



THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 111

Record No. 2020/121

**The President
Binchy J.
Pilkington J.**

BETWEEN/

DARREN FITZPATRICK

PLAINTIFF/RESPONDENT

- AND -

**THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, THE
COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE
ATTORNEY GENERAL**

DEFENDANTS/APPELLANTS

JUDGMENT of the Court delivered on the 15th day of April 2021 by Mr. Justice Binchy

1. This is an appeal from an order of Cross J. dated 16th March 2020, whereby he dismissed the application of the defendants/appellants to strike out the proceedings brought by the plaintiff/respondent on grounds of inordinate and inexcusable delay.

2. In these proceedings the respondent claims damages against the appellants for assault, battery, false imprisonment and breach of the respondent's constitutional rights. The incident the subject of the proceedings is alleged to have occurred on 15th January 2011, and

proceedings were issued by plenary summons dated 10th August 2012. While it is not stated in the papers before the Court when this was served, the statement of claim is stated on its face to have been delivered the following day, 11th August 2012, so it is reasonable to assume that that is the date of service of the plenary summons also. An appearance to the proceedings was entered on behalf of the appellants on 28th March 2013. A defence was delivered on behalf of the appellants on 18th July 2013. A notice for particulars dated 26th September 2013 was served and replies thereto were delivered on 13th November 2013.

3. The defence is a full defence denying each and every allegation of wrongdoing. However, it is accepted that the respondent was arrested by a member of an Garda Síochána and that he was brought to Finglas Garda station where he was detained, placed in a cell and subsequently searched. It is pleaded that the respondent was released after approximately 40 minutes, which in this respect is broadly consistent with the statement of claim in which it is stated at paragraph 4 that the respondent was “put in a cell for about half an hour and later released.”

4. At paragraph 13 of the defence it is pleaded as follows:

“It is further denied that eight members of An Garda Síochána were involved in his arrest, or that he was pushed to the ground in the course of his arrest. It is expressly pleaded that the Plaintiff, in the course of resisting his arrest caused the arresting member and himself to fall over a low garden wall. The defendants, their servants and/or agents were unaware and were not made aware of the fact that the Plaintiff had been injured, which is denied. It is denied that the Plaintiff made any complaint whatsoever with regard to same.”

5. Following delivery of the defence, there were no further developments in the proceedings until the respondent, through his solicitors, served a notice of intention to proceed on 7th June 2018. Thereafter, the appellants, on 20th July 2018, caused the issue of

a notice of motion seeking to have the respondent's claim struck out pursuant to O.122, r.11 of the Rules of the Superior Courts, for want of prosecution. In the alternative, the appellants sought an order pursuant to the inherent jurisdiction of the Court, striking out the respondent's claim on the basis of inordinate and inexcusable delay.

6. On 19th September 2018 the respondent caused the issue of a motion for discovery, seeking discovery of his custody record for 15th January 2011 and the statements made in relation to his arrest and detention on that date. Both motions came on for hearing before Cross J. on 16th March 2020. While the respondent sought to have the motion for discovery dealt with first, Cross J. acquiesced to the submissions of the appellants that the motion to dismiss should be dealt with first, since it issued first in time.

7. At the hearing before Cross J., the respondent accepted that there had been an inordinate delay in the prosecution of the proceedings. In his affidavit resisting the application however, he provided an excuse, which was that at the time of the incident he was in a relationship with a woman who was an independent witness to the incident, but that relationship broke down soon afterwards, and for some considerable time thereafter he had no contact at all with that person. He considered that he had no chance of succeeding with his case without the evidence that she would be able to give. However, he is now on speaking terms again with that person and she has confirmed that she will give evidence at the trial. The respondent also avers that he has been unemployed and did not have sufficient means to fund the commencement of the trial and he further avers that an unspecified portion of the delay was caused by his legal team.

8. The respondent's affidavit was quite scant. He provides no details at all as regards the time the relationship referred to broke down, nor when contact resumed again. He did not claim that he was advised that he could not succeed with his case without the evidence of

the independent witness, or that he had even discussed the matter with his solicitors. Nor did he provide any supporting affidavit from that witness.

