APPROVED **[2023] IEHC 453**

THE HIGH COURT

2012 No. 2298 S

BETWEEN

NAHJ COMPANY FOR SERVICES

PLAINTIFF

AND

ROYAL COLLEGE OF SURGEONS IN IRELAND

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 31 July 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to dismiss the within proceedings on the grounds of inordinate and inexcusable delay. The proceedings arise out of an "*arrangement*" entered into between the plaintiff and the defendant in respect of the recruitment of students from Saudi Arabia to the defendant's medical commencement programme. The neutral term "*arrangement*" is used deliberately in this judgment in circumstances where the precise nature of the relationship between the parties is very much in dispute, with the plaintiff contending that the arrangement was in the form of a

partnership, and the defendant contending that the arrangement was, in essence, an exclusive agency agreement.

2. It appears from the pleadings that the "*arrangement*" between the parties had arisen against a factual background whereby the Ministry of Higher Education in Saudi Arabia provided state-funded scholarships to students to participate in medical courses. The plaintiff's case is that it is entitled to a payment of €5,000 commission in respect of each Saudi Arabian student registered on the defendant's medical commencement programme. This commission is said to have been payable for all students registered during the period between January/February 2010 and November 2014. It is pleaded that the commission was included as part of the overall fee fixed for the programme by the defendant.

3. The defendant pleads that the arrangement between the parties has been brought to an end by the doctrine of frustration. More specifically, it is pleaded that the Ministry of Higher Education had issued a directive in June 2010 to the effect that all students were now to be recruited through the cultural section of the Saudi Arabian Embassy in London. The defendant, and its agent, the plaintiff, were to cease recruiting students in Saudi Arabia, and the fees to be charged to the Ministry of Higher Education by the defendant were to be *reduced* by an amount equal to the commission which had until that date been paid to the plaintiff by the defendant. It is further pleaded that the implementation of this directive rendered the previous arrangement between the plaintiff and defendant impossible to perform, i.e. the agreement has been frustrated.

4. One of the issues in dispute between the parties concerns the level of fees which were to be charged in respect of each student. Specifically, there is a dispute as to whether the fee of €16,000 fixed in or about September 2008 was inclusive or

exclusive of the commission in the sum of €5,000. It is pleaded in the statement of claim that the Saudi Arabian officials were advised *in error* that the fee for each participating student was €21,000 instead of €16,000. This alleged mistake then gives rise to a series of allegations of wrongdoing against the defendant. It is pleaded, in effect, that the defendant instructed the plaintiff not to inform the Ministry of Higher Education of an earlier error in the figure advised for fees, which had resulted in the commission being added twice to the fees charged in respect of each participating student. More specifically, it is pleaded that the Saudi officials were erroneously advised that the fee was €21,000 instead of €16,000 and that when the plaintiff sought to correct this error, it was told not to do so by officials of the defendant. It is further pleaded that the defendant subsequently sought to "*disguise*" this error. The gravamen of the allegation appears to be that the defendant continued to include a figure for commission in the fees charged, notwithstanding the directive issued by the Ministry of Higher Education in June 2010, and wrongfully retained same for its own benefit.

5. It should be emphasised that these allegations are merely that, allegations, and that same are strenuously denied by the defendant. However, the very fact of the allegations having been made and maintained for a period of some eleven years is relevant to the balance of justice. As discussed at paragraphs 40 to 46 below, the plaintiff had hoped to use the threat of these unproven allegations being publicised as "*leverage*" in mediating a settlement of the proceedings.

6. The final introductory matter to note is that the plaintiff had been put on express notice in November 2020 that the delay to date in the prosecution of these proceedings was a cause of concern to this court. Notwithstanding this, the plaintiff failed to progress the proceedings. No positive procedural step has been

taken by the plaintiff since April 2021. I will return to this point at paragraph 50 below.

