THE COURT OF APPEAL

APPROVED

Record Number: 2022/132
High Court Record Number: 2010 9891P
Neutral Citation Number [2023] IECA 224

Noonan J.

Haughton J.

Allen J.

BETWEEN/

GERARD MC CARTHY

PLAINTIFF/APPELLANT

-AND-

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of September, 2023

1. Delay is an ever recurring theme in litigation. So much has been said about it in our courts over many decades that one might have thought there remained little room for debate. In many spheres of litigation the inexorable move towards early judicial intervention by case management has meant that the scope for delay continues to be reduced.

2. However, there remain categories of case where progression is left to the parties and inevitably, these are the cases where applications by defendants to dismiss for delay still

abound. While the principles to be applied are well-settled since *Primor plc v. Stokes Kennedy Crowley* [1996] 2I.R. 459 and *Ó Domhnaill v Merrick* [1984] I.R. 151, the application of those principles is not always as straightforward as one might hope. This is perhaps unavoidable as the facts are different in every case. The court is required to balance the right of plaintiffs to litigate their cases against the right of defendants not to be exposed to claims which have, by the passage of time, become impossible, or at least significantly more difficult, to defend.

3. It has frequently been said that litigation is a two way street and the conduct of both sides has to be considered. Many cases have been concerned with the nature of the delay, be it described as culpable, innocent, active, inactive and so forth. The extent to which defendants are entitled to let sleeping dogs lie often features, as it does here.

4. Many cases are concerned with an analysis of the degree of prejudice necessary to tip the balance of justice in favour of dismissal. Some went so far as to suggest that *"marginal"* prejudice may suffice, although more recently doubt has been cast on that - see the judgment of Collins J. in *Cave Projects Limited v Gilhooly & Ors* [2022] IECA 245 at para. 36. Sight of course can never be lost of the fact that the prejudice to the plaintiff is always terminal. *Cave* suggests that there must be a real and tangible injustice to the defendant demonstrated. The same case suggests that care must be taken in assessing the balance of justice where the only prejudice alleged is reputational. 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.

5. In *Cave*, Collins J. undertook a careful analysis of the main features of the delay jurisprudence. He emphasised a number of points, including that the issue of prejudice is a

complex and evolving one. He said that prejudice is not to be presumed, while recognising that the absence of evidence of specific/concrete prejudice does not necessarily exclude a finding that the balance of justice warrants dismissal in any given case – general prejudice may suffice. He also drew attention to the fact that many of the cases appear to proceed on the basis that, once there is any period of inordinate and inexcusable delay, general prejudice should be assessed by reference to the entire period between the event giving rise to the claim and the date of trial. He considered this not to be an appropriate approach and that only such prejudice as is properly attributable to the plaintiff's delay ought to be taken into account. He made the following important observation (at para. 36):

- *"The authorities increasingly emphasise that defendants also bear a responsibility in terms of ensuring the timely progress of litigation: see, for instance, the decision of the Supreme Court in Comcast International Holdings Incorporated v Minister for Public Enterprise [2012] IESC 50. The precise contours of that responsibility have yet to be definitively mapped but, it is clear at least that any 'culpable delay' on the part of a defendant – delay arising from procedural default on its part – will weigh against dismissal."*

6. *Comcast* is of particular relevance in the context of the facts of this case as appears further below.

Background

7. The plaintiff alleges that on the 1st November, 2008, he was assaulted by members of An Garda Síochána as a result of which he suffered injuries. In his PIAB application form, the plaintiff describes his *"accident"* thus:

"The applicant was assaulted by members of An Garda Síochána during the early hours of the 1st November, 2008 as he cycled through the O'Devaney Garden estate in an attempt to ascertain the extent of a fire which was blazing at the rear of his girlfriend's property on Findlater Street."

8. This is further elaborated upon in the plaintiff's written submissions in this appeal:

"On turning a corner, he came across a team of members of An Garda Síochána in full riot gear. Without warning, he was then charged by the said gardaí and was struck on a number of occasions. It is the appellant's case that he was an innocent bystander and was not involved with any incidents of antisocial behaviour that may have occurred or been occurring over that Halloween night period."

