[2021] IEHC 260

THE HIGH COURT

[2003 No. 14424 P.]

BETWEEN

CIARAN CARROLL

PLAINTIFF

AND

NEW IRELAND ASSURANCE COMPANY PLC T/A BANK OF IRELAND LIFE

DEFENDANT

JUDGMENT of Ms. Justice Butler delivered on the 14th day of April, 2021

Introduction

1. In December, 2003, the plaintiff instituted these proceedings against his former employer challenging the validity of a decision to dismiss him taken in September, 2002. That decision was upheld on an external review in August, 2003. The events underlying the defendant's decision had largely occurred in 2000 and were the subject of an internal audit and a disciplinary investigation both of which commenced in 2001. The plaintiff alleges that his dismissal resulted from a flawed investigation and that there was a breach of fair procedure in the disciplinary process conducted by the defendant. The plaintiff also disputes the factual basis upon which the decision was reached. All of these allegations are denied by the defendants.

2. The application before the court is the defendant's application to strike out the proceedings for want of prosecution. It is difficult to envisage anything other than truly exceptional circumstances justifying a court permitting litigation to proceed where there has been a delay of nearly 18 years between the institution of the proceedings and the bringing of a motion to strike them out. Certainly, the first relief sought in these proceedings, a declaration that the plaintiff continues to be employed by the defendant, is manifestly stale and could never be awarded by a court after what is now an interval of 20 years. However, counsel for the plaintiff has argued strongly that the dismissal had and continues to have significant reputational and financial repercussions for the plaintiff, such that if the court does not accept that the delay is excusable, the balance of justice nonetheless favours allowing him to continue with his litigation. Consequently, it is necessary to look at the circumstances in which the delay has occurred to see if there is a legally acceptable excuse for it and, if not, to consider where the balance of justice as between the parties lies.

Background Facts

3. The plaintiff was employed by the defendant as a financial services manager from 1988 and up until 2001 worked at their Limerick branch. The defendant is a company within the Bank of Ireland Group of companies. Although legally distinct from Bank of Ireland, there were and are relationships between the companies within that group which have some bearing on this application. Most notably, as an employee of the defendant's, the plaintiff's mortgage and various loans were organised through other Bank of Ireland companies. In June, 2000, Bank of Ireland Mortgage Bank ("the Bank") made a loan of €70,000 to the plaintiff and his wife by way of equity release.

4. In January, 2001, the plaintiff and his wife separated in acrimonious circumstances that led to protracted family law proceedings. This upheaval no doubt caused the plaintiff additional financial strain and, on 21st September, 2001, he received correspondence from the Human Resources Department of the Bank of Ireland Group in relation to the management of his personal finances. A few days later, Bank of Ireland received a letter from the plaintiff's wife stating that she had not consented to the equity release loan in June, 2000. This prompted an investigation by the Internal Audit Department of Bank of Ireland Group which found that the signature on the loan documentation purporting to be that of the plaintiff's wife was not in fact her signature. A handwriting expert was engaged as part of this investigation.

5. Around this time, the plaintiff was transferred from the defendant's Limerick branch to their branch in Roscrea. The plaintiff claims this was an act of victimisation against him because he had become romantically involved with another member of staff in Limerick. The new posting was short-lived because, on 10th October, 2001, the plaintiff was called to a meeting at which he was put on special paid leave pending an investigation into the 2000 loan. All in all, the plaintiff attended four meetings with the defendant, the first in October, 2001, a second in February, 2002 and two formal disciplinary meetings in March and September, 2002. The plaintiff makes a range of allegations of a lack of fair procedures in the conduct of those meetings. The plaintiff was dismissed on 9th September, 2002. He availed, unsuccessfully, of both an internal and an external review process in accordance with the defendant's internal procedures.

6. There is no doubt that the loss of his job shortly after the breakup of his marriage caused the plaintiff considerable personal stress and he was treated by a psychiatrist for extreme anxiety from late 2003. To the plaintiff's credit, he obtained alternative employment with a different financial institution with whom he worked from early 2003 to 2008, albeit at a lower salary than that which he was paid by the defendant. In August, 2008, he started a new job (presumably on more attractive terms) with yet another financial institution but, unfortunately for the plaintiff, the economic circumstances of the time resulted in his being made redundant in 2011. Since then, he has worked in a self-employed capacity as an insurance broker. The plaintiff claims that because he works in the financial sector, all of the positions for which his skills and experience are suitable are ones which are regulated by the Central Bank under the Central Bank Reform Act, 2010. Therefore, in order to be approved for such a position, he has to disclose the fact of and the reasons for his dismissal by the defendant in 2002. This has, in effect, prevented him from obtaining equivalent employment. Consequently, the plaintiff maintains that, notwithstanding the passage of time since the events complained of, the dismissal continues to cause him ongoing financial and reputational damage.

