COURT OF APPEAL

Neutral Citation Number: [2017] IECA 178

Appeal No. 2015/622

Irvine J.
Hogan J.
Hedigan J.

BETWEEN/

BRIAN FLYNN

PLAINTIFF/

APPELLANT

- AND -

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

DEFENDANTS/

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 31st day of May 2017

1. This is an appeal against the order and judgment of the High Court (Barrett J.) dated respectively the 10th November and the 22nd October, 2015, whereby he dismissed the plaintiff's proceedings (i) for want of prosecution and (ii) for inordinate and inexcusable.

Background
2. The appellant ("Mr. Flynn") maintains that on the 28th April 2002 he was assaulted, beaten and falsely imprisoned by members of An Garda Síochána at Leighlinbridge, Co. Carlow. As a result of the respondents alleged wrongdoing he claims that he experienced a wide range of psychiatric symptoms including panic attacks and depression which were treated with a combination of medication, counselling and in patient treatment. Suffice to state that the respondents deny each of the allegations of wrongdoing and maintain that at all times they acted with due care for the safety and welfare of Mr. Flynn.

Chronology
3. As is customary on an appeal from an order dismissing proceedings for want of prosecution or on the basis of a finding of inordinate and inexcusable delay, it is necessary to consider the judgment of the High Court judge in the context of the time line relevant to the proceedings. In this case I have adopted, subject to slight amendment, the timeline from the judgment of the High Court judge, as the same is not contentious.

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 the High Court issues order for discovery.

19.12.07: Solicitors for Mr. Flynn forward order for discovery to Chief State Solicitor's Office.

16.01.08: Letter sent requesting the respondent's affidavit of discovery.

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. 2008.

14.10.08: Respondent's affidavit of discovery is sworn.

23.02.09: Mr. Flynn's solicitors request copies of certain documents referred to in affidavit of discovery.

09.03.09: Reminder sent by Mr. Flynn's solicitors.

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 filing of affidavit of discovery.

15.07.09: Conditional consent issues from Mr. Flynn's solicitors to late filing of affidavit of discovery.

30.07.09: Discovery documents sent by Chief State Solicitor's Office to Mr. Flynn's solicitors.

22.10.10: Letter issues from Mr. Flynn's solicitors seeking further and better discovery and also copy documents in respect of which privilege had been claimed.

26.11.10: Reminder letter from Mr. Flynn's solicitors.

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 from Mr. Flynn's solicitors warning of intention to issue motion concerning demand for discovery as per letter of 22nd October, 2010.

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 the 6th July, 2007; 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).

22.01.14: Letter from Chief State Solicitor's Office stating that the documents sought were privileged. Letter refers to the ten year delay and ensuing prejudice. Offer to have proceedings struck out with no order as to costs.

30.01.14: Notice of trial issues from Mr. Flynn's solicitors.

20.02.14: Chief State Solicitor's office suggests remittal of action to Circuit Court.

26.05.14: Letter from Mr. Flynn's solicitors identifying documents being sought and indicating his desire to have his action heard before a jury.

27.05.14: Letter of reply issues from Chief State Solicitor's Office threatening motion to dismiss for want of prosecution.

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 confirming that no statements from independent witnesses exist.

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 letter indicating concerns assuaged regarding discovery following recent correspondence.

30.09.14: Chief State Solicitor's Office asks if Mr. Flynn is willing to share his medical reports on a without prejudice basis.

10.10.14 Chief State Solicitor's Office issues Motion to dismiss.

15.10.14: Chief State Solicitor's Office issues letter requesting Mr. Flynn to attend for medical evaluation.

The judgment of the High Court

4. Having first set out in some detail the principles to be applied by a court when asked to invoke its inherent jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay, the trial judge expressed himself satisfied that during what he considered to be the relevant period, *i.e.*, the seven years between December 2007 to December 2014, that Mr. Flynn's "near four-year period of delay" was by any standard inordinate and inexcusable.

5. In particular the trial judge highlighted what he described as a striking fourteen month period of delay from August 2009 to October 2010 and a further "quite remarkable" delay between June 2011 and October 2013. It is perhaps relevant to record that he did not consider any delay prior to December 2007 to be relevant and he also noted with some particularity those periods of delay to be ascribed to the respondents.