9. In the affidavit grounding the application to dismiss sworn by Ms. Frederique Duchene of the CSSO, five statements from members of An Garda Síochána are exhibited in relation to the events of that Halloween night. In his statement, Inspector Con O'Halloran, commander of the Public Order Unit, describes a scene of rioting around a bonfire where roadblocks had been erected by the crowd and gardaí had been attacked repeatedly. He says:

"At one point a youth, with his face covered came from the ranks of the rioters on a pedal cycle and cycled in our direction. I directed that he was not to be permitted to breach the line of public order shields. This individual cycled straight into the line of shields. The line held and he fell to the ground."

10. A similar account is given in the statement of Garda Ray Andrews. The male cyclist is not identified as the plaintiff. However, it seems reasonably clear that the plaintiff's version of events is likely to be strongly contested by the defendants. As a result of these events, the plaintiff, who was born on the 17th June, 1970, alleges that he suffered a fracture

of his clavicle, or collarbone, and some other relatively minor injuries. His presentation is complicated somewhat by the fact that he fractured the same clavicle a year earlier and also injured it almost two years subsequently.

Chronology

- 1st November 2008 – The plaintiff was allegedly assaulted.
- 28th October 2010 – The plaintiff's solicitors issued a plenary summons.
- 7th July 2011 – The statement of claim was served.
- 20th December 2011 – The defendants served a notice for particulars.
- 10th January 2012 – The plaintiff's solicitors issued a motion for judgment in default of defence.
- 16th January 2012 – The plaintiff's solicitors delivered replies to particulars.
- 23rd January 2012 – The plaintiff's motion for judgment was struck out by agreement to extend the time for a defence by four weeks with costs to the plaintiff.
- 26th January 2012 – The defendants delivered their defence, putting all matters in issue.
- 28th February 2013 – The plaintiff's solicitors issued a motion for discovery seeking categories including relevant CCTV footage.
- 29th April 2013 – The motion for discovery came on for hearing when an order was made on consent for discovery allowing a period six weeks to the defendants to swear an affidavit of discovery.
- 11th October 2013 – The defendants having failed to comply with the order for discovery, the plaintiff's solicitors issued a motion to strike out the defendants' defence.

- 18th October 2013 – The defendants' affidavit of discovery was delivered some six months after the order for discovery was made.
- 23rd November 2013 – The plaintiff's motion to strike out the defence was struck out with costs to the plaintiff.
- 29th March 2017 – The plaintiff's solicitors served a notice of intention to proceed, now some three years and four months after the last step in the action.
- 10th July 2017 – The plaintiff's solicitors wrote to the CSSO referring to the defendants' affidavit of discovery and stating that they had reviewed the CCTV footage provided on foot of the order for discovery and were of the view that the footage discovered did not comply with the order for discovery. They gave reasons for reaching this conclusion. They concluded the letter with the following:

  > *"Please note that the plaintiff is anxious to proceed with this matter and list the matter for hearing. It is essential, however, for us to clarify the position in relation to CCTV footage before this matter can be listed. We would therefore be obliged if you would revert to us without delay."*

  This letter was not replied to.

- 18th January 2021 – Updated particulars of injury were delivered by the plaintiff's solicitors.
- 25th January 2021 – A second notice of intention to proceed was served.
- 2nd March 2021 – The plaintiff's solicitors served a notice to produce and notice of trial.

- 19th May 2021 – The matter appeared in the jury list to fix dates and was adjourned to the next list.
- 14th June 2021 – The plaintiff's solicitors served a disclosure schedule pursuant to S.I. No. 391 of 1998 and called upon the defendants to do likewise.
- 22nd June 2021 – The plaintiff's solicitors wrote to the CSSO enquiring how many witnesses were likely to be called for the defendants and how long the defendants believed the case would be likely to take.
- 19th July 2021 – The plaintiff's solicitors wrote to the CSSO complaining that they had not received the defendant's S.I. No. 391 schedule and threatening a motion in default.
- 11th August 2021 – The plaintiff's solicitors issued an S.I. No. 391 motion.
- 16th August 2021 – The plaintiff's solicitors served the S.I. No. 391 motion.
- 7th October 2021 – The matter again appeared in the jury list to fix dates. The evidence of the plaintiff's solicitor, Mr. Ciaran Lawlor, which is not controverted, is that on that date, the defendants' counsel applied to adjourn the proceedings so that they could issue a motion to dismiss the case for want of prosecution, and that the list judge, Reynolds J., refused the application on the grounds that it had come too late and that the case was now ready to be heard. A hearing date of the 16th November, 2021 was assigned.
- 20th October 2021 – The within motion to dismiss the plaintiff's claim was issued by the defendants with a return date of the 14th February 2022.
- 9th November 2021 – One week before the trial was due to take place, counsel on behalf of the defendants renewed their application for an adjournment before Reynolds J. At that time, due to the pandemic, the jury sessions were held in Croke Park. The court again refused the defendants' application for the

