Neutral Citation [2016] IEHC 700

THE HIGH COURT

[2009 No. 1137P]

BETWEEN

MARTIN PADDEN

PLAINTIFF

– AND–

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 6th December, 2016.

Contents

I. Overview

1. Mr Padden has commenced proceedings against the State for certain wrongs that he alleges were done to him by members of An Garda Síochána. These include wrongful arrest, false imprisonment, malicious prosecution, breach of constitutional rights, trespass, reckless infliction of emotional suffering, and misfeasance in public office.

2. The factual essence of Mr Padden's complaints is as follows. He claims that (i) back in 1999 he complained to the Gardaí that he and his brothers had been seriously assaulted outside a pub in Geesala, Co Mayo, (ii) one of the assailants was an off-duty Garda, (iii) after he made his complaint Mr Padden was assaulted by a number of Gardaí, then arrested and falsely imprisoned, and (iv) thereafter he was subjected to a course of Garda intimidation and harassment that included him being maliciously prosecuted (unsuccessfully) for various alleged criminal wrongs, the last failed prosecution ending with an acquittal on 14th February, 2003.

3. The court cannot over-emphasise that at this time all of Mr Padden's claims are unproven, each and all of the wrongs claimed by him to have occurred are denied, and Mr Padden may or may not succeed in the ultimate trial of his proceedings. For their part, the defendants consider that matters ought not now to go to trial. They have brought the within application seeking an order dismissing Mr Padden's claim for want of prosecution on grounds of inordinate and inexcusable delay in the conduct of the within proceedings. The application has been brought pursuant to O.27, r.1 and/or O.122, r.11 of the Rules of the Superior Courts 1986, as amended, and /or the inherent jurisdiction of the court.

4. In their notice of motion the defendants also sought an order directing the trial of a preliminary issue in relation to the application of the Statute of Limitations, or an order treating the hearing of the application as a hearing of that preliminary issue. However, on the day of hearing, counsel for the defendants eventually withdrew this element of the defendants' application, rightly conscious that

in so doing there would be nothing to stop the defendants raising any issue as to the Statute of Limitations at any trial that ensues in these proceedings. After all, if any aspect of the proceedings is time-barred, then it is time-barred and that is that. For the purposes of the within judgment, this aspect of matters having been left to the court of trial, the court does not address or arrive at any conclusion as to whether the proceedings are time-barred.

II. A Summary Chronology and Some Preliminary Points

5. It is helpful to begin with a summary chronology of the pleadings in this case:

> 06.02.09 Plenary Summons.
>
> 22.04.09. Appearance.
>
> 10.12.10. Statement of Claim.
>
> 21.04.11. Defendant's Notice for Particulars.
>
> 23.02.12. Plaintiff's Reply to Particulars.
>
> 03.05.12. Defence.

6. As can be seen, the proceedings were commenced by way of plenary summons dated 6th February, 2009. On 22nd April, 2009, the defendants entered an appearance. Mr Padden delivered a detailed statement of claim on 10th December, 2010. On 22nd April, 2011, the defendants delivered a statement of particulars. There was some delay in furnishing the replies to same: these came on 23rd February, 2012. Following receipt of these replies, the defendants delivered a defence on 3rd May, 2012. Thereafter, no correspondence was received from Mr Padden until 9th June, 2015, when a letter for voluntary discovery was received by the defendants. This last, circa. 1,100-day delay, is the particular focus of the within application. Counsel for the defendants noted at the hearing that Mr Padden has given no explanation for the inaction arising. However, Mr Gill, the solicitor who has carriage of the within proceedings for Mr Padden, has sworn an affidavit that offers a comprehensive explanation of same:

> *"…6. The Defendants refer to a three year delay in the proceedings. Whilst there was a three year gap between the delivery of the Defence and the delivery of the letter of voluntary discovery* [Mr Gill]*…was engaged with Counsel in relation to the matter during this period and it has always been the Plaintiff's intention to proceed with his claim herein. The Plaintiff underwent surgery in early 2013 to deal with complications arising from a previous amputation of his left leg….*[Mr Gill] *and Counsel are responsible for any delays herein. Proofs have been progressed during this period. Whilst it is accepted that this gap could and should have been shorter it is denied that the delay is inordinate and inexcusable or that it has prejudiced the Defendants to the extent that there cannot be a fair trial of the matters at issue.*
>
> *7. I say that the Defendants' grounding affidavit reveals no actual prejudice to the defence of the proceedings, e.g. no loss of witnesses or documents and instead relies on a generalised reference to fading memories with the passage of time. Indeed at paragraph 23 of their affidavit, in a passing reference to our request for discovery the Defendants confirm that they are in possession of key documents in relation to the matters at issue and that their reference to such documents is without prejudice to any claim of privilege they may make over such documents in due course.*
>
> *Significantly, they also expressly acknowledge in the following paragraph, i.e. paragraph 24 that they have not, thus far, been deprived of any essential witness or documentation."*

