THE COURT OF APPEAL
CIVIL

Unapproved
No Redactions Needed

Costello J.
Pilkington J.
Allen J.

Neutral Citation No. [2024] IECA 185

Court of Appeal Record No. 2023/127

High Court Record No. 2016/8083P

BETWEEN/

VAL CLARKE AND COILEAR ROSMUC TEORANTA

PLAINTIFFS/APPELLANTS

- AND –

CONOR O'BOYLE
(PRACTISING UNDER THE STYE AND TITLE OF O'BOYLE AND ASSOCIATES)

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Pilkington delivered on the 12th day of July 2024

1. This is an appeal from an *ex tempore* judgment and Order of Egan J. of 11 May 2023 in which she struck out the plaintiffs' claim on the basis of inordinate and inexcusable delay. In doing so Egan J. made no order as to costs and the respondent cross appeals this aspect of her order.

2. The pleadings comprise the plenary summons issued on 8 September 2016. It seeks declaratory reliefs; firstly, that the defendant was in breach of his contract of engagement with the plaintiffs and secondly, that the defendant was negligent and in breach of his duty of care, followed by a claim for damages arising from each of these alleged breaches. The summons was served personally on the defendant. The endorsement of service is dated 11 August 2017.

3. On 20 October 2020 the plaintiffs issued a notice of intention to proceed, which was served under cover of a letter dated 2 November 2020. No steps were taken following its service.

4. On 24 January 2023 the defendant entered an appearance. A letter of the same date from Messrs. Ronan Daly Jermyn, solicitors for the defendant, informed the plaintiffs' solicitor that they had been appointed as the defendant's new solicitors.

5. The next day (25 January) the defendant issued a motion seeking to strike out the plaintiffs' claim for want of prosecution and/or inordinate and inexcusable delay.

6. The affidavits before the High Court comprised the grounding affidavit of Sharon Burke, solicitor, sworn on 24 January 2023 and the replying and supplemental affidavits of Daragh M. Keane, solicitor, sworn on 9 March and 4 May 2023 respectively.

7. The grounding affidavit points to the plaintiffs' ongoing delays, the defendant's lack of knowledge as to the case the plaintiffs seek to advance, and arising from this, his *"severe prejudice"* in the absence of any particulars of claim.

8. The defendant also claimed additional ongoing prejudice; a stay put on Circuit Court proceedings *("the debt collection proceedings")* pending the resolution of this application. and to an increase in his professional liability insurance premia, arising from the existence of these proceedings.

9. In dealing with the issue of delay and why no statement of claim has issued, Mr. Keane's replying affidavit makes reference to a complaint made by the plaintiffs to the defendant's professional body. I do not understand the relevance of this averment. With regard to the debt collection proceedings, Mr. Keane avers that following an award in favour of the defendant in August 2017, His Honour Judge McCabe agreed to a stay pending the outcome of these proceedings on condition that the sum of €35,000 was lodged in Court, which was done.

10. Mr. Keane's affidavit also refers (at para. 9) to proceedings between the revenue commissioners and the plaintiffs which have been appealed and which were due to be heard on 14 April 2023 (the affidavit is sworn in March 2023). He states that these proceedings '*will determine the majority of the contents of the plaintiffs statement of claim to the within proceedings'*. This is a reference to proceedings which were heard before the Tax Appeals Commission *("TAC")* on 14 April 2023 *("the TAC proceedings")*.

11. Mr. Keane also maintained that the plaintiffs have not delayed unduly in light of delays occasioned by the COVID pandemic and the first named plaintiff's health issues. In this regard he exhibited a letter sent from Mr. Clarke's GP dated 17 August 2019 addressed to TAC, setting out certain ongoing medical issues, which appears to have been submitted in support of an application for a deferred or staggered hearing of the TAC proceedings. Mr.

Keane further contended that the defendant has suffered no real prejudice as he has been on notice of these proceedings at all times.

Judgment of Egan J.

12. Egan J.'s judgment considered the well-known criteria for the strike out of proceedings on the grounds of delay within *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 *("Primor")* as to whether:- (1) there was an inordinate delay (2) if there was an inordinate delay, whether such delay was excusable; and (3) if the delay was inordinate and inexcusable, whether, on the balance of justice, the proceedings ought to be dismissed.

