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

FIFTH SECTION

DECISION

Application no. 48625/19
Paul Joseph SWEENEY
against Ireland

The European Court of Human Rights (Fifth Section), sitting on 7 October 2021 as a Committee composed of:
Ganna Yudkivska, *President,*
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*
Having regard to the above application lodged on 5 September 2019,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Paul Joseph Sweeney, is an Irish national, who was born in 1963 and lives in Scotstown, County Monaghan. His application was lodged on 5 September 2019. He was represented before the Court by Mr Shane Kennedy, a solicitor practising in County Monaghan.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The background facts

3. On 26 January 2001, the applicant was involved in an accident in the course of his employment as a lorry driver. He alleged the accident was caused by the defective condition of his vehicle and that he had suffered severe injuries as a result. He claimed that he had previously informed his employer, Mr K, and the garage responsible for servicing the vehicle, that the vehicle was defective.

(a) The proceedings

4. In 2001 the applicant approached a solicitor in relation to taking a personal injury claim. In February 2002, he approached the Legal Aid Board ("the Board"). In August 2002, the Board granted him a legal aid certificate and took over his claim. On 22 December 2003, he issued a summons commencing High Court proceedings against his employer and the garage responsible for maintaining the vehicle.

5. The second defendant (the garage) "entered an appearance" (see paragraph 27, below) on 26 February 2004. The applicant delivered a statement of claim on 9 August 2006 and filed a motion for judgment in default of appearance against the first defendant (his employer) on 21 August 2006. The first defendant entered an appearance on 10 January 2007.

6. In March 2004 the Board commissioned an engineer's report of the vehicle. This did not identify any fault in the braking or steering system. The applicant claimed the report was of limited value, but it raised concerns for the Board as to whether his claim was sustainable.

7. The relationship between the applicant and the Board was in difficulty by 2007. The Board stated that the applicant failed to provide instructions to allow his claim to be progressed, and that he had been warned that his claim could be struck out for want of prosecution, but that they continued to seek his instructions and manage his claim until 2010. The applicant claimed that the Board terminated his legal aid certificate in June 2007 and withdrew representation, maintaining contact only to seek to persuade him to settle his claim for a nominal sum. In March 2010 the Board suggested that he approach another solicitor.

8. The applicant approached his current solicitor on 21 May 2010. There was some dispute as to when the latter took over the proceedings. On 25 May 2010, his current solicitor wrote to the Board, asking for the applicant's file. The Board claimed that he had taken over the proceedings upon transfer of the file in June 2010. The applicant claimed that his current solicitor was merely providing a second opinion on the claim until he came on record on 18 August 2011.

9. On 9 August 2011 the second defendant issued a motion seeking to dismiss the applicant's claim for want of prosecution (see paragraph 28, below). On 15 December 2011 the first defendant issued a similar motion. The applicant filed replying affidavits on 9 November and 20 December 2011.

(b) The High Court decision

10. On 16 April 2012 the High Court heard the motions(as regards the approach to determining whether a claim should be struck out for want of prosecution under domestic law, see paragraphs 29-30, below).

11. The defendants pointed to the long delays before both the issue of a summons and service of a statement of claim and the applicant's failure to take subsequent steps. They argued that he was culpable of inordinate and inexcusable delay and that they would suffer prejudice as a result in defending the claim. During the hearing it emerged that the principal of the first defendant, Mr K, had died in 2008. This has not been raised previously, but that defendant now argued that his death caused them "specific" prejudice because of his interactions with the applicant. The applicant accepted that his conversations with Mr K formed part of his evidence (he later resiled from that position).

12. The applicant accepted the delay was inordinate, but argued it was excusable due to his difficulties with his changes of solicitors and his difficulties with the Board and how they had approached his claim. He argued the balance of justice weighed in his favour as he had suffered serious injuries and lost his livelihood as a result of the accident.

