

THE HIGH COURT

[2022] IEHC 242
[Record 2012/5992/P]

BETWEEN

RYANS BAKERY WEXFORD LIMITED

PLAINTIFF

AND

**HARMONY ROW FINANCIAL SERVICES LIMITED AND INDEPENDENT TRUSTEE
COMPANY LIMITED**

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 27th day of April, 2022

1. This is the defendants' application to dismiss the proceedings for the delay that occurred from 2012 when the proceedings were issued to July 2020 when this motion was filed.
2. The court must establish: -
 - (1) Has there been inordinate delay?
 - (2) If so, is that delay excusable?
 - (3) If the delay is both inordinate and excusable, does the balance of justice lie in favour of dismissing the proceedings?

Background

3. The plaintiff runs a bakery business in Wexford. The defendants sell financial investment products. In June 2006 the plaintiff purchased two geared tracker bonds from the defendants. Both performed badly and the plaintiff lost virtually all the money it had invested. In June 2012, very close to the applicable six-year limitation period, the plaintiff issued a plenary summons in which it claimed damages for negligence, misrepresentation, negligence, misstatement, breach of contract, breach of fiduciary duty and breach of duty. The plenary summons was not preceded by any initiating correspondence which meant that the defendants were given no information about the plaintiff's claims or the facts giving rise to them.
4. On 7 July 2020 the defendants issued a motion to dismiss the plaintiff's claim pursuant to O.27 r.1 of the Rules of the Superior Courts dismissing the plaintiff's claim for want of prosecution on the basis that the plaintiff had failed to deliver a statement of claim within the prescribed time. The defendants had previously threatened to bring that motion in correspondence dated 26 July 2019. By the time the motion issued, there had been a delay of over eight years in filing the statement of claim.
5. The court was furnished with a useful chronology of relevant events, summarised below.

Date	Step
June 2006	Defendants alleged to have been engaged by the Plaintiff
19 June	Plenary Summons issued

2012	
2 September 2013	Defendants enter an Appearance
9 March 2016	Plaintiff's solicitors file a Notice of Change of Solicitors
9 March 2016	Plaintiff files a Notice of Intention to Proceed
11 September 2019	Defendants file a Notice of Intention to Proceed
11 October 2019	Defendants issuing a "Warning Letter" in respect of this Motion
28 December 2019	Plaintiff indicates correspondence should be sent to a "case coordinator"
27 Jan 2020	A Notice of Motion filed for the Plaintiff's solicitors to come off record
14 February 2020	Defendants issuing a further "Warning Letter" in respect of this Motion
10 March 2020	The Plaintiff's solicitors given liberty to come off record
13 July 2020	This Motion issued
14 December 2020	This Motion's return date
28 January 2021	The Plaintiff's current solicitors come on record
25 March	Replying Affidavit on behalf of the plaintiff

2021	
7 April 2021	Delivery of Statement of Claim
12 May 2021	Replying Affidavit of the defendants

The defendants' submissions

6. The defendants contend that the delay is inordinate and that the excuses offered by the plaintiff are inadequate. They rely on decisions of this court which condemned similar or lesser periods of delay as inordinate; one year and three months (*Diamrem Ltd v. Clare County Council* [2021] IEHC 408) three years and two months (*Bank of Ireland v. Wilson and Cahalane* [2020] IEHC 646) four years and one month (*Millerick* [2016] IECA 206) and two years and seven months (*Allied Irish Banks Public Ltd v. Boyle* [2020] IEHC 377). The defendants submit that a plaintiff who issues their proceedings very close to the time when they would have been statute barred, is under a greater obligation to progress the proceedings without delay, as per Noonan J. in *McGuinness v. Wilke and Flanagan Solicitors* [2020] IECA 111. The defendants rely heavily on the Supreme Court's view set out in *Comcast International Holdings v. Minister for Public Enterprise and Ors* [2012] IESC 50 that the courts should no longer indulge litigants who delay in prosecuting their proceedings.

