THE COURT OF APPEAL

UNAPPROVED

Record Number: 2024/82
High Court Record Number: 2012/7852P
Neutral Citation Number [2024] IECA 207

Whelan J.

Costello J.

Noonan J.

BETWEEN/

JOHN PADDEN

PLAINTIFF /RESPONDENT

-AND-

MICHAEL MCDARBY, SEAN ACTON AND CATHERINE MCDARBY PRACTICIING UNDER THE STYLE AND TITLE OF MICHAEL MCDARBY AND COMPANY SOLICITORS

DEFENDANTS/APPELLANTS

JUDGMENT (*ex tempore*) of Mr. Justice Noonan delivered on the 31st day of July, 2024

1. This is yet another delay case. The defendants, who are a firm of solicitors, seek to have the proceedings dismissed on the basis of the delay of the plaintiff, a former client of the firm. As in all such cases, a chronology of the relevant events is central:

- 28th November 2003 – The plaintiff was involved in a road traffic accident. He was travelling in a car which was being driven by his brother. The plaintiff alleges that the car was stationary at a traffic signal when struck from behind by a car driven by a Mr. David Heffernan. The plaintiff alleges that he suffered personal injuries as a result of the accident.
- 1st December 2003 – The plaintiff instructed the defendants in relation to a potential claim. He was an existing client of the firm.
- 17th December 2003 – The defendants prepared a statement of the plaintiff which is unsigned, and appears to have been intended for use in a complaint to the gardaí. This statement suggests that Mr. Heffernan was known to the plaintiff and his brother and there appears to have been some animosity between the parties. It discloses that a number of gardaí attended at the scene of the accident after it occurred. It indicates that an unidentified garda alleged at the scene of the accident that the plaintiff's brother had reversed into Mr. Heffernan.
- 16th July 2004 – The defendants issued a civil bill on behalf of the plaintiff naming Mr. Heffernan as sole defendant.
- 23rd August 2004 – The defendants wrote a letter of claim to Mr. Heffernan which was replied to by solicitors on his behalf denying liability.
- 13th September 2004 – An attempt at serving the civil bill on Mr. Heffernan was unsuccessful.
- 9th November 2004 – A second attempt was also unsuccessful. It subsequently emerged that Mr. Heffernan was uninsured at the material time.

- 7th April 2005 – A third attempt at service, this time personal, of the civil bill failed.
- 26th May 2005 – A further attempt at service failed.
- 16th July 2005 – The civil bill expired without having been served.
- 26th July 2007 – Two years later, the plaintiff made a complaint to the Law Society about the defendants concerning delay in the case. During the intervening two year period, the defendants had been seeking payment of fees from the plaintiff in respect of work done on the case.
- 10th November 2010 – The plaintiff instructed a new firm of solicitors Messrs. T. Dillon Leetch who sought a copy of the plaintiff's file from the defendants.
- 23rd November 2010 – The defendants advised Messrs. Dillon Leetch that the file was in storage and a bill of costs would now be raised. This was subsequently delivered.
- 18th October 2011 – The plaintiff instructed a new firm of solicitors, Messrs. Mallon. They wrote a letter of claim to the defendants.
- 31st July 2012 – A plenary summons issued claiming damages for negligence against the defendants for allowing the proceedings to become statute barred.
- 10th May 2013 – The plenary summons was served after a delay of over nine months.
- 2nd April 2014 – A statement of claim was served after a delay of almost eleven months.
- 19th January 2015 – A motion for judgment in default of appearance was brought against the defendants.
- 2nd February 2015 – The defendants entered an appearance following an order of the High Court.
- November 2015 – A motion for judgment in default of defence was brought by the plaintiff.