same reasons and notwithstanding that the motion had in the interim issued. In the event, the case was not reached at those sessions and was put back into the next jury list callover, due to take place on the 24th March 2022. Before then however, the defendants' motion was heard by the High Court on the 21st March 2022 and an *ex tempore* judgment was delivered on the 23rd March 2022.

Judgment of the High Court

11. In her *ex tempore* judgment, the judge referred to an effective seven year period in which there was no activity: between the 23rd November, 2013 when the motion to strike out the defence was struck out and the 25th January, 2021 when the second notice of intention to proceed was served. The judge did refer to the intervening notice of intention to proceed in 2017 and the correspondence about the CCTV but said that nothing came of it.

12. The judge noted that during the hearing, counsel for the plaintiff fairly conceded that the delay was both inordinate and inexcusable and that the case turned on balance of justice principles identified in *Primor*. She said that the court must exercise a judgment in its discretion as to the balance of justice and importantly, said that the conduct of the defendant is relevant, insofar as he may have been guilty of delay or have acquiesced, and delay in this context must be culpable delay. It is clear therefore that the judge regarded the only relevant conduct on the part of the defendant to be considered in the context of delay was where the defendants' delay was one that was culpable and thus a delay arising from some failure on the part of the defendants to take a procedural step that they were obliged to take.

13. The judge observed that where a plaintiff is found to be guilty of inordinate and inexcusable delay, there is a weighty obligation on the plaintiff to establish countervailing circumstances. She analysed a number of the authorities, noting that proof of specific prejudice is not required. She considered that the gardaí concerned were quite identifiable

and therefore concluded that the claim constituted a reputational matter for those gardaí, which was something to be taken into account. She also considered that the fact that the injury was fairly modest was also a factor to be weighed in the balance.

14. The judge specifically concluded that there was no fault on the part of the defendants for not moving immediately after the second notice of intention to proceed or the notice of trial was served. She clarified this further in saying that in not serving a notice to dismiss the claim, either earlier or following the first notice of intention to proceed in 2017, this is not in fact categorised as culpable acquiescence; and she found support for this conclusion in the judgment of this Court in *Flynn v Minister for Justice* [2017] IECA 178.

15. In reaching her final conclusion, the judge said that imputation of acts of gross professional misconduct is not a matter that should be hanging over a party for several years and again she relied on the judgment in *Flynn* as support for this. Having regard to the lapse of time in the case, she considered that it was appropriate to dismiss it. It does notappear however that the judge identified any aspect of specific or concrete prejudice, or indeed even general prejudice, but rather was of the view that the only specific or concrete prejudice accruing to the defendants in this case was the imputation of misconduct against the relevant gardaí.

The Appeal

16. The plaintiff's grounds of appeal identify six issues. I think these can be summarised as a complaint that the judge erred in applying jurisprudence concerning the halting of a trial during its course to a pre-trial application to dismiss as in the present case. There is a complaint that the judge gave undue weight to what was identified as no more than general prejudice by the defendants but in particular, having regard to the fact that a hearing date was actually assigned to the case, the judge ought not have dismissed the claim without

allowing it to proceed to a hearing. In oral argument, counsel for the plaintiff submitted that it was clear from the judgment in *Cave* that the onus of proof remains at all times on the defendant to establish that the balance of justice requires dismissal. In that respect, counsel submitted that the judge was in error in concluding that there was an onus on the plaintiff to establish countervailing circumstances and this led her into error.