The Proceedings

7. As these proceedings have now been in existence for nearly eighteen years, it is unsurprising that they have had a lengthy and, at times, complex history. Nonetheless, it is probably fair to observe that for most of their duration, the proceedings have been dormant with nothing happening over extended periods of time. It is also fair to observe

that any time action was taken by the plaintiff, an appropriate response was made by the defendant in a timely manner.

8. The proceedings were instituted on 16th December, 2003, not long after the plaintiff's appeal had been rejected by the external reviewer. However, a statement of claim was not served until more than two years later on 6th February, 2006. A defence was filed and notice for particulars raised by the defendant on 10th April, 2006. These particulars were not replied to until 26th January, 2012, nearly six years later.

9. In the intervening period, the plaintiff was also dealing with proceedings which had been instituted against him in 2004 by Bank of Ireland Mortgage Bank seeking to recover the monies drawn down on foot of the 2000 loan (Record No. 2004/758S, "the Bank's proceedings"). One of the grounds on which the plaintiff sought to defend those proceedings was that the internal audit had found that the loan documentation was not validly executed. Based on the fact that the 2000 loan was a feature of both cases, the plaintiff made an application to the High Court in the Bank's proceedings on 19th June, 2006 seeking to have the two cases linked. Notwithstanding the Bank's objections, Hanna J. ordered that the two cases be listed for hearing on the same date and before the same judge. It seems that despite the fact that this order had a material effect on these proceedings, the defendant was not on notice of the application, save to the extent that it might be regarded as being indirectly on notice because both it and the Bank were members of the same group of companies.

10. The existence of the linking order seems to have had the effect of bringing both sets of proceedings to a standstill. These proceedings were largely dormant between 2006 and 2012. The only activity which occurred was an exchange of solicitors' correspondence in respect of voluntary discovery between June and November, 2008. Although the plaintiff's solicitor's correspondence threatened a motion for discovery if voluntary discovery was not agreed, and a notice of intention to proceed was issued in July, 2009, possibly for this purpose, no motion was in fact brought until 11th January, 2012. Discovery was ordered by the High Court on 27th January, 2012 and an affidavit of discovery filed by the defendant on 17th February, 2012.

11. A number of steps were taken in early 2012 which kick-started the proceedings back to life as, in addition to seeking discovery, on 26th January, 2012, the plaintiff replied to the notice for particulars which had been raised by the defendant in April, 2006. The papers before the court do not include any Notice of Intention to Proceed preceding these steps and that may be because an order unlinking the two sets of proceedings had been made by the High Court on the Bank's application on 25th May, 2011. The Bank then proceeded to take steps to bring its claim against the plaintiff to trial and it was listed for hearing on 17th April, 2012. For reasons that are not entirely clear given that the two sets of proceedings had been "unlinked" in May, 2011, these proceedings were also listed for hearing on that date. However, the plaintiff's solicitor brought an application to come off record on the grounds that, due his financial situation the plaintiff had not been able to make any meaningful contribution towards the costs of the litigation. This application was

allowed on 17th April, 2012 and these proceedings were adjourned. The Bank's proceedings continued against the plaintiff as a lay litigant and, on 18th April, 2012, judgment was granted against the plaintiff for a sum of nearly €160,000. An attempt by the plaintiff to have his ex-wife indemnify him in respect of some or all of this debt was unsuccessful and was struck out by the High Court in October, 2012.

12. I pause in this narrative to acknowledge that these events put the plaintiff in an invidious position. His difficult financial situation had now crystallised into a significant judgment debt which was registered as a judgment mortgage over his home in 2013. He no longer had the benefit of legal representation with which to pursue his employment litigation. He sought legal aid but this was refused. The exhibited correspondence includes a letter from the Legal Aid Board dated 5th December, 2012 which indicates that the plaintiff had been deemed financially eligible for legal services but that a decision whether to grant a legal aid certificate to him would depend on the merits of his case. He was told that an appointment to see a solicitor would be made for him but that due to demand there was a waiting list of about seven months. The plaintiff has not provided any further information as regards why or when his application for legal aid was refused. He does say that he tried but was unable to procure private legal representation due to his financial circumstances and I have no doubt that this was the case.

13. No further step was taken in these proceedings until 2019. However, the plaintiff acting as a lay litigant, instituted proceedings against the Bank of Ireland and a number of related companies on 5th January, 2016 alleging deceit, fraud and unjust enrichment (Record No. 2016/40P). The basis of the allegations underlying these proceedings are set out in correspondence and have been strenuously refuted by the Bank. No statement of claim was ever delivered and a notice of discontinuance was served by the plaintiff's current solicitors on 16th December, 2019.