9. The affidavit sworn on behalf of the appellants grounding the motion is also light on detail. It really does no more than recite the progress of the pleadings and request the court for an order in the terms of the notice of motion. There is no reference to any prejudice likely to be suffered by the appellants in defending the proceedings. It is not claimed that any of the defence witnesses are not available. It is not claimed that no statements were made by any of the personnel involved in the arrest and detention of the respondent, or that there are no records of the events giving rise to these proceedings.

Decision of the High Court

10. Cross J., in an *ex-tempore* decision, dealt first with the issue of delay, which, as I have said above, the respondent conceded was inordinate. Cross J. considered that the delay was also inexcusable. He held that any delay caused by legal advisers cannot be a good reason for failing to advance proceedings. Nor did he consider that the fact that the respondent thought he could not get on with his case without the independent witness could be an excuse. And finally, while noting the respondent's claim to be of insufficient means, he also noted the frequent practice in cases such as these whereby legal advisers deal with them on a "no foal, no fee" basis. For these reasons he considered the delay to be inexcusable.

11. Cross J. then went on to consider the third limb of the test in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, i.e. he considered where the balance of justice lay. Noting that he had been referred to a number of relevant authorities, he considered them to be of limited assistance to what he described as the "fundamental" matter which he was required to decide. He noted that the appellants had not argued that they were likely to suffer any specific prejudice if the trial proceeds, but rather relied upon general prejudice which is to

be inferred from the passage of time, most particularly in a case such as this which will be tried almost exclusively on the basis of oral testimony.

12. Cross J. noted that the respondent had not made out any case that the appellants had acquiesced in the delay in not bringing forward the motion sooner. He considered that the appellants were justified in waiting as long as they did in bringing the application. However, it was also his opinion that the appellants had failed to establish that the balance of justice requires the dismissal of the proceedings. He was of the opinion that the appellants would almost certainly have taken statements from all of the witnesses, and that if they had not done so they should have done so (after the issue of proceedings, at latest). He considered that, if anything, the delay is likely to harm the respondent's case, not least because the respondent's witness is less likely to have made a contemporaneous statement. He therefore considered that the appellants will not be prejudiced if the case proceeds and he refused the reliefs sought. He then went on to consider the respondent's motion for discovery, and made an order for discovery, subject to a stay, the precise duration of which is the subject of some disagreement between the parties, but which is now of academic interest, for reasons that will become apparent.

Arguments on Appeal

Inordinate and Inexcusable Delay

13. At the hearing of this appeal, counsel for the respondent argued that the delay on the part of the respondent, while inordinate, was "not inexcusable". In response to a specific question from the Court, however, he did not go so far as to suggest that the delay was excusable. He argued simply that the breakdown in the respondent's relationship with the only person who would give evidence on his behalf, coupled with his weak financial situation constituted "unpredictable hazards of life" that afflict the course of litigation, as

referred to by Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 IR 510 (at p.518).

14. Counsel did not press this argument very strongly, and I think rightly so. I consider that the trial judge was correct in his determination that the delay on the part of the respondent has been inexcusable and that none of the excuses tendered by the respondent, taken individually or together are adequate to excuse the delay. Moreover, even if they were, the level of detail provided by the respondent in relation to each of these excuses is wholly inadequate to enable any proper evaluation of them, and goes no further than mere assertion.

15. It is very unlikely that the unavailability of a witness who could be subpoenaed to give evidence, could excuse the respondent's failure to prosecute his claim. Moreover, the respondent appears to have formed his own conclusions as to the implications for his case arising from the unavailability of this witness, or at least he does not make any averments that he discussed the matter with his solicitors and was acting on advice. As is submitted by the appellants, the respondent made a unilateral decision not to progress the proceedings.