17. Counsel further submitted that there was nothing to suggest that the delay that had occurred here had impacted the defendants' ability to defend the case, particularly in circumstances where the gardaí involved had made contemporaneous statements. He also adverted to the fact that Reynolds J. had twice refused to adjourn the anticipated trial to allow the defendants to bring this motion; that they had not appealed those refusals; and it was pure happenstance that the case was not reached and the motion got on first. He also submitted that there was significant acquiescence on the part of the defendants in relation to the chronology above.

18. In substance, counsel contended that the defendants had moved to dismiss the action far too late in the day and the proper course was to allow the trial already fixed to proceed.

19. Counsel for the defendants, for his part, submitted that inaction by a defendant is not enough to count against the defendant, there must be culpable delay in the sense that that expression is used throughout the cases. In this case, by far the main delay of some seven years was one that the plaintiff was entirely responsible for and there was no onus on the defendants to move during this time.

Periods of delay

20. While two years elapsed between the alleged assault and the commencement of proceedings, no particular complaint is made by the defendants about that. Some at least of that delay appears to have been attributable to the erroneous belief on the part of the plaintiff's solicitors that the plaintiff's claim was governed by the provisions of the Personal Injuries assessment Board Act, 2003.

21. Thereafter the matter proceeded at a reasonable, if relatively leisurely, pace. It took eight months to serve a statement of claim and a further five to serve a notice for particulars which was replied to fairly promptly. However, it took over six months for the defendants to deliver their defence, and then only in response to a motion. Shortly thereafter the plaintiff's solicitors sought discovery which was evidently not agreed giving rise to the necessity for a motion and order. Almost six months later, the defendants had failed to comply with the order for discovery necessitating a further motion which resulted in the delivery of the affidavit and an order for costs in the plaintiff's favour.

22. Thus far, it could reasonably be said that most of any culpable delay that had occurred up to this point in time should be laid at the door of the defendants, that delay being of the order of a year.

23. Thereafter, however, the matter went into abeyance for a period of some three years and four months before the first notice of intention to proceed was served, and clearly this delay was both inordinate and inexcusable. The defendants say that they had no obligation to respond in any way to the notice of intention to proceed and there is undoubtedly support in some authorities for that contention. They say the same in respect of the subsequent letter of the 10th July, 2017, despite a clear indication that the plaintiff was now anxious to proceed

but needed clarification on the CCTV footage which was requested. The defendants did not respond to that letter.

24. As appears from the above chronology, unfortunately nothing happened thereafter for a further three and a half years and in respect of this entire period of delay of some seven years, the defendants say that this is entirely the responsibility of the plaintiff and their conduct during this period is not to be criticised.

Sleeping dogs

25. In *Dowd v Kerry County Council* [1970] I.R. 27, Ó Dálaigh C.J. had the following to say on this topic (at p. 41):

> *"First, in weighing the extent of one party's delay, the court should not leave out account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution. There is the provision of O. 27, r.1 and the provisions of O. 108, r. 11 where there has been no proceeding for two years. The adage about sleeping dogs may be wise but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will 'get by' without having to face the peril of being decreed. Litigation is a two party operation and the conduct of both parties should be looked at."*

26. The Chief Justice accordingly appears to suggest that the failure of a defendant to avail of remedies available to it under the rules to have proceedings struck out for want of prosecution is something to which the court should have regard. Similar views were expressed by Finlay P. in his judgment in *Rainsfort v Limerick Corporation* [1985] 2 I.L.R.M. 561 where he observed:

> *"Delay on the part of a defendant seeking a dismiss of the action and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution, may be an ingredient in the exercise by the Court of its discretion."*

27. Although these *dicta* suggest that a defendant's failure to move to have proceedings dismissed for delay is a material consideration in the exercise of the court's discretion to dismiss, in *Anglo Irish Beef Processors v Montgomery* [2002] 3 I.R. 510, Fennelly J. suggested that this is not to be equated with blameworthy conduct (at p. 519):

> *"When considering any allegation of delay or acquiescence by the appellants,* [the court] *will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the respondents' claim dismissed."*

He referred to the passage from the judgment of Ó Dálaigh CJ. in *Dowd* referred to above and continued (at pp. 519 – 520):

> *"In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something 'akin to acquiescence' "*

28. These observations were subsequently relied on in the judgment of this Court in *Millerick v Minister for Finance* [2016] IECA 206 where Irvine J. (as she then was) speaking for the Court, considered that silence or inactivity on the part of a defendant is not material, unless there is some behaviour by the defendant that constitutes acquiescence. She said (at para. 36):

> *"The question… is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that*

the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff."

