Neutral Citation No: [2018] NICA 36	*Ref:*	**DEE10772**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**5/11/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

BETWEEN

WILLIAM DENIS HORNER

Plaintiff/Appellant

and

CLEAVER FULTON AND RANKIN a firm
AND
ALASTAIR RANKIN

Defendants

_____

Before: Morgan LCJ, Stephens LJ and Deeny LJ

_____

DEENY LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by Mr Horner against the decision and judgment of McBride J delivered on 28 February 2018. She concluded that it was appropriate to dismiss the plaintiff's action, 1999 No.3659, QBD, for want of prosecution pursuant to Order 3 Rule 6(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules"), the inherent jurisdiction of the Court and Article 6 of the European Convention on Human Rights.

[2] The application brought by the defendants had also sought a number of other reliefs. The judge found it unnecessary to deal with those in the light of her finding on want of prosecution. Similarly, it is not necessary for us to say anything further in that regard.

[3] Mr Horner was a litigant in person. At a review of this case he and the defendants agreed that, unless the Court of Appeal subsequently considered it necessary at a later stage, the Court would deal with the matter on the basis of written submissions. Having received extensive submissions the Court is content to deliver judgment without an oral hearing.

[4] Order 3 Rule 6 of the Rules reads as follows:

> "*Notice of intention to proceed after year's delay*
>
> 6. – (1) Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.
>
> (2) Where two years or more have elapsed since the last proceeding in a cause or matter the defendant may apply to the Court by summons to dismiss the same for want of prosecution.
>
> (3) A motion or summons on which no order was made is not a proceeding for the purpose of this rule."

[5] The prolonged and unusual history of this matter is helpfully summarised by the judge at paragraphs 5-12 of her judgment which we set out:

> "[5] Thomas Joy Horner ("the deceased") died on 11 April 1995. On 31 March 1995 he executed a Will in which he appointed his daughter Caroline Anderson as sole executrix. His other daughter Maureen Hall was a beneficiary under the terms of the Will. The plaintiff, who is a son of the deceased, was not a beneficiary under the Will.
>
> [6] On 17 October 1996 Higgins J pronounced in favour of the deceased's Will dated 31 March 1995 and granted liberty to the executrix to apply for a grant of probate of the said Will.
>
> [7] The plaintiff initially issued proceedings against the executrix and Maureen Hall. These proceedings were struck out by Sheil J on 19 November 1998.
>
> [8] Related proceedings were brought by the plaintiff's mother Marion Horner against the executrix and Maureen Hall. These proceedings were struck out by Girvan J on 11 November 1998.
>
> [9] The plaintiff issued the present writ on 25 August 1999. An appearance was entered thereto on 14 September 1999 and a statement of claim was served on 26 September 1999. A further statement of claim was

> then served on 26 April 2000. A defence was entered thereto on 23 October 2000 and the matter was set down for trial on 13 February 2001. Thereafter lists of documents were served by both the plaintiff and the defendant. On 15 March 2002 Kerr J made an order joining three defendants to the action, namely Conor Wylie, Caroline Anderson and Maureen Hall. Thereafter, the writ and statement of claim were amended to reflect the joinder of these parties.
>
> [10] On 27 June 2002 the defendants applied by summons to have the proceedings struck out. The plaintiff issued a summons dated 18 July 2002 to 'strike out and set aside the defendants demands'. In connection with these applications various steps were taken by each of the parties. The last step taken in the proceedings was taken by the plaintiff when he filed an affidavit sworn on 8 October 2002.
>
> [11] On 30 January 2003 Kerr J made an order striking out the plaintiff's pleadings against Conor Wylie, Caroline Anderson and Maureen Hall.
>
> [12] Thereafter no action was taken by the plaintiff until he received a letter from the court office dated 3 March 2017 informing him that the case would be reviewed on 22 March 2017 for the purpose of striking out the proceedings. In response to this the plaintiff filed an affidavit sworn on 20 March 2017 and thereafter a further statement of claim dated 7 June 2017 and a further statement of claim dated 29 August 2017. On 26 September 2017 he issued a Notice of Lis Pendens together with a summary to all his statements of claims and an affidavit in support of the statement of claim and notice of motion."

[6] It can be seen from this that these proceedings were commenced by Writ some 19 years ago. Some steps were taken in the proceedings by Mr Horner or the defendants up to and including the decision of Kerr J, as he then was, on 30 January 2003 to strike out the case against 3 defendants who had previously been added.

[7] Absolutely nothing was done in the case by the plaintiff thereafter until he was informed of the application to strike out being heard on 22 March 2017. Therefore, for some 14 years the plaintiff/appellant had taken no steps in this action. At paragraphs 22 and 23 of her judgment, McBride J records giving two opportunities on different occasions to Mr Horner to provide reasons for that

undoubted delay. She describes his emotional reaction on that occasion. She records that he responded so emotionally to that invitation that she rose to allow him some time to reflect upon the issue of explanation for the delay. When the court resumed the plaintiff referred the court to his affidavit sworn on 20 March 2017 and in particular paragraphs 3-5. The plaintiff further stated to the court that he had had a heart attack in 2006 and a quadruple bypass in 2006/2007.

[8] On examining that affidavit neither paragraphs 3-5 nor the rest of the affidavit advance reasons or excuses for the long delay after October 2003 in the finding of the judge.

Case Law

[9] The judge correctly cited the decision of the House of Lords in *Birkett v James* [1978] AC 278 as the leading authority. The judgment of Lord Diplock, with whom the other members of the Appellate Committee agreed upheld the approach set out by the Court of Appeal in England in *Allen v McAlpine* [1968] 2 QB 229. Lord Diplock summarised the principles as follows:

> "The power should be exercised only where the court is satisfied either:
>
> (i) that the default has been intentional and contumelious, e.g. disobedience to a pre-emptory order of the court or conduct amounting to an abuse of the process of the court; or
>
> (ii) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and plaintiff or between each other or between them and a third party."

