**THE HIGH COURT**

**[2023] IEHC 596**

**[Record No. 2012/7582P]**

**BETWEEN**

**JOHN PADDEN**

**PLAINTIFF**

**AND**

**MICHAEL McDARBY, SEAN ACTON AND CATHERINE McDARBY PRACTISING UNDER THE STYLE AND TITLE OF MICHAEL McDARBY AND COMPANY SOLICITORS**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Bolger delivered on the 3rd day of November 2023**

**1.** This is the defendants' application to dismiss the plaintiff's negligence proceedings on grounds of delay. The plaintiff says the defendants were negligent when they advised him on a personal injuries action arising from a road traffic accident that took place on 28 November 2003, in not serving and/or renewing the Civil Bill and/or in failing to sue all relevant parties. The proceedings were issued by Plenary Summons dated 31 July 2012 following on from a Letter of Claim of 18 October 2011 and relating to claimed negligence of which the plaintiff says he first became aware on (or about) 19 August 2006.

**Periods of delay**

**2.** The most relevant periods of delay are:-

(1) Pre proceedings delay from 19 August 2006 up to 31 July 2012 when the Plenary Summons was issued.

During this time, the defendants say, correctly, that the plaintiff was under an obligation to move quickly in prosecuting a claim where there had already been delay (*Manning v. Benson & Hedges* [2004] 3 IR 556).

(2) A delay of ten months before the Plenary Summons was served.

No excuse is offered for this.

(3) A further delay of eleven months before the Statement of Claim was served.

No excuse is offered for this.

(4) A delay from 2016 to 2020. During that time the plaintiff was seeking discovery. He brought two motions against the defendants, one for discovery and one to strike out the defence. The defendants say this delay was the plaintiff's fault. The timeline furnished by each confirms the defendants resisting voluntary discovery after a number of reminders and, eventually, the plaintiff having to issue a motion which was repeatedly adjourned on consent and, when orders were eventually dealt, several more reminders had to be sent to the defendants' solicitors to comply with the orders that had been made.

I am satisfied that responsibility for this period of delay rests with both sides.

(5) 2020 to 2022: The plaintiff's solicitors had served a Notice of Trial on 9 October 2020 and did nothing further until 21 July 2022. The plaintiff acknowledges having delayed during this time and points out that it coincided with the COVID-19 pandemic.

Responsibility for this period of delay rests with the plaintiff and beyond acknowledging its coincidence with lockdown, he does not seek to excuse it.

**Current status of the proceedings**

**3.** By email dated 21 July 2022, the plaintiff's solicitors advised the defendants that their senior counsel had certified the matter was ready for trial and that their junior counsel would be making an application on 28 July 2022 to seek a date for hearing. The defendants' solicitors objected and said the matter was not ready to proceed as they had not been served with a Notice of Intention to Proceed either prior to the Notice of Trial being served or in advance of lodging the certificate of readiness. The plaintiff's solicitors filed a Notice of Intention to Proceed on 2 August 2022. The defendants' solicitors were advised that the plaintiff's counsel would attend court on 6 October 2022 to seek a date for trial. Two days before that date, the defendants' solicitors issued the within motion to dismiss the proceedings for delay. On 6 October 2022, the substantive matter was assigned to 6 December 2022 for case management, but the defendants' motion was served on the same day (6 October 2022), so the case management hearing scheduled for 6 December 2022 did not take place.

**4.** The plaintiff says the case is ready to be listed for hearing and his solicitors have averred to his confidence that had the defendants not issued the within motion to dismiss, the case would have been allocated a hearing date in October 2022. The defendants maintain that the case is not ready for hearing and highlight the plaintiff's failure to comply with the High Court Practice Direction HC75 on consultation prior to filing the certificate of readiness. The defendants say they have no knowledge

of the plaintiff's expert witness or whether any experts will be giving evidence or whether an expert had given the required opinion that there was professional negligence. The defendant says these issues go to the balance of justice should the court determine it necessary to consider that.

