

**THE HIGH COURT
JUDICIAL REVIEW**

[207/2000 JR]

BETWEEN

NOELLE O'CONNOR

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

AND

THE MINISTER FOR EDUCATION AND SCIENCE

AND

THE MINISTER FOR HEALTH AND CHILDREN

AND

IRELAND AND THE ATTORNEY GENERAL

AND

THE CHILD AND FAMILY AGENCY

RESPONDENTS

JUDGMENT of Ms. Justice Reynolds delivered on the 23rd day of October, 2019

Introduction

1. This is an application to, *inter alia*, re-enter the within proceedings which were struck out by Order of Quirke J. dated 22nd May, 2006.
2. Before dealing with the merits or otherwise of the application, it is necessary to set out the factual background to the proceedings.

Factual Background

3. The applicant was born on the 9th August, 1984 and is now aged 35. The applicant has suffered from psychological and psychiatric difficulties from a young age and was formerly in the care of the first named respondent pursuant to an order of the High Court.
4. Judicial review proceedings were commenced on her behalf against the respondents herein in 2000 seeking declaratory and other ancillary reliefs. In essence, the applicant claims that the respondents failed to ensure that an appropriate placement was provided for her in a high support unit during her time in care having regard to her particular special needs.
5. Leave was granted by order of the High Court dated 27th April, 2000. Thereafter, a motion issued on foot of that Order seeking, *inter alia*, an order providing for a residential placement for the applicant in a suitable high support unit together with the appropriate supports.
6. The applicant was initially detained in the care of the Eastern Regional Health Board in Oberstown Girls Centre before she was subsequently transferred to Ballydowd Special Care Unit in September, 2000. A Guardian *ad litem* was appointed at that time.
7. The proceedings were listed for hearing in July 2002 but owing to the applicant's fragile, psychological and psychiatric state, were unable to proceed. In the circumstances, they were adjourned generally with liberty to re-enter.

8. In May, 2003, the High Court made an order discharging the Guardian *ad litem* and granted the applicant liberty to proceed in her own name having attained her majority.
9. In March, 2006, the Guardian *ad litem* issued a motion for his costs. It appears common case that the application was not served upon the applicant or her legal advisers.
10. At the hearing of the motion, an order was made providing for the Guardian's costs and the proceedings were struck out. The order erroneously recites that the applicant was present in court.
11. In December, 2008, an application was made under the slip rule by the Guardian *ad litem* seeking to have the order amended inserting the Guardian in place of the applicant in respect of the order for costs in circumstances where an error arose on the face of the order. That amendment was granted but the order erroneously continued to recite that counsel for the applicant was present on the day the proceedings were struck out.
12. In February, 2017, the applicant's solicitor issued the within motion seeking liberty to re-enter the within judicial review proceedings together with other ancillary orders in circumstances where no final order was ever made in the presence of the applicant's solicitor or counsel.
13. Many of the original reliefs sought by the applicant are of no relevance in circumstances where she is no longer a minor. The primary outstanding relief claimed on her behalf is that of damages.

The Applicant's Position

14. The application is grounded on a number of affidavits sworn by Pól Ó Murchú, solicitor, who has at all times been instructed by the applicant in relation to the proceedings herein.
15. In his affidavits, a full history of the orders previously granted in the within proceedings have been set out as follows: -
 - (a) 27th April, 2000, Order of Finnegan J. granting leave to issue the within judicial review proceedings.
 - (b) 3rd May, 2000, 7th June, 2000 and 28th June 2000, Orders of Kelly J. directing that the applicant be detained at Oberstown Girls' Centre, Lusk, Co. Dublin.
 - (c) 24th August, 2000, Order of Herbert J. directing that the applicant be transferred to Ballydowd Special Care Unit on 11th September, 2000.
 - (d) 25th August, 2000, Order directing the Commissioner and members of An Garda Síochána to search for and arrest the applicant without warrant and to detain her in Oberstown.
 - (e) 30th November, 2000, Order of Kearns J. directing a phased return of the applicant to Ballydowd.

