

# THE HIGH COURT

[2022] IEHC 324

[Record No. 2010/553 P]

**DOREEN BURKE**

**PLAINTIFF**

**AND**

**BROTHERS OF CHARITY SERVICES GALWAY**

**DEFENDANT**

**JUDGMENT of Ms Justice Siobhan Phelan delivered on the 31<sup>st</sup> day of May, 2022.**

## **INTRODUCTION**

1. The Defendant seeks to dismiss the Plaintiff's claim for want of prosecution pursuant to the inherent jurisdiction of the Court and/or for inordinate and inexcusable delay and/or pursuant to Order 122, rule 11 of the Rules of the Superior Court.

2. In the event that the Defendant is unsuccessful in the application to dismiss the proceedings on delay grounds, the Defendant also seeks liberty to amend the Defence filed to plead reliance on the Statute of Limitations Act, 1957 (as amended).

3. The applications in this case were listed before the Court together with applications in two other cases, namely, *Brannach v. Brothers of Charity Services Galway* (Record No. 2014/9856P) and *McDonagh v. Brother of Charity Services Galway* (Record No. 2009/8327P). Due to a late application to come off record by the solicitor acting in the *McDonagh* case, the applications in that case were adjourned. The applications in this case and in *Brannach* proceeded and were heard together. The same solicitor acted in both and there was some cross-over in correspondence as between the two cases as both were work related bullying and harassment claims brought against the same employer and the same lawyers acting in both. As there are some differences between the two cases, I am delivering a separate judgment in the *Brannach* case.

## **BACKGROUND**

4. The Plaintiff's claim is for damages for personal injuries caused by bullying and harassment in the workplace. The Plaintiff began employment with the Defendant as a locum houseparent in or about October, 1995. The Plaintiff's work-related issues which resulted in the bringing of these proceedings as pleaded date to her attendance at a team building programme in 1999 during which she claims that she expressed concerns in relation to the treatment of service users and further complained about the lack of support for staff in dealing with challenging service users. In her pleadings she further identifies specific events from 1999 including a meeting in the office of a named supervisor in or about July, 2001, a further review meeting in the Spring of 2004 during which the Plaintiff was subjected to complaints from fellow staff without intervention from senior staff present, difficulties in relation to sick leave in connection with an unrelated serious illness requiring attendance for medical treatment in the mid-2000s, difficulties in relation to her return to work on a part-time basis in November, 2006, difficulties around the closure of the home where she worked in 2007 associated with the care and relocation of service users and her own re-assignment allegedly unilaterally and without consultation in February, 2008. The Plaintiff claims to have encountered difficulties with work colleagues and to have been subjected to ongoing bullying and harassment throughout this period of almost ten years between 1999 and 2008 culminating in her resignation from her position in April, 2008.

5. The Plaintiff commenced proceedings in the Circuit Court in January, 2009. These were discontinued (March, 2013) given the link with the within proceedings. The within proceedings commenced in January, 2010. A full Defence was filed more than three years later in May, 2013. The Defence included allegations of contributory negligence as against the Plaintiff but did not include a plea based on the Statute of Limitations.

6. The Defendant claims that the last step taken in the proceedings was the filing of an affidavit of discovery on behalf of the Defendant (provided to the Plaintiff in May, 2018) on foot of an Order made in July, 2017 and the primary focus of the Defendant's application is on the period of delay thereafter.

## CHRONOLOGY

7. 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 twenty-three years since the Plaintiff was first subjected to the treatment on foot of which she brings her claim.