6. The High Court judge then, as obliged so to do by the prevailing jurisprudence, turned his attention to the factors material to his assessment as to whether, notwithstanding the finding of inordinate and inexcusable delay, the balance of justice favoured permitting the action to proceed to trial or dismissing it in accordance with the relief sought by the respondents.

7. In addressing this particular issue the High Court judge dealt in some detail with the submission made that the respondents' conduct amounted to acquiescence such that the balance of justice favoured permitting the proceedings go to trial.

8. Having considered the decisions of Dunne J. in *Muchwood Management v. McGuinness* [2010] IEHC 185 and Laffoy J. in *Duffy v. Irish Progressive Assurance Company Limited* [2010] IEHC 27, the trial judge rejected the submission that there had been acquiescence on the part of the respondents during the seven year period prior to the issue of the motion to dismiss the proceedings such that the claim should be allowed to proceed. The respondents delay in providing documentation to Mr. Flynn or in replying to correspondence did not, he stated, warrant a finding of acquiescence. Neither did he consider the respondents' failure to issue their motion until eight months after the service of the notice of trial to amount to acquiescence.

9. Thus it was that the trial judge resolved the issue of the balance of justice in favour of the respondents and dismissed the proceedings for inordinate and inexcusable delay.

The appellant's submissions
10. Mr. Cody S.C. does not seek to contest the trial judge's finding of inordinate and inexcusable delay. Rather he makes a range of submissions, destined to establish that the trial judge's treatment of the "balance of justice" issue was unsatisfactory to the point that it should be reconsidered by this Court in the interests of the administration of justice.

11. Counsel submits that the trial judge failed to have regard to the fact that the respondents failed to identify any specific prejudice as a result of Mr. Flynn's delay in prosecuting his action. All of their witnesses were still available, even if one had retired and another was no longer employed by An Garda Síochána.

12. Mr. Cody maintains that the High Court judge misapplied the law in relation to acquiescence on the part of a defendant on an application to dismiss proceedings for inordinate and inexcusable delay. In this case, the respondents were fully engaged in the proceedings and particularly so after the service of the notice of trial in January, 2014. There was no indication that the respondents were unwilling or incapable of meeting the claim advanced. To the contrary they had acquiesced in the continued prosecution of the proceedings by taking the following steps, namely:-

> (i) By letter of the 5thSeptember 2014, the Chief State Solicitor's Office had written to Mr. Flynn's solicitor noting that the last details she had concerning his client's injuries where those which had been advised in the replies to particulars dated the 27th September 2006 and asked that the up-to-date position be confirmed;
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> (ii) by letter of the 30th September 2014, the Chief State Solicitor's Office had asked if Mr. Flynn was a position to share his medical reports on a without prejudice basis, and finally
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> (iii) by letter of the 15th October 2014, the Chief State Solicitor's Office had notified Mr. Flynn's solicitor that a medical appointment for the 19th November, 2014 had been arranged with Mr Kenneth Sinnanan, Consultant Psychiatrist, retained by the respondents to act on their behalf in the proceedings.

13. Thus, unlike many of the other cases which form part of what might be termed the "delay" jurisprudence, the respondents were fully engaged during what might otherwise have been the final run up to the trial of the action. The respondents could never have laboured under the impression that the proceedings might "go away" if left alone.

14. Mr. Cody further submits the trial judge failed to weigh in the balance the fact Mr. Flynn had expended a sum of €1,059 to obtain a medical report on the 23rd September 2014, in order to bring his action to trial in addition to which he criticised the trial judge's conclusion that the respondents' delay in issuing their motion was a matter relevant only to the issue of costs and did not go to the substance of the motion.

15. Finally, counsel submits that the trial judge adopted an incorrect starting point when he came to consider the issue of the balance of justice. Mr. Cody relies upon para. 6(2) of his judgment where he concluded that members of An Garda Síochána should not have to wait for over a decade to have the rights and wrongs of impromptu decisions or actions taken by them in the course of their work adjudicated upon by a court. That statement, he submits, would suggest that the trial judge had elevated the Gardai to a position above other defendants when it came to a consideration of the balance of justice and that this was not a correct approach having regard to what was at stake for his client in terms of his constitutional rights and the wrong allegedly perpetrated against him. It was in the interests of public policy that a claim such as this should be allowed to proceed to trial.