- (f) 8th March, 2001, Order of Kearns J. directing the applicant be transferred from Ballydowd to St. Brendan's Psychiatric Hospital.
 - (g) 5th April, 2001, an Order directing the transfer of the applicant from St. Brendan's Psychiatric Hospital to James Connolly Memorial Hospital together with the detention of the applicant pursuant to the Mental Treatment Act.
 - (h) 31st May, 2001, an Order granting liberty to the applicant to amend her Statement of Grounds.
 - (i) 4th July, 2002, Order of O'Caomh J. adjourning the proceedings generally with liberty to re-enter.
 - (j) 29th May, 2003, Order of Kearns J. discharging the Guardian *ad litem* and granting liberty to the applicant to proceed in her own name.
 - (k) 22nd May, 2006 Order of Quirke J. amending the title of the proceedings to allow the Health Service Executive be substituted as the first named respondent in lieu of the Southern Area Health Board and thereafter striking out the proceedings.
 - (l) 5th December, 2008, Order of O'Neill J. granting liberty to amend the order dated 22nd May, 2006 to substitute incorrectly identified parties and dates.
16. In response to the within application, each of the respondents filed replying affidavits objecting to the proceedings being re-entered on the grounds of delay. Further affidavits were filed by Mr. Ó Murchú on behalf of the applicant dealing with the issue of delay on a without prejudice basis, in circumstances where it is contended that there is no application before the court to dismiss the claim for want of prosecution, and without prejudice to the submission that such an application should be brought at the close of the pleadings herein.
17. In dealing with the delay issue, it is contended on behalf of the applicant that the delay in prosecuting the within proceedings was caused by reason of the applicant's psychological and psychiatric difficulties which were caused by reason of the actions of the respondents. Further, it is submitted that the applicant had, on an ongoing basis since 2002, with some interruptions, been unable to manage her affairs and therefore not in a position to prosecute her claim herein.
18. Paragraphs 12-19 of Mr. Ó Murchú's affidavit dated 27th April, 2018 elaborates upon the medical grounds relied upon and exhibits a number of medical reports.
19. Mr. Ó Murchú avers that the applicant instructed him to advance the within proceedings in early 2016 and he thereafter bespoke the High Court file from the Central Office. Upon receiving all orders on the file in February, 2016, he became aware that the proceedings had in fact been struck out in or around May 2006. The within application issued in February 2017 seeking to have the proceedings re-entered to enable the applicant to

pursue her claim for damages. A draft intended Statement of Claim was exhibited in the original grounding affidavit dated 10th February, 2017.

20. In a further supplemental affidavit, Mr. Ó Murchú concedes that he had in fact received a copy of the Order dated 22nd May, 2006 (striking out the proceedings) in December 2013, in excess of three years before the application was made to re-enter the proceedings.

The Health Service Executive's Position

21. The affidavit of A.B. sworn on the 5th July, 2017, sets out the reasons for its opposition to the within application and the specific prejudice arising for the first named respondent should the proceedings advance further. She avers that having conducted a preliminary review of possible witnesses that would be available to give oral evidence, it is apparent that at least two material witnesses are now deceased, a number are retired and would therefore be unavailable and a number are untraceable. In circumstances where the proceedings commenced in 2000, it is contended that recollections of events and ability to give oral evidence will be severely compromised at this remove.
22. A.B. further avers that the applicant disengaged with the services of the first named respondent in May 2004 following her discharge from James Connolly Memorial Hospital against medical advice. The first named respondent was not made aware of any ongoing difficulties the applicant may have had as set out in the medical reports exhibited in Mr. Ó Murchú's affidavit and no material representations were made by the applicant or her solicitor in relation to these proceedings from 2005 until 2017 when the motion issued. It is contended that the first named respondent will be at an evidential deficit in that no contemporaneous reports exist on its behalf.
23. In summary, the position advanced on behalf of the first named respondent is that the delay in the within proceedings is both inordinate and inexcusable in circumstances where the applicant's own delay operates from the date the proceedings were adjourned generally with liberty to apply in July 2002, being a delay of approximately 15 years before any further steps were taken in the proceedings. The first named respondent posits that it is severely prejudiced in mounting an adequate defence to the claim for damages due to the passage of time.

The position of the second, third, fourth and fifth respondents (the State Parties)

24. The State Parties to the proceedings put in a Statement of Opposition on 14th June, 2000. The former Northern Area Health Board, originally the first named respondent filed opposition papers on the 25th June, 2000 but the said party was substituted by order dated 22nd May, 2006.
25. The State Parties oppose the within application on the grounds of delay. The principal arguments set out in a number of affidavits, filed on behalf of the State Parties, can be summarised as follows: -
 - (a) The parties contend that there is insufficient and inadequate explanation provided by the applicant for the extraordinary delay in progressing the within proceedings.

- (b) A core material witness from the Department of Education is now deceased, thus causing prejudice in defending the proceedings.
- (c) The parties have been further prejudiced in circumstances where in the ordinary way, were a claim for damages being pursued in a timely manner, it would have been open to them to seek to have the applicant medically/psychiatrically examined for the purposes of such litigation. It is contended that this can no longer be done at a time proximate to the events complained of.
- (d) Despite extensive searches of records and archive records held by the parties, it is apparent that at this remove of time the State Parties face insurmountable difficulties in this regard. In particular, the relevant period pre-dates the digitisation of records, occurred before the re-organisation of the various Departments of State and indeed the establishment of various bodies providing the relevant services to young people.
- (e) It is further contended that at this remove of time memories of any available witnesses who might be identified would be greatly diminished and unreliable.