7. In short, Mr Gill indicates that during the circa. 1,100-day period of delay referred to above (1) background legal work was ongoing, (2) Mr Padden suffered a period of ill-health, (3) proofs were progressed, and (4) it is the lawyers involved, not Mr Padden, who is to blame for any delay arising. Mr Gill also points to the fact that no specific prejudice is claimed by the defendants to arise by virtue of the delay presenting. All that is claimed is some general prejudice arising by reference to the elapse of time, notwithstanding that there has been no loss of witnesses or documents; the most that is claimed is a potential fading of memory in the context of events so extraordinary as to be extraordinarily memorable…if they occurred. The court does not share the perturbation which appears to afflict the defendants that Mr Padden has not sworn an affidavit in lieu, or complementing that, of Mr Gill.

III. The Primor Principles Applied

i. Overview.

8. The parties are agreed that the within application falls to be decided by reference to the *Primor* principles, *i.e.* the principles approved by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Those principles require the court to determine whether the delay that arises:

> (i) is inordinate,
>
> (ii) if inordinate, is inexcusable, and
>
> (iii) even if inordinate and inexcusable, presents a real risk of an unfair trial for the defendants, or whether justice is best served by allowing the case to proceed now to trial.

9. In the course of argument, reference was made by counsel for the defendants to the informative decisions of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74 and *Gorman v. Minister for Justice* [2015] IECA 41. The court has had regard to those cases, and to the notably chill wind that appears to be blowing from the Court of Appeal at this time in terms of the degree of tolerance to be shown when it comes to delay in the conduct of proceedings. Ultimately, however, the court's decision falls to be made by reference to the particular facts presenting in the within case and to the legal principles approved by the Supreme Court in *Primor*, albeit that the application of those principles falls to be construed in the context of all other case-law that binds the court.

ii. Is the Delay Arising Inordinate?

10. The defendants maintain that inordinate delay arises in this case. Although the critical delay focused upon in the within

proceedings is the circa. 1,100-day delay referred to above, the defendants point also to the fact that the events complained of occurred between 1999 and 2004 and that it was not until 2009 that the proceedings were commenced. At least two factors of relevance might usefully be mentioned in this regard:

> - first, the various events complained of by Mr Padden, if proven, are so outrageous in nature that the court does not accept that they will present any issue as regards recollection. All of us, put to the point, would generally have some difficulty recalling in detail what we did as recently as last week. But anyone present, for example, at Belmullet Garda Station on 15th August, 1999, and who witnessed and/or participated in the extraordinary wrongs that Mr Padden alleges to have been done to him by members of An Garda Síochána at that station on that date, seems extremely unlikely to have forgotten the detail of what was witnessed and/or done, if indeed anything untoward occurred, not least in light of the various court appearances, *etc.* that ensued and created a series of events over time and lasting some years;
>
> - second, Mr Padden's claims include, *inter alia*, a claim of malicious prosecution, which, in respect of any one claim of malicious prosecution, could not be brought, until the prosecution to which that claim relates was unsuccessful (see McMahon and Binchy, *Law of Torts*, 4th ed., para. 36.05).

11. Having regard to the foregoing factors, the court has some doubt as to whether (a) the time that has elapsed since the alleged events at the centre of these proceedings are said to have occurred, or (b) the 1,100-day delay that is a centre of focus in this case, can properly be described as inordinate in all the circumstances presenting.

iii. Is the Delay Arising Inexcusable?

a. General.

12. The defendants contend that the delay in the within proceedings is inexcusable in that Mr Padden has furnished no reasonable explanation for his delay in bringing and progressing the within proceedings.

13. Insofar as the above-quoted elements of Mr Gill's replying affidavit are concerned, the defendants maintain that (a) the affidavit is insufficiently detailed in this regard, and (b) Mr Padden cannot escape the consequences of such delay as presents by relying on his lawyers' conduct.

