APPROVED **[2021] IEHC 176**

THE HIGH COURT
CIRCUIT APPEAL

2020 No. 214 CA

BETWEEN

STEPHEN DOYLE

PLAINTIFF

AND

THE GOVERNOR OF MOUNTJOY PRISON
THE MINISTER FOR JUSTICE EQUALITY AND DEFENCE
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 26 March 2021

INTRODUCTION

1. This matter comes before the High Court by way of an appeal against an order of the Circuit Court dismissing these proceedings on the grounds of inordinate and inexcusable delay. These proceedings take the form of personal injuries proceedings. The plaintiff (hereinafter "***the injured party***") seeks damages arising out of injuries said to have been received while he was detained at Mountjoy Prison. Specifically, it is said that the injured party suffered lacerations caused by the sharp edge of a broken safety bar as he climbed down from his bunk bed.

2. The incident occurred on 11 December 2011. The proceedings had still not been brought on for hearing by 8 June 2020, at which stage the defendants issued a motion seeking to dismiss the action.

3. The principal issue for determination on this appeal is whether the balance of justice lies in favour of allowing the proceedings to go to full trial. The resolution of this issue turns, to a large extent, on whether the delay gives rise to a substantial risk of an unfair trial.

CHRONOLOGY

4. The chronology of events is set out in tabular form below.

11 December 2011	Incident giving rise to personal injuries
20 March 2012	Injured party released from prison
13 June 2012	First letter of claim
21 June 2012	State Claims Agency seeks further details of claim
27 June 2012	Injured party's solicitors seek copy of accident report and inspection facilities
18 October 2013	Second letter of claim
22 October 2013	Application to Personal Injuries Assessment Board (PIAB)
4 December 2013	PIAB issue authorisation
12 March 2014	Personal injury summons issued (Circuit Court)
11 April 2014	Summons served
26 June 2014	Appearance entered
7 July 2014	Notice for particulars
16 October 2014	Replies to particulars
30 January 2015	Second notice for particulars
19 March 2015	Defence
31 March 2015	Replies to particulars
8 August 2017	Voluntary discovery request
29 November 2017	Response to request for voluntary discovery
30 April 2020	Notice of intention to proceed served by defendants
11 May 2020	Notice of change of solicitor for plaintiff
8 June 2020	Motion to dismiss issues

LEGAL PRINCIPLES GOVERNING APPLICATION TO DISMISS

5. The principles governing an application to dismiss proceedings on the basis of inordinate and inexcusable delay are well established. The leading judgment remains that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("***Primor***"). The principles are summarised as follows (at pages 475/76 of the reported judgment).

> "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."

6. As appears, a court must consider three issues in sequence: (i) has there been inordinate delay; (ii) has the delay been inexcusable; and (iii) if the answer to the first two questions is positive, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed. I address each of these in turn under separate headings below.

(I) WHETHER DELAY INORDINATE

7. The incident giving rise to these proceedings is said to have occurred on 11 December 2011. The injured party appears to have consulted his solicitor shortly after his release from prison in March 2012. The solicitor sent a letter of claim on 13 June 2012. The letter requested inspection facilities for the injured party's engineer. In a subsequent letter of 27 June 2012, a copy of the "accident report" was requested. The State Claims Agency replied on 11 July 2012 stating that the request for the accident report was a matter for discovery, and that inspection facilities for the engineer would be afforded at the "appropriate stage" in legal proceedings.

8. Thereafter, the first significant period of delay by the injured party occurred. No steps appear to have been taken between the date of the correspondence in June and July 2012, and the issuing of a (second) letter of claim on 18 October 2013.

9. At this stage, the two-year limitation period was close to expiry. An application was made to the Personal Injuries Assessment Board, and the board subsequently declined to assess the claim and instead issued an authorisation to institute legal proceedings. This fact was notified to the State Claims Agency by letter dated 20 January 2014.

10. The personal injuries summons duly issued on 12 March 2014. Thereafter, the proceedings were initially prosecuted at a reasonable pace. Two notices for particulars were raised and replied to; a defence delivered; and affidavits of verification filed.

11. Then the next significant period of delay occurred. No steps appear to have been taken between 31 March 2014 and 8 August 2017. On the latter date, the injured party's solicitor sought voluntary discovery. The letter of request identified four categories of documents. The solicitors acting on behalf of the defendants replied to this letter on 29 November 2017. It was indicated that the defendants had no difficulty in furnishing the discovery requested in relation to three of the four categories. An amendment was sought to the final category which would have restricted the period of time for which the documentation was to be supplied. The concluding paragraph of the defendants' solicitor's letter stated that they awaited hearing further from the injured party's solicitor. No reply was ever made to this letter of 29 November 2017. This represents the third period of delay.

