

**THE HIGH COURT**

**Record No.2005/1486P**

**Between:**

**BRIAN FLYNN**

**Plaintiff**

**-and-**

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

**Defendants**

**JUDGMENT of Mr Justice Max Barrett delivered on 22nd October, 2015.**

**PART I: BACKGROUND FACTS**

1. In April 2002, a number of members of An Garda Síochána sought to arrest Mr Flynn outside a pub. It seems to be common case that the arrest was not easily effected. Several Gardaí were eventually involved. It is alleged that Mr Flynn's then girlfriend sought to intervene. In the end, Mr Flynn had to be hand-cuffed and was brought to a Garda station in Carlow Town where, he claims, his head was struck against a door. Three years after the arrest, in April 2005, Mr Flynn sued the defendants for damages for assault, false imprisonment, trespass to the person, breach of his constitutional rights and failure to vindicate his constitutional rights. More than thirteen years after the events that led to the commencement of the said proceedings, the matter still has not come to trial. Perhaps unsurprisingly, the Defendants now come to court seeking a dismissal of Mr Flynn's action for want of prosecution and inordinate and inexcusable delay on the part Mr Flynn in the prosecution of these proceedings.

**PART II: SUMMARY TIMELINE**

2. The court sets out below a summary timeline of the key events arising in the within proceedings:

28.04.02 Arrest effected and alleged wrongs done.

27.04.05 Plenary Summons issues.

17.05.05 Memorandum of Appearance filed by Chief State Solicitor's Office.

21.03.06 Statement of Claim delivered.

18.08.06 Notice for Particulars issues from Chief State Solicitor's Office.

18.08.06 Defence delivered.

27.09.06 Replies to Notice for Particulars issue.

27.09.06 Letter seeking voluntary discovery issues from Mr Flynn's solicitors.

22.11.06 Letter seeking voluntary discovery issues from Mr Flynn's solicitors.

07.02.07 Notice of Motion for discovery issues from Mr Flynn's solicitors.

06.07.07 Master of High Court issues order for discovery.

19.12.07 Solicitors for Mr Flynn forward just-received order to Chief State Solicitor's Office.

16.01.08 Letter seeking Affidavit of Discovery issues.

04.02.08 As above.

19.02.08 As above.

01.04.08 As above.

10.07.08 Master adjourns motion to strike out to 16th October.

14.10.08 Affidavit of Discovery sworn.

23.02.09 Mr Flynn's solicitors request certain documents referred to in Affidavit of Discovery.

09.03.09 As above

15.05.09 As above.

06.07.09 As above.

10.07.09 Chief State Solicitor's Office apologises for delay and seeks consent to late entry of Affidavit of Discovery.

15.07.09 Conditional consent issues from Mr Flynn's solicitors to late entry of Affidavit of Discovery.

--.08.09 Discovery documents sent by State to Mr Flynn's solicitors.

22.10.10 Letter issues from Mr Flynn's solicitors seeking further and better discovery.

26.11.10 As above.

21.12.10 As above.

16.02.11 As above.

07.04.11 As above.

31.05.11 As above.

23.06.11 As above.

12.09.13 Letter warning of intention to issue motion compelling discovery.

11.06.13 Notice of Intention to Proceed filed by Mr Flynn's solicitors.

12.09.13 Letter warning of intention to file Motion compelling discovery.

10.12.13 Notice of Motion filed by Mr Flynn's solicitors seeking: strike-out of defence for non-compliance with discovery order of 06.07.07; or order compelling compliance with said order.

21.01.14 Master strikes out motion, there being no attendance for Mr Flynn.(It appears that a diary error led to the non-attendance).

26.05.14 Letter from Mr Flynn's solicitors indicating documents being sought.

27.05.14 Letter of reply issues from Chief State Solicitor's Office.

12.06.14 Letter from Mr Flynn's solicitors indicating documents being sought.

13.06.14 Letter of reply issues from Chief State Solicitor's Office.

05.09.14 Further letter of reply issues from Chief State Solicitor's Office.

10.09.14 Holding letter issues from Mr Flynn's solicitors.

29.09.14 Mr Flynn's solicitors issue later indicating concerns assuaged re. discovery following recent correspondence.

30.09.14 Chief State Solicitor's Office seeks medical reports.

15.10.14 Chief State Solicitor's Office issues letter seeking that Mr Flynn attends for medical check.

30.01.14 Notice of Trial issues from Mr Flynn's solicitors.

17.10.14 Notice of Motion issues from Chief State Solicitor's Office seeking dismissal of proceedings for want of prosecution and/or inordinate and inexcusable delay.

