

// LITIGATION & DISPUTE RESOLUTION

Putting Justice to Hazard: When does delay justify the dismissal of proceedings?

April 2022

There has been an increase in applications to dismiss legal proceedings for want of prosecution on the grounds of delay before the Irish courts in recent months. In this Briefing we look at the principles a court will apply to such applications, and their likelihood of success, with reference to these recent cases.

INTRODUCTION

The procedure, including the time periods, for the prosecution of civil proceedings before the High Court (**Court**) is regulated under statutory court rules, the Rules of the Superior Courts (**RSC**). The RSC make specific provision for applications to dismiss civil proceedings for want of prosecution where there is a failure to comply with certain procedural rules. Separate to applications under the RSC, the Court has an inherent jurisdiction to dismiss proceedings for want of prosecution on the grounds of delay where so required by the interests of justice.

In recent months several applications to dismiss proceedings for want of prosecution on the grounds of delay came before the Court. These judgments continue to illustrate that the success of an application to dismiss proceedings will depend on the particular facts of each case. A period of delay found to be prejudicial in one case may not be determinative of the point in subsequent cases of similar delay.

THE GUIDING PRINCIPLES

1) Post Commencement Delay

The principles to be applied by the Court on an application to dismiss civil proceedings on the grounds of delay depends on the nature of the delay. In the case of delay after the institution of the proceedings (**post-commencement delay**), the Court will apply a three-stage test, which has its roots in the Supreme Court decision of *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 (**Primor**). The Court must determine:

- i) whether the plaintiff's delay is inordinate,
- ii) whether that inordinate delay is excusable and if not,
- iii) whether the balance of justice favours the dismissal of the action in all the circumstances.

INORDINATE DELAY

Whether delay can be characterised as “inordinate” is not capable of precise definition. The Court has held that it is primarily a question of fact. What constitutes inordinate delay in one case, may not be found to be so in another case. To illustrate this point, it is notable that three individual periods of delay of 15 months, two years and eight months, and four years and four months were each found to be inordinate in *O’Reilly v National Document Management Group Ltd and Anor* [2022] IEHC 37 (**O’Reilly**). However, in *Hennessy v Ladbrokes Payments (Ireland) Ltd* [2022] IEHC 60, periods of delay of 12 months and 15 months were found not to be inordinate.

In most cases, it will be clear whether the delay is inordinate in the circumstances, the real question therefore is whether the delay is excusable.

INEXCUSABLE DELAY

Explanations offered to excuse any delay will be carefully scrutinised by the Court. To succeed, the explanation must be supported by evidence and must legitimately excuse the relevant delay.

For inordinate delay to be excusable, case law suggests that the explanation should relate to the actual proceedings rather than matters unrelated to them. In *O’Reilly*, the Court refused to accept the plaintiff’s personal and financial difficulties as a good excuse for not progressing the proceedings.

Delay on the part of the plaintiff’s legal advisers will not necessarily excuse a period of delay. Responsibility for prosecuting a case rests with the plaintiff. In *Walsh v Mater Misericordiae University Hospital and Poynton* [2022] IEHC 126 (**Walsh**), the plaintiff made a complaint to the Law Society in relation to the delay on the part of her solicitor in prosecuting her case. After the Law Society concluded its review of the complaint, the plaintiff continued to instruct the same solicitor. The substantive proceedings were issued in 2013 and related to events in 2011. The second defendant brought an application to dismiss the plaintiff’s case against him on grounds of inordinate and inexcusable delay. In defence of the application to dismiss the proceedings, the plaintiff’s solicitor put forward various excuses on her part for the delay, including staffing difficulties, over-work, health difficulties, and the Law Society complaint. None of these were accepted as convincing excuses for the delays in the case.

However, in *O'Reilly*, the Court found that the plaintiff acted appropriately in changing his solicitors during the course of the proceedings where the relationship had broken down. The plaintiff was forced to make a complaint to the Law Society to obtain his file from his former solicitors. This process took approximately 14 months. The defendants argued that delay on the part of legal advisers did not excuse the relevant period of delay. The Court found that the plaintiff could not reasonably have been expected to prosecute his case without his file and therefore the delay was excusable.

THE BALANCE OF JUSTICE

The Court will have regard to all relevant circumstances in determining where the balance of justice lies. Hamilton CJ in *Primor* held that the courts have an inherent jurisdiction to control their own procedure and can dismiss a claim when the interest of justice so requires. The balance of justice test invokes the concepts of fairness and justice - is it fair to the defendant to allow the action to proceed and is it just to the plaintiff to dismiss the action?

