THE HIGH COURT

[2024] IEHC 563

[Record No. 2013/1209 P]

BETWEEN

EMMA GRAYDON (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND DEIRDRE DONOHOE

PLAINTIFF

AND

WESTWOOD CLUB LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Bolger delivered on the 27th day of September 2024

1. This is the defendant's application to dismiss the plaintiff's proceedings instituted by way of personal injury summons dated 6 February 2013 arising from an accident alleged to have occurred on 5 April 2009. The defendant relies on the jurisprudence in *O'Domhnaill v. Merrick* [1984] IR 151 and *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459. The plaintiff says that the *Primor* jurisprudence does not apply to an infant. The parties agree that the *O'Domhnaill* jurisprudence involves a higher standard of prejudice.

2. I am satisfied that there has been inordinate delay in the progression of these proceedings at a level as required by the *O'Domhnaill* jurisprudence and I dismiss the proceedings for the reasons set out below.

The progress of the proceedings

3. The progress of these proceedings and the information that has been furnished on behalf of the plaintiff to the defendant at various stages, form an important basis for a court's decision and, therefore, requires to be set out in some detail.

4. The plaintiff attended at the defendant's play premises in Clontarf, Dublin on 5 April 2009, aged eighteen months, in the company of her mother, her two siblings and her aunt. It is claimed that she slipped and fell off an object (the exact nature of which is important

and addressed further below) while at a water fountain and sustained a broken elbow. She was being supervised by her aunt at the time as her mother had gone to the bathroom.

5. In December 2010, the plaintiff's solicitor wrote to the defendant. Further correspondence followed between the parties and their solicitors on 20 January 2011 and 3 February 2011. In each letter, the plaintiff's solicitor said the accident occurred on 1 April 2009 but none of the letters gave any details whatsoever about how or where the accident occurred. The first time any such detail was provided was in the plaintiff's PIAB application of 29 March 2012, although it, like the correspondence, did not identify the location of the accident. I do not make much of the absence of an identified *locus* as it seems to be common case between the parties that the plaintiff did attend at the defendant's premises in Clontarf on 5 April 2009 and that both parties approached the proceedings on that basis from the outset, albeit that the personal injuries summons incorrectly identifies the *locus* of the accident as the defendant's premises at Leopardstown. However, the explanation of how the accident occurred and how this has altered over the years is very relevant to my decision.

6. The PIAB form said the plaintiff slipped on a wet *"step-stool"* while getting water from the water fountain. The personal injury summons issued on 6 February 2013 contained a similar description of the accident, i.e., that the plaintiff *"slipped on excess water on a footstool at the water fountain"*.

7. In October 2013, the plaintiff's solicitor sought to serve the personal injury summons on the solicitors with whom they had been corresponding on behalf of the defendant, but those solicitors declined to accept service as they had no instructions to do so. They had not entered an appearance and were, therefore, entitled to refuse to accept service. The personal injury summons was not served on the defendant until 20 January 2015, even though it could have been served on them at any time since it was issued almost two years previously.

8. The defendant's solicitors entered an appearance on 25 January 2015. Particulars were raised by the defendant on 16 April 2018 and replied to promptly by the plaintiff's solicitors on 18 July 2018. Thereafter, there was no further engagement between the parties until the plaintiff wrote a warning letter seeking the defence on 21 January 2019. A defence was filed shortly afterwards on 24 January 2019 and received by the plaintiff's solicitors on 31 January 2019. Nothing further occurred in terms of engagement between the parties until December 2022 when the plaintiff's solicitor sought inspection facilities, to which the defendant's solicitor explained, in response, that the entire area had been renovated and

the water fountain, at which the plaintiff said the accident had happened, no longer existed and that an engineer's inspection was not possible.

9. The defendant issued this motion on 14 February 2023 and grounded it on an affidavit sworn by their solicitor in which the following prejudice was averred to:-

(1) No contemporaneous investigation took place at the accident because it had not been reported and there was no accident report form in existence.

(2) The area in which the accident was alleged to have occurred had been completely renovated in around 2019/2020 and the water fountain no longer exists.

10. In relation to reporting the accident, the plaintiff's mother and next friend has always maintained that she did report it to an unidentified male member of staff at the time. However, an incorrect date of the accident was identified to the defendant by the plaintiff's solicitors at all times up until the PIAB form. The first time the defendant could have investigated the existence of a complaint was when they were given the correct date of the accident in that PIAB form almost three years post the accident. It is clear that the defendant has suffered prejudice in not having any records relating to any such complaints.

