



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF McMULLEN v. IRELAND

(Application no. 42297/98)

JUDGMENT

STRASBOURG

29 July 2004

FINAL

29/10/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of McMullen v. Ireland,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMESEN,
Mr J. HEDIGAN,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 4 July 2002 and 8 July 2004,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in an application (no. 42297/98) against Ireland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Irish national, Mr Michael McMullen (“the applicant”), on 27 January 1998.

2. The Irish Government (“the Government”) were represented by their Agents, Dr A. Connelly, Ms D. McQuade and Ms P. O’Brien, all of the Department of Foreign Affairs.

3. The applicant mainly alleged that his negligence proceedings exceeded the reasonable time requirement of Article 6 § 1 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. It was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted (Rule 26 § 1).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

7. By a decision of 4 July 2002, the Court declared the application partly admissible.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

9. The applicant was born in 1942 and lives in Dublin.

10. In 1982 he issued nuisance proceedings against his landlord. Those proceedings were settled in July 1985. Subsequently, and as a result of alleged further nuisance problems and new evidence, he unsuccessfully attempted to re-enter the nuisance proceedings in 1987.

11. On 29 June 1988 he issued negligence proceedings in the High Court against the firm of solicitors (“KC”) who had acted for him in the above-described nuisance action. He took issue with the advice given to him by KC during the settlement and, in particular, in relation to the possibility of re-entering his nuisance action. KC filed an appearance dated 26 October 1988. The applicant’s statement of claim was filed on 21 December 1988 and on 9 March 1989 he filed an application seeking judgment in default of defence which he obtained from the High Court on 10 April 1989. However, KC filed its defence on 18 April 1989 and sought an order to set aside the default judgment. On 1 May 1989 the default judgment was set aside. Further particulars of the applicant’s claim were requested by KC on 10 May 1989 and the applicant responded on 30 June 1989. On 15 May 1989 KC applied for discovery and on 2 June 1989 the High Court refused that application.

12. On 18 July 1989 the applicant applied for discovery by KC. On 5 October 1989 the High Court ordered discovery to be made by KC within six weeks. On 28 November 1989 he applied to strike out the defence of KC as they had not made discovery as ordered. That application was adjourned on 11 December 1989 and on 15 January 1990 his strike out application was refused. On 22 February 1990 he applied for further discovery from KC and on 5 March 1990 the High Court ordered KC to make further discovery within four weeks. KC filed affidavits of discovery on 26 February and 23 April 1990. On 21 November 1990 the applicant applied for further discovery to be made by KC. The hearing of this application was adjourned on 4 and 10 December 1990 and was considered on 14 January 1991. While the specific directions of the High Court after that hearing are not known, costs were awarded against KC.

13. On 28 June 1991 a notice of trial was filed by the applicant. On 21 August 1991 KC filed a motion for discovery by the applicant. On 24 October 1991 the High Court struck out this motion and costs were awarded against KC. The applicant then lodged a notice to amend his statement of claim on 5 May 1992. The action was put in a list to fix a hearing date three times (between July and December 1991). On the latter occasion the hearing date was fixed for 20 February 1992. However, on that date the High Court was informed of settlement negotiations and in March or April 1992 the case was accorded a further hearing date in May 1992.

The High Court heard the case on 5-7 May 1992, legal submissions were heard on 23 June 1992 and the court reserved its judgment. Judgment was delivered on 13 July 1993 dismissing the applicant's case. The High Court judge found the evidence of a senior counsel (who had acted for the applicant in the nuisance proceedings – "SC") more convincing than that of the applicant and found that KC had simply relied on the SC's advice during the nuisance proceedings. Accordingly, it was found that no negligence could be attributed to KC. Costs were awarded to KC "when taxed and ascertained".

14. On 30 August 1993 the applicant lodged his appeal to the Supreme Court: he argued that the High Court should not have relied on evidence of SC which was given in breach of SC's privilege of confidentiality to the applicant.

