

THE HIGH COURT

[2023] IEHC 374

[Record No. 2012/4689P]

BETWEEN:

STEPHANIE NEISER

PLAINTIFF

AND

LEINSTER SENIOR COLLEGE LIMITED

DEFENDANT

AND

IDEMUDIA AKPEKPE (JOINED BY ORDER)

THIRD PARTY

RULING of Ms. Justice Siobhán Phelan delivered on the 29th of June, 2023

INTRODUCTION

1. This matter came before me as an application to dismiss for want of prosecution pursuant to Order 122, rule 11 of the Rules of the Superior Courts, 1986 and/or inordinate and/or inexcusable delay pursuant to the Court's inherent jurisdiction. A review of the papers and the chronology provided on behalf of the Plaintiff demonstrates that when the motion issued in August, 2020, it had not been more than two years since the last proceeding had in the case. The application was pursued in submissions before me as an application in reliance on the Court's inherent jurisdiction rather than pursuant to O.122, r.11 which requires no step in proceedings for a two year period prior to the making of the application.

BACKGROUND

2. These proceedings were commenced by way of Personal Injuries Summons issuing on the 11th of May, 2012 on foot of a PIAB authorisation issuing in July, 2020 arising from an incident which occurred on the 12th of May, 2010. It is alleged that the Plaintiff, then a student, was forcibly pushed by another student (the joined third party) while using the stairs at the

Defendant school. In the incident she fell to the bottom of the stairs sustaining a fracture to her right ankle and requiring medical intervention.

3. A full chronology (see Appendix A hereto) has been provided on behalf of the Plaintiff from which it is clear that between June, 2012 and July, 2014, proceedings progressed by, *inter alia*, the delivery of a full defence attributing liability to a third party, an application to join a third party who was a fellow student of the Plaintiff's at material times, the raising and response to particulars and an application for discovery resulting in an order for discovery being made in July, 2014 on application of the Defendant.

4. Thereafter, the Chronology reveals that the proceedings became somewhat derailed with an application to strike out for the Plaintiff's failure to make discovery followed closely in time by a Notice of Change of Solicitor at a time when the Plaintiff said her previous solicitor was in professional difficulties in dealing with the file. Following the change in solicitor which took place by arrangement between the Plaintiff's original solicitor and a connected solicitor rather than through the Plaintiff electing to take the file elsewhere, the Plaintiff's discovery was completed in February, 2017.

5. At this point the Plaintiff moved to her current solicitor who pursued discovery on her behalf during 2017, ultimately obtaining an order for discovery on the 18th of December, 2017, but discovery was not made by the Defendant until June, 2019. Accordingly, while there was delay necessitating the service of a Notice of Intention to Proceed in March, 2019, this delay occurred at a time when discovery was outstanding from the Defendant.

6. Following service of the Notice of Intention to Proceed, additional particulars of injury were delivered in June, 2019. A schedule of witnesses was provided and reports were disclosed in January, 2020 by both Plaintiff and Defendant. A hearing date was assigned for the 4th of February, 2020 but the hearing was adjourned on application on behalf of the Defendant due to late delivery of reports from the Plaintiff including a psychiatric report, a vocational assessor's report and an actuarial report which enlarged the Plaintiff's claim. A second hearing date was assigned for the 12th of May, 2020 but could not proceed due to COVID-19 restrictions. The application to dismiss issued in August, 2020, some three months after the second aborted hearing date.

7. A striking feature of this application to dismiss is that the Defendant's solicitor wrote a series of letters without response of any kind from the Plaintiff's solicitor. This correspondence included letters dated the 7th of July, 2020, 14th of July, 2020, 5th of August, 2020, 29th of September, 2020, 25th of February, 2021, 1st of June, 2021, 17th of September, 2021, 5th of October, 2021 asking, *inter alia*, if the Plaintiff was ready to proceed and calling on the Plaintiff to make an application to list the case for a further hearing date in circumstances where the Plaintiff was further assessed on behalf of the Defendant in March and April, 2020 in respect of the enlarged case. Finally, by letter dated the 10th of March, 2022, the Defendant's solicitor wrote advising of an intention to apply to dismiss the proceedings in view of the fact that it was then almost 12 years post-accident and the Plaintiff had not proceeded to secure a fresh hearing date for the proceedings. The decision to instruct counsel to draft a motion to dismiss was communicated by letter dated the 29th of March, 2022.

