Neutral Citation: [2014] IEHC 203

THE HIGH COURT

[2000 No. 12913 P.]

BETWEEN

DAVID CASSIDY

PLAINTIFF

AND

MARTIN BUTTERLY AND COMPANY LIMITED, PATRICK MONAGHAN (DROGHEDA) LIMITED AND DROGHEDA DEEP SEA DOCKERS ASSOCIATION LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered on the 10th April, 2014

This is an application to dismiss the plaintiff's claim as against the first defendant, pursuant to the inherent jurisdiction of the court and/or under O. 122, r. 2 of the Rules of the Superior Courts for want of prosecution.

1. Background

The plaintiff claims that he was employed as a casual docker at Drogheda Docks, Co. Louth between 1978 and 1982. In 1982 he was appointed to a permanent position in the employment of the first or the second or the third defendants or of some combination thereof and the employment continued until the 21st November, 1991, when he suffered an accident at work and injured his right knee. It is claimed that he was medically certified as unfit for work from the 23rd January, 1993, and that continued up to a time in or around January 1999, when he attempted to return to work. He claims that the defendants or one or other of them refused to permit him to return. They purported to terminate his employment and allegedly acted in concert to prevent him from going back to work.

During the plaintiff's period of employment and the further time during which he was entitled to be employed, he himself made some payments to a fund to provide a pension and other benefits for him and other employees, which fund was operated, managed and controlled by the third defendant. Whichever of the defendants was the actual employer of the plaintiff was also obliged during the period of employment to make contributions to the said fund.

The plaintiff claims many reliefs including a declaration that he has a subsisting contract of employment with one or other of the defendants; an injunction restoring him to his position of work; a declaration that a purported termination of the plaintiff's employment is null and void; damages for intentional or reckless infliction of mental distress and other emotional upset; damages for breach of contract and other wrongs, as well as a variety of other declaratory, injunctive and other reliefs.

It would appear that the plaintiff's essential claims are that he was in permanent employment at the time he sustained his injury at work, that the injury kept him out of work for a long period of years, that his employment continued notwithstanding his long absence, that he was entitled to present himself for work when he had recuperated, that his employer wrongfully refused to take him back and put him to work and/or purported to terminate his employment and that the employer failed to make appropriate payments to the plaintiff's pension fund during the period of his employment and his absence on leave because of injury. In the result, he claims to have suffered mental distress and other upsets as well as financial losses arising from the above circumstances.

The plaintiff does not specify which of the defendants was his employer, pleading that it was the first and/or the second and/or the third defendants.

The first two defendants are stevedoring firms in Drogheda and the third defendant appears to be a limited company set up to receive payments and provide benefits for dockers at Drogheda Docks and, according to the plaintiff's pleadings, to supply and even employ dockers at that port.

The first two defendants have filed full defences.

2. History of Proceedings

The motion by the first defendant to strike out the plaintiff's claim is grounded on the affidavit of Mr. Ronan O'Reilly, solicitor, dated the 16th August, 2013. He furnishes relevant dates as follows:

> 7th November, 2000, plenary summons issued.
>
> 18th May, 2001, statement of claim delivered.
>
> 27th June, 2002, defence delivered.
>
> 11th July, 2002, the deponent says that that was the last correspondence passing between the parties for a period of almost nine years.
>
> 13th May, 2011, notice of change of solicitor by Messrs Hamilton Turner, the plaintiff's new solicitors.
>
> 11th January, 2012, notice of intention to proceed was served by the plaintiff's solicitors.
>
> 14th March, 2012, notice of trial was served.
>
> 29th April, 2013, the plaintiff's solicitors issued a discovery request.
>
> 16th May, 2013, motion for discovery by the plaintiff.

Mr. O'Reilly deposes that the delay in prosecuting the plaintiff's proceedings has been inordinate and inexcusable. He says that the defendant is seriously prejudiced, not just by reason of the delay itself but in seeking to defend the action. He says that the voluntary discovery request refers to documentation in relation to payments made by the first defendant or to the third defendant on his behalf. The first letter came from the plaintiff's then solicitor on the 17th June, 1999, which elicited a reply from the first defendant that they had had no communication from the plaintiff for many years and he was no longer in their employment. Although the plaintiff makes "some case that he should have been allowed to return to work in 1999, he had not worked for the first named defendant company since 1993, some twenty years ago". In the circumstances it would be onerous in the extreme to require the first defendant not just to make discovery but to defend the action. Mr. O'Reilly adds the following:-

> "In addition the plaintiff is also relying on alleged representations made to his union representative in relation to his return to work. Particulars were raised in this regard in March, 2001, but were not replied to and the matter subsequently went into abeyance in July 2002. With the passage of time, the first named defendant may not be able to call the relevant witnesses to deal with this and their recollection if available will in any event be poor at this remove."

