

THE HIGH COURT

**[2022] IEHC 216
[Record No. 2013/12697P]**

BETWEEN:

GEMMA NI CHIONNAITH

PLAINTIFF

AND

JOHN FAHY

AND

NATIONAL UNION OF JOURNALISTS

DEFENDANTS

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 8th day of April, 2022

INTRODUCTION

1. In these proceedings the plaintiff claims as against the first named defendant, who is a barrister, for alleged negligence and breach of duty. Similar claims are advanced against the second named defendant, a trade union.

2. The claims for negligence and breach of duty as against the first defendant turn on advices, both oral and written, which he provided to the plaintiff in July, 2009 and May, 2010 arising out of the termination of the plaintiff's employment with Radio Telefís Éireann [hereinafter 'RTÉ'] in December, 2009.

3. By Motion dated the 4th of March 2021, the first named defendant has sought an order dismissing the plaintiff's claim by reason of inordinate and inexcusable delay. This motion issued in response to an earlier motion issued by the plaintiff seeking judgment in default of defence (albeit without first serving the necessary notice of intention to proceed in circumstances where the proceedings had lain dormant for more than twelve months).

FACTUAL BACKGROUND

4. The plaintiff claims that she was employed by RTÉ on a series of fixed terms contracts from July, 2005 until the termination of her employment in December, 2009.

5. Following the termination of the plaintiff's employment, she instructed solicitors, who in turn briefed the first named defendant. The first named defendant met with the plaintiff in consultation initially in July of 2009 and again on the 11th of May 2010. The first named defendant provided the plaintiff with certain written advices in relation to her employment in or about 27th of May, 2010, including his views on her chances of succeeding in a claim pursuant to the provisions of the Unfair Dismissals Acts, 1977-2007. It is claimed that the first named defendant advised the plaintiff that she would have acquired the right to a contract of indefinite duration but did not advise her to secure the said right by bringing a claim pursuant to the Protection of Employees (Fixed Term Work) Act, 2003.

6. The first named defendant's last involvement with the plaintiff was in May, 2010 because without utilising the services of the solicitor whom she had consulted and without briefing the first named defendant, she commenced proceedings pursuant to the provisions of the Unfair Dismissals Acts by lodging a claim which was received by the Rights Commissioner on the 21st of June, 2010. This claim was heard on the 22nd day of November 2010. The claim made is that the proceedings were conducted on the plaintiff's behalf by the second named defendant.

7. The proceedings under the Unfair Dismissals Act 1977-2007 were unsuccessful at first instance before the Rights Commissioner. The plaintiff pleads that in a determination issuing on the 22nd of February, 2011, the Rights Commissioner found that he had no function in the dispute which related to the status of the plaintiff's contract and that, by virtue of s. 2(2)(b) of the Unfair Dismissals Acts, 1977-2007, the plaintiff had waived her entitlement to bring a claim under the Acts and that her dismissal had occurred at the expiry of the term of her contract without it being renewed. Accordingly, the Rights Commissioner found that the plaintiff was not entitled to the protection of the Unfair Dismissals Acts 1977-2007 and her application failed with a finding that she was not unfairly dismissed.

8. There is no evidence that any appeal was brought against the decision of the Rights Commissioner to the Employment Appeals Tribunal but it appears that the plaintiff thereafter proceeded to make further application to a Rights Commissioner seeking an extension of time within which to bring a claim pursuant to the Protection of Employees (Fixed Term Work) Act,

2003. By further decision of the Rights Commissioner dated the 19th of January, 2012, this application was refused having regard to the six month statutory time limit pursuant to s. 14(4) of the 2003 Act for the plaintiff to bring a claim.

9. Arising out of the foregoing, the plaintiff sought expert opinion as to whether the defendants were professionally negligent in the advice provided to her. She received an expert opinion in March, 2013 and thereafter proceeded to initiate these proceedings by Plenary Summons dated the 19th of November 2013. A Statement of Claim was delivered by her then solicitors, on or about the 21st of October 2014. In the proceedings she claims, *inter alia*, that the first named defendant was negligent by reason of his failure to advise her to make an application to establish her right to a contract of indefinite duration pursuant to the Protection of Employees (Fixed Term Work) Act, 2003 and failing to properly advise her in relation to a claim under the Unfair Dismissal Acts, 1977-2007. A claim is advanced for loss of a full-time permanent position with RTÉ and loss of career opportunities.

CHRONOLOGY

10. Insofar as is relevant to the questions I must determine, the following chronology provides an overview of the relevant time-line and steps taken in the more than twelve years since the plaintiff was first advised, she says negligently, by the first named defendant.

