

THE HIGH COURT

[2022] IEHC 323

[Record No. 2014/9856P]

BRID BRANNACH

PLAINTIFF

AND

BROTHERS OF CHARITY SERVICES GALWAY

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 31st day of May, 2022.

INTRODUCTION

1. The Defendant seeks to dismiss the Plaintiff's claim for want of prosecution pursuant to the inherent jurisdiction of the Court and/or for inordinate and inexcusable delay and/or Order 122, rule 11 of the Rules of the Superior Court.

BACKGROUND

2. The Plaintiff's claim is for damages for personal injuries caused by bullying and harassment in the workplace. The Plaintiff began employment with the Defendant on a temporary basis in or about April, 1993 and was made permanent on or about May, 1995.

3. The Plaintiff's work-related issues which resulted in the bringing of these proceedings as pleaded date to events occurring in July, 1997 when she raised an issue in relation to inadequate gender/number of staff to service users. She was subsequently the subject of a protracted workplace investigation in 2004 during which period she was suspended. The Plaintiff was subject to further various allegations during the term of her employment. In 2007, the Plaintiff was unable to continue with a three-day training due to injury and was subject to a complaint of misconduct consequent upon same. She was denied requests for leave and

required to work days that she was not rostered to work. In January, 2008, she raised concerns in relation to a service user at a meeting but was ignored by management. She attended with her GP following this meeting experiencing severe anxiety, fatigue and persistent insomnia and she was certified unfit for work. Unable to return to work, in April, 2008 she resigned from her position due to the difficulties she was encountering by reason of her work environment. She claims to have developed depression and to require long term hypnotics and anti-depressants to alleviate her symptoms.

4. It is the Plaintiff's case that she was not provided with a safe place of work, that there was a failure to investigate complaints made by her regarding the care of service users and that she was targeted for making complaints. She found her place of work and hours of work unilaterally changed and was wrongly accused of poor work practices and misdemeanours.

5. Two sets of proceedings were commenced in the Circuit Court in November, 2009 (by way of Ordinary Civil Bill and Personal Injuries Summons) but were consolidated by order and then transferred to the High Court in November, 2014.

6. A full Defence was filed in December, 2015, more than 6 years after the issue of proceedings. The Defence included allegations of contributory negligence as against the Plaintiff and a plea based on the Statute of Limitations. It was claimed that the Plaintiff had failed to invoke the Anti-Bullying Procedure or the Dignity at Work Policy.

7. A Motion to Dismiss by reason of delay was issued by the Defendant in this and in two related cases. The motions in the three cases travelled together and two of the three motions proceeded to hearing together, namely this case and the case of *Burke v. Brothers of Charity Services Galway (Record No. 2010/553P)*. The Plaintiffs in both proceedings were represented by the same firm of solicitors and correspondence in each case sometimes referred to the other proceedings. Judgements are being delivered together in both cases.

CHRONOLOGY

8. Insofar as is relevant to the questions I must determine, the following chronology provides an overview of the relevant timeline and steps taken in the more than twenty-three

years since the Plaintiff was first subjected to the treatment on foot of which she brings her claim.

Circuit Court Proceedings

Personal Injuries Summons	11 th of November, 2009
Ordinary Civil Bill	6 th of November, 2009
Circuit Court Appearance	14 th of May, 2010
Circuit Court Appearance	14 th of May, 2010
Notice for Particulars	11 th of October, 2010
Replies to Notice for Particulars	3 rd of April, 2013
Notice for Particulars	10 th of September, 2010
Replies to Notice for Particulars	3 rd of April, 2013
Affidavit of Verification of the Plaintiff	3 rd of April, 2013
Affidavit of Verification of the Plaintiff	3 rd of April, 2013
Order of the County Registrar for County Galway	11 th of November, 2013

High Court Proceedings

Plaintiff solicitors wrote to Defendant noting that no objection was taken by the Plaintiff to have the other 2 cases consolidated and heard at the same time	18 th of April, 2011
Solicitors for Defendant wrote to Plaintiff solicitors consenting to amending the PI Summons	2 nd of November, 2011
Plaintiff solicitor wrote to Defendant solicitor requesting a copy of the Plaintiff's contract of employment	2 nd of April, 2012, 1 st of May, 2012, 31 st of May, 2012, 16 th of July, 2012, 4 th of September, 2012, 25 th of October, 2012, 8 th of November, 2012, 15 th of November, 2013

