

APPROVED

[2022] IEHC 625



THE HIGH COURT

2006 No. 777 P

BETWEEN

JOHN KILLEEN

PLAINTIFF

AND

BRIAN O'SULLIVAN
ANNE MARIE KELLEHER
PRACTISING UNDER THE STYLE AND TITLE OF BYRNE & O'SULLIVAN
SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 November 2022

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 an action for professional negligence as against a firm of solicitors.
2. One of the principal issues which arises for consideration on the facts of the present case is the weight to be attached, in assessing the balance of justice, to

NO REDACTION REQUIRED

the delay on the part of the Defendants themselves. The Defendants should have delivered their defence by, at the very latest, October 2012. In the event, no defence was ever delivered. Instead, the Defendants ultimately brought a motion in September 2020 seeking to dismiss the proceedings.

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. The *Primor* principles are complemented by a separate but overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial and/or an unjust result. This complementary jurisdiction had first been considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151.

6. The difference between the legal tests governing these two complementary jurisdictions has been explained with admirable clarity by the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74 (at paragraphs 33 to 38). As appears from that judgment, the two principal distinctions are as follows. First, whereas it is a necessary ingredient of the *Primor* test to establish that the delay is “*inexcusable*”, the *O’Domhnaill* test does not require that there have been culpable delay on the part of a plaintiff. Secondly, whereas both tests require that some consideration be given to whether the delay has prejudiced the defendant in the defence of the proceedings, the degree of prejudice required differs between the two tests. Under the *O’Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice.
7. In *Gibbons v. N6 (Construction) Ltd* [2022] IECA 112 (at paragraph 93) the Court of Appeal held 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.
8. 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.”

9. 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.”

10. One of the principal issues which arises for consideration on the facts of the present case is the weight to be attached, in assessing the balance of justice, to the delay on the part of the Defendants themselves. As explained below, the Defendants never delivered a defence to the proceedings and are thus in default. I will defer discussion of the case law which is directly relevant to this issue until paragraphs 35 to 38 below.

PROCEDURAL HISTORY

11. These proceedings take the form of an action for professional negligence against a firm of solicitors. It is no function of this court, on an application to dismiss the proceedings on the grounds of delay, to make any attempt to adjudicate upon the underlying merits of the action. However, it is necessary to refer briefly to the pleadings in order to identify the time period over which the professional negligence is said to have occurred. The fact that the index events occurred two decades ago is relevant to the assessment of the balance of justice.
12. The Plaintiff, John Killeen, is a farmer and self-employed agricultural contractor. The action arises out of the administration of the estate of the Plaintiff's late father. The Plaintiff's father died on 16 December 1996. Two brothers of the Plaintiff had been appointed as executors. In brief, the Plaintiff alleges that the Defendants, who are the firm of solicitors retained by the executors, were negligent. It is pleaded that a deed of family arrangement had been drawn up with the assistance of the Defendants in March 2000. Thereafter, the Plaintiff's mother invoked her legal right, as surviving spouse, to a one-third share of the estate, pursuant to Part IX of the Succession Act 1965. To this end, the Plaintiff's mother instituted proceedings before the High Court seeking to set aside the deed of family arrangement ("*the probate proceedings*"). The probate proceedings were ultimately settled on the third day of the hearing on 16 July 2009.
13. The Plaintiff instituted these proceedings on 20 February 2006. One of the principal allegations made against the Defendants is that they failed to advise the executors of the implications of the surviving spouse's legal right to a share of

the estate. The Plaintiff seeks damages to compensate him for the legal costs incurred by him in respect of the probate proceedings. The Plaintiff also seeks to be compensated for the loss of the use of the money from the estate during the currency of the probate proceedings.

14. It is apparent from the statement of claim that any adjudication upon the claim will require careful consideration of events which occurred some twenty years ago, i.e. the events surrounding the drawing up of the deed of family arrangement on 7 March 2000.