29. The court's conclusion on this issue was as follows (at para. 39):

"... a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice."

30. It is true to say that a simple failure to apply to dismiss, when that becomes an option, ought not without more lead to the refusal of an application to dismiss. Were it otherwise, a defendant would be placed in an impossible position in having to decide between making an immediate application to dismiss, which might be viewed as premature, and running the risk that by delaying, it waited too long. Each case must be decided on its own facts but I do not think the court in *Millerick* was intending to suggest that a failure to apply to dismiss must in all circumstances be regarded as irrelevant, in the absence of some tangible act of acquiescence. In *Flynn*, Irvine J., speaking for the Court, reiterated the view that *"It is entirely legitimate and understandable that defendants might decide to 'let sleeping dogs lie rather than invite upon themselves litigation claiming damages' as was endorsed byFennelly J. in Anglo Irish Beef Processors Ltd."*- at para. 35.

31. In *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2012] IESC 50, the Supreme Court appears to have placed emphasis on earlier authorities such as *Dowd*, in particular in the judgment of McKechnie J., with which, notably, Fennelly J. agreed. At para. 34, McKechnie J. referred to the passage from *Dowd* cited above, saying (at para. 36):

"Whilst there can be no doubt but that the moving party has the greater obligation of expedition overall, nonetheless the defendant's interaction or lack of it, as the case

may be, with the delay of which he later complains, whether active or purely inactive, to use such phrase, may rightfully attract condemnation by virtue of many other circumstances such as: the identity and character of the particular defendant; the position which he holds; whether that be public or private; the standing and accountability of that position, whether it be representative of the public, of an institution which it serves or otherwise; and the nature of the issues which he is called upon to answer. Given the gravity of the charges levelled against the State defendants in this case, I am astonished that they have not sought, with all due alacrity, an immediate opportunity to answer such charges and to vindicate their repeated assertion as to the integrity of such a hugely significant public process. 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."

32. Those comments have a certain resonance in the present case given the seriousness of the allegations made by the plaintiff against an organ of the State and the claim by the defendants, accepted by the trial judge, that the potential reputational damage to the defendants is a significant factor to be weighed in the balance against the plaintiff. Considering this issue further, McKechnie J. referred to the Australian authority of *Calvert v Stollznow* [1980] 2 N.S.W.L.R. 749 (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."

33. Clarke J. (as he then was) also agreed with the judgment of McKechnie J. He pointed to the fact that areas of litigation remain where progression is left to the parties, saying (at para. 3.11)

"...But, as McKechnie J. points out, that fact places obligations on defendants as well. The Rules of Court provide various mechanisms which allow a defendant, who is concerned by the slow pace of litigation, to seek to have the process accelerated. A defendant who does not avail of these procedures is, in my view, in a different position from a defendant who has sought to speed up the process but has been frustrated in that endeavour by a failure on the part of the relevant plaintiff to respond reasonably."

34. 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. However, in seeking to achieve an appropriate balance of justice, it is clear that *"the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct and the interests of all parties to the litigation" – per* Fennelly J. in *Anglo Irish Beef Processors Limited* at 518.

Conclusions

35. In the light of these authorities, I do not think it can be correct to say that the most significant delay in this case between 2013 and 2021 of some seven years is a period during which the defendants' conduct ought not be considered. There can be no doubt but that the major blame for this delay rests at the door of the plaintiff. That is certainly true in the context of the period leading up to the service of the first notice of intention to proceed. Thereafter, however, the plaintiff through his solicitors made clear that he wished to proceedbut could not do so until the issue of the CCTV was clarified and he sought that clarificationfrom the defendants who ignored this request.

36. That in itself does not of course absolve the plaintiff from pressing on with the matter but the case may well have taken a different course had the defendant replied. A reply would presumably have prompted further action by the plaintiff's solicitors but it seems likely that, because there was no response, the matter slipped into abeyance again. Unlike the trial judge therefore, I am of the view that the failure of the defendants to move after July 2017 is, at a minimum, a factor to be taken into account in weighing the balance of justice. However, itis not the only, or most important, one.

