Neutral Citation No. [2003] NIQB 69 | *Ref:* **COGC4039**

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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

WILLIAM PENSION

Plaintiff;

-and-

JOHN BOGUE
WILLIAM McNULTY
RAYMOND McCALLION
MARY McHUGH
CONOR DOWNEY
P/A BOGUE & McNULTY SOLICITORS

Defendants.

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COGHLIN J

[1] This is an application on behalf of the defendants for orders pursuant to Order 3 Rule 6, Order 34 Rule 2(2) of the Rules of the Supreme Court (Northern Ireland) 1980 and in accordance with the inherent jurisdiction of the court to dismiss the plaintiff's action against the defendants for want of prosecution. Mr Michael Maxwell appeared on behalf of the defendant while the plaintiff was represented by Mr Joseph McEvoy. I am grateful to both counsel for their helpful and concise submissions.

Background facts

[2] The background facts may be summarised as follows:

(i) On 3 April 1986 the plaintiff was a passenger in a van belonging to his employers, Medu Electrical Services Limited which was being driven

by a fellow employee, Alan Hodgson, when the vehicle left the road and went over a hedge as a result of which the plaintiff suffered personal injuries, loss and damage.

(ii) The plaintiff subsequently instructed the defendant firm of solicitors in relation to a personal injuries claim and the defendants issued a writ on behalf of the plaintiff on 6 March 1989. On 14 August 1989 an appearance was entered on behalf of Alan Hodginson (subsequently amended to Alan Hodgson) and Medu Electrical Services Limited and a statement of claim was delivered on the 19 April 1990.

(iii) At the material time Alan Hodgson was the holder of only a provisional licence and did not have any relevant insurance cover. Unfortunately, the defendant solicitors failed to serve the appropriate notice upon the Motor Insurers Bureau within the time limit. The defendants took no further steps and in late 1993 Mr McCallion of the defendant firm of solicitors advised the plaintiff to seek alternative advice.

(iv) On 21 July 1995 the writ was issued in these proceedings and an appearance was entered on behalf of the defendants on 1 November 1995. On 8 November 1995 a statement of claim was delivered and further pleadings were exchanged with the defendants being granted discovery of the plaintiff's medical records on 3 October 1997.

(v) In 1999 the plaintiff's present solicitors served an amended writ of summons in the original action to which an appearance was entered by the second named defendant, Medu Electrical Services Limited, on 23 March 1999. On 25 May 1999 the defendant obtained an order pursuant to Order 34 Rule 2 of the Rules of the Supreme Court (Northern Ireland) 1980 on consent staying these proceedings until the plaintiff's original action against Alan Hodgson and Medu Electrical Services Limited had been determined. On 8 May 2003 the defendants issued this summons.

(vi) In an affidavit sworn on 11 June 2003 the plaintiff's present solicitor, Mr Tony Caher, stated that the file first came to his attention on 3 June 2003 following receipt of the summons and affidavit and an investigation revealed that the file had been under the control of a former partner who had resigned from his practice with effect from 30 May 2003. Mr Caher accepted that there had been inordinate delay in pursuing the plaintiff's claim against the defendants. In the affidavit grounding the summons herein, Mr Hugh McGrattan, the solicitor acting on behalf of the defendants, deposed that the partner in the defendant firm responsible for dealing with the plaintiff's file in the original action, Mr Raymond McCallion, had died on 29 August 1998.

[3] At paragraph 5 of his affidavit sworn on 17 February 1999 Mr McGrattan, conceded that there was no doubt that the defendants had failed to give the relevant notice to the Motor Insurer's Bureau within 7 days from the commencement of proceedings and that such a failure was a bar to liability on behalf of the Bureau. In the same affidavit Mr McGrattan alleged that the plaintiff, at all material times, was aware that Mr Hodgson did not have a full driving licence and was not permitted by his employers to drive. In such circumstances he submitted that the MIB would have been able to maintain a good defence to any proceedings which might have been brought against it by relying on Clause 6 of the 1973 Agreement which excludes liability in respect of any person allowing himself to be carried in a vehicle in respect of which he knew or had reason to believe there was no relevant contract of insurance. Mr Maxwell accepted that, in such circumstances, the real issue was whether the plaintiff ever had anything other than a merely speculative claim against the defendants in the original action.