13. The High Court issued an *ex tempore* judgment on 16 April 2012 striking out the applicant's claim against both defendants on the basis that the applicant's delay was inordinate and inexcusable, and the death of Mr K created real prejudice. Final orders were made on 23 April 2012.

(c) Proceedings before the Supreme Court and the Court of Appeal

14. On 15 May 2012 the applicant filed a notice of appeal with the Supreme Court. On 27 November 2013 he filed a motion seeking a digital audio recording (DAR) of the High Court hearing. On 27 January 2014, the High Court granted access to the part of the DAR containing the *ex tempore* judgment. On 23 April 2014 the second defendant filed a motion to strike out the appeal for want of prosecution returnable for 9 May 2014. On the latter date the Supreme Court directed the applicant to file books of appeal within seven days or have his appeal struck out. The applicant lodged the books on 16 May 2014.

15. On 23 May 2014 the first defendant filed a motion seeking to introduce new evidence as to the prejudice they had suffered due to the death of Mr K. The Supreme Court granted this motion on 30 May 2014.

16. On 29 October 2014 the appeal was transferred to the Court of Appeal. The applicant was informed by letter of 11 December 2014. On 29 August 2016 he wrote to that court inquiring as to his appeal. On 23 October 2017, after seeking counsel's advice, he issued a motion seeking directions for the hearing of his appeal. On 15 December 2017 the Court of Appeal heard the motion, issued directions as to the lodging of submissions and transferred the appeal to the list to fix dates on 25 January 2018. On the latter date the appeal was set down for hearing on 17 December 2018. The applicant filed submissions on 25 January 2018. The defendants filed submissions on 25 January and 22 February 2018.

17. On 28 November 2018, the applicant filed motions with the Court of Appeal, seeking leave to amend his appeal, to introduce into evidence several new affidavits sworn on 14 November 2018 and to deliver an amended statement of claim. The supporting affidavits stated that the notice of appeal did not adequately set out the grounds of his appeal, his previous affidavit did not explain why his delay was excusable and his statement of claim did not "properly set out the factual matters necessary to the real questions in controversy between the parties" or accurately describe the circumstances surrounding the accident. The purpose of these affidavits appears to have been to address the question of specific prejudice that had arisen in the High Court. They exhibited an amended statement of claim and the results of a medical examination carried out on 1 October 2018.

18. These motions were dismissed on 30 November 2018. The motions had not been properly served on the defendants. The applicant's counsel accepted that this was "totally unsatisfactory and unacceptable". The Court of Appeal was highly critical of the application:

> "As I have already stated, this is an appeal...that go back to orders made on the 16th April 2012 and it is simply unjust, unfair and otherwise than in accordance with the proper administration of justice to allow or even permit a motion to be entertained to permit new evidence at this point."

19. The appeal was heard on 17 December 2018. Further difficulties emerged as the applicant had not lodged all relevant affidavits before the hearing. The full transcript of the High Court hearing was only provided to the Court of Appeal during the hearing. The court was again highly critical of the applicant. He then sought to make preliminary arguments that the court refused to consider, as they had not been raised in the High Court or included in his grounds of appeal or submissions. The court noted that it had no jurisdiction to amend the statement of claim.

(d) The Court of Appeal judgment

20. The Court of Appeal issued a written judgment on 20 February 2019 upholding the High Court decision.

21. The Court of Appeal noted that the summons was issued on 22 December 2003, close to the expiry of the time limit, obliging the applicant to act quickly. The proceedings were not complex and had not become mired in interlocutory applications. Yet, two and a half years elapsed between the summons and service of the statement of claim. The applicant then took no steps from August 2006 until the defendants' motions issued in 2011. The applicant had provided no explanation for the delay between the summons and his statement of claim and no valid excuse had been provided for the later delay. The Court of Appeal thus found the applicant's delay inordinate and inexcusable.

22. The Court of Appeal then considered if the balance of justice favoured dismissal of the claim. The applicant had provided no medical

evidence as to his injuries and this factor could not be weighed in his favour. The Court of Appeal did not accept that the defendants were required to take active steps to force the applicant to progress his own claim.

