

# THE HIGH COURT

[2023] IEHC 524

[Record No. 2009/10739 P]

**BETWEEN**

**STEPHANIE ABRAMS**

**PLAINTIFF**

**AND**

**SOUTH TIPPERARY GENERAL HOSPITAL**

**DEFENDANT**

**DECISION of Ms Justice Bolger delivered on the 15<sup>th</sup> day of September 2023**

**1.** This is an application to dismiss the plaintiff's claim for want of prosecution and/or pursuant to the inherent jurisdiction of this Court on grounds of inordinate and inexcusable delays and/or for failure to comply with a discovery order made on 12 November 2018. For the reasons set out below I am granting this application.

**2.** The application is grounded on the affidavit of the defendant's solicitor in which the history of these proceedings is set out. The plaintiff, who had been represented by solicitors until they were permitted to come off record by the Court in July 2022, did not swear an affidavit but did make oral submissions to the court about the delay and about her intention to get her case on for hearing as soon as possible. The court had sight of the affidavit sworn by her former solicitor grounding his application to come off record, in which he set out some history of the litigation and of his dealings with the plaintiff. In her oral submissions to the court the plaintiff disputed her former solicitor's averments albeit it does not seem that she mounted those challenges when the application to come off record was before the court. I

did not find her submissions on that point to be convincing. I accept the veracity of the contents of that affidavit.

### **Background**

**3.** The plaintiff issued personal injury proceedings on 27 November 2009 arising from injuries she claimed to have suffered during the course of the delivery of her child on 29 November 2007. The following is a summary of the chronology of subsequent relevant events:-

- 6 July 2011: The plaintiff applied to renew her summons for a period of six months;
- 26 January 2012: The proceedings were served;
- 10 May 2012: An appearance was entered on behalf of the defendant;
- 17 August 2012: The defendant served a notice for particulars;
- 28 August 2013: The defendant furnished a request for voluntary discovery;
- 14 November 2013: The defendant issued a motion to compel replies to particulars and a motion for an order for discovery;
- 1 December 2015: The plaintiff delivered replies to particulars;
- 18 January 2017: The defendant filed their defence;
- 12 November 2018: The defendant sought and was granted a discovery order against the plaintiff;
- 1 May 2019: The plaintiff furnished the defendant with incomplete copies of her medical records;
- 16 September 2019: The defendant requested further information pertaining to the plaintiff's medical records. That request remains outstanding to date;
- 19 October 2020: The defendants threatened to bring a motion dismissing plaintiff's proceedings for delay;
- 20 October 2020: The plaintiff sought additional time as she said she was waiting for her Senior Counsel to furnish advice on proofs;
- 3 June 2021: The defendant brought the within motion to dismiss the proceedings;
- 13 June 2022: The plaintiff's former solicitors issued an application to come off record;

- 28 June 2022: The court made an order allowing the plaintiff's solicitor to come off record.

### **Decision**

**4.** The court must establish:-

- (i) Has there been inordinate delay?
- (ii) If so, is that delay excusable?
- (iii) If the delay is both inordinate and inexcusable, does the balance of justice lie in favour of dismissing the proceedings?

#### *(i) Is the delay inordinate?*

**5.** By the time this motion was issued, over 24 years had passed since the delivery that the plaintiff claimed was mismanaged and 22 years had passed since the Personal Injury Summons had been issued. There has been lengthy periods of delay between events that did occur including approximately three and a half years from when the defendant raised its notice for particulars to when the plaintiff delivered her replies and a further seven years from when the defendant first sought voluntary discovery to when the plaintiff furnished incomplete medical records in May 2019. The furnishing of those incomplete records was followed up a few months later by the defendant's request for further information by letter dated 16 September 2018, which request remains outstanding to date and has not been addressed or engaged with in any way by the plaintiff. Nothing at all has been done by the plaintiff to progress her litigation since this motion issued in June 2021.