The respondent's submissions
16. Mr. Doyle S.C., on behalf of the respondents, submits that the trial judge's finding that the balance of justice favoured dismissal of the action was correct as a matter of law having regard to all of the relevant circumstances.

17. Counsel submits that the overriding duty rests with a plaintiff to prosecute their action with appropriate diligence. Having regard to the straightforward nature of the proceedings and the cumulative delay on the part of Mr. Flynn, the balance of justice warranted the dismissal of the claim. Insofar as Mr. Flynn had sought to rely upon the engagement of the parties in relation to discovery as a countervailing circumstance to offset his inordinate and inexcusable delay, that argument was unsustainable in light of the fact that the position adopted by his solicitors in relation to the adequacy of the respondents' discovery was misconceived as was ultimately acknowledged when the motion brought to strike out the defence for failure to make proper discovery was struck out with an order providing for the respondents' costs and the fact that his solicitor later confirmed, by letter dated the 29th September 2014, that no discovery issues remained outstanding.

18. As to prejudice, Mr. Doyle submits that the authorities do not require a defendant to prove specific prejudice. Against a backdrop of a finding of inordinate and inexcusable delay, even modest prejudice is sufficient to warrant the dismissal of proceedings and there was ample general prejudice to be found in the present case. Finally, counsel submits that acquiescence is only relevant if it can be

considered to be culpable and there was none such in the present case. At worst there were periods of relative inactivity on the part of the respondents. A query as to whether further particulars of injuries were to be expected or whether Mr. Flynn was prepared to share his medical reports on a without prejudice basis could not be considered to be acts of culpable acquiescence. Neither could the same be said of a request that the plaintiff attend a medical examination.

Legal Principles

19. In the course of his judgment the trial judge set out a summary of the key principles to be considered by a court when asked to exercise its inherent jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay. He did so by reference to a number of relatively recent decisions on the issue. Given that, subject to one important exception, these are not controversial I gratefully adopt and below set forth the summary of the relevant principles identified by Barrett J. at para. 5 of his judgment. I have also taken the liberty of including one additional factor emanating from the judgment of Fennelly J. in *Anglo Irish Beef processors v. Montgomery*[2002] 3 I.R. 510.

> "(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.
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> (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.
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> (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.
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> (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.
>
> (16) Where a plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed."

20. Having regard to the precise wording used by the trial judge which is replicated at para. 19 (11) above, I think it is necessary to state that I doubt whether it is correct to say that the courts *are themselves under an obligation by virtue of Article 6(1) ECHR* to see to it that all litigation is heard within a reasonable time, at least so far as Irish domestic law is concerned. It is true, of course, that s. 3(1) of the European Convention of Human Rights Act 2003 ("the 2003 Act") imposes an obligation on "every organ of the State" to perform its functions in a manner compatible with the State's obligations under the Convention provisions. One cannot, however, overlook the fact that the phrase "organ of the State" is defined by s. 1(1) of the 2003 Act as excluding any court. It cannot, therefore, be correct to say that *the court* is under an obligation, as such, to see that the State's obligations under Art. 6(1) ECHR are complied with so far as the 2003 Act (and, by extension, Irish domestic law) is concerned.

21. If it were otherwise it would mean in substance that the entirety of the ECHR would be directly effective and the courts would then be obliged to give effect to it qua an organ of the State. Of course, the Supreme Court has made it clear in two major judgments that the ECHR is not directly effective in Irish law and that there has been only partial incorporation of the Convention via

the 2003 Act: see *McD v. L.* [2009] IESC 81, [2010] 2 I.R. 199 and *MD v. Ireland* [2012] IESC 10. This, however, is not to say that the courts could be indifferent as to the State's Article 6(1) ECHR obligations and it is clearly a highly relevant factor to which the courts can and indeed ought to have significant regard in delay cases see *e.g.*, *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 and my own judgment in *Collins v. Minister for Finance* [2015] IECA 16. All of this is to say that while the courts must have proper regard for the implications of Article 6(1), it is not the case that Article 6(1) is as such independently directly effective as a matter of our domestic law.