16. It is well settled that delay on the part of a litigant's legal advisers is no defence to a motion to dismiss proceedings on grounds of delay, and nothing more needs to be said in relation to that excuse. In relation to the third excuse advanced i.e. lack of funds, the respondent provided no evidence as to his means, his arrangements with his solicitors as regards fees payable by him or requests for payment from his solicitors of fees due or as would be required in order to progress the litigation. Cross J. took the view, not unreasonably, that in many cases of this kind, fee arrangements are structured, in old parlance, on a "no foal, no fee" basis, which arrangements are nowadays no doubt tailored appropriately to meet the requirements of the Legal Services Regulation Act 2015. For all these reasons, the trial judge was, in my opinion, correct in his conclusion that the delay in progressing the proceedings was both inordinate and inexcusable.

Balance of Justice

17. Counsel for the appellants submits that the trial judge failed to assess properly the prejudice faced by the appellants as a result of the delay on the part of the respondent in prosecuting these proceedings, being a delay of over four years, resulting in the passage of a total of ten years since the date of the incident the subject matter of the proceedings. He argues that the respondent took a unilateral decision not to prosecute his case, and that that puts him in an even weaker situation than most other cases where the issue of delay arises by reason of passive inactivity. In effect, counsel for the appellants argues that the reason for the delay in this case is relevant, not just to the question of whether or not the delay is excusable, but also in the consideration of the balance of justice. It is submitted that it is fundamentally wrong to ask a jury to make sense of and adjudicate upon conflicting testimony in relation to an alleged assault that took place on 15th January 2011, in circumstances where the respondent deliberately decided not to proceed to trial until after the appellants issued their motion to dismiss on 20th July 2018.

18. The appellants further argue that, having regard to the delay and the fact that it is now more than ten years since the date of the alleged incident, there must be a strong inference of potential prejudice to the appellants. The appellants rely on the decision of the High Court in *Carroll Shipping Limited v. Matthews Mulcahy & Sutherland Limited* [1996] IEHC 46 in which the court held:

“Where in any trial the issues between the parties which fall to be decided by the Court can clearly be established by documentary evidence only, it may well be that delay, however inordinate or inexcusable, will not in fact prevent the holding of a fair and just trial. However, where matters are at issue which are not, or are not fully, covered by documentary evidence, there is a greater likelihood of prejudice resulting from delay.”

19. As to the kind of period which a court might consider fatal to the respondent's case, counsel for the appellants referred to the decision of Clarke J. (as he then was) in *Rogers v. Michelin Tyre Plc and Michelin Pensions Trust (No.2) Limited* [2005] IEHC 294. In his judgment, Clarke J. referred with approval to observations made by Finlay Geoghegan J. in *Manning v. Benson and Hedges Limited* [2005] 1 ILRM 190 that; "delays of four to five years as a matter of probability will reduce the potential of such persons to make meaningful assistance or act as a witness." The appellants rely on the following passage from the decision of Clarke J. as regards the issue of general prejudice:

"A defendant, in bringing an application such as the one now before the court, will be faced with a dilemma. The defendant is entitled to rely on what might reasonably be called general prejudice, that is to say the prejudice which could reasonably be expected to occur in any case of the type concerned and having regard to the delay involved. A defendant will also be entitled, if it wishes, to put before the court any special or additional prejudice. If it does so, it will necessarily have to draw the court's attention by means of evidence to a specific or additional prejudice. ... However it would also be naïve to ignore the fact that by so doing the defendant will draw the plaintiff's attention to the difficulty which the defendant would incur in properly defending the proceedings in the event that their application for a dismiss is unsuccessful. In those circumstances it seems to me that it is perfectly appropriate for a defendant (if it wishes) to rely simply on general prejudice."

20. In short, it is the contention of the appellants that through his unilateral actions, the respondent made a deliberate decision that had the consequence of causing a delay in excess of four years in the progress of these proceedings, and that it may reasonably be assumed that this delay will prejudice the appellants in the conduct of their defence, owing to the passage of time and the impact of that on the recall of the appellants' witnesses. This, it is

submitted, is a serious prejudice to the appellants, of a kind that makes it unfair to allow the action to proceed and tilts the balance of justice in favour of striking out the proceedings.