7. In assessing the balance of justice, the defendants submit that a heavy burden rests on the plaintiff to point to countervailing circumstances to cancel out delays that the court has found to be inordinate and inexcusable and rely in particular on the decision of Allen J. in *South County Dublin Council v. CF Structures Ltd* [2021] IEHC 5 which, the defendants submit, does not require them to establish special prejudice they have suffered special prejudice as a result of the delay. Nevertheless they identify the prejudice they would suffer if the proceedings were allowed to continue, in highlighting the plaintiff's failure to identify anyone who furnished the advice which the plaintiff now claims was negligent etc., or any documentation relevant to its claim. That means that oral testimony will be necessary but the defendants say they will be prejudiced in adducing evidence after the passage of so many years since they were engaged by the plaintiff. The defendants rely on the decision of Noonan J. in *McGuinness v. Wilkie* where the court found that witnesses could not have the benefit of written statements of their recollections made at an early juncture because the defendant had no idea what case was being made against it before it received the statement of claim some seven to eight years after the relevant event. The defendants also rely on the decision of Heslin J. in *Boyle* on the real risk that witness memories will be impaired or less reliable than would have been the case had the proceedings been properly progressed.

The plaintiff's submissions

8. The plaintiff disputes that the delay in delivering the statement of claim was inordinate, but if it was, the plaintiff seeks to excuse it by relying on the difficulties it claims it encountered firstly with its former solicitors and secondly in securing an expert witness.

The plaintiff accepts that at least some oral evidence will be required to prove what it claims were oral representations made and advices given to it by the defendants, but seeks to rely on the fact that the defendants have not claimed that any of its potential witnesses have died, nor have they identified witnesses or documents that are not available to them. However, the plaintiff also fairly accepts that it has not identified any individuals or documents supporting its allegations in the statement of claim. It says this was because counsel had to draft the statement of claim with limited information as their solicitors' file is still being held by the plaintiff's second firm of solicitors.

9. The plaintiff relies on the decision of Ferriter J. in *Traynor v. Netech Renewables Ltd* [2022] IEHC 36 where there had been delay but as the court expected the trial would revolve around expert evidence, it held that the defendants were not any worse off than they would have been if the proceedings had been instituted at some earlier point.

What was happening during the period of delay?

10. The delay in this case occurred from 2012, when the proceedings were issued, to July 2020 when this motion was filed. It is necessary for the court to consider the events that took place during this time and, to some extent, the events that took place thereafter including the filing of a statement of claim in April 2021 some nine months after this motion was issued.
11. The proceedings were issued in June 2006 by the plaintiff's previous solicitors without any initiating correspondence. The plaintiff had previously instructed different solicitors in relation to their case but for ease of reference I will refer to the solicitors who issued the proceedings as the plaintiff's 'previous solicitors'. The plaintiff has set out in its affidavit a long history of their attempts to get their previous solicitors to engage an expert witness and to deliver a statement of claim. The plaintiff contends there was concealment by their previous solicitors in relation to the delays in progressing the litigation. The emails and correspondence exhibited by the plaintiff, which I consider in more detail below, show ongoing correspondence between the plaintiff and its previous solicitors in which the plaintiff repeatedly expressed their concerns about the slow pace of progress and highlight the plaintiff's concern that delaying in filing a statement of claim would pose a risk for the litigation. There is nothing in the correspondence to suggest concealment. The plaintiff's previous solicitors never suggested that a statement of claim had been filed or that an expert witness had prepared a report (as versus having been identified or spoken to). The solicitors repeatedly set out their intention to attend to both tasks and provided some explanation as to why this has not happened.
12. The plaintiff contends that any delay in progressing the proceedings is excused by the evidence they have put before the court of their attempts to ensure that a statement of claim was filed in time.
13. The defendants do not particularly challenge the plaintiff's case that some of the delay was caused by their previous solicitors but they do challenge the plaintiff's contention that the plaintiff bears no responsibility for any of that delay. The defendants identify 2 November 2018 as the date on which the plaintiff knew or ought to have known that its

previous solicitors were no longer advising them, albeit those solicitors remained on record until they came off record by way of an order of this Court in March 2020.