Discussion and analysis

22. The first matter of significance is to note that there is no appeal from the decision of the High Court judge in respect of his conclusion on the first two strands of the test advised in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 namely that Mr. Flynn's delay in the prosecution of his action was both inordinate and inexcusable. That being so what is in dispute on this appeal is the treatment of the trial judge of the third leg of that test, namely, whether having regard to that inordinate and inexcusable delay, the balance of justice favoured permitting the proceedings advance to trial or their dismissal, as per the respondents' application.

23. Having considered the submissions of the parties on this appeal I am in agreement with the conclusion of the trial judge that, having regard to the inordinate and inexcusable delay on the part of Mr. Flynn in the manner in which he prosecuted his action, the balance of justice did indeed favour the dismissal of the proceedings.

24. I will briefly refer now to the matters which in my view, having regard to the Court's obligation to seek to do justice between the parties, tip the scales in favour of the dismissal of the proceedings. In doing so I intend to refer to a number of factors relied upon by the appellant on this appeal, which were not specifically addressed by the trial judge in his judgment, as it is only by pursuing such an approach that the correctness of his decision can be assessed.

25. Material to the court's consideration as to whether the balance of justice favoured the dismissal of this action must be an evaluation of the nature and complexity of the claim advanced as those are factors which often impact upon the speed at which litigation can be progressed. Mr. Flynn's claim is, to say the least, one which can comfortably be described as straightforward. To advance a claim for assault, apart from the delivery of formal pleadings, routinely, all that is required is the assembly of those persons known to have been present when it took place. Here, there is no suggestion that the claim could not be advanced because of any difficulty encountered in locating essential witnesses or the need to put complex arrangements in place to ensure their availability.

26. Relevant also to the overall delay in this case is the fact that criminal charges were brought against Mr. Flynn arising out of the incident, with the result that he had a solicitor advising him from as early as 2002. Hence, when the proceedings were commenced in April, 2005, he should have been in an optimum position to advance his claim with reasonable expedition.

27. Neither is this a claim which has been delayed due to difficulties encountered in obtaining expert evidence to establish liability or causation, as is often the case with personal injury claims. All that was required was for Mr. Flynn's solicitor to obtain a medical report or reports as to his injuries, treatment and prognosis. Again, there was no evidence to suggest that Mr. Flynn's injuries were complex or his prognosis uncertain such as might cause a delay in obtaining such a report.

28. Other than the delay in relation to the finalisation of the respondents' discovery, an issue to which I will later return, there was no procedural reason to justify the delay that occurred in this case, unlike for example the situation that pertained in *Gaffney v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2017] IECA 52, a case with similar facts to the present one. The plaintiffs in those proceedings (two separate claims) were mother and son who maintained that members of An Garda Síochána had forcibly entered their home in February, 2008 without a valid warrant after which Mr. Gaffney was struck several blows while his mother was restrained and locked in a bathroom. Following a complaint made by the plaintiffs to An Garda Síochána Ombudsman Commission a decision was made that the gardaí involved in the incident be prosecuted. The first trial collapsed in October, 2010 and the accused gardaí were later acquitted following a retrial in July, 2011. In November, 2015 a motion was brought seeking to have both sets of proceedings dismissed on the grounds of inordinate and inexcusable delay. In considering the overall period of delay in that case Hogan J. referred to what he described as some "special features" of the proceedings which served to distinguish them from the decision of this Court in *Millerick v. Minister for Finance* [2016] IECA 206, a decision to which I will later return. In particular, he noted that it was hard to see how the civil proceedings could realistically have been disposed of prior to the conclusion of the criminal proceedings such that the period of delay up to the conclusion of those proceedings might be excused. No such considerations arise in the present case. It is perhaps also relevant to note that the overall delay in *Gaffney* was six years and hence considerably shorter than that which arises for consideration in the present case.

29. In these proceedings the only excuse proffered to explain the delay on the part of the appellant was a dispute concerning discovery. The respondents' affidavit of discovery was sworn on the 14th October 2008. Some seven years later, unhappy about that affidavit, the appellant brought a motion to strike out the respondents' defence for failure to make proper discovery. That motion was struck out due to his non-attendance, albeit it that this was because of an error in the legal diary. However, that event was later followed by a letter from his solicitor withdrawing the complaint earlier made concerning the privilege that had been claimed by the respondents in respect of certain documents, thus undermining the appellant's reliance on outstanding discovery to justify or excuse the delay. That is not to ignore, for the purposes of considering the balance of justice, the unacceptable two years delay on the part of the respondents in making discovery and their particularly tardy response to the many letters written by Mr. Flynn's solicitors in relation thereto.

