THE HIGH COURT

[2021] IEHC 39

[2010 No. 10712 P]

BETWEEN

NIALL DEMPSEY

PLAINTIFF

AND

BRENDAN FORAN, DES RUSHE AND NEVAN O'SHAUGHNESSY PRACTISING UNDER THE STYLE AND TITLE OF O'SHAUGHNESSY & COMPANY SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 22nd day of January, 2021

SUMMARY

1. This case considers what the Supreme Court has described as the *'inevitable injustice'* which occurs when a person is sued by an impecunious plaintiff (including that court's observation that such impecuniosity could be used to '*blackmail'* a defendant to 'buy off the case'). As well as being '*inevitable'*, this injustice can be financially significant. This is because if an individual, on the average income in the State, is unfortunate enough to be sued by an impecunious plaintiff, he could end up having to work for several years just to pay the legal fees of the case he has 'won', because the 'losing' plaintiff does not have the money to meet any award of costs made against him.

2. Since the function of a court is to achieve justice between the parties to litigation, this case considers the relevance, of this inbuilt and inevitable injustice which can apply to just one of the parties to the litigation, when a court is deciding issues between litigants at any stage of the litigation process. The present case concerns an application by two defendants to have proceedings against them struck out because the plaintiff has allegedly been guilty of inordinate and inexcusable delay in progressing his proceedings. It considers the extent to which the '*inevitable injustice'* of being sued by an impecunious plaintiff is a factor in this Court's consideration of whether to allow the proceedings continue.

3. This case also concerns a claim that this Court should take into account, when deciding whether to permit delayed proceedings continue, that the proceedings are against a lawyer in relation to his professional practice. The plaintiff claims that, because one of the defendants is a lawyer who is subject to the continuous supervisory jurisdiction of the High Court, this is a *'countervailing circumstance'* which justifies the continuation of delayed litigation, which might otherwise not be permitted.

4. Having considered these and other issues, this Court concludes, for the reasons set out below, that the plaintiff's proceedings have been inordinately and inexcusably delayed and should be struck out as there are no countervailing circumstances which would permit their continuation and accordingly that the balance of justice favours their dismissal.

BACKGROUND

5. The first defendant ("Mr. Foran") seeks to dismiss the proceedings, issued by the plaintiff ("Mr. Dempsey") seeking the repayment of a loan allegedly paid to Mr. Foran. The third defendant ("Mr. O'Shaughnessy") is a solicitor and he seeks to dismiss the proceedings in

which he is being sued by the plaintiff for the alleged breach of an undertaking related to that loan. Both defendants seek the dismissal of the proceedings because of the alleged inordinate and inexcusable delay by Mr. Dempsey in prosecuting his claim.

6. The substantive proceedings issued by Mr. Dempsey involve a claim that in September 2006 he lent for one month the sum of €125,000 to Mr. Foran and the second named defendant ("Mr. Rushe") of which €115,000 is unpaid.

7. Although the cause of action arose in 2006, these proceedings were not issued until 2010. Mr. O'Shaughnessy and Mr. Foran issued motions in 2020 for the dismissal of the proceedings on the grounds of want of prosecution and inordinate delay.

8. Mr. Rushe has not entered a defence and is no longer represented in these proceedings. He appears to be no longer contactable and the Court has been advised that he is not interested in participating in the proceedings and that he has no assets.

9. In his proceedings, Mr. Dempsey also seeks reliefs as against Mr. O'Shaughnessy based on his claim that Mr. O'Shaughnessy gave an undertaking that he would hold the title documents to the property to be purchased on trust for Mr. Dempsey until such time as the full loan amount plus interest was discharged by Mr. Foran and Mr. Rushe. Mr. O'Shaughnessy's defence to the claim that he is in breach of his undertaking is that it was a condition of that undertaking that he would receive the title deeds from Mr. Foran and Mr. Rushe, which he says never occurred. In defending this application to dismiss, Mr. Dempsey claims that Mr. O'Shaughnessy is in continuous breach of this solicitor's undertaking.

Timeline

10. The following timeline is relevant to the applications to dismiss.

11. On 26th September, 2006, Mr. Dempsey claims that he advanced to Mr. Foran and Mr. Rushe a loan in the sum of €125,000 for the purpose of funding the purchase of a property in Edenderry, Co. Offaly. It is alleged that this amount, together with compound interest at 10%, was to be repaid to Mr. Dempsey within one calendar month. It is Mr. Dempsey's case that only €10,000 was actually repaid by Mr. Foran and Mr. Rushe. The undertaking which was given by Mr. O'Shaughnessy is also dated 26th September, 2006.

12. It is clear therefore that the cause of action in these proceedings first arose in or around late October/early November 2006 (i.e. one calendar month from 26th September, 2006).

13. On 19th November, 2010, the plenary summons issued – some 4 years after the date on which the cause of action accrued.

14. On 31st January, 2011 an appearance was entered on behalf of Mr. O'Shaughnessy. On 1st March, 2011 an appearance was entered on behalf of Mr. Foran and Mr. Rushe.

15. Thereafter, the Statement of Claim was delivered on 23rd May, 2011.

16. On 11th July, 2011 the solicitor acting on behalf of Mr. O'Shaughnessy raised a notice for particulars. Replies to these particulars were delivered by Mr. Dempsey in November 2011. At the request of Mr. O'Shaughnessy's solicitor, further replies were delivered by Mr. Dempsey on 24th January, 2012.

17. On 11th July, 2011, a Notice of Indemnity and Contribution was served by Mr. O'Shaughnessy on Mr. Foran and Mr. Rushe.

18. By Notice of Motion dated 30th November, 2011, Mr. O'Shaughnessy sought a Mareva injunction against Mr. Foran. On 5th December, 2011, an order was made, by consent, whereby Mr. Foran gave an undertaking not to dissipate his assets below a certain sum.

19. On 30th April, 2012 Mr. Dempsey issued a motion for judgment in default of defence against Mr. O'Shaughnessy. Shortly thereafter, on 2nd July, 2012, Mr. O'Shaughnessy delivered a defence to the proceedings.

20. On 10th December, 2012, the High Court heard a motion issued by Mr. Dempsey for judgment in default of defence against Mr. Foran and Mr. Rushe. Those defendants were given 6 weeks to deliver a defence.

21. However, no defence was delivered by Mr. Foran and Mr. Rushe within this period. One year later therefore, on 9th December, 2013, the High Court heard the second motion issued by Mr. Dempsey for judgment in default of defence against Mr. Foran and Mr. Rushe. Those defendants were ordered to deliver a defence within 8 weeks. No defence was delivered within this period of time.

22. Nothing at all happened for some two and half years. Then on 20th July, 2016 the solicitor for Mr. Dempsey served a Notice of Intention to Proceed and stated that it was Mr. Dempsey's intention to serve a Notice of Trial within 14 days thereof. Following the service of this notice, correspondence (set out in detail later in this judgment) issued between the parties and it became clear that the defendants did not agree that the trial was ready to proceed as discovery needed to be completed.

23. On 16th September, 2016 a request for voluntary discovery was made by Mr. O'Shaughnessy from Mr. Dempsey and from Mr. Foran and Mr. Rushe.

24. On 21st October, 2016, some three months following service of the Notice of Intention to Proceed, Mr. Dempsey served a Notice of Trial.

25. On 23rd January, 2018 the solicitor for Mr. Foran and Mr. Rushe sought voluntary discovery from Mr. O'Shaughnessy.

26. Shortly thereafter, on 19th February, 2018, the solicitor who had up to that point been representing Mr. Rushe in the proceedings was granted an order allowing him to come off record in respect of Mr. Rushe. That solicitor continues to represent Mr. Foran in the proceedings.

27. On 18th March, 2018, the discovery, requested a year and a half earlier by Mr. O'Shaughnessy, was delivered by Mr. Dempsey.

28. On 6th June, 2018, a defence to the proceedings was delivered by Mr. Foran. At that stage, some seven years had passed since the Statement of Claim was delivered.

29. The first motion to dismiss was issued by Mr. Foran on 19th May, 2020. The second motion to dismiss was issued by Mr. O'Shaughnessy on 1st September, 2020. Both of these motions were heard by this Court on 11th December, 2020.

THE LAW RELEVANT TO DISMISSAL FOR INORDINATE DELAY

30. The law in relation to the dismissal of proceedings for want of prosecution/inordinate delay is well settled and was most recently considered by the Court of Appeal (Irvine, Baker and Kennedy JJ.) in *Sweeney v. Keating* [2019] IECA 43. In that case, Baker J. succinctly summarised the law as set down in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and as clarified by several cases since then. Those principles which she outlined, and which are most relevant to this case, can be summarised as follows:

First the delay must be inordinate and inexcusable

- The defendant must establish that the plaintiff's delay has been both inordinate and inexcusable – to be excusable the explanation for the delay must *'legitimately excuse'* the delay (per Irvine J. (as she then was) in *Millerick v. Minister for Finance* [2016] IECA 206). In deciding whether the delay has been inordinate and inexcusable, the following is relevant:

    - Where the proceedings were not themselves issued promptly after the cause of action arose, then there is an additional onus on the plaintiff to pursue the proceedings with all due diligence.
    - A party to litigation cannot avoid culpability for delay by relying upon the conduct of his/her legal advisers.