First named defendant's consultation with plaintiff (instructed by Padhraic Harris & Co.)	- 9 th July 2009
First named defendant's consultation with plaintiff (instructed by Padhraic Harris & Co.)	- 11 th May 2010
First named defendant's written advices to Padhraic Harris & Co. in respect of Plaintiff's employment rights	- 27 th May 2010
Plaintiff makes a complaint under the Unfair Dismissal Act. Complaint received by EAT (the plaintiff is represented by NUJ – second defendant)	- 21 st June 2010
Plaintiff's claim is heard by Rights Commissioner at a hearing (the plaintiff is represented by NUJ – second defendant)	- 22 nd November 2010

Decision by Rights Commissioner (the plaintiff is represented by NUJ – second defendant)	- 22 nd February 2011
Plaintiff makes complaint to the Labour Relations Commission and has a hearing before a Rights Commissioner (the plaintiff is represented by her new solicitors, Purdy Fitzgerald Solicitors)	- 10 th October 2011
Decision made by Rights Commissioner (the plaintiff is represented by Purdy Fitzgerald Solicitors)	- 19 th January 2012
Advices received from employment law expert stating that proceedings should have been lodged under the Protection of Employees (Fixed Term Work) Act, 2003	- April 2013
Letter Purdy Fitzgerald Solicitors for the plaintiff to first named defendant intimating a claim	- 26 th August 2013
Letter Purdy Fitzgerald Solicitors for the plaintiff to first named defendant advising that they had not heard from his insurers and that proceedings would issue	- 18 th September 2013
Solicitors for the first named defendant, Holmes O'Malley Sexton (HOMS), write to Purdy Fitzgerald in response to correspondence to first defendant indicating that they would accept service of legal proceedings and also indicating that liability was denied and the matter would be fully defended.	-13 th October 2013
Plaintiff issued Plenary Summons	- 19 th November 2013
Plaintiff's Solicitors Purdy Fitzgerald write to HOMS by letter dated 24 th February 2014 enclosing original High Court proceedings to accept service -letter received by HOMS	- 25 th February 2014
HOMS return legal proceedings with acceptance of service endorsed, to Messrs Purdy Fitzgerald and request service of Statement of Claim. HOMS request a copy of the plaintiff's file from plaintiff's solicitors Purdy Fitzgerald.	- 28 th February 2014
HOMS seek copy letter of claim of 26 th August 2013	-28 th February 2014

First named defendant's Appearance entered and a Statement of Claim is again requested.	- 4 th March 2014
HOMS write threatening a motion to dismiss for want of prosecution if Statement of Claim not delivered within a further 21 day period	- 20 th of October, 2014
Plaintiff serves Statement of Claim	- 21 st October 2014
HOMS make a further request for a copy of the Plaintiff's file in respect of which the Plaintiff was making allegations of professional negligence.	- 24 th October 2014
HOMS again request the Plaintiff's prior file from Plaintiff's solicitors Purdy Fitzgerald.	- 5 th February 2015
First named defendant raises a Notice for Particulars. The Notice includes a request for details of efforts made to mitigate loss and details of alleged loss of career opportunity.	- 27 th February 2015
HOMS again request the entire file held by the plaintiff's former solicitors Padhraic Harris and Company and the entire file held by the National Union of Journalists (NUJ) from Plaintiff's solicitors Purdy Fitzgerald.	- 27 th February 2015
HOMS again request copy of the relevant files from plaintiff's solicitors Purdy Fitzgerald. By separate letter they refer to the outstanding request for particulars.	- 21 st July 2015
Messrs Purdy Fitzgerald, solicitors for the plaintiff furnish the Padhraic Harris file by letter dated 7 th August 2015 to HOMS indicating that a Data Access Request would be made for the NUJ file. Said letter was received by HOMS on the 11 th August, 2015	- 11 th August 2015
Plaintiff Replies to Particulars	- 14 th October 2015

HOMS on behalf of first named defendant write to plaintiff's Solicitors Purdy Fitzgerald indicating dissatisfaction with many aspects of the Plaintiff's Replies to Particulars and indicating further rejoinders would be raised on same. Agents on behalf of first named defendant again request the file of the National Union of Journalists (second named defendant) - 8th January 2016

Plaintiff's Solicitors Purdy Fitzgerald serve Notice of Intention to Proceed - 14th February 2017

First named defendant raises further rejoinders to plaintiff's Replies to Particulars and arising out of the deficiency in plaintiff's earlier Replies to Particulars - 5th April 2017

Plaintiff Solicitors Purdy Fitzgerald furnish NUJ file to NUJ - The first named defendant disputes that they received this file - 5th April 2017

Defence of second named defendant delivered - May, 2017

Plaintiff replies to first named defendant's Notice for Further Particulars - 22nd September 2017

Plaintiff's solicitor retains new vocational assessor - September, 2018

Plaintiff's solicitor receives report from second vocational assessor - November, 2019

Mark Killilea phones Holmes O'Malley Sexton Solicitors looking for first named defendant's Solicitor -10th November 2020

Mark Killilea (MK Solicitors) emails First Named Defendant's Solicitors seeking Defence of first named defendant -10th November 2020

Mark Killilea (MK Solicitors) comes on record for plaintiff as per Court Website. Notice of Change of Solicitor not served on HOMS. - 24th November 2020