**6.** I am satisfied that an inordinate delay has occurred here.

#### *(ii) Is the delay excusable?*

**7.** The plaintiff seeks to excuse the delay largely by blaming her solicitors. Her submissions on this point were unconvincing in fact and questionable in law. She disputes the contents of her former solicitor's affidavit in which he set out extensive details of his attempts to engage with her and the plaintiff's failure to respond to him. The plaintiff disputes what he says but could not confirm having communicated her disagreement with

that affidavit at any time previously, including during the application to come off record which the plaintiff attended in person.

**8.** The plaintiff claims, by way of oral submission to the court, to be ready to make discovery. She has not identified or exhibited any documentation and has taken no steps in the litigation (other than in relation to the within motion) since this motion was filed in June 2021. In effect, the plaintiff has done nothing to progress her litigation since she purported to make incomplete discovery in May 2019.

**9.** The plaintiff has failed to satisfy me that the inordinate delay progressing her litigation is excusable in any way.

*(iii) The balance of justice*

**10.** It has not been suggested that any aspect of the defendant's conduct has caused or contributed to the delay.

**11.** In *Gallagher v. Letterkenny General Hospital* [2019] IECA 156, Costello J. referred to the analysis of Irvine J. in *Cassidy v. The Provincialate* [2015] IECA 74 who found at para. 30 that the *Primor* test required:-

*"... the court to carry out a balancing exercise in the course of which it will put the interests of each of the parties and their conduct into different sides of a scales for the purpose of deciding whether the balance of justice favours allowing the case to proceed to trial. In this regard it is to be noted that one (emphasis added) of the factors that may go into that scales is whether the delay relied upon gives rise to a real risk that it is not possible to have a fair trial."*

Costello J. went on to say at para. 54 of *Gallagher*:-

*"Balancing the arguments in favour and against the proceedings continuing, I conclude that the justice of the case requires that the proceedings be dismissed. The continuance of a case of this kind at this remove would undoubtedly put justice to the hazard. The second named defendant has satisfied me that it would not be possible to conduct a fair trial of this case affording it the basic requirements of fair*

*procedures. As was stated by Irvine J. in Gorman v The Minister for Justice, Equality and Law Reform [2015] IECA 41 at para. 62:-*

*'Regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable the evidence becomes.'"*

**12.** I accept the defendant's submission that some oral evidence will be necessary in this case. The lapse of time will render that evidence more fragile and unreliable than had the case been heard within a reasonable period from when the proceedings were issued.

**13.** I am mindful of the plaintiff's inability to give the court any concrete assurances about her ability to ensure that the case will be ready for trial. Her failure to take any steps in her litigation since she made inadequate discovery in May 2019 adds considerably to this. The plaintiff's confidence that she will be able to set her case down for hearing very quickly if the court refuses this application, seems to be based far more on optimism than any concrete evidence of the readiness of the case, about which nothing was identified or put on affidavit. I appreciate that the plaintiff is now a lay litigant, but I also have been made aware, via her solicitor's affidavit grounding his application to come off record, of the plaintiff's failure to engage with his urgent correspondence to her while he was acting for her.

**14.** The circumstances of this case differ fundamentally from what was before Ferriter J. in *Treanor v. Newtech Renewables Ltd* [2022] IEHC 36, where he found the motion had been issued "at a time when the proceedings were virtually ready for hearing and can now proceed to be certified and get as early a trial date as can be accommodated". (at para. 43)

**15.** Given how the plaintiff has chosen to conduct this case, the balance of justice favours the dismissal of the proceedings pursuant to the inherent jurisdiction of the court on the grounds of inordinate and inexcusable delay.

#### **Indicative view on costs**

**16.** My indicative view on costs is that, in accordance with s. 169 of the Legal Services Regulation Act 2015, the defendant, having succeeded entirely in this motion in having the proceedings dismissed, is entitled to costs against the plaintiff. I will put the matter in before

me on 10:30am on 10 October 2023 at which time either party can make submissions in relation to costs and final orders.

The Plaintiff represented herself.

**Counsel for the defendant:** Donal McGuinness BL