14. The correspondence on which the plaintiff relies begins in October 2013 when the plaintiffs were advised by their previous solicitors that there was a lot of work to be done to apply to the courts to run these matters by way of a test case, and that they were instructing their experts to prepare initial views and were consulting with counsel. In July 2014 their previous solicitor was leaving to set up a new practice and the plaintiff agreed to the transfer of their file to the new practice. The next letter is dated 15 April 2015 which the plaintiff's previous solicitors advises the plaintiff that they are finalising the statement of claim and confirming their intention to apply to the court to run one test case. In June 2015 the solicitor who was looking after the plaintiff moved to a different practice and a new solicitor was assigned to review the file. By email dated 4 July 2015 Mr. Ryan on behalf of the plaintiff expressed concern about the slow pace and demanded "a more proactive approach" and stated that the plaintiff was not prepared or happy "to continue as is" with their solicitor. By email dated 18 May 2015 the solicitor advised Mr. Ryan that the statement of claim had been drafted and would be finalised in the coming weeks. By email dated 13 May 2016 the solicitor referred to difficulties in securing an expert witness and finalising the statement of claim.
15. On 24 August 2016 the solicitor wrote to a Mr. Paul Jackman describing the litigation as a complex commercial matter covering a broad spectrum of issues. He confirmed that they had canvassed a number of various experts who for one reason or another had dropped out of the case and advised that he had a meeting with another expert scheduled for 22 September. By email dated 11 October 2016 the solicitor advised the plaintiff that they had met with a Mr. Coburn and had briefed him for a preliminary report. By email dated 16 February 2017 the solicitor advised the plaintiff that once they got Mr. Coburn's report that they would have a better idea on the statements of claim. By email dated 19 April 2017 the solicitor advised the plaintiff that he hoped to send them the brief prepared for the expert and to come back to them on further details for the statement of claim. On 5 May 2017 the solicitor emailed the plaintiff saying he would have a report sufficient to allow completion of the statement of claim. In an email of 22 June 2017 he advised that the preparation of the expert report and review of the documents was ongoing but time consuming. By email of 21 July 2017 he advised the plaintiff that they needed an expert report to deliver the statement of claim, that the last expert he tried to retain was not the person to do the report but that he had sourced another expert called Kieran Walsh. On 4 August 2017 the solicitor emailed to say he had draft statements of claim but needed an expert report before they could be delivered. He referred again to Kieran Walsh as a potential expert witness. By email dated 20 September he advised Mr. Ryan that he was still working with the expert in relation to the claim. Mr. Ryan replied on the same day referring to a High Court decision of Baker J. in which the normal statute of limitation period of six years had been disapplied and asking whether that applied to just that case or all future cases. On 24 November the solicitor emailed Mr. Ryan again saying he had not yet been able to speak to Kieran Walsh the expert but that he had done further work

on the statement of claim. On 8 December 2017 he emailed Mr. Ryan again saying he needed to liaise with Mr. Walsh and it would be likely be the following week.

16. On 2 February 2018 he emailed Mr. Ryan stating his intention to arrange a conference call for a substantive review of the "impediments" to moving the litigation. On 27 March 2018 Mr. Ryan emailed the plaintiff's solicitor. This was just one of many emails that Mr. Ryan had sent to the plaintiff's solicitors throughout this time expressing concern at the lack of progress and the delays in the litigation. In his email at 27 March he stated the plaintiff absolutely need matters now urgently progressed and requested an assurance that the plaintiff's solicitors would support them in pursuing that in every way possible. He stated "realising the SOC's are vitally important documents, we cannot afford further delays and need to see action". Mr. Ryan emailed him again on 13 April 2018 referring to his real worry that the defendants could move to strike out the proceedings.
17. On 13 April 2018 the solicitor emailed Mr. Ryan confirming they had met another financial advisor that week and that they hoped to get either Kieran Walsh or a Paul McCarville to a consultation with counsel to determine exactly what was needed to complete statements of claim. He emailed again on 23 May confirming that Mr. McCarville would meet them but was not prepared to read into the case without discussing fees and being paid a retainer. On 5 July 2018 he emailed Mr. Ryan to say that he had emailed and called Kieran Walsh that day, and was getting the brief documents out and ready to go. On 23 October 2018 he emailed Mr. Ryan setting out Mr. Walsh's fees. Mr. Ryan emailed again on 6 November 2018 expressing the plaintiff's concern regarding the ongoing delays and requesting that the expert be briefed within ten days.
18. On 20 November 2018 the plaintiff emailed its solicitors expressing concern and stating their belief that they must make a decision regarding their best interest presently. The email asked for a response within 48 hours including confirmation that Kieran Walsh had been engaged as an expert witness and that otherwise they would be left with no option but to engage an alternative firm of solicitors to act.
19. On 23 November 2018 the plaintiff's previous solicitors received correspondence from a new firm of solicitors (referred to hereinafter as the plaintiff's second solicitors) in which they advised they had been instructed in connection with the within proceedings and enclosed a copy letter of authority signed by Mr. Ryan authorising that firm to take up the plaintiff's file in the matter. The authority confirmed the plaintiff's instruction to their previous solicitors to release their file to the new firm on the basis that their previous solicitors had failed to act as per their instructions. Thereafter the plaintiff's previous solicitors did not correspond any further with the plaintiff but remained on record. When the plaintiff's previous solicitors received correspondence from the defendants' solicitors indicating their intention to bring the within motion to dismiss, the plaintiff's previous solicitors furnished that letter to the plaintiff's second solicitors and asked the second solicitors to inform the defendants' solicitors that they had taken over the handling of the matter and to arrange to file a Notice of Change of Solicitor.