- 3rd December 2015 – The defence was delivered again pursuant to an order of the High Court.
- 21st April 2016 – The plaintiff sought discovery from the defendant.
- 7th June 2016 – The defendants indicated they are refusing to provide discovery.
- 12th January 2017 – After further attempts at obtaining voluntary discovery, a motion for discovery was issued.
- 6th February 2017 – The motion was listed and adjourned on consent.
- 3rd April 2017 – The motion was again listed and again adjourned on consent.
- 29th May 2017 – The High Court made an order directing the defendants to release their file on terms including the payment of outstanding fees by the plaintiff.
- 3rd October 2017 – The defendants provided partial discovery of the file.
- 27th July 2018 – A motion issued against the defendants for an alleged breach of the High Court order of the 29th May, 2017.
- 20th May 2019 – The discovery matter came before the High Court after a number of adjournments on consent. Categories were agreed and one was refused by the Court.
- 20th March 2020 – The defendant's affidavit of discovery was served.
- 9th October 2020 – A notice of trial was served.
- 21st July 2022 – After a delay of almost two years, the defendants' solicitors were advised that the case was certified as ready for trial and a trial date would be sought the following week. The defendants objected to this on the basis that a notice of intention to proceed had not been filed by the plaintiff.
- 2nd August 2022 – A notice of intention to proceed was filed.
- 13th September 2022 – The plaintiff's solicitors advise the defendants' solicitors that at the call over on the 6th October, the plaintiff intended to seek a date for trial.

- 6th October 2022 – The matter came before the High Court and was assigned to case management on the 6th December, 2022 on the basis that the within motion to strike out for delay was about to be served and it was duly served on that date.

The affidavit evidence

2. The defendants' motion is brought on the usual basis seeking to have the case dismissed for want of prosecution both pursuant to Order 122, rule 11 of the RSC and on the grounds of the court's inherent jurisdiction to dismiss the claim for inordinate and inexcusable delay. In addition, the defendants seek to have the matter dismissed pursuant to O. 19, r. 28 and/or the inherent jurisdiction of the court on the grounds that it is *"defective, frivolous, vexatious and an abuse of process."*

3. The motion is grounded upon the affidavit of the first defendant, Michael McDarby. He sets out a chronology of relevant events broadly in line with those I have described. Significantly, Mr. McDarby avers the following in relation to the circumstances of the event giving rise to the claim:

> *"November 2003 – The plaintiff is involved in an altercation with Mr. Heffernan which culminates in a ramming of a vehicle in which the plaintiff was a passenger."*

4. It is immediately apparent that this description of events is entirely at odds with the plaintiff's statement, drafted by the defendants, presumably on the plaintiff's instructions. The basis for Mr. McDarby's description is stated by him to be taken from the plaintiff's statement in which the plaintiff says that at the scene of the accident, an unidentified garda made an allegation that the plaintiff's brother reversed into Mr. Heffernan's car.

5. It is, however, clear from the plaintiff's statement that he did not accept that version of events and furthermore, although the civil bill that the defendants issued has not been

exhibited in these proceedings, it was presumably pleaded, in accordance with the plaintiff's instructions, that Mr. Heffernan had driven his car negligently and collided with the rear of the stationary car in which the plaintiff was a passenger. Clearly, if Mr. McDarby did not accept that the plaintiff's instructions were true, as he now appears to suggest, it would give rise to obvious ethical difficulties for him in purporting to issue court proceedings on the plaintiff's behalf asserting matters which he believed to be untrue.

6. In his affidavit, Mr. McDarby makes various complaints about the delays that have occurred in the proceedings and the difficulty in recalling events occurring, at that stage, some 17 years earlier. He makes complaint about the fact that the plaintiff delayed from August 2006 until late 2010 in discharging outstanding fees. He complains of various delays in first issuing the current proceedings and second prosecuting them. He makes a complaint of the fact that it will be difficult to track down relevant garda witnesses and/or Mr. Heffernan and their recollection of events is likely to be poor or unreliable. He also complains of the fact that the plaintiff's claim is now far in excess of what it was when it started in the Circuit Court. He complains of a violation of his rights under the Constitution and the European Convention on Human Rights.

