Neutral Citation No. [2006] NIQB 55 | *Ref:* **DEEC5635**

Judgment: approved by the Court for handing down | *Delivered:* **06/09/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ELVITT JOHN WELSH

Plaintiff;

and

MINISTRY OF DEFENCE

Defendant.

DEENY J

[1] This is an appeal by the plaintiff from an order of Master Wilson QC of June 2006 dismissing the plaintiff's action for want of prosecution. The application was brought under Order 3 rule 6.2, Order 34 rule 2 and the inherent jurisdiction of the court.

[2] As appears from the affidavit of Mrs Mary O'Kane, Solicitor, of the Crown Solicitors Office the plaintiff's claim arose out of an accident on 6 June 1997, some 9 years ago. This took place while he was a serving soldier in the course of an army exercise in Canada. He alleges that he was required to jump out of a helicopter approximately 15 feet above the ground as a result of which he broke his leg.

[3] Mr Philip Aldworth who appeared for the defendant outlined the delay in the matter which he contended, I find rightly, to be inordinate. The writ of summons was not issued until 26 May 2000. The House of Lords has ruled in Donavan v Gwentoys Ltd [1990] 1 All ER 1018 that in considering limitation and the balance of prejudice the court may take into account the whole period of delay between the date of the accident and the date of the hearing. I do so here. The statement of claim was served with reasonable expedition on 8 November 2000 and was responded to by the defence on 14 March 2001. However the defendant's detailed notice for particulars of the same date was not replied to for a full 2½ years, namely on 16 September 2003. There has been no step in the proceedings since that date ie a period of more than 2 years.

[4] The defendant's solicitor has been scrupulous in writing to the plaintiff's solicitors seeking some progress in the action. The defendants themselves have furnished discovery on two occasions since September 2003 but that does not constitute a step. The plaintiff's solicitor wrote in reply to the last of those letters on 10 August 2005 asking for a further indulgence of one month because he had difficulty in getting a response from his counsel. That was not Mr O'Kane who appeared before me. However nothing in fact did happen and this application was made on 3 May 2006. As I say I find the delay inordinate. The explanation for the delay appears clearly to be a failure on the part of counsel to respond with a reluctance on the part of the solicitor to instruct other counsel. This explains the delay but it does not in my view excuse it.

[5] The third of the three principles to be applied in these cases was set out in Allen v Sir Alfred McAlpine and Sons [1960] 1 AER 543 per Salmon LJ. This was that the defendants would be likely to be seriously prejudiced by the delay which had occurred. In support of that Mrs O'Kane in her affidavit and Mr Aldworth in his submissions, drew attention to three matters. Firstly it was likely that the recollection of any witnesses to the accident would be compromised by the passage of time. In support of that he said that no statements had been taken from persons at the time and that the only contemporaneous document was a form dealing with the injury which the plaintiff had received. The plaintiff's delay in issuing a writ of summons would be relevant here. Plaintiff's counsel says that this was a memorable event and not a complex factual scenario. There is something in that but against it one has to consider what the issues are likely to be at any hearing. Did he in fact jump from 15 feet or was it a much lower height which might be acceptable? Was it his fault or the pilot's fault that he jumped onto to the hard ground rather than into a river? Did he jump sooner than it was intended he should? It is likely that persons would have great difficulty in commenting on these matters after a gap of 9 years when contemporary statements had not been taken from them.

[6] The defendant also points out that at least some of the potential witnesses have left the army and it may not be possible to contact them. Mr Aldworth pointed out that the officer in charge at the time was a Major Tim Collins who has certainly left the army. While no doubt that gentlemen could be traced and would seek to be of assistance it is a pointer to the fact that after 9 years a number of other military personnel are likely to have left the army also and be much harder to trace. Furthermore they may well all have had eventful lives since then which would not assist in their recollecting this particular incident in 1997.

[7] Thirdly Mr Aldworth points out that the accident happened in Canada which would add to the defendant's difficulties and, therefore, prejudice.

[8] While plaintiff's counsel is able to point to a number of names of witnesses having been given from army records I have to accept the contention that it is likely that a number of those are not available and the other contentions made by Mr Aldworth in this regard. Mrs O'Kane placed heavy reliance on the judgment of Coghlin J in Pension v Bogue & McNulty [2003] NIQB 69 but it seems to me that the decision, with which I respectfully agree, is on very different facts from this case. There were already two actions in existence and the plaintiff, who was not at fault would have had to resort to yet another set of legal advisers if the judge had granted the application. Furthermore it would appear that the original road traffic accident there, which had happened in Northern Ireland, did not really give rise to any major factual dispute. The driver was clearly at fault and indeed was convicted of careless driving. His first solicitor was also at fault in failing to notify the Motor Insurers Bureau of the action. There was a police report and a prosecution providing, as Coghlin J said "contemporary documents available to refresh the memories of any of these witnesses …"

[9] I have considered the relevant authorities in this case including Houston v James P Corry & Co Ltd, McGonigal J; and Hughes v Hughes [1990] NI 295. I consider that the plaintiff, if I uphold the decision of Master Wilson, will not be left without a remedy. The combination of his instructions with whatever discovery has been made available by the Ministry of Defence is likely to put the parties there in approximately the same position for properly compensating the plaintiff as he would be if he were permitted to resume his action against the Ministry of Defence. As has been said many times the rules are there to be obeyed. Although neither counsel referred to the European Convention on Human Rights one of the parties here, the defendant, has through no fault of its own failed to obtain a trial within a reasonable time. The plaintiff's legal advisers must bear the responsibility for that, subject of course to any part that the plaintiff may have played in that delay. However that is something that will be known to the plaintiff and his present legal advisers and can be taken into account in the dealings between them that will now occur. While of course it will normally be preferable that the party that was at fault and caused loss or damage to the plaintiff should pay the damages to which the plaintiff is entitled, in this case it seems to me that there has been inordinate delay for which there is no excuse which has seriously prejudiced the defendants defence of the action. I therefore refuse the plaintiff's appeal and affirm the order of Master Wilson.