Neutral Citation no. [2006] NIQB 103 | *Ref:* **HIGF5572**

Judgment: approved by the Court for handing down | *Delivered:* **16/6/2006**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

JANINE CORNELIA FLYNN

Plaintiff/Appellant;

-and-

THE DEPARTMENT OF ENVIRONMENT FOR NORTHERN IRELAND
WHITEMOUNTAIN (SURFACING) LIMITED AND
D WALKER T/A D & S CONTRACTS

Defendants/Appellants;

-and-

WHITEMOUTAIN (SURFACING) LIMITED

Third Party;

-and-

D WALKER T/A D & S CONTRACTS

Fourth Party.

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HIGGINS J

[1] This is the plaintiff's appeal against decisions of Master Wilson whereby he ordered that the plaintiff's action against the defendants be struck out. The plaintiff's claim is that on 23 December 1995 she fell on an defective kerbstone at or about University Street, Belfast and sustained a fracture of her left ankle. A writ of summon was issued by her then solicitor on 23 December 1998 and an appearance entered by the first defendant on 10 March 1999. A

statement of claim was served on 15 October 1999 and defence on 29 February 2000. The defence denied the plaintiff's claim and pleaded contributory negligence. A notice for particulars was served by the defendant on 29 February 2000 and the plaintiff replied on 29 September 2001. In their replies the plaintiff identified the location of the alleged fall as outside Dukes Hotel and the defect as a depression in the kerb caused by the erosion of cement or grouting between two kerbstones.

[2] On 5 June 2001 the defendant issued a third party notice against White Mountain (Surfacing) Limited a civil engineering and road surfacing contractor. The statement of claim alleged that the third party and the defendant entered into a contract on 4 October 1995. The contract was entitled "Ormeau Avenue & Botanic Avenue Carriageway & Footway Resurfacing". The statement of claim also alleged, pursuant to the contract, that on or about 1 December 1995 the third party lifted and replaced the kerbing at the location of the plaintiff's alleged fall and that the third party was negligent in , inter alia, failing to point gaps between the kerbstones. A photograph produced to the court shows the kerbing with a gap between two kerbstones. The photograph is not of the best quality but the alleged defect is visible. The defendant claims indemnity or contribution to the full extent of the plaintiff's claim. In its defence the third party denied the defendant's claim.

[3] On 4 April 2003 the third party issued a fourth party notice against D Walker T/A D & S Contracts and a statement of claim was served on 11 June 2003. This alleges that the fourth party was sub-contracted to carry out the kerbstone work at the location in question and that by reason of negligence, nuisance, breach of statutory duty and breach of contract it failed to complete the works so as to leave the kerbstone in a safe condition and claims indemnity and contribution in full. It is alleged that the contract between the third and fourth parties was made orally. The fourth party's defence denies the claim and also pleads that the claim is statute barred.

[4] On 31 March 2003 the third party was joined as a second defendant and on 26 September 2003 leave was granted to join the fourth party as a third defendant. The plaintiff was permitted 28 days within which to serve an amended writ and statement of claim on the fourth defendant. To date the amended writ and statement of claim have not been served.

[5] On 24 January 2006 the first defendant issued a summons –

> for an order pursuant to the provisions of Order 34 Rule 2(2) of the Rules of the Supreme Court and/or to the inherent jurisdiction of the Court striking out this action and entering Judgment with costs for the Defendant or for such other order as the Court deems just and for an Order that the Plaintiff pay the

> Defendant's cost of this application due to the Plaintiff's failure to set this action down for trial.

[6] On 10 February 2006 the fourth party (the third defendant) issued a summons for –

> an order pursuant to Order 3 Rule 6(2) and/or pursuant to Order 34 Rule 2(2) and/or pursuant to Order 19 Rule 1 and/or pursuant to the inherent jurisdiction of the Court dismissing the above-entitled action in its entirety and entering judgment herein inter alia in favour of the Fourth Party upon such terms as the Court may think fit and together with all necessary and consequential directions.