### Employment History

Plaintiff began employment with Defendant as a locum houseparent	On or about October, 1995
Plaintiff became a fulltime houseparent with the Defendant	On or about April, 1998
Plaintiff attended a 3-day team building programme in County Galway	On or about, 1999
Plaintiff was called to Office of Ms. Breathnach	On or about July, 2001
A meeting was held to discuss plans and review progress for service users	On or about Spring, 2004
Plaintiff returned to work after Sick leave on a part-time basis	6 <sup>th</sup> of November, 2006
Plaintiff expressed concern about the Inverin home closing and 2 service users being sent to an inappropriate alternative services	November, 2007
Plaintiff due to return to work but unilaterally assigned to 2 different locations, hours and place of work was changed and altered allegedly without consultation	February, 2008

Circuit Court Proceedings:

Ordinary Civil Bill	30 <sup>th</sup> of January 2009
Circuit Court Appearance	5 <sup>th</sup> of March, 2009
Notice for Particulars	31 <sup>st</sup> of March, 2009
Replies to Notice for Particulars	7 <sup>th</sup> of July, 2009
Notice for Further and Better Particulars	17 <sup>th</sup> of July, 2009
Replies to Notice for Further and Better Particulars	20 <sup>th</sup> of August, 2010
Notice for Additional Particulars	11 <sup>th</sup> of October, 2010
Notice for Discontinuance	6 <sup>th</sup> of March, 2013

High Court Proceedings:

Personal Injuries Summons	21 <sup>st</sup> January 2010
Memorandum of Appearance	6 <sup>th</sup> of May, 2010
Notice for Particulars from Defendant	10 <sup>th</sup> of September, 2010
Replies to Notice for Particulars by Plaintiff	13 <sup>th</sup> of February, 2013
Affidavit of Verification of the Plaintiff	13 <sup>th</sup> of February, 2013
Letter sent from Plaintiff solicitors to the Defendants solicitors	15 <sup>th</sup> of February, 2013
Further letter sent from Plaintiff solicitors to the Defendants solicitors	20 <sup>th</sup> of March, 2013
Motion for judgment in default of Defence	24 <sup>th</sup> of April, 2013
Defence Delivered	1 <sup>st</sup> of May, 2013
Defendant requested Discovery from Plaintiff solicitors	1 <sup>st</sup> of May, 2013
Affidavit of Verification of the Defence	9 <sup>th</sup> of May, 2013

Letter sent to Defendant's solicitors seeking voluntary discovery on behalf of the Plaintiff	5 <sup>th</sup> of July, 2013
Order of Cross J. on the Defendant's application for discovery as against the Plaintiff	23 <sup>rd</sup> of June, 2014
Affidavit of Discovery on behalf of the Plaintiff	27 <sup>th</sup> /28 <sup>th</sup> of August, 2014
Plaintiff requesting Defendants to swear and file their Affidavit of Discovery	8 <sup>th</sup> of January, 2015
Further requests for Discovery from Plaintiff to Defendant	16 <sup>th</sup> of August, 2016, 11 <sup>th</sup> of October, 2016, 8 <sup>th</sup> of May, 2017
Notice of Change of Solicitor	20 <sup>th</sup> of January, 2017
Plaintiff solicitor sent letter to new Defendant solicitor requesting the Defendant to comply with request for Discovery	8 <sup>th</sup> of May, 2017
Further Order of Discovery of Cross J. on the Plaintiff's application directing the Defendant to make discovery within eight weeks	3 <sup>rd</sup> of July, 2017
Plaintiff's solicitor threatens to issue Motion to Compel the Defendant to provide Discovery	19 <sup>th</sup> of September, 2017
Further letter sent by Plaintiff solicitor requesting the Defendant to comply with Order for Discovery failing which application would be made to strike out Defence	17 <sup>th</sup> of November, 2017

Plaintiff Solicitor pursuing a report on the Plaintiff loss of earning and pension entitlements November, 2017

Correspondence between Chartered Accountant and payroll – individual within Defendant responsible for calculating pay entitlements on sick leave November, 2017-April, 2018

Plaintiff solicitor received unsworn Affidavit of Discovery from Defendant 29<sup>th</sup> of November, 2017

