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| **Neutral Citation No: [2023] NIMaster 11** | *Ref:* **2023NIMaster11** |
| | *ICOS No:* ***22/069656/01*** |
| ***Judgment: approved by the court for handing down (subject to editorial corrections)**** | *Delivered:* **30/11/2023** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**KING'S BENCH DIVISION**

**JOAN MAGUIRE**

**Plaintiff**

**and**

**WESTERN EDUCATION AND LIBRARY BOARD**

**Defendant**

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**Master Harvey**

*Introduction*

[1] This started off as an application by the defendant for an Order staying the proceedings on the basis the limitation period to bring the action has "expired under the Judicature Act, Section 86(3) and the inherent jurisdiction of the Court."

[2] Mr Boyle appeared for the defendant, Mr McNamee appeared for the plaintiff.

[3] Upon hearing from counsel it was apparent that the actual relief being sought by the defendant was a dismissal of the plaintiff's claim on the basis it was statute barred pursuant to Article 7 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order"), the cause of action having occurred on the 12th December 2017 and the writ of summons having been issued on the 8th August 2022, one year and nine months outside the applicable three year limitation period.

[4] The court has power to amend a summons of its own motion under Order 20 rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the 1980 Rules") to reflect the relief being sought, which was an order pursuant to Order 32 rule 12A of the 1980 Rules, that the court should refuse to direct that the provisions of Article 7 of the 1989 Order do not apply in respect of this action. Counsel for the

plaintiff raised no objection, indicating he knew in advance the defendant was seeking a dismissal of the action and, therefore, was not taken by surprise as to the nature of the dispute between the parties. I therefore make the amendment to the summons.

***Factual background***

[5] The plaintiff was employed as a kitchen assistant by the defendant at Omagh High School. She alleges that on the 12 December 2017 she was at the rear entrance to the school and was caused to slip as a consequence of icy ground conditions. The plaintiff alleges the defendant failed to take the necessary steps to treat the ground with salt and that a broken spouting above the area where she allegedly fell caused a build-up of water which became frozen as a consequence of the weather conditions.

[6] The writ of summons was issued on the 18 August 2022, almost five years after the cause of action occurred. The plaintiff purportedly instructed her solicitor in January 2018 and seeks to explain the delay in progressing the case as due to the serious health issues suffered by her, as well as her solicitor, between 2020-2022 and the impact of the covid-19 pandemic. There is no dispute that there were delays in advancing the claim.

[7] The defendant asserts it took reasonable precautions for the safety of the plaintiff and denies liability in respect of the accident, contending that it would have relied upon the evidence of several witnesses. They included the school principal who has retired. The defendant indicates that it will be in excess of six years before the plaintiff's intended action will be heard meaning the witnesses' recollection of events may be adversely affected as a consequence of the delay. Moreover, the building supervisor who they assert is an essential witness has since died and this will unquestionably significantly hamper the defendant's defence of taking reasonable precautions.

***Legal principles***

[8] In a personal injury action arising from negligence or breach of duty the period of limitation is three years. Article 50 of the 1989 Order grants the court discretion to permit a plaintiff to proceed with the claim if it would be equitable to do so having regard to the degree of prejudice caused to the parties. Article 50(4) requires a number of factors for the court to consider when carrying out this balancing exercising. Article 50 (4) states:

> "…
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> (4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to—
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> (a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be, 9;

(c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[9] I referred the parties to the case of *Margaret Roseanna Gordon and McKillens (Ballymena) Limited* [2016] NIQB 32 as the current application had many similarities to the issues which arose in that action. In the judgment, Stephens J dealt with the jurisdiction of the master to hear and determine limitation issues under Article 50 of the 1989 Order. This jurisdiction derives from the Rules of the Court of Judicature at Order 32, rule 12A which, although it has not been amended and only refers to the repealed Statute of Limitations (Northern Ireland) 1958, is to be construed as a reference to the 1989 Order.