[7] Both summonses were heard together. On the first defendant's summons the Master ordered –

> pursuant to Order 34 Rule 2(2) of the Rules of the Supreme Court and under the inherent jurisdiction of the court, that the plaintiff's action against the defendant be and it is hereby struck out for want of prosecution and that judgment therein be entered for the defendant with costs (same not to be enforced without further order of the court).

[8] On the third defendant's summons the Master ordered –

> pursuant to Order 3 Rule 6(2), Order 34 Rule 2(2) Order 19 Rule 1 of the Rules of the Supreme Court and under the inherent jurisdiction of the court, that the plaintiff's action against the defendant be and it is hereby struck out for want of prosecution and that judgment therein be entered for the defendant with costs (same not to be enforced without further order of the court).

The plaintiff appeals against both orders.

[9] The case made by the first defendant is that since the replies to the notice for further and better particulars served on 20 September 2001 the plaintiff has taken no further step in the prosecution of her action, the case has not been set down and two years have elapsed since the service of the replies. The alleged accident occurred over ten years ago and the first defendant submitted that the plaintiff has been guilty of inordinate and inexcusable delay which has seriously prejudiced the defendant in its defence.

Recollections of witnesses will have dimmed and the location of the accident has changed in appearance. The solicitor for the first defendant wrote to the plaintiff's present solicitors in 2003, 2004 and 2005 seeking information about the progress of the case, but received no replies to these letters.

[10] The third defendant alleges that the delays in this case are so gross, palpable and extensive as to be likely to give rise to substantial prejudice against the defendants and each of them. The third defendant would have to give evidence about working practices and procedures that operated more than 10 years ago. It is believed (but not asserted as fact) that witnesses will now be dead, have retired, have gone to work elsewhere, be untraceable or be unable to give evidence on behalf of the third defendant.

[11] The plaintiff instructed a firm of solicitors who did not progress her case. She instructed another solicitor who issued the present proceedings. In June 2001 this solicitor's firm was closed down by the Law Society and the present solicitor took over the files of the former solicitor. The plaintiff's file passed through the hands of a number of solicitors in the present firm before coming misfiled with other files from the firm that had been closed down. It was finally located shortly after the first summons was issued.

[12] Order 3 Rule 6(2) provides that where two years or more have elapsed since the last proceeding in a cause or matter the defendant may apply to dismiss the case for want of prosecution. Order 19 Rule 1 provides that where a plaintiff is required by the Rules to serve a statement of claim and he failed to do so within the required period the defendant may apply to dismiss the action. Order 34 Rule 2(2) provides, inter alia, that where the plaintiff fails to set down an action for trial the defendant may apply to the Court to dismiss the action for want of prosecution.

[13] The High Court has a general inherent jurisdiction that includes a jurisdiction to dismiss an action for want of prosecution. Whether that inherent jurisdiction survived the emergence of Order 3 Rule 6(2) or its predecessor Order 65 Rule 15 was once an issue. In DHSS v Derry Construction Co Ltd 1980 NI 187 Hutton J (as he then was) accepted the proposition, as stated by Salmon LJ in Allen v Sir Alfred McAlpine & Sons Ltd 1968 2 QB 229 at 268D, that a defendant could apply to have an action dismissed for want of prosecution either under the Rules of the Supreme Court or under the court's inherent jurisdiction. In Bannon v Craigavon Development Commission and Another 1984 NI 387 Carswell J (as he then was) expressed doubts whether the power to dismiss for want of prosecution existed under the inherent jurisdiction, when there was express power in certain circumstances to do so under the Rules of the Supreme Court. He also expressed doubts whether, if the power under the inherent jurisdiction existed, it should be exercised when the application to do so falls outside the terms of Order 3 Rule 6(2). These doubts were resolved in Braithwaite & Sons

Ltd v Anly Maritime Agencies Ltd 1990 NI 63 when Carswell J considered the issue in detail and concluded at page 70 -

> "I consider that the arguments presented on behalf of the defendant are correct, and that my doubts were not justified. In my opinion the inherent jurisdiction still exists, notwithstanding the specific power to dismiss for want of prosecution contained in Order 3 Rule 6(2)."