Secondly the balance of justice must favour dismissal of action

- Where the delay is found to be both inordinate and inexcusable, the Court must then consider whether the balance of justice favours the dismissal of the action. At that stage, the onus of proof shifts to the plaintiff to establish the existence of *'countervailing circumstances'* which would warrant permitting the proceedings to continue to trial. This is because, as noted by Baker J., the scales of justice at that point are weighed against the plaintiff who has been found guilty of inordinate and inexcusable delay.

  In considering whether the balance of justice favours the dismissal or continuation of the proceedings, Baker J. noted that the Court should have regard, *inter alia*, to the factors identified in Primor, including the conduct of the parties, acquiescence and possible prejudice. In particular it is relevant to note that:

Prejudice can be assumed if there has been an extensive delay

- o When considering an application to dismiss proceedings for inordinate and inexcusable delay, the Court can assume prejudice once there has been an

extensive period of time between the events complained of and the likely date of trial.

There is no obligation on a defendant to progress proceedings

- There is no obligation on a defendant to progress proceedings since every step he or she takes is financially costly and a defendant may never recover their costs even if he/she wins the litigation.

ECHR states that litigation should be conducted in an expeditious manner

- Baker J. also noted that the Court is obliged to have regard to the European Convention on Human Rights ("ECHR") to ensure that litigation is conducted in an expeditious manner and so a laissez-faire attitude to the progress of litigation cannot be tolerated given that any delay may constitute a violation of Art. 6 of the ECHR. In this regard, Denham C.J. in *Comcast v. Minister for Public Enterprise* [2012] IESC 50 at para. 13 noted in the context of the ECHR, that:

> "in recent times there has been an acknowledgement that cases may not be let lie, in a laissez faire attitude, for the parties to move. There is a requirement to ensure that cases are progressed reasonably."

Onus is on the plaintiff to prosecute the claim

- In addition to these principles outlined by Baker J. in *Sweeney v. Keating,* Denham C.J. in the Supreme Court case of *McNamee v. Boyce* [2017] IESC 24 at para. 78 noted that the onus lies on the plaintiff, and not a defendant, to prosecute the case, an onus which is particularly heavy where there is a significant lapse of time between the date of the cause of action and the institution of proceedings.

Any delay on behalf of the defendants must be 'culpable delay'

- Also Fennelly J. noted in the Supreme Court case of *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 I.R. 510 that any delay or acquiescence on behalf of the defendants must be a *'culpable delay'* for it to cancel out the effect of an inordinate and inexcusable delay by a plaintiff, so as to allow the proceedings to continue, which approach was adopted by Irvine J. in *Flynn v. Minister for Justice* [2017] IECA 178.

Impecuniosity of plaintiff may be relevant

- Finally, Irvine J. in *Millerick* noted that in considering applications to dismiss it is relevant to consider that it is the plaintiff who commences legal proceedings and he/she does so against the will of the defendant with all the adverse financial and reputational consequences that this entails for the defendant, including the possibility that the plaintiff may not be a mark for an award of costs.

31. In this case, it is clear from the foregoing timeline (where the cause of action arose in 2006, proceedings were issued in 2010 and the matter has not yet come to trial by 2020) that there has been a *prima facie* delay in this claim. However, in resisting the motions to dismiss, particular emphasis has been placed by Mr. Dempsey on two factors to be considered in determining whether any such delay is excusable and whether or not the balance of justice favours the dismissal of the proceedings. These factors are Mr.

Dempsey's claim that the delay was caused in part by the defendants and his claim that there is no prejudice to the defendants in allowing the case to proceed to trial, notwithstanding any delay.

THE PERIODS OF DELAY

32. With this in mind, it is proposed to consider in detail the various periods of delay and the explanations provided for each of them.

(I) November 2006 to November 2010 – Pre-commencement delay

33. The first period of delay arose between the date when the cause of action arose, which was a month or so after the loan was made in September 2006 (as the loan was to be repaid within one calendar month), and the date when the Plenary Summons issued, which was on the 19th November, 2010. It is important to note that this is a pre-commencement period of delay and so is not directly taken into account in determining whether there has been an inordinate and inexcusable delay in the *prosecution* of the proceedings, since the proceedings had not issued during this period. However, it is indirectly relevant since it is clear from the foregoing authorities that there is an onus on a plaintiff, who has delayed in issuing proceedings, to pursue those late-issued proceedings with due diligence. This is certainly a case where that principle applies, since on the date that the proceedings issued in November 2010, one was already dealing with a cause of action that was over 4 years old. The only explanation for this delay on behalf of Mr. Dempsey is the averment by his solicitor in his affidavit resisting the within motions that states:

> "After repeated demands to each of the Defendants, and despite efforts to resolve matters without recourse to legal proceedings, it became necessary to pursue a claim on behalf of the Plaintiff and this was done by way of a Plenary Summons issued on the 19th November 2010."

However, this explanation does not *'legitimately excuse'* the fact that it took four years to issue proceedings, which for this reason is an inordinate and inexcusable delay of at least 3 years on the part of a plaintiff who claims to have a good cause of action that arose in November 2006.

34. After the proceedings were issued, matters initially moved promptly, appearances were entered by Mr. Foran, Mr. Rushe and Mr. O'Shaughnessy by March 2011. A Statement of Claim was delivered on 23rd May, 2011, a Notice of Indemnity and Contribution was served by Mr. O'Shaughnessy on Mr. Foran and Mr. Rushe on 11th July, 2011 and a defence was delivered by Mr. O'Shaughnessy on 2nd July, 2012, *albeit* that this was after a motion for judgment in default of defence was issued by Mr. Dempsey (which was before the High Court on 30th April, 2012, when Mr. O'Shaughnessy was given three weeks to deliver his defence.)

Analysis of effect of delay on defendants is different for two defendants

35. In considering the periods of delay from this point on, it is necessary to distinguish between the defendants, since by this stage Mr. O'Shaughnessy has delivered his defence

(while Mr. Foran does not deliver his defence until 7 years after delivery of the Statement of Claim, on the 6th June, 2018).

A straight forward claim

36. However, before doing so, it is to be noted that in one respect, the analysis of the delay is the same for both defendants, that is the fact that the claim against both defendants is very straight-forward, i.e. it is an alleged failure to pay back a loan *vis-à-vis* Mr. Foran and an alleged breach of undertaking by Mr. O'Shaughnessy. Neither of these causes of action could be described as complex such as to provide a 'legitimate excuse' for a delay in prosecuting the claim. Thus, like the proceedings in *Sweeney v. Keating* (i.e. a claim that an employer provided a defective lorry to an employee resulting in personal injuries), this claim could, in this Court's view, also be described as *'routine and straightforward'*. Accordingly, Mr. Dempsey does not have any legitimate excuse for delaying the proceedings arising from the nature of the claim he is making.

THE DELAY VIS-À-VIS MR. O'SHAUGHNESSY

37. Between 2nd July, 2012 (when Mr. O'Shaughnessy delivers his defence) and 20th July, 2016 (when Mr. Dempsey files a Notice of Intention to Proceed), Mr. Dempsey takes no step in these proceedings vis-à-vis Mr. O'Shaughnessy. This period, the second period of delay, will now be considered.

(II) July 2012 to July 2016 – Motions against Mr. Foran & Mareva between defendants

38. This second period of delay arose from July 2012 to July 2016, a period of 4 years. This is clearly an inordinate delay and no excuse has been offered for this delay vis-à-vis Mr. O'Shaughnessy. During this period, Mr. Dempsey issued motions for judgment in default of defence against Mr. Foran, however this does not provide a legitimate excuse for any delay vis-à-vis Mr. O'Shaughnessy and so this delay is inexcusable.

39. In order to excuse this delay, Mr. Dempsey also refers to the proceedings being delayed because Mr. O'Shaughnessy took Mareva injunction proceedings against Mr. Foran during this period. However, there is nothing in the fact that one defendant seeks a Mareva injunction against another defendant which prevents a plaintiff from progressing his claim against one or both of those defendants. As noted in *McNamee v. Boyce*, the onus lies on the plaintiff to prosecute his claim and accordingly, this does not provide a legitimate excuse for Mr. Dempsey to delay in progressing the proceedings against the defendants.

40. Accordingly, this delay of 4 years is both inordinate and inexcusable.

(III) September 2016 to March 2018 – Mr. Dempsey's delayed discovery

41. The third period of delay was from 16th September, 2016 (when Mr. O'Shaughnessy sought voluntary discovery from Mr. Dempsey) to 18th March, 2018 (when discovery was provided by Mr. Dempsey), a period of 1.5 years.