MK Solicitors for the Plaintiff issues Motion for Judgment in default of Defence, Motion issued 5th January 2021, received by first named defendants Solicitors on the 8th January 2021 and Motion returnable for 19th April 2021. - 8th January 2021

HOMS issue Motion to strike out Plaintiff's claim by reason of inordinate and inexcusable delay and for want of prosecution. - 4th March 2021

11. The first named defendant identifies five distinct periods of delay in the timeline above which he claims are inordinate and have not been explained or excused as follows:

- I. The period between July, 2009 and November, 2013 when negligent advice is alleged to have been given and the issue of proceedings;
- II. The period between the service of the proceedings in February, 2014 and the delivery of the Statement of Claim in October, 2014;
- III. The period between October, 2014 when the former files were sought, February, 2015 when particulars were raised and the furnishing of replies to particulars in October, 2015;
- IV. The period between April, 2017 and September, 2017 when replies were furnished;
- V. The period between the delivery of replies to particulars in September, 2017 and the issue of a motion for judgment in default of defence in January, 2021.

12. The first named defendant maintains that his involvement with the plaintiff in this matter was limited to two consultations and the delivery of written advices more than a decade ago. He further claims that his solicitors sought access to the second named defendant's files of papers from as early as February, 2014 but that these only came into the possession of the solicitors in or about the month of July, 2021, whereas the plaintiff's solicitors claim to have furnished them as long ago as April, 2017. In the circumstances, having regard to what is claimed are lengthy, inordinate and inexcusable delays on the part of the plaintiff in prosecuting her claim, the first named defendant seeks to have these proceedings struck out.

LEGAL PRINCIPLES

13. The law in relation to the dismissal of proceedings for want of prosecution and/or inordinate delay is well settled. In this case the first named defendant asserts both pre-commencement and post-commencement delay. 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.”

14. 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 ECHR 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.”

15. 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:

“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)”*

16. Notwithstanding a clear tightening of standards in respect of delay over the last three decades, the decision of the High Court in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 259 remains the touchstone authority 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.”*

17. 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 established 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).

18. More recently still in *Sullivan v. Health Service Executive* [2021] IECA 287, Donnelly J. addressed the differences between the application of the *Primor* and *O'Domhnaill* principles, summarising the current law as follows (para. 45):

“a) Regardless of whether the delay is pre or post commencement of proceedings, where a defendant establishes inordinate and inexcusable delay on the part of a plaintiff, the defendant may rely upon the third leg of the Primor principles to ask the court to dismiss the proceedings where the balance of justice requires this (a lesser standard than whether there is a real and substantial risk of an unfair trial or unjust result).

b) 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.”
(para. 52).

19. Accordingly, where inordinate or inexcusable delay is demonstrated, regardless of whether it is pre or post-commencement, the proceedings may be dismissed where the balance of justice requires it. However, the Court may also dismiss on grounds of pre-commencement delay, without any culpability (in terms of inordinate and unexplained delay) being established, where it is demonstrated that there is a real and substantial risk of an unfair trial or an unjust result consequent upon delay. The parties identified other relevant caselaw including *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 I.R. 510, 514, 518; *Comcast International Holdings Inc v. Minister for Enterprise* [2012] IESC 50, para. 12 per Denham C.J.; *McNamee v. Boyce* [2017] 2 I.L.R.M. 168) (paras. 43 to 44), *Tesco Ireland Ltd. v. McNeill* [2014] IEHC 367, *O’Connor v. John Player and Sons* [2004] 2 I.L.R.M. 321, *Sweeney v. Keating* [2019] IECA 43, *Mangan v Dockeray* [2020] IESC 67 and most recently *Rose v. Murray* [2022] IEHC 94 (where the principles are summarised at para.3).

20. 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.”

21. 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.

22. 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 evidence (*AIG Europe Ltd v. Fitzpatrick* [2020] IECA 99, Whelan J.). Irvine J. in *Collins v. Minister for Justice* [2015] IECA 27 (cited with approval in *AIG Europe Limited*) observed that the first matter to be 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. Irvine J. stated at para. 125 as follows:-

“...Of significant relevance to that issue must be the nature of the claim being advanced by the plaintiff in the proceedings.”

23. In *AIG Europe Ltd.*, Whelan J. identified two factors as relevant in determining prejudice, first, “*whether the appellant was prejudiced by the respondent’s delay*” and second, “*whether there was anything in the appellant’s conduct which contributed to the delays or would militate against granting the reliefs sought*” (para. 37). She added that (para. 40) “*it is incumbent that prejudice is clearly articulated rather than a vague generalised assertion.*” “*General*” and “*specific*” prejudice must be considered, as well as other matters such as the nature of the

proceedings (para. 50). 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 (at para. 34).