8. The Plaintiff's solicitor served a Notice of Intention to Proceed in January, 2023. I am advised that the case is now ready for a date.

EVIDENCE

9. The application is grounded on the Affidavit of Robert Laffan, Solicitor for the Defendant, who refers to the overall delay of more than twelve years between the occurrence of the incident which led to the institution of proceedings and the bringing of the application to dismiss. He asserts prejudice because the claim is one which will be based entirely on the oral testimony of all relevant witnesses. He exhibits some 13 letters between the 27th of February, 2020 and the 29th of March, 2022 calling on the Plaintiff to advance the proceedings. Not once did the Plaintiff's solicitor reply to any of this correspondence.

10. In a replying affidavit sworn by the Plaintiff personally she explains an unhappy history with her legal representation prior to her current solicitors coming on record in 2017. In terms of delays following the adjournment of the case in February, 2020, she explains that she engaged with the Defendant's experts during this period but also lost her job in March, 2020, she says for reasons connected with her injury. She confirms that the case was unable to proceed on the new hearing date assigned in May, 2020 due to the COVID-19 Pandemic.

11. The Plaintiff avers that when her case was adjourned in February, 2020 she was informed by her solicitors of the necessity to provide a significant sum of money for outlays,

medical, engineering and other expert reports, legal fees etc. Her explanation for a failure to advance the hearing of her case since the summer of 2020 is a lack of resources. She confirms that her parents agreed to sell a property to fund the litigation, but the sale fell through on a number of occasions, partly due to the COVID-19 Pandemic. A Notice of Intention to Proceed is exhibited in draft form. The Court record shows that this has since been filed.

12. In a second Affidavit, Mr. Laffan contended that no excuse or acceptable explanation had been offered for delay by the Plaintiff noting that while the adjournment of the first hearing date was sought by the Defendant, this was because of the late delivery of medical reports. Further, while he did not dispute that the Plaintiff had engaged with medical assessors on behalf of the Defendant in March and April, 2020, this did not constitute a step in the proceedings. Referring to the period of 2 1/2 years which had passed since the second hearing date in May, 2020 without any step being taken to get the matter on for hearing, Mr. Laffan maintained that the financial issues cited do not excuse this delay.

LEGAL PRINCIPLES

13. I have the benefit of the parties written legal submissions in this case and books of authority which were presented in support of each side's position. I have had occasion to consider the legal principles applicable to this type of application in reliance on the inherent jurisdiction of the Court on a number of occasions in recent months. In my recent ruling in the case of *City Pharmacy, Corrigan Pharmacy Holdings Limited and Eileen Corrigan v. Roche & Ors.* delivered on the 19th of May, 2023, I adopted the summary of principles contained in the recent Court of Appeal decision in *Gibbons v N6 (Construction) Limited* [2022] IECA 112, as cited with approval by the later Court of Appeal decision of *Cave Projects Limited v Kelly* [2022] IECA 245.

14. In both *Gibbons* and *Cave* the Court of Appeal engaged in an extensive review of the authorities, many of which are cited by the parties in their submissions. There is no real disagreement between the parties as to the applicable principles, albeit they part ways in their application of the principles. Indeed, there is an overlap in the authorities relied upon by the parties in this application and both the Plaintiff and the Defendant rely on the decision of the Court of Appeal in *Cave*. As set out in *Cave*, the starting point on an application of this kind is a consideration of the three-limb test set out in *Primor* and summarised by Barniville J. (as he then was) in *Gibbons* at para. 79 as follows:-

"There are three limbs to the Primor test. The defendant must first establish that the delay on the part of a plaintiff in the prosecution of the claim has been inordinate. If it establishes that the defendant must then establish that the delay has been inexcusable. If the defendant establishes, or if it is agreed, that the delay is 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. (per Hamilton C.J. in Primor at para.(e) on p. 475)".