Factors relevant to the balance of justice were recently summarised by Barr J in *Walsh*. They include:

- the conduct of both parties e.g. delay or acquiescence on the part of the defendant (*Mellerick v Minister for Finance* [2016] IECA 206),
- the nature of the cause of action,
- whether the plaintiff has an alternative remedy open to him if the proceedings are struck out,
- the nature of the evidence required to establish liability. Will liability turn on oral evidence or documentary evidence? In the case of the latter, the prejudicial effect of delay may be less,
- whether all relevant witnesses and documents will be available at the trial.

Simons J in the recent case of *Rooney v HSE* [2022] IEHC 132 emphasised that the balance of justice is not simply an exercise in weighing potential loss of action by the plaintiff against the ability of a defendant to defend the proceedings. Rather, other factors including the conduct of the parties will have to be assessed in determining where the balance of justice lies.

THE ONUS OF PROOF

The onus of proof rests on the party moving an application to dismiss for want of prosecution (usually the defendant) to establish that the delay is inordinate and inexcusable. If the moving party establishes inordinate and inexcusable delay, the onus of proof shifts to the plaintiff to establish that the balance of justice lies in favour of allowing the case to proceed (*Gibbons v N6 (Construction) Ltd* [2021] IEHC 138).

2) Pre-Commencement Delay: Lapse of Time

In cases where there has been delay on the part of a plaintiff in instituting proceedings, even where those proceedings are instituted within the relevant statutory limitation period, it remains open to the Court to dismiss those proceedings where the interests of justice require it.

The Court will consider whether by reason of the passage of time between the acts complained of and the trial, there is a real risk of an unfair trial. This test has its origins in the Supreme Court decisions of *O'Domhnaill v Merrick* [1984] 1 IR 151 and *Toal v Duignan (No 1)* [1991] ILRM 135. The Supreme Court in *Mangan v Dockery* [2020] IESC 67, reiterated that often the *O'Domhnaill* and *Toal* jurisdiction will overlap with the *Primor* three-step test when considering an application for dismissal on delay or prejudice grounds.

It was accepted by the Court in *Rose v Murray Ireland and the AG* [2022] IEHC 94 (**Rose**) that a plaintiff is under an “added onus” to prosecute his proceedings with expedition where there was a lengthy lapse of time between the acts complained of and the commencement of proceedings.

RECENT DECISIONS

Walsh v Mater Misericordiae University Hospital and Poynton [2022] IEHC 126

The plaintiff instituted proceedings in 2013 claiming damages for personal injuries arising out of the defendants' failure in April 2011 to diagnose that she had a vascular disease. The second defendant brought an application to dismiss the plaintiff's case against him on grounds of inordinate and inexcusable delay. Barr J found that the relevant period of delay stood in the region of 12 years, where the earliest likely date for the trial of the action was mid - 2023. As set out above, the plaintiff's solicitor offered various reasons for the delay on her part in prosecuting the claim, none of which were accepted by the Court as excusable delay.

Applying *Primor*, Barr J found that the delay in the case was inordinate and inexcusable. In such circumstances, the defendant only had to show moderate prejudice for the court to dismiss the proceedings. It was not necessary for the defendant to establish that he would not get a fair trial. Barr J noted that the key issue in considering the balance of justice was whether there was sufficient prejudice to tilt the scales in favour of striking out the proceedings. After considering the pleadings, Barr J found that the liability of the second defendant will turn exclusively on the notes and records made contemporaneously by him and that oral evidence will have a minor role to play. In those circumstances, Barr J found that there was not sufficient prejudice to tip the balance in favour of striking out the action against the second defendant, even with the inordinate delay in prosecuting the proceedings.

Rose v Murray Ireland and the AG [2022] IEHC 94

The first defendant brought an application to dismiss the plaintiff's proceedings for want of prosecution under the RSC and under the court's inherent jurisdiction on the grounds of inordinate and inexcusable delay in the commencement and prosecution of the proceedings. The proceedings were instituted in 2006 and claimed damages for sexual abuse during 1967 and 1968.

The Court found that there was no doubt but that the delay was inordinate. The Court also found that there was an inexcusable delay of eight and half years. In terms of the balance of justice, the Court was swayed by the fact that the underlying abuse, which was at the centre of the plaintiff's case, was previously the subject of a criminal conviction. Furthermore, there were other proceedings against the first defendant arising in similar

circumstances to the plaintiff's proceedings, so no material injustice could be said to arise for the first defendant. The very particular circumstances of this case were influential in the Court deciding that the balance of justice favoured the plaintiff being permitted to proceed with the action.