Report from Cognitive Behavioural Psychotherapist 5<sup>th</sup> of March, 2018

Plaintiff solicitor made enquiries with regard to obtaining services of Bullying Expert April-May 2018

Plaintiff received sworn Affidavit of Discovery from Defendant of foot of letter seeking voluntary discovery sent on 28<sup>th</sup> August 2014 9<sup>th</sup> of May, 2018

Plaintiff solicitor sent letter requesting services of Mr. Devine as expert 28<sup>th</sup> of May, 2018

Repeated follow up correspondence to Mr. Devine with no response until January, 2020 15<sup>th</sup> of August, 2018-January, 2020

Plaintiff solicitor correspondence with Professor O'Moore requesting a report 17<sup>th</sup> of August, 2018

Senior Counsel advised seeking a second Senior Counsel October, 2018

Solicitor sent a brief to the new Senior Counsel and asked for his advices 29<sup>th</sup> of January, 2019

Advices from the new Senior Counsel were received by the Plaintiff solicitor 18<sup>th</sup> of February, 2019

Notice of Intention to Proceed 2<sup>nd</sup> of October, 2019

Consultation with Plaintiff and full legal team took place in the Four Courts 7<sup>th</sup> of October, 2019

Follow up by Plaintiff's solicitor with Professor O'Moore through repeated correspondence 8<sup>th</sup> of October, 2019 – May, 2020

Plaintiff's solicitor writes with reference to Practice Direction of Cross J. with regard to mediation 8<sup>th</sup> of October, 2019

Plaintiff solicitor writes following up with regard to mediation without response 30<sup>th</sup> of October, 2019 – January, 2020

Plaintiff solicitor sent a letter to Mr. Smith, alternative expert, within the anti-bullying centre in DCU 10<sup>th</sup> of June, 2020

Plaintiff solicitor letter from Defendant solicitor requesting permission to amend their Defence that was delivered on 1<sup>st</sup> May 2013 and would proceed to bring a Motion to Amend the Defence if they did not hear from the Plaintiff by the 6<sup>th</sup> July 2020 15<sup>th</sup> of June, 2020

Notice of Motion in respect of application to dismiss for delay 25<sup>th</sup> of June, 2020 (returnable to 7<sup>th</sup> of December, 2020)

Grounding affidavit of Maria Dillion

16<sup>th</sup> of June, 2020

Notice of Motion seeking liberty to amend defence 15<sup>th</sup> of July, 2020 (returnable to 11<sup>th</sup> of January, 2021)

Plaintiff solicitor received a reply from Mr. Smith suggesting that Mr McGuire could substitute Professor O'Moore

4<sup>th</sup> of September, 2020

Plaintiff solicitor sought confirmation from the Plaintiff for an assessment to be conducted by Mr. McGuire

8<sup>th</sup> of September, 2020

Plaintiff confirmed of willingness to be assessed by Mr. McGuire

10<sup>th</sup> of September, 2020

Appointment took place between the Plaintiff and Mr. McGuire via Zoom

29<sup>th</sup> of April, 2020

Replying affidavit of Doreen Burke

12<sup>th</sup> of May, 2021

## **LEGAL PRINCIPLES**

8. Both the inherent jurisdiction of the Court and jurisdiction deriving under O. 122, r. 11 of the Rules of the Superior Courts is relied upon by the Defendant in moving this application to dismiss for want of prosecution and delay. Order 122, rule 11 of the Rules of the Superior Courts provides that in any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the court to dismiss the same for want of prosecution, and on the hearing of such application the court may order the cause or matter to be dismissed accordingly or may make such order on such terms as to the court may seem just.

9. The law in relation to the dismissal of proceedings for want of prosecution and/or inordinate delay is well settled. In this case the Defendant relies on post-commencement delay but also points to the history of the incidents relied upon in the claim some of which pre-date the issue of the within proceedings by more than ten years. 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.”*

10. 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.”*

11. 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 (para. 109):

*“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)”*

12. Notwithstanding a clear tightening of standards in respect of delay over the last three decades, the decisions in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, both relied upon by the Defendant in its submissions, remain touchstone authorities 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.”*

**13.** 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 establishes 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). Further, 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.