15. As regards the balance of justice, Barniville J. noted in *Gibbons* (at para. 82) a list of factors which the Court was entitled to consider in determining this issue as set out by Hamilton CJ. in *Primor*. These include matters such as basic fairness of procedures and the effect of any prejudice on the proceedings.

16. Arising from the case-law reviewed so fully in *Gibbons* and by way of summary it can be said that when assessing where the balance of justice lies for the purposes of considering the third limb of the *Primor* test, it is necessary for the Court to take into account a wide range of factors the nature of which will vary depending on the facts of a particular case. The onus to establish that the balance of justice lies against permitting the proceedings to continue rests on the moving party. Addressing the treatment of the applicable test in the case-law since *Primor* in his judgment in *Cave*, Collins J. sought to emphasise a number of points in an extensive passage (at para. 36 of his judgment) opened during argument before me. In particular, he emphasized that an order dismissing a claim is a far-reaching one and that it would seem to follow that such an order should only be made in circumstances where there has been significant delay and where, because of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. He observed:

"the court must be satisfied that the "the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be [.]proportionate and [.]just"

17. Collins J. further focussed on the fact that the question of prejudice must be the forefront of the Court's considerations when weighing where the balance of justice lies, albeit that prejudice is not confined to "fair trial" prejudice. He added that the absence of any specific

prejudice or concrete prejudice may be a material factor in the court's assessment even though general prejudice may suffice. He reiterated that assertions of general prejudice must have a sufficient evidential basis and fall to be carefully and fairly assessed. Only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the plaintiff is responsible ought to be considered in this context. The jurisdiction is not punitive or disciplinary in character. Having elaborated on points he wished to emphasize in the case-law, Collins J. observed the risks of a tick box approach and overcorrection before concluding as follows:

“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.”

18. Different points of emphasis are taken by the parties in respect of the growing volume of delay jurisprudence. The Defendant and moving party focusses on the importance of oral evidence in this case with reference to cases such as *O'Reilly v. National Document Management Group Ltd. & Anor.* [2022] IEHC 37. Weight is also attached to the inherent public interest in ensuring the timely and effective administration of justice as recognised in *Doyle v. Foley* [2022] IECA 193.

19. In responding to the application on behalf of the Plaintiff reliance is placed on cases supportive of the fact that personal circumstances, including the absence of resources, are relevant factors which may be weighed by a court in considering excusability of delay and the balance of justice. Counsel for the Plaintiff cited the decisions of Pilkington J. in *Grant v. Minister for Communications, Marine and Natural Resources* [2019] IEHC 468 and Ferriter J. in *Treanor v. Nutech Renewables Ltd.* [2022] IEHC 36, both cases in which weight was attached to the fact that the Plaintiffs were ready to set the cases down for hearing as factors weighing against the making of a dismissal order. The Plaintiff places great importance on the fact that these proceedings would have concluded in May, 2020 but for the intervening global Pandemic.

APPLICATION OF PRINCIPLES

Whether Delay Inordinate

20. Quite properly the Plaintiff does not dispute that the delay in question in these proceedings is inordinate. Nothing in the nature of this claim warranted a time-frame of more than 13 years before progressing the case to a concluded hearing. While the delays apparent in this case are clearly inordinate, I would observe that delay can be a two-way street. In this case the Defendant contributed to delay and I note particularly the period taken to complete the Defendant's discovery. The most striking period of delay for the purposes of this application, however, is the final period since the Summer of 2020, following the abortion of the second hearing date by reason of the COVID-19 Pandemic, during which period the Defendant's solicitor corresponded requesting a response in relation to the Plaintiff's intention to apply for a fresh date for hearing without any response from the Plaintiff's solicitors.

Whether Delay Inexcusable

21. The parties join issue on whether the inordinate delay in this case is excusable. Focussing on the period since May, 2020 when no steps have been taken to progress the case to hearing and determination, the Defendant does not consider that the reasons offered in terms of loss of employment with implications for the Plaintiff's ability to fund the litigation and reliance on the sale of her parent's property constitute acceptable explanations. The absence of supporting documentation in relation to the loss of employment and the attempts to sell her parents' property is highlighted on behalf of the Defendant. It is also pointed out, however, that had any of these difficulties been communicated to the Defendant, the within application might have been avoided.