[10] It is worth recording that the delay in the case before Lord Diplock was infinitely more modest than here, running for two years from June 28 1973 to July 25 1975. Furthermore, the plaintiff would have been entitled to issue fresh proceedings if its proceedings had been dismissed as the limitation period had not expired. We would wish to leave open the issue of whether a period of this duration of some 14 years might in itself justify a dismissal for want of a prosecution even if a defendant was unable to show a substantial risk of not having a fair trial or a likelihood of serious prejudice.

[11] In fact in this case the judge was persuaded by the defendants that prejudice was likely. As can be seen from the chronology of events set out above the proceedings relate to the estate of the plaintiff's father who died as long ago as 11 April 1995. The plaintiff feels he had a claim on part of his estate based on dealings and conversations between them which allegedly gave rise to an equitable interest. Some of the material therefore for the substantive claim would be dating back some 25 years and the alleged fault on the part of the defendant would relate to dealings some 20 years or more ago.

[12] The judge accepted that a number of the solicitor's files which would have been in existence and relevant to the dispute between the plaintiff and the defendant were no longer to be found. There would be evidence from lay witnesses who did not have documentary records. The judge was satisfied that the memories of witnesses will have deteriorated after this effluxion of time.

[13] She noted the prejudice to the defendants in having to maintain insurance provision for this claim for such a long period of time, and a continuing period of time if their application to dismiss was unsuccessful. She recorded the distress and anxiety that the matter would cause, particularly as the individual defendant had retired from practice as of 30 April 2015. The judge found those matters were established before her and found that substantial prejudice had been caused to the defendants and found as follows:

> "[34] In my judgment having regard to the issues involved and the evidence which is needed to resolve them, there is substantial prejudice caused to the defendants by the delay in this case, due to fading memories of witnesses, the stress caused by the delay and the impact delay has on the likelihood of a fair trial. I therefore find it is proper to draw an inference that substantial prejudice arises from the inordinate and inexcusable delay of the plaintiff."

Conclusion

[14] The first thing that must be said is that there was indisputably a want of prosecution here for two years or more entitling the defendant to apply and the court to dismiss the action pursuant to Order 3 Rule 6(2). The judge's decision was in exercise of her discretion pursuant to that rule. The second matter to consider was whether on foot of the leading case of *Birkett v James* op cit that delay was "inordinate". We consider that it was, being excessive and immoderate. The period here of 14 years can be contrasted with the period of 2 years in *Birkett v James*.

[15] One must then consider whether the delay is "inexcusable". The judge records that no excuses were provided to her save for the plaintiff/appellant's significant heart condition in 2006 and 2007. If that were established in evidence,

that might justify a want of prosecution in those two years. But it cannot assist the plaintiff at all for the 3 years preceding this illness or the very long period after it. She therefore found that no satisfactory excuse or explanation had been given.

[16] Mr Horner had a further opportunity to address this matter in his 56 page skeleton argument put before the judge. He was conscious of the issue because he goes seriatim through the judgment of the judge in the following way:

"Para 22 McBride judgment	No longer possible to have a fair trial for the plaintiff.
Para 23 McBride judgment	Plaintiff to provide reasons for the delay.
Para 24 McBride judgment	Unable to find any excuse or explanation all the judges and lawyers involved failed to investigate."

No response is made save the admission that a fair trial was no longer possible

[17] He comes back to the issue of "inordinate and inexcusable delay" at page 11 but again fails to provide any material on which a finding in his favour could be made.

[18] Much of the skeleton argument is composed of previous decisions and alleged actions of Kerr J, Carswell LCJ, Nicholson LJ, Higgins J and Shiel J, as they then were.

[19] At page 23 he says the following:

> "After the way I had been treated [2003] bullied, coerced, the injustice of it all, left mentally paralysed and overborne, in traumatic distress, driven to such a decree (sic) that I yielded for the sake of peace and quiet."

He goes on to complain of financial desperation as his wife had lost her first husband's pension due to marrying him. At page 24 he mentions that his wife and he had serious health problems without going into any details in that regard.

[20] No further excuses are advanced. Even viewing these assertions, which are not backed up by any medical or other documentation, at their height, they cannot amount to a justifying excuse for the period of delay in this case. He had appeared at that time as a litigant in person and was to do so again in 2017. The truth of the

matter might be as he indicates himself that he had given up for the sake of "peace and quiet". But that is not an excuse for doing nothing and then seeking to resume his attack on the defendants 14 years later. That is unjust and unfair to the defendants.

[21] We then move to consider whether there was prejudice to the defendants which could constitute a basis for the judge's findings. We note her additional argument at paragraph 36 that the assets which formed the estate of the deceased have long since been distributed. That would render any further proceedings almost certainly futile. She concluded there is a threat to a fair trial and prejudice to the defendants. Quite remarkably at page 47 of his skeleton argument to this court the plaintiff/appellant agrees. At 27(b) we find the following:

> "Fair trial no longer possible.
>
> 1. Thereafter, it is impossible for the plaintiff to be given a fair trial."

[22] Although he writes extensively he does not rebut the findings of the judge that there is prejudice to the defendants.

[23] It is clear therefore that the judge was perfectly entitled to reach the decision which she did. It was not necessary for her to consider the plaintiff's notice of motion to subpoena some members of the judiciary nor to deal with the further grounds relied on by the defendants. For completeness we record that the defendants have always vigorously denied any wrong doing on their part and, indeed, the second defendant has done so on affidavit earlier in these proceedings.

[24] We dismiss the plaintiff's appeal.