



**THE HIGH COURT
CIRCUIT APPEAL**

Record No. 2024/198CA

BETWEEN

TOMASZ MAKSYM

Plaintiff

-and-

S & S RECYCLING LIMITED (In Liquidation) and STRYKER ORTHOPAEDICS

Defendants

JUDGMENT of Ms Justice Sara Phelan delivered on the 14th day of January 2025

Introduction

1. This matter comes before the High Court by way of appeal from an order of the Circuit Court, made on the 16 July 2024, dismissing the plaintiff's claim for want of prosecution on the grounds of inordinate and inexcusable delay. For the reasons set out hereunder, the plaintiff's appeal is allowed.

Procedural Background

2. The plaintiff's claim is one for damages arising out of personal injuries allegedly occasioned to the plaintiff on the 3 January 2013 during the course of his employment with the first-named defendant and whilst working at a premises owned or occupied

by the second-named defendant. The progression of the claim is best set out in tabular form as follows:

Date	Step	Comment [insofar as relevant to the appeal]
16 Mar 15	plaintiff issues personal injuries summons	
16 Jul 15	second-named defendant enters appearance	
16 Jul 15	second-named defendant serves notice for particulars	
26 Jan 16	first-named defendant enters appearance	
17 May 17	first-named defendant serves notice for particulars	
17 May 17	first-named defendant serves notice requiring further information	
15 Jun 18	second-named defendant issues motion seeking to strike out the plaintiff's claim for failure to deliver replies to particulars and for want of prosecution	16 Jul 18 – motion struck out
12 Jun 19	plaintiff replies to the second-named defendant's notice for particulars	
19 Jun 19	plaintiff serves notice of change of solicitor	
29 Jul 19	plaintiff replies to the first-named defendant's notice requiring further information	
15 May 20	first-named defendant is placed into voluntary liquidation	
04 Jun 20	plaintiff replies to the first-named defendant's notice for particulars	
15 Jun 20	second-named defendant delivers defence	
13 Jul 20	plaintiff writes to the second-named defendant seeking voluntary discovery	
28 Jul 20	plaintiff serves additional particulars of negligence	
13 Aug 20	first-named defendant issues motion seeking to strike out the plaintiff's claim for want of prosecution on the grounds of inordinate and inexcusable delay	16 Nov 20 – motion struck out with a direction that the plaintiff provide post-accident medical records to the first-named defendant to enable it to prepare its defence
07 Dec 20	plaintiff writes to the first-named defendant regarding its liquidation	
08 Jun 21	plaintiff furnishes post-accident medical records to the first-named defendant	

Date	Step	Comment [insofar as relevant to the appeal]
08 Jun 21	first-named defendant serves notice of indemnity & contribution	
24 Sep 21	first-named defendant delivers defence	<ul style="list-style-type: none"> • this is a standard defence, putting the happening of and the circumstances of the plaintiff's claim in issue, together with the plaintiff's sequelae • does not take any issue with delay or prejudice accruing to the first-named defendant as of the date of its delivery • delivered subsequent to the first-named defendant entering into voluntary liquidation
07 Nov 22	first-named defendant issues motion ["the third motion"] seeking to strike out the plaintiff's claim for want of prosecution on the grounds of inordinate and inexcusable delay	
14 Nov 22	plaintiff issues motion seeking discovery as against the second-named defendant	motion ultimately struck out
05 Dec 22	Circuit Court adjourns the third motion and the discovery motion	
07 Dec 22	plaintiff issues motion in the High Court seeking leave to proceed against the first-named defendant [in voluntary liquidation] pursuant to the provisions of the Companies Act 2014, s.678	19 Jan 24 – leave granted by the High Court
mid-Jun 24	third motion proceeds before the Circuit Court	
16 Jul 24	order of the Circuit Court	motion successful and the plaintiff's claim dismissed
24 Jul 24	plaintiff serves notice of appeal	

Appeal

3. The appeal came on for hearing on the 16 December 2024 and, pursuant to the provisions of s.37 of the Courts of Justice Act 1936, proceeded by way of rehearing on affidavit, with the burden of proof resting on the first-name defendant ["the

defendant”]. The defendant’s application was grounded on the affidavit of the defendant’s solicitor sworn the 7 November 2022 and it was replied to by affidavit of the plaintiff’s solicitor sworn on the 27 March 2024. Thereafter, two further affidavits were sworn, by the defendant’s solicitor on the 22 April 2024, and by the plaintiff’s solicitor on the 7 May 2024, and written legal submissions were filed firstly, by the plaintiff (undated) and subsequently, by the defendant (dated the 22 November 2024).