**The law**

**5.** The plaintiff relies on the two lines of jurisprudence on delay: *O'Domhnaill v. Merrick* [1984] IR 151 and *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. Ultimately, the defendants must prove that there has been inordinate delay that is inexcusable. If they do so, the court must then consider whether the balance of justice favours dismissing the case or allowing it proceed.

**6.** There is a vast amount of case law on this issue but I have found the recent decent of the Court of Appeal in *Cave Projects Ltd v. Gilhooley & ors* [2022] IECA 245 to be particularly instructive, where Collins J. emphasised a number of points from the jurisprudence, the following of which have particular relevance to this case:-

(i) The burden of proof rests on the defendant.

(ii) An order dismissing a claim is a far reaching one.

(iii) There must be a causal connection between the inordinate and inexcusable delay and the matters relied on to establish that the balance of justice favours dismissal.

(iv) A defendant is also responsible for the timely progress of the litigation.

(v) Professional defendants do not enjoy any privileged status.

(vi) General prejudice may suffice but prejudice is not to be presumed.

(vii) The dismissal of a claim is an option of last resort for where permitting a claim to proceed would result in some real and tangible injustice to the defendant.

**7.** In allowing that claim to proceed, Collins J. had regard to a number of factors including the absence of evidence of (i) relevant witnesses being unavailable due to the plaintiff's delay; (ii) any steps taken by the defendants to identify and secure the attendance of witnesses at trial; (iii) lost documentary evidence. He also had regard to the defendants' contribution to the delay and placed particular weight on the fact that the proceedings had been listed for hearing which he described as *"a significant factor in assessing where the balance of justice lies"* (at para. 44).

**Was this delay inordinate?**

**8.** The plaintiff accepts responsibility for the delay that occurred between 2020 and 2022, which coincided with the COVID-19 pandemic, though the plaintiff does not identify any particular issue that lockdown had for the progress of his proceedings. The same period of two years was described by Collins J. in *Cave Projects Ltd* at para. 39 as resting *"at the 'lower end' of the spectrum in this*

*context."* I find this delay to have been inordinate when considered against the background that proceedings had been issued eight years prior to 2020 relating to alleged negligence going back six years before the issuing of proceedings and the other previous delays between 2016 and 2020.

**Is the delay excusable?**

**9.** Some of the delays in the past were the joint responsibility of the plaintiff and defendants, including where discovery was being made, and other delays were due to the plaintiff's inaction prior to the institution of the proceedings at a time when the plaintiff was under a duty to move quickly having regard to the delay that already occurred in instituting proceedings very close to the statutory time limit. Further delays were due to the plaintiff's delay in issuing the Plenary Summons and the Statement of Claim.

**10.** The plaintiff does not seek to excuse the delay in filing his pleadings and the final period of delay between 2020 and 2022. The plaintiff's delay is clearly inexcusable taking account both of the length of it and the fact that it occurred against a background of previous delays.

**Balance of justice**

**11.** Having found that there has been inordinate and inexcusable delay, I must consider whether the balance of justice favours allowing the proceedings to continue or whether doing so would result in a real and tangible injustice to the defendants. The defendants assert tangible prejudice in identifying and locating witnesses so many years after the alleged negligence is said to have occurred. There are witnesses that the defendants say may be of assistance to them in making their case that the accident did not occur as the plaintiff claims, including members of An Garda Síochána whom they say may present a different version of events from that of the plaintiff's and whose evidence may assist them in making the case that the plaintiff would not have succeeded in his personal injury proceedings had that case ever progressed. The defendants identify one of those gardaí as now being in poor health and a number of others who have since retired. I do not see the relevance of their having retired, particularly given that the defendants have their names.

**12.** The plaintiff furnished the defendants with a statement when he first instructed them, which included his account of the conduct of named members of An Garda Síochána after the car in which the plaintiff was travelling was rear-ended by the named defendant in the plaintiff's personal injuries proceedings. The plaintiff's statement recounts those gardaí alleging that the plaintiff's brother had driven into the named defendant's vehicle and making remarks disparaging of the plaintiff's family.