14. The circumstances in which these proceedings came to be re-activated in 2019 are unclear. The plaintiff engaged his current firm of solicitors some time in the Autumn of 2019. The solicitor who swore the defendant's grounding affidavit believes that this was done in response to correspondence from her dated 25th October, 2019 requesting these proceedings to be discontinued. However, counsel for the plaintiff informed the court that that letter was, in turn, a response to a letter from the plaintiff (or perhaps his current solicitor) dated 18th October, 2019 which is not exhibited. The question of whether the plaintiff resurrected the proceedings unilaterally or was prompted to do so by correspondence from the defendant's solicitor is said to be relevant to whether the plaintiff will now prosecute the proceedings promptly and efficiently if allowed to continue with them. I do not think that it is absolutely necessary for me to decide what prompted the re-activation of these proceedings in the Autumn of 2019. Indeed, I have concerns that this could not be fairly decided without sight of the letter of 18th October, 2019 on which the plaintiff relies. At this point, it is sufficient to note that, since coming on record, the plaintiff's current solicitors have taken a number of pro-active steps including the discontinuance of the 2016 proceedings against the Bank and the service of a notice of intention to proceed on 29th October, 2019. They also indicated their intention of serving

a Notice of Trial but refrained from doing so on the defendant's request in order to allow this motion to be brought and determined.

Delay – Basic Principles

15. There is a considerable volume of jurisprudence in relation to delay as the courts grapple with identifying the point at which a particular period of delay can be said to be such as to disentitle the party responsible for that delay to continue with the litigation. It goes without saying that a court must make its decision based on the facts and circumstances of each individual case. Nonetheless, a number of general principles had been articulated which assist a court in identifying which of the parties bears the onus of proving discreet matters within the envelope of a delay application and how a court should exercise its discretion in cases where that arises.

16. Broadly speaking, there are three discrete but overlapping strands to the delay jurisprudence and a party seeking to have proceedings struck out by reason of delay frequently invokes two or more of them. Firstly, under O. 122, r. 11, an application can be made to strike out proceedings where no proceeding has been taken in the two years preceding the application. Order 122, rule 11 provides, insofar as material:-

> *"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. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule."*

The significance of asking the plaintiff to refrain from serving a notice of trial is evident from the terms of this rule. Had a notice of trial been served, then that would constitute a "*proceeding*" within the last two years which would have precluded any application being made under O. 122. As it is, the last step in these proceedings prior to this motion was taken in 2012. It is notable that the period envisaged by the rule as constituting a sufficient delay to warrant an application under O.122 is a small fraction of the delay which has occurred in this case. However, the two-year period of inactivity is merely the threshold which must be met by a party making an application under O. 122, r. 11 - the rule provides the court with a full discretion thereafter to dismiss or not to dismiss the proceedings. If the court does not make an order to dismiss the proceedings, it may impose terms on their continuance which might require the party in default to take certain steps within certain timeframes so as to ensure that the proceedings will be disposed of in an efficient manner.

17. Apart from the jurisdiction which the court has under O. 122, r. 11, it has long been recognised that the court has an inherent jurisdiction to dismiss proceedings in cases of delay. That inherent jurisdiction gives rise to both of the other strands of jurisprudence on this topic. Firstly, where a delay has been inordinate and inexcusable, a court may dismiss proceedings pursuant to its inherent jurisdiction if the interests of justice require

that that be done. Secondly, even where the delay is excusable it may nonetheless have caused prejudice to the defendant such that it is no longer possible to have a fair trial. In both instances, the court looks firstly to see whether the delay complained of is inordinate. The period of delay that will be regarded as inordinate varies depending on the particular circumstances of the case and of the parties. However, that in more recent times, courts have become less tolerant of delay which impedes the efficient administration of justice as a result of which periods of time which were not regarded as inordinate in earlier case law are now more likely to be found to be unacceptable..

18. The court then looks to whether there is a reasonable excuse for the delay. It is at this point that the divergence between the two categories of case occurs. The distinction between the two categories lies in whether there can be said to be culpable blame attaching to a plaintiff for the delay complained of. Under what, for convenience, is referred to as the *Primor* line of jurisprudence (*Primor Plc v. Stokes Kennedy Crowley* [1996] IR 459), if there is an acceptable excuse for the delay then that is the end of the exercise as there is no basis for the invocation of the court's inherent jurisdiction if the delay is not both inordinate and inexcusable. However, if there is no reasonable excuse for the delay, the court then proceeds to exercise a discretion and, in order to do so, considers whether the balance of justice favours the striking out of the proceedings or allowing the plaintiff to conclude the litigation. This balancing exercise is conducted from the starting premise that as the plaintiff is responsible for culpable delay, it must justify allowing the litigation to continue.