The plaintiff's solicitor, Mr. Andrew Turner swore a replying affidavit dated the 1st November, 2013. He says that the plaintiff retained the firm of Donal Branigan & Co. in 2000, but that he had no solicitor from approximately 2005 until the 13th May, 2011, when Hamilton Turner came on record. The plaintiff has attempted to prosecute his claim with vigour and the fact that that has not occurred is not his fault.

Mr. Turner gives some information about the third defendant. He says that it was founded in 1983 as a Union within the Amalgamated Transport and General Workers Union and that membership of the Association would automatically lead to membership of the Drogheda Deep Sea Dockers Association Pension Scheme. The first and second defendants contributed employers' contributions to the pension scheme.

Mr. Turner says that the plaintiff suffered an injury to his right knee in the course of his work on the 21st November, 1991. He was certified medically unfit from the 23rd January, 1993 by reason of the injuries. The plaintiff sued the second defendant and the personal injury proceedings were settled on the 24th November, 1998. He was thereafter certified as fit to return to work and attempted to do so in January, 1999, but the first defendant and/or the second defendant and/or the third defendant did not permit him to return to work.

Mr. Turner says that between the 21st November, 1991, and January 1999, "it was represented and warranted to the plaintiff by the defendants, their servants or agents that they agreed and accepted that the plaintiff continued to be an employee of the defendants". He claims that the first and second defendants failed to make pension contributions on behalf of the plaintiff during the period of his absence from work. He alleges that they wrongly and wrongfully stated in June and July 1999 that he had resigned from his employment with the defendants and was no longer employed by them.

Mr. Turner asserts that "the substantive issue in the within proceedings is the status of the plaintiff's pension fund held with the Drogheda Deep Sea Dockers Association Pension Scheme". In or about 2001, the plaintiff engaged with the Pensions Board in regard to his entitlements. He applied on the 5th October, 2007, to the Board seeking a determination on his pension entitlements. On the 5th May, 2009, the Pensions Board furnished a favourable determination which he says has not been challenged by the defendants. He claims that the first defendant was aware of the Pensions Board involvement in the matter at all material times.

Mr. Turner deposes that he delivered replies to the first defendant's notice for particulars dated the 20th March, 2001, on the 18th April, 2012. He refers to his application for discovery.

Mr. Turner points out that it was not until the 16th August, 2013, almost two years after the service of the notice of change of solicitor, that the defendant filed its motion to strike out the plaintiff's proceedings. During that period the first defendant's solicitors did not claim any serious prejudice by the delay up to that point, in fact there was some communication between the solicitors during that period.

Mr. Turner claims that in circumstances where the Pensions Board determination was not delivered until the 5th May, 2009, any delay on the plaintiff's part was justified, because that was an inherent component of the proceedings and he reiterates the contention that the first defendant was aware of the plaintiff's ongoing involvement with the Pensions Board.

Finally, Mr. Turner draws attention to the terms of O. 122, r. 11 referring to a cause or matter in which there has not been a proceeding for two years, which he says does not apply in the case of this motion.

The plaintiff himself swore an affidavit on the 22nd January, 2014 in further resistance to the motion by the first defendant. He refers particularly to the claim by Mr. Turner that he had no solicitor from 2005, until the 13th May, 2011, and he amplifies that proposition. Mr. Cassidy says that his understanding was that Branigan and Company, his original solicitors, were corresponding with the defendants and progressing his case throughout 2003 and 2004. In or around 2004, he says that Mr. Branigan, his then solicitor, advised him that he had a case against the solicitor who acted for him in the personal injury proceedings arising out of his injury at work, but since Mr. Branigan did not himself pursue such litigation, the plaintiff should go to another solicitor, which Mr. Cassidy duly proceeded to do. The new solicitor, Mr. Traynor, would not take on the professional negligence claim against the solicitors on its own without also acting in these proceedings and Mr. Cassidy says that he signed relevant documents to bring about that situation. However, the new solicitor did not serve a notice of change of solicitor in this action.