Thus the accepted view is that the inherent jurisdiction has survived and exists side by side with Order 3 Rule 6(2).

[14] In Allen v Sir Alfred McAlpine & Sons Ltd 1968 2 QB 229 at 268E Salmon L J set out the principles applicable on an application for dismissal for want of prosecution as follows –

> "In order for such an application to succeed, the defendant must show:
>
> (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.
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> (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
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> (3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff or between each other, or between

> themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

[15] If the defendant establishes the three factors to which I have referred, the court in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. In Allen's case, supra, Diplock LJ (as he then was) stated the principles in these terms at page 259E:

> "What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago."

[16] These principles were adopted and applied in Northern Ireland by the Court of Appeal in Boyd v Sinnamon [1974] NIJB June, an application to have the action dismissed for want of prosecution brought under Order 65 Rule 15, the predecessor of Order 3 Rule 6(2).

[17] The first defendant's application was brought under Order 34 and the inherent jurisdiction. It was submitted by Mr Aldworth who appeared on behalf of the first defendant that no step had been taken by the plaintiff after the reply to the notice for further and better particulars. a period of over four years. This represented very considerable delay and the court should infer that prejudice would occur if the trial is permitted to proceed. However if specific evidence is required the threshold for it should be low.

[18] The third defendants application was brought under Order 3 Rule 6(2), Order 19 Rule 1, Order 34 Rule 2 and the inherent jurisdictions. Mr A Devlin, who appeared on behalf of the third defendant, supported Mr Aldworth's submissions. He relied on four grounds – no step had been taken for over four years; the plaintiff had failed to set down the action; the statement of claim was not served within 28 days and the inherent jurisdiction. In addition he submitted that the proceedings in this case could not have been issued any later and in those circumstances there was a duty on the plaintiff's solicitors to proceed expeditiously. He argued that there was no necessity to point to any specific prejudice, but if there was then the fact the contract between the second and third defendants was oral and over 10 years ago, was sufficient. He also relied on the failed attempts secure a site inspection with the plaintiff as well as the failure to respond to correspondence.

[19] Mr M Maxwell who appeared on behalf of the plaintiff/appellant conceded that the first two requirements were satisfied namely that inordinate and inexcusable delay had occurred. He submitted that the court should be slow to penalise the plaintiff for the faults of her solicitors, the last of whom she inherited through the intervention of the Law Society. The defendants had failed to show any prejudice or that any witness had died or was unavailable. The change to the locus was recent in origin and the case would largely depend on the credibility of the plaintiff and the records of the defendants. The defendants had to show more than minimal prejudice to them and if they did then the court had to balance that against the plaintiff's right and interest in pursuing her case and the prejudice to the plaintiff in having to commence proceedings against her solicitor. He relied on a passage in Valentine's Supreme Court Practice at 11 – 188 which suggests that while prejudice can be inferred it cannot be presumed.

[20] In Houston v James P Corry & Company Limited 1972 NIJB (April) , the plaintiff was injured in October 1965 when operating a machine at work. A letter of claim resulted in the insurers carrying out an investigation following which they informed the plaintiff's solicitors that the accident was entirely the plaintiff's own fault. Proceedings were issued in 1967 and the last step in the proceedings, a reply to a request for particulars, was in December 1968. Six years then passed. Having quoted the passage from Allen's case cited above McGonigal J said –

"There is no question here on the matter of delay. The accident happened in October 1965, and the pleadings were closed by delivery of reply on 17th December 1968, and the final act, the answer to the plaintiff's Notice for Particulars of Contributory Negligence was delivered on 20th December, 1968. No step has been taken since then and no explanation given for the failure to take the mater any further. The defendants are in no way to blame and indeed throughout have acted in general expeditiously whenever action on their part was called for. The delay is due solely to the plaintiff or to the plaintiff's legal advisers.

There has therefore been inordinate delay and no excuse for it. The third requirement set out in Allen's case is whether the defendants will be seriously prejudiced by the delay.