30. All of the aforementioned factors were material to the decision of the High Court judge not only as to whether the delay was inordinate and inexcusable, but also to his decision as to whether the balance of justice favoured dismissing the proceedings or allowing them proceed.

31. However, the Court having concluded that his delay had been both inordinate and inexcusable, it fell to Mr. Flynn to seek to excuse his fault by reference, if possible, to some weighty countervailing circumstances as was advised by Fennelly J. in *Anglo Irish Beef Processors Ltd. v. Montgomery*. Commencing on page 518 of his judgment Fennelly J. referred to the judgment of Hamilton C.J. in *Primor* and in particular to his reference to the judgment of Henchy J. in *O'Domhnaill v.Merrick* [1984] IR 151. What follows at p. 519 of the judgment of Fennelly J. is, I believe, significant in the context of the present proceedings:

> "One of the authorities cited by Hamilton, C.J. was Domhnaill v. Merrick [1984] I.R. 151, where Henchy J. said at page. 157 –
>
> > "Whether delay should be treated as barring a claim must inevitably depend on the particular circumstances of the case. However, where, as in this case, the delay has been inordinate and inexcusable, *such delay is not likely to be overlooked unless there are countervailing circumstances,* such as conduct akin to acquiescence on the part of

the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent" (emphasis added).

That statement of the law indicates that the author of delay which is found to be both inordinate and inexcusable will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration in the cited passage from the judgment of Hamilton C.J., namely whether "on the facts the balance of justice is in favour of or against the proceeding of the case". As I have already suggested, the plaintiffs were unable to point to any disadvantage or disability affecting them. Nor was there any delay or acquiescence of the defendants, which might redress the balance of fault.

In such circumstances, when the court comes to strike the balance of justice in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find something weighty to cancel out the effects of the plaintiffs' behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiff's claim dismissed."

32. For my part, having considered the submissions of the parties and the evidence before the High Court judge, I am not satisfied that the appellant was in a position to ask the Court to excuse him his inordinate and inexcusable delay. He was not able to point to any particularly meritorious countervailing circumstances. The principal excuse advanced to excuse his fault was premised upon an asserted difficulty encountered in obtaining full and proper discovery. While it is true to say that there were seven years between the order for discovery made on the 6th July, 2007 and Mr. Flynn's solicitor's letter of the 29thSeptember, 2014 declaring himself satisfied with the adequacy of that discovery and that the respondents were at times in significant default in dealing with queries raised in relation thereto, it ultimately transpired that the discovery made in 2008 was in fact in accordance with the respondents' obligations.

33. Even if that had not been the position, the onus is on a plaintiff to prosecute their claim with reasonable diligence and if a defendant fails to co-operate, for example by ignoring correspondence in relation to discovery, the Rules of Court provide a method whereby that co-operation can be secured. Mr. Flynn had, as was considered material in *O'Domhnaill*, the ability to control any such delay. Yet, not only did he not pursue any procedural remedy between the 14th October, 2008, when the respondents' affidavit was sworn and the 10th December, 2013, when he issued a motion to strike out the defence for failure to make proper discovery, but that motion was, as earlier advised, ultimately struck out and was later followed by correspondence from which it is clear that the appellant's concerns as to the sufficiency of the respondents' affidavit of discovery had been misplaced.

Matters not addressed by the Trial Judge.

34. When it came to his consideration of the third leg of the *Primor* test, I agree with Mr. Cody S. C. that the trial judge did not specifically address, as he might have done, a number of matters relied upon by the appellant as alleged acts of acquiescence sufficient to justify the Court deciding that the balance of justice favoured allowing the claim to proceed.