20. The next letter exhibited by the plaintiff, dated 21 October 2019, was sent by the plaintiff's third solicitors (who were also the solicitors who entered an appearance in these proceedings on 28 January 2021) to the plaintiff's previous solicitors. This letter referred to a letter of 15 October 2019 from the plaintiff's previous solicitors, but that letter is not exhibited in this application. The plaintiff's third solicitor's letter of 21 October 2019 stated that the plaintiff's previous solicitors remained the solicitors on record and that the plaintiff's second solicitors were retained to provide advices in relation to the proceedings which, the third solicitors claimed, was the second firm's sole involvement in the matter. They claim that the plaintiff's third solicitors furnished their second solicitors with copies of their mutual client's file for that purpose. The letter advises the plaintiff's previous solicitors that the plaintiff considered that office (the plaintiff's previous solicitors) to be their solicitors in the case.
21. Mr. Ryan has sworn an affidavit on behalf of the plaintiff in which he set out the plaintiff's stated understanding of its relationship with those three firms of solicitors at that time. Mr. Ryan states that the plaintiff's previous solicitors consulted with the second and third firm of solicitors in order to seek advice on how best to progress the proceedings and specifically how they might compel their previous solicitors to complete the promised work. He states that the plaintiff did not want to engage a new firm of solicitors again given the delays in the transfer of files previously. He states that the second firm of solicitors had written to the first firm on behalf of the plaintiff in order to request information and claims that the letter from the second firm of solicitors dated 23 November 2018 makes no mention of the transfer of the file or to the second firm of solicitors coming on record for the plaintiff.
22. Mr. Ryan goes on in the affidavit to criticise the plaintiff's previous solicitors for not having sought instructions from the plaintiff in relation to their letter of 26 July 2019 to the plaintiff's second solicitors asking them to arrange to file a notice of change of solicitor. Mr. Ryan states in his affidavit that he believes the plaintiff's previous solicitors should have sought instructions when it became apparent to them that the plaintiff's second solicitors were not entering a notice of change of solicitors as per the request of the plaintiff's previous solicitors.
23. It has been difficult for the court to marry the contents of the correspondence with what Mr. Ryan has stated on affidavit. The letter from the plaintiff's second solicitors of 23 November 2018 addressed to its previous solicitors includes an authority signed by Mr. Ryan clearly instructing the plaintiff's previous solicitors to release their file to their second solicitor. It is incorrect for Mr. Ryan to contend that that letter makes no mention of the transfer of these files. It is difficult to understand Mr. Ryan's expectation that the plaintiff's previous solicitors should have sought instructions from the plaintiff when Mr. Ryan claims it became apparent that the plaintiff's second solicitors were not entering a notice of change of solicitors as per the request made by their previous solicitors.
24. The letter from the plaintiff's previous solicitors to the plaintiff's second solicitors of 26 July 2019, advising them that the defendants' solicitors had written indicating their

intention to issue a motion to dismiss the proceedings for failure to file a statement of claim and asking them to arrange to file a Notice of Change of Solicitor, was not replied to. The plaintiff's silence at this time in communicating with their previous solicitors at least until the plaintiff's third solicitors wrote to the previous solicitors by letter dated 21 October 2019, contrasts sharply with the proactive way in which the plaintiff had engaged with its previous solicitors in the past.