24. In *Ahearne v. O'Sullivan & others* [2020] IEHC 46, in considering the balance of justice, Simons J. said it was relevant to have regard to the reputational damage for a defendant. Noting the allegations of negligence made in those proceedings against the orthopaedic surgeon, Simons J went on at para. 43 to state as follows:

“43. A plaintiff who makes such serious allegations should prosecute his or her proceedings without delay. Having failed to do so, the balance of justice points towards dismissing the proceedings in order to vindicate the surgeon's right to a good name.”

25. It was submitted before me that in the instant case where allegations of negligence are made against a barrister, there is a similar obligation on the plaintiff to prosecute her claim without delay. My attention was drawn in this regard to the recent decision of the High Court, (Twomey J.) in *Dempsey v. Foran & others* [2021] IEHC 39 which was a case involving a solicitor who was sued in respect of an alleged breach of an undertaking. In *Dempsey*, the Court set out the timeline and analysed the various periods of delay on the part of the parties. The Court referred to *Primor Plc v. Stokes Kennedy Crowley* and applying the principles therein identified reflected that there is an obligation to litigate claims promptly against a professional. At para. 119 of his judgment, Twomey J. stated:-

*“Indeed, it could be argued that, because of the likely effect, of unproven allegations of a breach of undertaking, on a professional's insurance premium (which effect is likely to continue until the 'claim' is resolved) and the impact of such allegations on her professional reputation in the marketplace, there is an added onus on plaintiffs to progress such claims as quickly as possible. This is because it is well settled that there is an onus on a plaintiff not to sue a professional without a reasonable basis, usually an expert opinion supporting that claim. Denham J., as she then was, in *Cooke v. Cronin* [1999] IESC 54 at p. 4 of her judgment, explained the rationale for this rule as follows:*

“To issue proceedings alleging professional negligence puts an individual in a situation where for professional or practice reasons to have the case proceed in open Court may be perceived and feared by that professional as being detrimental to his professional reputation and practice. This fear should not be utilized by unprofessional conduct.” (Emphasis added)”

26. Twomey J. went on to note that a similar point was the subject of discussion by the Supreme Court in *Mangan v. Dockeray* [2020] IESC 67, where McKechnie J. made the following observation:

“Reputation is a crucial component of one's right to earn a livelihood at a personal level, as it is for public confidence in the profession of which that person is a member, at an institutional level [...] by instituting practice related proceedings against such a person or body, is to put their reputational integrity in issue, at least to some extent, and thus should only be undertaken if there is justifiable reason for so doing”

27. Twomey J. summarised his position as follows at para. 122: -

“... this Court is of the view that a solicitor should not have to endure litigation hanging over him (in this case for a decade or more), simply because of the supervisory jurisdiction of the High Court. On the contrary, it is arguable that, in proceedings against a professional such as a solicitor, where reputation is so crucial, there is an onus on a plaintiff to pursue any such litigation promptly. In this case, one is talking about a breach of undertaking which is alleged to have occurred some 14 years ago, which only led to proceedings being instituted 10 years ago. Because of the pre-commencement delay (at least 3 years) and post-commencement delay (at least 5 years), this has led to a case, which could be perceived as a claim of unprofessional conduct, hanging over Mr. O'Shaughnessy for at least 8 years longer than necessary.”

28. 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, regardless of whether it is pre or post-commencement, 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 his reputation or otherwise. Even if I decide that there has been no culpable delay (meaning inordinate and inexcused or unexplained) I may also dismiss on grounds of pre-commencement delay, where it is demonstrated that there is a real and substantial risk of an unfair trial or an unjust result consequent upon delay.

EVIDENCE IN RELATION TO REASONS FOR DELAY

29. The time-frame which requires to be considered on the first named defendant's application to dismiss is apparent from the pleadings, the affidavit evidence (affidavit of John Fahy, sworn on the 19th of February, 2021, the replying affidavits of Mark Killelea and the plaintiff dated the 2nd of June, 2021, the further affidavits of Donal Creaton dated the 8th of June, 2021 and the supplemental affidavit of Mark Killelea dated the 7th of July, 2021) and exhibits thereto and an agreed chronology as summarised above.

30. In terms of the want of prosecution complained of by the first named defendant, it is clear that it is now some twelve years since the last advices furnished by the first named defendant to the plaintiff (May, 2010).

31. As apparent from the chronology the plaintiff did not institute proceedings for a period of three years and four months from her last contact with the first named defendant (and more than four years after his initial oral advices). Thereafter having instituted proceedings, she delayed for a period of eleven months in serving her Statement of Claim, was dilatory in replying to particulars (eight months delay in dealing with the first Notice for Particulars and five months on the second) and in securing copies of the plaintiff's file from her former solicitors and the second named defendant and providing them to the first named defendant.

