THE HIGH COURT

[2024] IEHC 448

[Record No. 2021/289 P]

BETWEEN

JUDITH PRESTON GRACE

PLAINTIFF

AND

BRADPOWER LIMITED, SECURITY PARTNERS LIMITED, MICHAEL MCDONALD, MICHAEL BURKE, LEO FOY, NIAL CHRISTLE, PAUL SINNOTT AND OLLIE FINN

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 31st day of July 2024

1. The plaintiff issued proceedings by personal injuries summons dated 18 January 2021 seeking damages for the wrongful death of her brother Frank Grace (hereinafter referred to as "the deceased") which she pleads was caused by the negligence and breach of duty of the defendants or each or either of them. The plaintiff received two PIAB authorisations on which she grounded her proceedings, one relating to the first and second named defendants on 13 May 2015 and the second relating to the third to eighth named defendants received on 7 July 2020.

2. The first defendant and the second to eighth defendants, both of whom are separately represented, brought motions seeking to have the proceedings dismissed as (1) statute barred and (2) on grounds of the plaintiff's inordinate and inexcusable delay. The applications were heard by this court on 2 May 2024 on affidavit evidence only. For the reasons set out below, I am refusing these applications.

Background

3. The first defendant was the owner of Cooper's Bar in Portlaoise, the second defendant provided security services at the premises and the third to eighth defendants were

all employed by the second defendant at the relevant time. The personal injuries summons pleads that, early on the morning of 10 June 2012, the deceased was ejected from Cooper's Bar by the defendants, or each or all of them, and as a result of the actions of the defendants, or each or all of them, the deceased was pushed and/or fell on the path. He was pronounced dead shortly thereafter. The personal injuries summons pleads that his death was caused by the negligence and breach of duty of the defendants, which is denied as against the first defendant in its defence delivered on 24 April 2024.

4. An inquest took place into the deceased's death on 25 March 2013 and 29 April 2013, at which the jury accepted the opinion of Dr. Jaber, the Deputy State Pathologist, that the deceased died due to acute coronary syndrome following on and associated with a fall, obesity and acute alcohol intoxication. The verdict was death by natural causes. The plaintiff's solicitors advised that there were time limits applicable to legal proceedings, and the plaintiff instructed their solicitor to make an application to PIAB in 2015, which he did. Upon receipt of the authorisation, the plaintiff was advised by her solicitor and counsel that there was no basis for issuing proceedings against the first and second named defendants because of the medical evidence that death was from natural causes and not from misadventure (as averred to by the plaintiff at para. 9 of her affidavit).

5. The plaintiff was unhappy with the verdict of the inquest and sought a further inquest. In 2016, the Attorney General directed a second inquest which took place in January 2019. CCTV footage and statements were made available to the plaintiff that had not been furnished previously and had not been before the first inquest. Dr. Michael Farrell, consultant neuropathologist, gave evidence at the second inquest and commented on Dr. Jaber's report and on the CCTV footage and statements. The plaintiff avers in her affidavit that *"[a]t least one of the witnesses admitted that our brother had been pushed forcibly out of the premises and fell and hit his head as a result"* (at para. 10). The jury found the deceased died *"due to a) aspiration of gastric contents secondary to a fall resulting in a loss of consciousness b) which precipitated an acute cardiac inefficiency on which a verdict of misadventure is recorded."* The plaintiff avers at para. 15 of her affidavit that *"we did not know that our brother's death was attributable to the push and the fall until we received the verdict of the second inquest and that accordingly time for the purposes of Statute of Limitations does not run until after that date."*

6. The first defendant's solicitor responded by replying affidavit in which he refers to a copy of the plaintiff's PIAB Form A of 3 June 2014 and does not take issue with any other aspect of the plaintiff's affidavit. The solicitor for the second to eighth defendants also replied and averred that the plaintiff had failed to explain why an authorisation against the third to eighth defendants had not been obtained at the time the authorisation against the first and second defendants was obtained and said the third to eighth defendants were all readily identifiable from the time of the first inquest. A further replying affidavit was sworn by the plaintiff's solicitor in which he said he obtained reports from a consulting engineer after the photos and CCTV stills were made available to the plaintiff in 2018, who opined that the photos indicated at least two of the third to eighth defendants were involved in the incident but that they did not know which two it was.