13. In considering the burden of proof, Egan J. held that it is not for the plaintiffs to prove that the balance of justice does not favour dismissal but for the defendant to prove that it does (p. 2 of the transcript). I agree.

14. In considering the *Primor* criteria Egan J. could see no evidence of pre-commencement delay but there was evidence of very significant post-commencement delay.

15. The plaintiffs contended there had been no delay on their part as, citing the decision of Allen J. in *Promontoria v Walsh* [2019] IEHC 650 *("Walsh"),* they argued that they were not under any obligation to furnish a statement of claim. This case is considered below but in any event Egan J. considered that the plaintiffs were under an obligation to progress the proceedings, which had not occurred in this case. In doing so she also pointed out that the plaintiffs could have issued a motion for judgment in default of appearance but had not done so.

16. Egan J. found there had been culpable delay from the initiation of proceedings, or from at least August 2017 (the date of service), which was ongoing.

17. Is the delay inexcusable? In the trial judge's view, it was. She found that there was a paucity of correspondence between the parties from the date of issue of the proceedings to the date of the strike out application. She found that no proper explanation was furnished to the Court or the defendant as to the progress of the TAC proceedings or its implications for this litigation. That in turn made it difficult for the Court to understand how the two sets of proceedings were linked. She also took the view that the impact of COVID and the first named plaintiff's health difficulties did not, on the timeline and facts of this case, provide exculpatory evidence.

18. In support of their argument that the delay ought not to be considered inordinate or inexcusable the plaintiffs also relied upon the decision of Butler J. in *Diamrem Ltd. v Clare County Council* [2023] IECA 49 *("Diamrem").* This case is also considered below but in summary Egan J. believed it could be distinguished from the facts of this case.

19. In considering the balance of justice criteria the High Court, on the basis of the judgment of Collins J. in *Cave Projects v. Gilhooley* [2022] IECA 245 *("Cave Projects"),* also had regard to the existence of some prejudice, either general or specific, claimed by the defendant.

20. Whilst Egan J. acknowledged that the defendant's argument as to prejudice was couched in very general terms, in her view this arose in large part owing to the total lack of specificity by the plaintiffs as to the case the defendant was obliged to meet. She found that

this paucity of information impeded the defendant's ability to formulate his argument of fair trial prejudice.

21. Egan J. also noted that the ongoing delays in the prosecution of these proceedings resulted in the defendant being unable to recover the monies lodged in the Circuit Court in the debt collection proceedings. In considering the argument of increased liability insurance premia, she noted that this did not appear to be reflected to any appreciable extent within the documentation that had been exhibited.

22. The judge also pointed to the fact that the plaintiffs had only set out in very broad terms how their case was to be progressed. There was no statement of claim before the court, nor any suggested timetable for its delivery, whether at the conclusion of the TAC proceedings, or otherwise.

23. In considering the question as to whether there had been delay on the part of the defendant the High Court judge referred to *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50 *("Comcast")* and noted that she should have regard to any delay on the part of the defendant as well as the plaintiffs.

24. At page 10 of the transcript the judge stated;

> *"I tend to take the view that unless the defendant has been in default, little weight should be attached to delay or acquiescence on the defendant's part provided the defendant's delay does not in turn contribute to the plaintiff's delay or disadvantage the plaintiff by causing him or her to incur further costs"*. I agree.

25. The trial judge found that a defendant simply cannot be expected to wait for upwards of seven years for a case against him to be advanced. She held that given that these are professional negligence proceedings, it was incumbent upon the plaintiffs to provide a supportive expert report or at the very least provide the defendant with the most basic information as to the basis of the claim. None of these steps had been taken. She was also satisfied that the defendant had suffered general prejudice and reputational damage in defending this claim, as well as not having the benefit of the monies from the debt collection proceedings.

26. In the High Court's view the balance of justice favoured dismissal.

27. In respect of her award of costs, Egan J. noted that the defendant had not sought consent for his late entry of an appearance. She stated that this had given her pause for thought as to whether his failure to do so had enabled the defendant to be in a position to immediately issue his strike out application, to use her word, *"prematurely"*. By this I understand her to mean that had consent been sought to the late entry of an appearance this might have afforded the plaintiffs sufficient time to immediately deliver a statement of claim. Egan J. rejected this submission on the basis that by the time the application came on for hearing before the High Court, the plaintiffs had failed to confirm that they were even then in a position to deliver their pleading.