23. The court stated that it was entitled to assume some "general" prejudice accrued to the defendants from the mere passage of time. The court then examined whether "specific" prejudice arose as a result of the death of Mr K, concluding that his death would be likely to make it more difficult for the defendants to defend the claim. In relation to the delay before the Court of Appeal the court noted:

> "It was, in my view, incumbent upon the plaintiff, in light of the overall delay in the proceedings to apply, as soon as practicable, to the Court of Appeal for directions and a hearing date. As it happens, his application for directions was only made on 23 October 2017. This delay has visited a further three-year delay upon the proceedings."

24. Finally, the Court of Appeal stated:

> "Material also to an application to dismiss proceedings for inordinate and inexcusable delay is the fact that that the court itself is obliged, in furtherance of its constitutional obligations to administer justice and its obligation to have regard to the European Convention on Human Rights ("ECHR"), to ensure that litigation is conducted in an expeditious manner... A laissez faire attitude to the progress of litigation by the plaintiff cannot be tolerated given that delay may constitute a violation of Art. 6 ECHR rights."

25. The Court of Appeal was satisfied that the balance of justice lay in favour of dismissing the applicant's claim. Final orders were issued on 6 March 2019.

26. The applicant applied for leave to appeal to the Supreme Court on 2 April 2019. His application was lodged with this Court on 5 September 2019 while that application was pending. The application for leave to appeal was refused on 21 November 2019.

B. Relevant domestic law and practice

Striking out a claim for want of prosecution

27. Under domestic law personal injury proceedings commence with the issue of an originating summons by the plaintiff. A defendant contesting the claim must "enter an appearance" by filing a document with the court; failure to do so allows the plaintiff to seek judgment. After an appearance is entered, the plaintiff serves a statement of claim detailing his or her claim and a defence is delivered. Interlocutory applications such as motions for discovery and motions seeking particulars of the claim follow before the matter is set down for trial. If the plaintiff fails to progress their claim diligently a defendant may apply to strike out the claim for want of prosecution.

28. Order 122, rule 11 of the Rules of the Superior Courts states:

> "... In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just."

29. The judgments in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 set out the principles applicable to the dismissal of a claim for want of prosecution. The court examines whether the delay has been inordinate, and if inordinate, whether it has been inexcusable. If the delay was inordinate and inexcusable the court then examines whether the balance of justice favours dismissing the claim. In the current proceedings the Court of Appeal judgment set out these principles as follow (*Sweeney v Cecil Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43):

> "(a) the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (b) in considering this latter obligation the court is entitled to take into consideration and have regard to:
>
> (i) the implied constitutional principles of basic fairness of procedures;
>
> (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action;
>
> (iii) any delay on the part of the defendant, because litigation is a two-party operation, the conduct of both parties should be looked at;
>
> (iv) whether any delay or conduct of the defendant amounts to acquiescence;
>
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case;
>
> (vi) whether the delay gives rise to substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant;
>
> (vii) the fact that the prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to defendant's reputation and business."

30. The Court of Appeal also considered the statements of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 as to the exercise of its discretion in such cases:

> "In my view the first material consideration in the exercise of this discretion is the nature of the case itself. It is clear from the statement of Counsel that the injuries to the plaintiff are very severe and that his chance if he has a good cause of action of

being compensated for those injuries probably represents the last major opportunity notwithstanding an extreme handicap to provide for himself and his dependants."

COMPLAINTS

31. The applicant complained that the length of the proceedings was excessive, breaching his rights under Article 6 § 1 of the Convention.

32. The applicant also complained under Article 6 § 1 that the decisions of the High Court and the Court of Appeal striking out his claim were manifestly unfair and unreasonable and denied him access to a fair and impartial hearing. He complained under Article 1 of Protocol No. 1 in conjunction with Article 6 that those decisions denied him access to compensation for his personal injuries.