25. Whatever understanding the plaintiff had about its relationship with their previous solicitors must have been clarified when those solicitors issued a motion on 22 November 2019 to come off record. Shortly thereafter the directors of the plaintiff wrote to the defendants' solicitors by letter dated 28 December 2019 acknowledging the defendants' solicitors' correspondence in relation to delivering a statement of claim and confirming that the plaintiff had engaged "a case co-ordinator" and were in the process of engaging an expert witness. The case co-ordinator was identified as a Bob Quinn, principle of The Money Advisors. The letter demonstrates that the plaintiff was aware at that time that their previous solicitors, who were officially still on record for them in the proceedings, were no longer advising them and that the plaintiff had, instead, instructed Mr. Quinn of The Money Advisors. It is also clear that at this point in time the plaintiff was aware of the defendants' solicitors' intention to issue the within motion. The letter refers to the plaintiff delivering their statement of claim in the coming weeks, and asks the defendants' solicitors to delay filing the motion for a period of sixteen weeks to give them sufficient time to deliver the statement of claim. Whilst there is no correspondence exhibited from the defendants' solicitors agreeing to delay their motion for the sixteen weeks that the plaintiff had sought, they did not file their motion until 13 July 2020, which allowed the plaintiff considerably more than the sixteen weeks they had sought to file their statement of claim. The statement of claim was not delivered during that sixteen-week period.
26. Mr. Ryan's affidavit refers to ongoing difficulties in securing an expert report which he says were exacerbated by the Covid-19 pandemic. Mr. Ryan stated that the plaintiff managed to secure an expert report on 13 December 2020. This was in spite of the fact that the plaintiff's third solicitors, being the same firm that are currently on record for the plaintiff, confirmed in their letter of 30 September 2019 to the plaintiff's previous solicitor, their view that the plaintiff's previous solicitors failure to discharge the plaintiff's instruction to deliver a statement of claim arose on account of their seeming inability to instruct a suitably qualified expert to prepare the necessary report to ground the preparation of a statement of claim. The plaintiff's third solicitors stated that the plaintiff was astounded at that position and that "with some modest assistance from this office they have been able to instruct (without any real difficulty) an 'Expert' in such matters who has agreed to review all of their papers and to prepare, if appropriate, the necessary Report. That this task could not have been completed by your office simply amazes our company and the Ryan family."
27. It would appear that, in spite of the ease with which the plaintiff's third solicitors had been able to instruct an expert, that expert did not furnish their report till 13 December 2020. Mr. Ryan claims that some difficulties in that regard were caused by the Covid-19

pandemic. He does not clarify how or in what respect the pandemic delayed securing an expert report from an expert who was apparently instructed by the plaintiff's third solicitors as far back as September 2019.

Who was responsible for the delays between 2006 and 2020?

28. The plaintiff contends that their delay in filing the statement of claim is due to their previous solicitors. Whether that renders the delay excusable will be considered further below but for the moment I wish to assess whether the evidence supports the defendants' case that from in around November 2018, the plaintiff was or ought to have been aware that their former solicitors were no longer acting for them and that the delay from then to when the defendants issued their motion in July 2020 was the plaintiff's responsibility.
29. The correspondence up to November 2018 shows the plaintiff advising their previous solicitors of their deep concern about the delays in progressing the litigation, in particular in filing a statement of claim. It also demonstrates the plaintiff's understanding of the potential significance of the delays and it's awareness of the defendants' intention to issue the motion to dismiss that the defendants eventually issued in July 2020. I do not consider any of the delay during this time can be blamed on the plaintiff's conduct. Whether the plaintiff is responsible for their then solicitor's delays will be considered further below.
30. By November 2018 the plaintiff was considering instructing different solicitors. They warned their then solicitors of this in the email of 20 November 2018 referred to above. They followed this up by instructing their second firm of solicitors to write to their previous solicitors and authorised the second firm to take up their file. The letter from the plaintiff's second solicitors of 23 November 2018 confirmed those instructions and the authorities furnished by the second solicitors to the plaintiff's previous solicitors. Nevertheless Mr. Ryan claims on affidavit that the letter makes no mention of a transfer of the file or of the plaintiff's second solicitors coming on record for the plaintiff. Mr. Ryan contended that the plaintiff's directors, of which he is one, are not what he refers to as "sophisticated corporate types". However, his own correspondence with the plaintiff's previous solicitors shows a good understanding of litigation and the need to ensure that litigation is properly expedited. Even if Mr. Ryan and his co-directors are not "sophisticated corporate types" I cannot accept that Mr. Ryan believed he was simply consulting with the plaintiff's second solicitors and ultimately with the plaintiff's third solicitors in order to seek advice on how the plaintiff might compel their first solicitors to complete the promised works and progress the litigation.
31. If there was any misunderstanding about the plaintiff's previous solicitors continuing to act for them, that must have been clarified in January 2020 when the plaintiff's previous solicitors applied to come off record. In fact, the plaintiff had already moved in December to instruct a case coordinator and to correspond with the defendants' solicitors directly, both steps confirming what seems to have been the plaintiff's understanding that their previous solicitors were no longer acting for them.