4. The defendant’s claim in the context of this appeal is that, due to the plaintiff’s delay in prosecuting his case, it [the defendant] is prejudiced in defending the claim by reason of it being in voluntary liquidation since firstly, it no longer has ready access to three of the plaintiff’s co-workers, together with the inevitable dimming of memories over time, and secondly, it is unable to finalise its winding up.
5. The defendant also claims that the unexplained delays are, as averred to by the defendant’s solicitor, “*entirely prejudicial to [its] ability to defend the claim in a manner which [it] would have had if the matter progressed in a timely manner from the outset*”.
6. Counsel for the defendant, during the course of the appeal hearing, did not take issue with the contention that the issue of prior delay (i.e., delay up to the hearing of the second motion to dismiss in November 2020) had been dealt with by the Circuit Court and that this court was concerned with delay from November 2020 onwards.
7. The plaintiff, for his part, makes much of the delay brought about by the defendant opposing his s.678 application, an opposition which the plaintiff conceded at hearing the defendant was entitled to make, and such opposition being primarily on the grounds of delay.
8. The plaintiff also refers to the delay by the defendant in delivering its defence and in the request from the defendant for sight of post-accident medical records prior to the delivery of its defence.
9. Lastly, the plaintiff refers to the involvement of the second-named defendant as a factor to be considered when looking at his delay and the fact that the plaintiff was

left with no alternative but to issue a motion for discovery against the second-named defendant on the 14 November 2022.

Applicable Law

10. This appeal falls to be decided under the well-settled principles concerning post-commencement delay as enunciated by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 and as followed and elaborated upon by the superior courts in many decisions subsequent thereto. Helpfully, there was no dispute as between the parties as to the applicable law in terms of what constitutes inordinate delay, inexcusable delay and the balance of justice as between the parties, and both parties referred in particular to *Cave Projects Ltd v. Gilhooley* [2022] IECA 245 and *Beggan & Beggan v. Deegan & ors* [2024] IECA 4.
11. For a defendant to be successful under the *Primor* principles, such defendant must establish to the satisfaction of the court that a plaintiff's delay is firstly, inordinate; secondly, inexcusable; and thirdly, that the balance of justice lies against the case proceeding. Each of these conditions is cumulative and every case turns on its own facts per Collins J in *Cave Projects* at §36, “[a] period of delay that is considered inordinate in one case may not be regarded as such in another. Factors which excuse delay in one case may be ineffective in another. For that reason, the citation of previous decisions for the purpose of demonstrating that a particular period of delay was (or was not) found to be inordinate and/or inexcusable in another case involving other circumstances will rarely be helpful”.
12. Where a court is satisfied that the delay is both inordinate and inexcusable, the court must proceed to consider the balance of justice and the court may only dismiss the proceedings where the balance of justice so requires. In deciding where the balance of justice lies, the standard to be applied is a lesser standard than whether there is a real and substantial risk of an unfair trial or an unjust result (per Donnelly J in *Sullivan v. Health Service Executive* [2021] IECA 287, at §52).

13. Further, in looking at the balance of justice, moderate prejudice to the defendant may suffice in justifying the dismissal of the proceedings and what is required, in the words of Noonan J in *Beggan* at §25, is prejudice “*sufficient to make it unfair to call on the defendant to meet the case at trial. If such unfairness is not established, it is difficult to see how the balance of justice could favour dismissal*”.
14. Lastly, the onus remains on the defendant to establish that the balance of justice favours the dismissal of the case (per Barniville J (as he then was) in *Gibbons v. N6 (Construction) Ltd* [2022] IECA 112, at §80; and per Collins J in *Cave Projects* at §36).