35. That said, I reject the submission made that the respondents are to be considered to have acquiesced in the delay because they failed to apply to dismiss the proceedings following the service of the notice of intention to proceed on the 11th June 2013. As was made clear by Fennelly J. in his judgment in Anglo *Irish Beef Processors Ltd*, a mere failure to apply to have a claim dismissed is not to be treated as a culpable act of acquiescence. Whilst defendants often choose to serve an application to dismiss proceedings on receipt of a notice of intention to proceed, their failure to do so cannot be held against them. Often times a plaintiff, notwithstanding service of repeated notices of intention to proceed, will not bring their proceedings on for trial thus relieving the defendant of any further expenditure on the proceedings. 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 by Fennelly J., in *Anglo Irish Beef Processors Ltd.*

36. There are many potential reasons why the respondents in this case may have decided against bringing a motion to dismiss the proceedings following receipt of the notice of intention to proceed such as that they considered it too early to hope it might prove successful. However, regardless of what their reasoning may have been, a failure to issue such a motion is not culpable behaviour amounting to acquiescence to be weighed in the balance as part of the Court's consideration as to whether or not the balance of justice favours the dismissal of the proceedings under the third leg of the Primor test.

37. Further, the fact that the respondents' failure to issue a motion to dismiss the proceedings following receipt of the notice of intention to proceed resulted in the appellant incurring the costs of issuing a motion to strike out the respondents' defence for failure to make proper discovery, is hardly a matter that can weigh in his favour when it comes to a consideration as to where the balance of justice is to be found. First, that submission presupposes that the application to dismiss would at that point in time have been successful. Second, the costs of the motion to strike out the defence were awarded against the appellant because he failed to appear on the hearing date, albeit through a diary error. It is, nevertheless, to be inferred from what happened later that the application was, in any event, misguided in that the discovery made some five years previously was ultimately accepted as being in compliance with the respondents' obligations. If there had been any merit in the appellant's motion and the respondents had been found to be in default, Mr. Flynn would have been entitled to his costs of that motion against the respondents, regardless of the respondents' failure to seek to bring the proceedings to a conclusion following the service of the notice of intention to proceed.

38. As to the fact that following the service of the notice of trial the appellant had expended a sum of €1,059 to obtain a medical report, that, in my view, is not a matter that can be weighed in the balance against the respondents when it comes to a consideration as to whether as a matter of justice the claim ought or ought not be dismissed. That was a cost that had to be incurred by the appellant if he wished to pursue his claim for damages for assault. That was expenditure incurred independent of any request or demand made by the respondents and cannot be argued to result from any culpable conduct on the part of the respondents.

39. As to the submission that the letters sent by the respondents solicitor on the 5th and the 30th of September, 2014, which respectively noted that the last details received concerning Mr. Flynn' s injuries where as per the replies to particulars dated the 22nd September, 2006, and asked if he would be prepared to share his medical report on a without prejudice basis, these are clearly not acts of acquiescence to be held against the respondents for the purposes of considering the balance of justice issue. These letters cannot be understood to mean that the respondents were willing to waive their right to maintain an application to dismiss for want of prosecution and that is particularly so in light of the correspondence to which I now intend to refer.

40. By letter dated the 22nd January, 2014 the respondents' solicitor, inter alia, complained that in excess of 10 years had elapsed since the events the subject matter of the claim had occurred. She referred to the prejudice to the respondents resulting from that

delay observing that with the passage of time that memories become dimmed. She made an offer to compromise the proceedings whilst indicating that if the matter could not be resolved she had been instructed to apply to dismiss the claim for want of prosecution.

41. In a letter dated the 20th February, 2014, replying to a letter seeking the respondents' consent to having the matter called on for hearing as a jury action, the respondents' solicitor suggested that the proceedings might be remitted to the Circuit Court. This time she referred to what she described as the appellant's inordinate and inexcusable delay in bringing his action on for trial and noted that almost 12 years had elapsed since the incident and almost 10 years since the summons had issued. She also repeated her earlier offer to agree to the proceedings being struck out with no consequential costs order, in default of which a motion to dismiss for want of prosecution would issue.

42. On the 27th May 2014, the respondents' solicitor, when dealing with an issue belatedly raised concerning her clients' discovery, advised that she would be briefing counsel to strike out the proceedings for want of prosecution and/or remittal to the Circuit Court unless the action was withdrawn.

43. Finally, on the 13th June 2014 the respondents' solicitor, in reply to a letter from Mr. Flynn's solicitor highlighting the importance of the proceedings to his client insofar as the claim concerned a breach of his constitutional right to bodily integrity and the deprivation of his liberty, advised that it would be remiss of her not to apply to have the matter struck out for want of prosecution.