32. With regard to pre-issue delay, the plaintiff maintains that her claim against the first named defendant only crystallised with the second decision of the Rights Commissioner refusing her an extension of time in January, 2012. She exhibits the decision of the rights Commissioner delivered

on the 22nd of February 2011 which concluded:

“I have no function in relation to the matters which were in dispute between the parties as it relates to the status of the contract. That matter may be determined only on foot of a complaint under the relevant enactment. Section 2(2)(b) of this Act is unambiguous and clearly allows for a waiver of employment rights. It provides that the protection of the Act shall not apply to dismissal consisting only of the expiry of the term of a fixed term contract, provided the contract is in writing”

33. On affidavit she explains that she withdrew her further application for an extension of time to pursue a determination that she was entitled to permanency under the 2003 Act on legal advice from her new solicitors and that she instructed those solicitors to advise her on whether the defendants were negligent in respect of the advices given to her. She avers that she was advised by her solicitors that the Court had made it clear that an independent expert report must be obtained to assess whether or not negligence has taken place before issuing proceedings for professional negligence. She deposes to duly obtaining an expert opinion in April, 2013.

34. The first named defendant further points to individual periods of delay following the issue of proceedings when it is claimed that there were delays in replying to notices for particulars and furnishing documentation. It is noted that while the plaintiff’s solicitors wrote seeking a defence on a number of occasions, the first named defendant maintained that it could not serve a Defence until such time as the second named defendant’s file was made available and the plaintiff’s solicitor agreed to seek a copy under Data Protection legislation and furnish it on receipt. A Notice for Particulars was raised on behalf of the first named defendant dated the 27th of February 2015, which was replied to on the 14th of October 2015. It appears that the first named defendant believed that those Replies were deficient and wrote to the plaintiff’s solicitors on the 8th the January 2016 expressing dissatisfaction with aspects of the Replies. In that correspondence, the first named defendant’s solicitors indicated that the plaintiff’s file in relation to the handling of her case by the second named defendant had not been received, and that the first named defendant would not be in a position to file his defence until the said file had been received and considered. No reply was received to that correspondence and no further steps were taken by the plaintiff until her then solicitors, Purdy Fitzgerald, served a Notice of Intention to Proceed on 14th February 2017. The first named defendant places particular emphasis on the delay between 2017, when the later replies

to particulars were received, and November, 2020 when the Plaintiff's solicitor made contact with his solicitors in relation to the failure to deliver a defence.

35. In addressing these periods of delay on affidavit the plaintiff says that she was advised that she was required to particularise her claim and she was referred to a vocational assessor for a report. On affidavit the plaintiff outlines an evolving situation with regard to her work and studies over the period of years following the termination of her employment, all of which she believed required to be assessed in terms of establishing her losses arising from the loss of permanency which flowed from the negligent advice she claims she received. Her solicitor confirms that the particulars sought by the first named defendant required this referral as they had sought full and complete details of each and every loss of career opportunity and full and complete details of her efforts to mitigate her loss. In the interim, the vocational assessor originally appointed retired early and it became necessary to secure an alternative expert. She deposes to the fact that a new vocational assessor was appointed in September, 2018 and a report was received from him in November, 2019.

36. It appears also that other events were taking place behind the scenes between 2017 and 2020. The plaintiff's solicitor moved from his consulting role with the solicitors on record for the plaintiff and set up practice in his own right in July, 2018. The plaintiff's file travelled with him. Her solicitor explains that he waited for receipt of the vocational assessor's report to take further steps. Although this report was received at the end of November, 2019, he attributes further delay to the onset of the pandemic and lockdown restrictions with the result that he did not contact the first named respondent's solicitors until November, 2020 advising them that he was acting on behalf of the plaintiff and requesting a copy of their Defence.

37. The plaintiff further points out that although the first named defendant makes an issue of the delay in obtaining the second named defendant's files, that this was something that he could have pursued himself by way of discovery. She says that she was advised to make a data request for the file and that when it was obtained it was delivered to the first named defendant by letter dated the 5th of April 2017 and that a further request for delivery of Defence was repeated at that juncture. Importantly, this is the letter which the first named defendant claims not to have received. There is dispute between the parties in relation to when the second named defendant's file was furnished.

38. Although the correspondence exhibited on behalf of the plaintiff suggests that it was delivered in April, 2017, the first named defendant maintains that this was only received when they raised the issue of the awaited file after the eventual issue of a Motion for judgment in default of defence in January, 2021. However, as far as the plaintiff is concerned, she contends that the first named defendant caused or at least contributed to this period of delay. As far as the second named defendant knew, however, no further formal steps were taken following the service of Notice of Intention to Proceed and delivery of replies to particulars in 2017 until a Notice of Motion seeking judgment in default of defence was issued by the plaintiff's solicitors (without the service on the first named defendant of a Notice of Change of solicitor) on the 5th January 2021.

APPLYING THE TEST

39. As set out above (in line with the approach of the Supreme Court in *Mangan v. Dockeray & Ors.* [2020] IESC 67 at para. 128 and the Court of Appeal in *Sullivan v. Health Service Executive* [2021] IECA 287), I am proceeding on the basis that for this Court to be satisfied that a dismissal of the proceedings is warranted on delay/prejudice grounds, it must first be established that the delay is both inordinate and inexcusable. If it is not so established, it is the end of the matter unless it has been established that a real risk of an unfair trial caused by delay prior to the commencement of the proceedings. If inordinate and inexcusable delay is established, I must embark on a balance of justice test. The necessity to consider whether a real risk of an unfair trial is demonstrated on the balance of probabilities only arises in respect of pre-commencement delay where delay is found to have been excusable with the result that the balance of justice test was not conducted. Accordingly, my first task is to determine whether there has been inordinate and unexplained delay.