28. The transcript then discloses that following the decision to strike out the plaintiffs' claim, the plaintiffs then made a submission to the effect that, whilst costs usually follow the event, the court ought to make no order as to costs *"in the event that as has been outlined to the court in relation to the way the motion was brought"* (p.13 of the transcript). I understand this to have been a reference to the Court's finding regarding the failure of the defendant to

seek consent to the delivery of its belated appearance. The High Court acceded to that application and made no order as to costs.

The Appeal

Preliminary Application

29. At the commencement of the oral hearing of the appeal the appellants stated that a comprehensive statement of claim had now been drafted and sought leave to submit it. The appellants confirmed it had not been before the High Court and had only been drafted recently. The application was resisted by the respondent who had not been furnished with any draft pleading prior to this application.

30. Having considered the application the Court (Costello J.) delivered an *ex tempore* ruling, with which Allen J. and I agreed, in which she refused to admit the draft statement of claim on the following bases;

(a) The statement of claim had not been before the High Court. It was not appropriate at this stage of the proceedings to permit the appellant to produce a draft statement of claim on the morning of the hearing of the appeal without leave of the Court and in a manner which had not afforded the respondent any meaningful opportunity to respond to the application.

(b) Furthermore, the Court was not satisfied that the appellant had addressed the three criteria for the admission of new evidence on appeal as set out in *Murphy v. Minister for Defence* [1991] 2 I.R. 161 *("Murphy").* The first limb is "*1. The evidence must have been in existence prior to the date of the decision of the High Court and could not with due diligence have been adduced before the High Court".*

Costello J. confirmed that this limb has not been satisfied. She also pointed to the decision of Hogan J. in *Student Transport Scheme Limited v. Minister for Education* [2015] IECA 303 which makes it clear that the three requirements of *Murphy* are cumulative. It followed therefore that the failure to satisfy the particular limb quoted above meant that the appellant's application must be refused.

The Appeal

31. In this appeal, the appellants' focus in considering the *Primor* criteria was primarily directed to two matters; first, that the High Court judge erred in failing to give consideration to what were described as parallel proceedings, comprising the TAC proceedings and this litigation and secondly, in failing to properly consider the implications arising from delay on the respondent's part. For these reasons the appellants maintained that the delay, whilst inordinate, was excusable and that the balance of justice necessitated the reversal of the High Court judgment as they were now in a position to proceed with their litigation.

32. The TAC heard the appellants' tax appeal in April 2023 and delivered judgment on 21 August 2023. The Court was informed that the issues before the TAC concerned both appellants and was a matter of some complexity. The appellants, it was said, had therefore needed time after delivery of the determination of the TAC to consider its implications and as a consequence a comprehensive statement of claim had only just been drafted.

33. In considering the *"parallel proceedings"* the appellants further submitted that, prior to delivery of the TAC determination, they were never in a position to deliver their statement of claim. The TAC determination, it was said, was required in order that they could properly

clarify the parameters of their claim. Arising from this they contended that the High Court should have made proper allowance for this fact.

34. The appellants further submitted that, for the same reason, they had never sought judgment in default of appearance, nor – they said – were they in a position to confirm to the High Court when they would be in a position to serve their pleading nor to request Egan J. to provide a timescale for its delivery.

35. In short, it was clear that the appellants, on their own admission, were not in a position to deliver a statement of claim from the institution of their proceedings and its service in August 2017 until after the TAC determination in August 2023, which post-dated the delivery of the High Court's judgment in this case.

36. The appellants maintain that the respondent was on notice and fully aware of the TAC proceedings. They submit that having knowledge of these other proceedings and the limited resources available to the appellants to maintain both, coupled with the necessity to quantify their claim following delivery of the TAC determination, meant that it was not unreasonable for the appellants to await that determination before finalising their pleadings.