33. The applicant also complained under Article 13 in conjunction with Articles 6 and 10 of the Convention and Article 1 of Protocol No. 1 that the limited jurisdiction of the Supreme Court denied him an effective remedy from the decision of the Court of Appeal.

THE LAW

A. Alleged violation of Article 6 of the Convention

34. The applicant complained of the duration of the domestic proceedings and the decision of the domestic courts to strike out his claim under Article 6 § 1 of the Convention. Article 6 § 1 states, as relevant:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

35. The Court considers that the applicant's complaints under Article 6 may be dealt with together as they relate in essence to the duration of the domestic proceedings and the responsibility of the applicant for that delay.

1. The duration of proceedings

36. The Court notes that the application was submitted to this Court on 5 September 2019 after an application for leave to appeal had been lodged with the Supreme Court. The relevant period thus commenced with the issue of a plenary summons on 22 December 2003 and concluded with the determination of the Supreme Court on 21 November 2019.

(a) General principles

37. The Court refers to the statement of the relevant general principles in its recent judgment in the case *Keaney v. Ireland*, no. 72060/17, §§ 85-91, 30 April 2020.

(b) Application to the present case

(i) Complexity of the case

38. The Court of Appeal described the proceedings as "routine and straightforward." The Court would agree that they were neither legally nor factually complex.

(ii) Conduct of the applicant

39. The Court notes that the applicant, despite issuing a summons close to the end of the three year limitation period, did not issue a statement of claim for two and a half years and then took no substantive steps prior to the issue of the defendants' motions (see paragraphs 4-9, above). The domestic courts heard no interlocutory applications during this period. He accepted in the domestic proceedings that this delay was inordinate. The domestic courts, in striking out his claim, did not accept that the defendants were responsible for any part of this delay, or that his failure to act could be excused due to his difficulties with his former solicitors.

40. The Court also notes that the applicant lodged an appeal on 15 May 2012. The first step described thereafter was the issue of a motion seeking the DAR in December 2013. The applicant did not lodge books of appeal until May 2014 when the Supreme Court ordered that his appeal be struck out for failure to do so. After his appeal was transferred, he waited three years before issuing a motion seeking directions from the Court of Appeal, that court noting that his delay in making this application had contributed to the length of the proceedings (see paragraphs 14-16, above).

41. Furthermore, the applicant issued two motions less than three weeks before the hearing date, seeking to introduce new evidence and to reformulate his appeal and his statement of claim. The supporting affidavits stated that his existing statement of claim, notice of appeal and affidavits did not properly set out his claim or grounds of appeal. These motions were issued eighteen years after his accident, fifteen years after his summons, six and a half years after the High Court decision, four years after books of appeal were filed and nine months after the parties' legal submissions were filed. When this application was refused the applicant sought to raise novel arguments in the hearing not included in his grounds of appeal or argued in the High Court (see paragraphs 17-19, above).

42. Finally, the Court notes that the applicant, despite stressing his injuries as a crucial factor that should be weighed in his favour, was unable, as a result of his own delay, to submit any medical evidence to the domestic courts on this point (see paragraph 22, above).

(iii) Conduct of the authorities

43. The Court has observed previously that a claim for damages arising from injuries sustained as a result of a road accident does not belong to any

special category of cases that require special diligence (*Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 213 25 June 2019). The applicant did not identify any delay of the domestic courts in dealing with any specific application. From the information on the file, the only motions the High Court was required fully to consider were the defendants' motions to strike out his claim, which were issued in August and December 2011 and dealt with in April 2012, after replying affidavits had been filed. The motion seeking the DAR, issued in December 2013, was dealt with in January 2014. Two motions issued by the defendants in April and May 2014, were dealt with in May 2014. The applicant's motion for directions, issued on 23 October 2017, was dealt with on 15 December 2017. On 25 January 2018, the Court of Appeal set the appeal down for hearing on 17 December 2018. On 20 February 2019, two months after the hearing, a written judgment was delivered. Final orders issued on 6 March 2019 (see paragraphs 9-25, above). Thus, it appears that once the parties took the necessary steps, their applications were dealt with promptly by the courts.