CHRONOLOGY

19 June 2012	Summary summons
24 June 2013	High Court orders security for costs
31 July 2014	Master fixes amount of security for costs (30 days) (Order made on consent)
17 October 2014	Motion filed to dismiss for failure to provide security
9 March 2015	Security for costs lodged
19 October 2015	Motion to enter summary judgment filed
10 November 2015	Proceedings remitted to plenary hearing
29 January 2016	Statement of claim
24 February 2016	Notice for particulars raised by defendant
16 March 2016	Replies to notice for particulars
3 June 2016	Defence
21 November 2016	Discovery order against plaintiff
22 September 2017	Notice of change of solicitor (defendant)
5 February 2018	Court of Appeal varies discovery on consent
6 April 2018	Reply to defence
12 October 2018	Notice for particulars raised by defendant
10 January 2019	Replies to particulars by plaintiff
8 February 2019	Notice to admit facts served by defendant
8 October 2019	Interrogatories delivered by defendant
31 July 2019	Discovery order against defendant

12 November 2020	Judgment re: interrogatories
21 December 2020	Order directing answers to interrogatories
20 April 2021	Answers to interrogatories delivered
31 March 2023	Motion to dismiss for delay filed
4 May 2023	Motion to come off record filed (plaintiff)
22 May 2023	Plaintiff's solicitor permitted to come off record
17 July 2023	Hearing of motion to dismiss for delay

LEGAL PRINCIPLES GOVERNING APPLICATION TO DISMISS

7. The principles governing an application to dismiss proceedings on the basis of inordinate and inexcusable delay are well established. The leading judgment remains that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("***Primor***"). The Supreme Court summarised the position thus (at pages 475/76 of the reported judgment):

> "The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:–
>
> (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

8. As appears, a court must consider three issues in sequence: (1) has there been inordinate delay; (2) has the delay been inexcusable; and (3) if the answer to the first two questions is in the affirmative, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed.

9. As emphasised by the Court of Appeal in *Sweeney v. Keating* [2019] IECA 43 (*per* Baker J., at paragraph 26), a *laissez faire* attitude to the progress of litigation cannot be tolerated:

> "Material also to an application to dismiss proceedings for inordinate and inexcusable delay is the fact that the court itself is obliged, in furtherance of its constitutional obligations to administer justice and its obligation to have regard to the European Convention on Human Rights ('ECHR'), to ensure that litigation is concluded in an expeditious manner (see, for example the decision in *Quinn v. Faulkner* [2011] IEHC 103). A *laissez faire* attitude to the progress of litigation by the plaintiff cannot be tolerated given that delay may constitute a violation of Art. 6 ECHR rights."

10. The importance of the constitutional imperative to bring to an end the culture of delays in litigation, so as to ensure the effective administration of justice and the application of procedures which are fair and just, has recently been reiterated by the Court of Appeal in *Gibbons v. N6 (Construction) Ltd* [2022] IECA 112 (at paragraph 93). At the conclusion of his survey of the relevant authorities, Barniville J. approved of the trial judge's observation that while the fundamental principles to be applied have not changed since *Primor*, the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition.

11. The principles governing an application to dismiss on the grounds of delay have been considered most recently by the Court of Appeal in *Cave Projects Ltd v. Kelly* [2022] IECA 245. Collins J. reiterated that an order dismissing proceedings should only be made in circumstances where there has been significant delay, and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. The

nature of the assessment to be carried out is described as follows (at paragraph 36):

> "The court's assessment of the balance of justice does not involve a free-floating inquiry divorced from the delay that has been established. The nature and extent of the delay is a critical consideration in the balance of justice. Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between *that* delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. A defendant cannot rely on matters which do not result from the plaintiff's delay."

12. The need for expedition in litigation is addressed as follows (at paragraph 37):

> "It is entirely appropriate that the culture of '*endless indulgence*' of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the *Primor* test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant."

13. These, then, are the principles to be applied in assessing the application to dismiss these proceedings.

(1). INORDINATE DELAY

14. There are four periods of culpable delay as follows. The first period of delay relates to the provision of security for costs. The plaintiff failed to comply with

the order of the Master of the High Court of 31 July 2014 directing that security in the sum of €51,865.81 be lodged within 30 days. The security was not, in fact, lodged until 9 March 2015, that is, some six months after it should have been. The lodgement was only made after the defendant had issued a motion seeking to dismiss the proceedings for failure to provide security. The period taken to comply with the order is more than six times that allowed under its terms.