14. With regard to (a), the professionals who have carriage of Mr Padden's case have been satisfied to lay the blame for any such delay as presents at their own door. This could, theoretically, open them to a future claim of negligence; whether or not such a claim would be successful is another matter, but they would hardly be likely to expose themselves to the risk of such litigation unless they genuinely believed what Mr Gill has asserted; and lawyers, of course, have an ethical obligation not to mislead the court. So the court unequivocally takes Mr Gill at his word. Whether that avails Mr Padden is a matter that the court considers in greater detail below. It would but note here the additional factor that insofar as Mr Padden's having to press his lawyers to press his case, it is worthy of remark in this regard that he appears to have suffered from a period of ill-health in and about 2013 when it would be natural to focus on one's person and not on the ongoing progress of court proceedings.

b. Blaming the Lawyers.

A. Overview

15. The defendants maintain that Mr Padden cannot escape the consequences of delay by relying on his lawyers' conduct. They pray in aid a trio of cases in this regard. First, *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, in which Hardiman J. observes that "*The assumption that even grave delay will not lead to the dismissal of the action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one"*. Second, *Rogers v. Michelin plc* [2005] IEHC 294, in which Clarke J. observes that "[T]*he Court is entitled to have regard to the fact that responsibility for the delay has been accepted by the plaintiff's solicitor…"*. Third, *McBrearty v. North Western Health Board* [2007] IEHC 431, in which MacMenamin J. observes that as a result of the inordinate delay in the case before him, there was a particular duty on the plaintiff's solicitor to ensure that the proceedings before him moved "*with very great expedition*". It is helpful to consider each of these cases in some detail.

B. Gilroy

16. The extract from the judgment of Hardiman J. in *Gilroy* is not especially damning when read in isolation. It is even less so, when one has regard to the entirety of the facts in *Gilroy* and the resultant decision. In *Gilroy*, the eponymous plaintiff had been injured in September 1997, commenced proceedings in 2000, and by the time of the Supreme Court's decision in December 2004, had not yet delivered a statement of claim. Notwithstanding that Hardiman J., for the Supreme Court, found, at para.8 of his judgment, that Mr Gilroy had been "*dilatory in a high degree*" and that "*it was not contested that he* [Mr Gilroy] *had been guilty of inordinate delay and it was not seriously contested that the delay was inexcusable",* the Supreme Court allowed the appeal against the High Court's dismissal of the proceedings and gave Mr Gilroy one week from the date of its judgment to file a statement of claim. Admittedly this was done in the context of what was apparently to be an assessment-only case, but the degree of delay which the Supreme Court was prepared to countenance is nonetheless striking, especially when one has regard to the much smaller, and explained, period of post-commencement delay arising in the within proceedings.

17. In his judgment, Hardiman J. noted, *inter alia*, at para. 12, that the courts had "*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 action accrued*". He referred also to the fact that under the European Convention on Human Rights, the courts, independent of the action or inaction of the parties to proceedings, "*have an obligation to ensure that rights and liabilities…are determined within a reasonable time.*" He then continued, at para. 13:

> "[C]*omfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above [Rainsford and Primor] will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope….In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."*

18. A number of points arise from this last-quoted text. First, Mr Padden has neither counted upon, nor sought "*endless indulgence*".

Second, he has sought some indulgence; however Hardiman J., in his reference to the unavailability of "*endless indulgence*", clearly allows for the prospect of some indulgence, just not indulgence of the endless variety. Third, Mr Padden has not come to the court seeking easy escape from the consequences of delay; rather he contends that a proper application of the *Primor* principles does not yield the result that the within proceedings should be dismissed. Fourth, at its height, and in what appears to be an obiter observation (though one of no little weight given its provenance) Hardiman J. suggests that the assumption that grave delay will not lead to dismissal where the delay is attributable to a professional adviser "*may prove…unreliable*"; this is a form of wording which allows for the possibility that in some instances such an assumption 'may not' prove unreliable. Moreover, Hardiman J. does not say that delay on the part of professionals must be laid at a client's door.