[4] On behalf of the defendants Mr Maxwell based his submissions primarily upon the passage of time since the date of the original accident, some 17½ years ago, arguing that such a period in itself was sufficient for the court to infer the necessary prejudice. In particular, he referred the court to the well known passage from the judgment of Gibson LJ in McMullen –v- Wallace [1977] NI 1 at page 12:

"I need not analyse the present state of judicial opinion because it has been authoritatively set out by the Court of Appeal in England in Allen –v- Sir Alfred McAlpine & Sons Limited [1968] 2 QB 229 and by this court in Boyd –v- Sinnamon [June 1974]. In the present case it is conceded that the delay has been inordinate and inexcusable. The only issue is whether the ensuing prejudice to the second defendant is sufficiently serious to warrant dismissing the action. The only direct evidence on affidavit is the statement by Mr Jefferson, the second defendant solicitor, that he will be "gravely prejudiced if this action were permitted to proceed," whereas the plaintiff's solicitor avers his belief that no prejudice will arise. Whether delay will occasion prejudice must, of course, depend on the nature of the action and the form and content of the evidence proposed or necessary to be given. The substantial defence of the second defendant is that though the first defendant was driving the car of the second defendant at the time of the accident with his consent it was not being driven for a permitted purpose. The scope of authority of the first defendant would apparently turn on the terms of a conversation between the defendants in February, 1964, as to which there is a conflict of interest and possibly also a difference of recognition between them. In such circumstances it is plain that the passage of more than 12 years to date,

apart from the time which must elapse before the action could come to trial, could not fail to have impaired the second named defendant's memory and so seriously prejudice his defence and in particular so as the onus of disproving agency lies on him."

The relevant legal principles have been more recently confirmed by Gillen J in Galbraith (A minor) v Vine & Others (NIHC 8/10/99).

[5] In this case the negligence of Mr McCallion is conceded and the real issue is whether the plaintiff had any real prospect of success in the original action. It is clear from Mr McGrattan's affidavit of 26 September 2003 that a police report was compiled shortly after the road traffic accident and, as a result of the police investigation, the first named defendant, Alan Hodgson, was convicted of having no insurance, no L-plates and careless driving. The police took statements from Mr Hodgson and from Mr McKeag who was the direct employer of the plaintiff and Mr Hodgson. Thus, there are contemporary documents available to refresh the memories of any of these witnesses and I note that there is no specific averment in the defendant's affidavit that the memories of any of these individuals have been adversely affected. In addition, the defendants have available a statement made by the plaintiff to Mr McCallion when giving his original instructions. Furthermore, at the present time, the plaintiff continues to prosecute his original action and I have given directions as to a timetable for doing so.

[6] While the passage of time in relation to these proceedings has undoubtedly been both inordinate and inexcusable there is no specific allegation of prejudice in relation to any relevant witness. In the absence of any such allegation, having regard to the fairly straightforward and limited factual content of the disputed issue together with the existence of memory-refreshing documentation, I would not be prepared to draw an inference of prejudice simply from the passage of time. Furthermore, the original action remains alive and should be capable of resolution without any further unnecessary delay. The plaintiff himself does not appear to have been personally to blame for any of the delay and whatever the potential merits of his claim, there is no doubt that he has been poorly served by two firms of solicitors. It would be quite wrong to attribute the actions of his solicitors to the plaintiff – see Das v Ganju (1996) 6 Med LR 198 and Corbin v Penfold TLR 2/5/00. In the circumstances, I am not persuaded that the interests of justice would be properly served by requiring him to resort to yet another set of legal advisors. Accordingly, I propose to exercise my discretion against the defendants and refuse the application.