15. The chronology of key events in the proceedings is tabulated below:

20 February 2006	Plenary summons issued
13 February 2007	Plenary summons served on Defendants
18 February 2007	Appearance entered by Defendants
4 July 2011	Statement of claim delivered
8 July 2011	Defendants' notice for particulars
25 September 2012	Plaintiff's reply to notice for particulars
17 September 2020	Defendants issue notice to dismiss for delay
28 June 2021	Plaintiff discharges his solicitors
15 December 2021	Plaintiff issues motion seeking to compel affidavit
25 July 2022	Appeal to Court of Appeal struck out
26 September 2022	Plaintiff's counter motion to motion to dismiss
7 November 2022	Hearing of application to dismiss for delay

16. As appears, no steps had been taken in the proceedings for an eight-year period between September 2012 and September 2020. On the latter date, the Defendants issued a motion seeking to have the proceedings dismissed on the grounds of delay. This prompted two motions in response by the Plaintiff: first,

a motion to compel the filing of an affidavit, and secondly a counter motion seeking to dismiss the Defendants' application to dismiss. The first of these two motions by the Plaintiff was refused by the High Court on 21 March 2022 and an appeal against that refusal was ultimately struck out for non-attendance by the Court of Appeal on 25 July 2022. The Plaintiff's second motion, i.e. the counter motion to the application to dismiss, was then issued on 26 September 2022.

17. Both the application to dismiss and the counter motion came on for hearing before me on 7 November 2022. (The matter had been listed for hearing two weeks previously on 24 October 2022 but had to be adjourned in circumstances where the paginated booklet of pleadings, which had been prepared for the hearing, had not been made available to the Plaintiff. I adjourned the hearing and directed that the papers be provided. I also directed that the Plaintiff could have the assistance of a *McKenzie* friend).
18. The first relief sought in the Plaintiff's counter motion is to dismiss the application to dismiss. This relief stands or falls on the same principles which govern the application to dismiss. It is, in effect, the mirror image of the Defendants' application. The second and third reliefs in the counter motion seek, in brief, the fixing of a trial date and an order directing the Defendants to make discovery of documents. Logically, consideration of the second and third reliefs must await the determination of the application to dismiss. It is only if the application to dismiss is refused that it would then become appropriate to make directions in respect of the exchange of pleadings and discovery.
19. The Plaintiff had filed written legal submissions in advance of the hearing and a *McKenzie* friend was permitted to address the court on his behalf, by reason of

exceptional circumstances arising from the Plaintiff's ill health. This was permitted in accordance with Practice Direction HC 72 (*McKenzie Friends*).

20. It should be noted that the Plaintiff had had the benefit of legal representation in these proceedings until 28 June 2021. On that date, the Plaintiff lodged a notice of discharge in the Central Office of the High Court.

(1) INORDINATE DELAY

21. There has been inordinate delay in the prosecution of these proceedings. The first significant period of delay is in respect of the delivery of the statement of claim. As appears from the chronology above, there was a delay of in excess of four years before the delivery of the statement of claim. This period is inordinate in circumstances where, from a legal perspective, the claim is not a complex one and the formulation of the pleadings would have been straightforward. Tellingly, the statement of claim itself only runs to 10 paragraphs.
22. The second significant period of delay occurred after the delivery of replies to the Defendants' notice for particulars in September 2012. Neither side took any further steps in the proceedings until September 2020 when the Defendants issued their motion to dismiss on the grounds of delay. The Plaintiff's counter motion, which issued in September 2022, represents the first time the Plaintiff sought to ready the proceedings for hearing, by seeking to bring the pleadings to a close and to obtain the discovery of documents.
23. As discussed under the next heading below, the Plaintiff has sought to explain his own delay by reference *inter alia* to the conduct of the Defendants. For the purpose of the first stage of the analysis under the *Primor* principles, however, it is sufficient to find that a delay on the part of the Plaintiff to take any steps to

progress the proceedings for a period of four years and eight years, respectively, is inordinate. Even then, it was only in September 2022 that the Plaintiff took steps to ready the case for hearing.

24. In summary, the cumulative delay to the date of the issuance of the application to dismiss in September 2020 is properly characterised as inordinate in circumstances where proceedings, which were instituted some 14 years earlier, had yet to progress to the stage of the close of pleadings.