15. The second period relates to the delay in the bringing of an application seeking liberty to enter judgment. The plaintiff chose to institute the proceedings by way of summary summons. This is intended as an expedited procedure, and once the issue in respect of security for costs had been resolved, the plaintiff should have brought on a motion seeking liberty to enter judgment. This was not done for a period of some seven months.

16. The third period relates to the delay in answering the interrogatories. The High Court, by order dated 21 December 2020, had directed that an affidavit in answer was to be delivered by 22 January 2021. In the event, the affidavit was not delivered to the defendant until 20 April 2021, that is, some three months after it should have been.

17. The fourth period of delay runs from the date of the (belated) delivery of the answers to interrogatories on 20 April 2021 to the date of the issuance of the defendant's motion to dismiss on 31 March 2023. No progress had been made in the proceedings in the intervening two years. The action had not been set down for trial, notwithstanding that the pleadings were closed and discovery completed.

18. In summary, as of the date the defendant issued the motion to dismiss, the plaintiff had been guilty of cumulative delay of some 40 months. In two instances, the delay was in breach of a court order. The cumulative delay is inordinate in the context of commercial proceedings.

(2). INEXCUSABLE DELAY

19. It is necessary next to consider whether the delay is inexcusable. An affidavit has been sworn on behalf of the director and chief executive officer of the plaintiff ("***the chief executive***") setting out his explanation for each of the periods of delay.

20. The reason offered for the delay in the provision of security for costs is that the plaintiff company "*did not readily have access to this amount of money*". With respect, this is not a valid excuse for the delay in complying with the time-limit stipulated in the order. The plaintiff had been aware for more than twelve months that it would be required to provide security: the High Court order directing security is dated 24 June 2013. The amount of security ultimately agreed upon was actually less than that initially sought by the defendant. The fact that the defendant itself had delayed in bringing on its motion fixing the amount of security does not absolve the plaintiff of its subsequent delay in providing the security within the time period stipulated. If anything, it meant that the plaintiff had more time to make the necessary financial arrangements to provide the security.

21. Turning next to the delay in bringing a motion for liberty to enter judgment, a variety of excuses are offered. These include that the chief executive of the plaintiff sought to engage directly with the defendant in an attempt to resolve

matters; that time had been spent in giving instructions to, and receiving advice from, the plaintiff company's former solicitors; and that the chief executive was "*completely unfamiliar with the Irish legal system and with legal terminology in the English language*". With respect, none of this amounts to a valid excuse for this period of delay. The fact of the matter is that the plaintiff had chosen to invoke the summary summons procedure. It behoves a litigant who employs what is intended as a fast-track procedure to move with expedition. The preparation of the necessary paperwork for a motion for liberty to enter judgment is not complicated. Indeed, the summary summons procedure is only properly available in cases where there is no credible defence to the proceedings. It should not have taken seven months to prepare and file the paperwork.

22. The principal reason offered for the next period of delay, namely the delay in answering the interrogatories, is that same were "*extensive and involved and required careful consideration*". This is not a valid excuse for the delay. The interrogatories were, in truth, narrowly drawn, and the answers ultimately provided on behalf of the plaintiff were perfunctory: in many instances, the response was simply to say that the particular question was not a proper matter for interrogatories. It cannot have taken long to prepare those answers. The time allowed under the order was entirely reasonable and it should not have taken the plaintiff an additional three months to deliver the answers. Similarly, the logistical difficulties outlined in terms of swearing the affidavit abroad are ones which should have been anticipated and addressed within the period allowed under the order.

23. This period of delay is all the more unacceptable in circumstances where the High Court, in its judgment of 12 November 2020, had expressly raised a

concern as to the overall delay in the proceedings: *Nahj Company for Services v. Royal College of Surgeons in Ireland* [2020] IEHC 539 (at paragraph 45).