12. The next event on behalf of the injured party was the filing of a notice of change of solicitor on 11 May 2020, and the issuing of correspondence indicating an intention to serve a notice of trial.

13. As appears from this chronology, there are three significant periods of delay. The first between July 2012 and October 2013; the second between March 2014 and August 2017; and the third between November 2017 and May 2020. Whereas the traditional view had been that delay had to be assessed by reference only to delay in the prosecution of the

proceedings, i.e. by reference to delay *subsequent* to the institution of the proceedings, the more recent case law indicates that both pre- and post-commencement delay can be considered. See, for example, *Cassidy v. The Provincialate* [2015] IECA 74, [32] and *Connolly's Red Mills v. Torc Grain and Feed Ltd* [2015] IECA 280, [29].

14. The delay in the prosecution of these proceedings is inordinate. This is a case which could have—and should have—been dealt with promptly. The claim could hardly be more straightforward. The injured party alleges that he suffered lacerations as a result of the dangerous condition of the bunk bed in his cell. Specifically, it is alleged that the safety bar on the bunk bed was broken, and a sharp edge exposed. The outcome of the case will turn largely on evidence as to the condition of the bunk bed, and whether its condition had been brought to the attention of the prison authorities.

15. None of the difficulties which can occasionally occur in a personal injuries claim and cause delay—such as, for example, the identification of the appropriate defendants in a hit-and-run accident—arose in this case. The injured party was detained in prison at the time of the incident and, accordingly, the defendants were readily identifiable. Nor are the proceedings complex in terms of medical evidence. Whereas the injuries suffered were unpleasant, they were capable of being dealt with on an outpatient basis. The medical records will, presumably, be available from the hospital. The ongoing sequelae are limited.

(II). WHETHER DELAY INEXCUSABLE

16. The next matter to be considered is whether or not the delay is inexcusable. The injured party has addressed the delay in the proceedings in his affidavit of 9 November 2020. In brief, it is sought to explain the delay in the prosecution of the proceedings by reference to three factors as follows. First, it is suggested that the defendants have contributed to

delay by their (alleged) tardiness in allowing inspection facilities and in furnishing a copy of the accident report. Secondly, some reliance appears to be placed on the fact that the injured party was again detained in prison between May 2018 and August 2018. Thirdly, the injured party avers that he is not gainfully employed and is of limited means. It is implied that this may be the explanation for his not having pursued the discovery of documents in November 2017.

17. With respect, none of these explanations provides a valid excuse for the delay in prosecuting what is a very straightforward claim. The approach of the defendants to the discovery of documents cannot realistically be criticised. The defendants, through their solicitors, had responded promptly to the request for voluntary discovery. Three of the four categories were agreed, and a suggested amendment was made in respect of the fourth. Thereafter, the blame for the delay in completing the discovery process lies with the injured party alone. For reasons which have not been properly explained, his side never responded to the defendants' proposed amendment to the categories of documents to be discovered. Instead, the proceedings fell into abeyance between November 2017 and May 2020.

18. Insofar as the injured party's impecuniosity is concerned, this does not provide a proper explanation for failing to respond to the correspondence in relation to discovery. As appears from the correspondence, the defendants had, in effect, agreed in November 2017 to make voluntary discovery, subject only to an amendment to the temporal scope of one of the four categories sought. Had the injured party agreed to this approach, then it would have been unnecessary to bring a formal application for discovery (with the attendant costs). In the event, the correspondence was not replied to at all.

19. More generally, the case law indicates that impecuniosity cannot be relied upon to excuse delay. Thus, for example, the Court of Appeal has held that a delay in obtaining expert

reports, even where the delay is attributable to financial difficulties on the part of a plaintiff, does not excuse delay in prosecuting a claim. See *Gallagher v. Letterkenny General Hospital* [2019] IECA 156, [42].

20. Insofar as inspection facilities are concerned, it is correct to say that the defendants had insisted that same be deferred to what they described as "an appropriate stage" in legal proceedings. It would have been preferable had inspection facilities been made available earlier. Crucially, however, it was at all times open to the injured party to make an application for an order requiring evidence to be preserved pursuant to the provisions of section 12 of the Personal Injuries Assessment Board Act 2003.

21. Finally, insofar as the imprisonment of the injured party for a time in 2018 is concerned, most of the delay in the proceedings had already occurred before this date, and cannot be attributed to his imprisonment.

