THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 114

Record Number: 2017/553

High Court Record Number: 2009 8787P

Costello J.
Noonan J.
Collins J.

BETWEEN/

PAUL KENNY

PLAINTIFF/APPELLANT

-AND-

MOTOR NETWORK LIMITED

T/A JENNINGS TRUCK CENTRE

& J HARRIS ASSEMBLERS

DEFENDANTS/RESPONDENTS

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 25th day of February, 2020

1. This is an appeal brought by the appellant against the judgment and order of the High Court (Twomey J.) of the 7th November, 2017 whereby he dismissed the plaintiff's claim on the grounds of delay.

Facts

2. As appears from the pleadings herein, the plaintiff is a haulage contractor who resides at Navan, County Meath. On the 22nd September, 2005, the plaintiff purchased a new Hino 700 Series 8x4 cement mixer lorry from the first defendant who was a distributor of Hino vehicles. The second defendant/respondent is the importer, assembler and distributor of Hino vehicles in Ireland. The purchase price was €145,770. The appellant alleges that the cement mixer was used by him as a sub-contractor of Kilsaran Concrete with whom he had a contract since 2001 to draw loads of concrete presumably from the Kilsaran premises to construction sites and the like.

3. In his Statement of Claim, the plaintiff pleads that he had problems with the vehicle from the very outset and he details these. He itemises the dates when problems manifested themselves in his replies to particulars commencing on the 27th September, 2005, five days after he purchased it. Most of the difficulties thereafter appear to occur in 2006 although there were also problems in 2007 and 2008. The last straw, as it were, appears to have been when the truck was off the road for seven days in August 2008 when the

gearbox failed for the second time. It may have been in or around this point that the appellant decided to take action since he instructed a motor assessor, Mr. Frank Maguire, to examine and report on the vehicle in September 2008. Thereafter, the vehicle was repossessed on the 3rd March, 2009, presumably by a finance company that had underwritten the purchase.

4. A plenary summons was issued on the 30th September, 2009, about a year after Mr. Maguire examined the vehicle and six months after it was repossessed. This was followed expeditiously by a statement of claim on the 9th November, 2009. An appearance was entered by the second defendant/respondent only. It would appear that by the time the proceedings issued, the first defendant had gone out of business and was placed in liquidation on the 4th November, 2009, ultimately being dissolved on the 5th June, 2012.

5. Following the service of the notice for particulars, the respondent delivered its defence on the 3rd February, 2010 which in effect closed the pleadings and entitled the appellant to serve notice of trial. Replies to particulars were eventually delivered by the appellant's solicitors on the 9th February, 2012, approximately 26 months after they had been requested. The replies set out the various dates upon which the vehicle was off the road for repairs and what the nature of those repairs was. It also gives details of the claim for special damage. The first item claimed is a sum of €12,500 for loss of earnings due to problems with the vehicle. This is based on a simple calculation of average earnings of €625 per day multiplied by 20 days the vehicle was off the road.

6. This calculation was presumably. therefore, available at the time the statement of claim was served. Similarly, a sum of €420,000, by far the largest item claimed, is said to arise from loss of contract amounts/loss in value. The replies to particulars indicate that this figure was arrived at by taking the average net earnings arising from the vehicle at €60,000 per annum and multiplying it by the expected life of the vehicle being seven years. Here again, this calculation was presumably done at the time the statement of claim was served.

7. The only other items claimed are a sum of €3,000 for removal of solidified concrete and €9,465.00 for repairs to the vehicle. Small amounts are claimed for motor tax and insurance. Following service of the replies to particulars, nothing further of any kind occurred in the proceedings until the respondent issued the within motion on the 30th November, 2016 returnable to the 19th December, 2016. Ultimately the matter came on for hearing before the High Court (Twomey J.) on the 6th November, 2017 followed by an *ex tempore* judgment the next day dismissing the claim.

The Evidence before the High Court

8. Only two affidavits were before the High Court. Mr. John Burns, the financial controller of the respondent, swore an affidavit which was replied to by the appellant's solicitor, Mr. Fergus Minogue. Apart from rehearsing the facts as I have set them out, Mr. Burns avers that the respondent has suffered a significant prejudice in its ability to defend the proceedings first, by virtue of the delay in itself and second, as a result of a number of key personnel in the respondent's business having either retired or left since September,

2005. He also points to the fact that the second defendant's ability to seek indemnity from the first defendant has been compromised by the delays as a result of the first defendant going out of business.

9. In his replying affidavit, Mr. Minogue first deals with the over two year delay in delivering replies to particulars and says this is explained by the fact that the appellant got a job working as a driver on the continent between 2009 and 2012. This meant that he encountered difficulties with his accountant in terms of accurately calculating the losses that he suffered. He draws attention to the fact that the respondent did nothing to progress the case either and in particular, sent no warning letters or correspondence seeking for the matter to proceed before issuing the within motion. He says that the respondent was entitled to itself serve notice of trial but did not do so. He refers to the fact that there is no real prejudice to the respondent arising from the delay and the balance of justice favours allowing the case to proceed.

Judgment of the High Court

10. In brief summary, the trial judge set out the facts in outline as I have indicated above. He concluded that the delay of 26 months for delivering the particulars was both inordinate and inexcusable. He considered that the excuse offered by Mr. Minogue was not reasonable and there was no obvious reason why the particulars could not have been delivered within a period of months. He noted that no excuse of any kind was advanced for the delay of some four and a half years from the delivery of the particulars to the issuing of the respondent's motion.