The plaintiff had a number of consultations with the new solicitor but the latter was then the subject of action by the Law Society and was suspended. The solicitor gave Mr. Cassidy three boxes of files relating to the proceedings saying that he could no longer act in the case. This left him in late 2005 and early 2006 without any legal representation. It was of course the case that Mr. Branigan was still on record as his solicitor and no formal change had taken place but Mr. Cassidy was of the understanding that the necessary steps had indeed been taken. He was therefore left on his own to deal with the pension situation and correspond with the Pensions Board. After much correspondence with different bodies, the outcome was a decision of the 5th May, 2009 that was in Mr. Cassidy's favour. He claims that during this time the defendants were aware that he was pursuing the matter through the Pensions Board.

Mr. Cassidy also says that he attended at the High Court and filed a notice of intention to proceed in August 2008. He says that he served this notice on the three defendants by prepaid registered post. He knew about this process as a result of having taken up legal studies in Griffith College, which he began in September 2007. Mr. Cassidy contacted his Union, then the ATGWU, now UNITE and the Regional Secretary, Mr. Cullen, gave him advice and referred him to his present solicitor, Mr. Andrew Turner of Hamilton Turner. Mr. Cassidy points out that the defendants were in receipt of discovery requests in 2004. They also received notice of intention to proceed in 2008.

The last affidavit was sworn on the 27th January, 2014, by Mr. Tom O'Reilly who is the Managing Director of the first defendant. He confirms receipt of the voluntary discovery request from the plaintiff's solicitors in April 2004. He points out that Mr. Branigan was on record as the plaintiff's solicitors until 2011. Mr. O'Reilly swears that the Pensions Board contacted the defendants with a view to ascertain the plaintiff's date of cessation of work for the purpose of the pension scheme and he says that Coyle Hamilton Willis, the brokers for the pension, were in contact with the Pensions Board.

Mr. O'Reilly denies having received the notice of intention to proceed in 2008, which Mr. Cassidy says that he served and Mr. O'Reilly draws attention to certain apparent inconsistencies in the information given by Mr. Cassidy that he suggests tend to undermine the plaintiff's assertion. Mr. O'Reilly reiterates the claim that the plaintiff's delay has been inordinate and inexcusable and that the action ought to be dismissed.

Counsel for the defendant and moving party, Mr. McGowan, BL and counsel for the plaintiff Mr. Thullier, BL were in broad agreement about the legal principles to be applied. Mr. McGowan cited particularly the fact that the plaintiff has not been in the employment, even on his own allegations, of the first defendant or of the second defendant since 1993. The case will therefore be heard dealing with a situation that is more than twenty years old. Mr. Thullier for his part pointed out that the defendant was technically not entitled to invoke O. 122, r. 11, because two years had not passed since the last proceedings. He referred to the fact that the plaintiff was in effect acting for himself and was making inquiries from the Pensions Board and associated entities that extended to relevant matters that arose out of the case and out of the losses that he had sustained. The circumstances, therefore were not such that the plaintiff had neglected to do anything; if it is to be considered that he directed his attention to the wrong area, that is something that is understandable in the circumstances because he was in effect a lay litigant. The plaintiff was unfortunate enough to have been directed to a solicitor who was subsequently struck off for misconduct. He also referred to the notice of intention to proceed that was served in August 2008, and pointed out that the second defendant had received the notice sent by the plaintiff.

Mr. McGowan did not assert any specific prejudice that arose at this point such as would inhibit the capacity of the first defendant to meet the case. However, he did not concede that such prejudice might not arise in fact when they assembled their evidence to defend.

The following appear to be the principles of law to be applied. As is common, it is not the principle but the application that is difficult.

3. The Law

The defendant has to establish in the first place that the plaintiff's delay in proceeding with his claim was inordinate and inexcusable. Finlay P was of the view in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, that there was no basis for an application to dismiss unless the delay was inordinate and inexcusable, although that has been questioned in recent times. The second question is whether it is in the interests of justice that the case should be dismissed.