37. That appears to me to arise subsequently.

38. By early 2021, there could no longer be any doubt in the defendants' mind but that the plaintiff was pressing ahead with his claim. Similarly, he served updated particulars of injury and a further notice of intention to proceed and in March, a notice to produce and notice of trial. At that stage, any lingering doubt about the dog being asleep were dispelled.

It will be seen from the chronology above that it took a further seven and a half months for the defendants to issue their motion to dismiss, but only after a series of significant events had occurred.

39. The matter first appeared in the list to fix dates in May 2021. It ought by then to have been clear to the defendants that the plaintiff was preparing for trial and ready to proceed. This was further clear from the, as it transpired, misguided service of the S.I. No. 391 notice and following motion. Nonetheless there could be no doubt in the defendants' mind but that the plaintiffs were actively preparing for trial and seeking information from the defendants about the number of witnesses they were intent on calling and how long the case would take. Given the service of the S.I. No. 391 motion, one assumes that counsel was again actively engaged in preparations for trial and proofs were being directed and briefs prepared, if not actually out. All of this involved expense.

40. It is also not without significance that when the matter first appeared in the list to fix dates in May, there was no suggestion by the defendants that they wished to bring a motion to dismiss. That was made for the first time at the subsequent appearance of the case in the list on the 7th October, 2021. This indication was given to the list judge by counsel for the defendants in opposing the plaintiff's application to have a date fixed. That opposition was unsuccessful, with the judge ruling that the defendants were now too late to bring the motion, and I tend to agree.

41. It is of importance I think that this decision by the list judge was not appealed by the defendants but more importantly, despite subsequently actually issuing the motion on the 20th October, 2021 in the teeth of the trial date of the 16th November, 2021, the defendants made no application for short service of the motion or any attempt, even if it might have proved futile, to have it dealt with before the trial.

42. Another unsuccessful effort was made by the defendants to have the trial adjourned on the 9th November, 2021 which was again refused for the same reasons and again, there was no application to either expedite the motion or any attempt to appeal the judge's ruling. On the contrary, it was by the pure happenstance of the case not being reached at the first sessions in Croke Park that the motion came to be heard at all. Had the case been reached, the motion would have been entirely academic.

43. It will by now be clear that I find myself unable to agree with the trial judge's conclusion that the only relevant conduct on the part of the defendant to be considered in weighing the balance of justice was where the defendant was guilty of some culpable delay. I think the authorities when taken as a whole demonstrate that a wider assessment is called for and factors such as the nature of the case and the identity of the parties are, as McKechnie J. suggested in *Comcast*, relevant to that assessment. In that context, the defendants' failure to move from 2017 at least onwards is in my view material.

44. In addition to that, and more importantly, I am satisfied that the latest point from which the defendants should have been actively seeking dismissal was in or about March of 2021. Thereafter, the defendants sat on their hands and allowed the plaintiff to incur significant expense in the process of preparing for a trial to the point where a trial date was actually fixed in advance of the defendants even issuing their motion. As the list judge said, this was far too late.

45. While it cannot be gainsaid that the delay in this case has by any standards been enormous, and most of the blame for that is the plaintiff's, it nonetheless remains the case that the defendants bear the onus of establishing that the interests of justice require that the case ought not proceed. In my view, they have failed to do so. The have pointed to no concrete prejudice accruing by the delay. Unlike the trial judge, I do not believe that the

purported reputational damage issue is sufficient in itself, without more, to justify a denial of the plaintiff's right to have his case heard. Like McKechnie J. in *Comcast*, I am somewhat surprised that if this was a genuine concern on the part of the defendants, that they would have allowed matters to drift as long as they did.

46. For these reasons therefore, I would allow this appeal, set aside the order of the High Court, and remit the matter for hearing at the earliest available date.

47. As the plaintiff has been entirely successful in this appeal, my provisional view is that he is entitled to the costs of the appeal and the motion in the High Court, but that order should be stayed pending the final determination of the proceedings. If either party wishes to contend for an alternative order, they will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the other party will have a similar period to respond likewise. In default of such submission being received, an order in the terms proposed will be made.

48. As this judgment is delivered electronically, Haughton and Allen JJ. have authorised me to record their agreement with it.

20/09/2023