14. The parties identified other relevant caselaw including *Desmond v. MGN* [2009] 1 IR 737 (Geoghegan J.), *Mannion v. Bergin* [2016] IECA 163 (Mahon J.), *McNamee v. Boyce* [2017] IESC 24, *Sweeney v. Keating* [2019] IECA 43 (Baker J.), *Cassidy v. Butterly & Ors.* [2014] IEHC 203 (Ryan J.), *South Dublin County Council v. CF Structures Limited* [2021] IEHC 5 (Allen J.) and *Irish Water v. Hypertrust Ltd.* [2021] IEHC 323, *Mansfield v. Roadstone Provinces Limited* [2022] IEHC 223 and *Bergin v. McGuinness* [2022] IEHC 151.

15. 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.”*

16. 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.

17. The first matter usually 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. Many of the authorities identified on behalf of the Plaintiff were addressed to the issue of prejudice. 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 or oral evidence. A further factor is whether there was anything in the Defendant's conduct which contributed to the delays or would militate against granting the reliefs sought. Thus, in *Bergin v. McGuinness* [2022] IEHC 151, Dignam J. relied on the fact that the Defendant bore some responsibility for parts of the delay and had not previously availed of mechanisms available under the Rules to move proceedings on to refuse an application to dismiss.

**18.** The Courts have also stressed the importance of prejudice being clearly articulated and have been critical of vague, generalised assertion. This notwithstanding, 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. However, in *Irish Water v. Hypertrust Ltd.* [2021] IEHC 323, Creedon J. refused to dismiss on delay grounds in circumstances where no specific issues of prejudice by reason of a general decline in recollections had been identified. Relying on the decision of McKechnie J. in *Mangan (APUM) v. Dockery* [2020] IESC 67 (para. 110) where he said that considerations of justice transcend all other considerations and “*imperfect justice is better than no justice*”, she concluded that she could identify no prejudice and that therefore justice would best be served by the action proceeding.

**19.** More recently, in *Mansfield v. Roadstone Provinces Ltd.* [2022] IEHC 223, Bolger J. found that delay in proceedings which issued in 2006 from 2009 when a defence was filed until the service of a notice of intention to proceed in March, 2019 whilst inordinate and inexcusable, did not warrant the dismissal of the proceedings because the prejudice it was claimed the Defendant would suffer was not adequately identified and there was, therefore, very little basis for the court to find the Defendant's prejudice in having to defend a claim after so many years, outweighed the Plaintiff's prejudice. In the circumstances and noting that the matter was very close to being ready for trial, Bolger J. refused the defendant's application to dismiss on delay grounds. The balancing of justice test involves a weighing of different considerations. In *Cassidy v. Butterly & Ors* [2014] IEHC 203 the Court held that where it was found that a Defendant who is unable to demonstrate prejudice and/or where he has not taken active steps to bring the case forward, may find it difficult to succeed in an application to dismiss a claim for want of prosecution.

**20.** 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, 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 its reputation or otherwise. Where I do not find inordinate and inexcusable delay, I must still consider whether there is a real or significant risk of an unfair trial and if satisfied that such risk is established and cannot be addressed through directions or other steps, I must dismiss the action.

## **EVIDENCE IN RELATION TO REASONS FOR DELAY**

**21.** The delay in this case, as apparent from the chronology above, is self-evidently significant. Insofar as stress and bullying claims relate to a pattern of behaviour and recurring treatment dating in this instance to 1999 and continuing up until April, 2008 when the Applicant in this case resigned, it is clear that there is a delay of almost ten years pre-commencement of proceedings. In my view, given the nature of bullying and harassment claims such as this one which are based on demonstrating a pattern of abusive behaviour, it would be difficult to classify the period of time over which the Plaintiff claims to have been subjected to wrongful treatment as a period of inordinate delay prior to commencing proceedings, certainly in advance of hearing the evidence. Such delay is, however, relevant in the overall scheme of things, both in determining whether there is a real risk of unfairness in permitting the proceedings to continue by reason of delay and also in assessing periods of delay post-commencement to determine whether they should be treated as inordinate.