(2) INEXCUSABLE DELAY

25. The Plaintiff seeks to excuse the delay by reference to three grounds as follows. First, it is alleged that responsibility for the delay lies with the firm of solicitors which had represented the Plaintiff in these proceedings until 28 June 2021. It is submitted that the Plaintiff is not familiar with the legal process, had trusted his solicitors to progress the proceedings, and they failed him.
26. It has to be said that this allegation does not appear to be borne out by the limited correspondence which the Plaintiff has put before the court. The content of this correspondence suggests that the firm of solicitors had been anxious to resolve the proceedings and to bring finality to the matter. At all events, as discussed at paragraph 42 below, there would be a remedy available to the Plaintiff if there had been any wrongdoing on the part of that firm of solicitors.
27. The second ground advanced is that the delay in the proceedings has been caused by the failure of the Defendants to deliver their defence. Whereas this failure is certainly a factor which must be considered under the third limb of the *Primor* test, namely the balance of justice, it does not constitute an excuse for the

purpose of the second limb. The Plaintiff could have progressed the proceedings by the simple expedient of bringing a motion for judgment in default of defence.

28. The third ground advanced on behalf of the Plaintiff is that the delay is referable to attempts between the parties to compromise the proceedings. The essence of the submission seems to be that the court should infer from the existence of settlement negotiations between the parties in March 2013 and in February 2017 that the Defendants have tacitly admitted negligence. With respect, it is inappropriate for the Plaintiff to make reference to “*without prejudice*” discussions between the parties to the litigation. There is a public interest in the amicable resolution of legal proceedings, and, for this reason, the court will not allow a party to refer to “*without prejudice*” negotiations lest it discourage other litigants from engaging in such negotiations. It should also be noted that the settlement negotiations referred to by the Plaintiff took place as long ago as 2013 and 2017. There can be no question, therefore, of the Plaintiff relying on the existence of ongoing negotiations as a reason for not progressing his proceedings in the following years (cf. *Campbell v. Geraghty* [2022] IEHC 241 (at paragraphs 33 to 37)).

(3) BALANCE OF JUSTICE

29. 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 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 in the paragraphs following. 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.

30. 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 delay as one of in excess of twenty years, i.e. the entirety of the period of time which has elapsed since the events of March 2000 which give rise to the claim. This is because even if the Plaintiff had progressed his proceedings with diligence, the claim would not have come on for hearing until a number of years after the index events. The limitation period for a professional negligence action is six years and the preparation of an action for trial can legitimately take a number of years. However, the inordinate delay on the part of the Plaintiff has resulted in proceedings, which could and should have been heard within a decade of the relevant events, trundling on into a third decade. It is the effect of this additional delay which should be assessed.
31. In the present case, 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 professional negligence has been compromised by the delay. These proceedings relate to events which occurred in the year 2000 and will centre on the precise nature of the instructions

given to, and the advice provided by, the defendant solicitors in connection with the execution of the deed of family arrangement. The outcome of the proceedings will turn, in large part, on oral evidence. It is apparent from the replies to particulars dated 25 September 2012 that there is very little by way of contemporaneous correspondence from the defendant solicitors. It also appears from the pleadings in the probate proceedings that it had been alleged that the Plaintiff's mother had telephoned the defendant solicitors prior to the execution of the deed of arrangement and had said that she did not wish to exercise her legal right to a one-third share of the estate.

32. 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 twenty years ago will be limited. Matters are further complicated by the fact that the defendant solicitors had been retained by the executors of the estate and do not appear to have been acting on behalf of the Plaintiff directly.
33. Secondly, the fact that a claim for professional negligence remains outstanding some sixteen years after the proceedings were instituted creates a specific prejudice. It is averred in the Defendants' affidavit that the proceedings have had and continue to have an adverse effect on the firm's professional indemnity insurance premiums.
34. Thirdly, the proceedings are still not ready for hearing. In other cases, the Court of Appeal, in deciding not to dismiss, has attached significance to the fact that a hearing date has been fixed for the trial of the action. Here, the pleadings are not closed, and no discovery of documents has yet been undertaken. It seems unlikely, therefore, that the trial of the action would take place until the end of 2023, at the very earliest, having regard to the lead time in the Non-Jury List.