Plaintiff contract of employment copy received under cover letter 20th of February, 2013

Plaintiff solicitor provided replies to particulars to Defendant solicitor and confirmed affidavit of verification would be furnished shortly 3rd of April, 2013

Plaintiff solicitor served Motion to consolidate the proceedings and transfer proceedings to the High Court on the Defendant 17th of April, 2013

Motion to consolidate and transfer of proceedings to the High Court was adjourned to the 27th of May, 2013 14th of May, 2013

Plaintiff solicitor requested a copy of a letter from the HSE setting out the Plaintiff entitlements under the Superannuation Scheme 25th of September, 2013

Plaintiff solicitor wrote to Defendant solicitor noting that they instructed a firm of Accountants to calculate the Plaintiff loss of earnings and pension entitlements 9th of October, 2013

Plaintiff solicitor served a copy of the Court Order dated 11th November 2013 on Defendant solicitors 2nd of December, 2013

Plaintiff solicitor served a Motion to have the matter adopted to High Court on the Defendant solicitor 13th of November, 2013

Order of the Master of the High Court 14th of November, 2014

Defendant's solicitor wrote to Plaintiff solicitor requesting the delivery of consolidated pleadings in the matter 14th of April, 2015,
28th of April, 2015,
12th of May, 2015,
29th of May, 2015

Plaintiff solicitor wrote to Defendant's solicitor confirming that they had been informed by the High Court Office that there was no requirement to serve consolidated proceedings	28 th of September, 2015
Defence to Consolidated Action delivered	15 th of December, 2015
Affidavit of Verification of Defence	15 th of December, 2015
Notice of Change of Solicitor [Defendant]	20 th of January, 2017
Plaintiff solicitor wrote to Defendant solicitor noting that they were providing Discovery in the 2 associated cases and requested that they indicate that they would provide similar Discovery	19 th of September, 2017
Plaintiff solicitor wrote to Defendant new solicitor noting that the matter was proceeding to trial and requested an affidavit of Discovery	17 th of November, 2017
New Defendant solicitor noted that there was no letter seeking voluntary Discovery on the file	20 th of November 2017
Plaintiff solicitor sent a letter of Voluntary Discovery to Defendant solicitors	1 st of December, 2017
In follow up correspondence it was pointed out that documentation requested was already in the possession of the Defendant given the requests in related cases of Doreen Burke and provided a further 21 days to provide an Affidavit of Discovery	2 nd of January 2018
Defendant solicitors wrote to Plaintiff solicitors noting that they were taking client instructions and asked for forbearance	19 th of January 2018
Defendant solicitors wrote to Plaintiff solicitor offering to provide some of the discovery sought	5 th of February 2018
Plaintiff solicitors sent letter to Defendant solicitor consenting to the categories offered	

and allowing a period of 4 weeks for the Affidavit of Discovery	22 nd of February, 2018
Defendant solicitors wrote to Plaintiff solicitor noting that their client was collating the necessary documents to comply with discovery	5 th of March 2018
Plaintiff solicitor wrote to Defendant solicitor threatening to report them to the law society for delaying with discovery	27 th of March, 2018
Defendant solicitors wrote to Plaintiff solicitor noting that discovery was only agreed on the 22 nd February 2018 and their client had not been tardy	3 rd of April 2018
Plaintiff solicitors wrote to Defendant solicitor noting that it had been a month since they had written indicating that they would have the affidavit of Discovery and would need to bring a motion if they did not receive same within 14 days	14 th of May, 2018
Plaintiff solicitor received an unsworn affidavit of Discovery	12 th of June, 2018
Plaintiff solicitor wrote to Defendant solicitor noting that they were yet to send both missing pages from the unsigned discovery and sworn affidavit of discovery	19 th of July, 2018
Plaintiff solicitor wrote to Defendant solicitor noting that the missing pages had not been provided and warned that a motion would issue	31 st of August 2018
Defendant solicitor wrote to Plaintiff solicitor noting that the affidavit was sent back and forth and the Defendant owing to typographical errors and hoped to have it within 2/3 weeks	3 rd of September, 2018
Defendant solicitor sent a sworn affidavit of discovery to Plaintiff solicitor	20 th of September 2018