19. The other line of jurisprudence, referred to as the *O Domhnaill* jurisprudence (O *Domhnaill v. Merrick* [1984] IR 151), acknowledges that even where a plaintiff can excuse an inordinate delay, the delay itself may be so prejudicial to a defendant that the court should nonetheless exercise its inherent jurisdiction to strike out the proceedings. The focus of the court's analysis is not simply on the balance of justice as between the parties but on whether the delay will result in the court being unable to afford the parties, and specifically the defendant as the complaining party, a fair trial. The starting point for this exercise is that the court should, in principle, allow litigation to continue where there has been no culpable delay. Consequently, the defendant must establish that it would be unfair in all of the circumstances to require it to defend the litigation at this remove. This places a high onus on a defendant with the case law using language such as "*a clear and patent unfairness"* and "*a real and serious risk of an unfair trial".*

20. The difference between what the court is considering at the terminal phase of its analysis in each of the categories set out above has been recognised in a number of recent cases. The key factor is that where a plaintiff is responsible for inordinate and inexcusable delay, a defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be struck out. More modest prejudice may tip the balance of justice against allowing the proceedings to continue. Further, the court will in any event take account of the prejudice that inevitably results from a lengthy delay in the conduct of litigation, the prejudice being commensurately greater the longer the period of delay. In contrast, where a plaintiff has not been guilty of inexcusable delay, there is a

positive onus on a defendant not only to establish prejudice but to establish that that prejudice is of a kind and a level which will, in fact, impede a fair trial.

21. In this case, the plaintiff has accepted that the delay complained of is inordinate. Therefore, the first question for the court is whether the delay is also inexcusable. The answer to that question will determine whether the court then proceeds to conduct a *Primor*-type balancing exercise or whether the defendant must establish that the delay is such that a fair trial will be impossible at this remove. I propose to start by looking at the excuses proffered by the plaintiff to each of the three periods of delay identified by the defendant.

Excusability of Delay?

22. The defendant has broken the eighteen years during which the plaintiff's proceedings have been in existence into three discrete periods and makes complaints of delay in respect of each of them. The first is the period between the institution of proceedings in December, 2003 to the service of the statement of claim in February, 2006 (two years); the second is the period from the service of the defence and notice for particulars in April, 2006 to the re-activation of the proceedings by service of a motion for discovery in January, 2012 (six years); and the third is the period from the adjournment of the proceedings in April, 2012 to their second re-activation and the coming on record of the plaintiff's current solicitor in the Autumn of 2019 (seven and a half years).

23. Although the first period is relatively short and certainly so compared to the later periods, the defendant points to para. 40 of its defence to show, even at that early stage, it had raised and was relying on the plaintiff's delay. Paragraph 40 of the defence is as follows:-

> "Without prejudice to the generality of the foregoing it is pleaded by the defendant that the plaintiff has been guilty of inexcusable and unreasonable delay and by reason of the said delay the declaratory relief sought by the plaintiff is inappropriate and it is pleaded by the defendant that this Honourable Court should exercise its discretion to refuse equitable relief by reason of the laches on the part of the defendant."

> *The defendant contends that the delay in the second period is largely attributable to the linking of these proceedings with the Bank's proceedings, a step taken unilaterally by the plaintiff and then relied on by him to do nothing with either set of proceedings. Finally, the defendant points to the fact that absolutely no step was taken by the plaintiff for over seven years between 2012 and 2019 and contends that even if the earlier periods of delay were to be regarded as excusable (which is disputed by the defendant), then this seven-year period would of itself meet the threshold of being inordinate and inexcusable.*

24. The plaintiff disputes each period of delay and also makes a number of overarching arguments which I will deal with separately. In respect of the first period, the plaintiff notes that this is only two years and suggests that it was largely immaterial. This is because the plenary summons put the defendant on notice of the fact that the plaintiff's

claim was for wrongful dismissal and, as his employer, the defendant knew the case it had to meet and was already in possession of the relevant files and minutes. In respect of the second period, the plaintiff points to the existence of the linking order and the fact that the bank adjourned its summary proceedings on multiple occasions to submit that "*hence there was limited opportunity for the plaintiff to advance the employment proceedings during this period*". He points to the correspondence in 2008 in connection with voluntary discovery as evidence of activity in relation to the case which indicated to the defendant that it was still being pursued. The plaintiff also relies on the fact that during this period he was simultaneously defending the Bank's proceedings and his ex-wife's family law proceedings and that his personal and financial circumstances were extremely precarious. He has exhibited a psychiatric report dated November, 2006 which describes treatment afforded to him from 2003 for extreme anxiety. The text of the report suggests that the plaintiff was no longer receiving active treatment at the time it was written and also that his psychiatrist had not regarded him as being unfit to take up the alternative employment which had commenced in 2003. Finally, in respect of the third period, the plaintiff relies on the fact that he did not have the benefit of legal representation after his original solicitors came off record in 2012 until he secured the services of his current solicitors in 2019. He points to the fact that since his current solicitors came on record, the case has been proactively managed and also asserts that, should the litigation be allowed to proceed, it can be brought on for hearing relatively quickly.

25. In respect of each of the periods of delay, the plaintiff argues that the defendant did not take any of the procedural steps open to it under the Rules of the Court to compel the plaintiff to advance the proceedings nor did it write to the plaintiff's solicitors complaining about the delay nor warning of its intention to seek to have the proceedings struck out if they were not prosecuted more expeditiously. Originally, courts took the view that as litigation is a two-way street, there was an onus on a defendant to take positive action in the face of any delay by a plaintiff. However, that no longer seems to represent the law as is evident from the following passages of the judgment of Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 IR 510 at p. 519, citing and disagreeing with the earlier views of the Supreme Court in *Dowd v. Kerry County Council*:-

> *"When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed.*
>
> *O Dálaigh C.J. said in Dowd v. Kerry County Council [1970] IR 27 at p. 41:-*
>
> > *"... in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution… the adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances, it is acted upon by a defendant in the hope that*

he will "get by" without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at."

