APPROVED **[2023] IEHC 584**

THE HIGH COURT

2017 No. 7404 P

BETWEEN

ANTHONY WALSH

PLAINTIFF

AND

EMMA MCHUGH

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 October 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to dismiss the within personal injuries proceedings on the grounds of inordinate and inexcusable delay. There was no attendance at the hearing of the motion by the solicitors on record for the plaintiff. Proof of service was established by way of affidavit.

LEGAL PRINCIPLES GOVERNING APPLICATION TO DISMISS

2. 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."

3. 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.

4. 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."

5. 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.

6. The principles governing an application to dismiss on the grounds of delay have been considered more 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."

7. 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."

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

CHRONOLOGY

9. The chronology of events is set out in tabular form below:

7 November 2014	Road traffic accident
11 August 2017	Personal injuries summons issued
9 August 2018	Personal injuries summons served
5 October 2018	Appearance entered
22 January 2019	Notices for particulars and further information
23 June 2021	Motion to compel replies to particulars is filed
8 November 2021	Order directing replies to particulars within 4 weeks
2 December 2022	Motion to dismiss for delay filed
13 February 2023	Motion transferred to Non-Jury List
15 February 2023	Motion adjourned with a direction that the Plaintiff file any replying affidavit by 31 March 2023
7 June 2023	Motion allocated a hearing date of 20 October 2023
20 October 2023	Hearing of the motion

(1). INORDINATE DELAY

10. As appears from the chronology above, the only substantive step ever taken in the proceedings by the plaintiff had been the service of the personal injuries summons on 9 August 2018. The plaintiff should have responded to the defendant's notice for particulars and notice for information pursuant to Section 11 of the Civil Liability and Courts Act 2004 within a reasonable period of time. These notices were served on 22 January 2019. No reply has ever been made to these notices, notwithstanding a subsequent court order directing delivery of same.

11. If one calculates the period of delay by reference to the latest date by which the plaintiff might reasonably have been expected to reply, say June 2019, the culpable delay prior to the filing of the motion to dismiss is approximately two and a half years. This delay is ongoing. No subsequent step has been taken in the proceedings by the plaintiff and there was no attendance on behalf of the plaintiff at the hearing of the motion to dismiss.

12. The result of the delay is that the pleadings are not yet closed in proceedings which had been instituted as long ago as 11 August 2017. The delay is inordinate in the context of what are very straightforward personal injuries proceedings, consisting of a claim for damages for an alleged whiplash injury arising from a road traffic accident.

(2). INEXCUSABLE DELAY

13. It is necessary next to consider whether the delay is inexcusable. As it happens, no affidavit has been filed in response to the motion to dismiss and there was no attendance at the hearing of the motion by the solicitors on record for the

plaintiff. Accordingly, there has been no attempt by the plaintiff to explain the delay, still less to put forward reasons which might excuse the delay.

14. Having regard to the straightforward nature of the case, as pleaded in the personal injuries summons, there can be no reasonable excuse for failing to have progressed these proceedings. The circumstances of the present case can be distinguished from, say, a professional negligence case where delay might be referable to the need to obtain further expert reports.

(3). BALANCE OF JUSTICE

15. 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 2 above, and in the subsequent case law discussed at paragraphs 4 *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.

16. In assessing where the balance of justice lies, it is necessary to have some regard to the legislative reforms introduced in respect of personal injuries actions. The limitation period for personal injuries actions has been reduced to two years under Part 2 of the Civil Liability and Courts Act 2004. The rules in relation to the service of proceedings have also been tightened up. Whereas the time period

within which proceedings must be served remains the same, i.e. twelve months from the date of issue, the threshold to be met in an application to renew a summons outside that period has been raised under the amended Order 8 of the Rules of the Superior Courts. The court must be satisfied that there are "*special circumstances*" which justify an extension of time. A summons may only be renewed for a period of three months.

17. The default position, therefore, is that personal injuries proceedings will have been issued within two years of the date of the alleged wrongful act, and that a defendant will have been served with the summons within a further period of twelve months. Put otherwise, the default position is that, at the very latest, a defendant will be on notice of the nature and extent of the claim against them within an aggregate period of three years. There would be little point putting in place procedural safeguards at the *outset* of the proceedings, only to allow those proceedings to drag on indefinitely thereafter. Here, the plaintiff has failed to provide a reply to the particulars requested, notwithstanding having been ordered to do so. It would be inconsistent with the underlying objective of the legislative reforms to allow such delays go unchecked.

18. 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 upon 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 eight years, i.e. the entirety of the period of time that has elapsed since the date of the road traffic accident which gives rise to the claim, and the date upon which the motion to

dismiss the proceedings was filed. 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 filed. 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 subsequent trial of the action. The limitation period for a personal injuries action is two years and the exchange of pleadings and the preparation of an action for trial can legitimately take a number of years thereafter.

19. On the facts of the present case, these proceedings were instituted on 11 August 2017, and given the straightforward nature of the claim, should have been ready for hearing well within three years. 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 the year 2020. Instead, and in consequence of this inordinate and inexcusable delay, an action, which could and should have been heard within six years of the road traffic accident, has been delayed unnecessarily for years. It seems unlikely that the trial of the action could now take place until the end of 2024, at the very earliest, having regard to the fact that the pleadings are still not closed, and the discovery process has not commenced. It is the effect of this additional delay of some four years which must be assessed.

20. The factors which weigh in favour of the dismissal of the proceedings on the grounds of delay are as follows. First, the capacity of the court of trial to adjudicate fairly on the claim for personal injuries has been compromised by the delay. 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 ten 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.

21. The second factor is the attitude of the plaintiff to these proceedings. The plaintiff is in continued breach of the order directing him to reply to the defendant's notice for particulars. The plaintiff failed to attend the hearing of the motion to dismiss. All of this is indicative of an absence of an intention, even now, to progress the proceedings with any expedition.

22. 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 personal injuries. The proceedings will have been dismissed without any adjudication—one way or another—on the merits of his claim. A decision to dismiss the proceedings will thus engage the plaintiff's constitutional right to litigate, i.e. his 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. 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.

23. 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)).

24. 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.

25. In the present case, the balance of justice points firmly to the dismissal of the proceedings. The operative delay has compromised the capacity of the court of trial to adjudicate fairly on the personal injuries claim for the reasons explained above. Moreover, in weighing the balance, the court is entitled to have regard to the fact that the defendant is in continuing breach of an order to deliver replies to particulars and, even now, has evinced no intention to progress the proceedings with expedition.

CONCLUSION AND PROPOSED FORM OF ORDER

26. 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 reasons set out above.

27. As to costs, my *provisional* view is that the defendant, having been entirely successful in having had the proceedings dismissed, is entitled to recover the costs of the proceedings as against the plaintiff. This reflects the default position under Section 169 of the Legal Services Regulation Act 2015. If the plaintiff's side wishes to contend for a different form of order, they should file written submissions within seven days of today's date; the defendant will have seven days thereafter to reply.

28. If no submissions are filed, the order will be drawn up as *per* my provisional view above.

Appearances

No attendance on behalf of the plaintiff
David Lennon for the defendant instructed by Ennis & Associates Solicitors

Approved Garrett Simons