

**THE HIGH COURT****2002 5994 P****BETWEEN****KIERAN JACKSON****PLAINTIFF****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL****DEFENDANTS****AND****KEVIN LENNON****THIRD PARTY****JUDGMENT of Ms. Justice Dunne delivered the 20th day of May 2010**

The defendants herein brought a motion dated the 2nd April, 2009 and returnable for the 25th May, 2009, seeking to dismiss the plaintiff's claim herein for want of prosecution. The motion came on for hearing before me on the 12th March, 2010.

**Background**

The plaintiff was a member of the Garda Síochána and it is alleged that whilst a serving member of An Garda Síochána he was subjected to constant harassment, bullying and intimidation by a superior officer at Letterkenny and Ramelton Garda stations between February 1993 and December 2000. The allegations are summarised in the affidavit of Aoife Burke, sworn herein on the 31st March, 2009, on behalf of the defendants as follows:-

1. The plaintiff alleges that Supt. Kevin Lennon, a member of An Garda Síochána stationed in Donegal, had an affair with the plaintiff's now estranged wife and that he "intermeddled" in his domestic affairs. In particular it is alleged that the plaintiff's wife and Kevin Lennon (who has been dismissed from An Garda Síochána) orchestrated a false allegation of assault by the plaintiff on his wife in and around February 1993. The plaintiff's wife made a statement alleging assault, although this was subsequently withdrawn. The plaintiff alleges that Supt. Lennon was anxious to ensure a prosecution would take place and he harassed the plaintiff in this regard.
2. It is further alleged that a number of years later, in 1999, Supt. Lennon (as he then was) was in attendance at a court maintenance hearing and that he informed the plaintiff that he still had his wife's statement and that this put the plaintiff under severe stress and, it is alleged, it resulted in him entering into a judicial separation agreement, the terms of which were "highly disadvantageous to the plaintiff".
3. The plaintiff also alleges he was further victimised by Supt. Kevin Lennon and was sent home during policing of an Orange march in August 1996. He further alleges that Supt. Lennon wrote derogatory remarks on his file and instigated disciplinary proceedings arising out of the escape of a prisoner from Letterkenny Garda station in 1997.
4. The third allegation relates to the plaintiff's transfer to Ramelton Garda station. This occurred allegedly after he had a meeting with Chief Supt. Denis Fitzpatrick (as he then was) in September 1998, when he allegedly informed him that he had been "bullied" and wanted a transfer to Ramelton Garda station, which request was agreed to. The plaintiff, however, alleges that subsequently Supt. Lennon was also transferred to that station and the bullying continued.

It appears that the plaintiff was subsequently certified unfit for work between the end of June 2000 and the end of December 2000. He returned to work from the 25th December, 2000, to the 25th January, 2001, when he reported sick and unfit for duty and subsequently he did not return back to duty and he was medically discharged from An Garda Síochána on the 14th August, 2004.

At this point it would be of assistance to set out a chronology of events in relation to these proceedings:-

1. A plenary summons issued on the 25th April, 2002.
2. An entry of appearance was filed on behalf of the defendants on the 9th September, 2002.
3. The plaintiff's statement of claim was delivered on the 29th April, 2002.
4. The defence was delivered by the defendants on the 7th July, 2003.
5. A notice of motion seeking to join Supt. Kevin Lennon as third party to the proceedings issued on behalf of the defendants on the 20th August, 2003.
6. An order granting liberty to the defendants to issue and serve a third party notice on Supt. Kevin Lennon was made on the 17th November, 2003.
7. A third party notice issued on behalf of the defendants on the 21st November, 2003.
8. A notice of change of solicitor was served by the plaintiff's current solicitor on the 26th April, 2007.
9. A notice of intention to proceed was served by the plaintiff's solicitor on the 3rd December, 2008.