Plaintiff solicitor wrote to the Defendant solicitor noting the missing material and sought an explanation for the missing pages 24th of September 2018

Defendant solicitor sent Plaintiff solicitor a letter noting that there were no missing pages but the gaps in numbering was a pagination error on their part 26th of September, 2018

Plaintiff solicitor wrote to Defendant solicitor suggesting mediators 8th of October 2018

Plaintiff solicitor wrote to solicitors for the Defendant requesting a response to their letter of 8th October 2019 6th of January 2020

Plaintiff solicitor sent a letter to Solicitor on record in a related case noting the difficulty contacting Professor O'Moore and enquiring if he had contact details for her

Plaintiff solicitor wrote to Defendant solicitor noting that they failed to respond to our previous letters regarding mediation stating that they intended to set the matter down for hearing and to apply for hearing date 21st of April 2020

Plaintiff solicitor wrote to solicitors for Defendant noting that they failed to respond to previous letters re: mediation 15th of May 2020

Plaintiff solicitor wrote to Defendant solicitor noting that they failed to respond to previous letters re: mediation 2nd of June 2020

Affidavit of Maria Dillon 16th of June, 2020

Plaintiff solicitor wrote to Defendant solicitor noting that they failed to respond to previous letters

Notice of Motion 25th of June, 2020

LEGAL PRINCIPLES

9. Both the inherent jurisdiction of the Court and jurisdiction deriving under O. 122, r. 11 of the Rules of the Superior Courts is relied upon by the Defendant in moving this application to dismiss for want of prosecution and delay. Order 122 rule 11 provides that in any cause or matter in which there has been no proceeding for two years from the last proceeding had, the Defendant may apply to the court to dismiss the same for want of prosecution, and on the hearing of such application the court may order the cause or matter to be dismissed accordingly or may make such order on such terms as to the court may seem just.

10. The law in relation to the dismissal of proceedings for want of prosecution and/or inordinate delay is well settled. In this case the Defendant relies on post-commencement delay but also points to the history to the incidents relied upon in the claim, some of which pre-date the issue of the within proceedings by more than ten years. While the Irish courts have traditionally treated pre and post commencement delay differently, it is acknowledged that in either case litigants and their advisors should be held to more exacting standards of expedition than in the past. A hardening of judicial attitudes to delay has long been signalled. In his well-known dicta in *Gilroy v. Flynn* [2004] IESC 98 Hardiman J. said (para. 17):

“[T]he assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one.”

11. The refinement of the approach of the Irish courts can be in part attributed to the jurisprudence of the European Court of Human Rights. In *Comcast v. Minister for Public Enterprise* [2012] IESC 50, Denham C.J. noted in the context of the European Convention on Human Rights that (at para. 52):-

“[I]n recent times there has been an acknowledgement that cases may not be let lie, in a laissez faire attitude, for the parties to move. There is a requirement to ensure that cases are progressed reasonably.”

12. Albeit that the principles are now well established, there is a recognition in the case-law that each case is different and so no hard and fast rules can be identified as to when a case will be dismissed on delay grounds. The need for a case by case assessment, albeit by reference to established criteria, was reiterated in the following terms by McKechnie J. in *Mangan v. Dockeray* [2020] IESC 67 (para. 109):

“109. In addition, it is worth repeating a few points which have consistently been made in the case law: -

- i) The ultimate outcome of a delay/prejudice issue must invariably depend on the particular circumstances of any given situation: “Every case is different. Factual resemblances are only of limited value”. (McBrearty at pg. 36)*
- ii) In cases where the court is essentially concerned with delay post the commencement of proceedings, it will view the obligation of expedition much more strictly where there has been a considerable delay pre-commencement. (McBrearty at pg. 25)*
- iii) Delay and certainly culpable delay on the part of a defendant may constitute countervailing circumstances which militates against a dismissal.*
- iv) The existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.*
- v) This latter point may be of very considerable significance, particularly in medical negligence cases as most treating doctors and certainly all consulted experts, will rely on such information for their evidence. (McBrearty at pg. 48)”*

13. Notwithstanding a clear tightening of standards in respect of delay over the last three decades, the decisions in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, both relied upon by the Defendant in its submissions, remain touchstone authorities for a statement of the principles in relation to post commencement delay. In *Primor* the principles were set out in the following terms (p. 460): -

“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.”