C. Rogers

19. In *Rogers*, the plaintiff contended that he was entitled to an early pension. Proceedings commenced in March 1997, a statement of claim issued in the same month, a notice for particulars was raised and replied to by July 1997, and a defence was filed in October 1997. The proceedings then went into apparent hibernation until they were reactivated more than six years later. No comparable delay arises in the within proceedings. Even so, *Rogers* is of interest because of certain observations made by Clarke J. when explaining his rationale for dismissing the proceedings in part, *viz*:

> *"In relation to the delay of in excess of six years during which nothing of any substance occurred in the case it should be noted that the plaintiff's solicitor has, with commendable forthrightness, accepted the blame for that state of affairs. In evidence he indicated that due to pressure of work he did not take any steps in relation to the case until such time as a new solicitor was recruited to deal specifically with this case and other files in the relevant practice. That new solicitor commenced practice in January 2004….*
>
> *A delay of over six years during which time no step was taken towards progressing the plaintiff's claim must be regarded as inordinate. Similarly there was no good external reason for the delay (such as the need to obtain additional advices, evidence or the like). In those circumstances it is not possible to excuse a delay of the length which occurred. While the Court is entitled to have regard to the fact that responsibility for the delay has been accepted by the plaintiff's solicitor it remains the case that there is no evidence that there is no evidence that the plaintiff took any direct steps to seek to move matters along."*

20. A number of points arise from the foregoing. First, in *Rogers* there was, following the commencement of proceedings, a six year-plus period in which nothing happened. In the within case, there has been, following the commencement of proceedings, a circa. 1,100-day period during which (1) background legal work was ongoing, (2) Mr Padden suffered a period of ill-health, and (3) proofs were progressed. Second, Clarke J. expressly acknowledges that the court is "*entitled to have regard to the fact that responsibility for the delay has been accepted by* [a lawyer involved]". That is an observation which rebounds to Mr Padden's favour in the within proceedings; after all, Mr Gill, his solicitor has expressly averred that he (Mr Gill) and counsel "*are responsible for any delays*", some of which occurred while Mr Padden endured a period of ill-health. Mr Gill, a professional gentleman, is well placed to identify where blame should rest as regards any delay arising and, his attributing blame as he does, averring against his own interest and that of counsel, makes his averment in this regard all the more credible. Third, as with the judgment of Hardiman J. in *Gilroy*, to which Clarke J. refers in *Rogers*, Clarke J. does not say that delay on the part of professionals must be laid at a client's door.

D. McBrearty

21. In *McBrearty*, the plaintiff was born in early-1981 and appears to have suffered from severe disabilities. In early-1999, Ms McBrearty's GP advised Ms McBrearty and her husband that they should investigate what had happened when their son was born. This seems, from the case-report, to have been the first time that Ms McBrearty and her husband suspected something untoward might have occurred back in 1981. In July 2000, they approached a firm of solicitors, moving on, in November 2001, to a firm of solicitors with greater experience of medical negligence cases. In the same month, proceedings for negligence and breach of duty were commenced. But it was not until July 2006 that notice of the plenary summons was served on a Dr Singh, one of the co-defendants, a motion for judgment in default of defence issuing against him the following January. Thereafter, a number of the defendants sought dismissal of the proceedings on grounds, *inter alia,* of inordinate and inexcusable delay in the prosecution of same. It was in this context that MacMenamin J. observed as follows, at para. 32 of his judgment:

> *"It is an inescapable fact that by reason of the inordinate delay which occurred in this case, there devolved upon the plaintiff's solicitor a particular and specific duty to ensure that the proceedings moved with very great expedition. This must be seen in the context of the ability of a defendant to defend a claim after the elapse of time of what is now 26 years. Such considerations may necessitate the application of standards which would not otherwise be applicable, and the imposition of time scales to an order of rigour which would not otherwise be expected."*

22. This observation is not concerned with the issue of reliance by a plaintiff on a professional adviser's delay to excuse her or his own delay, but rather with the duty of particular expedition that can arise for a legal advisor in circumstances where, as in *McBrearty*, there has been very great delay. Moreover, insofar as there has been delay in the within proceedings (and there has been nothing like the delay in *McBrearty*) the legal advisors accept that they are liable for such delay. What is disputed is whether it is inordinate or inexcusable or has prejudiced the defendants (if at all) to such an extent that there cannot be a fair trial of the matters arising. This is an aspect of matters to which the court returns later below in its consideration as to where the balance of justice lies.

c. Some Conclusions.