22. In all of the circumstances, the delay is inexcusable.

(III). BALANCE OF JUSTICE

23. Given my finding that there has been inordinate and inexcusable delay in the prosecution of these proceedings, it is necessary to consider next whether the balance of justice is in favour of or against allowing the proceedings to go to full trial. The factors to be considered in this regard have been enumerated by the Supreme Court in the passage from *Primor* cited at paragraph 5 above.

24. One of the principal factors to be considered in the present case is whether the ability of the defendants to defend the proceedings has been prejudiced as a result of the delay. The nature of the consideration to be carried out is described as follows in *Primor*. The court must consider:

> "(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".

25. The only specific prejudice alleged on the part of the defendants is the disposal of the (allegedly damaged) bunk bed that is said to have been the cause of the injuries. The position is put as follows in the grounding affidavit of the defendants' solicitor (at paragraph 21 thereof).

> "As a result of the delay by the Plaintiff in first notifying the first-named Defendant of the claim, the bed in question was no longer identifiable for inspection, which may cause prejudice to the Defendants in defending the claim. Furthermore, as a result of the delay by the Plaintiff in prosecuting his claim, all of the beds that were in use at the time of the incident have been disposed of due to the complete renovation and refurbishment of Mountjoy Prison since the incident, which may cause prejudice to the Defendants in defending the claim."

26. It has to be said that the evidence in respect of the loss of the bunk bed is unsatisfactory. In particular, there is no affidavit evidence before the court as to when precisely the bunk bed became unidentifiable, nor as to when all of the bunk beds were disposed of. The only affidavit filed on behalf of the defendants is that of their solicitor, and this affidavit is short in detail and the content of same hearsay in nature.

27. It does appear from a letter dated 23 January 2015 sent by the defendants' solicitor that the relevant part of the prison (B Division) had been closed for refurbishment during the six-month period between the date of the incident (December 2011) and the receipt of the first letter of claim (June 2012). If these dates are correct, then it would appear that the bunk bed had been disposed of at a very early stage. Relevantly, the loss of the bed cannot be attributed to any post-commencement delay in the prosecution of the proceedings. If and insofar as any delay on the part of the injured party can be said to have caused prejudice, it is referable solely to pre-commencement delay.

28. In principle, a delay in notifying a personal injuries claim to an intended defendant might well result in prejudice. One can readily envisage a scenario in which relevant evidence or indeed details of witnesses, which might otherwise have been preserved or recorded had a timely notification been made, is lost. The question of prejudice must, however, be assessed by reference to the particular circumstances of the individual case. The distinguishing feature of the present proceedings is that the injured party had been detained in Mountjoy Prison at the time of the incident, and had been escorted to Beaumont Hospital to have his injuries attended to. It is self-evident, therefore, that the prison authorities had actual notice of the incident. It is also to be noted that, whereas neither side has adduced affidavit evidence on the point, the replies to particulars delivered on behalf of the injured party on 16 October 2014 plead that the bunk bed had been immediately replaced subsequent to the incident. This is elaborated upon in further replies dated 31 March 2015. It is pleaded that the injured party had made a complaint to a named prison officer approximately four weeks prior to the incident, and that the bunk bed had already been replaced by the time the injured party had returned from hospital. If these pleas are correct, then not only were the prison authorities on notice of the incident causing personal injuries, they had actually removed the bunk bed in response to the incident. It is also to be noted that one of the categories of documents requested by way of discovery—and agreed to by the defendants—had been the accident report form and all contemporaneous witness statements relating to the incident on 11 December 2011. It is implicit from their having agreed to make discovery that the defendants have these documents in their possession.

29. In assessing prejudice, this court is entitled to have regard to the very particular circumstances in which this incident occurred. Whereas it is correct to say that a formal notification of a claim, by way of solicitor's letter, had not been made until some six

months after the date of the incident, the prison authorities had, as discussed above, been on actual notice of the incident.

30. In this regard, a useful analogy can be drawn between the present proceedings and those under consideration by the Court of Appeal in *Reilly v. Campbell Catering Ltd* [2020] IECA 222. There, the Court of Appeal allowed an appeal against a decision to dismiss personal injuries proceedings on the grounds of delay. The claim arose out of an injury said to have been suffered during the course of the claimant's employment. The Court of Appeal held that the trial judge had accorded "undue weight" to the fact that the claimant failed to instruct solicitors until just prior to the expiry of the limitation period. The Court of Appeal observed that the claimant had reported the incident at the time, not alone to her immediate supervisor but also to management. The judgment observes that the respondent employer in that case must, having due regard to its obligations including to its own staff and employees, have had a system for the recording of accidents. The Court of Appeal held that notwithstanding that the respondent employer bore the onus of proof in respect of any alleged prejudice, the affidavit evidence filed on its behalf failed to cogently demonstrate the existence of actual prejudice.