7. The basis for the defendants' application to dismiss the proceedings as statue barred is that all elements of s. 2(1) of the Statue of Limitations (Amendment) Act 1991 were known to the plaintiff from as early as the day after the deceased died and certainly when the first PIAB authorisation was issued, in that she had a view at that time that the first and second defendants were responsible for the death of the deceased. The defendants dispute that there is any significant difference between the verdicts of the first and second inquest and, in any event, they rely on ss. 30 and 31 of the Coroner's Act 1962 which provides:-

> *"30.—Questions of civil or criminal liability shall not be considered or investigated at an inquest.*
>
> *31.—(1) Neither the verdict nor any rider to the verdict at an inquest [, nor any findings made at an inquest,] shall contain a censure or exoneration of any person.*
> *(2) Notwithstanding anything contained in subsection (1) of this section, [recommendations of a general character that are designed to prevent further fatalities or are considered necessary or desirable in the interests of public health or safety] may be appended to the verdict at any inquest."*

Those statutory provisions mean, according to the defendants, that the verdict of the second inquest is irrelevant in relation to liability in these proceedings. Counsel argues that any additional evidence made available to the plaintiff in 2018 went only to the strength of their evidence and not to the existence of their claim.

The Statute of Limitations and Date of Knowledge

8. The court is asked to assess the plaintiff's date of knowledge as of 2015 when the first authorisation was issued at a time when the plaintiff was within time to issue these proceedings. Clearly, the plaintiff knew at that time that there had been an injury that was significant. The question is whether she knew it was *"attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty"* as per s. 2(1)(c) of the 1991 Act. In effect, the question is whether she had knowledge of the actions of the defendants as now pleaded in the Personal Injuries Summons, which clearly reflects the verdict of the second inquest. The advice given to the plaintiff in 2015 by their solicitor and counsel is relevant in determining the state of the plaintiff's knowledge, having regard to s. 2(2)(b) and section 2(3)(a). It has been suggested that a solicitor could be an expert for certain purposes (*Henderson v. Temple Pier* [1998] 1 WLR. 1540). Where solicitor and counsel were advising on litigation, they must be considered as experts.

9. This application has been brought on affidavit and the court has not heard oral evidence and cross-examination, as many of the authorities cited by the defendants had. There is a dispute on many facts central to what may require to be determined at trial, including the plaintiff's date of knowledge before and after they received the additional evidence that came to light in 2018 and on which their solicitor consulted an expert engineer.

10. As confirmed by the Supreme Court in *Campion v. South Tipperary County Council* [2015] 1 IR 716, *"a unitary trial is the starting point"* (McKechnie J. at para. 22). The court also held that, where primary and secondary issues or facts are not agreed, a trial of a preliminary issue is not appropriate. This certainly presents as such a case. The necessity of cross-examination is raised by the plaintiff particularly in relation to the defendants' delay until 2018 in furnishing the CCTV footage and the plaintiff relies on s. 71 of the Statute of Limitations Act 1957 in that regard.

11. The defendants have not satisfied me, at this interlocutory stage, that the plaintiff's date of knowledge of all that is required by s. 2(1)(c) was in 2015. I take that view not by reference to the inquest verdicts, which as per s. 30 of the Coroner's Act do not consider questions on civil liability, but by reference to the evidence that the plaintiff did not have until 2018 including CCTV footage, their engineer's analysis of the footage, further statements and a medical assessment by Dr. Farrell who seems to have challenged the views of the Deputy State Pathologist on which the verdict of the first inquest was based. In those circumstances and having regard to the subjective nature of a plaintiff's knowledge of

attribution (as per *Fortune v. McLoughlin* [2004] 1 IR 526; *Gough v. Neary* [2003] 3 IR 92; *Naessens v. Jermyn* [2010] IEHC 102), the affidavit evidence before the court does not establish that the plaintiff had knowledge of the matters set out in s. 2(1) in 2015 such as enabled them to make the connection between the injury and the matters that are now alleged to have caused the injury.

12. I refuse the defendants' application to have the pleadings dismissed as statute barred at this stage in the proceedings.

Delay

13. The defendants must prove that there has been inordinate delay that is inexcusable. If they do so, the court must then consider whether the balance of justice favours dismissing the case or allowing it proceed.

14. There is a vast amount of case law on this issue but I have found the recent decent of the Court of Appeal in *Cave Projects Ltd v. Gilhooley & ors* [2022] IECA 245 to be particularly instructive, where Collins J. emphasised a number of points from the jurisprudence, the following of which have particular relevance to this case:-

(i) The burden of proof rests on the defendant.