IS THE DELAY INORDINATE AND INEXCUSABLE?

40. While not directly addressed in her affidavit evidence, it seems reasonable to conclude that the plaintiff could only be satisfied that the claim she had been advised to pursue would fail when the Rights Commissioner made his decision in February, 2011. To my mind there is no question of inordinate delay to that point.

41. Thereafter, she pursued an application for an extension of time in a belated bid to secure her rights under the Protection of Employees (Fixed Term Work) Act, 2003. It is contended on behalf of the first named defendant that it should have been obvious that this application was doomed to fail because of the statutory restriction on the grant of extensions of time and it is argued that throughout this period the plaintiff was guilty of delay in not pursuing a cause of action as against the first named defendant. I am not prepared to accept that a delay occasioned while the plaintiff sought to secure the remedy she had been advised to pursue by the first named defendant was either inordinate or inexcusable. Nor am I prepared to accept that the plaintiff's attempt to secure an extension of time within which to assert her rights under the Protection of Employees (Fixed Term Work) Act, 2003 was so foolhardy as to be incapable of providing a justification for not proceeding immediately against the first named defendant.

42. Indeed, it seems to me that had the plaintiff not taken these steps or at least explored the possibility of an extension of time that this might have been relied upon in defence of the proceedings as a basis for contending that her claim was not established or that she had failed to seek to mitigate her loss. As it is, I note that one of the particulars raised on behalf of the first named defendant was to enquire as to whether she had sought to challenge the decision of the Rights Commissioner by way of judicial review. Accordingly, in my view, the time taken in pursuing the course of action advised to the plaintiff before a full appreciation that the advice was to be treated as wrong is not inordinate or, if it is, it is certainly excusable.

43. It is also well established that before suing in professional negligence, expert opinion should be sought to establish that a reasonable or justifiable basis exists for bringing such a claim (for recent statement see *Dempsey v. Foran & others* [2021] IEHC 39 and *Mangan v. Dockeray & Ors.* [2020] IESC 67 referred to above). Accordingly, while the proceedings were not themselves issued promptly after the cause of action arose, I consider that the fact that the plaintiff was still exploring remedies before the Rights Commissioner and thereafter properly sought an expert opinion as to whether she had been negligently advised was not inordinate and, if it was, it has been adequately explained. As I have not found the pre-commencement delay to be inordinate and inexcusable, I must also consider whether this delay gives rise to a real risk of an unfair trial and I will return to this issue below.

44. There having been some delay in the issue of proceedings, there was an onus on the plaintiff to pursue the proceedings with all due diligence thereafter. I agree that there were delays following the service of the Statement of Claim which require scrutiny. Breaking down the periods of delay identified on behalf of the first named defendant, I am satisfied that while greater expedition should have been shown following the service of the Statement of Claim, the timeline demonstrates that steps were taken to progress the case between 2014 and 2017.

45. While there is evidence of some delay on the part of the plaintiff during this period there is also evidence, to a lesser extent, of delay on the part of the second named defendant. Notably the second named defendant delayed in reverting to the plaintiff with its further queries arising from what was contended had been an inadequate response to particulars (by letter dated the 5th of April 2017, some 18 months after receipt of the Replies to Particulars, the first named defendant raised further particulars). Time was spent in taking up records and addressing particulars. This is not a case where nothing was happening. There was slow progress such that in my view the time taken was not so excessive as to justify a finding of inordinate delay or inexcusable delay such as might warrant the dismissal of the proceedings were the balance of justice to so require.

46. Not so, however, the delay between 2017 when the second named defendant's file had been recovered and all particulars had been replied to and the next active *inter partes* step in the proceedings occurring in November, 2020. When looking at the time-line summarised above, it seems to me that by far the most stark period of delay is this period between April, 2017 - by which time the plaintiff had replied to all particulars raised and, on the plaintiff's case, had furnished outstanding documents in terms of the second named defendant's file - and November 2020 when the plaintiff's solicitor made contact with the first named defendant's solicitor to pursue the outstanding Defence. This is a three and a half year period during which no active steps in the proceedings were taken. The only excuse or explanation offered by the plaintiff is that her vocational assessor had retired necessitating the retainer of a new assessor, her solicitor set up practice in his own right and the pandemic struck. None of these factors provide an adequate explanation for the failure to take any *inter partes* step for such a protracted period.

47. This period of delay is inordinate and while excuses have been presented, I do not consider that any explanation for the delay has been advanced such as would "*legitimately excuse the delay*"

per Irvine J. (as she then was) in *Millerick v. Minister for Finance* [2016] IECA 206.