42. Just before this period commenced, on the 20th July, 2016, Mr. Dempsey's solicitor wrote to the solicitor for Mr. O'Shaughnessy (as well as the solicitor for Mr. Foran) putting them on notice of his intention to serve a Notice of Trial. (Mr. Dempsey served a Notice of Trial on the 21st October, 2016). In a reply to the letter of 20th July, 2016, the solicitor for Mr.

O'Shaughnessy, in a letter dated 2nd August, 2016, stated that the matter was *not* ready to proceed as he was about to serve a request for voluntary discovery, which he duly did on the 16th September, 2016. This therefore explains there being some delay in the prosecution of the proceedings after 16th September, 2016 to allow for Mr. Dempsey to provide discovery.

43. However, it took Mr. Dempsey a period of 1.5 years to provide this discovery. This is an inordinate time for the provision of discovery. Mr. Dempsey suggests that this delay is excusable as it took considerable effort to assemble the relevant documentation as he had to go back over dealings between the parties over the previous 10/12 years. However, an examination of his affidavit of discovery shows that it contains just two categories of documents, the first category has four letters and a receipt and the second category has 12 documents which are mostly legal documents, bank letters, statements and maps.

44. This amount of discovery of just 17 documents should, in this Court's view have taken no more than the typical amount of time granted by the High Court for a run of the mill discovery (say 8 weeks, or a maximum of 12 weeks) and not 1.5 years and so this delay is both inordinate and inexcusable.

(IV) April 2018 to May 2020 – Discovery between defendants & mediation proposals

45. The fourth period of delay is approximately 2 years, from April 2018 (when the discovery from Mr. Dempsey was provided) to May 2020 (when the motion to dismiss is filed by Mr. Foran). It is claimed that during this period Mr. Dempsey also did not progress the proceedings sufficiently.

46. During this time Mr. Foran and Mr. O'Shaughnessy were dealing with discovery between themselves. However, it is relevant to note that just prior to the commencement of this period, by letter dated 27th March, 2018, Mr. Dempsey's solicitor wrote to the solicitor for Mr. Foran and the solicitor for Mr. O'Shaughnessy stating that:

> "Please note it is our intention to call this matter on and obtain a date for hearing during the week of 16th April next […]
>
> You might provide your consent in this regard and/or outline any dates that may be unsuitable to your client." (Emphasis added)

47. Thus, at this stage in March 2018, Mr. Dempsey is seeking consent to have the matter put down for trial. It is also relevant to note the terms of Practice Direction HC75 which was issued prior to this letter (on 27th February, 2018) although it came into force on 9th April, 2018. At paras. 5 and 6 it provides that:

> "5. [….] the parties must consult so as to ensure accurate completion of the Certificate of Readiness, particularly insofar as the duration of the trial is concerned.

6. Failure to provide an accurate certificate particularly concerning the duration of the trial or to cooperate in the consultation process referred to at paragraph 5 may result in costs consequences for the parties regardless of the result of the action."

48. Against this background, by letter dated 5th April, 2018, which was received on 9th April, 2018 by the solicitor for Mr. Dempsey, the solicitor for Mr. Foran replied to this request as follows:

> "We confirm that we will oppose any application to call this matter on as the case is clearly not ready to proceed.
>
> You will be aware that we came off record for [Mr. Rushe] and we are in the process of finalising a Defence for [Mr. Foran.] Further we would add that discovery is outstanding between our client and [Mr. O'Shaughnessy].
>
> Please confirm that you will not proceed with your application until the Defence has been received and the outstanding discovery resolved." (Emphasis added)

49. By letter dated 11th April, 2018, the solicitor for Mr. Foran wrote again to the solicitor for Mr. Dempsey and stated:

> "[…] please confirm that you will not proceed with your application as outlined until the Defence has been received and the outstanding discovery resolved."

50. By letter dated 24th April, 2018 the solicitor for Mr. O'Shaughnessy wrote to Mr. Dempsey's solicitor and stated:

> "We are currently dealing with the Request for Voluntary Discovery from [Mr. Foran] and shall let you know as soon as that exercise has been concluded. Obviously, the matter cannot proceed to a hearing until then." (Emphasis added)

51. This statement by Mr. O'Shaughnessy's solicitor is also consistent with his sworn evidence in the affidavit dated 13th December, 2017 in support of Mr. O'Shaughnessy's application for discovery from Mr. Foran:

> "[….] it is essential that [Mr. O'Shaughnessy] obtains discovery of those documents in order to be in a position properly and fully to defend these proceedings." (Emphasis added)

52. It is to be noted that it took Mr. Dempsey over 1 year (by letter dated 2nd May, 2019) to follow up on his previous request (in March 2018) for consent from the defendants for the matter to be put down for trial. However it is true that Mr. O'Shaughnessy's solicitor did not notify Mr. Dempsey's solicitor that the discovery process had completed (despite his promise to do so in his letter of 24th April, 2018), but nonetheless this is a long time for a plaintiff, whose onus it is to prosecute the claim, to wait for the defendants to complete their discovery before following up. Accordingly, Mr. Dempsey must take some

responsibility for several months of this delay, particularly as it is his responsibility, as plaintiff, to progress the proceedings.

53. This letter of follow up, dated 2nd May, 2019 from Mr. Dempsey's solicitor to Mr. O'Shaughnessy's solicitor (and, in identical terms, to Mr. Foran's solicitor) states:

> "We understand that when we endeavoured to call this case on last year, that there was discovery between your office and the other Defendant's office. We presume at this stage that all these matters have now been completed and we will make an application early in the new term to call this matter on for hearing.
>
> You might please confirm by return of post that you consent to the matter being called on for hearing." (Emphasis added)

54. This therefore was Mr. Dempsey's second attempt to seek consent for the matter to be called on. There is no direct reply from Mr. O'Shaughnessy to this request for consent to have the matter set down for trial then. In fact, there is no direct reply from Mr. O'Shaughnessy's solicitor or indeed Mr. Foran's solicitor to the request in May 2019 for consent to have the matter set down for trial up until May 2020, when it becomes academic as a result of the filing of the first motion to dismiss.

55. The next correspondence from Mr. O'Shaughnessy's solicitor is over two months after this May 2019 request for consent to set the matter down for trial. It is an email dated 24th July, 2019. However, it makes no reference to the letter dated 2nd May, 2019 nor does it make any reference to the request for consent to the matter being called on for hearing.

56. In this email to Mr. Dempsey's solicitor (with a copy to Mr. Foran's solicitor), Mr. O'Shaughnessy's solicitor states:

> "This case has been dragging on now for a number of years.
>
> We suggest that the parties attend mediation with a view to trying to resolve the issue. You might kindly confirm by return your willingness to attend mediation."

57. It appears to be implicit in this email that the consent to the matter being set down for trial (sought in Mr. Dempsey's solicitor's letter of 2nd May, 2019) is being put into abeyance by Mr. O'Shaughnessy (with a copy to Mr. Foran's solicitor) at this stage in July 2019, in order to see if the case can be resolved by mediation.

58. He gets no reply from Mr. Dempsey's solicitor to this July 2019 email and so by further email dated 22nd October, 2019, the solicitor for Mr. O'Shaughnessy writes again to Mr. Dempsey's solicitor (with a copy to Mr. Foran's solicitor) as follows:

> "We refer to the above and to our email of the 8th of October and indeed a previous email suggesting mediation in this matter. Our first communication in this respect issued on the 24th of July.

> Time is moving on and the new term has commenced so hopefully everybody is now in the position to commit to mediation. You might kindly respond within the next 7 days so that we can move the matter on."

59. By letter dated 28th November, 2019 to Mr. O'Shaughnessy's solicitor, Mr. Dempsey's solicitor replied to the suggestion of mediation as follows:

> "We confirm that our client is considering mediation and perhaps you would let us have details of the costs associated with the Mediators so we can discuss further with our client."

60. Then on 24th January, 2020 in a letter to Mr. O'Shaughnessy's solicitor which is dated "*28th November 2019 Urgent Reminder 24th January 2020*", Mr. Dempsey's solicitor repeats the content of his letter of 28th November, 2019:

> "We confirm that our client is considering mediation and perhaps you would let us have details of the costs associated with the Mediators so we can discuss further with our client."

61. Mr. O'Shaughnessy's solicitor replied by email dated 27th January, 2020 enclosing a copy of his letter of 11th December, 2019 (which it seems was not received by Mr. Dempsey's solicitor) stating that:

> "In our experience the fees for a Mediator are of the order of €7,500 plus vat per day."

62. By letter dated 3rd February, 2020 Mr. Dempsey's solicitor replied to Mr. O'Shaughnessy's solicitor as follows:

> "Please note our client does not have the means to discharge the Mediator's fees or a portion of the Mediator's fees which we understand will have to be paid.
>
> If the Defendants wish to discharge the fees, we have no objection to entering into mediation. In the alternative, please note that we will proceed to call the matter on for hearing within seven days if we do not hear any further from you." (Emphasis added)

63. No reply was received from Mr. O'Shaughnessy's solicitor as to whether Mr. O'Shaughnessy (and/or Mr. Foran) were, or were not, willing to discharge Mr. Dempsey's fees for mediation. Equally however, Mr. Dempsey did not carry through with his promise to call the matter on within 7 days of that letter sent by his solicitor on 3rd February, 2020.