7. This affidavit was replied to by the affidavit of Ian Mallon, the plaintiff's solicitor. Mr. Mallon also sets out a chronology, albeit one that is somewhat more detailed than that set out by Mr. McDarby. He points to the fact that although Mr. McDarby attempts to undermine the basis for the plaintiff's claim, if it was the position that he considered that the plaintiff's brother was responsible for the accident, he ought to have joined him as a co-defendant in the proceedings. On the contrary, Mr. McDarby also issued proceedings on behalf of the plaintiff's brother against the same defendant, Mr. Heffernan. He also refers to the fact that the Motor Insurers Bureau of Ireland were not joined in the proceedings

despite the fact that Mr. McDarby was made aware that Mr. Heffernan was not insured at the material time.

8. Mr. Mallon further avers that it is unclear to him why garda witnesses might be required given that the plaintiff was at all material times a passenger in a motor vehicle being driven by his brother. He further says that the plaintiff was never made aware that the proceedings were issued in the Circuit Court nor does Mr. Mallon understand why a decision was taken to issue the proceedings there rather than in the High Court, as was the case with the plaintiff's brother's proceedings. He notes that during the period between 2003 and 2010 during which the defendants continued to be the solicitors on record for the plaintiff, they never sought a medical report on his injuries.

9. A further affidavit was sworn by the plaintiff in which he reiterates the version of the accident that appears in his statement referenced above. He further details various contacts with Mr. McDarby and says that he suffered injuries to his neck, back and shoulder which have had the effect of rendering him unable to work as a pipe layer, which he did prior to the accident. He was advised by a consultant orthopaedic surgeon in April 2018 that he was suffering from chronic pain syndrome.

Judgment of the High Court

10. The judge commenced by setting out a synopsis of the periods of delay in this case which he characterised as follows:

> *"(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 was offered for this.

(4) A delay from 2016 to 2020. [This was the period during which discovery issues were canvassed].

…

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."

11. The judge then gave a brief summary of the law, notably referring to the *"vast amount of case law on this issue"* but placed particular emphasis on the judgment of this Court in *Cave Projects Limited v Gilhooley & Ors* [2022] IECA 245. She goes on to conclude that there was both inordinate and inexcusable delay on the part of the plaintiff and, that being so, the issue revolved around the balance of justice under the well settled principles established by the Supreme Court in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459.

12. The judge noted (per *Cave Projects*) that she 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. She noted that the defendants assert tangible prejudice arising from difficulty in identifying and locating witnesses as a result of the passage of time, in particular garda witnesses. The judge noted that the defendants have been on notice of the claim since October 2011 when the letter of claim was served, but the first time they appear to have tried to establish the availability of the relevant gardaí was when they wrote to the Garda HR Department on the 21st November, 2022, after the motion to dismiss had been issued.

13. Importantly, the judge did not consider that the latter correspondence was 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 and motion to dismiss which the defendants filed over a month before they wrote to the Garda HR Department."*

She went on to say that even if the gardaí were not available, there may be documentary evidence of any concerns they may legitimately have had at the time of the incident. She therefore did not consider that the passage of time was so prejudicial for the defendants that it could not be addressed by a trial judge.

14. She reached the same conclusion concerning any medical evidence that might now be adduced. Her conclusion was that she was not satisfied the defendants had established sufficient or any specific prejudice by reason of the plaintiff's delay, particularly given the relatively straightforward nature of the alleged negligence, *i.e.*, failure to serve the proceedings in time. She also noted that the authorities confirmed that the fact that a case is ready for hearing goes against a dismissal, and although the present case was not fully ready

to receive a trial date, nonetheless it was reasonably close to it. She accordingly dismissed the application.

The appeal

15. Although the defendants advance 22 grounds of appeal, rather than identifying any specific error of law that is alleged to have been made by the High Court, they broadly appear to address the merits of the case suggesting that the judge misapplied the *Primor* test in failing to have adequate regard to the level of prejudice suffered by the defendants. Beyond that, the defendants say the judge was wrong to assume that the gardaí were likely to have documentary evidence which may ameliorate the effect on memory of the passage of time. They make the same complaint about the absence of medical records.