44. In light of the aforementioned correspondence, I reject the submission made that the respondents' conduct over the period post-dating the notice of trial, *i.e.* the 30th January 2014, amounts to acquiescence for the purpose of considering whether the balance of justice does or does not favour the dismissal of the proceedings. During all of that period the respondents' solicitor advised the appellant as to the likelihood that an application would be brought to dismiss the proceedings on the grounds of inordinate and inexcusable delay. Accordingly, any steps taken by the appellant during this period were taken by him in the full knowledge that such a motion might nonetheless issue. This is not a case in which a motion was sprung out of the blue after a period during which the defendant had encouraged the plaintiff to expend further monies on his or her claim.

45. As to the letter of the 15th October, 2014 notifying Mr. Flynn that he should attend a medical appointment arranged for the 19th November, 2014, it is true to say that it might be inferred from such a letter, if considered in isolation, that the respondents were content to permit the action proceed to trial regardless of any prior delay. However, in the present case there are other factors at play. First, the motion to dismiss was issued and served five days before the letter was sent requesting Mr. Flynn to attend for a medical examination. That being so, it was obvious that the appointment was contingent on the outcome of the application. Second, the correspondence during the months preceding that letter, and to which I have earlier referred, could have left the appellant in no doubt that he remained at risk that the respondents would pursue an application to dismiss his claim on the grounds of inordinate and inexcusable delay.

46. As to the submission made that the High Court judge had impermissibly elevated the gardaí in these proceedings to a position of greater importance to that of the appellant when it came to his consideration of the balance of justice, that is the submission that I reject. Of course a claim of assault, battery and false imprisonment made against members of An Garda Síochána is of the enormous importance, particularly in light of the constitutional guarantees of the right to the protection of the person, bodily integrity and personal liberty. However, as has been noted in many of the more recent authorities dealing with the court's inherent jurisdiction to dismiss claims for inordinate and inexcusable delay, a plaintiff's constitutional right of access to the courts, regardless of the seriousness of the claim made, is not an unqualified right. It is one which must be considered against the backdrop of other competing rights, such as a defendant's right to protect their good name and the court's own obligation to administer justice in fair and timely manner.

47. In this regard the decision of this Court in *Collins v. Minister for Finance* [2015] IECA 27 is relevant as it was a claim not dissimilar to that brought by the appellant. In *Collins*, the plaintiff alleged she had been subjected, between 1998 and 2001, to false arrest and to an unlawful internal examination by a medical practitioner acting on behalf of An Garda Síochána. In allowing the appeal against the refusal of the High Court judge to dismiss the proceedings for inordinate and inexcusable delay on foot of a motion brought eleven years later in May, 2012, I observed as follows at para.113 of my judgment:-

> "Finally, 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 of revoking the plaintiff's constitutional right of access to the courts. However, that 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 defendants 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 10 or more years before being afforded opportunity to clear their good name. Neither should they have to do so in circumstances were a court is satisfied that a fair trial and just outcome can no longer be assured."

48. In my view, it is clearly material for any judge considering an application to dismiss proceedings for inordinate and inexcusable delay to have regard to the likely effect on a defendant or defendants of having proceedings such as these hanging over their personal and professional reputation for more than a decade. The character of this claim is one which imputes acts of gross professional misconduct to a member / members of An Garda Síochána when on duty. Defendants against whom allegations of such misconduct are made are in a very different position, from many other types of defendant, for example the defendant in the moderate road traffic claim. Delay in the prosecution of such proceedings will routinely have no effect on the reputation or career prospects of the defendant and if the claim is an assessment of damages only they will be saved even the stress of having to give evidence. Here, the very existence of the proceedings casts a shadow over the reputations of those against whom the allegations have been made. Hence it behoves the Court to ensure that those charged with such serious allegations of professional misconduct are afforded the opportunity to protect their good name as is guaranteed by Article 40.3.2 of the constitution with reasonable expedition.

49. Accordingly, while it is indeed true to say that the claim made by Mr. Flynn is an important one concerning, as it does, rights which are protected by the Constitution, *i.e.*, the right to personal liberty, person and bodily integrity, he was afforded more than ample opportunity to advance that claim before the courts during the 12 years between the events the subject matter of the claim and the issue by the respondents of their motion to dismiss the proceedings, but he did not do so in a manner which is consistent with his own obligations. As, moreover, this Court has stressed as a consistent theme in its delay jurisprudence, delays of this magnitude tend to compromise the courts' ability to fulfil their most basic constitutional mandate under Article 34.1, namely, to administer justice.