21. At this juncture, it is opportune to mention again the respondent's motion for discovery. There was some controversy as to whether or not the order of Cross J. directing discovery had been stayed, but this controversy was, to some extent, defused by the appellants making discovery just prior to the hearing of this appeal. However, neither the affidavit of discovery nor the documents scheduled thereto were available to the Court for the hearing of this appeal. So far as the Court understood the position at the time of the appeal hearing, an unsworn affidavit of discovery and the documents to be discovered were delivered to the solicitors for the respondent on the day of or the day before the hearing of the appeal. Counsel for the respondent informed the Court that this documentation demonstrates that the respondent's arrest by the Gardaí on the occasion of the alleged assault occurred by reason of mistaken identity, and the documentation indicates that the respondent has a good case. Counsel for the appellants argued that it is no function of the Court on an application such as this to engage in any assessment of the strengths or weaknesses of the respondent's case. The question for the Court remains the same where there has been a finding of inordinate and inexcusable delay – is it unfair to the appellants to allow the action to proceed against them in circumstances where there has been an inexcusable and inordinate delay by reason of a unilateral decision taken by the respondent?

22. Counsel for the respondent submitted that there is no prejudice occasioned to the appellants by reason of the delay in circumstances where the documents discovered established that there are seven detailed statements, a custody record and a command and control printout relating to the incident complained of in these proceedings. These provide a contemporaneous narrative of the incident, and it is not suggested that any of the appellants' witnesses will not be available for trial. From the documentation provided, it

appears that the appellants may have eight witnesses. In response to a question from the Court as to whether the delay puts justice on the hazard, counsel for the respondent said that there are a number of tools that will assist the jury in arriving at a conclusion, including the detailed contemporaneous statements and oral testimony of the appellants' witnesses.

23. Counsel for the respondent further submitted that the trial judge applied the correct test and therefore that this Court should accord the decision of the trial judge due deference and should be slow to intervene even if this Court is as well placed as the trial judge to arrive at a conclusion on the application. It is clear that the trial judge applied the correct principles and asked himself the right questions and refused the application on the basis that he felt that it was almost certain that the appellants would have available to them contemporaneous statements and that if anything, the respondent's case would be weakened by reason of the delay in circumstances where the respondent was not likely to have the benefit of contemporaneous statements. Subsequent events i.e. the making of discovery have proven the trial judge correct. In short, the trial judge applied the correct test and correctly concluded that the appellants are not prejudiced by reason of the delay and this Court should not interfere with the conclusions of the trial judge.

24. Since the respondent was placing reliance on the documents discovered by the appellants, and since these documents were not available to the Court for the hearing of the appeal, the Court directed that the affidavit of discovery and documents discovered should be made available to the Court after the hearing, and gave the parties liberty to make such supplementary written submissions as they considered appropriate in relation thereto. The Court subsequently received the affidavit of discovery sworn on behalf of the appellants by Inspector Bronagh O'Reilly on 20th November 2020, together with the documentation referred to therein. Nine documents were discovered, seven of which were statements made by various members of an Garda Síochána, addressing the arrest and detention of the

respondent in custody, the other two documents being the custody record and the Garda command and control printout. The statements were all made in the first quarter of 2013 and so were obviously generated in response to these proceedings. While it is unnecessary for the Court to conduct any detailed analysis of all of the statements, it is helpful to quote from the statement of the Garda who initiated the arrest, i.e. Garda Gary Brennan. Having set out the background that Gardaí were on the lookout for a suspect who had carried out an armed robbery a short while previously, Garda Brennan goes on to say how he observed a person (the respondent) matching the description of that suspect, and states:

“At the time I believed this male was in possession of a handgun used in the robbery. I identified myself as a member of an Garda Síochána and on approaching him I attempted to restrain his arms. The male resisted and during the struggle that took place the two of us fell over a low garden wall to the ground. Detective Garda Eamon Ryan came to my assistance. The suspect, identified as Darren Fitzpatrick was handcuffed and arrested for the purpose of a search and subsequently conveyed to Finglas Garda station. Mr Fitzpatrick was fully searched at the station by Garda Ronan O’Reilly and then placed in a cell. No saliva swabs were taken from him at any time while he was detained at Finglas Garda station. I then made a number of enquiries and as a result ruled out Mr Fitzpatrick as a suspect for the robbery. Mr Fitzpatrick was released immediately. At the time of his release Mr Fitzpatrick made no complaint. At the time of his arrest he did not appear to suffer any injury and during the course of his detention he made no request to be attended by Dr which had been offered to him when the custody record was being filled out.”