64. This was where matters rested until the 19th May, 2020 when Mr. Foran filed the motion before this Court to dismiss Mr. Dempsey's claim. On the 1st September, 2020, Mr. O'Shaughnessy filed a similar motion to dismiss.

Was this fourth period of delay excusable on the part of Mr. Dempsey?

65. In relation to this 2 year delay, between the 27th March, 2018 (when Mr. Dempsey sought the consent of Mr. Foran and Mr. O'Shaughnessy to call the matter on for the first time) and February 2020 (when the seven day period, in the letter dated 3rd February, expired for Mr. Dempsey to put the matter down for trial), it seems to this Court that it is excusable on the part of Mr. Dempsey (save for the several months delay in following up on his first request in March 2018 for consent to put the matter down for trial).

66. This is because Practice Direction HC75 requires the parties to co-operate regarding, *inter alia*, an estimate for the duration of the trial, with the threat of cost consequences for a failure to do so. It seems to this Court that it was reasonable for Mr. Dempsey not to progress the proceedings during this time (by setting the matter down for trial) without having the co-operation of Mr. Foran and Mr. O'Shaughnessy. This is because Mr. Foran and Mr. O'Shaughnessy in April 2018 refused to consent to the matter first being set down for trial because of inter-defendant discovery and in May 2019 they failed to confirm whether the discovery was complete and whether they consented to the matter being set down for trial.

67. It seems to this Court therefore that most of this 2 year delay on the part of Mr. Dempsey is excusable. However, a period of at least six months around this time is not excusable, since after the expiry of the seven days from his solicitor's letter of 3rd February, 2020, there was no reason why (up until the motion to dismiss was filed in May 2020) Mr. Dempsey did not call the matter on for trial, as he had threatened. In addition, as already noted, he should have followed up more promptly on his first letter of 27th March, 2018 as the onus was on him to progress the proceedings.

Is it reasonable for a plaintiff of limited means to mediate only if paid for by defendant?

68. It should be noted that this Court does not have to determine whether the refusal by Mr. Dempsey to mediate, unless the defendants paid his costs, was reasonable such that any delay thereby resulting was excusable on Mr. Dempsey's part. This is because the majority of this fourth period of delay had already passed, when Mr. Dempsey refused to attend mediation unless it was paid for by the defendants.

69. This Court would nonetheless note the contents of the letter dated 3rd February, 2020 from Mr. Dempsey's solicitor regarding his inability to pay *any* costs of the mediation. It states:

> "Please note our client does not have the means to discharge the Mediator's fees or a portion of the Mediator's fees which we understand will have to be paid."

In effect, Mr. Dempsey, who one assumes has been advised of the enormous cost of High Court litigation, is stating that he does not have the means to pay even *'a portion of the Mediator's fees'*, yet he wished to proceed with High Court litigation which costs multiples of the costs of mediation. Although not explicitly stated, it seems that he would, as one of the three parties to the dispute, have been expected to pay one third of the mediation costs of €7,500 i.e. €2,500. This reply therefore appears to suggest that he was not in a

position to pay €2,500 or indeed any contribution towards the costs of the mediation. Quite apart from anything else, Mr. Dempsey seems to be suggesting that he would only engage in mediation if he has 'no skin in the game', i.e. where he would not have the usual incentive to make every effort to ensure that the mediation is a success, by virtue of having made a financial contribution towards same.

70. This approach seems surprising when one considers that the aim of such a mediation is to prevent a plaintiff, such as Mr. Dempsey, being exposed to the risk of a loss of many multiples of €2,500, i.e. many tens of thousands, if not hundreds of thousands, in legal costs - based on the risk of any plaintiff losing in the High Court and possibly in the Court of Appeal. In this regard, in *McEvaddy v. National Asset Loan Management DAC* [2020] IEHC 593, this Court referenced the estimate provided by legal costs accountants of costs of €120,000 (for just one side) in a straight forward three-day High Court case for the enforcement of a contract for the sale of a house. Thus, even in the most straight forward of cases, one could be dealing with costs, which are a multiple of the average annual earnings in the State of circa €40,000 (before tax). In light of this level of costs, it should be borne in mind that save in the clearest of cases, there is a 50:50 chance of a litigant losing a case and so it follows that one of the main purposes of mediation is often to avoid plaintiffs and defendants being exposed to the risk of having to pay costs which would take a person on the average income several years to earn.

71. It follows that in this letter, Mr. Dempsey was in effect stating that he did not have the means to contribute anything to the costs of one form of dispute resolution (i.e. mediation), but at the same time that he wished to proceed with another form of dispute resolution (i.e. High Court litigation), which was vastly more expensive and in which (on an objective basis) there is a 50:50 chance of losing.

72. Why Mr. Dempsey would take such an approach is not clear. However, it is obviously relevant to note that, based on Mr. Dempsey's solicitor's letter regarding his lack of means, whether this case was resolved at mediation or after a High Court hearing, may not have been of huge concern to him. This is because even if he lost in the High Court it seems his lack of means would mean that he would not be able to pay the significant legal costs that the 'winning' defendants would have incurred.

Inbuilt injustice for a defendant faced with impecunious plaintiff

73. This highlights the fact that a defendant who is faced with litigation brought by an impecunious plaintiff is in a no-win situation, since even if he wins the litigation he still 'loses' because of having to pay his own legal costs. Thus, he is in the unenviable position that he may feel that regardless of how strong his case is, it makes economic sense to 'pay-off' the claim for a sum, which is less than the amount he would have to spend in 'winning it'. Indeed, it is one of the ironies of litigation that an impecunious plaintiff with a weak claim against a defendant with some means, has greater leverage to receive a settlement if those proceedings are instituted in the High Court, rather than in the District Court or the Circuit Court. This is because such a defendant has more to 'save' in legal costs by settling High Court proceedings against an impecunious plaintiff, due to the higher costs associated with High Court litigation.

74. The Supreme Court has recognised the unenviable position of a defendant who is faced with an impecunious plaintiff in *Farrell v. Bank of Ireland* [2012] IESC 42. In that case, Clarke J. (as he then was) noted that a defendant who is being sued by an impecunious plaintiff is faced with an *'inevitable injustice'* since even if he wins, he will not recover his legal costs. The reason this gives rise not only to an inevitable injustice, but also a significant injustice, is first because of the critical importance of the award of legal costs in achieving justice between parties to litigation and secondly because of the enormous cost of High Court litigation (relative to the average earnings in the State).

75. The crucial role of costs orders in achieving justice between litigants, was noted by Clarke J. at para. 4.14:

> "[T]he power of the court to award costs is a very important aspect of the armoury of the courts designed to ensure that parties are treated justly and that the court process is not abused. Indeed, in that context, it is worthy of some note that the court's normal response to a procedural failure is to see, first, whether it is possible to remedy that procedural failure by an appropriate award of costs. If it were not possible to order costs as a means of dealing with a procedural failure then the court might, in balancing any rights involved, be constrained to take some more significant action which might affect the result of the case as a whole. This would be a highly undesirable development but one which would come into much greater focus in the event that the court was unable to deal with procedural failure on the basis of remedying the wrong arising from that failure (where possible and adequate as a remedy) by an award of costs." (Emphasis added)

It is relevant to note that in this passage the Supreme Court recognised that if a court is faced with an impecunious plaintiff where it is not possible to achieve justice between the parties by making an effective costs order (i.e. one that will be paid), it may be necessary for a court to consider other more significant action. One such action is the dismissal of the proceedings and so it seems to follow that a factor to be taken into account in determining whether to dismiss proceedings for want of prosecution or inordinate delay is whether the proceedings involve the defendant being sued in 'no win' litigation, i.e. even if she wins, she will not recover her costs.

76. In that case, the Supreme Court was dealing with a security for costs application against an individual plaintiff with limited means who was seeking to appeal a High Court judgment to the Supreme Court. Having noted the crucial role that costs orders play in achieving justice, Clarke J. went on to observe at para. 4.15 the injustice which arises if the winning party does not recover costs:

> "[A]n inability or difficulty in recovering costs can give rise to an injustice. If justice required the award of costs in the first place then it follows that a party not actually recovering costs properly awarded must be said to have suffered an injustice." (Emphasis added)

Then at para. 4.34, Clarke J. went on to describe the '*inevitable injustice'* in the position of a defendant faced with an impecunious plaintiff who could end up obtaining a costs order which was futile because of the plaintiff's impecuniosity:

> "It seems to me that the overall question which the Court must ask itself is as to whether the special circumstance or circumstances identified by the respondent demonstrate a sufficient risk of added and unnecessary injustice (beyond the inevitable injustice that will apply to any respondent who successfully defends an appeal brought by an impecunious plaintiff)" (Emphasis added)

Although Clarke J. was dealing with an appeal by an impecunious plaintiff, it is clear that a similar, but not identical, injustice arises whether the defendant is unsuccessfully seeking his costs for a first instance decision as where he is seeking them for an appeal. In both instances he will be out of pocket – indeed the extent of the injustice may be worse in a first instance decision, since the costs of the first instance decision will usually be greater than the costs of the appeal. On the other hand, the extent of the injustice in allowing an appeal by an impecunious plaintiff may be greater, since the impecunious plaintiff will already have had 'one shot' (at the expense of the defendant) but in seeking to appeal is going for a 'second shot' (at the expense of the defendant, if that appeal is also lost).