31. The Court of Appeal concluded that the hardship of denying the claimant access to a proper trial of her action in regard to workplace injuries would, in all the circumstances, be disproportionate and unjust. See paragraphs 60 and 61 of the judgment as follows.

> "The jurisdiction to strike out for delay is clearly confined to exceptional cases. The claim could not fairly be characterised as constituting a 'stale claim' as the respondent argued in submissions. There was undoubtedly some delay but nothing such as could warrant the permanent and irrevocable exclusion of the appellant from a right of access to the courts to have her claim determined.
>
> The balance of justice favours permitting the action to proceed against the respondent. Arguments regarding s. 8 of [the Civil Liability and Courts Act 2004] fall to be made at the trial of the action. The relative prejudice to the appellant flowing from the order sought is absolute and certain whereas the prejudice contended for by

> the respondent is largely hypothetical and such as is routinely resolved by means of discovery, including non-party discovery."

32. Whereas each case must, of course, be determined by reference to its own particular circumstances, there are some obvious parallels between *Reilly* and the present proceedings. In each instance, the alleged wrongdoer had actual notice of the incident giving rise to the claim. In consequence, the prejudicial effect, if any, of a delay in serving formal notice of an intention to pursue proceedings is greatly reduced. In each instance, the affidavit evidence filed on behalf of the respective defendants failed to demonstrate the precise prejudice being alleged. In each instance, the circumstances of the accident were such that the defendants had an obligation to maintain proper records: the accidents occurred in the context of a workplace in one case, and in the context of a prison, in the other.

33. Having regard to all of the circumstances of the present proceedings, and to the approach of the Court of Appeal in *Reilly*, I am satisfied that the balance of justice lies in favour of allowing the proceedings to go to full trial. The defendants have failed to discharge the onus of proof which lies on them to demonstrate any likely prejudice resulting from the delay on the part of the injured party. If a defendant wishes to rely on potential prejudice in support of an application to strike out proceedings on the grounds of delay, then there is an obligation to put forward relevant evidence on this issue. It is entirely unsatisfactory that an affidavit should be sworn in vague terms by a solicitor with no direct knowledge of the matters.

34. The affidavit evidence does not address what steps were taken, in the immediate aftermath of the accident, to examine the bunk bed. It does not address the plea that the bed was removed in reaction to the accident. The response to the request for discovery implies that the prison authorities hold an accident report. The defendants have signally failed to establish that the delay has resulted in their losing an opportunity, which they

would otherwise have had, to examine and, if necessary, preserve the bunk bed the subject of the claim.

35. Finally, it is to be noted that this is not a case which will turn on conflicting evidence from witnesses, whose recollections may have dimmed over the years. The claim will instead turn on the condition of the bunk bed.

CONCLUSION AND PROPOSED FORM OF ORDER

36. The balance of justice lies in favour of the injured party being allowed to pursue his proceedings to a full hearing. Were the proceedings to be dismissed, this would have the effect of restricting the injured party's right of access to the courts. This restriction would only be proportionate if necessary to vindicate the corresponding right of the defendants to defend the claim. This would be the position had the delay given rise to a substantial risk of an unfair trial, or was likely to cause serious prejudice to the defendants. The defendants have failed to put before the court any admissible evidence which would suggest that either of these contingencies arises.

37. Accordingly, the order of the Circuit Court dismissing the proceedings for inordinate and inexcusable delay will be set aside. This is subject to the caveat that if the injured party fails to serve a notice of trial within three months of today's date, the defendants have liberty to renew their application to dismiss the proceedings.

38. Insofar as the question of costs is concerned, the default position under Part 11 of the Legal Services Regulation Act 2015 is that a successful party is entitled to costs as against the unsuccessful party. Order 99, rule 2(3) of the Rules of the Superior Court indicates that the High Court should endeavour to make a costs order at the time it determines an interlocutory application (save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application). This rule is especially apposite

here given that this matter comes before the High Court by way of appeal, and the High Court's involvement in the case has now come to an end.

39. The injured party, as plaintiff, is entitled to recover the costs of the motion to dismiss as against the defendants. The costs are to include the costs of the court below, and all reserved costs. The costs are to be adjudicated (measured) by the Office of the Chief Legal Costs Adjudicator in default of agreement. A stay is placed on the execution of the costs order pending the determination of the entire proceedings.

Appearances

Noel McCarthy, SC and Martin Canny for the plaintiff instructed by Mark Killilea Solicitors (Galway)

Michael McCormack for the defendants instructed by Hayes Solicitors (Dublin)

Approved Garrett Simons