In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something "akin to acquiescence" as indicated in the judgment of Henchy J. cited above."

26. This does not mean that the conduct of a defendant in the course of the litigation is irrelevant. Clearly, if a defendant delays in taking steps which it is obliged to take under the Rules (e.g. in serving a defence or in complying with orders made against it), then it will be difficult if not impossible for that defendant to complain of commensurate delay on the part of a plaintiff. Likewise, if a defendant positively acquiesces in the plaintiff's delay, then it cannot complain. However, the failure of a defendant to take the positive step of applying to strike out a plaintiff's case is neither a breach of any procedural obligation it bears in the litigation nor an acquiescence in the plaintiff's delay. In many instances, litigation simply runs to ground. It is not unreasonable for a defendant to let matters lie rather than incur the cost of an application to strike out and, perhaps inevitably, provoke the plaintiff into action by making such an application.

27. As noted at the outset of this judgment, in this case the defendant has been responsive throughout the proceedings and has reacted promptly on each occasion it was legally required to do so. I do not accept the argument that the defendant somehow acquiesced in the plaintiff's delay during the period that the proceedings were linked to the Bank's proceedings by virtue of the fact that the Bank's proceedings were adjourned on consent on multiple occasions. Apart from the fact that there is insufficient evidence before the court to know who instigated those adjournments, the court cannot equate this defendant with the plaintiff in the Bank's proceedings merely because the two companies are both part of the larger Bank of Ireland Group. The linking of the proceedings was a step taken entirely at the plaintiff's instigation in circumstances where the Bank opposed it and this defendant was not on notice of it. It would be manifestly unfair to impute to this defendant, as a consequence of that linking order, knowledge or intent supposedly derived from the behaviour of the Bank in the Bank's proceedings. These comments are not intended to suggest that there was anything untoward with the way in which the Bank proceedings were prosecuted by the Bank. It appears from the affidavit sworn on behalf of the Bank in its application to unlink the two sets of proceedings that there was delay on the part of this plaintiff in defending those proceeding and a number of motions had to be brought to obtain a defence and replies to particulars and, thereafter, that the Bank was prevented from setting the matter down for trial because this plaintiff had not progressed these proceedings.

28. The court proposes looking at each period of delay individually but bearing in mind that the defendant's application relates to the cumulative effect of all three periods as comprising inordinate delay. I accept the plaintiff's argument that the initial two-year delay between 2003 and 2006 would not of itself qualify as inordinate delay. I note that

the plea in para. 40 of the defence is not a generalised plea directed at the entire of the plaintiff's claim, (which was brought well within the applicable statutory limitation period) but is specifically focused on the equitable aspects of the relief sought. However, the plea did serve to flag to the plaintiff at an early stage the defendant's concerns in respect of delay in the context of the specific type of proceedings brought by the plaintiff.

29. As regards the second period of delay, I do not accept that the linking of these proceedings to the Bank's proceedings on the plaintiff's application provides the plaintiff with an excuse for not progressing these proceedings during the time that the two sets of proceedings were linked. It appears from the order made by Hanna J. on 19th June, 2006 that its purpose was to enable the two sets of proceedings to be tried together given the overlap between them. The order does not presume that either or both sets of proceedings would be left in abeyance but rather that both would be progressed to a joint trial date.

30. The other excuse advanced by the plaintiff in respect of this period relates to his personal and financial circumstances and might be termed a "vicissitudes of life" plea. The courts are not blind to the fact that there may be circumstances largely outside the control of a litigant and, at times, unconnected to the litigation which impede a litigant in the prosecution of a claim. As Fennelly J. put it in *Anglo Irish Beef Processors v. Montgomery* (above) at p. 518:-

> *"There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim."*

The courts also recognise that there may be a financial disparity between parties to litigation which would make it unfair to hold both to the same standards. This was acknowledged by Clarke J. in *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50 at para. 3.10:-

> *"The circumstances of the parties and, in particular, any disparity in the resources available to the parties must always be a factor which the court takes into account. The degree of expedition and compliance with time limits which could properly be expected of large corporations involved in commercial disputes cannot reasonably be required of poorly resourced or otherwise disadvantaged litigants who may have to resort for representation to small law firms frequently accepting instructions without any guarantee of payment. Any legitimate tightening up must give all due consideration to the difficulties with which such parties are faced in progressing litigation which can, in many cases, be of significant importance to the party concerned."*

31. There was a period of time during which the plaintiff in this case was undoubtedly buffeted by multiple storms resulting from the simultaneous loss of his job and his

marriage compounded by the fallout from his indebtedness. The difficulty for the court is twofold; firstly, identifying the time period for which these difficulties persisted and, secondly, assessing the extent to which the defendant can be required to await prosecution of the litigation because of the personal difficulties being experienced by the plaintiff. In other words, the understandable leeway which a court might wish to afford a plaintiff who is experiencing personal difficulties largely unrelated to the litigation cannot be indefinite as it has an inevitable impact on the defendant who bears little or no responsibility for the matters complained of. It may seem harsh, but logically a court may have to treat a permanent problem facing a litigant which would require indefinite forbearance with less indulgence than a temporary problem which can be expected to pass.