16. They further suggest that there is no evidence of any supportive expert report which is an essential requirement for the institution of professional negligence proceedings. There is also a complaint that the judge failed to have regard to the fact that there was no affidavit evidence from the plaintiff, and given that the plaintiff swore an affidavit to which I have already referred, this ground is not understood.

Discussion and decision

17. As noted recently by this Court, applications to dismiss claims for delay are among the most common dealt with by the courts – see *Beggan v Deegan & Ors* [2024] IECA 4 at para. 16. Although the trial judge noted at the outset of her judgment that the defendants relied on two lines of jurisprudence, both that arising in *O'Domhnaill v Merrick* [1984] IR 151 and *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459, I think it is clear that she approached the case on exclusively *Primor* grounds. That is evident from the fact that the primary decision upon which the High Court relied was that in *Cave Projects* which was solely

concerned with the *Primor* jurisdiction. The defendants make no complaint about this in their notice of appeal although in oral argument sought to contend that the case falls within the *O'Domhnaill* strand in that there is a real risk that a fair trial can no longer be had.

18. Since the judge held that the delays in this case were both inordinate and inexcusable, and there is no cross-appeal by the plaintiff in respect of this finding, the case falls to be determined on a consideration of where the balance of justice lies. Before considering that, I think it is important to emphasise, as has been held in many cases, that *Primor* is primarily concerned with delay in prosecuting proceedings after those proceedings have been initiated. Pre-commencement delay is, broadly speaking, not relevant for the reason that a plaintiff cannot be considered to have been guilty of culpable delay in instituting proceedings that are brought within the time period provided in that regard by the Statute of Limitations.

19. This is clear, for example, from the judgment of Clarke J. (as he then was) in *Comcast International Holdings Incorporated and Ors v Minister for Public Enterprise and Ors* [2012] IESC 50 where he said (at para. 5.2):

> *"In addition, it is clear from cases such as Birkett v. James [1977] 2 All E.R. 801 (as adopted in both the High Court and this court in Stephens v. Paul Flynn Limited) that a party who starts their proceedings late, while within the relevant period provided for in the Statute of Limitations, bears an added burden of progressing their proceedings with expedition. The point is that the period within which proceedings have to be commenced is laid down by statute. It is not for the courts to second guess the choice of period provided for by the Oireachtas."*

20. In *Stephens v Flynn* [2005] IEHC 148 (cited in the foregoing extract), Clarke J. referring to an earlier judgment citing *Birkett v James*, said (at para. 10):

"In Hogan v Jones [1994] 1 I.L.R.M. 512, Murphy J. having referred to [Rainsfort v Limerick Corporation [1995] 2 I.L.R.M. 561] further approved and applied a principle stated by Lord Diplock in Birkett v James [1977] 2 All E.R. 801 at p. 808 to the following effect:

> *'It follows a fortiori from what I have already said in relation to the effects of statutes of limitation on the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading of recollections of his potential witnesses, their death or their untraceablity. To justify dismissal of an action for want of prosecution the delay relied on must relate to the time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued' ".*

21. Insofar as the High Court appears to suggest with regard to the periods of delay at (1) above that the plaintiff was under an obligation to move quickly in the period prior to the issue of the plenary summons, that is obviously contradicted by the passages I have referred to above, but in fairness to the judge, it is not entirely clear that she was referring solely to pre-commencement delay. Pre-commencement delay in that regard cannot be regarded as culpable but, as *Birkett v James* shows, it may have a bearing in a consideration of whether or not post-commencement delay is inexcusable or not. It follows that if there is no post-

commencement delay, pre-commencement delay is irrelevant and is solely governed by the Statute of Limitations.