23. Mr Gill avers in his affidavit evidence that during the circa. 1,100-day period of delay referred to above (1) background legal work was ongoing, (2) Mr Padden suffered a period of ill-health, (3) proofs were progressed, and (4) to the extent that there is delay, it is the lawyers involved, not Mr Padden, who is to blame. Having regard to these factors it does not appear to the court that the delay arising is inexcusable. The court notes that neither *Gilroy* nor *Rogers* (*McBrearty* is not, in truth, a case on point) requires that delay (here admitted delay) on the part of professionals must be laid at a client's door. And no reason has been identified as to any failing on the part of Mr Padden as regards his seeking to have these proceedings progressed. Indeed it is clear from the affidavit evidence of Mr Padden's solicitor that, at the least, his solicitor considers that it is him (the solicitor) and Mr Padden's counsel who are responsible for any delay arising, an averment which is laudable and all the more credible because it runs the risk of being used against Mr Padden's present legal team at some future time.

24. For the reasons stated above, the court does not consider the delay complained of in these proceedings to be inexcusable in all the circumstances presenting.

iv. The Balance of Justice.

a. Overview.

25. As the court has concluded that the delay complained of in this case is, in all the circumstances presenting, possibly not inordinate and certainly not inexcusable, it is not required, before refusing the within application by reference to the *Primor* principles, to consider whether there is a real risk of an unfair trial for the defendants, or whether justice is best served by allowing the case to proceed. But for the sake of completeness, it proceeds below to consider matters by reference to this final limb of the *Primor* principles.

b. The Defendants' Submissions.

26. When dealing with where the balance of justice lies, the defendants indicate as follows in the written submissions put before the court (and the oral argument closely followed these written submissions):

> "*While* [1] *the defendants have not, thus far been deprived of essential witnesses*, [2] *the availability of some contemporaneous statements and documents can only go so far towards assisting their authors in refreshing their memories* [3] *after such a significant passage of time. In this case,* [4] *given the multiplicity of individual incidents, there is a very real prospect that in the course of these proceedings, evidence may be led or allegations made regarding issues or details not addressed in those statements.* [5] *In those circumstances, the defendants may be deprived of the opportunity to respond to or challenge such allegations, due to the impaired recollection of key witnesses.* [6] *Had the proceedings been progressed with reasonable expedition, the defendants would not be so prejudiced in their ability to defend themselves….*
>
> *As part of the consideration regarding where the balance of justice lies,* [7] *it is acknowledged that dismissing a claim such as the present one is a significant step. However,* [8] *it is well established that the plaintiff's right to litigate is not an unqualified right, and that it must be considered against the backdrop of other competing rights in this case – namely the right of the defendants to protect their good name per Article 40.3.2º and the court's own obligation to administer justice in a fair and timely manner per Article 34.1."*

27. The defendants invoke the decision of the Court of Appeal in *Collins v. Minister for Justice* [2015] IECA 27 in advancing the above arguments. Before proceeding to consider that decision, it is helpful to analyse the above-quoted text in some detail.

28. "[1] [T]*he defendants have not, thus far been deprived of essential witnesses*".

Court's Response: it has to be an important consideration in the court's deliberations as to where the balance of justice lies that not a single essential witness has become unavailable at this time.

29. "[2] [T]*he availability of some contemporaneous statements and documents can only go so far towards assisting their authors in refreshing their memories…".*

Court's Response: this is true of every contemporaneous statement and document in every case.

30. "…[3] *after such a significant passage of time".*

Court's Response: two points arise that have already been touched upon elsewhere above: (1) the various events complained of by Mr Padden in his detailed statement of claim, if proven, are so outrageous in nature that the court does not accept that they will present any issue as regards recollection; (2) Mr Padden's claims include, for example, a claim of malicious prosecution, which, in respect of any one prosecution, could not be brought, until the prosecution to which that claim relates was unsuccessful.

31. "[4] [G]*iven the multiplicity of individual incidents, there is a very real prospect that in the course of these proceedings, evidence may be led or allegations made regarding issues or details not addressed in those statements."*

32. Court's Response: this, in truth, is but a reformulation of the points already made in [2] and [3].

33. "[5] *In those circumstances, the defendants may be deprived of the opportunity to respond to or challenge such allegations, due to the impaired recollection of key witnesses."*

34. Court's Response: there is no evidence before the court that any of the key witnesses suffer from any infirmity of recollection, and a mere assertion that this is so does not suffice to make it so, or even likely so. As to whether the elapse of time may have engendered such infirmity of recollection, this point has been made at [3] and considered by the court.