32. On the first issue, the defendant has made a specific argument as to the lack of evidence before the court as to any of the matters raised expect, of course, the plaintiff's indebtedness. This argument is well made. I accept that as of 2003 the plaintiff's life was in a state of crisis. However, the medical evidence dates from 2006 and relates back to a period circa 2003/2004. There is no evidence that the plaintiff continued to experience mental health symptoms after 2006. Further, as the defendant points out, the plaintiff's psychiatric report does not suggest that his mental health problems were such as to prevent him working, even in 2003, nor to preclude his involvement in litigation, although the doctor's observation that the resolution of his family law proceedings would affect a major improvement in the plaintiff's mental health was almost certainly correct.

33. Equally, there is no evidence before the court as to the length of time the plaintiff's family law proceedings were extant. It would be extremely unusual for proceedings of that nature to persist for a decade without resolution, accepting of course that issues can arise from time to time even after a couple separate or divorce. However, the plaintiff has not put any concrete evidence of the course of his family law proceedings before the court and, consequently, the court cannot really take them into account as part of an excuse for being unable to progress these proceedings more quickly except, perhaps, during the initial period of delay which I have found not to have been inordinate in any event. I also note the authorities relied on by the defendant to make the point that the excuses relied on must relate to the proceedings in which the application is brought and not to extraneous matters including other litigation in which the plaintiff might be involved (per Geoghegan J in *Truck and Machinery Sales Ltd. v General Accident* [1999] IEHC 201). I accept in principle that the plaintiff's involvement in on-going family law proceedings would not constitute an excuse for his delay in these proceedings, although it might be a matter relevant to the exercise of the court's jurisdiction as to where the balance of justice lies. It is unnecessary for me to address the point further given the absence of concrete evidence as to the extent to which the family law proceedings were in fact on-going during the second and third periods of delay.

34. The third and final element of the plaintiff's difficulties is his financial situation and the extent to which blame for that attaches to the defendant as a result of the matters the subject of these proceedings. I fully accept that a private litigant without access to the

same professional advice as a corporate or institutional litigant cannot always be held to the same standards. However, the nature of *inter partes* litigation is such that a party cannot rely on a relative financial disadvantage to claim a permanent exemption from the normal rules. There is a difference between allowing a plaintiff some leeway to take account of a financial disparity and excusing a plaintiff altogether from the obligation that a plaintiff undertakes when embarking upon litigation. There is also a difference between tolerating some slippage in meeting deadlines on the part of a poorly resourced litigant and accepting complete inaction for the same reason.

35. Further, it is not evident that the significant financial crisis experienced by the plaintiff can be attributed, or even mainly attributed, to the defendant even if the plaintiff's claim in these proceedings were to be upheld. There is apparently a difference in the salary the defendant paid the plaintiff and the salary in his subsequent employment, although, again, there is no evidence before the court as to the amount of that difference. Unfortunately, many separated people experience financial stress because the cost of maintaining two households is inevitably greater than that of maintaining one. However, the loan drawn down by the defendant which became the subject of the Bank's proceedings pre-dated both the break-up of his marriage and the loss of his job. Thus, the underlying facts of this case indicate that the management of the plaintiff's personal finances was already an issue before he lost his job and before his marriage broke up. The actions of the defendant certainly did not help, but they do not appear to have been the cause of the plaintiff's problems.

36. Were this application to have been made to the court during the second period of delay, no doubt some leeway would have been allowed to the plaintiff because of the multitude of problems he had faced in the preceding years. It is difficult to pinpoint the exact point in time beyond which such leeway would not or should not have been extended. Certainly the evidence does not take us much past the end of 2006. It is also difficult at this remove to know whether a court would, in 2008 or 2009, have regarded the matters now relied on by the plaintiff as excusing his delay or as weighing in his favour in the balance of justice. There is a difference between an explanation which might account for how a delay has arisen and an excuse for that delay which offers a justification for it which the law will recognise. This distinction is not always easy to draw and indeed there can be a significant overlap as many, but not all, explanations will also constitute excuses. Counter-intuitively the line is more likely to be blurred nearer the events themselves and to become clearer as time passes. In this case I think that the matters relied on by the plaintiff do not excuse his delay between 2006 and 2012, although I suspect that had the defendant moved to strike out the proceedings a decade earlier they might have been accepted as such or, at very least, tilted the balance in the plaintiff's favour thereafter.