32. By this time the plaintiff had also dealt with the issue of an expert witness as confirmed by their third solicitor's letter of September 2019 referred to above. Whether delays in instructing an expert witness can excuse an inordinate delay is considered further below but for the moment I simply observe that the plaintiff had, with the assistance of their third solicitors, apparently procured an expert witness in September 2019.
33. In spite of these matters being attended to, the statement of claim was not filed and the defendants were compelled to issue the within motion to dismiss the proceedings for failure to file a statement of claim in July 2020. I note that it was not until 28 January 2021 that the plaintiff's third and current solicitors came on record and it was not until 25 March 2021 that the plaintiff's replying affidavit to the defendants' motion to dismiss was filed. The plaintiff did not, even at this stage, seem to appreciate the need to deal with the litigation expeditiously.
34. I find that the delay prior to November 2018 was due to the plaintiff's previous solicitors and from November 2018 until July 2020 was due to the plaintiff.

Was the delay inordinate?

35. Over eight years passed from 2012 when the proceedings were issued to when the notice of motion was filed in July 2020. The defendants referred me to a number of decisions in which lesser periods of delay were found to be inordinate. This is not a case of varying periods of delay for example one period between issuing proceedings and filing the statement of claim and another between an agreement to make voluntary discovery and actually making it. This is a single period of delay during a fundamental time in litigation, i.e. moving from setting out a general account of the claim in a plenary summons and the relief being sought to setting out the claim, the grounds for it, and the relief sought in far more detail in a statement of claim, so that a defendant can understand the basis of the relief that the plenary summons seeks. I am satisfied that a delay of eight years between the issuing of the plenary summons and filing a statement of claim is inordinate.

Is the delay excusable?

36. Given the fact that the proceedings were issued very close to the statutory six-year limitation period, I accept that there was a greater obligation to progress the proceedings without delay. Noonan J. in *McGuinness v. Wilkie* [2020] IECA 111 stated:

"There is more than ample authority for the proposition that where proceedings are commenced very late in the day, as here, there is an onus on the plaintiff to prosecute them expeditiously ..."

37. I also accept the court's obligation to ensure that there will not be an excessive indulgence of delay, as per Clarke J. (as he was then) in *Comcast International Holdings Incorporated & Ors v. Minister for Public Enterprise & Ors* [2012] IESC 50.
38. The plaintiff's primary excuse is that the delay was caused by their previous solicitors. I have found that the delay from November 2018 to July 2020, of one year and eight months, was due to the plaintiff. I do not have to determine whether the two periods of delay are to be assessed differently by reference to who was responsible as I am satisfied

that any delay caused by the plaintiff's former solicitors is imputed to the plaintiff as per McMenamin J. in *McBrearty v. North Western Health Board* [2007] IEHC 431 where he stated:

"Even (as here) in the circumstances of an absence of culpability on the part of the plaintiff, culpability may nonetheless be imputed to the plaintiff by virtue of delay on the part of his solicitors in the determination as to whether or not the delay was inexcusable".

This approach is fortified by the decision of Irvine J. in *Padden v. Ireland*, an *ex temporare* decision in the Court of Appeal on 31 January 2018 identified by the Supreme Court (*Padden v. Ireland* [2019] IESCDET 102 in its decision refusing the plaintiff leave to appeal the Court of Appeal's decision). Irvine J. concluded that there was "*no evidence before the High Court judge which was sufficient to justify his decision that the delay could be excused.*" The Court of Appeal overturned the decision of Barret J. [2016] IEHC 700 in which he found that the delay which had been admitted by the plaintiff's lawyers could not be laid at a client's door.