24. Finally, insofar as the delay since 20 April 2021 is concerned, the plaintiff alleges that the delay during this period "*arose almost exclusively due to the Plaintiff's former Solicitors not having the necessary resources to dedicate to this case*". The chief executive of the plaintiff concludes this part of his affidavit with the following observation:

> "I say and believe that, unfortunately, the Plaintiffs former Solicitors did not have the resources available to them to progress this matter as efficiently as would have been hoped since April 2021 to the present. I say that I do appreciate that the Plaintiff's former Solicitors had lost some key staff to larger Dublin firms during this final period of purported delay and I accept that, without these resources, it would be difficult for [the solicitor] and his team to bring these proceedings forward. In the circumstances, I did not object when [named solicitor] advised that his firm wished to come off record and the Plaintiff did not object to the Solicitors' application to come off record when it came before the Court on the 22nd May 2023."

25. With respect, this averment is self-serving and does not address the proximate cause of the delay, namely that the plaintiff was not discharging the professional fees of the former solicitors. This was the reason for which the former solicitors applied to come off record in the proceedings. The position is stated as follows in the solicitor's affidavit grounding that application:

> "In circumstances where the prosecution of the proceedings have involved very significant work and time including court time for my firm and Counsel over the years and where the plaintiff has not put my firm in funds to discharge professional fees and Counsel's fees my firm has been left with no alternative but to seek an Order pursuant to Order 7, rule 3 of the Rules of the Superior courts allowing my firm to come off record for the plaintiff in the proceedings.
>
> The plaintiff who accepts the position adopted by my firm is not opposing the application and has informed me that it

> intends to represent its interests in prosecuting the proceedings to full hearing."

26. The chief executive of the plaintiff, in an attempt to corroborate the allegation that the former solicitors are to blame for this period of delay, has chosen to exhibit certain email and text communications passing between the company and its former solicitors. The chief executive, in his affidavit, has expressly waived the litigation privilege which would otherwise apply to these communications. The email and text messages have been exhibited in redacted form: certain sentences from the messages have been deleted.

27. At the hearing on 17 July 2023, I ruled that if the plaintiff company wished to continue to rely on the email and text messages which had been exhibited, it would have to produce unredacted versions of same. Alternatively, if the plaintiff company wished to maintain privilege over the unredacted portions, it would not be permitted to rely on the email and text messages which had been exhibited. My concern was that the redacted content was potentially relevant and necessary to put the messages in their proper context. As discussed in *McGrath on Evidence* (Round Hall Press, 3rd edition, 2020) at §10-187, a person intending to make a partial waiver only may, nonetheless, be taken to have *impliedly* waived privilege in the whole of a document where unfairness might result from partial disclosure.

28. This ruling was confined to the specific documents which had already been exhibited: there was no requirement to disclose any additional documents, still less to provide a full set of the communications with the company's former solicitors.

29. Counsel for the plaintiff company was afforded time to take instructions on this issue. Counsel subsequently confirmed that her instructions were that the

company was waiving privilege over the exhibited messages. A small booklet containing unredacted versions of the email and text messages was then made available to the court and to the other side.

30. It is apparent from the messages that these proceedings were not being progressed by the former solicitors because they could not give priority to a case which was not contributing to the income of the practice. This explanation is set out as follows in an email sent by the plaintiff's former solicitors on 7 April 2022:

> "I appreciate your frustration in relation to this case. A few weeks ago I had a conversation with Vincent and I explained to him the reasons why I have not devoted time and resource to progressing this towards a hearing.
>
> We like all other businesses have come through 2 years of the pandemic which has had quite an impact on all businesses. It has had financial implication for all. There have been and continued to be delays in the Court system with the absence for long periods of in person hearings and those delays impact on progression of cases through to completion and then payment of fees. It would not be fair to suggest that this is the only reason for delay because it is not.
>
> In this particular case it has for some time even before the pandemic been slow to progress and this is principally because we cannot give a case priority that is not contributing to the income of the practice. It goes without saying that we have to prioritise those clients who are paying fees on an ongoing basis and it would be wrong to do otherwise.
>
> A case such as this gets time and resource when we can afford it within the practice and we cannot operate otherwise."