22. Although some of the older authorities appear to suggest that once inordinate and inexcusable delay is established, the onus shifts to the plaintiff to justify why the case should not be dismissed, I think more recent cases such as *Cave Projects* no longer support such an approach. Thus, Collins J., in the latter case, said (at p. 27):

> *"The onus is on the defendant to establish all three limbs of the Primor test i.e. that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim: …"*

23. Relevant also in these proceedings is the observation of Collins J. that a defendant cannot rely on matters which do not result from the plaintiff's delay (p. 28) and that *"the authorities increasingly emphasise that defendants also bear a responsibility in terms of ensuring the timely progress of litigation* [citing *Comcast* in support]" – at p. 29. It is also important to have regard to the level of prejudice suffered by the defendant as a result of the plaintiff's delay in determining whether it has become unfair to call upon the defendant to meet the case. Thus in *Beggan v Deegan* (op. cit.), speaking for this Court, I said (at para. 18):

> *"This case is concerned with the [Primor] line of jurisprudence as distinct from that arising under [O'Domhnaill]. To succeed under the latter, a defendant must demonstrate that there is a real risk that a fair trial can no longer be had. Under Primor however, it has been said repeatedly that moderate prejudice short of that <u>may</u> suffice. It seems clear therefore, that under Primor, a case may be dismissed even though a fair trial is still possible. One would have thought that for a plaintiff*

to suffer the draconian remedy of having their case dismissed, notwithstanding that a fair trial is still available, the level of prejudice suffered by the defendant as a result of delay, even if described as 'moderate', must be significant enough to make it unfair to the defendant for a trial to proceed." (Emphasis in original).

24. It seems to me that a fundamental consideration in the calibration of the balance of justice is a determination of whether the prejudice alleged, assuming it to be sufficient to warrant dismissal, is prejudice solely caused by culpable delay on the part of the plaintiff. It is axiomatic that if the prejudice of which the defendants complain is of their own making, they can hardly be heard to rely upon it irrespective of what delay has occurred.

25. That, in my view, is a significant feature of the present case. There are two particular aspects of alleged prejudice that the defendants here rely on. The first is the alleged non-availability of garda witnesses and the second, of medical evidence, both of which it is said have been caused by the plaintiff's delay. I do not accept that this is so. The civil bill in this case expired on the 16th July, 2005. The defendants were aware of this although the plaintiff was not. However, the plaintiff was sufficiently disgruntled by the lack of progress in his case as to make a complaint to the Law Society two years later in 2007.

26. In those circumstances, the defendants must surely have apprehended the real prospect of being sued by the plaintiff for allowing his case to become statute barred. That apprehension can only have been strengthened three years later when the plaintiff's new solicitors sought a copy of the file. If there was any doubt about the matter even then, it was dispelled two years later when a letter of claim was written by the plaintiff's current solicitors. So what by 2007 must have been a reasonable likelihood became a certainty in 2012.

27. By that time, at the very latest, the defendants knew that they would have to defend a professional negligence claim, although as I have said, it seems to me very probable that they were well aware of this long before the letter of claim was written. It then became incumbent upon the defendants to begin assembling such evidence as they felt they would require to defend a claim which they now say includes evidence from gardaí who attended at the scene of the incident.

28. However, as the trial judge correctly pointed out, the first attempt by the defendants to even make contact with any relevant gardaí came on the 21st November, 2022 after the motion to dismiss had been issued. I agree entirely with the view of the trial judge who concluded that this was a belated attempt to shore up the defendant's proofs for the motion they had initiated. In those circumstances, I fail to see how the defendants can credibly assert that they have suffered prejudice because of delay by the plaintiff, in relation to the evidence of gardaí whom it is far from clear have any relevance to the case in the first place.

29. Indeed, if the defendants believed this evidence to be of importance to his claim when the plaintiff first instructed them, it is surprising that no effort was made to obtain the evidence then. In a road traffic accident case, it would in the normal way, as counsel for the plaintiff submitted, be a matter of routine for the plaintiff's solicitor to seek a copy of the garda abstract and accompanying statements. Had that been done, it would presumably have gone a long way to addressing the complaints of prejudice now made by the defendants about the unavailability of garda evidence. Instead, the defendants waited 19 years to seek this evidence, and only then after their motion issued.