11. In relation to renovating the premises, the plaintiff's solicitor says in his replying affidavit that the defendant could and should have taken photographs before the renovations. Whilst that ostensibly appears to be a sensible suggestion, in reality it would not have assisted either of the parties because the plaintiff's engineer's report, exhibited in the plaintiff's solicitor's third affidavit, gave an entirely different and new version of the accident. In that report it was claimed, for the first time, that the plaintiff's mother gave an account of the accident involving the plaintiff having slipped on a "*foam style cube"* that she was using to access the water fountain. Photos were set out in the engineer's report of similar objects commonly found in children's soft play areas. The plaintiff's mother also claimed that she saw other small children using similar objects to reach up to the water fountain. The only account from the plaintiff's aunt, who had claimed to have witnessed the accident, given via the plaintiff's mother, was that the aunt had told the plaintiff's mother that the plaintiff *"had slipped on a wet cube at the fountain"*. The plaintiff's mother also advised the engineer that the fountain may have been "*approximately 1 metre high and that at the time of the accident, [the plaintiff] was between 500mm and 750mm in height"* and

that the plaintiff *"would not have reached the fountain without standing on something".* From that account, the engineer opined that:-

> *"…the use of a soft play shape was not suitable for a young child to stand on to access a water fountain. A safer alternative would have been to use a wall mounted water fountain unit mounted at low level to accommodate smaller children."*

12. Thus, even if the defendant had taken photographs before carrying out the renovations on the area in 2019/2020 (which renovations are not disputed by the plaintiff), the photographs would not have included the objects from which it is now claimed that the plaintiff slipped or the height of the water fountain in circumstances where the case made to the defendant at all times up to the plaintiff's solicitor's replying affidavit filed in March 2023, was limited to a claim that the plaintiff had *"slipped on excess water on a footstool at the water fountain"* (as per the personal injury summons).

Delay

13. There has been a delay of ten years in progressing these proceedings from when the personal injury summons was issued on 6 February 2013 to 23 February 2023 when this motion was issued. I make no criticism of any pre-commencement delay as the plaintiff was, and still is, an infant. Neither do I criticise the plaintiff for any delay as occurred in progressing the proceedings for which she cannot be blamed. However, I do find that this delay has led to a real prejudice for the defendant, a prejudice exacerbated by the recent and dramatic change in the description of the plaintiff's accident from that contained in the PIAB form of 29 March 2012 and the personal injury summons of 6 February 2013. The defendant was informed, via an engineer's report exhibited to the third affidavit to this motion of 23 November 2023, for the first time, some 14 years after the accident is alleged to have occurred, that the eighteen month old plaintiff *"slipped on a wet cube at the fountain"* and that the plaintiff *"would not have reached a fountain without standing on something"* (at p. 19 of the engineer's report). The defendant has no record of the accident, or any complaints made at the time, having been given the actual date on which the accident is alleged to have occurred for the first time in the PIAB form of 29 March 2012, some three years afterwards and having been previously given an incorrect date in a number of letters from the plaintiff's solicitors. The defendant's solicitor has averred that *"[n]o meaningful or useful inspection is possible at this remove"* (at para. 17 of the grounding affidavit). That

seems to be a reasonable conclusion for them to draw. I cannot accept the plaintiff's submission that the alteration in the description of the accident is not significant.

14. Neither am I satisfied that the proceedings are currently ready to be set down, as the plaintiff had asserted, in the light of that altered description as set out by the engineer and the necessity to seek to amend the personal injury summons to plead the correct *locus* of the accident. The further anticipated delay in getting the matter to trial can be taken into account by this court in the exercise of its discretion.

15. Given the circumstances of the renovations of 2019/2020, the delay in advising the defendant of how the accident occurred, the changes in the account of how the accident occurred and the further delay that will be incurred in seeking to amend the personal injury summons to insert the correct *locus* of the action, I find the prejudice caused to the defendant by the delay in progressing the proceedings to be significant and one that renders a fair trial at this juncture, and given the evidence now available, to be impossible. I am satisfied that the *O'Domhnaill* test of *"a real risk of an unfair trial or an unjust result"* (as per Irvine J. in *Cassidy v. The Provincialate* [2015] IECA 74) is satisfied.

16. I, therefore, dismiss the proceedings. I will put the matter in for 10.30am on 10 October 2024 for final orders.

Counsel for the plaintiff: Niall Mooney BL

Counsel for the defendant: Barbara McGrath BL