31. In the premises, the suggestion that the blame for the delay from April 2021 onwards lies with the former solicitors is unconvincing. The only reasonable inference open on the evidence before the court is that the proximate cause of the delay had been the failure of the plaintiff to put the solicitors in funds to

discharge their own professional fees and those of counsel. This ultimately led to the solicitors being permitted to come off record in the proceedings.

32. Counsel for the plaintiff company submitted that the court should infer from the various emails and text messages that the company had financial difficulties, and, accordingly, should not be held to the "*gold standard*" expected of well-resourced litigants. Counsel cited the decision of the Supreme Court in *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50. The relevance of a disparity of resources, in the context of an application to dismiss for delay, is summarised as follows by Clarke J. in his judgment (at paragraph 3.10):

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

33. In the present case, there is simply no evidence before the court to the effect that the plaintiff was in financial difficulties. Rather, the explanation for the delay offered by the chief executive on affidavit is that the blame lay with the former solicitors: it is said that the firm of solicitors did not have the resources available to them to progress the proceedings efficiently. In the absence of evidence that the plaintiff itself was impecunious, it cannot rely on a line of argument to this effect. It should also be observed that the circumstances of the present case are far removed from the type of social and economic disadvantage at issue in the

case law being summarised by the Supreme Court in *Comcast International Holdings*. The present case concerns a commercial dispute between two corporate entities.

34. For completeness, it should be noted that the jurisprudence indicates that, in a case where the entire responsibility for delay rests upon a professional advisor retained by a plaintiff, the court can and should take into account the fact that a plaintiff may have an alternative means of enforcing his or her rights, i.e. by way of an action in negligence against that professional advisor (*Rogers v. Michelin Tyre plc* [2005] IEHC 294 (at pages 10 and 11), and *Sullivan v. Health Service Executive* [2021] IECA 287 (at paragraph 56)). Similar sentiments have recently been expressed by the High Court (Ferriter J.) in *Scannell v. Kennedy* [2022] IEHC 169 (at paragraphs 28 to 32). The consequences of any (alleged) professional negligence should not be visited upon the other side to the proceedings. A defendant is entitled to have the proceedings against them heard and determined in a reasonable period of time. It follows that even if the plaintiff in the present case had been able to persuade the court that the former solicitors were responsible for the delay—and this has not been established—this would not absolve the plaintiff, as principal, for the delay on the part of its agents.

35. To summarise: the final period of delay, i.e. that from April 2021 onwards, is also inexcusable. A litigant is expected to pursue their proceedings with expedition, especially so in circumstances where, as in the present case, grave allegations are being made against a defendant. Here, the proximate cause of delay was the failure of the plaintiff company to put its former solicitors in funds. This does not represent a reasonable excuse for the delay. Even if the former solicitors had been to blame—and same is not borne out on the evidence—this

would not absolve the plaintiff. This is not a case where the existence of the delay had been concealed from the client. The chief executive of the plaintiff had been aware at all material times that the proceedings had stalled. It was a matter for the plaintiff to address this, whether by putting the solicitors in funds or seeking legal representation elsewhere.

(3). BALANCE OF JUSTICE

36. Given my finding that there has been inordinate and inexcusable delay in the prosecution of these proceedings, it is necessary next to consider whether the balance of justice is in favour of or against allowing the proceedings to go to full trial. The type of factors to be considered in this regard have been enumerated by the Supreme Court in the passages from *Primor* cited at paragraph 7 above, and in the subsequent case law discussed at paragraphs 9 *et seq.* As appears, the range of factors to be weighed in the balance is broad. The exercise is not confined to a consideration of the effect of the delay upon a defendant's ability to defend the proceedings. It can also include factors external to the defence of the proceedings, such as, for example, reputational damage caused by the prolonged existence of the proceedings.