15. SC was the subject of a complaint by the applicant to the Barristers Professional Conduct Tribunal of the Bar Council of Ireland. On 24 April 1995 the tribunal found that SC had been in breach of the Code of Conduct and by decision of 24 June 1995 he was formally admonished by the tribunal for dealing directly with the applicant and for giving evidence in court as to the advice he had given to the applicant without any protest as to confidentiality or privilege. On 21 November 1995 the Barristers' Professional Conduct Appeals Board rejected an appeal and upheld the tribunal's decisions.

16. On 12 July 1995 his representatives confirmed that all documents for the appeal had been filed. A letter of 20 November 1996 confirmed to the applicant that his appeal had been listed for hearing on 3 March 1997.

17. However, it was then listed for mention on 21 March 1997 when the applicant's solicitors applied and were allowed to come off record. On that date the appeal hearing was adjourned (to 11 June 1997) and final submissions were ordered to be lodged by 14 May 1997. The applicant was not represented for the remainder of the proceedings. On 10 April 1997 the applicant applied for leave to amend his appeal and on 18 April 1997 the Supreme Court granted him leave.

18. The appeal came on for hearing on 11 June 1997. Since one of the judges had previously participated in a High Court action brought by the applicant, the applicant was given the opportunity of having the appeal heard by a differently constituted Supreme Court, the applicant accepted and the hearing was adjourned for mention on 20 June 1997. On that latter date, the appeal was listed for hearing on 17 October 1997.

19. On 18 July 1997 the Supreme Court adjourned the applicant's request for leave to introduce fresh evidence until the date fixed for the hearing of the action. Due to the illness of one of the Supreme Court judges, that hearing date was vacated. A further hearing date was set for 16 December 1997. The hearing took place on 16 December 1997 and judgment was reserved. Judgment was delivered on 27 January 1998

rejecting the applicant's appeal. The Court found that the applicant had impliedly waived his privilege by instituting the proceedings. The court noted that, even if the alleged negligence had been established, it was questionable whether he had suffered loss as the original nuisance action on which KC had advised him was more likely to fail than to succeed. The costs of the appeal were also awarded to KC "when taxed and ascertained".

20. On 20 December 1998 KC filed a note of their High and Supreme Court costs. In the absence of the applicant's agreement on the level of the costs, on 12 January 1999 KC issued a summons to taxation, returnable for 11 February 1999. On 29 January 1999 the parties consented to the matter being adjourned until 9 March 1999. On 24 February 1999 the applicant issued a motion for an order staying the taxation of costs. On 5 March 1999 the Supreme Court dismissed his application for a stay. On 9 March 1999 the taxation matter was adjourned on a consent basis until 28 April 1999. On that date taxation of the High Court costs commenced and concluded with a stay agreed on the issuance of the taxation certificate for fourteen days on the applicant's request. On that date also (28 April 1999) the taxation of the Supreme Court costs also commenced, but was not finalised as some information was outstanding. On 14 May 1999 the taxation of the Supreme Court costs was concluded and, on the applicant's request, a stay was put on the issuance of the relevant certificate until 21 June 1999.

21. On 21 June 1999 the applicant requested and obtained a further stay until 6 July 1999. On that date leave was granted by the taxing master to KC to take up both certificates of taxation. On 30 September 1999 those certificates were taken up by KC and were served on the applicant with a demand for payment by 4 October 1999. The costs payable by the applicant amounted to almost 70,000.00 pounds sterling inclusive of value added taxation. Further demands were sent to the applicant on 15 October and 1 November 1999 indicating that KC would apply for his bankruptcy should he not discharge the sums due.

22. On 28 January 2000 KC issued and served a "notice of the particulars of demand and requiring payment prior to the issue of a bankruptcy summons", a notice which was updated with the interest accrued and served on the applicant on 12 September 2000. KC then filed affidavits dated 16 October and 3 November 2000 and on 20 October 2000 the High Court issued a bankruptcy summons on the application of KC.