The Child and Family Agency's Position

- 26. By way of preliminary objection, the Child and Family Agency contends that it is a stranger to the matters complained of in the within proceedings, having only been established in 2014. Its predecessor in title was substituted as a party to the proceedings by order of the court dated 22nd May, 2006, and at the time the proceedings appear to have been struck out.
- 27. Again similar arguments are proffered on its behalf in relation to the delay issue particularly having regard to the fact that it is almost fifteen years since the applicant's last involvement in the case and in circumstances where she had the benefit of legal advice throughout.
- 28. Further, it relies on the medical report of Dr. Paul McQuaid, dated 17th December, 2014 wherein he was specifically instructed by the applicant's solicitor to provide an opinion in relation to the applicant's capacity. Dr. McQuaid reported that "Noelle had the capacity and fitness to instruct and maintain High Court Proceedings from the period of her 16th birthday, being the 9th August, 2000 to the present". It is submitted that this negates the assertion made by Mr. Ó Murchú that the applicant had been unable to progress her claim due to her inability to manage her affairs.
- 29. The Child and Family Agency maintains that it is severely prejudiced by the delay on the part of the applicant in prosecuting her proceedings in a timely fashion.

Application to Re-Enter

- 30. The within application comes before this Court in somewhat unusual circumstances wherein the proceedings were adjourned generally with liberty to re-enter at the behest of the applicant in July 2002, but thereafter were formally struck out in circumstances where the applicant claims she had not been served with the application that precipitated

that order. However, there is no dispute but that Mr. Ó Murchú became aware that the proceedings had been struck out in December, 2013 and indeed it is likely that this precipitated the request to Dr. McQuaid to provide an opinion as to the applicant's capacity to maintain the within proceedings.

31. In any event, the application now is to re-enter the proceedings on behalf of the applicant and each of the respondents is objecting on the grounds of delay. In the normal course, the issue of delay in prosecuting proceedings is considered in the context of an application by one of the respondents to strike out the proceedings. It is contended on behalf of the applicant that this is the appropriate course to be adopted with any such application being brought at the close of the pleadings herein. Further it is submitted that any such application should be brought at the close of the pleadings herein.
32. That submission does not find favour with this Court in circumstances where it is clear that the Court must have regard to the prolonged period of time that has elapsed since the applicant's last participation in these proceedings in July, 2002 and February, 2017 when the motion herein issued, i.e., a delay of almost 15 years, in considering the within application.
33. There is an onus on an applicant to re-enter proceedings in a timely fashion to ensure the fair and proper administration of justice.

Delay

34. There is no dispute between the parties in relation to the relevant principles applicable to the delay argument which have emerged from two different strands of jurisprudence.

In *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, Finlay P. set out the following principles: -

- "(1) Inquiry should be made as to whether the delay on the part of the person seeking to proceed has been 'inordinate' and 'inexcusable'.
- (2) Even where the delay has been inordinate and inexcusable, the court must exercise its discretion to decide whether the balance of justice is in favour or against the case proceeding.
- (3) Where a party must to an extent be vicariously liable for the inactivity of his/her solicitor, the litigant's personal blameworthiness is material to the exercise of the court's discretion."

35. The Rainsford's principles were approved and expanded upon by the Supreme Court in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459, Hamilton C.J., having reviewed the relevant authorities, summarised the principles to be applied 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 and 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.

36. The *Primor* principles have been affirmed and endorsed in numerous decisions. In applying the principles, the court must first decide if there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting their action. It is only if the court so finds that it is required to decide whether the balance of justice rests in favour of dismissing the case or in allowing it to proceed. In determining this issue, the court must carry out a balancing exercise based on a consideration of all of the relevant circumstances having regard to the facts of the case. Prejudice and unfairness to the defendant or the substantial risk that it is not possible to have a fair trial, are amongst the factors identified in *Primor* to which the court must have consideration.

Element of Inordinate Delay

37. Clearly this Court's first consideration under the *Primor* principles is whether there has been inordinate delay by the plaintiff in the prosecution of proceedings. In the instant case, there can be no dispute but that a delay of over fifteen years from when the

proceedings were adjourned generally with liberty to re-enter is undoubtedly inordinate. Indeed, there appears to be little dispute between the parties on this issue.