30. In that latter regard, the defendants want to apparently call the gardaí involved with a view to proving that the plaintiff's claim that the car in which he was a passenger was rear-ended by Mr. Heffernan is false, and would not have succeeded in the first place. That

approach is to my mind quite extraordinary for the reasons I have already touched upon. The plaintiff's case is quite simple. He was a passenger in a car, the car was involved in a collision and he suffered injuries. In the normal way, such a case would be unanswerable and the only liability issue that might arise is in respect of the non-wearing of a seatbelt, if applicable.

31. When the plaintiff retained the defendants, he gave clear instructions as to how the accident happened. If those instructions are correct, it would appear that, *prima facie* at any rate, Mr. Heffernan is the culpable party. In giving his initial instructions, the plaintiff also alerted the defendants to the fact that apparently Mr. Heffernan was advancing an alternative narrative, namely that the plaintiff's brother reversed into him. The plaintiff of course denied that but if the defendants were in any doubt about the matter, they had the option of advising the plaintiff to institute proceedings against both Mr. Heffernan and the plaintiff's brother, leaving them to sort the issue of liability out between themselves. While it is accepted that the plaintiff did not instruct the defendants to take the latter step, it is not known whether he was advised to do so or not. Notably however, the defendants accepted instructions from the plaintiff's brother to institute High Court proceedings on his behalf against Mr. Heffernan.

32. In my judgment, the defendants' attempt to now discredit the plaintiff's claim, when it suits them to do so, reflects little credit on them for the reasons I have already explained. Suffice to say that I am far from satisfied that any alleged unavailability on the part of the gardaí concerned is a matter prejudicial to the defendants or even if it is, that such prejudice is the responsibility of the plaintiff.

33. With regard to the question of medical records, it must be remembered that the defendants were instructed by the plaintiff to represent him in a claim for damages for

personal injuries. Apart from writing initial letters of claim, the first thing any competent solicitor would do in such circumstances is to seek a medical report from the plaintiff's treating doctors, not least because this would be an essential prerequisite to determining the jurisdiction in which to bring the claim. It is to my mind quite extraordinary that in the seven years between 2003 and 2010 that the defendants were the plaintiff's solicitors in this matter, at no time did they ever seek a medical report from anybody. Here again therefore, the complaint about an absence of medical records rings very hollow and if any prejudice does arise from that, it is entirely of the defendants' own making.

34. The defendants also place reliance on alleged prejudice they have suffered as a consequence of a claim in professional negligence hanging over them for such a lengthy period. In *Cave Projects*, Collins J. cautioned against placing too much reliance on such assertions, noting that *"it is, perhaps, an issue that should be approached with a degree of caution, lest it appear that the law confers on certain categories of defendant – and in particular professional defendants – some form of privileged status"* – at p. 31.

35. It is pertinent in that respect to note the observations of Binchy J. giving the judgment of this Court in *Walsh v Mater Hospital & Anor* [2023] IECA 276 where the defendant's doctor made complaints of the impact on his professional reputation of the long outstanding proceedings. Binchy J. said (at para. 76):

> *"... in my view where an applicant wishes to rely heavily upon reputational damage in support of an application to dismiss proceedings on grounds of delay, it is necessary for the applicant to provide at least some evidence of damage to his or her reputation, and not simply assert it by way of submission. While the authorities do indeed refer to the potential for damage to a person's reputation by reason of the issue of proceedings (in the case of professional defendants in*

> *particular, although Collins J. in Cave makes it clear that defendants who are professionals do not enjoy any privileged status) there is no presumption that a person's reputation is damaged by the mere issue of proceedings. Very often nobody other than the parties and their legal representatives and others associated with or involved in the proceedings will even be aware of proceedings. But even where others are so aware, damage to the reputation of the defendant does not follow inexorably just by reason of the issue of proceedings. ... some evidence of damage to reputation must be provided for consideration by the court."*