11. He characterised the claim as a straightforward claim for defective products and placed particular reliance on the decision of this court in *Millerick v. Minister for Finance* [2016] IECA 206. As regards the suggestion that the defendant was culpable for itself delaying, he rejected that on the basis that there was no particular duty on the defendant to advance the case again in reliance on *Millerick*. He dismissed the claim.

12. Obviously as this appeal is not a rehearing on the merits, this court must accord significant deference to the findings of the trial judge while retaining its jurisdiction to correct errors of law by the High Court.

Discussion and Conclusion

13. The law on delay is by now so well settled that there is, I think, little to be gained from an extensive exposition of the legal principles which are firmly embedded in our jurisprudence. The *Primor* principles continue to be the touchstone in cases of this type. It is also by now well settled that where a plaintiff makes a late start, there is an additional onus on that plaintiff to progress the case without undue delay. Even though this vehicle was giving trouble from the outset and apparently suffered from a litany of problems, proceedings were not issued for some four years. It took a year from the expert inspection by Mr. Maguire for the proceedings to issue and notably, the vehicle had already been repossessed for six months when the summons issued. It seems thereafter that there was little realistic prospect of the respondent being in a position to have the vehicle examined by an equivalent expert to Mr. Maguire. Of course, while it must be

accepted that the respondent, as the party who carried out the repairs, would have a certain level of knowledge, it would obviously be important in defending the case to have the evidence of an impartial expert.

14. The timeline above shows that the proceedings did in fact progress with very considerable expedition so that from the issuing of the summons to the delivery of the defence, a little over only four months had passed. As I have said, it was at all times open to the appellant thereafter to serve notice of trial and bring the case on for hearing. There is no suggestion made for example that this could not be done without the benefit of pre-trial steps such as discovery. On the contrary, the appellant's solicitor indicated that a certificate of readiness was being sought from counsel at one stage, implying that there were no outstanding interlocutory steps.

15. I cannot see how the trial judge can be faulted in finding that the delay in delivering the replies to particulars was both inordinate and inexcusable. It is hardly credible to suggest that the appellant is required to consult with his accountant to provide particulars because when those particulars came, they consisted of little more than a calculation of the special damages which had already been made for the purposes of the statement of claim. The subsequent delay of four and a half years could not, by any stretch of the imagination, be described as anything other than inordinate and, as no excuse has been offered, inexcusable. The only issue therefore that remained to be determined was where the balance of justice lay.

16. I am not sure I entirely agree with the trial judge's analysis of the prejudice to the appellant arising from the delay. The fact that staff may have retired or resigned does not mean, nor did the respondent suggest, that those witnesses were unavailable to give evidence. Similarly, the fact that the first defendant had gone into liquidation was to my mind of doubtful materiality in circumstances where the high probability is that if the plaintiff had succeeded in his claim, the respondent, as the assembler and distributor of the vehicle, would have had to indemnify the first respondent for any defects therein, rather than the converse. However, as already noted, this court should be slow to interfere with those findings.

17. I do however, think that the trial judge was correct in rejecting the argument that there was any culpability on the part of the respondent for the delays that occurred. As pointed out by Irvine J. in *Millerick*, the onus is on a plaintiff in general to progress his or her case. Mere inaction, without more, on the part of a defendant does not amount to acquiescence in the delay. In particular, the fact that the defendant could have served notice of trial is neither here nor there. A defendant is, as *Millerick* points out, perfectly entitled to let sleeping dogs lie and await developments on the basis that they might never occur. There is no reason why a defendant should seek to precipitate incurring the very substantial costs of bringing a claim to trial in circumstances where he or she is perfectly entitled to take an expectant approach as to whether the plaintiff will in fact do so.

18. This is not a case where the respondent lulled the appellant into a false sense of security or sat on its hands while allowing the appellant to incur significant cost in the belief that the defendant was not complaining about the delay. As Irvine J. said (at para. 36): -

> "A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay his silence or inactivity is not material."

19. It is axiomatic that delay is prejudicial in litigation of any kind that is heard on oral evidence. Even if the trial judge had refused the respondent's application and directed the matter proceed to trial, it would have taken more than likely a further year or so before a trial could be held towards the end of 2018, then 13 years after the purchase of the vehicle. Delays of very considerably less than this have been held in many cases to amount to prejudice sufficient to warrant the dismissal of proceedings, even in the absence of any other factor. Prejudice will be presumed where such delays have occurred even absent any specific identifiable prejudice. Moderate and even minimal prejudice have been held sufficient to tip the balance of justice in favour of dismissal.

20. This is not a case where the determination of the issues can be largely made by reference to documentary evidence thereby reducing the potential for injustice arising from frailty of recollection. The determination of liability and quantum issues in this case will in large measure be dependant on the oral evidence of the parties' witnesses as to events now some 15 years in the distant past. I cannot see how that can be anything other than prejudicial to the respondent and as I have noted, even moderate prejudice such as this is sufficient to tip the balance in favour of the respondent.

21. I should add that delays of the magnitude that occurred here cannot, on any view, be reconciled with the State's obligations under the ECHR and in particular Article 6 thereof.

22. In all the circumstances therefore, I am satisfied that the determination of the trial judge that the balance of justice lay in favour of dismissal cannot be impugned and I would accordingly dismiss this appeal.

23. [Costello J.]: I agree with the judgment delivered by Noonan J.

24. [Collins J.]: I agree with the judgment delivered by Noonan J.