### **PART III: SOME CONCLUSIONS REGARDING TIMELINE**

3. There are a number of conclusions to be drawn from the above timeline and such affidavit evidence concerning same as has been placed before the court:

#### *State delay*

- first, from April 2002 to December 2007 matters proceeded much as one would expect and there was little or no delay arising. However, the smooth progress of matters was interrupted by a ten-month delay on the part of the State before the Affidavit of Discovery was sworn. Throughout this period the solicitors for Mr Flynn were entirely active in pressing the State to act.
- second, the six-month delay between February and August 2009 in furnishing Mr Flynn's solicitor with documents referred to in the Affidavit of Discovery is notable, though not perhaps especially excessive. Throughout this period the solicitors for Mr Flynn were again entirely active in pressing the State to act.
- third, the fact that no timely reply issued from the State to the letters of October 2010 onwards is to be regretted; however, it is overshadowed by the quite remarkable delay that Mr Flynn manifested between June 2011 and October 2013.
- fourth, the State took eight-plus months from the issuance of the Notice of Trial to the issuance of the motion now before the court.

#### *Mr Flynn's delay*

- fifth, the 14-month delay on Mr Flynn's part in prosecuting matters further between August 2009 and October 2010 is striking.
- sixth, the 27-month delay on Mr Flynn's part in prosecuting matters between June 2011 and September 2013 is striking.

4. If one ignores the period to December 2007, during which there was little or, at least, no major delay on either side, and focuses instead on the seven year period that preceded the issuance of the strike-out motion that is the subject of the within application, one can see that within that seven-year period there have been almost four years (14 months + 27 months) of delay on the part of Mr Flynn. Yes, there were (lesser) delays on the part of the State, but this is Mr Flynn's claim and it is for him to prosecute it at an appropriate pace. Within the context of a seven-year period, a near four-year period of delay appears to the court to be, by any standard, inordinate and inexcusable.

#### **PART IV: SOME APPLICABLE PRINCIPLES**

5. When it comes to the issue of inordinate and inexcusable delay, there seems little point in the court ploughing afresh a field of law that has been well furrowed in recent years. Instead the court confines itself to a summary of what it considers the key principles to be derived from recent judgments of the superior courts. All judgments are, of course, ultimately but essays on the margins of the law, and here the law falls to be considered within the penumbra of the constitutional right of access to the courts to defend and vindicate one's legal entitlements, a right of signal importance in any democracy, a right that received perhaps its finest articulation in the judgment of Walsh J. in *Byrne v. Ireland* [1972] 1 I.R. 241, a right which in no sense has been relegated to second-tier status or banned like a naughty child from the courtroom because it has proved so troublesome in the past, and a right which has not (yet) been immolated before the god of administrative efficiency. The court sets out below the applicable key principles, as outlined by it in its recent judgment in *Farrell v. Arborlane Limited and ors* [2015] IEHC 535, para.30. The authorities supporting the below-mentioned principles are identified in that earlier judgment; unsurprisingly, the judgments in *Collins v Minister for Justice* [2015] IECA 27 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, which received attention in this case, are prominent among them:

*"Key principles applicable to issue of inordinate and inexcusable delay*

*(1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so...*

*(2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard...*

*(3) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable...*

*(4) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter...*

*(5) Even when delay has been 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 case proceeding...*

*(6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay...*

*(7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result...*

*(8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay...*

*(9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business...*

*(10) All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name...*

*(11) The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its considerations, not only its own constitutional obligations but the State's Convention obligations...*

*(12) The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations...*

*(13) There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence)...*

*(14) The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action...*

*(15) As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them..."*

#### **PART V: THE BALANCE OF JUSTICE**

6. So, where does the balance of justice lie between Mr Flynn and the State in the within proceedings? Here the court considers two important competing factors to arise:

*(1) the natural interest of us all that members of An Garda Síochána conduct themselves properly when on duty and do not commit wrongs such as those alleged in the within proceedings;*

(2) that members of An Garda Síochána who are regularly called upon to make spur-of-the-moment decisions in challenging situations that are often marred by the presence or threat of violence should not generally have to wait for over a decade before the rights and wrongs of such impromptu decisions as they make or actions they take in such circumstances are later adjudicated upon, if indeed they fail to be adjudicated upon, by a court.