23. The applicant applied on 6 December 2000 to dismiss the summons. KC filed an affidavit in response on 27 February 2001 to which the applicant replied by affidavits filed on 13 March and 10 December 2001. KC therefore filed an affidavit in response on 21 December 2001. On 22 January 2002 the High Court gave the applicant time to submit a further replying affidavit. The applicant submitted this affidavit on 4 February 2002. The matter was heard by the High Court on 19 and 20 March 2002 (by a judge different from the judge sitting 22 January 2002). The detailed

judgment delivered on the latter date acceded to the request for the applicant's bankruptcy and refused his application to dismiss the summons. Noting that KC had undertaken not to take steps to enforce the bankruptcy summons for six weeks, the High Court put no stay on its order.

24. On 29 April 2002 the applicant appealed, requesting the Supreme Court to dismiss and stay indefinitely the bankruptcy summons. On 8 May 2002 he also issued a notice of motion before the Supreme Court requesting a stay on the order of the High Court of 20 March 2002 pending the finalisation of his appeal. On 7 June 2002 the Supreme Court rejected that motion, finding that it was not possible to stay a summons and that an injunction restraining KC from taking any action on foot of the bankruptcy summons would not be justified. In any event, it was extremely unlikely that KC could take any further action based on the existing bankruptcy summons since there was a three-month time-limit from the date of issue of the summons, within which KC should have applied for adjudication against the applicant. On 30 June 2003 KC issued and served a further "notice of the particulars of demand and requiring payment" of the costs award plus relevant interest, amounting to the sum of 104,185.48 euros (EUR).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

25. The applicant complained that the length of the negligence proceedings violated the reasonable time requirement of Article 6 § 1 of the Convention. That provision, in so far as relevant, reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] tribunal ..."

A. The parties' submissions

26. The Government maintained that the Court should only take into account the length of the "substantive proceedings" ending with the judgment of the Supreme Court in January 1998. Contrary to the situation in the case of *Robins v. the United Kingdom* (judgment of 23 September 1997, *Reports of Judgments and Decisions* 1997-V), they submitted that the taxation of costs in the present case did not determine the applicant's civil rights and obligations because the Supreme Court had already determined his liability to pay KC's costs in January 1998 and the Taxing Master's only function was a non-judicial assessment of the acceptability of the sums claimed in costs by KC. The Government also submitted that the

bankruptcy proceedings should be considered separately from the negligence action: the bankruptcy proceedings were not an automatic consequence of the costs' order but rather the result of an independent decision by KC to issue a bankruptcy summons and the applicant had not specifically complained about delay in the taxation or bankruptcy proceedings. In any event, the applicant was responsible for delay on taxation due to his requests for adjournments (except the initial stay which was sought by both parties) and for the delay in the bankruptcy proceedings since he failed to discharge the costs as taxed and because of his unsuccessful attempts to have the bankruptcy summons stayed or dismissed.

27. The Government further argued that the length of the substantive negligence proceedings was reasonable having regard to the conduct of the applicant and emphasised that, under Irish law, the responsibility for prosecuting civil litigation lies on the parties. They referred, *inter alia*, to the fact that the applicant did not file a notice of trial until June 1991 (two years after KC submitted its defence). He also lodged books of appeal two years after the notice of appeal had been filed and he was also responsible for a number of adjournments including of the High Court hearing in February 1992, of the appeal hearing on 21 March 1997 and of the appeal hearing in June 1997.

28. The applicant considered that the courts were responsible for most of the delay in the proceedings. He pointed to, for example, a fourteen-month delay between the High Court hearings (May 1992) and the delivery of its judgment (July 1993). He had delayed in lodging his books of appeal because of the pending and relevant disciplinary proceedings against SC (see paragraph 15 above). He also alleged that KC had attempted to engineer delays and was obstructive about discovery.

29. In his observations submitted after the partial admissibility decision in the present case (of 4 July 2002), the applicant essentially repeated certain inadmissible complaints about the fairness of the proceedings against KC. He also made extensive submissions about other proceedings not directly relevant to the complaints declared admissible by the Court on that date. All of these submissions are to be examined by the Court in a separate application (no. 17238/03).