Discussion

Inordinate Delay

15. Both parties are agreed that the period of delay under review is from November 2020 onwards and the plaintiff accepts that such delay is inordinate. This court is of the same view.

Inexcusable Delay

16. It is not unreasonable to expect that the plaintiff would have managed his case expeditiously from November 2020 onwards, having already ‘survived’ two motions to dismiss [albeit accepting that the primary relief sought in the first motion was the compelling of replies to particulars], but nothing in the more recent conduct of the plaintiff’s case suggests any degree of urgency in bringing his claim to a conclusion.
17. It is of particular note in this regard that the plaintiff did not take any action on foot of the defendant’s liquidation until December 2022, and the plaintiff does not give any explanation for the two-year delay on his part in bringing such application, in circumstances where the plaintiff was on notice of the voluntary winding up since at least the 7 December 2020 and the s.678 motion was issued exactly two years later on the 7 December 2022. At hearing, the plaintiff’s counsel stated that the need to bring the application was recognised but not acted upon, without any further explanation

being forthcoming. And indeed, it would appear that the precipitating factor in the plaintiff eventually initiating the s.678 application was the issue by the defendant of the third motion in November 2022, rather than any positive action on the plaintiff's part.

18. There is then further delay on the plaintiff's part in that the s.678 motion did not come on for hearing until the 19 January 2024. This motion had been previously listed for hearing in June 2023, but it was not 'called on' by the plaintiff on the week prior to the hearing date "*due to an oversight*". There is no further explanation given by the plaintiff in this regard, other than [at hearing] that the plaintiff's legal advisors were not aware of the necessity to call the matter on.
19. Thus, and despite the plaintiff's solicitor having sworn two affidavits in response to the defendant's motion, there are no excuses proffered for the delay from November 2020 onwards which this court considers to be real and justifying excuses such that the plaintiff's delay can be considered excusable. Indeed, there is no explanation at all for the considerable delay on the plaintiff's part other than the fact that it was through 'inadvertence' and 'oversight'.
20. Separately, and given the plaintiff's delay in issuing the motion for discovery as against the second-named defendant, the fact that the plaintiff had to also progress his case against the second-named defendant is not a factor that this court considers relevant in the context of considering the delay to be excusable. The issue of this discovery motion by the plaintiff must be viewed against the backdrop of the second-named defendant's defence having been delivered on the 15 June 2020 and the plaintiff having sought voluntary discovery from the second-named defendant by way of letter dated the 13 July 2020. The plaintiff provided no real explanation for a delay of over two years between seeking voluntary discovery and issuing the motion for discovery.
21. Lastly, and albeit that the defendant's defence cannot be said to have been delivered with any degree of expediency, this court is of the view that such delay is not sufficient to justify or excuse the plaintiff's delay in progressing his case. This is all the more so in circumstances where it was open to the plaintiff at any time [and well before

2021] to bring a motion for judgment in default of defence to compel the delivery of such defence.

22. Thus, and given that this appeal primarily concerns the delay subsequent to November 2020, I am of the view that the plaintiff's delay is inexcusable, not least when viewed against the backdrop of two prior motions to dismiss.

Balance of Justice

23. Finally, this court must also have regard to the balance of justice and, in so doing, must consider the interests of both parties before deciding whether to permit the case to proceed.

24. As stated above, the onus remains on the defendant to establish that the balance of justice favours the dismissal of the case and with some reluctance [due to the fact that it is now almost 10 years since the proceedings were commenced and just over 12 years since the happening of the accident the subject matter of the proceedings], I am of the view that the defendant has not discharged the onus at this particular time.

25. In coming to this conclusion, I have relied primarily on the fact that the defendant has not, in any meaningful way, established that it is prejudiced in the plaintiff's case continuing as matters stand and, whilst the defendant has asserted prejudice under two broad headings, being the lack of access to witnesses and the delay in winding up, the defendant has not substantiated such prejudice.