22. For her part the Plaintiff attaches significance to the requirement to change solicitors which resulted in delay as a circumstance which excused personal culpability of the Plaintiff for delay given that the Plaintiff's former solicitor was ultimately struck off. She refers to her personal circumstances and specifically her lack of resources, the fact that this case has already been listed for hearing on two occasions which distinguishes it from most cases in which applications of this nature are successfully made and the fact that the case is now ready to proceed.

23. Noting that no delay point was taken prior to the second hearing date in May, 2022 and focussing of the inordinate delay since then, I accept that the fact that two hearing dates were given to this case, that delays were contributed to since then by COVID-19 and that a Notice of Intention to Proceed has now been served are all factors which tend to mitigate the Plaintiff's position. I am at a complete loss to understand, however, why the Plaintiff's solicitors entirely ignored a whole series of letters spanning a period of some twenty months prior to the issue of the within proceedings. I appreciate that the Plaintiff had a resource issue as explained by her on affidavit but I am not satisfied that such an issue can operate to excuse delay in the absence of the basic courtesy of a response to the Defendant's solicitor's correspondence throughout the period in question.

24. It is not open to the Plaintiff to embark on proceedings and bring them to hearing but then unilaterally take no further steps for reasons not communicated to the other party to the litigation. The absence of any communication from the Plaintiff's solicitors in response to this correspondence over a protracted period not unreasonably prompted the question of whether the Plaintiff was intent on pursuing her proceedings at all but even this question was not replied to. No attempt at an explanation has been made for the failure to respond to this correspondence. To my mind this absence of response cannot be simply addressed by general reliance on resourcing issues. Accordingly, I am not satisfied that a proper explanation for the final period of inordinate delay identified in this case has been provided and I am not prepared to excuse that delay.

Where the Balance of Justice Lies

25. From the case as pleaded, there is no doubt that the Plaintiff's claim against the Defendant is for significant personal injury, loss and damage. If I were to accede to the application on behalf of the Defendant, the Plaintiff's claim would suffer enormous prejudice and she would likely be deprived of a remedy in respect of the wrongs claimed to have been done to her.

26. As against this, I am mindful of the fact that the Plaintiff's right to a remedy and access to the court protected under the Constitution is a right which is subject to a duty of expedition. There is no doubt but that the Defendant's right to expedition has been significantly affected. I do not accept, however, that expedition in the progress of these proceedings has been affected

by reason only of the delays for which the Plaintiff is responsible. The Defendant has contributed to delays as evident most especially from the length of time taken to make discovery.

27. Furthermore, while this is an oral testimony case, I am not satisfied that any specific prejudice has been identified arising from delay. There is no suggestion that any witness will no longer be available or that documents have been lost. The parties have been on notice of the claims made from shortly after the occurrence of the incident which gives rise to the proceedings. The PIAB authorisation issued within a short number of months of the incident itself. Accordingly, the Defendant had an opportunity to investigate the incident at the time and to take witness statements while matters were fresh in witness memory. Reference was made in submissions to the fact that contemporaneous statements are disclosed as having been taken in the discovery material (which was not before me).

28. It seems to me that the fact that the Defendant was made aware of the incident at the time of its occurrence (or soon thereafter) and is aware of a claim since shortly afterwards mitigates the prejudice which the Defendant claims to apprehend in relation to faded memories. As pointed out on behalf of the Plaintiff this was a single and dramatic event involving a fall down a stairs in a school. It may be distinguished from cases involving evidence regarding a course of dealing, a series of transactions or personal interactions which evidence I would expect to be more affected by the passage of time. Discovery has been made by both parties and while affidavits of discovery are not before me, it appears that contemporaneous material exists independently of witness recollection. This reduces the risk of injustice arising from diminished witness recall.