14. The difference between the *Primor* (post-commencement) and *O'Domhnaill* (pre-commencement) delay principles was addressed by Irvine J. (as she then was) in *Cassidy v. The Provincialate* [2015] IECA 74. With regard to the *Primor* principles, Irvine J. noted that the third limb did not require the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the Defendant seeking to engage the *O'Domhnaill* test (i.e., that it faces a significant risk of an unfair trial). Thus, if a Defendant establishes inordinate and inexcusable delay, it may then urge the court to dismiss proceedings having regard to a whole range of factors, including the relatively modest prejudice arising from that delay (See *Cassidy*, para. 36). Further, where a Defendant cannot establish culpable delay on the part of the plaintiff prior to the commencement of proceedings, the Defendant may nonetheless succeed in an application to dismiss the claim where he or she can establish on the balance of probabilities that there is a real and substantial risk of an unfair trial or unjust result.

15. The parties identified other relevant caselaw including *Desmond v. MGN* [2009] 1 IR 737 (Geoghegan J.), *Mannion v. Bergin* [2016] IECA 163 (Mahon J.); *McNamee v. Boyce* [2017] 2 I.L.R.M. 168 (Denham C.J.) as she then was); *Sweeney v. Keating* [2019] IECA 43 (Baker J.); *Cassidy v. Butterly & Ors.* [2014] IEHC 203 (Ryan J.); *South Dublin County Council v. CF Structures Limited* [2021] IEHC 5 (Allen J.); *Irish Water v. Hypertrust Ltd.* [2021] IEHC 323 (Creedon J.); *Mansfield v. Roadstone Provinces Limited* [2022] IEHC 223 (Bolger J.) and; *Bergin v. McGuinness* [2022] IEHC 151 (Dignam J.).

16. In *Sweeney v. Keating* [2019] IECA 43, having found inordinate and inexcusable delay in a failure to progress proceedings in the *Sweeney* case following the delivery of a Statement of Claim for a period of five years, Baker J. turned to consider the balance of justice in the following terms at para. 19:

“If the delay is found to be both inordinate and inexcusable, the court is then obliged to consider what is frequently described as the third leg of the Primor v. Stokes test, whether the balance of justice favours the dismissal of the action. The onus of proof shifts to a

plaintiff to establish the existence of countervailing circumstances which would warrant permitting the proceedings to proceed to trial (see the judgment of Fennelly J. in Anglo Irish Beef Processors Ltd v. Montgomery [2002] 3 IR 510). This is because the scales of justice at that point are weighed against the plaintiff who has been found guilty of inordinate and inexcusable delay. If the position was otherwise, there would be no point in a court engaging in an assessment as to whether the plaintiff had been guilty of inordinate and inexcusable delay. The court might just as readily commence its analysis of the application by deciding whether the justice of the case would favour permitting the action proceed to trial.”

17. When considering whether the balance of justice favours the dismissal or continuation of the proceedings, Baker J. noted that the Court should have regard, *inter alia*, to the factors identified in *Primor*, including the conduct of the parties, acquiescence and possible prejudice.

18. The first matter usually addressed by a court when considering where the balance of justice lies is the extent to which a Defendant has demonstrated he would be likely to be prejudiced if the proceedings were allowed to continue. Many of the authorities identified on behalf of the Plaintiff were addressed to the issue of prejudice. It is also well established that prejudice must be evaluated in the context of the issues in the case and the nature of the dispute. A material consideration is whether proof or defence of the claim is substantially based on documentary or oral evidence. A further factor is whether there was anything in the Defendant’s conduct which contributed to the delays or would militate against granting the reliefs sought. Thus, in *Bergin v. McGuinness* [2022] IEHC 151, Dignam J. relied on the fact that the Defendant bore some responsibility for parts of the delay and had not previously availed of mechanisms available under the Rules to move proceedings on to refuse an application to dismiss.