37. In doing so they relied upon *Diamrem*. This was a case in which the court was considering whether the plaintiff's claim ought to be dismissed on the grounds of inordinate and inexcusable delay. Butler J. found that the relevant delay was not inordinate or inexcusable. She held it was reasonable for the plaintiff to await the outcome of related proceedings it had instituted pursuant to s.160 of the Planning and Development Act 2000 ('s.160 proceedings'), she found the respondent was aware that the plaintiff was awaiting the outcome of the s.160 proceedings and took no steps to challenge this period of alleged

delay. She also considered the period in which the plaintiff pursued certain FOI requests for information. The appellants point to para. 58 of the judgment where Butler J. set out in detail the steps that had been taken, arising from which the court found, on the facts of that case, that the respondent could have been in no doubt as to the plaintiff's intention to actively pursue its case. They highlight the judge's finding within this paragraph that the information the appellants in that case sought by way of FOI requests *"....was relevant to the quantum of the claim the plaintiff wished to make, and whilst not strictly essential for the purpose of drafting the statement of claim, it was not unreasonable for the plaintiff to seek that information before finalising its pleadings".* The final sentence of this paragraph states *"…this is not a case where litigation has lain fallow for many years in circumstances where a defendant might reasonably have assumed that the plaintiff no longer intended to pursue it".* Egan J. distinguished *Diamrem* on the basis that the facts of this case disclose that this litigation has lain fallow and this respondent was entitled to assume or at least to wait to determine whether these appellants intended to pursue it. I agree. In making a finding that the delay, on the facts of that case, was not unreasonable Butler J. distinguished it from a scenario which neatly fits the facts of this case.

38. Within her judgment (p. 12 of the transcript) in considering the argument as to the conduct of the defendant in respect of its alleged delay, Egan J. refers to para. 65 of Butler J's judgment. Within that paragraph, whilst noting that the respondent did not take any steps to ensure the advancement of the proceedings by the plaintiff, Butler J. stated that she accepted that *"... at all times the legal onus was on the plaintiff to act ... it was nonetheless open to the respondent to take steps to ameliorate the prejudice which was allegedly being caused to it and it failed to do so. Whilst this might not be a relevant factor in a case concerning a longer period of delay or a case in which the defendant had no real*

understanding of why the plaintiff had not progressed the proceedings or even a case in which there was no other interaction between the parties during the relevant period, it seems to be a factor of some relevance on the facts of this case. In particular, as the plenary summons had been served on the defendant, it was open to the respondent to bring a motion under Order 27 in order to procure the delivery of a statement of claim. … The respondent understood why the plaintiff had not progressed the proceedings. The parties and solicitors were in continuous, intermittent contact in relation to the s. 160 proceedings. The period of delay, although inordinate, was still one calculated in months rather than years". (My emphasis.)

39. Egan J. distinguished para. 65 quoted above from the length of the appellants delay in the present case (she notes in *Diamrem* it was 22 months) and the lack of interaction between the parties since the appellants issued proceedings. I agree. I have set out the quotation from para. 65 in some detail, so as to highlight the clear factual differences between *Diamrem* and this case; here there was an absence of communication between the parties – indeed within her judgment Egan J. was uncertain as to the precise linkage between this litigation and the TAC proceedings - and the period of delay in this case is significantly longer. This is all against the background of the appellants' submissions in which they asserted their inability to deliver a statement of claim until after the TAC determination, which in turn postdated Egan J.'s judgment. Indeed, this case comes within the criteria envisaged within the underlined section quoted above. All of the potential matters highlighted within this quotation as being possible grounds for this respondent to *"ameliorate the prejudice"* in circumstances which might lead a Court to consider the delay to be excusable are simply not present in this case. The respondent in this case – where the delay is calculated in years not months – had no idea of the case he was required to meet, nor why the action had not been

progressed. *Diamrem* assists the respondent not the appellants as it points to the factual basis upon which a court would consider the delay to be inexcusable, which in my view accords with the appellants' conduct in this case. Egan J. considered (page 12 of the transcript) that Diamrem is distinguishable from the facts of the present case and does not assist the appellants. For the reasons set out above, I agree.

40. If, as the appellants maintain, the TAC appeal amounted to parallel proceedings, I can find no reference to this in any correspondence (which is limited in any event) appraising the respondent of their progress before the TAC. Nor is it explained why no statement of claim could be drafted setting out the parameters of the claim, whilst also perhaps delineating which portions of it, particularly with regard to any claim for damages, could only be properly clarified at a later stage.

41. The appellants maintain that both parties are or were well known to each other and in such circumstances would have been aware of the progress of the litigation and the necessity or otherwise as to why it could not be progressed. These matters are not clear on the face of any documentation before the court. There is only an oblique reference in the plenary summons to a *"contract of engagement,"* which is itself unclear.