Risk that litigation by an impecunious plaintiff could amount to blackmail

77. It is to be noted that in *Farrell* the Supreme Court went further in its analysis of the position of an impecunious plaintiff and in particular his power to '*abuse [his] position of impecuniosity'* (para. 4.22). At para. 4.12 the Supreme Court noted that a plaintiff could use his impecuniosity as an *'unfair tactic little short, at least in some cases, of blackmail'*, since an impecunious plaintiff:

> "could threaten proceedings which would undoubtedly put the defendant to significant cost in the hope that the defendant would buy off the case (even it was unwholly unmeritorious) so as to avoid having to incur the costs of defending. If it were not possible, ordinarily, to recover costs on behalf of a defendant in respect of a failed claim then such a tactic could easily be adopted by many unscrupulous parties." (Emphasis added)

While this Court is currently considering the risk of inevitable injustice which arises for a defendant being sued by an impecunious plaintiff, it is of course essential that the Court never loses sight of the '*undoubtedly high constitutional value that is attributed […] to the right of access to courts'* (at para. 4.16), which applies to every plaintiff, regardless of means. However, as suggested by Clarke J. at para. 4.6, it is often more accurate to refer to the right to have litigation fairly conducted, rather than the right of access to courts, because in many cases litigants do not have any issue gaining access to the courts to issue proceedings:

> "Where, however, a party has had access to the court, but where, as part of the administration of justice, decisions are taken by the court which affect that party's

ability to pursue the litigation, then it seems to me that such questions are more properly viewed in the context of the right to fair process being the right to have litigation fairly conducted (whereby the court is required to balance the rights of all parties to litigation in a fair, balanced and proportionate way) rather than on the basis of a right of access to the court *per se*"

For this reason, when this Court is considering the right of *'access to the courts'*, and in particular the right of every litigant, whether a plaintiff or defendant, '*to have litigation fairly conducted',* the observations of the Supreme Court regarding the power of an impecunious plaintiff to blackmail a defendant are relevant. Those observations highlight the inevitable injustice for a defendant who is sued by an impecunious plaintiff (from the moment the proceedings are explicitly or implicitly threatened).

A financially significant injustice

78. As well as being an 'inevitable' injustice, it is also a financially significant injustice because, as previously noted, it could take a person on the average income in the State many years to earn the costs of even a straight forward High Court case. This injustice is exacerbated by the fact that litigation costs in Ireland are 41% higher than the EU average according to the recent World Bank report (*Doing Business 2019, 16th Edition*).

Impecuniosity of plaintiff is a factor in strike out applications

79. While the foregoing observations regarding impecunious plaintiffs were made by the Supreme Court in the context of a security for costs application, it seems clear to this Court that they are of general application.

80. In this regard, it is relevant to note that the Court of Appeal in *Byrne v. NAMA* [2020] IECA 305 has concluded that the impecuniosity of the plaintiff is a factor which weighs in the balance when considering whether to dismiss proceedings (on the grounds that they are frivolous and vexatious and/or bound to fail). In that case, the proceedings were dismissed on the grounds that the claims were bound to fail. A factor in this regard was the fact that the plaintiffs were impecunious/not a mark for costs and in these circumstances the Court of Appeal concluded that to allow the proceedings to continue could amount to a significant injustice to the defendant. At para. 54, Noonan J. stated:

> "I readily accept, as did the trial judge at the outset of his judgment, that the jurisdiction invoked in this case by NAMA is one to be exercised sparingly and with considerable caution, being as it is a significant limitation on the right of access to the court. It is however well recognised that such right of access is not absolute. In clear cases, and this is one such, the court should not shrink from exercising the jurisdiction. Defendants also have constitutional rights which include the right to the protection of the court from abusive litigation. Such litigation is not infrequently pursued by persons who are not a mark for costs against parties who incur, sometimes very substantial, expense in defending unmeritorious claims where such costs will never be recovered. That is potentially a source of significant injustice. The courts are vigilant to ensure that the rights of defendants are accorded equal

respect to the rights of plaintiffs in considering necessary limitations on the right of access in the interests of justice." (Emphasis added)

81. In the context of applications to dismiss for inordinate delay, the relevance of the observations of the Supreme Court in *Farrell* is clear. This is because the relevance of the impecuniosity of the plaintiff in such cases has previously been recognised by the Court of Appeal. For example, in the decision of *Sweeney v. Keating*, Baker J. expressly referred at para. 25 to the recoverability of costs being a factor for the Court to consider in that case in which proceedings were sought to be struck out due to inordinate delay:

> "Every step by a defendant is one which is financially costly and a defendant may never recover that expenditure even if the action is successfully defended." (Emphasis added)

82. Similarly in the Court of Appeal case of *Millerick*, a case also dealing with a strike-out application due to inordinate delay, Irvine J. noted at paras. 37 and 38 that a factor in the consideration of these applications is that the plaintiff may not be a mark for an award of costs:

> "[I]t is the plaintiff who commences legal proceedings and draws the defendant into the legal process. No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise. In many cases the plaintiff has no valid claim and they may be no mark for any award of costs that a defendant may obtain following a successful defence of the proceedings. Often times, a defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to a claim.
>
> Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?" (Emphasis added)

83. From all of this it is clear that, while there is a constitutional right of access to the courts, the *'inevitable injustice'* of a defendant being faced with an impecunious plaintiff could, in certain circumstances, be a factor which weighs in the balance of justice in favour of dismissing proceedings brought by that plaintiff, where there has been inordinate and inexcusable delay by that plaintiff.

Is refusal to mediate an abuse by the plaintiff of his position of impecuniosity?

84. Against this background, one might consider how reasonable it is for Mr. Dempsey, a plaintiff of limited means, to refuse to make any contribution at all towards the cost of mediation so as to allow it proceed, but who insists on pursuing expensive litigation in the knowledge that if he loses, there may be no financial downside for him as the defendant is likely to be faced with the '*inevitable injustice'* of not recovering legal costs from him.

85. At para. 4.22 of *Farrell*, Clarke J. refers to this type of situation, where a plaintiff may abuse his impecuniosity, since he refers to the risk that a plaintiff:

> "was going to abuse its position of impecuniosity by taking measures which would greatly increase the costs of its opponent in circumstances where the opponent was unlikely to recover those costs." (Emphasis added)

86. Although Clarke J. was referring to the taking of measures to *increase* costs, this principle is equally applicable to an impecunious plaintiff who refuses to take measures which might *save* costs – the financial effect is the same for the defendant. For this reason, one could ask if an impecunious plaintiff is 'abusing his position of impecuniosity' by refusing to mediate, where that refusal facilitates that plaintiff pursuing litigation on a 'no lose' basis for him, but on a 'no win' basis for the defendant? – it is 'no lose' for the plaintiff because if he wins, the defendant pays the High Court costs, but if he loses the plaintiff does not have the funds to pay those costs. It is 'no win' for the defendant because if he loses he pays the legal costs of the plaintiff, but if he wins he also 'loses' since he will not recover those legal costs from the plaintiff.

87. This question does of course assume that one is dealing with two defendants who have means. In this case, this appears probable, although it has not been fully clarified. For example it may well be that Mr. O'Shaughnessy, a solicitor (although no longer practising), has an insurance company which is defending the case on his behalf and if so he is in effect a defendant with means. In relation to Mr. Foran, he may also be a defendant with means, since he gave an undertaking to Mr. O'Shaughnessy not to reduce his assets below €422,500 when he was defending the Mareva injunction application against him (which was brought by Mr. O'Shaughnessy).

88. However, as already noted, this Court does not have to determine whether it was reasonable for Mr. Dempsey to only mediate if he had no 'skin in the game' and whether it was reasonable for him to thereby oblige Mr. Foran and Mr. O'Shaughnessy to litigate their dispute on a 'no win' basis for the defendants but a 'no lose' for him.

89. However, at a minimum what this Court can say is that it does seem surprising that Mr. Dempsey would refuse to have some 'skin in the game' by making even a contribution towards the cost of mediation, because of his limited means, but at the same time, those limited means do not prevent him from undertaking High Court litigation despite the fact that it will cost 10, 20 or 30 times the amount of any such contribution to the costs of mediation.

90. It is important to note that, in making the foregoing general points about the risk of litigation by impecunious plaintiffs amounting to a form of blackmail, it is not being suggested that in this case the plaintiff's claim is not a valid claim or indeed that it is a 'nuisance' claim or that there is any suggestion of 'blackmail'. Nor in making the foregoing general points is it being suggested that Mr. Dempsey's might not have a strong claim against both defendants or that his claim is 50:50 or less.