39. The plaintiff also seeks to excuse the delay as caused by its difficulties in locating an expert witness. The plaintiff's third solicitors in their letter of 30 September 2019 confirms the plaintiff's success in instructing an expert witness who had been asked to review the papers and prepare, if appropriate, a report. I note from the plaintiff's replying affidavit that it had made its own enquiries to find an expert report after the plaintiff's previous solicitors were given liberty to come off record on 10 May 2020. This seems to be inconsistent with the letter from the plaintiff's third solicitors confirming that they had located such an expert as far back as September 2019.
40. Mr. Ryan confirms in his affidavit that the plaintiff managed to secure an expert report on 13 September 2020. It was another month before the statement of claim was eventually filed in April 2021, some time after the motion to dismiss proceedings for failure to file a statement of claim had been filed.
41. I do not accept that an opinion and/or report of an expert witness was required to draft the statement of claim, such as could excuse the delay in filing the statement of claim caused by the apparent difficulties in locating such an expert. I can appreciate that an expert report may have been helpful in scoping out the claim being made but the claim made is a relatively straightforward one of negligence, misrepresentation, negligence, misstatement and breach of duty in how the plaintiff was sold a particular investment product. It is not a claim of professional negligence akin to one brought against the professional person such as would require an expert report before counsel could put their name to proceedings.
42. For completeness I should also confirm that I would not consider that any delay caused by the plaintiff's former solicitors in considering the possibility of running a test case, could excuse inordinate delay in filing a statement of claim. Irish law does not recognise such a process other than by agreement between the parties or acquiescence of one of

the parties. There was no evidence put before the court as to the engagement between the plaintiff's former solicitors and the defendants' solicitors on this point. The only evidence was the correspondence from the plaintiff's former solicitors referring to their apparent efforts to secure agreement from the defendants' solicitors as to how the case should be run and their apparent intention to apply to the court to run one case as a test case, proposals which were confirmed by the plaintiff's former solicitors to have been rejected by the defendants' solicitors in an email of 18 August 2015, which was well before the defendants indicated their intention to pursue a motion to dismiss for failure to file a statement of claim.

43. In all of these circumstances I do not find the inordinate delay in this case from 2012, when the proceedings were issued, to July 2020 when the motion to dismiss was filed, is excused by the circumstances identified by the plaintiff.

The balance of justice test

44. If the court finds the delay to have been inordinate and inexcusable it should then consider whether the balance of justice favours dismissing the proceedings. The defendants describe the balance of justice test as requiring the plaintiff to point to "some countervailing circumstances as may be considered sufficient to cancel out the effect of such behaviour ..." (as per Irvine J. in *Millerick*). The defendants contend that it does not have to establish that the delay has given rise to specific prejudice and relies on the dicta of Allen J. in *CF Structures* where he stated that the "defendant has not established that the delay has given rise to specific prejudice" and noted that "it is not obliged to do so".
45. I do not accept that the burden is as contended for by the defendants. In *CF Structures* Allen J. stated:

"The defendant having established that the plaintiff has been guilty of inordinate and inexcusable delay, the onus shifts to the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim to proceed. That onus is a weighty obligation".

In that case the plaintiff had not filed a replying affidavit, so there was nothing on which the plaintiff could rely in discharging its onus to demonstrate how the balance of justice was in favour of allowing the action to proceed. It was in that context that Allen J. confirmed that there was no obligation on the defendant to establish specific prejudice on the delay.