In *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, the Supreme Court focused on whether the delay resulted in prejudice to the defendant in meeting the claim. The Court set the bar high for a defendant applying for a dismissal, holding that the question of particular prejudice was central to the exercise of discretion. It also endorsed and emphasised the importance of the role of the defendant in relation to the plaintiff's delay. The Court held that the principles of law relevant to an application to dismiss an action for want of prosecution were:

> (1) that the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice so required;
>
> (2) that the party who sought the dismissal on the ground of delay in the prosecution of the action must establish that the delay had been inordinate and inexcusable;
>
> (3) that even where the delay had been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice was in favour of or against the case proceeding;
>
> (4) that when considering this obligation the court was entitled to take into consideration and have regard to -
>
> > (a) the implied constitutional principles of basic fairness of procedures,
> >
> > (b) whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action,
> >
> > (c) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at,
> >
> > (d) whether any delay or conduct of the defendant amounted to acquiescence on the part of the defendant in the plaintiff's delay,
> >
> > (e) the fact that conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not, in law, constitute an absolute bar preventing the defendant from obtaining a dismissal but was a relevant factor to be taken into account by the court in exercising its discretion whether or not to dismiss, the weight to be attached to such conduct depending on all the circumstances of the particular case,
> >
> > (f) whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant,
> >
> > (g) the fact that the prejudice to the defendant referred to in (f) might arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.

O'Flaherty J said that whilst the Court had inherent jurisdiction to dismiss a claim in the interests of justice where the delay in the proceedings was in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself, it was a jurisdiction which should not be frequently or lightly assumed. He also said that where a plaintiff's claim was infirm, that could be taken into account on a defendant's motion to dismiss for want of prosecution.

In *Sheehan v. Amond* [1982] I.R. 235, Henchy J said at pp. 238 - 239:

> "After eight years of silence, after the infant plaintiff had grown from childhood to manhood, when memories of the circumstances of the accident had inevitably become dulled or distorted with the passing years, when the scene of the accident may possibly have changed, when medical and other evidence may have lost sharpness or reality, when money values had changed out of all recognition, when the many other changes that are the inevitable consequences of the fading of events into the distant past must have taken place, is it any wonder that in those circumstances the response of the defendant to the belated effort of the plaintiffs solicitor to resuscitate this seemingly entombed action was to bring a motion to have it struck out? That is what the defendant did."

Any question of prejudice is therefore central to the court exercising its discretion. But the role of the defendant is also relevant and a defendant who has sat back and done nothing may, in some circumstances, be considered to have acquiesced in the plaintiff's delay. It follows that where there has been a long delay and the defendant is unable to demonstrate prejudice and/or where he has not taken active steps to bring the case forward, it may be difficult to succeed in an application to dismiss a plaintiff's claim for want of prosecution.

The balance of justice test
The authorities suggest that in regard to the balance of justice, the case will usually be dismissed if there is inordinate and inexcusable delay unless the plaintiff is able to adduce some exceptional countervailing argument or circumstances to avert that consequence. In *O'Domhnaill v. Merrick* [1984] I.R. 151, Henchy J said at p. 157:

> "Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a 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 the inability on the part of an infant plaintiff to control or terminate the delay of his or her agent."

In *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510, Fennelly J added a further endorsement of the passage quoted above from Henchy J, saying at pp. 519 -520:

> "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 respondents were unable to point to any disadvantage or disability affecting them. Nor was there any delay or acquiescence of the appellants, which might redress the balance of fault. In such circumstances, when the court comes to strike that *'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 respondents' behaviour. It will attach weight to the character of the claim and to the character of the respondents. When considering any allegation of delay or acquiescence by the appellants, 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 respondents' claim dismissed.

O'Dálaigh C.J said in *Dowd v. Kerry County Council* [1970] I.R. 27 at p. 41:

> '... [I]n weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution ... 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.'
>
> 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'* as indicated in the judgment of Henchy J cited above."

More recently, the Court itself has expressed concern in the public interest to see to the efficient dispatch of litigation. This has at its heart a conception of the court's function in litigation that is to ensure that cases are brought to expeditious conclusion. Litigation is not simply a matter for the parties and Hardiman J in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, commented that significant developments had occurred since the *Primor* and *Rainsford* decisions when he said at pp. 293-294:

> "[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of the action accrued….
>
> …[F]ollowing such cases as *McMullen v. Ireland* [ECHR 422 97/98, 29 July, 2004] and the European Convention on Human Rights Act, 2003 the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."