B. The Court's assessment

30. It is not disputed that the period to be taken into account in calculating the length of the proceedings began when the applicant issued the negligence proceedings on 29 June 1988.

31. As to when that period ended, the Court recalls that Article 6 § 1 of the Convention requires that all stages of legal proceedings for the “determination of ... civil rights and obligations”, not excluding stages subsequent to judgment on the merits, be resolved within a reasonable time (see *Silva Pontes v. Portugal*, judgment of 23 March 1994, Series A no. 286-A, §§ 33–36). In addition, it is recalled that the taxation of costs procedure by which the costs to be paid by one party to another are established, even if separately so, has to be seen as a continuation of the substantive litigation and accordingly as part of the “determination of ... civil rights and obligations” (*Robins*, cited above, § 29, and *Doran v. Ireland*, no. 50389/99, § 43, ECHR 2003-X). The Court therefore considers that these taxation proceedings are to be included in the period to be taken into account in assessing the overall length of proceedings. It has, moreover, taken into account the length of the subsequent bankruptcy proceedings: whether or not they constitute enforcement proceedings and therefore a further stage in the substantive proceedings (*De Pede v. Italy* and *Zappia v. Italy* judgments of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 24 and 20), that period of time is, in any event, entirely attributable to the applicant (see paragraph 36 below).

32. In such circumstances, the period to be taken into account began on 29 June 1988 and is continuing: a period of approximately 16 years.

33. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court’s case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation (see, among other authorities, *Comingersoll v. Portugal* [GC], no. 35382/97, § 19, ECHR 2000-IV, and *Horvat v. Croatia*, no. 51585/99, § 52, ECHR 2001-VIII).

34. It notes that the proceedings, between two parties only, concerned the determination of whether the applicant’s solicitors had given him negligent advice. Since January 1998 the proceedings have concerned solely the calculation and enforcement of a costs’ order against him. The Court does not consider that the proceedings have been significantly complex from a procedural, factual or legal point of view.

35. As regards the conduct of the applicant, it is recalled that applicants are entitled to make use of all procedural steps relevant to them but they should do so with diligence (*Deumeland v. Germany*, judgment of 29 May 1986, Series A no. 100, § 80) and they must bear the consequences when such procedural applications result in delay (*Joanna Malicka-Wąsowska v. Poland*, (dec.), no. 41413/98, 5 April 2001).

36. In this regard, the Court notes that the applicant did not lodge the necessary appeal documents with the Supreme Court until July 1995 which was almost two years after he had lodged the notice of appeal. While he claimed that the disciplinary proceedings against SC provided an adequate explanation for this, he did not apply to the Supreme Court for an adjournment of the appeal pending the outcome of the disciplinary proceedings and, indeed, confirmed that the appeal documents were complete prior to the final decision of the Barristers' Professional Conduct Appeals Board. The Court also observes that the applicant made extensive use of the procedural opportunities open to him in the proceedings: he, *inter alia*, made three applications for discovery (1989-1992); he applied to strike out KC's defence; he applied for leave to amend his appeal in April 1997; and he requested that his appeal be heard by a differently constituted Supreme Court. In addition, the Court considers the delay in the proceedings after the issuance of the taxation certificate (April 1999) to be entirely attributable to the applicant who has, to date, failed to pay the costs established on taxation as due to KC.

37. While the Court therefore considers that the conduct of the applicant contributed in no small part to the delay in the proceedings, it alone does not explain their overall length. Accordingly, the Court has examined the conduct of the authorities.

38. The Court recalls that a State is obliged to organise its legal system so as to allow its courts to comply with the reasonable time requirement of Article 6 (*Süßmann v. Germany*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1174, § 55). It has held on a number of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings does not dispense the State from complying with the requirement to deal with cases in a reasonable time (for example, *Mitchell and Holloway v. the United Kingdom*, no. 44808/98, § 56, 17 December 2002). If a State lets proceedings continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be considered responsible for the resultant delay (for example, *Price and Lowe v. the United Kingdom*, nos. 43185/98 and 43186/98, § 23, 29 July 2003).