Treanor & Anor - v- 'Nutech Renewables Ltd, Forkin and Quigley [2022] IEHC 36

The plaintiffs were the developers of 12 houses in County Monaghan. The plaintiffs instituted proceedings in 2012 arising out of an agreement between the plaintiffs and the first defendant in 2006 for the design, commission, supply and installation of a specialist "eco" heating, ventilation and hot water system in the houses in the development. The plaintiffs claimed that the system installed by the defendants failed entirely causing them loss and damage in the approximate sum of €650,000.

The defendants issued a motion to dismiss the proceedings on the grounds of delay pursuant to the Court's inherent jurisdiction. The Court found there were accumulated periods of inexcusable delay of 30 months. The Court held that the balance of justice lay in favour of not dismissing the proceedings, where the prejudice to the defendants did not outweigh the plaintiffs' right to a hearing for their claims for compensation for the significant loss allegedly suffered as a result of the defendants' wrongdoing. However, it was noted that no further delay on the part of the plaintiffs would be tolerated.

Cabot Financial [Ireland] Ltd v Damien Heffernan, Patrick Heffernan and Grant Macrea Stationery Ltd [2021] IEHC 823

The Court dismissed summary summons proceedings against the second defendant for want of prosecution on the grounds of inordinate and inexcusable delay. The proceedings arose out of financial transactions that took place between 12 and 17 years ago. The summary summons was issued in 2012 and was only at the motion for summary judgment stage nine years later. In considering the balance of justice, the Court was influenced by the defence of undue influence maintained by the second defendant. If the proceedings continued, oral evidence of conversations many years previously would be required. The Court was also cognisant of the advanced age of the second defendant and that having the proceedings "hanging over" him was a source of stress. In the circumstances, the balance of justice lay in dismissing the proceedings against the second defendant.

Kennedy v Wexford County Council & Priority Construction Company Limited [2021] IEHC 187

The plaintiff's claim was for damages for trespass and nuisance. The proceedings related to allegations that the second named defendant dumped waste material on his land during the construction of the N25. The plaintiff had given the defendant construction company permission to leave some material on his land provided that they removed it when construction was complete. The events took place between 2001 and early 2002.

The action commenced in October 2007. The claim would have become statute barred by May 2008. The defendants sought particulars in 2008 and replies were provided in June 2009. The plaintiff served a notice of intention to proceed in March 2011 and a defence was delivered in May 2011. Following two applications for judgment in default of defence, the first named defendant delivered a defence in November 2012. Replies to the defences were delivered in May 2014. An application was brought to compel discovery in May 2015. No further step was taken until a notice of intention to proceed was served in February 2018 and particulars of loss and damage was served by the plaintiff in February 2019.

The Court found that the delay was inordinate and inexcusable. The action commenced more than five years after the events in question and there was no effort to particularise the damage until 2019 (12 years after issue of the claim). The fact that the defendants had themselves delayed in delivering their defences, did not excuse the plaintiff's delay. The defendants delay amounted to a year and a half. Turning to the balance of justice, the Court noted that two key witnesses, the project manager and managing director of the defendants, had died, and their evidence was central to the issues. Mr Justice Owens found that the balance of justice did not lie in permitting the action to go to a hearing on the merits. Key elements of the defence could not be proved because the defendant was deprived of two witnesses. The claim was struck out.

CONCLUSION

Applications to dismiss for want of prosecution on the grounds of inordinate and inexcusable delay are common before the Court. The authorities show that even where the delay is inordinate and inexcusable, the Court will weigh the balance of justice carefully in deciding whether to accede to an application to dismiss proceedings. It is clear from the many recent decisions of the Court in this area that each case will be decided on its facts.

Even where prejudice to the defendant because of the delay is established, this will not be determinative of itself in an application to dismiss for want of prosecution. Although the Court will be mindful of its obligation to ensure that litigation is progressed with reasonable expedition, as noted by McKechnie J in *Mangan v Dockery*, citing *Calvart v Stollznow* [1980] 2 NSWLR 749, "Justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice".



CONTACT US

To discuss any of the matters discussed in this Briefing, please contact Adele Hall, Paul Convery or your usual William Fry contact.



Paul Convery
PARTNER
+353 1 639 5193
paul.convery@williamfry.com



Adele Hall
SENIOR ASSOCIATE
+353 1 639 5163
adele.hall@williamfry.com



Gail Nohilly
KNOWLEDGE LAWYER
+353 1 639 5083
gail.nohilly@williamfry.com

WILLIAM FRY

DUBLIN | CORK | LONDON | NEW YORK | SAN FRANCISCO | SILICON VALLEY

William Fry LLP | T: +353 1 639 5000 | E: info@williamfry.com

williamfry.com

This briefing is provided for information only and does not constitute legal advice