This proposition has at its source Article 6(1) of the European Convention on Human Rights ("ECHR"). In *Gerald J.P. Stephens v. Paul Flynn Limited* [2008] 4 I.R. 31, Clarke J expressed the view that a radical re-appraisal might now be necessary in determining the balance of justice and it might even extend to the appraisal of the elements of inordinacy and inexcusability.

In his dissenting judgment in *Desmond v. M.G.N. Limited* [2009] 1 I.R. 737, Kearns J endorsed this new approach. He said that the delay in that case was so long that it "almost certainly gave them [the defendants] reasonable grounds to believe that this litigation had simply 'gone away' and would never be brought before a court." Kearns J in addition to addressing the function of the court having regard to Article 6 of the ECHR, cited the review by Fennelly J of the authorities in his judgment in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510, as outlined above.

A variant of this doctrine derives an obligation on the courts to achieve efficient disposal of court proceedings. On this analysis, the courts have a duty and they also have a public interest independent of the private interests of the litigants. Peart J said in *Byrne v Minister for Defence* [2005] 1 I.R. 577:

> ". . . [T]here is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their

> litigation, as well is increase the cost to the Courts' service, and through that body to the taxpayers, are providing a service of access to the courts which serves best the public interest."

Hogan J cited that passage with approval in *Quinn v. Francis Faulkner trading as Faulkner's Garage and M.M.C. Commercials Limited* [2011] IEHC 103, in which he held that article 34.1 of the Constitution presupposed an obligation on the courts to ensure the timely administration of justice.

However, Geoghegan J in *Desmond v. M.G.N. Limited* [2009] 1 I.R. 737 did not agree that the jurisprudence in relation to when an action should be struck out for delay needed to be modified having regard to the incorporation into domestic law of the ECHR by the Act of 2003. He said that the views of Hardiman J in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 were *obiter dicta* so therefore the basic principles in *Rainsford v. Limerick* Corporation [1995] 2 I.L.R.M. 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 represent the law.

The latest occasion on which this topic was considered by the Supreme Court was in *Comcast International Holdings Inc v. Minister for Public Enterprise* [2012] IESC 50, where McKechnie J at para. 31, warned against recalibration, citing *Guerin v. Guerin* [1992] 2 I.R. 287:

> "It will be recalled that the plaintiff in that case met with a road traffic accident in 1964 when aged 4, but that the proceedings were not issued until 1984, more than 20 years later. Whilst the Statute of Limitations did not arise for consideration and whilst *O'Domhnaill v. Merrick* [1985] I.L.R.M. 40 *("O'Domhnaill") and Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135 *("Toal (No. 1)")* and *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140 *("Toal (No. 2)")* are referred to in the judgment, the learned judge decided the issue by reference to *Primor*. In a powerful understanding of the disadvantaged and with a deep insight of the deprivation under which they labour, Costello J excused the delay by reference to the plaintiff and his family's destituteness in virtually every aspect of their existence, including their living, financial, and educational circumstances. As stated by him they survived in a 'world from which the world so familiar to lawyers in which people sue and are sued was remote and arcane'. Given their particular circumstances it was held that the delay, although undoubtedly inordinate, was in the judge's view excusable. Any contrary result in *Guerin* I believe would have been unjust, but nonetheless may have been possible if weight reassessment was in place."

It may be that *Guerin* should be considered as a case where the delay was explained and thus not inexplicable, rather than as an exercise of the balance of justice but the categories are not watertight.

4. Analysis and Conclusion
Let me now turn to apply the legal principles to the facts of this application.

(1) Was the delay inordinate? I think it is irresistible that the delay in this case was inordinate. It can be considered as a whole, stretching from the initiation of proceedings up to the present time, but it is more relevant, I think to focus on the particular period of delay that the first defendant cites, which is the seven years approximately between the discovery requests in 2004 and the notice of change of solicitor in 2011. Mr. Thullier does not seriously suggest that the period is anything other than inordinate and I think he is quite right to accept that point. He was of course careful to emphasise that it was not a period of almost nine years, but rather seven years.