35. "[6] *Had the proceedings been progressed with reasonable expedition, the defendants would not be so prejudiced in their ability to defend themselves….".*

36. Court's Response: it is worth recalling that that no specific prejudice is claimed by the State to arise by virtue of the circa. 1,100-day period of delay referred to above; all that is claimed is some general prejudice arising by reference to the elapse of time, notwithstanding that there has been no loss of witnesses or documents, and the best that can be claimed is a potential fading of memory in the context of events that are so extraordinary in their nature as to be extraordinarily memorable, if they occurred.

37. "[7] [I]*t is acknowledged that dismissing a claim such as the present one is a significant step."*

38. Court's Response: This, with respect, is something of an under-statement. To dismiss a claim such as that now made is *very* significant given that the allegations made concern extraordinary unlawful behaviour – which it must again be emphasised is but alleged at this time – on the part of members of An Garda Síochána, *i.e.* persons who are duty-bound, in their official capacity, to uphold the law.

39. "[8] [I]*t is well established that the plaintiff's right to litigate is not an unqualified right, and that it must be considered against the backdrop of other competing rights in this case – namely the right of the defendants to protect their good name per Article*

40.3.2º and the court's own obligation to administer justice in a fair and timely manner per Article 34.1."

40. Court's Response: In essence, all that is asserted in this regard is that the court must balance various constitutional rights in arriving at its judgment. But that, in truth, is but to re-state the third limb of the *Primor* principles by reference solely to such constitutional law considerations as present.

c. The Decision in Collins.

41. At first glance, there is an apparent similarity between the facts in *Collins* and those in the within proceedings. On closer examination, this similarity is more apparent than real. In Collins, the plaintiff commenced proceedings in 2003, complaining of Garda misconduct between 1998 and 2001. A purported statement of claim was delivered in 2007 but no valid statement of claim was delivered until January, 2010, and this after the plaintiff, in October 2009, was given something of a 'last chance' by Quirke J. to advance her claim expeditiously. Unfortunately, even after this 'last chance' further difficulties ensued: the Notice of Trial was struck out in October, 2011 after the plaintiff's representatives failed to attend a hearing to fix dates. In May, 2012, a motion to dismiss was issued, and was refused by the High Court in July, 2012. In February, 2015, the Court of Appeal reversed the decision of the High Court.

42. In the course of its judgment, the Court of Appeal had no little regard to the fact that (i) the plaintiff in *Collins* had failed to advance her claim despite the 'last chance' offered by Quirke J., and (ii) a key witness on the defence side had passed away. In the within proceedings, (a) there has been no such 'last chance' given, (b) there has been no loss of witnesses or documents, and (c) there is no specific prejudice claimed by the State to arise by virtue of the circa. 1,100-day period of delay referred to above. All that is claimed is some general prejudice arising by reference to the elapse of time (notwithstanding that there has been no loss of witnesses or documents), being a potential fading of memory in the context of events so extraordinary as to be extraordinarily memorable, if they occurred. And all of this in the context of a claim which, at least insofar as the malicious prosecution dimension is concerned, could not be brought, in respect of any one prosecution, until the prosecution to which that claim relates was unsuccessful.

43. It is perhaps useful to consider the closing observations of Irvine J., for the Court of Appeal, in *Collins*, at para. 106, *et seq*:

> *"Balance of Justice*
>
> *106. Having concluded that the plaintiff's delay was both inordinate and inexcusable it now falls to the court to consider whether the balance of justice favoured the striking out the claim.*
>
> *107.* [1] *The first matter to be addressed by a court when considering where the balance of justice lies is the extent to which the defendants would likely be prejudiced if the proceedings are allowed to continue. Of significant relevance to that issue must be the nature of the claim being advanced by the plaintiff in the proceedings. In this regard the court is satisfied that the plaintiff's claim is a very serious one in so far as it makes substantial allegations of wrongdoing against those who are charged with upholding the rights of citizens in this state. In particular, the court considers her claim surrounding the events that she maintains occurred in November 2000 to be extremely serious. A claim by a woman to the effect that she was subjected to an unwarranted, unlawful and negligent internal medical examination is one which the court should be cautious to dismiss because public confidence in An Garda Síochána would best be met by a full hearing and determination of such a claim. Such a hearing not only potentially benefits a plaintiff who has been wronged but also affords a defendant against whom very serious allegations are made the opportunity of clearing their good their name and restoring their reputation….*
>
> *109.* [2] *Insofar as the plaintiff complains that the internal examination was carried out negligently, clearly the absence of Dr Maloney, who carried out that examination, would leave the defendants, who are alleged to be vicariously liable for his actions, tremendously exposed. In this respect the fact that Dr Lawless is available to give evidence at the hearing does nothing to mitigate that prejudice. He was not present when the examination was carried out and did not arrive until several hours after it had taken place….*
>
> *111.* [3] *The Court must also have regard to the conduct of the defendants in deciding whether or not justice would favour the dismissal of the proceedings. In this case at no stage did not defendants acquiesce in what the court has concluded was inordinate and inexcusable delay….*
>
> *112. In the foregoing circumstances it can hardly be said that the defendants by their conduct added in any material way to the delay in the prosecution of this action.*
>
> *113.* [4a] *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, 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..* [4b] *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 where a court is satisfied that a fair trial and a just outcome can no longer be assured."*