He also cited at para. 77 an observation made earlier by this Court in *McCarthy v The Garda Commissioner* [2023] IECA 224**,** at para. 4:

> *"Although reputational damage is referred to as a prejudice to be considered in an assessment of the balance of justice in several cases, particularly where professional defendants are concerned, it has rarely, if ever, sufficed on its own to warrant dismissal".*

36. In the course of their oral submissions, the defendants submitted that they bore no onus to progress the current litigation and were entitled to "sit on their hands" to see if the plaintiff decided to proceed or not. It was suggested that the authorities supported them in this approach. In *McCarthy*, I sought to address a similar contention in a passage in the judgment entitled *"Sleeping Dogs"* in which I cited observations to the contrary by the Supreme Court in *Dowd v Kerry County Council* [1970] I.R. 27 and by Finlay P. (as he then was) in *Rainsfort v Limerick Corporation* [1995] 2 I.L.R.M. 561. These were considered in the judgment of McKechnie J. in *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2012] IESC 50 where he said (at para. 36):

"Whilst I readily accept that what in truth is the plaintiffs' delay should not rest on the defendants' table, nonetheless it must be remembered that the constitutional guarantee of fair procedures and the right to a fair trial – both of which are invariably relied upon in motions to dismiss for either want of prosecution or in the interests of justice – are at the disposal of a defendant in a host of varying circumstances, and relatively speaking from a very early stage of the proceedings."

37. McKechnie J. went on to refer with approval to the Australian authority of *Calvert v Stollznow* [1980] 2 N.S.W.L.R. 749 saying (at para. 37):

"37…In that context reference was made to [Calvert], where the issue as to how far a defendant should go to compel a plaintiff 'to progress the outstanding litigation' is discussed. Cross J., in his unreported judgment but which was affirmed on appeal as stated, disagrees with the suggestion found in some English cases, that a defendant is entitled to 'let sleeping dogs lie' in the hope that the action will expire. If he chooses this route and if his tactical gamble, for that is precisely what it is, should not come to pass, then surely he should not be allowed to subsequently rely on that delay to advantage himself? To so permit seems unattractive and unfair."

38. In *McCarthy*, I noted at para. 34 that:

"In Comcast, the Supreme Court returned to the theme of litigation being a 'two-way street' and this means that the conduct of the defendant must also be looked at, whether properly described as blameworthy or 'active' in the procedural sense or not".

39. Insofar as the defendants in oral argument complained of prejudice arising from the failure of the plaintiff to adequately particularise and progress the claim, there is an array of

remedies available under the RSC to a defendant in such circumstances, none of which were here availed of. Therefore, I cannot see how these defendants can rely on the fact that the claim is insufficiently particularised as a prejudice entitling them to dismissal.

40. It is also noteworthy that when the defendants delivered their defence in December 2015, they did not plead any alleged prejudice from delay arising up to that time. In the ensuing seven years up to October 2022 when this motion issued, the defendants did little or nothing to progress the case and, if anything, it was the plaintiff who was seeking to move matters on in regard to discovery, with the exception of the final two years. While during this period there was no procedural obligation resting upon the defendants, the above authorities suggest that the defendants' inactivity is something to be considered in the assessment of the balance of justice.

Conclusion

41. I am therefore satisfied that the defendants have fallen well short of establishing the level of prejudice that would warrant the Court dismissing this claim and accordingly that the High Court judge was correct in the conclusions she reached. I would therefore dismiss this appeal.

42. As the plaintiff has been entirely successful in this appeal, my provisional view is that the defendants should be responsible for the costs. If they wish to contend otherwise, they will have 14 days from the date of this judgment to deliver a written submission not exceeding 1,000 words and the plaintiff will have a similar period to respond likewise.

43. As this judgment is delivered electronically, Whelan and Costello JJ. have authorised me to record their agreement with it.