**22.** As further apparent from the chronology above, despite the historic nature of the events relied upon to ground the claim, proceedings did not progress with expedition following their commencement. Notably there was a delay of two and half years in replying to particulars (between September, 2010 and February, 2013) and no further step in the proceedings from the making of discovery in May, 2018 until the issue of the Motion to dismiss in June, 2020. However, it is also immediately apparent that delay was a two-way street with the Defendant contributing through the failure to deliver pleadings in a timely manner taking some three years

for the delivery of a defence and finally only delivering same following the issue of a motion and through a protracted failure to make discovery in accordance with Court orders. The Defendant's discovery process in total spanned a period of some 4 and ½ years between the first request for voluntary discovery (July, 2013) and the final filing of an Affidavit of Discovery (January, 2018). In making discovery the Defendant failed to comply with court ordered timelines and was threatened with an application to strike out its Defence by reason of said failure. Similarly, the Defendant has not demonstrated attention to the proceedings or a desire to expedite them in the manner in which its solicitors have dealt with correspondence, most recently evidenced in the repeated correspondence which the Plaintiff's solicitor sent in relation to mediation between October, 2019 and January, 2020 to which the Defendant never replied.

**23.** While the grounding affidavit sworn on behalf of the Defendant summarizes the history to the proceedings providing relevant dates, the only period of delay alluded to in the Defendant's grounding affidavit is the period from the last step in the proceedings to the date of issuance of the motion in June, 2020, a period of 2 and ½ years.

**24.** In her replying Affidavit, the Plaintiff sets out in some detail the history to the proceedings and the various steps taken in the proceedings including the necessity to motion the Defendant for a Defence in 2013, to pursue discovery by way of motion in 2017 and thereafter to police compliance with the discovery order made in May, 2018. It is clear from the Affidavit evidence that the proceedings got bogged down in respect of particulars and discovery.

**25.** The Plaintiff further seeks to explain the delay from 2018 by reference to attempts to procure expert reports including a report on loss of earnings and pensions entitlement, a Cognitive Behavioural Psychotherapist's Report and a Bullying Report (with an appointment finally being offered by an expert for assessment in April, 2021 via Zoom). It appears that from April 2018 to April 2021, the Plaintiff's solicitor wrote to two experts in the field of bullying, it taking almost two years to establish definitively that one was not prepared to act by reason of a conflict of interest. It would be fair to accept that there appears to have been a degree of hidden complexity in securing appropriate expertise which goes some way towards explaining delay. The Plaintiff further relied on the necessity to brief a second Senior Counsel due to capacity issues.

**26.** Separately she referred to endeavours to comply with Cross J.'s practice of requiring attempts to secure agreement to mediate before a case is set down for hearing. In submissions, counsel for the Plaintiff pointed to a judicial resistance to listing a bullying case for hearing unless the parties have been to mediation, save for good reason. The Plaintiff detailed on affidavit how repeated letters regarding mediation met with no response from the Defendant's solicitors and then out of the blue, without any reference to this correspondence, a letter being received in June, 2020 seeking consent to the amendment of the Defence, followed quickly thereafter by a motion to dismiss on grounds of want of prosecution in late June, 2020 and then a separate motion in July, 2020 seeking liberty to amend the Defence.