26. Firstly, and as regards witnesses, the defendant claims that it is prejudiced in defending the plaintiff's claim by no longer having ready access to three of the plaintiff's co-workers, together with the inevitable dimming of memories with the passage of time, but the defendant did not further elaborate on such prejudice and, for example,

- gave no explanation as to its efforts to locate any of the plaintiff's co-workers, which according to the defendant are essential witnesses in mounting its defence,
- did not explain why these [unnamed] co-workers are essential witnesses,

- gave no indication as to whether statements had been taken from any of these individuals, and, if not, why not.
27. Counsel for the defendant further submitted during the appeal hearing that the passage of time would also adversely affect the plaintiff's ability to recollect the specific occurrences on a date in 2013 [i.e., the detail of the happening of the alleged accident] and whilst this is undoubtedly the case, it is the plaintiff who will bear the burden of proof at the substantive hearing and it is the plaintiff who must overcome this passage of time issue before it ever falls to the defendant to rebut the plaintiff's claim.
 28. Secondly, and as regards not being able to finalise its winding up, the defendant provided no details on affidavit as to how it is adversely affected by the inability to finalise the winding up, albeit that counsel for the defendant stated in oral submissions that the delay in finalising the liquidation was preventing the distribution of funds. But this assertion, without more, is not sufficient to discharge the onus of proof. Counsel for the defendant did observe during the hearing that there may be the cost of lost opportunity but fairly accepted that this has not been put on affidavit.
 29. This court simply cannot infer prejudice in the absence of specific detail and the defendant has not demonstrated to the court *how* it is prejudiced if the case is to continue or, to put it another way, the defendant has not demonstrated a real and tangible injustice in the words of Collins J in *Cave Projects* at §37.
 30. Further, the defendant did not plead delay or prejudice in the defence as delivered in September 2021 and the defendant has certainly not explained how any prejudice may have arisen in the 14 months following the delivery of its defence and prior to the issue of its motion in November 2022.
 31. That said, I do not accept that the defendant has been guilty of any culpable delay from November 2020 to November 2022 and whilst the defendant could have delivered its defence in a more timely manner, such defence was delivered within three-and-a-half months of receiving the plaintiff's post-accident medical records from the plaintiff's solicitor under cover of letter of 8 June 2021. This 'delay' of three-and-a-half months in delivering its defence is to be contrasted with the almost 12

months it took for the plaintiff to reply to the defendant's notice for particulars following service of a notice of change of solicitor, and the almost 10 months it took the plaintiff to provide his post-accident medical records to the defendant having been directed to so do.

Court by its own conduct to ensure that litigation is completed in a timely fashion

32. Separately, I am also mindful of the court's responsibility to manage and control its own processes and ensure that litigation is completed in a timely fashion, and if this matter were a High Court matter *ab initio*, I would make certain that it is case managed from here on out to ensure that it is brought to a hearing expeditiously and that no further delay ensues.
33. This court is very concerned that there be no further delay and this concern is heightened by the fact that counsel for the plaintiff advised the court during the appeal hearing, upon being asked by the court if the case were now ready to be set down for hearing, that consideration is being given to applying to transfer the matter to the High Court. In so doing, counsel for the plaintiff did accept that the plaintiff would be willing to submit to case management.
34. However, given that this matter will be remitted to the Circuit Court by reason of this decision, this court can have no further function in terms of case management, but that said it is urged upon the solicitors for all parties to properly manage the case so that no further delay ensues and, in the words of Noonan J in *Beggan*, it behoves [the parties] "*to proceed with the case as a matter of considerable urgency*". Certainly, if there is any further delay or if the case is not set down for hearing within, say, the next three months [without valid and very cogent reasons for any further delay], the defendant would then appear to have almost unassailable grounds for dismissal.

Costs

35. Pursuant to the provisions of s.169 of the Legal Services Regulation Act 2015, costs should follow the event "*unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings*

by the parties". In circumstances where the appeal has now been finalised, where the role of the High Court has concluded, and where I have found the plaintiff's delay to be both inordinate and inexcusable, I am of the view that the plaintiff's conduct is conduct to which I should have regard and my provisional view in relation to costs is that there should be no order in relation to costs both above and below.

36. However, it is open to the parties to contend for the making of a different form of costs order and I will hear the parties in relation to the precise form of order to be made. I propose listing this matter, in person, for Tuesday 28th January 2025 for such purpose.