

APPROVED

[2023] IEHC 46



THE HIGH COURT

2010 No. 7478 P

BETWEEN

CATHERINE SHEEHAN

PLAINTIFF

AND

CORK COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 February 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 take the form of a personal injuries action by an employee against her employer. In brief, the employee alleges that she endured “*significant emotional suffering*” as a result of a “*flawed*” disciplinary investigation carried out by her employer, Cork County Council.

NO REDACTION REQUIRED

2. The principal events giving rise to the personal injuries action occurred between March 2006 and May 2008. The within proceedings were instituted on 6 August 2010. As explained presently, there has been an inordinate and inexcusable delay in the prosecution of these proceedings since at least October 2013. As of that date, the pleadings were closed, and the process of the discovery of documents had been completed. Yet the employee, as plaintiff, has taken no steps since that date to set the matter down for trial.

LEGAL PRINCIPLES GOVERNING APPLICATION TO DISMISS

3. 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."

4. 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.

5. 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.”

6. 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.
7. 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.”

8. 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.”

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

CHRONOLOGY

10. The key events in the chronology are set out in tabular form below:

April / May 2006	Disciplinary investigation commences
28 April 2008	Letter setting out findings sent to plaintiff
6 May 2008	Plaintiff absent from work on “ <i>stress leave</i> ”
4 August 2009	Plaintiff returns to work
6 August 2010	Personal injuries summons issued
25 August 2010	Appearance entered by defendant
7 October 2010	Defendant’s notice for particulars
27 May 2011	Replies to notice for particulars
28 September 2011	Order extending time for delivery of defence
7 November 2011	Defence delivered
9 April 2013	Defendant’s motion for discovery
4 June 2013	Order for discovery against plaintiff
27 August 2013	Notice of trial served by defendant
27 September 2013	Plaintiff’s affidavit of discovery
9 October 2013	Plaintiff’s supplemental affidavit of discovery
2 March 2017	Defendant’s motion re: expert reports
31 March 2017	Schedule of witnesses delivered by plaintiff
3 April 2017	Motion re: expert reports struck out
11 September 2018	Notice of change of solicitor on behalf of plaintiff
17 December 2021	Defendant files motion to dismiss proceedings
21 March 2022	Order allowing plaintiff’s solicitor to come off record
30 January 2023	Hearing of motion to dismiss proceedings

(1). INORDINATE DELAY

11. There has been inordinate delay in the prosecution of these proceedings since at least October 2013. As appears from the chronology above, as of that date, the pleadings were closed, and the process of the discovery of documents had been completed. Yet the plaintiff has taken no steps since that date to set the matter down for trial. This represents a delay of some eight years when measured to

the date upon which the defendant filed its motion to dismiss the proceedings. Even as of the date of the hearing of the motion to dismiss (30 January 2023), the plaintiff had still not evinced any intention to set the matter down for trial.

12. A delay of some eight years is inordinate in the context of a personal injuries action. As discussed at paragraphs 15 and 16 below, the legislative intent is that such proceedings should be pursued with reasonable expedition.

(2). INEXCUSABLE DELAY

13. The plaintiff has not sought to justify the delay. Rather, the plaintiff has conceded on affidavit that the delay is both inordinate and inexcusable. This concession is sensibly made. It is apparent from the uncontradicted evidence filed by the plaintiff's former solicitor, in the context of the latter's application for leave to come off record, that the solicitor has been unable to obtain instructions from the plaintiff since the year 2015. The solicitor has exhibited a series of letters to the plaintiff, spanning the period October 2015 to January 2022, seeking instructions without avail. From February 2020 onwards, the solicitor had expressly warned the plaintiff of the risk that the defendant would seek to strike out the proceedings for want of prosecution.

(3). BALANCE OF JUSTICE

14. 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 3 above,

and in the subsequent case law discussed at paragraphs 5 *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.

15. 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.
16. 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.

17. 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 thirteen years, i.e. the entirety of the period of time that has elapsed since the events of 2006 to 2008 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 trial of the action and the index events. 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.
18. On the facts of the present case, these proceedings were ready for trial by October 2013. 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 within twelve months of that date. Instead, and in consequence of this inordinate and inexcusable delay, an action, which could and should have been heard within six years of the index events, has been delayed unnecessarily for years. It seems unlikely that the trial of the action could now take place until the end of 2023, at the very earliest, having regard to the lead time in the Personal Injuries List. It

is the effect of this additional delay of some eight to nine years which must be assessed.

19. 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. These proceedings relate to the conduct of a disciplinary investigation in respect of the plaintiff. The gravamen of the plaintiff's claim is that the conduct and outcome of the disciplinary process was flawed and that this resulted in her enduring "*significant emotional suffering*". The defendant has filed a full defence. 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 during the period 2006 to 2008. The outcome of the proceedings will turn, in large part, on oral evidence. The trial judge will have to adjudicate on what was said at meetings which took place more than fifteen years ago.
20. 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 fifteen 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 2014 but for the inordinate and inexcusable delay on the part of the plaintiff. The lapse of a further eight to nine years will have diminished the witnesses' recollection of events.
21. The defendant's ability to defend the proceedings is further prejudiced by the fact that one of the key protagonists, the former personnel officer, is now retired and is not in good health.

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 her claim. A decision to dismiss the proceedings will thus engage the plaintiff's constitutional right to litigate, i.e. her 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. Here, the plaintiff has had more than ample opportunity to pursue her claim for personal injuries. The plaintiff had the benefit of professional legal representation and her claim had been ready for hearing by October 2013. For reasons which have never been properly explained, the plaintiff did not pursue the matter to hearing and ceased to provide instructions to her then solicitor. The plaintiff was expressly warned, as early as February 2020, of the risk that the defendant would seek to strike out the proceedings for want of prosecution. Despite all of this, the plaintiff took no steps to bring the action on for hearing. Even now, the plaintiff has not indicated any intention to take such steps.
26. 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 at paragraphs 18 to 21 above. The plaintiff only has herself to blame for the loss of the opportunity to pursue her claim.

CONCLUSION AND PROPOSED FORM OF ORDER

27. 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. In particular, the operative delay has compromised the capacity of the court of trial to adjudicate fairly on the personal injuries action.
28. 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 motion as against the plaintiff. If either side wishes to contend for a different form of order, they will have an opportunity to make oral submissions on 21 February 2023 at 10.30 am. If more convenient to the parties, the hearing can be remote rather than in-person.

Appearances

The plaintiff appeared as a litigant in person
Paul Twomey for the defendant instructed by Ronan Daly Jermyn

Approved
Gemma S. Mans