**27.** In submissions on behalf of the Plaintiff it is contended that the Plaintiff has not let her case lie. I accept from the explanation offered by the Plaintiff on affidavit that she at no time abandoned the prosecution of her proceedings. Certainly, matters progressed at a dilatory pace but not without attempts on the part of the Plaintiff to move things forward more quickly as seen through the threat of and issue of motions in the face of inactivity on the part of the Defendant. Delays of this nature are not only undesirable but are unacceptable having regard to requirements of expedition which arise under the Constitution and the European Convention on Human Rights. Notwithstanding what is said on behalf of the Plaintiff in respect of delay and some sympathy given the evident and documented efforts to progress proceedings on the part of the Plaintiff's solicitor, I am satisfied that a delay in getting these proceedings on for hearing is both inordinate and inexcusable. Indeed, I consider that on occasion the Plaintiff was guilty of excessive tolerance of the Defendant's delays and would have been justified in proceeding more quickly to motion the Defendant.

**28.** In view of the extent of the delay and the explanations offered which are not satisfactory, it is appropriate to proceed to consider whether the balance of justice lies in favour of dismissing the proceedings.

**29.** For all that there has been significant delay, the Affidavit sworn on behalf of the Defendant to ground the within application runs to nine paragraphs only. Other than a general description of the history to the proceedings, the Affidavit states as regards prejudice (at paras. 7 and 8) simply as follows:



*“7. I say that a consideration of the Personal Injuries Summons reveals that the Plaintiff went on sick leave in March, 2008, in excess of 12 years ago. The events which the Plaintiff alleges occurred on diverse dates over a period of approximately 21 years. I say that the delay in bringing proceedings in the first instance and the delays in prosecuting same exposed the Defendant to considerable prejudice in terms of meeting the case in a fair and equitable way.*

*8. I say and believe that the delay is inordinate, and in the circumstances, inexcusable. I say that the Defendant is prejudiced by the delay and is entitled to a fair hearing within a reasonable timeframe pursuant to the provisions of Article 6 of the European Convention for Human Rights. I say that the proceedings herein amount to an improper and inefficient use of the legal process contrary to the effective administration of justice in the manner envisaged by Article 34.1 of Bunreacht na hEireann and the obligations placed on the State by Article 6 of the European Convention on Human Rights.”*

**30.** These are the barest and most general of pleas. They are what might be described in the words of Baker J. in *Sweeney* (para. 28) as “*no more than bald averments, unsupported by evidence or details concerning these difficulties.*” No reference is made to any element of specific prejudice. In particular, there is no suggestion that any evidence or witness will be unavailable by reason of the passage of time.

**31.** In my view, the foregoing does not establish even “*moderate prejudice*”. Firstly, one might have expected that if recall were a problem there would have been an affidavit to that effect from the Defendant itself. Secondly, reference is made to a period of twelve years having passed; however, this period of time has to be looked at in the context of the Defendant not only acquiescing in the delay but actively contributing to it. It is patently clear that the Defendant is responsible for significant periods of delay and at no stage prior to the issue of motion to dismiss the proceedings agitated to progress proceedings. The Defendant’s contribution to delay weighs heavily on the facts and circumstances of this case. It is of course true that where inordinate and inexcusable delay is demonstrated, the onus shifts to the Plaintiff to persuade the Court that the balance of justice is in favour of the proceedings continuing to conclusion (see *Sweeney*, para. 19) but in circumstances in which the Defendant has contributed to delays and has failed to take steps available to it to move proceedings along, it is in my

opinion important that a Defendant set out in full fashion how it claims to have been prejudiced or why it is that the balance of justice is against proceedings being permitted to proceed.

**32.** The Plaintiff relies on the fact that no prejudice has been identified by the Defendant. It is submitted that any prejudice which may be alleged in respect of the deterioration of witnesses' memories ought to be ameliorated by records kept by the Defendant in relation to the various meetings had and procedures invoked. In this regard it is clear from the schedules to the Affidavit of Discovery filed and contained in the book of pleadings that this is a case in which voluminous documentation relevant to the issues in the proceedings exists. Accordingly, while this is a case in which undoubtedly oral evidence will play a role, it is clear that a documentary record exists to assist witnesses.