42. The appellants also maintain that it was only when it was apparent that the hearing before the TAC was imminent that the defendant instituted its strike out application. I do not believe that this point assists them.

43. The appellants further suggested that these proceedings were instituted as a form of protective writ, due to perceived concerns regarding the Statute of Limitations. Again no details were furnished and this point was not expanded upon.

44. The consideration that a court might afford to parallel proceedings was considered by Bolger J. in *Padden v. McDarby* [2023] IEHC 604. That was a strike out application where the plaintiff argued that discovery of documents, which was being sought in other proceedings, was necessary to enable this plaintiff to draft his statement of claim and had accordingly taken the view that it should not deliver this pleading until this discovery became available. The Court noted that the plaintiff had not sought the defendant's agreement to the course which it had adopted as to why no statement of claim was delivered. Within her judgment Bolger J. also quoted from the relevant passage in *Rodenhuis and Verloop B.V. v. HDS Energy Ltd.* [2010] IEHC 465 *("Rodenhuis"),* where Clark J. (then a High Court judge) considered parallel proceedings and continued at paragraph 3;

> *"In Rodenhuis and Verloop B.V. v. HDS Energy Ltd. [2010] IEHC 465, the plaintiff's delay in progressing proceedings was not excused by parallel proceedings in the absence of any agreement with the defendant. Clarke J. (as he was then) said at para. 3.4:-*
>
> > *'While there was undoubtedly a connection between the matters, it does not appear to me that the existence of those parallel proceedings provided any legitimate basis for Rodenhuis in not progressing these proceedings or, at least at a minimum, in not raising the question of whether it might be appropriate to stay these proceedings pending a resolution of either or both of the parallel cases. <u>It does not seem to me that it is open to a party to take the unilateral action of allowing one set of proceedings to go asleep because of the existence of another set of proceedings and then use the connection between the two sets of proceedings as an excuse for having allowed the proceedings concerned to go to sleep</u>. If it is truly felt that it is inappropriate for some reason not to progress a set of proceedings because of the existence*

> *of other proceedings, then it is at a minimum incumbent on the party who holds that view to raise the issue in correspondence and seek to reach agreement. If agreement cannot be reached, then it is incumbent upon the party either to progress the proceedings or make some appropriate application to the court for directions. In those circumstances, I was not satisfied that the existence of the parallel proceedings provided any significant excuse for the delay.'"(*My emphasis).

45. Adopting *Rodenhuis* , the same can be said here. The appellants have not, either within their pleading or in correspondence, sought to advance a case in respect of any parallel proceeding. At best there is an averment within Mr. Keane's affidavit which makes reference to the TAC proceedings. At no stage did the plaintiffs seek a stay of these proceedings. Nor is the Court aware of any difficulties that precluded a statement of claim being delivered, even in circumstances where certain matters might remain to be clarified at a later stage. Although one might surmise as to the reason for the suggestion that this litigation and the TAC proceedings are parallel proceedings, this is unclear on the face of any documentation or pleading. The reference by Clarke J. within the above quotation to allowing one set of proceedings to *"go to sleep"* is apposite to the facts of this case.

46. The appellants explain their service of a notice of intention to proceed in 2020 on the basis that it was hoped that the hearing of the TAC proceedings was imminent. In explaining what appeared to be an apparent delay in procuring a hearing before TAC they referred to the medical certificate concerning the first named appellant referred to above and also delays occasioned by the COVID pandemic. However, these proceedings were issued and nothing happened following their service in August 2017. This was long before the commencement of the pandemic and endured far longer than the first named appellant's illness.

47. The appellants relied upon the passage from *Primor* where, in discussing the principles of law to be applied, Hamilton C.J. states that account may be taken of:-

> *"(d) (iii) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at".*

48. In considering the issue of why their delay was excusable the appellants seek to point to the respondent's delay and rely significantly upon the decision in *Walsh*.

49. In that case Allen J. considered a strike out application, in a case in which the action was commenced by plenary summons on 19 September 2014, the summons was served on 15 September 2015 and an appearance entered on behalf of both defendants on 18 September 2015. The appearance had not called for the delivery of a statement of claim and nor had one been requested subsequently. Allen J. in carefully considering the applicable Rules of Court found that the defendants, having failed to call for the delivery of a statement of claim as required within the Rules, then the plaintiff was never under any obligation to deliver one. The plaintiff, having never been obliged to deliver a statement of claim, it could not be said to have been guilty of delay in failing to do so.