WHERE DOES THE BALANCE OF JUSTICE LIE?

48. As I have found the delay to be both inordinate and inexcusable during the period from 2017 to 2020, I must next consider whether the balance of justice favours the dismissal of the action. Inordinate and inexcusable delay having been established, the onus of proof shifts to the plaintiff to establish the existence of “*countervailing circumstances*” which would warrant permitting the proceedings to continue to trial.

49. The Court notes that during the particular period of offensive delay the parties appear to have laboured under a misapprehension as to the stage the proceedings had reached. The plaintiff had replied to all particulars and furnished all documentation sought and was awaiting delivery of a defence whilst at the same time addressing evidential matters with a view to readying her case for hearing, whereas the first named defendant believed that documents in the form of the second named defendant’s file were outstanding and that it was not expected to deliver a Defence until that documentation had been furnished.

50. I am not in a position to determine where fault lies as regards the delivery or non-delivery of the second named defendant’s file. On an application of this nature, I am obliged to proceed on the basis that both parties are telling the truth and there was a breakdown in communication in 2017 whereby the plaintiff believed the file had been delivered and was awaiting delivery of a Defence whereas the first named defendant proceeded on the basis that no action was required of him pending receipt of the file. On the basis of the foregoing I do not think it can be properly concluded that the responsibility for the delay lies exclusively at the plaintiff’s door, albeit that she bears the burden of prosecuting her claim. In my view both parties were wrong in the positions they adopted and neither should have sat back and waited for the other to take the next step for a period exceeding three years. While the fact that they each laboured under a misapprehension does not excuse the delay, it seems to me that it is a factor that requires to be weighed in the Court’s approach to the balance of justice and constitutes “*countervailing circumstances which militates against dismissal*”. (per McKechnie J. *Mangan v. Dockeray* [2020] IESC 67, para. 109).

51. It seems to me that it would be unfair to burden the plaintiff alone with responsibility for the delay when the first named defendant shares that responsibility by sitting back and awaiting delivery of documents over such a protracted period without making any further enquiry or taking any further steps in the proceedings. As set out in *Primor*, I am entitled to consider:

“(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...”

52. Further, as noted in *Lismore Builders Ltd (In Receivership) v. Bank of Ireland* [2013] IESC 6 at para.52, (McMenamin J.):

“The onus to progress proceedings does not only lie on one side. I consider that these [the defendants’ delay in delivering their respective defences] are countervailing factors which, albeit not, strictly speaking, acquiescence, cannot be ignored.”

53. It is therefore clear that when seeking to determine where the balance of justice lies, I am entitled to consider the extent to which the defendant was culpable in respect of any portion of the delay which the Court determined to be inordinate and inexcusable (see also *Mannion v. Brennan* [2016] IECA 163 at para. 32). I consider it a countervailing circumstance to be weighed against the dismissal of proceedings that there was a misunderstanding as between the parties as to the stage of the proceedings reached which meant that neither party can be exonerated or held blameless in relation to the period of delay which I have determined to be inordinate and unexplained.

54. As for the evidence of prejudice, clearly in deciding where the balance of justice lies, this is a key consideration. In terms of the issues which may give rise to prejudice for a defendant, the list is non-exhaustive, but includes, as identified by Mahon J. in *Mannion v Brennan* [2016] IECA 163 at para. 35:

“the non-availability of important witnesses because of death or emigration, destruction of documentation, lack of or reduced recollection because of the passage of time or a belief that the proceedings have been long since abandoned.”

55. No specific concerns have been advanced with regard to the availability of important witnesses or the destruction of documentation. In this case I am mindful of the nature of the claim in these proceedings. In his grounding affidavit the first named defendant says that he is prejudiced because the case relates to consultations which he had with the plaintiff more than a decade ago. Accordingly, the primary prejudice asserted on behalf of the first named defendant is that in addition to written advices, he also provided oral advices at two consultations now some twelve years ago and more and this passage of time impacts on the reliability of memory. However, insofar as witness memory is concerned, it seems to me that this is less of an issue in a case of this nature where the oral advices in question were followed by written advices which it is not suggested differed in any material way from the oral advices offered. Further, it is clear that the claim as against the first named defendant is substantially based on his written advices.

56. I accept that where matters are at issue which are not, or are not fully, covered by documentary evidence, there is greater likelihood of prejudice resulting from delay. It seems to me, however, that in a professional negligence case where consultations typically involve the preparation of attendance notes by solicitors and where, as in this case, the consultation is followed by written advices, then the written record is of far greater importance than a witness' memory or recall of events (see Supreme Court in *Andrew Mangan (a person of unsound mind) v. Dockeray and Others* [2020] IESC 67, paras. 104 to 109). There may be other documentary evidence also available in the form of solicitor's attendance notes, although no evidence was presented to me in this regard either as to its presence or absence.