(iv) What was at stake for the applicant

44. The Court notes that, even prior to the High Court decision, doubts had arisen as the prospects for success of the applicant's claim. Shortly before his hearing in the Court of Appeal the applicant issued motions seeking leave to amend his appeal and his statement of claim. He was not in a position to present medical evidence to the domestic courts as to his injuries. The Court can therefore only note that the applicant failed to establish, at any point during the proceedings, what was at stake for him.

(v) Conclusion

45. The Court reiterates that in civil proceedings the principal obligation for progressing proceedings lies on the parties themselves, who have a duty to diligently carry out the relevant procedural steps (see *Unión Alimentaria Sanders S.A. v. Spain*, 7 July 1989, § 35, Series A no. 157, and *Healy v. Ireland,* no. 27291/16, § 55, 18 January 2018).

46. However, 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 (see, for example, *McMullen v. Ireland*, no. 42297/98, § 38, 29 July 2004, with further references).

47. Nevertheless, it is clear that the reason for the delay in the proceedings in the present case was the applicant's failure to take the steps necessary to prosecute his own claim in the High Court and to prosecute his subsequent appeal. While some criticism must attach to the domestic courts for allowing the applicant's inaction in prosecuting his claim to persist

without repercussions, those courts dealt promptly with any specific application before them and were conscious of their obligations to both parties under Article 6.

48. Moreover, the Court notes the Court of Appeal's criticism of how the applicant managed his appeal and of his attempts to submit new evidence, to raise new arguments and to reformulate his statement of claim. The Court considers those criticisms both justified and material to any consideration of the applicant's complaint concerning the duration of the proceedings. It appears that, despite the lengthy period between the High Court decision and the Court of Appeal hearing the applicant was simply not in a position to fully prosecute his own appeal.

49. The Court thus rejects the applicant's complaint concerning the duration of the proceedings as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. The other Article 6 complaints

50. The applicant also complained under Article 6 § 1 that the decisions of the domestic courts to strike out his claim denied him a fair hearing.

51. The Court notes that it has previously examined applications where the domestic courts are called upon to determine cases where the Convention rights of the opposing parties are in conflict. The Court has noted that the balancing of such conflicting interests is a difficult exercise and the domestic courts must be awarded a wide margin of appreciation (see *Sanofi Pasteur v. France*, no. 25137/16, §§ 56-57, 13 February 2020).

52. In the present case it considers that these complaints are closely linked to the question of the applicant's responsibility for delay, examined above. The Court of Appeal examined his responsibility and the potential prejudice to the defendants, applying well-established case-law. That court was conscious of the obligations of the domestic courts under Article 6 and took account of the fact that the applicant was responsible for the significant delay in progressing his own appeal (see paragraph 23, above). For similar reasons to those set out above, the Court can see nothing manifestly unfair or unreasonable in the decisions of the domestic courts to strike out the claim.

53. This leads the Court to conclude that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Other alleged violations of the Convention

54. The applicant also complained under Article 1 of Protocol No. 1 that the same decisions denied him the opportunity to seek compensation for his injuries. As the Court can see nothing manifestly unfair in those decisions, it follows that this complaint must also fail.

55. The applicant also complained under Article 13 in conjunction with Articles 6 and 10 of the Convention and Article 1 of Protocol No. 1 that the limited jurisdiction of the Supreme Court denied him a remedy in respect of the Court of Appeal decision.

56. The Court notes that the applicant was able to exercise a right of appeal to the Court of Appeal, which carried out a detailed review of the original decision of the High Court; the fact that the jurisdiction of the Supreme Court is limited does not in itself disclose any appearance of a violation of the Convention.

57. Accordingly, these complaints are also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 4 November 2021.

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Martina Keller
Deputy Registrar

Ganna Yudkivska
President