46. In assessing the balance of justice, I have had regard to the factors the plaintiff says I must consider; the availability of evidence and the fact that the plaintiff was now, according to the plaintiff, in a position to progress the claim, having accumulated the relevant material with the assistance of their expert and the provision of an expert report. The plaintiff contends in its written submissions that the case can be assessed solely on that report and on documentary evidence. However, in their oral submissions counsel for the plaintiff quite properly conceded that much of what is claimed in the statement of claim relates to representations and advices furnished by the defendants to the plaintiffs

verbally rather than by way of documentation. It was also confirmed that the statement of claim is lacking in detail in not identifying any person who furnished the alleged advice or any document on which the plaintiff relied, which was explained by the plaintiff as being due to the file remaining with the plaintiff's second solicitors who never entered an appearance and who are no longer advising the plaintiff. That questions the plaintiff's stated position that it is now ready to progress the litigation. Therefore, this case is different to the circumstances that arose in *Treanor v. Newtech Renewables Ltd* [2022] IEHC 36 where Ferriter J. found that the motion had been issued "at a time when the proceedings were virtually ready for hearing and can now proceed to be certified and get as early a trial date as can be accommodated."

47. Apart from that, I am satisfied that this is a case that is likely to require oral evidence (albeit the defendants are not yet able to identify who their witnesses might be given the lack of detail in the statement of claim on which particulars will need to be raised). I consider the circumstances here to be similar to those that are raised in *McGuinness v. Wilkie* [2020] IECA 111 where Noonan J. described it as not a case:

"where witnesses could even be said to have the benefit of written statements of their recollections made at an early juncture because the defendant had no idea of what case was being made against it before it received the statement of claim in March 2013, already seven to eight years after the relevant events."

48. In the statement of claim that was delivered to the defendants in April, 2021, the last date identified is 2006. If this matter was to go to trial it would mean that evidence would be being given approximately sixteen years, or possibly more, after the events are alleged to have taken place. The evidence that may be required in this case is likely to revolve around a witness's recollection of ordinary events encountered in their working life of selling investment products rather than a more unusual incident that might stick in a person's memory such as an accident or witnessing a sexual assault. Therefore, any risk of delay impairing the witness's recollection of what may be quite mundane matters, is heightened.

49. In *Allied Irish Banks v. Boyle* [2020] IEHC 377 Heslin J. accepted the defendants' concerns about what witnesses would remember of events going back to 2008 and said he was satisfied that the court is entitled to conclude that:

"there is a real risk that witness memories will be impaired or less reliable than would have been the case had the proceedings been progressed with the requisite expedition. I am fortified in that view by the authorities I have referred to, in particular, by the 2005 decision of Ms. Justice Finlay Geoghegan in Manning, wherein the court observed that: 'Delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or act as a witness'".

50. The court must also consider the possible availability of an alternative remedy. The plaintiff relied on Irvine J.'s dicta in *Millerick* at p.11 where she stated:

"It is to be noted that the fact that a plaintiff may have a potential alternative method of recovery available to them, should their proceedings be dismissed, is something that may be factored into the Court's consideration as to where the balance of justice lies".

The plaintiff contends that no alternative method of recovery is available to them here. I do not agree with the plaintiff's assessment that this means an alternative method of recovery arising from the same claim i.e. the negligence etc of the person who sold the plaintiff the investment product. The plaintiff has already threatened and explored proceedings against some of its former advisors. I consider that is the nature of the alternative remedy floated by Irvine J. I make no comment on whether the plaintiff has such a remedy available to it but insofar as it is something that may be factored into the court's consideration in relation to that injustice, I do not find the plaintiff's submission in this regard to be convincing in persuading me to allow these proceedings to continue.

Conclusion

51. I find the delay in this case from 2012, when proceedings were issued, to July 2020 when this motion was issued to have been inordinate. I find that some of that delay, in particular from in around November 2018, was caused by the plaintiff. I do not find the delay excusable either by the conduct of the plaintiff's previous solicitors, the challenges they encountered in securing an expert witness report or their initial strategy of seeking to run a test case.
52. In considering the balance of justice I do not consider the plaintiff has established countervailing circumstances to persuade me that these proceedings should not be dismissed albeit I accept the consequences of a dismissal will be to deny the plaintiff the opportunity to make their case against the defendants. I find that the defendants have established specific prejudice such as to outweigh the prejudice suffered by the plaintiff, in that the case is likely to require oral evidence and the proceedings are still well away from being ready to be set down for trial.
53. I therefore allow the defendants' application to dismiss the proceedings on grounds of delay.

Indicative view on costs

54. My indicative view on costs is that the defendants, having succeeded, are entitled to their costs both of the motion and the proceedings. If either party wishes to make submissions on costs or the form of final order to be made, I will list the matter for hearing in front of me at 10 am on 18 May.