35. On the other side of the scales, it is necessary to consider the delay on the part of the Defendants. As explained in *Primor*, the conduct of both parties should be looked at because litigation is a two-party operation. Delay on the part of a defendant will be especially significant if it amounts to acquiescence in the plaintiff's delay and/or caused the plaintiff to incur additional costs.
36. A distinction is sometimes made between what is described as “*mere inaction*”, on the one hand, and “*culpable delay*”, on the other. In particular, a defendant, who is not in default of pleading, will not be found guilty of culpable delay by reason of their failing to bring an application to dismiss at an earlier stage.
37. On the facts of the present case, the failure of the Defendants to deliver a defence to the proceedings can be characterised as culpable delay. Had the overall delay in the proceedings been shorter, this failure might well have resulted in the refusal of the application to dismiss. However, having regard to the very significant delay in the present case, including a delay of some four years in the delivery of the statement of claim, the default on the part of the Defendants does not tip the balance in favour of the Plaintiff. The prejudice to the Defendants is so weighty that the balance of justice requires the proceedings to be dismissed notwithstanding their own default in pleading.
38. As emphasised by the Court of Appeal in *Tanner v. O'Donovan & O'Donovan t/a Construction Design Studio* [2015] IECA 24, there are remedies open to a plaintiff to address a default on the part of a defendant. On the facts of that case, the Court of Appeal dismissed the proceedings notwithstanding that one of the defendants had failed to deliver a defence. See also *Kirwan v. Connors* [2022] IECA 242 (at paragraph 132) where proceedings were dismissed notwithstanding the defendant's failure to reply to a notice for particulars.

39. In reaching my determination that the present proceedings should be dismissed, I have carefully considered what has been described as “*the terminal prejudice*” suffered by a plaintiff in circumstances where their proceedings are dismissed. Here, the Plaintiff will have lost the opportunity to pursue a claim for damages arising out of what he alleges had been the negligent provision of legal services. The proceedings will have been dismissed without any adjudication—one way or another—on the merits. A decision to dismiss the proceedings will thus engage the Plaintiff’s constitutional right to litigate, i.e. his 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.
40. 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 modest prejudice may tip the balance of justice against allowing the proceedings to continue.

41. On the facts of the present case, the prejudice to the Defendants outweighs that to the Plaintiff because of the three factors identified earlier.
42. If and insofar as the Plaintiff relies on the alleged failures of the firm of solicitors who had represented him in these proceedings, the court can and should take into account the fact that he may have an alternative means of enforcing his rights, i.e. by way of an action in negligence against that professional advisor (*Rogers v. Michelin Tyre plc* [2005] IEHC 294 (at pages 10 and 11), and *Sullivan v. Health Service Executive* [2021] IECA 287 (at paragraph 56)).
43. In this regard, it appears that the Plaintiff has, in fact, instituted proceedings against those solicitors on 8 September 2022. (High Court 2022 No. 4642 P).
44. Finally, the suggestion that the balance of justice is affected by the fact that, since June 2021, the Plaintiff has not had the benefit of legal representation is incorrect. See *Kirwan v. Connors* [2022] IECA 242 at paragraph 165 as follows:

“The appellant’s approach to his lay litigant status and its relevance to the assessment of the balance of justice is somewhat misconceived. Undoubtedly, litigants in person may be vulnerable and unfamiliar with court proceedings and, traditionally, judges have demonstrated courtesy and patience towards their position. However, the fact that they are litigants in person does not entitle them to be treated in a manner that is preferential to that of other litigants who are represented.”

CONCLUSION AND PROPOSED FORM OF ORDER

45. 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 at paragraphs 29 to 44 above. In particular,

the operative delay has compromised the capacity of the court of trial to adjudicate fairly on the claim for professional negligence and has left the Defendants exposed for a disproportionate period of time to a claim which has had an adverse effect on their professional indemnity insurance premiums. These considerations are not outweighed by the fact that the Defendants were in default of pleading.

46. On a matter of housekeeping, I will also make an order amending the title of the proceedings to reflect the correct spelling of the Plaintiff's surname.
47. As to costs, my provisional view is that the Defendants, having been entirely successful in having had the proceedings dismissed, are entitled to recover their costs 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 5 December 2022 at 10.45 am.

Appearances

The Plaintiff represented himself with the assistance of a *McKenzie* friend Daniel Simms for the Defendants instructed by Groake & Partners, Solicitors

Approved
Gareth S. Moss