50. By analogy with the facts in *Walsh*, the appellants' argued that the question of their delay was subordinate to the principal issue which was that the respondent had never called for a statement of claim and therefore the delay was theirs. From the appellants' perspective there was no room for argument; it was not a question of timing but of adherence to the Rules as set out in *Walsh*. It is correct that the respondent in this case never sought delivery of a statement of claim, within his appearance or at all.

51. I note, as did Egan J., that the timeline in *Walsh* is considerably shorter than the present case. The appellants in this case contend that the respondent waited six years and four months to enter an appearance and, as in *Walsh,* never sought the delivery of a statement of claim. In the absence of being called upon to serve it they argued the delay was the respondent's as they had no obligation to serve a statement of claim until called upon to do so.

52. Counsel for the respondent submits that in considering the exceptionally generalised pleading within the plenary summons, his client was entitled to take the view that he should wait and see as to the manner in which the appellants chose to progress matters, if at all. The respondent also confirmed that the necessity for the entry of an appearance was not with a view to seeking delivery of a statement of claim, but rather to institute this strike out application.

53. As highlighted above, the factual position here is significantly different to that in *Walsh*. Within the period of 6 ½ years after issuing the plenary summons and 5½ years after its service the appellants have confirmed before this Court that they were not in a position to seek judgment in default of appearance at any time prior to August 2023. Whilst the appellants fault the respondent for failing to call for the delivery of a statement of claim, they, on their own admission, were not in a position to comply with any such request at any time until after the conclusion of the High Court action and delivery of the judgment. In such circumstances in my view their reliance on *Walsh* is misplaced.

Discussion and Conclusion

54. Whilst I understand these are professional negligence proceedings, in my view this fact is only discernible on the face of the pleading from the identity of the defendant to the plenary summons. No expert report or even letter before action was furnished prior to issuing the plenary summons.

55. Applying *Primor*, in my view the delay is inordinate and the appellants do not seriously seek to resile from this finding. On the facts of this case, it is difficult to see how a contrary argument might be formulated.

56. They do however, for the reasons set out above, claim it was excusable. I cannot see how this can be when none of the reasons they now seek to advance (parallel proceedings, coupled with the now claimed necessity to await the outcome of the TAC determination prior to delivery of the statement of claim) were ever properly set out within pleadings or correspondence. These proceedings were never progressed over a period of significant delay and no reason was ever advanced as to why this was so.

57. In considering the appellants' arguments as to the respondent's delay, on the facts of this case, in my view he cannot be criticized given the generality of the pleading within the plenary summons. In my view the respondent is entitled in such circumstances to see whether the appellants intended to proceed with this action.

58. In this case the position is relatively straightforward, there is an onus on the appellants to explain their lengthy delay from 2016 to the hearing before the High Court, in circumstances where all that had transpired in that period was the service of a plenary summons. The argument that they were not obliged to take a step when they were not called upon by the respondent to do so for a period of five and a half years cannot be accepted as a

legitimate way to prosecute proceedings nor endorsed by this Court. It cannot excuse five and a half years inactivity from the service of their sole pleading in this litigation.

59. In *Diamrem* the court was clear that the respondent in that case could be in no doubt but that the appellants were dealing with specific issues relevant to the case which was delayed; on the facts of this case there is and was every suggestion to the contrary.

60. *Comcast* considers that a court must also make an enquiry as to any delay on the part of the respondent in considering the question as to whether to strike out proceedings. In this case the respondent has not contributed to the delay which, on the appellants' own case, is directly linked to the TAC proceedings.

61. Any strike out application must be very carefully considered, given the consequences if such an Order is made against these appellants. However, in a case such as this where their delay is of such magnitude, for reasons that do not directly relate to any action on the part of the respondent, then in my view the court's primary focus must be upon their stated reasons for that delay. In my view, for the reasons set out above, their delay is inexcusable.

62. In considering the balance of justice, in my view there is significant trial prejudice where this respondent has not had any case pleaded against it. Such delay is not ameliorated by anything within the correspondence between solicitors or even ensuring that the respondent was aware of the progress of the TAC litigation. I have also noted the failure to serve any pre-trial report in these professional negligence proceedings. The appellants cannot simply do nothing for such an extended period of time in circumstances where the respondent had no notion of the case pleaded against it.