19. The Courts have also stressed the importance of prejudice being clearly articulated and have been critical of vague, generalised assertion. This notwithstanding, from her review of the authorities, in *Sweeney* Baker J. concluded that in a case where a Defendant has established inordinate and inexcusable delay, even moderate prejudice can tip the balance in favour of dismissal of the action. However, in *Irish Water v. Hypertrust Ltd.* [2021] IEHC 323, Creedon J. refused to dismiss on delay grounds in circumstances where no specific issues of prejudice by reason of a general decline in recollections had been identified. Relying on the decision of McKechnie J. in *Mangan (APUM) v. Dockery* [2020] IESC 67 (para. 110) where he said that

considerations of justice transcend all other considerations and “*imperfect justice is better than no justice*”, she concluded that she could identify no prejudice and that therefore justice would best be served by the action proceeding.

20. More recently, in *Mansfield v. Roadstone Provinces Ltd.* [2022] IEHC 223, Bolger J. found that delay in proceedings which issued in 2006 from 2009 when a defence was filed until the service of a notice of intention to proceed in March, 2019 whilst inordinate and inexcusable, did not warrant the dismissal of the proceedings because the prejudice it was claimed the Defendant would suffer was not adequately identified and there was, therefore, very little basis for the court to find the Defendant’s prejudice in having to defend a claim after so many years, outweighed the plaintiff’s prejudice. In the circumstances and noting that the matter was very close to being ready for trial, Bolger J. refused the Defendant’s application to dismiss on delay grounds. The balancing of justice test involves a weighing of different considerations but in *Cassidy v. Butterly & Ors* [2014] IEHC 203 the Court held that where it was found that a defendant who is unable to demonstrate prejudice and/or has not taken active steps to bring the case forward, that defendant may find it difficult to succeed in an application to dismiss a claim for want of prosecution.

21. In summary, therefore, in deciding on this application, I must decide whether there has been inordinate and inexcusable delay. Where inordinate and inexcusable delay is demonstrated, the proceedings may be dismissed where the balance of justice requires it. In terms of the balance of justice test, even moderate prejudice can tip the balance in favour of dismissal. Prejudice is evaluated in the context of factors such as the nature of the claim, the respective conduct of the parties, any contribution to the delay, the degree of specificity with which prejudice is identified including prejudice associated with the availability of witnesses and the impact on the defence of the proceedings together with the impact on the Defendant of protracted proceedings in its reputation or otherwise. Where I do not find inordinate and inexcusable delay, I must still consider whether there is a real or significant risk of an unfair trial and if satisfied that such risk is established and cannot be addressed through directions or other steps, I must dismiss the action.

EVIDENCE IN RELATION TO REASONS FOR DELAY

22. The delay in this case, as apparent from the chronology above, is self-evidently significant. Insofar as stress and bullying claims relate to a pattern of behaviour and recurring

treatment dating in this instance to 1997 and continuing up until April, 2008 when she resigned, it is clear that there is a delay of almost eleven years pre-commencement of proceedings. In my view, given the nature of bullying and harassment claims such as this one which are based on demonstrating a pattern of abusive behaviour, it would be difficult to classify the period of time over which the Plaintiff claims to have been subjected to wrongful treatment as a period of inordinate delay prior to commencing proceedings, certainly in advance of hearing the evidence. Such delay is, however, relevant in the overall scheme of things, both in determining whether there is a real risk of unfairness in permitting the proceedings to continue by reason of delay and also in assessing periods of delay post-commencement to determine whether they should be treated as inordinate.

23. As further apparent from the chronology above, despite the historic nature of the events relied upon to ground the claim, proceedings did not progress with expedition following their commencement. Notably there was a delay of some two and ½ years in replying to particulars (between October, 2010 and April, 2013) and no further step in the proceedings from the making of discovery in September, 2018 until the issue of the Motion to dismiss in June, 2020. However, it is also immediately apparent that delay was a two-way street with the Defendant contributing through the failure to deliver pleadings in a timely manner taking some six years for the delivery of a defence. Court orders were obtained in respect of discovery in the related proceedings and while no separate application was pursued in this case, the delays in finalising discovery in the related proceedings were replicated in this case. The Defendant has not demonstrated attention to the proceedings or a desire to expedite them in the manner in which its solicitors have dealt with correspondence, most recently evidenced in the repeated correspondence which the Plaintiff's solicitor sent in relation to mediation between October, 2018 and June, 2020 to which the Defendant never replied.

24. While the grounding affidavit sworn on behalf of the Defendant summarizes the history to the proceedings providing relevant dates, the only period of delay alluded to in the Defendant's grounding affidavit is the period from the last step in the proceedings which was identified as the filing of a Notice of Change of Solicitor on the part of the Defendant in January, 2017 and the motion in June, 2020, a period of 3 and ½ years.