**33.** In considering where the balance of justice lies in this case, it is important to recognise that in dismissing a claim such as the present one the court is, in effect, revoking the Plaintiff's constitutional right of access to the courts. This is not an unqualified right and is one which must be considered against the backdrop of the other competing rights in the case, namely; the right of the Defendant to protect their good name as is their entitlement under Article 40.3.2. and the court's own obligation to administer justice in a fair and timely manner as is to be inferred from Article 34.1. Nobody against whom serious allegations of the nature at the heart of these proceedings are made, particularly where their professional reputation is at stake, should have to wait 12 or more years before being afforded opportunity to clear their good name. Nor would they be required to do so in circumstances where a court were satisfied that a fair trial and a just outcome could no longer be assured. When balancing competing constitutional rights, in my view the Plaintiff's right to litigate continues to prevail.

**34.** It is further submitted on behalf of the Plaintiff that the case is now ready for hearing and there is no further impediment to the proceedings being listed. This appears to be true with the exception of the pending application of the Defendant to amend its defence which in itself may lead to some further period of delay if the application is permitted. There is also the question of the Defendant's non-response over a protracted period of time to a request to consider mediation which should be finally addressed.

**35.** 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. 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 Defendant giving rise to this claim. Further, even when regard is had to periods of both pre and post commencement delay, which taken in the round are obviously excessive, it has not been demonstrated on the evidence that there is real and substantial risk of an unfair trial or unjust result.

**36.** There does not seem to be any impediment to the proceedings being advanced to hearing within a short timeframe and there is no obvious basis for further delay once the Defendant's application to amend its defence has been dealt with and the position with regard to mediation clarified, particularly where directions are made in relation to time and dealing with any outstanding issues. I am satisfied that the balance of justice remains in favour of the case proceeding and that there is no proper basis for the dismissal of proceedings. However, I consider that further delays in progressing these proceedings to conclusion should not be tolerated and I will hear the parties in relation to directions as to next steps in the proceedings with a view to ensuring that the proceedings are now concluded without further unnecessary delay.

#### **APPLICATION TO AMEND DEFENCE**

**37.** Order 28, rule 1 of the Rules of the Superior Courts provides for the amendment of pleadings at any stage of the proceedings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Order 28 rule 6 of the Rules of the Superior Courts provides on an application for leave to amend by either party to the court before or at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

**38.** In its application brought by Notice of Motion dated the 15<sup>th</sup> of July, 2020 (returnable to January, 2021), the Defendant seeks liberty to amend its Defence to plead reliance on the Statute of Limitations (Amendment) Act, 1991.

**39.** The Plaintiff resists the Defendant's application and submits that the Court ought to be slow to exercise its discretion to permit the amendment of the Defence not only because of the prejudice that will arise to the Plaintiff but also on the basis that the Defendant has delayed in bringing the application and has failed to provide any satisfactory explanation for the failure to plead the matter in the first instance.

**40.** The Plaintiff refers to the decision of Clarke J. in *Woori Bank v. KDB Ireland Ltd.* [2006] IEHC 156 in which Clarke J. held when considering the question of prejudice on an application to amend (albeit not to plead reliance on the Statute of Limitations) as follows (para. 10):

*“The starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration of the pleadings rather than the presence (if allowed) of the amendment itself”.*

**41.** It is submitted on behalf of the Plaintiff that prejudice would arise to the Plaintiff in the within proceedings as a result of the proposed amendment owing to the fact that the Plaintiff has proceeded with the claim since 2013 on the basis that the statute was not an issue. It is further submitted that if the Court is minded to permit the Defendant to amend its defence at this late stage, the Court ought to award costs to date as against the Defendant.