7. Related to the second factor mentioned above, is the consideration touched upon by Diplock L.J. in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229, 254 that "*The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard*" – though, when it comes to this well-known observation, it is important to remember that the nature of the harm alleged (allegations of child sexual abuse seem an obvious example) could be such in any one case as to incline the pendulum of justice towards allowing a person her or his 'day in court', even though their prospects of eventual victory may seem slim. Justice can, after all, sometimes be as much a matter of bringing proceedings as it is of winning them. And the ultimate hazard to justice is perhaps the court that places an unwarranted premium on administrative efficiency over the belated satisfaction of justice through the attempted or successful vindication of legal rights.

#### **PART VI: ACQUIESCENCE?**

8. Counsel for Mr Flynn suggests that the delays arising on the part of the State, as evident from the summary timeline above, amount to acquiescence by the State in such delay as has arisen on the part of Mr Flynn. Such acquiescence counsel (rightly) contend is of relevance to determining where the balance of justice lies in the within proceedings. They point in this regard to the decisions in cases such as *Muchwood Management v. McGuinness* [2010] IEHC 185 and *Duffy v. Irish Progressive Assurance Co. Ltd.* [2010] IEHC 27.

9. In *Muchwood*, a case in which significant delays arose in the context of an action for alleged breach of contract, misrepresentation, breach of warranty and breach of fiduciary duty, Dunne J. observes as follows, at 13:

*"It seems to me that in the context of considering the balance of justice, the critical issues to consider are whether the delay or conduct on the part of the defendants could be said to amount to acquiescence on the part of the defendants in the plaintiffs delay and whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to have caused serious prejudice to the defendants."*

10. In *Duffy*, Laffoy J. accepted that whilst the defendants should not be criticised too readily for delay due ultimately to the plaintiffs, but then proceeded, at 18, to characterise their conduct as "*akin to acquiescence*", referencing the defendants' failure to respond positively to a request for voluntary discovery and a delay in moving to have the proceedings dismissed.

11. The court respectfully concurs in the statements of law as propounded in each of *Muchwood* and *Duffy*. To the court's mind, where Mr Flynn's case as to acquiescence flounders is that a close examination of the facts suggests there to have been no acquiescence on the part of the State in the within proceedings. Again, if one ignores the period to December 2007, during which there was little or no major delay on either side, and focuses instead on the seven year period that preceded the issuance of the strike-out motion now being adjudicated upon, one can see that:

- within that seven-year period there have been a truly remarkable near-four years (41 months) of delay on the part of Mr Flynn;

- there are some delays by the State in providing documents (in 2009) or replying to correspondence (the letters of October 2010), but nothing – in the context of a legal system which, regrettably, still moves so often at an almost Dickensian pace – that places the State so 'beyond the Pale' in its actions as to warrant a finding that it has acquiesced in any delay arising. Would that we lived in a world where the legal system moved faster but at this time we do not.

12. What gave the court some cause for pause when it comes to the issue of acquiescence is that the State took eight-plus months from the issuance of the Notice of Trial to the issuance of the strike-out motion now before the court. However, on reflection it seems to the court that this is more a matter which may be of relevance to any costs application that follows these proceedings than something which evinces acquiescence on the part of the State.

#### **PART VII: CONCLUSION**

13. This Court has sympathy for Mr Flynn insofar as he may consider himself to have suffered wrong-doing back in April 2002. However, the court considers that more than 13 years after the occurrence of those alleged wrongs, and in light of the inordinate and inexcusable delay arising, and such other factors as the court has identified above, as well as the absence of acquiescence by the State in that delay, the balance of justice rests in this instance with the State. For the reasons stated in the within judgment, the court will grant an order directing that Mr Flynn's proceedings be dismissed for both want of prosecution and inordinate and inexcusable delay on his part in the prosecution of same.