Element of Inexcusable Delay

38. In the present case, it is submitted that the delay was excusable in light of the circumstances advanced on the plaintiff's behalf, specifically her health difficulties. However, it is clear from the medical reports exhibited on the plaintiff's behalf that she had got on with her life during the period of the delay. It is notable that during this period she married, gave birth to her second child and subsequently had to deal with the breakdown of her marital relationship. Dr. McQuaid, in his report dated 17th December, 2014, opines that she was capacious at all material times.
39. Further, the court is mindful of the fact that the applicant has at all times had the benefit of legal advice in circumstances where Mr. Ó Murchú has been her solicitor throughout this period.
40. These factors weigh heavily on this Court's considerations in determining that no reasonable or plausible explanation has been forthcoming by the applicant or her legal advisors which could account for or excuse the extensive delay in the within proceedings.

Balance of Justice

41. This test is comprehensively outlined in *Primor* wherein Hamilton C.J. set out the matters for consideration by the court in exercising its judgment on whether, in its discretion, on the facts the balance of justice is in favour or against allowing the case to proceed. When considering this issue the court is obliged to carry out a balancing exercise taking account of all the relevant circumstances and in particular the factors identified in *Primor*.
42. In the instant case, the respondents have set out on affidavit the specific prejudice that arises consequent upon the delay in the within proceedings as follows: -
 - (a) A number of material witnesses are now deceased, others are retired or untraceable.
 - (b) Witness testimony will be severely compromised with the passage of time.
 - (c) The respondents have been denied the opportunity to obtain contemporaneous medical reports and are at an evidential deficit in that regard.
 - (d) Further evidential difficulties arise due to loss of records in circumstances where the relevant period predates the digitisation of records.
43. In considering the foregoing, the court is satisfied that the extent of the delay has been such that it is not possible to have a fair trial and where the balance of justice is against the case proceeding. It is simply inconceivable that the respondents would be in a position to properly defend the within proceedings having regard to the foregoing.
44. The onus rests on a litigant to prosecute their proceedings consistent with the proper administration of justice. In the instant case, there is no doubt that the applicant

suffered health difficulties over the relevant period but this does not absolve the applicant of her responsibility to progress her proceedings. Indeed, it is clear that the applicant's solicitor continued to arrange for Medico-Legal assessments and reports over the years without taking any steps to ensure that the proceedings were progressed.

45. It was submitted on behalf of the applicant that the court is obliged to consider the absence of an application to dismiss the claim for want of prosecution. It is difficult to see how such an application could have been progressed in circumstances where the proceedings had already been struck out. Further, it is notable that the Child and Family Agency was not a party to the proceedings during that period. In all the circumstances, the court is satisfied that the delay in this case is entirely attributable to the actions or inactions on the part of the applicant herein.

The O'Domhnaill Principles

46. The second strand of jurisprudence emerged in *O'Domhnaill v. Merrick*, [1984] IR 151, whereby the court, in determining whether or not to dismiss a claim on the grounds of delay, is not required to find the plaintiff guilty of inordinate and inexcusable delay but merely must be satisfied that it is in the interests of justice to dismiss the case because the delay has resulted in a real risk that it will not be possible to have a fair trial and where the interests of justice require it.

47. Henchey J. in *O'Domhnaill* summarised the task for the court as follows: -

"In all cases, the problem of the court would seem to be to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend."

48. In applying these principles to the facts of the instant case, the court is obliged to take account of the psychological and psychiatric difficulties which the applicant undoubtedly encountered over the relevant period and her desire now to proceed with her claim for damages against the respondents.
49. However, the court must also have regard to the inevitable prejudice that would flow from allowing the case to proceed as already referred to above and the insurmountable difficulties for the respondents in that regard.
50. This Court is satisfied that the prejudice to the respondents is such that it firmly tips the balance in favour of refusing the application herein to re-enter the proceedings.

Conclusion

51. This is a difficult case in which the applicant maintains that the respondents failed to ensure that an appropriate placement was provided for her during her time in care over nineteen years ago.

52. The applicant is now aged 35 and many of the original reliefs sought by her are no longer relevant. The only outstanding issue is the claim for damages arising from events which occurred as far back as 2000.
53. This Court is mindful of the significant consequences which flow from its refusal to re-enter the within proceedings from the applicant's perspective. However, the court is obliged to apply the very clear principles which have emerged from the jurisprudence in dealing with the delay issue so as to ensure the fair and effective administration of justice. These require that a litigant must prosecute their proceedings in a timely fashion such that a defendant will not be unduly prejudiced by inordinate or inexcusable delay. The court is obliged to ensure that proceedings are conducted in a manner which will ensure the fair and proper administration of justice.
54. In the present case, the applicant has been guilty of inordinate and inexcusable delay in the manner in which she has pursued her claim and her failure in this regard has resulted in serious prejudice to the respondents in terms of their ability to defend the claim, such that the balance of justice favours the refusal of the relief sought.
55. In applying the principles in *O'Domhnaill*, I am satisfied that the same outcome is warranted.
56. In the circumstances, the application to re-enter is refused.