**42.** In his decision in *Woori*, Clarke J. referred to the decision of the Supreme Court on the question of amendment of pleadings in *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383. In the course of his judgment (speaking for the court) Geoghegan J. indicated that there had been an over emphasis in a number of cases on an obligation to give good reasons for having to amend the pleadings. In expressing that view the court reaffirmed *O'Leary v. Minister for Transport Energy and Communications* [2001] 1 ILRM 132 and held that the principal consideration in an amendment application was to the effect that pleadings should be amended

so as to ensure that the real questions of controversy between the parties should be determined in the litigation. Clarke J. added that this principle is, of course, subject to the limitation that amendments should not be made where to allow same would cause prejudice to the other party. In turn, however, this principle is subject to the limitation that where it is possible to deal with the prejudice in a fair and just manner by means other than excluding the party from relying upon the matters sought to be pleaded (such as by an appropriate order for costs) then the amendment should be allowed and the prejudice dealt with in the appropriate way.

**43.** It is the object of the court to decide the rights of the parties and not to punish them for mistakes made in the conduct of their cases by deciding otherwise than in accordance with their rights. The courts decide matters in controversy and therefore as soon as it appears that the way in which a party has framed his case will not lead to a decision on the matters in controversy, that party has a right to have it corrected if this can be done without injustice to the other party. The Defendant had a very wide discretion in how to plead its defence in the first instance and on the basis of the authorities my starting point for a consideration of whether to allow the amendment must be the fact that the Defendant could have included the plea in reliance on the statute in the first place without requiring any leave from the court.

**44.** The Plaintiff asserts prejudice on the basis that the proceedings have progressed on one basis and are now sought to be altered, however, the Plaintiff has not contended that by virtue of the absence of the amended plea in the first place, that steps have been taken which now make it impossible or significantly more difficult to deal with the case should the amendment be allowed. The type of injury to a party resulting from an amendment to the pleadings which would render liberty to amend an injustice to that party would be something which places that party in a worse position in relation to the presentation of his case than he would have been in if his opponent had pleaded the subject matter of the proposed amendment at the proper time. No such prejudice is contended for in this case. If a party suffers no prejudice in this regard then an award of costs is sufficient to prevent him from suffering injury and as a matter of principle the amendment should be allowed. Furthermore, while the application to amend is late, it does not have the effect of disrupting proceedings in that no trial date has yet been fixed. Nothing that was advanced at the hearing leads me to believe that the likely date of trial will be delayed if the amendment is allowed.

**45.** In the absence of prejudice other than occasioned by proceeding with a case on a particular basis and thereby incurring costs, I propose to allow the amendment sought on condition that the Defendant discharge the Plaintiff's costs of the proceedings (excepting reserved costs and discovery costs) between March, 2013 when a defence was delivered herein and July, 2020 when the motion to amend issued. I propose also to fix a time for the delivery of the amended Defence and any Reply thereto in relation to the new plea in reliance on the Statute of Limitations.

## **CONCLUSION**

**46.** I have found that inordinate delay which has not been satisfactorily explained or excused has been demonstrated in this case, 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 be established. There does not appear to be any impediment to the early conclusion of these proceedings nor any basis for further real delay.

**47.** I am satisfied that the Defendant has not identified prejudice such as would tilt the balance of justice in favour of granting the order sought, I have found that delay was both inordinate and inexcusable. This cannot continue and, with this in mind, I propose making directions in relation to next steps in these proceedings specifically with regard to the delivery of an amended Defence within a period of fourteen days, the filing of any Reply within a further ten days and directing a response to the request for mediation within a period of twenty-one days. Save where mediation is pursued, I direct that all steps necessary to apply for a date for hearing should be taken within three months of the delivery of this judgment and that an application for a hearing date shall be made forthwith thereafter.

**48.** I propose to dismiss the application to dismiss proceedings. I will allow the application seeking liberty to amend the Defence, conditioned as to time and costs as set out above. I will hear the parties in relation to the costs of the motions.