25. In her replying Affidavit, the Plaintiff sets out in some detail the history to the proceedings and the various steps taken in the proceedings. It is clear from the Affidavit

evidence that the proceedings got bogged down in respect of particulars and discovery, albeit that the issues in relation to discovery were primarily driven through the related proceedings of *Burke v. Brothers of Charity Services Galway* (Record No. 2010/553P).

26. The Plaintiff further seeks to explain the delay by reference to attempts to procure expert reports. These efforts were primarily advanced in the *Burke* proceedings but on the basis that the same experts would be used in both cases. It appears from the correspondence in related *Burke* proceedings which is relied upon by the Plaintiff in these proceedings that from April 2018 to April 2021, the Plaintiff's solicitor wrote to two experts in the field of bullying, it taking almost two years to establish definitively that one was not prepared to act by reason of a conflict of interest. It would be fair to accept that there appears to have been a degree of hidden complexity in securing appropriate expertise which goes some way towards explaining delay.

27. Separately, the Plaintiff referred to endeavours to comply with Cross J.'s practice of requiring attempts to secure agreement to mediate before a case is set down for hearing (correspondence from October, 2019 totalling six letters in all over a period of nine months until the issue of the motion met with no response). In submissions, Counsel for the Plaintiff pointed to a judicial resistance to listing a bullying case for hearing unless the parties have been to mediation, save for good reason. The Plaintiff detailed on affidavit how repeated letters regarding mediation were met with no response from the Defendant's solicitors and then out of the blue, without any reference to this correspondence, a motion to dismiss on grounds of want of prosecution and delay issued in late June, 2020.

28. In submissions on behalf of the Plaintiff it is contended that the Plaintiff has not let her case lie. I accept from the explanation offered by the Plaintiff on affidavit that she at no time abandoned the prosecution of her proceedings. Certainly, matters progressed at a dilatory pace but not without attempts on the part of the Plaintiff to move things forward more quickly, albeit steps were more actively taken in the related proceedings of *Burke v. Brothers of Charity Services Galway* (Record No. 2010/553P). Delays of this nature are not only undesirable but are unacceptable having regard to requirements of expedition which arise under the Constitution and the European Convention on Human Rights. Notwithstanding what is said on behalf of the Plaintiff in respect of delay, I am satisfied that a delay in getting these proceedings on for hearing is both inordinate and inexcusable.

29. In view of the extent of the delay and the explanations offered which are not satisfactory, it is appropriate to proceed to consider whether the balance of justice lies in favour of dismissing the proceedings.

30. For all that there has been significant delay, the Affidavit sworn on behalf of the Defendant to ground the within application runs to eight paragraphs only. Other than a general description of the history to the proceedings, the Affidavit states as regards prejudice (at paras. 6 and 7) simply as follows:

“7. I say that the proceedings relate to events some of which are alleged to have occurred in excess of 20 years ago. I say that the Plaintiff has failed, refused, and/or neglected to progress the proceedings and, as a consequence thereof, I say the delay is inordinate and, in the circumstances, inexcusable.

8. I say that the Defendant is prejudiced by the delay and is entitled to a fair and public hearing within a reasonable timeframe pursuant to the provisions of Article 6 of the European Convention for Human Rights. I say that the proceedings herein amount to an improper and inefficient use of the legal process contrary to the effective administration of justice in the manner envisaged by Article 34.1 of Bunreacht na hEireann and the obligations placed on the State by Article 6 of the European Convention on Human Rights.”

31. These are the barest and most general of pleas. They are what might be described in the words of Baker J. in *Sweeney* (para. 28) as “*no more than bald averments, unsupported by evidence or details concerning these difficulties.*” No reference is made to any element of specific prejudice. In particular, there is no suggestion that any evidence or witness will be unavailable by reason of the passage of time.