37. As recently emphasised by the Court of Appeal in *Cave Projects Ltd v. Kelly* [2022] IECA 245, where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. Applying this principle to the present case, it would be inappropriate to characterise the reckonable delay as spanning some fourteen years, i.e. the entirety of the period of time that has elapsed since the events of 2008 and 2009

which give rise to the claim and the date upon which the motion to dismiss the proceedings was issued. Rather, the reckonable delay is that between (i) the date upon which the proceedings might reasonably have been expected to come on for hearing, and (ii) the date upon which the motion to dismiss the proceedings was issued. This is because, even where a litigant has progressed their proceedings with diligence, there will inevitably be a considerable lapse of time between the index events and the trial of the action. The exchange of pleadings, discovery and the preparation for trial can legitimately take a number of years.

38. On the facts of the present case, there has been an inordinate and inexcusable cumulative delay of some 40 months. But for the inordinate and inexcusable delay on the part of the plaintiff, it might have been anticipated that the action would have been heard in 2020. Instead, and in consequence of this inordinate and inexcusable delay, the action has been delayed unnecessarily for years. As of the date that the defendant filed its motion to dismiss on 31 March 2023, the action had not been ready for hearing: the plaintiff's side were alleging that the discovery provided by the defendant is incomplete. (There was a belated attempt to row back from this position at the hearing before me on 17 July 2023). It seems unlikely that the trial of the action could now take place until the third quarter of 2024, at the very earliest. The case is likely to take two to three days and given the pressure on the Non Jury List, it is unlikely that a hearing slot will be available until then. It is the effect of this additional delay of some three to four years which must be assessed.

39. The factors which weigh in favour of the dismissal of the proceedings on the grounds of delay are as follows: first, the unnecessarily prolonged reputational damage suffered by the defendant; secondly, the adverse impact on the ability of

the court of trial to adjudicate fairly on the claim; and thirdly, the fact that the plaintiff had been put on express notice in November 2020 that the delay in the prosecution of these proceedings was a cause of concern to this court. I address each of these factors in turn below.

(i) Prolonged reputational damage

40. It is not uncommon for an individual or company to have been the subject of very serious allegations in legal proceedings, only for those allegations to be ultimately rejected, in terms, by the court of trial. The individual or company may well have suffered reputational damage in the period between the institution of the proceedings and their ultimate vindication. This is an unfortunate but inevitable consequence of litigation. The courts are, however, astute to ensure that a party is not exposed to an *unnecessarily prolonged* period of reputational damage. This is because the courts are cognisant that the continued existence of proceedings which entail grave allegations against a defendant may have adverse implications for them. The mere existence of the proceedings may result in the defendant having to pay elevated insurance premiums. Customers or clients may be deterred from dealing with a business because there are unresolved allegations hanging over that business. Accordingly, one of the factors which must be considered in weighing the balance of justice is whether the inordinate and inexcusable delay has resulted in a defendant suffering unnecessarily prolonged reputational damage.

41. As explained by the Court of Appeal in *Tanner v. O'Donnell* [2015] IECA 24 (at paragraphs 45 and 46), there is a constitutional dimension to this consequence of delay:

> "To this I would add that the effective protection of the right to a good name expressly guaranteed by Article 40.3.2 of the

> Constitution necessarily implies that claims of this kind – with obvious implications for the good name of a professional defendant – should be heard and determined within a reasonable time. Any other conclusion would undermine the substance and reality of that express constitutional guarantee.
>
> All of this means that the courts are obliged, where possible, to ensure that claims of this kind are adjudicated within a reasonable time if they are to remain faithful to the constitutional commitment to protect the right to a good name as protected by Article 40.3.2."

42. The Court of Appeal, in its more recent judgment in *Cave Projects Ltd v. Kelly* [2022] IECA 245 (at paragraph 36), has advised a degree of caution, lest it appear that the law confers on certain categories of defendant—and in particular professional defendants—some form of privileged status.