37. To a certain extent, the discussion in the preceding paragraphs can be regarded as obiter as the court has no difficulty in finding that the entire of the third period of delay is inexcusable. This is both the most extensive period of delay and a period during which absolutely no step was taken by the plaintiff such that the defendant was entitled to conclude that the proceedings would not be further prosecuted by him. The only positive

excuse offered is the fact that the plaintiff did not have legal representation. I accept that a lack of legal representation and financial inability to procure legal services is a real problem for many litigants. The adjournment of the proceedings in April, 2012 when the plaintiff's then-solicitor came off record was entirely appropriate as, notwithstanding the delays which had already occurred up to that point, it was reasonable to afford the plaintiff the opportunity to procure alternative legal representation whether through the Legal Aid Board or otherwise. We know that although the plaintiff was deemed financially eligible for legal aid, he was not provided with a Legal Aid Certificate. The plaintiff says he was unable to procure private representation because of his financial circumstances. He has not given any more detailed evidence of the efforts made by him nor for how long they persisted. Neither has he explained what change came about that enabled him to procure his current legal representation in the Autumn of 2019.

38. The difficulty facing the court is that litigation cannot be placed into semi-permanent abeyance because a party does not have legal representation. In the absence of having a solicitor on record, the plaintiff was entitled to act on his own behalf as a lay litigant. Whilst this solution may be far from ideal, it is notable that this plaintiff represented himself in the culmination of the Bank's proceedings in 2012 and subsequently in an application against his ex-wife for an indemnity in those proceedings. Even more strikingly, while these proceedings were in abeyance, the plaintiff, acting in person, instituted a further set of proceedings against the Bank in 2016. Thus, this plaintiff can and did act as a litigant in person but, for reasons which he has not explained, did not choose to do so in connection with these proceedings over an extended period.

39. The lack of legal representation may provide justification for a temporary inability to progress litigation. However, if the absence of legal representation persists beyond the short-term, then there is an onus on a plaintiff to either obtain alternative representation, to proceed as a lay litigant or to discontinue the litigation. A plaintiff cannot put proceedings on hold for an indefinite period because he lacks legal representation. To accept the lack of legal representation as an excuse for the indefinite stalling of litigation would be inconsistent with the court's obligations regarding the administration of justice which include the obligation to ensure that the parties receive a fair trail within a reasonable time (*per* Article 6 of the European Convention on Human Rights).

40. Based on the analysis above, I am satisfied that the plaintiff has not provided an excuse for the lengthy delay which has occurred in this case. Even if the first period between 2003 and 2006 is to be excluded and some allowance made thereafter for the difficult personal circumstances in which the plaintiff found himself, there is still a period of well over a decade which, of itself, reflects an inordinate delay for which there is no excuse. Further, the initial period of excusable delay does not drop out of the equation altogether as, where a plaintiff has been responsible for delay in the initiation or prosecution of proceedings, there is a heightened onus on that plaintiff to conduct the balance of the proceedings with expedition. Manifestly this has not occurred.

Balance of Justice

41. As the plaintiff has been responsible for inordinate and inexcusable delay, the court will now proceed to consider the balance of justice in accordance with the *Primor* jurisprudence rather than requiring the defendant to establish that a fair trial cannot take place. In *Primor*, Hamilton C.J. identified factors relevant to the exercise of the court's discretion in the following passage:-

> *"(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
>
> *(d) 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 on the part of the defendant in the plaintiff's delay,*
>
> *(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 a 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 referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."*

This is not an exhaustive list of the factors that may be potentially relevant to the facts of a given case and not all of these factors will be relevant to every case. For example, in this case, there has been no delay or conduct on the part of the defendant, including conduct that might amount to acquiescence, to be weighed in the balance against the plaintiff's delay. Instead, the balance is a more straightforward one between the loss to the plaintiff of the potential benefit of a cause of action against the defendant and the prejudice that might be caused to the defendant by requiring it to defend that cause of

action nearly two decades after the events giving rise to the initial complaint. As the defendant is a corporate entity, other forms of damage such as the stress of being subjected to litigation over an extended period or reputational damage arising from the existence of such litigation are not really relevant.

42. The plaintiff contends that this is, in essence, a documents case which can be decided on the basis of the HR files maintained by the defendant in respect of his dismissal. Based on the case as pleaded, I do not think that this is a fair characterisation. Further, employment litigation invariably depends on the evidence of those involved in the events leading to a dismissal or in the procedures surrounding the decision to dismiss. The plaintiff has placed in issue the substantive merits of the underlying decision to dismiss him as well as the procedural route through which that decision was reached. If the plaintiff is to argue that the contents of the HR files are unfair or even incorrect, then the defendant must be in a position to refute those suggestions. Given that the proceedings include complaints regarding the conduct of meetings which did not form part of the formal disciplinary process and the conduct of an investigation in which it is contended the investigator did not appropriately consider material furnished by the plaintiff, it will be necessary for these matters to be considered in substance and for evidence to be adduced in relation to them.