57. In *Mannion*, the Court of Appeal allowed an appeal of a High Court dismissal of professional negligence action against the Legal Aid Board, in circumstances where, despite significant delay in prosecuting the proceedings, there was no question but that the Board had retained the relevant files and were in a position to call expert evidence. As in *Mannion* where solicitors files were available in the instant case, the Court will have the written advices of the first named defendant before it and expert evidence can be called. The file from Padhraic Harris & Co. (the solicitors who briefed the first named defendant on behalf of the plaintiff and who no longer acts) has been sourced and is available. The second named defendant's file has been sourced and is also available.

58. Should this case proceed to hearing, there is likely to be significant reliance on the written advices which are available together with any notes from the plaintiff's former solicitor's file and from the second named defendant. The likelihood is that irrespective of the passage of time, the evidence of both the first named defendant and any experts called on his behalf, will be heavily if not almost entirely reliant on the written record. The written notes and records are particularly important in a case of this nature and they are not time dependent.

59. In addition to the passage of time since the consultations the subject of the claim took place, particular emphasis was also placed on behalf of the first named defendant during the hearing of the motion on the first named defendant's professional position and the nature of the claim against him in urging that the proceedings should be dismissed. While the issue of reputational damage has been urged in argument (and extensive case-law opened in this regard starting with (vii) of the *Primor* principles), this question has not been expanded upon by the first named defendant on affidavit. Thus, the first named defendant has not identified with any specificity real prejudice in this case having regard to impact on his business or reputation. Of course, I acknowledge that having proceedings of this nature hanging over the first named defendant for a protracted period of time is likely to have reputational implications and involvement in litigation is generally understood to be very stressful, I do not consider that there is anything in the evidence in this case to suggest that concerns particular to this case are such as might tip the balance against the plaintiff and in favour of a dismissal of her action.

60. Apart from impact on memory of witness and on the professional reputation of a defendant when proceedings of this nature become excessively protracted, no specific prejudice of a concrete nature such as missing evidence or death of a witness was identified on behalf of the first named defendant. The height of what is said by him in terms of prejudice in his affidavit is a bald averment that he is "*severely prejudiced in dealing with the matter at this remove in time*". In my view, the first named defendant does not identify anything resembling actual or specific prejudice caused by delay.

61. On the other hand, the prejudice to the plaintiff if the first named defendant's application succeeds is self-evident. If the application succeeds it will result in the ultimate prejudice being suffered in that her claim would be dismissed.

62. Subjecting the period 2014-2017 to a balance of justice assessment, I arrive at the same conclusion. There were delays on both sides during this period. Ultimately the nature of the case, the availability of the written advices and of documentary evidence in the form of the then solicitor's file and the trade union file are the determining features for me when coupled with the lack of any identified, specific prejudice to the first named defendant.

63. 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, still less that a real and substantial risk of an unfair trial or unjust result is demonstrated. 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 first named defendant giving rise to this claim. The written advices provided by the first named defendant remain available and are likely to be pivotal. Further, it remains incumbent upon a judge hearing this action to intervene at any stage if he or she is of the view that an injustice presents itself due to evidential deficit occasioned by the passage of time (see *Sullivan v. HSE* [2021] IECA 287, para. 106).

64. As counsel for the plaintiff has urged, given that this is in large part a documents case, and given that both the former solicitor's file and the second named defendant's files are available, once the first named defendant has delivered his Defence, this matter should be in a position to progress to trial in early course. 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. The balance of justice remains in favour of the case proceeding.

WHETHER REAL RISK OF UNFAIRNESS HAS BEEN DEMONSTRATED

65. For similar reasons to those rehearsed above and having regard to the fact that absent culpable delay, a case may still be dismissed where pre-commencement delay has the consequence of creating a real and serious risk of an unfair trial, I am satisfied that the nature of the case together with the availability of a written record of the advice provided means that it is not demonstrated on the balance of probabilities that there is a real risk of unfairness

consequent upon pre-commencement delay. Accordingly, I am satisfied that there is no proper basis for the dismissal of proceedings on grounds of pre-commencement delay.

CONCLUSION

66. While I have found that there has been inordinate delay during the period from 2017-2020 which has not been satisfactorily explained or excused, 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 the hearing to be established in respect of pre-commencement delay. In my view this is not a case in which the passage of time is likely to impact to any significant degree on the quality of the oral evidence available to the Court and it is not particularly witness dependant from the perspective of the first named defendant. As defences are now available from both the first and second named defendants and the relevant documents have been secured and shared, there does not appear to be any impediment to the early conclusion of these proceedings nor any basis for further delay.

67. Accordingly, I propose to dismiss this application. In circumstances where the plaintiff has successfully resisted this application, it is my preliminary view that she should be entitled to the costs of the motion as against the first named defendant to be adjudicated in default of agreement but subject to a stay of execution pending the determination of the proceedings. Should the parties wish to argue for a different order, then I will direct that the first named defendant file written submissions in relation to the order contended for within a period of ten days from the date hereof and I will allow a period of a further seven days for any response in writing the plaintiff wishes to make. Thereafter, I will finalise my order in this matter.