39. In this regard, the Court observes that a number of specific and lengthy delays in the proceedings are attributable to the domestic authorities: a period of more than one year between the last day of the High Court hearings and the delivery of its judgment (23 June 1992-13 July 1993); a period of almost two years between the applicant's confirmation that all appeal documents had been filed and the first hearing date for the appeal (25 July 1995-21 March 1997); and a period of six months for the Supreme Court to re-constitute and fix a hearing date for the

relevant appeal (11 June-16 December 1997). No explanation for these specific delays has been offered by the Government.

40. In such circumstances, and having regard to the criteria laid down in its case-law, the Court finds that the proceedings in the present case were not dealt with within a “reasonable time”, as required by Article 6 § 1 of the Convention and that there has therefore been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

42. The applicant claimed a sum of EUR 85,000 in damages without specifying whether it was in respect of pecuniary and/or non-pecuniary loss. He claimed reimbursement of solicitors’ fees which he estimated were incurred as a result of the excessive delay in the proceedings (in the sum of EUR 10,285). He also submitted that the ongoing proceedings continued to have a significant negative effect on his quality and enjoyment of life. He requested the Court to award a large sum in just satisfaction since the Government had done nothing to ensure that the judiciary complied with the State’s Convention obligations: indeed, he considered that he had highlighted this deep-rooted and endemic flaw at inordinate cost to himself. The overall sum claimed would allow *restitutio in integrum* and would reflect the extent and gravity of the violation of the Convention.

43. The Government did not consider the applicant to have made any claim in respect of non-pecuniary damage. They also submitted that the applicant had suffered no pecuniary prejudice as a result of the violation since the outcome of the substantive and costs’ proceedings would not have been different if they had progressed more speedily (*Davies v. the United Kingdom*, no. 42007/98, 16 July 2002, *Mavronichis v. Cyprus*, judgment of 24 April 1998, *Reports of Judgments and Decisions* 1998-II, and the above-cited *Robins* judgment). They considered that the losses claimed in the form of solicitors’ fees were not attributable to delay or, in the alternative, were not attributable to delay caused by the State. The Government considered that a finding of a violation would constitute sufficient just satisfaction.

44. Even if the legal costs allegedly incurred as a result of the excessive delay could constitute pecuniary loss, the Court has not found a clear causal connection between the legal fees claimed and the excessive length of

proceedings found to disclose a breach of Article 6 § 1 of the Convention (*Barberà, Messegué and Jabardo v. Spain*, judgment of 13 June 1994 (Article 50), Series A no. 285-C, §§ 16-20, and *Cakıcı v. Turkey*, no. 23657/94, *Reports of Judgments and Decisions* 1999-IV, § 127). The Court makes no award in this respect.

45. As to non-pecuniary loss, the Court does not find that the applicant has substantiated concrete injury to his quality and enjoyment of life caused by the excessive length of the relevant proceedings and which would justify the amount claimed. However, it does consider that the applicant must have suffered some distress and frustration resulting from the protracted length of the proceedings which could not sufficiently be compensated by the finding of a violation (see, for example, *Mitchell and Holloway*, cited above, § 69). Having regard to the overall length of proceedings, to the conduct of the parties (see paragraphs 37 and 39) and making its assessment on an equitable basis, the Court awards the applicant the sum of EUR 8,000 under this head.

B. Costs and expenses

46. The applicant claimed EUR 353.26 in respect of his own costs and expenses in pursuing the application before this Court including photocopying, telephone calls and postage. The Government did not dispute the applicant's entitlement to recover the amounts claimed. The Court considers the sum claimed to be reasonable and awards the costs and expenses as claimed.

47. Even if his claim for solicitors' fees outlined at paragraph 42 above could also be considered in this context, no attempt has been made to clarify how certain fees were actually and necessarily incurred in domestic proceedings in order to prevent the violation or to obtain redress (see, for example, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 18 October 1982 (Article 50), Series A no. 54).

C. Default interest

48. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the sums of EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage and EUR 353.26 (three hundred and fifty-three euros and twenty-six cents) in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President