43. An affidavit has been sworn by Ms. Joanne Healy, head of employee relations for the defendant, outlining the prejudice which the defendant will face if required to defend these proceedings at this remove. Ms. Healy notes that not all of the events which are the subject of the proceedings are covered by documentation or are procedural in nature and, consequently, that considerable evidence from persons within the defendant and the Bank of Ireland will have to be called. Counsel has advised proofs and indicated that at least eight identifiable witnesses should be called. At least three of these witnesses will not be able to attend the hearing or to provide evidence. The two witnesses who conducted the internal and external reviews are both elderly and have a poor recollection of events and of their involvement with the plaintiff. This is unsurprising as such persons were likely to have been asked to perform these functions in the first place because of their seniority or experience within the industry at the material time. Anybody working at that level in 2000/2001 is almost certainly retired by now and quite probably very elderly. It also appears that the handwriting expert has since died, although this presents less of a problem as an alternative expert could be instructed. In addition, other potential witnesses who have been contacted and who have indicated that they are available have all expressed concern about their recollection of events occurring nearly 20 years ago. Finally, Ms. Healy has been unable to identify or locate the persons who were involved in events prior to the original investigation in 2001. As a result of all of these factors, Ms. Healy contends that the defendant will face significant prejudice at trial if this case is to proceed.

44. The plaintiff in reply relies on the decision of MacGrath J. in *Myrmidon CMBS (Propco) Ltd v. Joy Clothing Ltd* [2020] IEHC 246 to the effect that a defendant faced with litigation should know the witnesses likely to be required to counter the allegations made and

should ensure their availability before they leave the defendant's employment. Whilst that is no doubt true in a general sense, in my view it would represent an unfair burden where the delay in the litigation has been as protracted as it is in this case. An employer is not required to keep track of the whereabouts of former employees over a 20-year period, especially when it would have been reasonable for all concerned to have taken the view that the proceedings were no longer being pursued 10 or more years ago. As it happens, the defendant is not making the case that it cannot locate relevant personnel, at least not as regards the events postdating 2001. Rather it has located the relevant personnel but they are not confident of their ability to give evidence in light of the delay which has occurred. I accept that this a real and genuine concern for the defendant and indeed for the individual witnesses. Whilst I do not doubt that this litigation and the events underlying it have formed an important part of the plaintiff's life over the past 20 years, persons working for the defendant who may have dealt with the plaintiff in the course of the investigations or the disciplinary process were merely carrying out their normal day-to-day jobs. They would have little cause at this remove to remember the details of an individual investigation or a disciplinary process occurring 20 years ago. It would, in my view, be a significant injustice to require the defendant to defend the plaintiff's proceedings after the lapse of time which has taken place.

45. The plaintiff emphasises the damage to his reputation caused by his dismissal and the ongoing effect it has on his ability to obtain alternate work. I accept this may well be the case but, that being so, it begs the question as to why the plaintiff did not move to prosecute these proceedings at an earlier stage. If a working life is to be measured at roughly 45 years, the plaintiff has allowed nearly half of his professional life to elapse between the action which allegedly caused such damage to his reputation and his recent attempts to re-activate these proceedings in order to vindicate it.

46. The defendant has pointed to authorities on the need to move promptly in defamation proceedings because of the nature of an injury to reputation (Leech v. Independent Newspapers (Ireland) Ltd [2017] IECA 8 and Desmond v. MGM [2008] IESC 56). I do not think it is necessary to decide whether these authorities establish a principle outside of the specific sphere of defamation applicable to all litigation concerning a person's reputation. The lapse of time in this case is simply so great when compared to the plaintiff's working life that it is difficult to understand how he believes that this litigation at this remove could meaningfully repair any reputational damage that might have been done to him 20 years ago. In saying this I accept that there can be circumstances where a historic injury to a person's reputation can have on-going and current impact. However, this is an employment case. Whilst the events underlying the proceedings were undoubtedly significant for the plaintiff, they did not take place in the public domain nor were they the subject of media interest or public comment. The fact of his dismissal did not prevent the plaintiff from subsequently obtaining employment in two other financial institutions nor from continuing to earn his living in that sector albeit now on a self-employed basis.

47. For all of the reasons discussed above, I am satisfied that the balance of justice favours the striking out of the plaintiff's proceedings at this stage. In considering the balance of justice, the defendant is not required to establish that a fair trial would not be possible. However, on the basis of the evidence and particularly that of Ms. Healy, I am satisfied that were this matter to proceed to trial now, there is a real and serious risk that the court would not be able to ensure that the trial would be fair. The lengthy lapse of time between the events giving rise to the proceedings and the likely date of any trial is such as to inevitably impair the ability of the available witnesses to recall events accurately and to give evidence and be cross examined in detail on these events. This is in addition to the non-availability of two key witnesses, the internal and external reviewers, both of whom upheld the defendant's decision to dismiss the plaintiff. The defendant would be placed at a significant disadvantage if required to defend the proceedings in these circumstances. I will therefore make the orders sought both under O.122, r.11 and pursuant to the court's inherent jurisdiction.