43. It is fair to say that, in some instances, the type of reputational damage asserted by a defendant tends to be somewhat abstract. However, the circumstances of the present case lie at the other end of the spectrum. Here, not only does the plaintiff recognise that the proceedings give rise to reputational damage to the defendant, but the plaintiff hoped to use this as "*leverage*" in mediating a settlement of the proceedings.

44. This is apparent from the unredacted text and email exchanges between the representatives of the plaintiff and its then solicitors. The representatives of the plaintiff considered that the public disclosure of the existence of the proceedings could adversely affect the commercial position of the defendant. It is said, for example, that this case is not "*going to see the inside of*" the High Court; that it would not serve the defendant's interest for the case "*to be made public*"; and that the "*bad publicity from this case would eliminate*" the defendant from competing for a potential contract for a new nursing programme.

45. It will be recalled that the plaintiff alleges, in effect, that the defendant had deliberately overcharged the Ministry of Higher Education in Saudi Arabia by continuing to include a figure for commission in the fees charged, notwithstanding the directive issued by the Ministry in June 2010, and wrongfully retained the additional monies for its own benefit. This is, on any view, a very serious allegation to make against a respected educational institution. It should be reiterated that the allegations are unproven and are strenuously denied by the defendant.

46. It is unfair and unjust that the defendant should have been left exposed to reputational damage for such an extended period of time. The plaintiff should have brought the action on for hearing well before now. Far from doing so, it hoped to use the ongoing risk of reputational damage to its advantage.

(ii) Ability to adjudicate fairly on claim

47. The capacity of the court of trial to adjudicate fairly on the claim has been compromised by the delay. One of the central planks of the plaintiff's claim involves an allegation that the defendant informed a representative of the plaintiff, Mr. Vincent Carroll, that he was not to alert the relevant Saudi Arabian officials to an error in the figure given for student fees, for the purpose of correcting that error. This alleged request is said to have been made on 29 May 2009 in the course of a telephone conversation. It is further alleged that the defendant failed to disclose and/or sought to disguise this error during the period February 2010 to November 2014.

48. In order for the trial judge to determine the question of liability, it would be necessary for him or her to examine events which had occurred in 2009. The outcome of the proceedings will turn, in large part, on oral evidence. The trial

judge would have to adjudicate on what was said in a telephone call which took place more than fourteen years ago and upon the subsequent dealings between the representatives of the plaintiff, the defendant and the Ministry of Higher Education.

49. This court is entitled to take judicial notice of the fact that the recollection of witnesses fades over time and that the ability of the witnesses to recall the events of some fourteen years ago will be limited. Crucially, the quality of any trial which would now take place would be inferior to that which could have taken place in 2020 but for the inordinate and inexcusable delay on the part of the plaintiff.

(iii). Plaintiff on notice that delay a cause of concern

50. The plaintiff had been put on express notice in November 2020 that the delay in the prosecution of these proceedings was a cause of concern to this court. More specifically, in a written judgment delivered on 12 November 2020, I directed that all further interlocutory applications in these proceedings be made returnable before me with a view to ensuring that there would be no further delay. See *Nahj Company for Services v. Royal College of Surgeons in Ireland* [2020] IEHC 539 (at paragraph 45).

51. The fact that a litigant has been given fair warning that their delay is a cause of concern is a factor which should be taken into account in assessing the balance of justice. Here, the plaintiff had been given an opportunity to mend its hand, by taking steps to bring its action on for hearing. The plaintiff was also afforded the opportunity of case management: all further interlocutory applications were to be brought before a nominated judge, familiar with the case. This would have ensured that any such applications would be heard and determined promptly.

Notwithstanding these opportunities, the plaintiff failed to progress the proceedings. No positive procedural step has been taken by the plaintiff since April 2021. The plaintiff made no attempt to ready the case for hearing. The plaintiff did not, for example, file a motion in respect of the adequacy of the defendant's discovery, an issue in respect of which the plaintiff has sought to criticise the defendant.