Summary of inordinate and inexcusable delays vis-à-vis Mr. O'Shaughnessy

91. To summarise the delays in Mr. Dempsey's prosecution of these proceedings *vis-à-vis* Mr. O'Shaughnessy, this Court concludes that the pre-commencement period of delay was inordinate and inexcusable. However, it is the post-commencement periods of delay which are the critical ones.

92. As regards the second period of delay of 4 years this was inordinate and inexcusable, as was the majority of the third period of delay of 1.5 years, so a period of over 5 years in total.

93. As regards the fourth period of delay, Mr. O'Shaughnessy did not reply during a period of two years to the request for consent to the case being set down for trial and thus that fourth period of delay is due in part to him. However, it is relevant to note that at that stage of the proceedings there had already been at least a 5 year delay in Mr. Dempsey prosecuting his claim and for this reason, it cannot be said to convert the previous delay by Mr. Dempsey, which this Court has found to be 'inexcusable' into an 'excusable' delay.

94. In addition, almost 1 year of this fourth period of delay (of 2 years in total) was as a result of Mr. O'Shaughnessy's attempt to mediate the dispute and so this was, in this Court's view, not a '*culpable delay'* by Mr. O'Shaughnessy, such as to excuse the earlier 5 year delay on the part of Mr. Dempsey, or to operate as an '*countervailing circumstance'* to permit the proceedings to continue, notwithstanding the delay by Mr. Dempsey. As noted by Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* at 519:

> "When considering any allegation of delay or acquiescence by the defendants, [the Court] 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."

An attempt by a defendant to mediate a dispute, which leads to a delay in the proceedings, is not, in this Court's view, a '*culpable delay'*.

95. In addition of course, as previously noted, a minority of this fourth period of delay, of approximately 6 months, was attributable to Mr. Dempsey and was a delay for which no excuse has been provided and so this is also inexcusable.

96. Overall therefore one is dealing with a delay of over 5 years (and in fact close to 6 years when one adds the aforesaid 6 months), which this Court regards as inordinate and inexcusable. While the pre-commencement delay (of over 3 years) is not directly relevant, it does mean that this 5 year post-commencement delay is regarded as particularly serious, since Mr. O'Shaughnessy has to deal with a 3 year pre-

commencement delay and a 5 year post-commencement delay, the result of which is that he has to defend a claim, approximately 8 years later than he should have to do so.

THE DELAY VIS-À-VIS MR. FORAN

97. From Mr. Foran's perspective, the delay in relation to the first period (i.e. the pre-commencement delay) applies to him as it does to Mr. O'Shaughnessy. Similarly, the fourth period of delay applies to him in a similar, if not identical, fashion as it applies to Mr. O'Shaughnessy (i.e. this delay was caused in part by Mr. Foran's failure to consent to the matter being set down for trial). As with Mr. O'Shaughnessy, part of this fourth period of delay could not be described as '*culpable delay'* on the part of Mr. Foran, since it was an attempt to mediate a resolution of the dispute, *albeit* that Mr. Foran was not the instigator of the mediation proposal, he was copied on that proposal and did not object to it and therefore must be taken to have acquiesced in it.

98. However, the second period of delay and the third period of delay by Mr. Dempsey are different vis-à-vis Mr. Foran than they are vis-à-vis Mr. O'Shaughnessy.

99. From Mr. Foran's perspective, the second and third periods of delay can be combined into one period of delay which starts from the date of the delivery of the Statement of Claim on 23rd May, 2011 (as the delivery of the defence by Mr. O'Shaughnessy in July 2012 is not relevant to him) until 27th March, 2018 (when Mr. Dempsey sought for the first time to have the matter put down for trial). This a period of almost 7 years.

100. It is relevant to note that unlike Mr. O'Shaughnessy, Mr. Foran did not file a defence promptly. He filed his defence on 6th June, 2018, which is seven years after the Statement of Claim was filed. It is relevant to note that Mr. Dempsey issued a motion seeking judgment in default of defence against Mr. Foran which was heard on 10th December, 2012 allowing Mr. Foran a period of six weeks to deliver his defence. Mr. Foran failed to do so within that six weeks.

101. Mr. Dempsey took no steps to ensure immediate delivery of Mr. Foran's defence after this failure and he allowed almost 1 year to pass when he issued a second motion for judgment in default of defence, which was heard on 9th December, 2013. This hearing led Mr. Foran to be given until February 2014 to file his defence.

102. Again, Mr. Foran failed to do so by February 2014. However, yet again Mr. Dempsey took no step to ensure immediate delivery of Mr. Foran's defence, and this time he allowed 4 years to pass from the deadline for the defence to be filed in February 2014 until the 6th June, 2018 (when Mr. Foran filed his defence). The fact that he did seek consent to call the matter on, by letter dated 27th March, 2018 is not significant since it was just two months prior to the filing of Mr. Foran's defence, and this still leaves a 4 year period from February 2014 to March/June 2018.

103. In total, Mr. Dempsey allowed a period of 7 years to elapse from the filing of the Statement of Claim to the Defence being filed by Mr. Foran. Some of this inordinate delay is excusable and/or is attributable to Mr. Foran, or to put the matter another way, Mr.

Foran was guilty of a culpable delay (since he failed to comply with the deadline set down by the Court). In this regard, Mr. Foran could be said to have been responsible for contributing a maximum of 2.5 years to the overall 7 year delay. This is because Mr. Foran's failure to comply with the request to file a defence led to Mr. Dempsey having to file two motions for judgment in default of defence with which Mr. Foran did not comply. However, while Mr. Dempsey followed up after the first court-imposed time limit (in December 2012) was not complied with, he delayed in so doing for several months as the motion was not issued until the 7th October, 2013 in respect of the missed deadline in January 2013.

104. However, no excuse is given as to why Mr. Dempsey failed to follow up when the second court-imposed time limit (in December 2013) was not complied with by Mr. Foran. From this period on (i.e. when Mr. Foran did not comply with the second deadline in February 2014 to file his defence) it was Mr. Dempsey's responsibility to follow up and if necessary bring a further motion for judgment in default of defence. However, he did nothing for a period of 4 years.

105. The delay between the delivery of the Statement of Claim in May 2011 and the missed deadline in February 2014 for filing his defence despite two motions, is the responsibility of Mr. Foran. Accordingly, in this Court's view, a maximum of 2.5 years of this delay is his responsibility and thus this part of the 7 year delay by Mr. Dempsey is excusable.

106. However at least 4 years of this delay could have been avoided by Mr. Dempsey pursuing the matter more diligently. As noted in *McNamee v. Boyce*, the onus is on Mr. Dempsey as the plaintiff, and not on Mr. Foran as defendant, to prosecute the claim and, if necessary, to take steps against Mr. Foran to ensure that he delivered a defence by issuing a motion for judgment in default of defence, as he had done in 2012 and 2013, but failed to do for a period of at least 4 years thereafter.

107. It is clear that by standing aside, while Mr. Foran failed to file a defence for 7 years, Mr. Dempsey must take responsibility for the majority of this delay or to put the matter another way, Mr. Dempsey has not got a *'legitimate excuse'* for a delay of at least 4 years as he simply let years go by, in particular between February 2014 and March 2018/June 2018, where he did nothing to progress the filing of a defence or the obtaining of a judgment in default of defence. In addition, it has been noted that he could have followed up several months sooner regarding the failure by Mr. Foran to comply with the first deadline for delivering his defence in January 2013.

Summary of inordinate and inexcusable delays vis-à-vis Mr. Foran

108. To summarise the delay by Mr. Dempsey vis-à-vis Mr. Foran, one can say that there was an inordinate and inexcusable pre-commencement first period of delay of at least 3 years. However, more significantly, this was followed by an inordinate delay (second/third period of delay combined) of some 7 years until March 2018/June 2018 when Mr. Dempsey sought consent to call the matter on/Mr. Foran filed a defence. Of this period of delay, at least four years were inexcusable.

109. As regards the fourth period of delay, Mr. Foran did not reply during a period of two years to the request for consent to the case being set down for trial and thus he is in the same position as Mr. O'Shaughnessy regarding the fourth period of delay, i.e. part of the fourth period of delay is due to him.

110. However, it is relevant to note that at that stage of the proceedings there had already been a delay of at least 4 years in Mr. Dempsey prosecuting his claim. In addition, almost a year of of this fourth period of delay (of 2 years in total) was as a result of Mr. O'Shaughnessy's attempt (with the knowledge and acquiescence of Mr. Foran) to mediate the dispute and so this is, in this Court's view, not a 'culpable delay'. Accordingly, it does not excuse the delay of at least 4 years on the part of Mr. Dempsey or operate as an *'countervailing circumstance'* to permit the proceedings to continue, notwithstanding that delay by Mr. Dempsey.