Garda Brennan then goes on to address a number of matters arising out of the statement of claim, which he denies occurred. For example he denies that eight members of the Gardaí jumped from a patrol car and pushed the respondent to the ground in the course of the arrest.

He denies the respondent was strip-searched, as alleged or that saliva swabs were taken from him, as alleged. He denies the respondent was subjected to any degree of serious assault or battery. It is clear from a review of the pleadings that these will be the main issues of controversy at the trial of the action, and the appellants have the benefit of this and other statements addressing these issues.

25. In their supplementary written submissions, the appellants in the first instance protest that the respondent insisted that the appellants should make discovery at all pending the determination of this appeal, in circumstances where the appellants maintain that Cross J. placed a stay on the order for discovery pending the same. There is clearly no need to enter into any consideration of this objection in circumstances where the appellants raised no issue regarding the accuracy of the perfected order for discovery until the hearing of this appeal, and instead chose to make discovery in the terms ordered by Cross J.

26. More substantively, the appellants submit that while the fact that the appellants have in their possession statements made by members of an Garda Síochána relating to the events giving rise to the proceedings bears out the supposition of the trial judge to this effect, the fact of there being such records does not sufficiently mitigate the consequences of the delay of the respondent and the prejudice caused to the appellants by that delay. The existence of these documents does not put the case in the same category of, for example, a commercial case the outcome of which turns primarily on the construction of written documents, such as was the case in *Carroll Shipping Limited v. Matthews Mulcahy & Sutherland Limited* [1996] IEHC 46. These proceedings will, for the most part, revolve around the oral testimony of the witnesses, and it is submitted that the dangers of prejudice arising from the delay are particularly acute in a case involving allegations of assault and false imprisonment. The documentation available to the appellants will be of limited assistance in their defence to the proceedings.

27. In his supplementary submissions, counsel for the respondent argues that the documents discovered lend support to the decision of the trial judge. The likelihood that the appellants would have such statements in their possession was central to his decision to dismiss the application.

28. As to the submission that these documents will be of limited assistance only to the appellants, and are not sufficient to offset the prejudice caused to the appellants by the delay, the respondent submits that, when read together, the documents provided give a detailed account of the entire incident from arrest through to the release of the respondent, all of which occurred in the space of approximately an hour. There are seven statements from six members of an Garda Síochána, four relating to the arrest of the respondent, and three relating to his time in custody, supplemented by the Garda custody record and Garda command and control printout. It is submitted that while the trial judge did not conclude that the statements could be a panacea to the prejudice caused by delay, rather they are a factor to be taken into account in weighing up where the balance of justice lies in the application. It is submitted on behalf of the respondent that if it had transpired that there were no Garda statements, or that such statements as there might be were of limited probative value, the appellants might have a strong argument that the trial judge erred in holding that the balance of justice lay in favour of dismissing the application. However, it is submitted that the documents vindicate the decision of the trial judge. It is submitted further that they demonstrate that the respondent has a strong case, and that he was the victim of a serious injustice in the course of which he sustained an injury.

Conclusion

29. It is not disputed that there has been an inordinate delay on the part of the respondent in prosecuting these proceedings. Nor was it seriously disputed that the delay is inexcusable. The delay was, as the appellants submit, the result of a unilateral decision taken by the

respondent, and is a delay of the order of four years. While the appellants do not contend that they will suffer any specific prejudice in the defence of the proceedings as a result of this delay, they claim that in proceedings such as these, which include allegations of assault and false imprisonment, and the outcome of which will be determined on the basis of the oral testimony of the witnesses, the appellants will inevitably suffer a general prejudice in their defence of the proceedings, such as to justify their dismissal, on the balance of justice.