It was argued before me that as the defendants had had an opportunity to investigate and did investigate the accident in 1966 they must then have seen and interviewed and taken statements from any relevant witnesses and that while the recollections of these witnesses may by now be greatly impaired the individual witnesses will be able to refresh his recollection by reading his statement and will then be in a position to deal adequately with the points relevant to the defendants' case. If that is a correct view no application to dismiss an action for personal injuries could succeed since insurers and their solicitors in general see and taken statements from such witnesses as appear relevant when making their initial enquiries. I cannot, however, accept that that is a correct view. A statement made by a witness, particularly by a defendants' witness, cannot deal in detail with all the points which may become relevant at the trial and his recollection of detail which did not appear material or relevant or in issue when he made the statement may be completely gone by the time a delayed trial takes place; nor where there are disputed issues of fact is it fair for a witness to have to try to give evidence based not on actual recollection of facts but on a recollection derived from what he said in a statement made five or six years ago. He cannot even call that statement in aid in the witness box and in honesty may have to make concessions

> based on faulty recollection which he would never have made if the action had come on for trial when the details were still fresh in his mind. There may also be controversial issues raised at the trial as to purported acts or conversation relied on by the plaintiff which the defendants would have no means of knowing and preparing for in advance and which they will now have no means of investigating from witnesses who may no longer be available and who even if they are available will depend on recollection blurred and dimmed by the passing of time.
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> It appears to me that where there is a delay of some years the inference of serious prejudice is properly to be drawn from the delay itself and in my opinion that is a case of that kind.
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> For this reason it appears to me that this case falls within the principle laid down in Allen's case that the application is entitled to succeed."

This passage was approved by Lowry LCJ in Boyd v Sinnamon, supra.

[21] There is no issue in the instant case relating to delay. There has been very considerable delay, which counsel on behalf of the plaintiff has rightly conceded is inordinate and inexcusable. No specified prejudice has been alleged by the first defendant. The third defendant relies on the oral nature of the contract. I doubt if, in the particular circumstances of this case, that much will turn on the specific terms of that contract. It was a contract to relay kerbstones and leave them in a safe condition. That apart no specified prejudice has been asserted by the third defendant. No application has been made by the second defendant. Counsel for the other two defendants has indicated that the second defendant is supportive of the application, but no prejudice relating to that defendant has been identified.

[22] Thus the issue is whether the court should infer prejudice from the period of the delay. In the determination of this issue all the circumstances of the case must be considered. In Shtun v Zalehska 1996 3 AER 411 Peter Gibson LJ quoted some general observations of Neil LJ in Slade v Adco Ltd (reported only in the Times Law Report of 7 December 1995). At p. 424 Peter Gibson LJ stated -

> 'The prejudicial effect of delay on a defendant and the effect of delay on the possibility of a fair trial will depend in large measure on the nature of the issues in the case. In some cases much of the

evidence will be in documentary form or there will be in existence statements made soon after the relevant events which will enable witnesses to refresh their memories. In other cases, however, including many cases involving road accidents or industrial accidents where claims for damages for personal injuries are made, the crucial evidence may be largely oral and any statements made shortly after the event may be imprecise or incomplete. It follows therefore that each case is likely to depend on its own facts. The onus of proving prejudice or the impossibility of a fair trial rests on the person who asserts it . . . An account must also be taken of the fact that delay may create difficulties for a defendant when he seeks to test by way of cross-examination the reliability of the plaintiff and his witnesses. As Sir George Baker said in Hayward v Thompson [1981] 3 All ER 450 at 464, [1982] QB 47 at 69: "There are few civil actions in which nothing new emerges in the course of the hearing". But even in the absence of some wholly new factor, the cross-examiner, in a stale claim, when seeking for example to ask questions about the position of some control mechanism (in an industrial accident) or lines of visibility (in a traffic accident), may be faced with the understandable reply "It is all so long ago that I cannot remember." Stuart-Smith LJ has referred to such an answer being a common experience for judges when trying stale cases (see Benoit v Hackney London BC [1991] CA Transcript 116).'