111. In addition of course, as previously noted, a minority of this fourth period of delay, of approximately 6 months, was attributable to Mr. Dempsey (in not following up on his March 2018 request for consent to put the matter down for trial) and for which no excuse has been provided and so this is also inexcusable. Furthermore, there was the inexcusable delay of several months by Mr. Dempsey in following up on the first missed deadline for filing the defence in January 2013.

112. Overall therefore, in relation to Mr. Foran, one is left with a period of at least 4 years (and closer to 5 years) of inordinate and inexcusable delay, where there had already been a pre-commencement delay of at least 3 years, and so one can conclude that Mr. Foran is being asked to defend this claim at least 7 years after he should have been.

113. The next step to consider is whether Mr. Dempsey has adduced countervailing circumstances which would tip the balance of justice in favour of the proceedings being allowed to continue despite this inordinate and inexcusable delay.

BALANCE OF JUSTICE

114. As is clear from the authorities, the onus is on Mr. Dempsey to show why, on the balance of justice, the proceedings should not be dismissed, i.e. he has to provide countervailing reasons which justify the continuation of the proceedings.

Delay partly caused by defendants?

115. Mr. Dempsey relies on the factor referenced by Baker J. at para. 20(b)(iii) of her judgment in *Sweeney v. Keating* that:

> "the court is entitled to take into consideration and have regard to [….] any delay on the part of the defendant, because litigation is a two-party operation, the conduct of both parties should be looked at."

116. In this regard, it is true that neither Mr. O'Shaughnessy nor Mr. Foran replied during a period of two years to the request for consent to the case being set down for trial and that the fourth period of delay is due in part to them. However, as already noted, in the context of whether this part of the delay by Mr. Dempsey was excusable, it is relevant to

note that at that stage of the proceedings there had already been at least a 5 year inexcusable delay by Mr. Dempsey (vis-à-vis Mr. O'Shaughnessy) and at least a 4 year inexcusable delay (vis-à-vis Mr. Foran). In addition, approximately 1 year of this fourth period of delay was as a result of Mr. O'Shaughnessy's attempt (with the knowledge and apparent consent of Mr. Foran) to mediate the dispute and so this is, in this Court's view, a non-culpable delay. Accordingly, it is this Court's view that the delay caused by Mr. O'Shaughnessy and Mr. Foran during this fourth period of delay is not a sufficient countervailing factor to justify this Court concluding that the proceedings should not be dismissed.

Should an inexcusable delay be allowed for a solicitor's breach of undertaking?

117. As regards the proceedings against Mr. O'Shaughnessy, Mr. Dempsey claims that the proceedings should not be struck out as they involve a claim of a breach of undertaking, which is alleged to be continuing, by Mr. O'Shaughnessy which involves the supervisory jurisdiction of the High Court regarding solicitors. He argues that this is a countervailing factor which justifies this Court is allowing the proceedings to continue, notwithstanding an inordinate and inexcusable delay in the prosecution of the proceedings.

118. As it happens, Mr. O'Shaughnessy is currently living abroad and is therefore not practising as a solicitor in Ireland at present. For this reason, he may not be seeking insurance to practice as a solicitor in Ireland at this time and so the existence of unresolved litigation alleging a breach of an undertaking will not directly impact upon the cost of any such insurance. However, as a general point, this Court does not believe that a solicitor, who is alleged to have breached an undertaking, should have those proceedings continued, even though *other* types of proceedings against that solicitor (or proceedings against a non-solicitor) might be dismissed, simply because the High Court has a supervisory jurisdiction regarding solicitors' undertakings and/or that the alleged breach of undertaking is 'continuing'. This is because, in this Court's view, solicitors are as entitled as any other defendants to have a hearing '*within a reasonable time'* (to quote Article 6.1 of the ECHR) to deal with any allegations against them.

Or is there an obligation to litigate claims promptly against a professional?

119. Indeed, it could be argued that, because of the likely effect, of unproven allegations of a breach of undertaking, on a professional's insurance premium (which effect is likely to continue until the 'claim' is resolved) and the impact of such allegations on her professional reputation in the market place, there is an added onus on plaintiffs to progress such claims as quickly as possible. This is because it is well settled that there is an onus on a plaintiff not to sue a professional without a reasonable basis, usually an expert opinion supporting that claim. Denham J., as she then was, in *Cooke v. Cronin* [1999] IESC 54 at p. 4 of her judgment, explained the rationale for this rule as follows:

> "To issue proceedings alleging professional negligence puts an individual in a situation where for professional or practice reasons to have the case proceed in open Court may be perceived and feared by that professional as being detrimental to his professional reputation and practice. This fear should not be utilized by unprofessional conduct." (Emphasis added)

120. A similar point regarding a professional's reputation was the subject of detailed discussion by the Supreme Court (McKechnie J.) in the recent decision of *Mangan v. Dockeray* [2020] IESC 67 (see para. 89 *et seq*.) The comments of McKechnie J. at para. 90 are particularly relevant to the present case:

> "Reputation is a crucial component of one's right to earn a livelihood at a personal level, as it is for public confidence in the profession of which that person is a member, at an institutional level […] by instituting practice related proceedings against such a person or body, is to put their reputational integrity in issue, at least to some extent, and thus should only be undertaken if there is justifiable reason for so doing "

121. It is clear from this that a plaintiff *cannot institute* proceedings against a professional without a reasonable basis, usually an expert opinion. The reason, for this high bar to suing a professional in the first place, is because the proceedings could be perceived as relating to unprofessional conduct and because of the negative effect of such proceedings on her right to earn a livelihood. In this Court's view, these very same reasons are why, once those proceedings have been instituted, they should be progressed promptly. In this way, the professional does not suffer damage to her reputation, her insurance premium and her right to earn a livelihood any longer than is absolutely necessary.

122. To conclude regarding this part of Mr. Dempsey's argument, this Court is of the view that a solicitor should not have to endure litigation hanging over him (in this case for a decade or more), simply because of the supervisory jurisdiction of the High Court. On the contrary, it is arguable that, in proceedings against a professional such as a solicitor, where reputation is so crucial, there is an onus on a plaintiff to pursue any such litigation promptly. In this case, one is talking about a breach of undertaking which is alleged to have occurred some 14 years ago, which only led to proceedings being instituted 10 years ago. Because of the pre-commencement delay (at least 3 years) and post-commencement delay (at least 5 years), this has led to a case, which could be perceived as a claim of unprofessional conduct, hanging over Mr. O'Shaughnessy for at least 8 years longer than necessary.

Delay by Mr. Foran in filing his defence

123. There is a certain degree of overlap between whether the delay, by Mr. Foran in filing his defence (which this Court estimates contributed up to 2.5 years to the delay in the proceedings), means that the delay in progressing the proceedings by Mr. Dempsey is inexcusable (which is dealt with above at para. 100 *et seq*.) on the one hand, and on the other hand whether this delay amounts to a countervailing circumstance which tips the balance of justice in favour of the proceedings being allowed to continue.

124. This Court has already concluded that because of Mr. Foran's delay in delivering a defence, only part (at least 4 years) of the 7 year delay in the second/third period of delay is attributable to Mr. Dempsey and so at least 4 years of this delay was inexcusable on the part of Mr. Dempsey.

125. This Court does not believe that Mr. Foran's contribution of up to 2.5 years to the delay in these proceedings, even though it is a culpable delay since he failed to comply with two court ordered deadlines, is a sufficient countervailing circumstance to swing the balance of justice in favour of allowing the proceedings to continue. This is because Mr. Dempsey is at fault for at least 4 years' delay (if not, as noted hereunder close to 5 years), against a maximum of 2.5 years contribution to the 7 year delay by Mr. Foran. Furthermore the onus was on Mr. Dempsey, and not Mr. Foran, to prosecute the claim.

126. On this basis, the delay by Mr. Foran in filing his defence is not a sufficient countervailing circumstance to swing the balance of justice in favour of allowing the proceedings to continue.

127. Although not determinative of whether Mr. Foran's delay was a sufficient '*countervailing circumstance'*, this Court proposes to make some observations about the fact that Mr. Dempsey stated that he did not have the means to make any contribution to a mediation. It is likely for this reason that Mr. Foran was unlikely to recover from Mr. Dempsey (if Mr. Foran won the litigation) any legal costs Mr. Foran incurred in preparing and filing a defence. In this regard, *Millerick* is relevant. However, that was a case in which there was no default on the part of the defendant in filing a defence (and it must be remembered that Mr. Foran was in default of a court-ordered deadline for the filing of his defence). *Millerick* dealt with a claim that it was a countervailing circumstance that the defendant had not taken steps to dismiss or progress the action. Although there is an important difference between a defendant who is in default of a court-ordered timeline and one who simply did not take steps to dismiss or progress the case, the following statements/questions set out by Irvine J., at paras. 37 and 38 (quoted in full earlier) are nonetheless of some relevance to this case:

- no defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise.
- the plaintiff may be no mark for any award of costs.
- a defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to a claim.
- why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps?
- if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?

128. Similarly in this case, Mr. Foran has been embroiled in this litigation against his will (as has Mr. O'Shaughnessy of course). In this regard, it is important to note that, as observed by Irvine J., when dealing with litigation, for most people it can be hugely

stressful. Sometimes being unfortunate enough to be subject to High Court litigation can for some people be one of the most significant events during their lifetime.