63. Egan J. noted that whilst the defendant /respondent had not asserted any specific trial prejudice, given the paucity of pleadings she accepted that it was impeded in indicating specific prejudice in such circumstances. I agree.

64. Whilst I accept Egan J.'s findings in respect of the relatively modest increase in professional liability insurance premia by virtue of these proceedings, nevertheless I assume the existence of this litigation would require ongoing notification to an insurer. The monies arising from the debt collection proceedings remain lodged in Court since 2017 and therefore unavailable to the respondent.

65. Egan J. found there had been culpable delay since the initiation of proceedings and particularly since August 2017. She was satisfied that prejudice had been established given the period of time of the delay. I also agree and in my view, on the facts of this case, such a significant period of delay must in and of itself be a factor for consideration within the balance of justice criteria. The Courts have on many occasions referred to the overall obligations upon all parties to litigation to ensure that cases are dealt with expeditiously. In my view a party initiating proceedings must ensure that they take the requisite procedural steps to achieve this. If for any reason they are not in a position to do so then, rather than do nothing, at a minimum they should have endeavoured, as identified by Butler J. in *Diamrem*, to ensure that the reason for this delay is explained to the respondent. In my view, on the facts of this case, delay of this magnitude does amount to a general fair trial prejudice, given the paucity of information pleaded or furnished to the respondent. In addition, these proceedings are far from ready for hearing.

66. For these reasons in my view the balance of justice in this case clearly favours dismissal of this action and I would reject this appeal.

Cross Appeal

67. The respondent has cross-appealed against the costs order made by Egan J. The trial judge made no order as to costs for the reasons set out at paras. 27 and 28 above. In essence Egan J. took the view that the respondent had issued its strike out application immediately after its solicitors filed an appearance without seeking the appellants' consent to the late entry of its appearance.

68. Egan J. noted the absence of any motion for judgment in default of appearance by the appellants. I note that before this court, particularly in the context of the appellants' preliminary application seeking leave to submit its statement of claim, those appellants were clear in their assertion that they could not serve this pleading in advance of the TAC judgment and also allowing for a period of consideration thereafter. All of this took place after delivery of Egan J.'s judgment.

69. RSC Order 12, rule 2 requires the entry of an appearance within eight days from the service of the plenary summons. This time limit had expired. In such circumstances Delany and McGrath on Civil Procedure (5th ed., 2023) state at para. 4-04;

'....the expiration of the time limit does not prevent the defendant from entering an appearance subject to the exceptions provided for in the Rules. Order 12, rule 13 provides that a defendant, save in actions for the recovery of land, may appear at any time before judgment. Thus, although it is commonly done, there is no requirement to seek or obtain the consent of a plaintiff to the entry of a late appearance. However, if a defendant appears at any time after the time limited for appearance, he shall not, unless the court otherwise

orders, be entitled to any further time for delivering his defence or for any other purpose than if he had appeared within the time limited for appearance.[1] *'.*

70. I appreciate that an appellate court should be slow to intervene in a trial judge's decision on costs but I do so particularly in view of the fact that these appellants have confirmed that they could not deliver a statement of claim until just before the appeal. In my view the respondent breached no rule of the RSC, therefore the reference to a failure to seek consent to the entry of a late appearance by the defendant / respondent was misplaced and it was therefore wrong to penalise the respondent on costs where it had succeeded in its strike out application. Therefore, it is appropriate to allow the cross appeal.

Outcome of the appeal

71. This appeal is dismissed.

Costs

72. In respect of this appeal as the respondent has been entirely successful my provisional view is that he should be entitled to the costs of this appeal and before the High Court, with such costs to be adjudicated in default of agreement.

73. Should the appellants wish to contest this order they may do so by filing written legal submissions (not to exceed 1,000 words) within 14 days of the date hereof and the respondent

[1] As confirmed by Peart J. (then a judge of the High Court) in *AIB v Lyons* [2004] IEHC 129 at p. 2

may reply by written legal submissions (also not to exceed 1,000 words) within 14 days thereafter. In default of any such notification the proposed orders will be made.

As this judgment is being delivered electronically Costello & Allen JJ. have indicated their agreement with it and the Orders I have proposed.