[23] In Shtun, supra, Neil LJ offered some further general assistance at pages 429 when he said -

'In many cases, however, the resolution of the issues will depend on oral testimony. Sometimes the defendant will be able to show that a witness has died or has become too infirm to give evidence, or has disappeared. But there will be cases where the proper assessment of the defendant's position and the nature and degree of any prejudice will not depend primarily on the absence of one or two particular witnesses, but on all the circumstances of

> the case. It is in these cases where the experience of the judge has a crucial part to play in evaluating prejudice and the possibility of a fair trial. As Lord Griffiths indicated in Smaller, it is incumbent on the defendant to explain his position and to establish prejudice. He must explain how the relevant delay will affect his case and, where relevant, the evidence he will be able to call and how it will affect the resolution of identified issues. But the court is not trying the case. The judge's task is to assess the likely effect on the trial and on the defendant's ability to put his case forward. The judge must, therefore, draw inferences based on all the material before him. These inferences will include inferences as to the effect of delay on the recollection of witnesses. It is in this context that I think it is important to keep in mind the words of Lord Browne-Wilkinson in Roebuck v Mungovin [1994] 2 AC 224 at 234 where he said that a judge can infer a further loss of recollection from any substantial delay. Whether that further loss of recollection is sufficient in a particular case will be for the judge to evaluate'."

[24] A ten year period is a long time and the usual if not inevitable inference would be that prejudice is bound to arise. However justice requires that the circumstances of the case be considered to ensure that an inference of prejudice is justified. The case made by the plaintiff and the defence to it as well as the cases between the defendants all require to be analysed in the particular circumstances as known at this time. The progress of this type of tripping case is well known. If the plaintiff is credible on the nature and location of the trip, a court would then have to consider whether the defect is actionable. In this regard the photographs (and any site inspection close to the time of the incident) would be highly relevant. The third defendant's request for a site inspection was in December 2003. It is not disclosed at this time when the accident locus changed, though counsel on behalf of the plaintiff suggested it was recent. It is probably common case that the kerbing was re-laid in early December 1995. If the plaintiff's evidence and the photographs demonstrate an actionable defect and the plaintiff is credible, what defence is open to the defendants. It appears the first defendant contracted the work to the kerbing to the second defendant who in turn subcontracted to the third defendant. The issue between the defendants' would be the identity of the party who left the kerbstone in a defective condition, if that is what it is found to be. The existence of a contract or sub-contract would be crucial in the determination of this issue, but it is unlikely that the terms of the contract (beyond the obvious ones referred to above)

would be relevant. What prejudice would the defendants suffer? No specific prejudice has been suggested. If it was the case that essential witnesses are dead or their whereabouts unknown, it would have been simple to make that case on affidavit. This has not been done. It would be wrong to infer it in those circumstances. Thus the issue is whether this is an appropriate case in which, from delay alone and in the absence of specific evidence of alleged prejudice, to draw the inference that prejudice will be caused should the action proceed. It does not seem to me that it is for the reasons I have stated. Therefore I decline to draw that inference in the absence of specified evidence of prejudice. The likelihood of the defendants suffering serious prejudice if this action proceeds to trial has not been established. Therefore I decline to exercise the inherent jurisdiction of the court to strike out the plaintiff's claim.

[25] Both defendants applied also under Order 34 Rule 2(2). To succeed under this rule a defendant must show that the failure of the plaintiff to set down the action has caused prejudice for which an award of costs cannot compensate. The third defendant applied also under Order 19 Rule 1. The failure of the plaintiff to serve the amended writ and statement of claim within the 28 day period from 26 September 2003 must cause prejudice to the third defendant. The proposed amendments do not alter the case made by the plaintiff. The third defendant applied also under Order 3 Rule 6(2) on the ground that two years or more had elapsed from the last proceeding in the case. To succeed the third defendant requires to demonstrate prejudice. The appeal was argued on the general propositions under the inherent jurisdiction set out above and no separate arguments were addressed to the court on the applications under Order 3 Rule 6(2), Order 19 Rule 1 or Order 34 Rule 2(2). For the reasons already given the defendants have failed to establish prejudice and each of these applications fails also.

[26] The appeals will be allowed and the decisions of the Master reversed with costs above and below.