52. Having regard to this procedural history, it would represent a regression to the culture of "*endless indulgence*" of delay were the plaintiff now to be afforded a *second* opportunity to mend its hand. This is especially so where the exhibited messages indicate that the plaintiff's side had no desire to progress their claim to a full hearing: their hope had been that the case was not "*going to see the inside of*" the High Court.

Prejudice to the plaintiff

53. On the other side of the scales, it is necessary to weigh the prejudice to the plaintiff. In the event that the proceedings are dismissed, then the plaintiff will have lost the opportunity to pursue a claim for damages for the alleged breach of the agreement between it and the defendant. The proceedings will have been dismissed without any adjudication—one way or another—on the merits of the company's claim. A decision to dismiss the proceedings will thus "*engage*" the plaintiff's constitutional right to litigate, i.e. the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law (*Tuohy v. Courtney* [1994] 3 I.R. 1 at 45). However, the right to litigate is not absolute: it must be balanced against other rights, including, relevantly, the right of defence and the right to a good name.

This is reflected, in part, by the imposition of limitation periods. It also underlies the inherent jurisdiction to dismiss proceedings on the grounds of delay.

54. Whereas the loss, by a plaintiff, of the opportunity to pursue a claim for damages is undoubtedly a significant detriment, it does not automatically trump the countervailing rights of a defendant. There is an obligation upon a plaintiff to pursue their claim with reasonable expedition. By definition, the carrying out of the *Primor* balancing exercise will only ever arise where a finding of culpable delay has been made against a plaintiff and/or their agents. A defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be dismissed in circumstances where a plaintiff is responsible for inordinate and inexcusable delay. More moderate prejudice may tip the balance of justice against allowing the proceedings to continue. Whether moderate prejudice will warrant the dismissal of a given claim, or whether something more serious must be established, will depend on all of the circumstances, including the nature and extent of the delay involved, the nature of the claim and of the defence to it and the conduct of the defendant (*Cave Projects Ltd v. Kelly* [2022] IECA 245 (at paragraph 36)).

55. To summarise: the balance of justice requires the court to consider a range of matters. It is not simply an exercise in weighing (i) the potential loss to the plaintiff of an opportunity to pursue a claim, against (ii) the ability of the defendant to defend the proceedings notwithstanding the delay. Other factors including, relevantly, the conduct of the respective parties and the constitutional imperative of reasonable expedition in litigation must be assessed as part of the *Primor* test.

CONCLUSION AND PROPOSED FORM OF ORDER

56. The within proceedings will be dismissed on the grounds of inordinate and inexcusable delay. The balance of justice lies in favour of the dismissal of the proceedings for the following reasons. First, the delay has caused the defendant to have suffered unnecessarily prolonged reputational damage. Secondly, the delay has adversely impacted on the ability of the court of trial to adjudicate fairly on the claim. Thirdly, the plaintiff had been given fair warning in November 2020 that the delay in the prosecution of these proceedings was a cause of concern to this court but failed to act on that warning. It would represent a regression to the culture of "*endless indulgence*" of delay were the plaintiff now to be afforded a *second* opportunity to mend its hand.

57. The loss to the plaintiff of the opportunity to pursue its claim for damages to conclusion has to be seen in context. These proceedings relate to a commercial dispute between two corporate entities. The plaintiff should have progressed its proceedings with reasonable expedition, especially having regard to the fact that it was given fair warning that the delay was a cause of concern and was afforded the opportunity of case management. The right to litigate is not unqualified and the point has now been reached where the scales have tilted in favour of dismissal. The plaintiff has only itself to blame for this outcome.

58. As to costs, my *provisional* view is that the defendant, having been entirely successful in having the proceedings dismissed, is entitled to recover the costs of the proceedings as against the plaintiff. This accords with the default position under Section 169 of the Legal Services Regulation Act 2015. If either side wishes to contend for a different form of costs order, they are to file written legal submissions within 14 days of today's date.

Appearances

Eliza Kelleher for the plaintiff instructed by Brosnan & Co. Solicitors (Killarney)
David Conlan Smyth SC and Kevin Callan for the defendant instructed by William Fry LLP