44. With regard to [1], the within application also concerns matters of, to borrow from the judgment of Irvine J., a "*very serious* [nature]*…in so far as it makes substantial allegations of wrongdoing against those who are charged with upholding the rights of citizens in this state."* With regard to [2], unlike *Collins*, there has been no loss of witnesses (or indeed documents) in the case now presenting. With regard to [3], it has been suggested in the within proceedings that there has been acquiescence by the defendants to any such delay as arises and that there has been some delay by the defendants also. The court does not see any act, whether positive or of forbearance, on the part of the defendants, that would justify a finding of acquiescence in any delay that has arisen. With regard to [4a], this is, in effect, a re-statement of a point already addressed by the court above, *viz*. that the court must, *inter alia*, balance various constitutional rights in arriving at its judgment in the within application. With regard to [4b], the court notes again that there is no specific prejudice claimed by the defendants to arise by virtue of the circa. 1,100-day period of delay; all that is claimed is some general prejudice arising by reference to the elapse of time (notwithstanding that there has been no loss of witnesses or documents), being a potential fading of memory in the context of events so extraordinary in nature as to be

extraordinarily memorable, if they occurred, and all of this in the context of a claim which, at least insofar as the malicious prosecution dimension is concerned, could not be brought, in respect of any one prosecution, until the prosecution to which that claim relates was unsuccessful.

d. Conclusion.

45. Having regard to the comments made by the court regarding items [1], [2], [4a] and [4b] immediately above, as well as such other considerations as have been addressed by the court in this Part of its judgment, the court considers that even if the court had found such delay as arises in the within proceedings to be inordinate and inexcusable (and the court, for the reasons stated, has found such delay to be possibly not inordinate and certainly not inexcusable), the court considers that, in all the circumstances presenting, (a) there is no real risk of an unfair trial for the defendants, and (b) justice is best served by allowing the case to proceed.

46. For the sake of completeness, the court notes also that to allow this case now to proceed will not, to borrow from the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151, "[put] *justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial*". At best the defendants have presented an unconvincing claim of some general prejudice, in a case where there has been no loss of witnesses or documents, it being contended that such general prejudice may or will arise by virtue of a potential fading of memory in the context of events so extraordinary in nature as to be extraordinarily memorable, if they occurred. And all of this in the context of a claim which, at least insofar as the malicious prosecution dimension is concerned, could not be brought, in respect of any one prosecution, until the prosecution to which that claim relates was unsuccessful.

IV. Decision

47. For the reasons stated above, all reliefs sought by the defendants at this time are respectfully refused at this time. However, it is clearly necessary that these proceedings should now continue with every expedition. So the court's present refusal of the reliefs now sought shall be made on terms designed to ensure that there is no further delay of any kind on Mr Padden's part. Mindful of the approach adopted by Hogan J. in *Casserly v. O'Connell* [2013] IEHC 391, the court will adjourn the defendants' motion, in the first place for a period of one week, so as to allow Mr Padden's counsel to prepare a proposed, expedited sequence and chronology of steps to be taken by and for his client hereafter. The court will then hear the parties briefly on what is proposed and make such order as seems appropriate in this regard. To borrow from the judgment of Hogan J. in *Casserly*, at para. 21, in "*sporting terms*" Mr Padden should consider himself as being "*shown the equivalent of a yellow card. But that colour might easily turn red if there were to be any further delay*".