[10] In *Gordon* the Court set out the legal principles in respect of these applications, at para 31:

"Article 50 of the 1989 Order gives the court a discretion to allow a plaintiff to proceed with an action for personal injuries notwithstanding that the time limited by Article 7 of the Order has expired, if it appears to the court that it would be equitable to do so having regard to the degree to which Article 7 prejudiced the plaintiff and the degree to which any decision under Article 50 would prejudice the defendant. In essence Article 50 requires the court to engage in a balancing exercise, weighing the prejudice to the plaintiff if the time limit is not extended against the prejudice to the defendant if it is extended. Article 50(4) requires a number of particular factors to be taken into account relevant to the balancing exercising required by Article 50(1). In that respect Article 50(4) is supplementary to Article 50(1). However Article 50(4) also states clearly that the court must have regard not only to those particular

factors when performing the balancing exercise but also to all the circumstances of the case."

[11] Further guidance can found in a recent decision of McAlinden J in *Stanislaus Carberry as personal representative of the estate of Stan Carberry (deceased) and Ministry of Defence* [2023] NIKB 54. This was a claim in relation to a fatal shooting by the British army on the Falls Road in Belfast on 13 November 1972. In the detailed judgment given in that case, at para 180, McAlinden J turned to consider when the court should deal with the issue of limitation, stating:

> "[180] Finally, although guidance contained in the caselaw steers the court towards addressing the issue of limitation and to reaching a decision on this issue before going on (in an appropriate case) to make a determination on the substance of the dispute between the parties; in order to properly come to a determination on the limitation issue, it is usually appropriate and, in a good number of cases, it may be necessary, to hear all the available evidence prior to determining the limitation issue. By adopting such a course, the court gains a clear insight into the evidence that is now available, and the quality and cogency of that evidence and it also gains an appreciation of the nature and extent of the evidence which previously would have been available but is no longer available due to the passage of time. The evidence is carefully examined at that stage not for the purpose of making a determination on the substance of the dispute between the parties but rather it is examined in order to ascertain whether such a fair determination can be made on the basis of both parties being able to present relevant, cogent, and reliable evidence to the court. "

***Conclusion***

[12] I assessed each of the factors set out in Article 50(4) of the 1989 Order as well as the circumstances of this case and considered the skeleton arguments, as well as the affidavits from the defendant's solicitor dated 10 March 2023 and 6 September 2023 and affidavits from the plaintiff's solicitor dated 23 June 2023 and 27 September 2023. At the hearing, the particular issue that formed the focus of the defendant's application was the extent to which the delay has impacted the liability evidence to be adduced by the defendant which it argues is likely to be less cogent than if the action had been brought within the limitation period. The basis for this assertion is that one of the defendant's liability witnesses is now deceased and two further witnesses have retired, therefore the delay has meant that the defendant is unable to rely on at least one liability witness and impacted the latter witness's memory of events.

[13] Despite the impact of the delay on the cogency of its evidence being the basis of the defendant's application, there was no evidence before the court presented by way of affidavit on behalf of the defendant setting out its precise impact. While counsel sought to address some of this at hearing, there was no evidence in the

affidavits of matters such as; whether a statement had been gathered before the death of the main liability witness, whether there were statements from the other witnesses who have since retired, evidence as to whether these individuals are still contactable and able to attend trial, was an investigation report compiled, were inspection, maintenance and repair records still available, were photographs taken of the accident locus, has an expert such as an engineer inspected the locus, has the locus changed to such an extent that an inspection would be hampered or could not be arranged?

[14] Counsel for the defendant initially suggested adjourning for a further affidavit from his instructing solicitor, however, after hearing from both counsel, I concluded that at this interlocutory stage in the absence of oral evidence, further documentation and affidavits, I could not properly have regard to the factors set out in Article 50(4)(b) of the 1989 Order, nor all the circumstances of the case.

[15] I directed that pursuant to Order 33 rule 3 of the 1980 Rules, this application should be heard as a preliminary issue at the hearing before the trial judge. The trial judge will have the advantage of being able to more closely investigate by the hearing of oral evidence, cross-examination, and review of all the documentation, which is not available at this interlocutory stage. Although the pleadings have not advanced beyond the service of a writ and lodging of a memorandum of appearance, no doubt the issue of limitation will be pleaded by the defendant in its defence, further preserving their right to pursue this issue at trial.

[16] Counsel for the plaintiff indicated the statement of claim was in draft form and could be served imminently. I therefore directed that the plaintiff shall serve a statement of claim within 7 days of the date of the hearing. I reserved costs to the trial judge and certify for counsel on behalf of the plaintiff and defendant.