32. In my view, the foregoing does not establish even “*moderate prejudice.*” Firstly, one might have expected that if recall were a problem there would have been an affidavit to that effect from the Defendant itself. Secondly, the delay in the case has to be looked at in the context of the Defendant not only acquiescing in the delay but contributing to it. It is clear from the chronology that the Defendant is responsible for significant periods of delay and at

no stage prior to the issue of motion to dismiss the proceedings agitated to progress proceedings. The Defendant's contribution to delay weighs heavily on the facts and circumstances of this case. It is of course true that where inordinate and inexcusable delay is demonstrated, the onus shifts to the Plaintiff to persuade the Court that the balance of justice is in favour of the proceedings continuing to conclusion (see *Sweeney*, para. 19) but in circumstances in which the Defendant has contributed to delays and has failed to take steps available to it to move proceedings along, it is in my opinion important that a Defendant set out in full fashion how it claims to have been prejudiced or why it is that the balance of justice is against proceedings being permitted to proceed.

33. The Plaintiff relies on the fact that no prejudice has been identified by the Defendant. It is submitted that any prejudice which may be alleged in respect of the deterioration of witnesses' memories ought to be ameliorated by records kept by the Defendant in relation to the various meetings had and procedures invoked. In this regard it is clear from the schedules to the Affidavits of Discovery filed in the *Burke v. Brothers of Charity Services Galway* (Record No. 2010/553P case which was heard together with this case and presumably also made in this case (albeit the Affidavits of discovery were not included with the papers) that this is a case in which documentation relevant to the issues in the proceedings exists. Accordingly, while this is a case in which undoubtedly oral evidence will play a role, it is clear that some documentary records are also available in aid of witness recall.

34. In considering where the balance of justice lies in this case, it is important to recognise that in dismissing a claim such as the present one the court is, in effect, revoking the Plaintiff's constitutional right of access to the courts. This is not an unqualified right and is one which must be considered against the backdrop of the other competing rights in the case, namely; the right of the Defendant to protect their good name as is their entitlement under Article 40.3.2. and the court's own obligation to administer justice in a fair and timely manner as is to be inferred from Article 34.1. Nobody against whom serious allegations of the nature at the heart of these proceedings are made, particularly where their professional reputation is at stake, should have to wait 13 or more years before being afforded opportunity to clear their good name. Nor would they be required to do so in circumstances where a court was satisfied that a fair trial and a just outcome could no longer be assured. When balancing competing constitutional rights in this case, in my view the Plaintiff's right to litigate continues to prevail.

35. It is further submitted on behalf of the Plaintiff that the case is now ready for hearing and there is no further impediment to the proceedings being listed. This appears to be true, albeit there remains the question of the Defendant's non-response over a protracted period of time to a request to consider mediation which should be finally addressed.

36. Whilst periods of delay identified in this case are inordinate and inexcusable, I do not consider that it has been demonstrated that, on the facts and circumstances of this case, the evidence supports a conclusion that the balance of justice is tipped against the case being permitted to proceed. Should the Plaintiff's claim be dismissed at this juncture, she would suffer a significant prejudice and hardship in that she would be without a remedy for the alleged wrongs caused to her by the Defendant giving rise to this claim. Further, even when regard is had to periods of both pre and post commencement delay, which taken in the round are obviously excessive, it has not been demonstrated on the evidence that there is real and substantial risk of an unfair trial or unjust result.

37. There does not seem to be any impediment to the proceedings being advanced to hearing within a short time-frame and there is no obvious basis for further delay once the Defendant's application to amend its defence has been dealt with and the position with regard to mediation clarified, particularly where directions are made in relation to time and dealing with any outstanding issues. I am satisfied that the balance of justice remains in favour of the case proceeding and that there is no proper basis for the dismissal of proceedings. However, I consider that further delays in progressing these proceedings to conclusion should not be tolerated and I will hear the parties in relation to directions as to next steps in the proceedings with a view to ensuring that the proceedings are now concluded without further unnecessary delay.

CONCLUSION

38. Although I have found that inordinate delay which has not been satisfactorily explained or excused has been demonstrated in this case, it is nonetheless my view that the balance of justice is in favour of the case proceeding. Furthermore, I have not found a risk of unfairness to be established. There does not appear to be any impediment to the early conclusion of these proceedings nor any basis for further real delay.

39. I am satisfied that the Defendant has not identified prejudice such as would tilt the balance of justice in favour of granting the order sought, I have found that delay was both inordinate and inexcusable. This cannot continue and, with this in mind, I propose making directions in relation to next steps in these proceedings and will hear the parties in this regard and with regard to any consequential orders.