(ii) An order dismissing a claim is a far reaching one.

(iii) There must be a causal connection between the inordinate and inexcusable delay and the matters relied on to establish that the balance of justice favours dismissal.

(iv) A defendant is also responsible for the timely progress of the litigation.

(v) Professional defendants do not enjoy any privileged status.

(vi) General prejudice may suffice but prejudice is not to be presumed.

(vii) The dismissal of a claim is an option of last resort for where permitting a claim to proceed would result in some real and tangible injustice to the defendant.

15. In allowing that claim to proceed, Collins J. had regard to a number of factors including the absence of evidence of (i) relevant witnesses being unavailable due to the plaintiff's delay; (ii) any steps taken by the defendants to identify and secure the attendance of witnesses at trial; (iii) lost documentary evidence. He also had regard to the defendants' contribution to the delay and placed particular weight on the fact that the proceedings had been listed for hearing which he described as *"a significant factor in assessing where the balance of justice lies"* (at para. 44).

16. The delay in issuing proceedings from the date of the deceased's death in June 2012 to the issuing of the Personal Injuries Summons in January 2021 is undoubtedly inordinate. Having regard to the evidence obtained by the plaintiff in 2018 and the second inquest in January and February 2019, the delay does appear to be excusable at least in part. The plaintiff's solicitors refer to other excuses around COVID-19 and delay in getting instructions. Those excuses are not the strongest. I proceed, therefore, to consider the balance of justice and the prejudice that the defendants claim they will suffer if the proceedings are allowed to proceed to trial.

17. The solicitor for the first named defendant averred, at para. 9 of his affidavit, that *"inevitably memories will have faded and the integrity of oral testimony undermined"*. The second to eighth defendants' solicitor's affidavit averred, in identical terms, at para. 11, to the prejudice that the defendants will suffer as *"inevitably memories will have faded and the integrity of oral testimony undermined."* Neither deponent refers to any inquiries that were with any of the defendants' intended witnesses to establish what the quality of their individual recollections and the integrity of their oral testimony might be. The plaintiff points to the statements made to the gardaí, the depositions taken by the coroner and the CCTV footage that will be available at the trial. In addition, it seems to the court that the matters at issue in the plaintiff's claim involve what must have been an unusual, and probably traumatic and memorable, event in the lives of those who were present when the deceased died. This court and the Court of Appeal has recognised that time can render memory more fragile. The defendants' deponents make that assumption about the memories of persons who witnessed the events the subject matter of these proceedings, without any reference to why they make that assumption other than the bare passage of time. Whilst such an assumption might be safely applied to a person's memory of relatively ordinary occurrences from many years ago, the same assumption cannot and should not be applied to a person's recollections of a highly unusual event, such as witnessing the death of a person outside a nightclub in the early hours of the morning.

18. The defendants' claims of prejudice are vague and devoid of any substantiation by reference to the individuals whose recollections are now doubted by the solicitors for the defendants. Even minor prejudice can suffice in determining the balance of justice in an application to dismiss on grounds of delay, but the defendants' concerns in relation to prejudice will remain a matter for the trial judge who will have the benefit of hearing the

direct and cross-examination of the witnesses. This plaintiff will suffer the greater injustice if the proceedings are dismissed for delay at this stage in the proceedings, than the defendants assert they will face in having to proceed to trial. I, therefore, find the balance of justice is in favour of allowing the case to proceed and I refuse the defendants' application to dismiss for delay.

Conclusion

19. I refuse the defendants' application to dismiss the proceedings as statute barred and for delay. The case should now proceed as expeditiously as is possible and I will consider any application for orders to facilitate this as either party wishes to make.

Indicative view on costs

20. My indicative view on cost is that, as the plaintiff has succeeded in defeating the defendants' application to dismiss the proceedings, that the plaintiff should, in accordance with s. 169 of the Legal Services Regulation Act 2015, be entitled to their costs of the motion, but I am also of the indicative view that a stay should be put on the execution of that costs order pending the final resolution of these proceedings. I will hear whatever the parties wish to say about costs when the matter is back in before me.

Counsel for the first defendant: Micheál Ó Scanaill SC, Aodhán Peelo BL

Counsel for the second to eighth defendants: Finbarr Fox SC, Grainne Larkin BL

Counsel for the plaintiff: David Kennedy SC, Daniel Boland BL