50. As to the final argument advanced by the appellant, namely that the absence of proof of any specific prejudice to the respondents by reason of the delay warranted that the trial judge conclude that the balance of justice favoured allowing the action proceed to trial, that is a submission which I reject. First, as was stated by Hamilton C.J. in *Primor*, the separate matters identified in his judgment as material to the consideration of the balance of justice are not exhaustive or cumulative but are matters to be considered material to the central issue, which is what is just in all of the circumstances. Potential prejudice is only one of a range of matters to be considered by the court when coming to its conclusion. Second, once there has been a finding of inordinate and inexcusable delay even moderate prejudice will suffice to justify the dismissal of the proceedings. (See, for example, the decision of Kearns J, in *Stephens v. Flynn Ltd* [2008] IESC 4). Proof of specific prejudice is not required. Third, the fact that all of the members of An Garda Síochána who were present at the time of the events complained are available to give evidence, may be of little consolation when those members come to be cross examined about matters which occurred approximately 15 years ago and about which their memories will inevitably be much less clear than they would have been had this action proceeded without undue delay. Fourth, the plaintiff's claim for damages is predicated upon a range of psychological injuries which he maintains were caused by the respondents' wrongdoing. It is undoubtedly the case that the relationship between any psychological condition and an event the subject matter of a claims such as this is often not readily apparent on a medical examination carried out several years after an event took place. Here Mr. Flynn's injuries will not be ascertainable in an objective manner such as is often the case in a claim for assault, or negligence where the injuries inflicted were of a physical nature and consequently captured by medical or hospital records, including, for example, x-rays, scans, test results. In this case, the passage of time will inevitably prejudice to some extent at least the respondent's ability to test Mr. Flynn's evidence concerning the nature and extent of his injuries and their connection to the events the subject matter of this claim. To that extent the claim is not unlike that considered by the court in *Gorman v. Minister for Justice and others* [2015] IECA 41.

51. In *Gorman* the plaintiff maintained that he was assaulted by three members of An Garda Síochána whilst in a cell in a garda station in Dundalk in January, 2001. Proceedings were issued in January, 2003 and a defence delivered in July, 2003. There was then a long period which was taken up with enquiries concerning a videotape which the plaintiff's advisors considered material to proof of the allegations. Eventually the defendants issued a motion to dismiss the proceedings in late 2011. In resisting the relief claimed, the plaintiff sought to rely upon the lack of specific prejudice identified by the defendants in their affidavits and emphasised the availability of witness statements taken at the time of the events in question which they maintained removed any real risk of prejudice. The defendants, however, submitted that the existence of witness statements would not negate the type of general prejudice that would ensue in meeting the claim 11½ years after the events in question, an argument accepted in the High Court at first instance and on the appeal.

52. Whilst not specifically so stated, it is to be inferred from the decision of Barrett J. that he was satisfied that the respondents would, by reason of the appellants inordinate and inexcusable delay in the prosecution of his claim, suffer at least moderate prejudice of the type I have described if the action were allowed to proceed to trial. If he was not so satisfied, he would hardly have dismissed the proceedings. Further, having myself considered all of the relevant circumstances and the submissions of the parties, I am satisfied that it is highly probable that the respondents would, for the reasons I have already referred to, suffer moderate prejudice if asked to defend this claim at such remove from the events of the subject matter of the claim.

Conclusions

53. Having regard to the fact that there is no appeal from the decision of the High Court Judge that the appellant was guilty of inordinate and inexcusable delay in the manner in which he had prosecuted his claim, the question for this court is whether the trial judge erred in law or in fact when he determined, in light of that finding, that the interests of justice warranted the dismissal of the proceedings.

54. I am quite satisfied that the trial judge acted in accordance with the evidence and the relevant legal principles when he decided to dismiss these proceedings for the reasons advanced in his judgment. Further, having considered those aspects of the evidence not specifically addressed by the trial judge in the course of his judgment, I am satisfied that there is nothing in that evidence sufficient to warrant interference by this court with the decision made by the High Court judge. That being so, for the reasons earlier advised I would dismiss the appeal.