29. On an application of the principles identified in the case-law since *Primor* and taking due cognisance of the fact that an order dismissing a claim is a far-reaching one which carries with it enormous prejudice for the Plaintiff whose claim is dismissed, I am not satisfied that the delays identified in this application are such as to cause real or actual prejudice to the Defendant which, on a proportionate assessment of the competing circumstances, is sufficient to tip the balance of justice in favour of a dismissal. In terms of wider balance of justice considerations, I am not satisfied that delays up to the summer of 2020 are properly attributable to a period of inordinate and inexcusable delay for which the Plaintiff alone is responsible. In

the context of the overall conduct of the proceedings, this final period of inordinate or inexcusable delay is not at a level which would justify an order dismissing proceedings.

30. Following a careful assessment of all the relevant facts and circumstances in this case, I am not satisfied that permitting the claim to proceed would result in real and tangible injustice to the Defendant. The most significant factor weighing against dismissal on my assessment of the competing facts and circumstances in this case is the fact that the case has already been twice listed for hearing and is ready to proceed. As it has been twice listed for hearing, the Defendant has already or should have already marshalled evidence in defence of the Plaintiff's claim. Despite this the Defendant does not point to any element of specific prejudice arising from delay in the Affidavits grounding this application or in submissions before me. I am not persuaded that the hardship of denying the Plaintiff access to a trial of her claim is, in all the circumstances, proportionate and just. I am satisfied that the balance of justice is not clearly against allowing the claim to proceed.

CONCLUSION

31. For the reasons stated, I refuse to make an order dismissing the Plaintiff's proceedings on grounds of inordinate and inexcusable delay being satisfied that this delay has not so prejudiced the Defendant as to tip the balance of justice against allowing the case to proceed. There is, however, an imperative for steps to be taken without any further delay to secure a hearing date for these proceedings. I will hear the parties in respect of any consequential matter but my preliminary view is that the non-response of the Plaintiff's solicitor to correspondence from the Defendant's solicitor over a twenty-month period is a factor which cannot be condoned or excused and should be reflected in the terms of any cost order I might make in respect of this application.

CHRONOLOGY: APPENDIX A

Personal Injuries Summons	11 th May 2012
Appearance	6 th June 2012
Notice for Particulars from Defendant	5 th June 2012
Personal Injuries Defence	30 th October 2012
Affidavit of Verification sworn by the Defendant	20 th November 2012
Notice of Motion by Defendant to join Third Party	28 th November 2012
Replies to Notice for Particulars by Plaintiff	25 th February 2013
Notice of Trial	13 th March 2012
Notice of Motion by Defendant for Discovery	7 th July 2014
Order for Discovery by Plaintiff	7 th July 2014
Notice of Motion for Strike Out for failure to make discovery	27 th April 2015
Notice of change of solicitors	12 th May 2015
Order of the Master to extend time for discovery by Consent	19 th May 2015
Affidavit of Discovery by Defendant	12 th February 2016
Notice of change of solicitor	22 nd February 2017
Notice of intention to proceed	23 rd February 2017

Request for discovery letter CW&P to Harrison O'Dowd Solicitors	12 th April 2017
Service of Notice of Motion seeking Discovery from Defendant.	25 th July 2017
Order for Discovery by Defendant	18 th December 2017
Notice of intention to proceed	7 th March 2019
Additional particulars of Personal Injury	11 th June 2019
Discovery affidavit sworn by the Defendant	20 th June 2019
Schedule of witnesses/Disclosure of reports and statements (Plaintiff) .	7 th January 2020
Schedule of witnesses/Disclosure of reports and statements (Defendant) .	8 th January 2020
Notice to produce (Plaintiff)	29 th January 2020
Amended Schedule of witnesses/Disclosure of reports and statements (Plaintiff)	30 th January 2020
Amended Schedule of witnesses/Disclosure of reports and statements (Plaintiff)	4 th February 2020
Hearing date #1	4 th February 2020
Hearing date #2	12 th May 2020
Amended Schedule of witnesses/Disclosure of reports and statements (Defendant)	7 th July 2020
Notice of Motion to strike out/dismiss for want of prosecution	2 nd August 2020
Motion booklet (Defendant)	10 th November 2020
Affidavit of plaintiff sworn	17 th January 2023

Notice of intention to proceed

24th January 2023

Second affidavit of Robert Laffin, solicitor
for the Defendant, sworn

18th January 2023