**13.** The defendants have been on notice of the substantive claim since October 2011 when they were served with a Letter of Claim. The first time the defendants seem to have tried to establish the

availability of the gardaí named in the plaintiff's statement was when they wrote to the Gardaí HR department by letter dated 21 November 2022, after this motion to dismiss had been filed, in which they referred to a letter from the gardaí dated 23 February 2004. That letter has not been exhibited and whatever information the defendants had from it is not available to this court.

**14.** I do not consider that letter of 21 November 2022 to have been a *bona fide* attempt to locate witnesses that the defendants claim are necessary for their defence. Rather, it presents as an attempt to shore up their proofs for this motion to dismiss which the defendants filed over a month before they wrote to the Garda HR department. In any event, even if the named gardaí are not available, it is to be expected that there may be documentary evidence of any concerns they legitimately had at that time in relation to the incident in which the plaintiff says he suffered personal injuries. There is also the plaintiff's own evidence about what happened and the version of that which he gave to the defendants when he first instructed them. Therefore, the passage of time and resultant less reliable memory may not be so prejudicial for the defendants and in any event, can be addressed by a trial judge.

**15.** The defendants seek to rely on the death of one of their summons servers and the advanced age and poor health of the other which they say will prejudice them in establishing the efforts they had made to serve the Civil Bill. Any such prejudice can also be addressed by the trial judge having regard to the likely availability of documentary evidence confirming the instructions given to those summons servers by the defendants and the outcome of same.

**16.** The defendants also express concern in relation to hearing oral evidence from (unidentified) medical witnesses in relation to matters that occurred over seventeen years ago. Any such medical evidence will, presumably, also be reflected in medical documentary evidence. It is generally accepted that the availability of medical records allows whatever prejudice may be suffered by a defendant where evidence is being given after a long period of time, to be properly addressed by the trial judge.

**17.** Therefore, I am not satisfied that the defendants have established sufficient or any specific prejudice by reason of the plaintiff's inordinate and inexcusable delay, in particular, between 2020 and 2022 and/or that the delay that has occurred directly caused any prejudice, specific or general, that the defendants may suffer in defending this claim such a long period of time after the plaintiff originally instructed them. Neither do I consider that there is sufficient general evidence of prejudice particularly given the relatively straightforward nature of the negligence the plaintiff pleads in the

defendants' failure to serve and/or renew the Civil Bill and to advise the plaintiff about joining additional relevant defendants including the Motor Insurers' Bureau of Ireland.

**18.** The authorities confirm that the fact a case is ready for hearing goes against a dismissal for delay. This case is not ready for hearing as it currently stands adjourned from having been listed for case management, which is not where a case immediately ready to be listed for hearing would be. The defendants assert a failure by the plaintiff to comply with Practice Direction HC75. However, even if they are correct on that, the consequences for a breach of the Practice Direction are stated in the Practice Direction to go to costs. Whilst the case may not currently be ready for hearing, it seems to be reasonably close to that. It was certainly the plaintiff's stated intention to seek to set it down for trial many weeks before this motion to dismiss was ever mentioned by the defendants.

**Conclusion**

**19.** There has been inordinate and inexcusable delay by the plaintiff in this case between 2020 and 2022 against a background of pre proceedings delay, delay in serving proceedings that rest with the plaintiff and further delays between 2016 and 2020, for which the plaintiff and the defendants share responsibility. Nevertheless, I find that the balance of justice lies in favour of allowing the plaintiff to continue his proceedings and ventilate his claim at trial in circumstances where the prejudice he would suffer in being denied the opportunity to make his case, outweighs the general prejudice the defendants may suffer as a result of the delay.

**Indicative view on costs**

**20.** As the plaintiff has succeeded in defending this motion, my indicative view on costs in accordance with s. 169 of the Legal Services Regulation Act 2015 is that they are entitled to their costs to be adjudicated upon in default of agreement, but I am also of the view that a stay should be put on the execution of those costs pending the outcome of the resolution of these proceedings. I will put the matter in before me at 10.30am on 29 November 2023 to hear any submissions the parties wish to make on the orders to be made at this stage.

**Counsel for the plaintiff:** David McGrath SC, Niall Mooney BL.

**Counsel for the defendants:** Barney Quirke SC, Francis McGagh BL.