(2) Was the delay inexcusable? The word sets the bar high, but its strict meaning of being quite unforgivable is not the sense in which it is used in this context. The question is whether any reasonable, credible explanation has been proffered for the delay overall or the particular period. In this case, it seems to me that the plaintiff has put forward a number of explanations to account for the seven year time lapse. In the first place, he had a solicitor who did not serve notice of change and does not appear to have done anything active in the proceedings. It may be that part of the period of inactivity elapsed because of the solicitor's difficulties with the Law Society. The point is however, that it seems to me that Mr. Cassidy has provided a rational, credible explanation for the period between 2004 and 2006. Thereafter, in the events that happened, he was essentially in the position of a lay litigant, although to all intents and purposes his previous solicitor, Mr. Branigan, was still acting. He was still officially on record as the plaintiff's solicitor although that situation had actually ceased to be the case back in 2004.

As to Mr. Cassidy's engagement with the Pensions Board, this appears to have begun in 2007 and ultimately culminated in a decision in his favour in 2009. I think he has provided a reasonable explanation for that period. It is true that he was not progressing his action in any way, but it is equally clear that he was asserting a claim to be entitled to some relief arising out his employment and that is the very matter that is the subject of the action. So while it may be said that he was pursuing the matter through the wrong avenue or, rather, that he was failing to pursue it through a correct avenue, there was a certain amount of logic in doing what he did and hoping to achieve a favourable outcome. It may be, but I am not of course deciding this and I am not even in a position to offer a view about it, that the decision by the Pensions Board is of assistance in pursuing this action. If that turns out to be the case, then it will have been a worthwhile exercise for Mr. Cassidy to have embarked on the quest with the pension agencies. But obviously he also needed to make progress with his action and that is the problem for him.

Overall, I think that this period has been explained in a fairly reasonable, although far from perfect, fashion and is sufficient at any rate to exclude the conclusion that the delay is in the category of being inexcusable.

(3) As to the point that counsel for the plaintiff makes that the first defendant delayed in bringing his application to strike out, and that such delay is fatal to the success of the dismissal motion, I think it is clear that O. 122, r. 11 does not in fact apply. There are indeed cases that hold a strict obligation on a moving party wishing to strike out the claim to assert such an entitlement promptly. I think the first defendant faces some difficulty under this heading, although on balance I would prefer to decide the case and do so on the grounds of excusability in the first place and secondly on the balance of justice. I am not holding in the circumstances of this case that the delay by the first defendant is fatal to the claim.

(4) I now look at the balance of justice, which falls to be considered if the plaintiff's delays were both inordinate and inexcusable. This arises if there are features of case that are in the plaintiff's favour. If no such elements are present, the balance of justice favours the defendant and dismissive of the case in normal circumstances. In light of the events that I have recounted above and the overall history of the case, including as it seems to me the absence of any personal responsibility on the part of the plaintiff for the delay in progressing the case (as to which see *Rainsford v. Limerick Corporation* above) I do not think that the balance of justice would favour dismissal of the action in the event that I had found the delay to be inexcusable as well as inordinate.

(5) Would the exercise of discretion in favour of the plaintiff on the balance of justice offend another principle to which the court must have regard? This arises where the delay is inordinate and inexcusable, but there are circumstances that make it *prima facie* or

unjust to dismiss the plaintiff's claim if there are also elements that call into operation other principles to which the court must have regard, such, for instance, as Article 6 of the European Convention of Human Rights and the interest that the courts have, independent of the parties, in the efficient conduct of litigation. It seems to me that in these circumstances the delay by the applicant, the first defendant, in making the application has some particular relevance. Overall, however, I do not believe that this is a case in which it would be appropriate to invoke some such other countervailing principle that would extinguish the equities that operate in favour of the plaintiff on the balance of justice.

I am deciding this matter on the basis of the affidavits and on the understanding that there is in fact no actual prejudice to the first defendant in defending the action. That is the state of affairs as it presents at this stage of the proceedings. Mr. McGowan, counsel for the first defendant, in fairness acknowledged that there was not any specific prejudice pleaded in the case such as would operate heavily in favour of the granting of the relief sought in the motion. (See in this respect the importance placed on actual prejudice in the leading authority *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459). It seems to me to be important therefore, that it should be left open to this defendant and the other defendants to prove at the hearing any express prejudice that arises and to revisit this question of dismissal of the action in evidence, argument and submissions at the trial. It will be a matter for the trial judge to give such importance as he or she thinks appropriate to any element of actual prejudice that arises and to weigh that in the balance in considering the decision in the case.

I propose therefore to dismiss this application.