial, my indicative view on costs is that, in accordance

with s.169 of the Legal Services Regulation Act 2015, costs should follow the event. If either party takes a different view in relation to costs and wishes to make submissions on same and/or on any orders that the court is to make including any orders on case management, I will list the matter for hearing at 10.00am on 10 May.