129. This is not just because of the enormous time involved, the stress, the publicity and damage to a defendant's reputation of having unproven allegations 'out there' against them (until the litigation concludes), but also because of the enormous cost (as noted above even the most straight forward High Court cases can cost over €100,000) which is involved for an individual defendant.

130. One can see therefore why, instituting litigation against an individual is not something which should be undertaken lightly and why Article 6 of the ECHR states that a person should have any such litigation dealt with within a '*reasonable time'*. Hence, there is an onus on a plaintiff to bring any such litigation to a conclusion in a reasonable time and not have it endlessly hanging over a defendant.

Where the plaintiff is a person of limited means

131. In this case, there is the added factor that Mr. Dempsey appears on the basis of his own admission to be a man of limited means. Thus for Mr. Foran, the enormous High Court legal costs are costs which he will likely have to personally discharge out of personal savings, even if he wins the action – 'no win' litigation.

132. For this reason, it is perhaps understandable why Mr. Foran might not be in a rush to spend money, he was unlikely to recover, in filing his defence particularly when there was no follow-up from Mr. Dempsey after February 2014 (*albeit* that unlike with the defendant in *Millerick*, Mr. Foran was subject to a court-ordered timeline). For the same reason, it is understandable why he might have hoped or thought that there '*was some chance'* because of Mr. Dempsey's '*tardy approach'* (*albeit* that Mr. Dempsey had previously filed two motions for judgment in default of defence, but then left matters lie for over 4 years) that he might no longer be pursuing this litigation against him.

133. While noting all of this, it is important to bear in mind that the determinative reason for concluding that Mr. Foran's delay in filing his defence is not a countervailing circumstance, is that the 2.5 years or so contribution to the 7 year delay pales in comparison with Mr. Dempsey's inexcusable delay of at least 4 years post-commencement and 3 years pre-commencement delay, particularly when one bears in mind the obligation is upon Mr. Dempsey as plaintiff to progress the case. Nonetheless in passing, it is to be observed that it is perhaps understandable that Mr. Foran might have hoped that this tardy approach by Mr. Dempsey might have led to the proceedings withering, particularly where every step Mr. Foran took in the litigation cost him money which he may not have been able to recover.

No prejudice to defendants in allowing the claim to proceed?

134. Mr. Dempsey also relies on the claim that there is no prejudice suffered by Mr. O'Shaughnessy in allowing these proceedings to continue. He relies on the decision of the High Court in *Hughes v. Cusack* [2016] IEHC 34 in which it was noted at para.78 that:

> "[I]f by reason of the inordinate and inexcusable delay, a defendant cannot get a fair trial then the Court should exercise its discretion to dismiss."

On the basis of this statement and the fact that Mr. Foran and Mr. O'Shaughnessy have not alleged that they cannot get a fair trial by reason of the delay, Mr. Dempsey claims that the proceedings should not be dismissed.

135. However, since that High Court judgment was handed down, the Court of Appeal judgment in *Sweeney v. Keating* has been delivered, which is binding on this Court, and which sets down the principles which apply to these cases. It is clear from Baker J.'s judgment in *Sweeney v. Keating* that the Court can assume prejudice once there has been an extensive period of time between the events complained and the likely date of the trial. At para. 32 she states:

> "Furthermore, it is well established law that the court, when considering an application to dismiss proceedings for inordinate and inexcusable delay can assume prejudice once that has been an extensive period of time between the events complained of and the likely date of trial."

136. In this case the events complained of occurred in 2006, some 14 years ago and this Court has found that there has been an inordinate and inexcusable delay of at least 5 years by Mr. Dempsey in prosecuting his claim vis-à-vis Mr. O'Shaughnessy and at least 4 years vis-à-vis Mr. Foran, as well as an inordinate and inexcusable delay of over 3 years, in instituting the proceedings in the first place. This amounts to Mr. O'Shaughnessy being asked to defend these proceedings approximately 8 years later than he should have been asked to defend them and Mr. Foran being asked to defend these proceedings approximately 7 years later than he should have been asked to defend them.

137. In this Court's view, based on the Court of Appeal decision in *Sweeney v. Keating* (and bearing in mind the right to a hearing within a *'reasonable time'* under the ECHR), this length of delay is sufficient prejudice in its own right and no further prejudice (such as being deprived of a fair trial) needs to be established by Mr. O'Shaughnessy or Mr. Foran to justify the grant of orders dismissing the proceedings.

138. In further support of this conclusion, this Court would observe that in *Sweeney v. Keating*, the Court of Appeal had little hesitation in upholding the High Court dismissal of proceedings which were issued 3 years after the cause of action arose (compared to 4 years here) and which were sought to be dismissed for want of prosecution 8 years after being instituted (compared to 10 years here), and so 11 years after the cause of action arose (compared to 14 years here).

139. For all of these reasons, this Court can see no countervailing reasons not to dismiss the proceedings against Mr. O'Shaughnessy and Mr. Foran in light of the inordinate and inexcusable delay in progressing them.

CONCLUSION

140. This Court concludes that Mr. Dempsey has been guilty of inordinate and inexcusable delay of at least 5 years in prosecuting his claim against Mr. O'Shaughnessy, which has been exacerbated by the delay of at least 3 years in issuing the proceedings.

141. This Court also concludes that Mr. Dempsey has been guilty of inordinate and inexcusable delay of at least 4 years in prosecuting his claim against Mr. Foran which has been exacerbated by the delay of at least 3 years in issuing the proceedings.

142. Having established the inordinate and inexcusable delay, Mr. Dempsey sought to discharge the onus on him to provide countervailing circumstances that justified the continuation of the proceedings vis-à-vis Mr. O'Shaughnessy or Mr. Foran.

143. As regards the 'countervailing circumstance' that the proceedings relate to an alleged breach of an undertaking by a solicitor that is continuing, this is not sufficient, since there is no authority for suggesting that solicitors should be treated worse than other defendants in relation to the pace at which proceedings are taken against them. Indeed what authority there is, regarding proceedings against professionals such as solicitors, supports the view that proceedings against a professional are a matter of considerable import because of their impact on that professional's right to earn her livelihood, professional reputation, insurance premium etc. If anything, this line of authority supports the proposition that such proceedings should be progressed *at least* as fast as proceedings against persons, whose reputation and livelihood are not on the line, if not faster.

144. As regards the countervailing circumstance of Mr. Foran's delay in filing a defence, this Court determined that a contribution of a maximum of 2.5 years to the 7 year delay in Mr Dempsey's proceedings against Mr. Foran could be attributed to Mr. Foran, As the Court also determined that at least 4 of those 7 years constituted an inexcusable delay on the part of Mr. Dempsey (where he stood by for over 4 years without bringing a motion for judgment in default of defence), it concluded that the delay by Mr. Foran was not a sufficient countervailing circumstances, in light of the much greater delay caused by Mr. Dempsey, particularly when one bears in mind that the onus was on Mr. Dempsey, as plaintiff, to progress the case. Although not determinative of the issue, this Court observed that, even though Mr. Foran had breached a deadline set down by the court in filing his defence and so was guilty of culpable delay, Mr. Foran may have formed the reasonable hope (after Mr. Dempsey did not follow up for 4 years after the missed deadline for filing the defence) that he would not be pursuing this litigation, particularly where, even if Mr. Foran won the litigation, any costs expended by him in preparing and filing his defence may not be recovered from Mr. Dempsey in view of his limited means.

145. As regards the countervailing circumstance of the alleged culpable delay by Mr. O'Shaughnessy and Mr. Foran of approximately 2 years in the fourth period of delay, this Court has concluded that approximately 1 year of this period was not 'culpable', since it related to the attempts by Mr. O'Shaughnessy (with the acquiescence of Mr. Foran) to mediate the dispute. The remaining 1 year period of delay during this period was culpable on the part of Mr. O'Shaughnessy and Mr. Foran, but it is not a sufficient countervailing

circumstance to permit the continuation of the proceedings, since by that stage there had already been a delay by Mr. Dempsey of at least 4 years (vis-à-vis Mr. Foran) and at least 5 years (vis-à-vis Mr. O'Shaughnessy), which was inordinate and inexcusable.

146. Since, Mr. Dempsey has failed to discharge the onus on him to satisfy this Court that there are sufficient countervailing circumstances to justify the continuation of the proceedings, notwithstanding the inordinate and inexcusable delay, the proceedings should be struck out.

147. Although not a factor in this case, this Court observed how there can be an *'inevitable injustice'* in defendants being faced with an impecunious plaintiff, which in other cases might weigh in the balance of justice in favour of dismissing proceedings which have been delayed to an inordinate and inexcusable extent.

148. As regards final orders, this Court would ask the parties to engage with each other to avoid court time being unnecessarily required to deal with any outstanding matters, but that if this is not possible, the matter will be in for mention on Friday 29th January, 2021 at 10.45.