30. The appellants further submit that, while the decision of the trial judge on an application such as this is one within his discretion, and with which this Court should not lightly interfere, nonetheless the Court has jurisdiction to do so and should do so in this case. The appellants rely in this regard upon the decision of Irvine J. (as she then was), when in this Court, in *Collins v. Minister for Justice, Equality and Law Reform and ors.* [2015] IECA 27 she stated, at para. 79:

“[T]herefore, we consider that the true position is that set out by MacMenamin J. in *Lismore Homes*, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.”

31. On the other hand, the respondent submits that any prejudice that the appellants might suffer by reason of the delay is mitigated sufficiently by the statements made by all of the members of an Garda Síochána involved in the arrest and detention of the respondent, together with the other Garda records in the possession of the appellants. The trial judge applied the correct test, and having done so, his conclusions are supported by the records of the appellants.

32. The appellants are correct in their submission that this is not a case which will be determined by reference to written records. That is not, however, the relevance of the written records that are available in these proceedings. Their relevance is that they will serve to refresh the memories of the members of an Garda Síochána who were involved in the events giving rise to these proceedings. The key events i.e. the arrest and detention of the respondent are admitted by the appellants in the defence filed on their behalf. That is a significant factor in the Court's consideration of the matter. Although there is a dispute of some significance as regards exactly what occurred, the events themselves are uncomplicated.

33. It is not in dispute that the trial judge applied the correct test and so really the only question to be addressed by this Court on this appeal is whether or not in doing so he came to a conclusion, as regards the balance of justice, that was so unreasonable, in the particular circumstances of the case, that it is likely to give rise to an injustice and should be set aside for that reason. In making his decision, the trial judge had regard to the likelihood - later proven to be correct - that the appellants would have contemporaneous statements and/other contemporaneous records that would assist them in the defence of the proceedings. This was a perfectly reasonable assumption. The Gardaí are required to maintain records relating to the arrest and detention of any person. While the witness statements of the various Gardaí involved were clearly prepared in response to these proceedings, nonetheless they were able to provide those statements, possibly with the assistance of their own notes, in early 2013.

34. While counsel for the appellants places great emphasis on the nature of these proceedings and the difficulty that witnesses will have in recalling the events surrounding an alleged assault so long after the event, it can hardly be doubted that in a case where the appellants have available to them the benefit of such statements and other information that the general prejudice that might otherwise be presumed to flow from such delay is greatly

mitigated. So those authorities relied upon by the appellants as regards the impact of delays of four to five years need to be considered in the light of the availability of such documentation. In such circumstances as these, the question the Court must ask itself in considering the balance of justice is where the greater injustice lies i.e. in the dismissal of an action in which some of the basic facts have been admitted in the pleadings (i.e. the arrest and detention of the respondent), or in permitting the continuation of the proceedings after such a long period of time, even though the appellants in the proceedings have available to them detailed statements and other information, and have admitted certain key facts in the pleadings (though to be very clear, no tort has been admitted). Put this way, I consider that it is clear that the greater injustice is likely to result from the dismissal of the proceedings, and that the trial judge was correct in the manner in which he exercised his discretion.

35. I might add that even if this Court had not had the benefit of the discovery made by the appellants, it is very likely that I would have reached the same conclusion. That said, however, it should not be presumed by reason of this decision that, in any case in which there is a likelihood that statements may be available, such statements will, in effect, always tilt the balance of justice test in favour of a delaying plaintiff. As I said above, the factual matrix surrounding these proceedings is uncomplicated and the fact that the arrest and detention of the respondent is admitted in the pleadings is of some considerable significance in the context of this application. It remains the case that in such applications, the court must conduct a rigorous assessment as to where the balance of justice lies notwithstanding the availability, or likely availability of statements of witnesses in the hands of the defendant relating to the events giving rise to the proceedings.

36. As the respondent has been entirely successful in the appeal, my provisional view is that he is entitled to his costs both in this Court and the High Court. However, I also consider it appropriate to place a stay on the execution of that order pending the determination of the

proceedings. If the appellants wish to contend for an alternative form of order, they will have liberty to apply to the Court of Appeal Office within fourteen days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the Court, the appellants may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

37. Since this judgment is being delivered electronically, Birmingham P. and Pilkington J. have indicated their agreement to the same.