10. This notice of motion was issued on the 2nd April, 2009, returnable for the 25th May, 2009.

A replying affidavit was sworn by Greg O'Neill, solicitor, on behalf of the plaintiff herein. In the affidavit sworn by Mr. O'Neill, he makes a number of points in relation to the application herein. The first point he makes is that the plaintiff's claim in these proceedings is inextricably connected to the matters that occurred in the Donegal Division of An Garda Síochána which resulted in a Tribunal of Inquiry being set up by the Oireachtas, commonly known as the Morris Tribunal. That Tribunal was set up in March 2002, hearings began in 2003 and evidence was given until December 2007. The final reports of the Tribunal were published in 2008. He goes on to state in his affidavit at para. 5:-

"Supt. Kevin Lennon was a person who became central to great part of the Morris Tribunal's investigation. He was dismissed from An Garda Síochána arising from his disreputable behaviour. Mr. Lennon is central to the claims made by the plaintiff as against the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General. It should be further noted, as set out in the affidavit of Ms. Burke, that it was the defendants who sought and were successful in having an order of this court made joining Supt. Lennon to these proceedings as a third party."

Mr. O'Neill then provided a narrative to explain the delay that has occurred in prosecuting this claim. The plaintiff first instructed Brophy Solicitors, in which Mr. O'Neill was working as an assistant solicitor in 2002. A plenary summons was issued together with a statement of claim. The third party notice in respect of Supt. Lennon was received in November, 2003. Advices were sought from counsel in relation to a number of matters. The plaintiff was also dealing with the Garda authorities in relation to his difficulties in continuing his employment, as was his solicitor. This referred to the period between 2002 and 2004 and Mr. O'Neill deposes that during 2003 and 2004 he engaged in much correspondence with the Garda authorities in relation to this issue.

The plaintiff retired from An Garda Síochána on health grounds. Following his retirement further difficulties arose with the Garda authorities in relation to the payment of the plaintiff's pension and gratuity. This matter appears to have been resolved by December 2004. Issues arose as to the basis upon which the retirement of the plaintiff took place and the fact that the plaintiff's acceptance of pension entitlements and gratuity would not be treated as acceptance by the plaintiff of the lawfulness of the decision taken by the Garda Commissioner or any acceptance as to the propriety or correctness of the determination or adjudication upon which the retirement order was based.

Mr. O'Neill left the firm of Brophy Solicitors around the end of December 2004, and commenced his own practice around that time. The plaintiff contacted him in February 2005, and requested him to continue working on the plaintiff's behalf. Mr. O'Neill had no dealings with the case for most of 2005.

In the meantime, it appears that the plaintiff's estranged wife had taken libel proceedings against a newspaper arising from a story it published relating to Supt. Lennon and the plaintiff's wife. The plaintiff was a prospective witness in those proceedings and he made contact in August 2005, with Mr. O'Neill for the purpose of obtaining advice in relation to that matter. He also indicated at that stage that he wished Mr. O'Neill to continue to act in relation to these proceedings. Mr. O'Neill agreed to do so in October 2005. He took steps to instruct junior counsel in relation to the matter and he also made contact with a solicitor acting for the plaintiff in relation to matrimonial proceedings which had been initiated in Northern Ireland.

In November 2006, it was indicated that the libel action involving the plaintiff's wife and in which the plaintiff was a potential witness would be coming up for hearing in early course. The libel proceedings were settled between the newspaper and the plaintiff's wife. Somewhat oddly, it is then deposed that in April 2007, Mr. O'Neill was again advised that the libel action would be coming up for hearing. I am not sure how this could be so given the averment that the proceedings had been settled. In the meantime, Mr. O'Neill was keeping an eye on events taking place at the Morris Tribunal and was attempting to obtain the papers from Brophy Solicitors in relation to these proceedings. Having received all of the files a notice of change of solicitor was served. There had been some discussions between Mr. O'Neill and junior counsel in the course of this period. It was necessary to engage a new counsel at some stage during this period as the previous counsel instructed left the Bar and became a solicitor.

The plaintiff was also seeking treatment in relation to his health, physical and mental throughout the whole of this period. It is stated that his injuries are ongoing. The plaintiff attends a GP and a Counsellor and has been seen by a Clinical Psychologist. Reports were obtained from the clinical psychologist in early 2008. In 2007, arrangements were made for the plaintiff to see a Rehabilitation Consultant. A report has been obtained from Ms. Brenda Keenan, the Rehabilitation Consultant. Mr. O'Neill commented in the course of the affidavit as follows:-

"I am conscious that a number of years have passed since proceedings issued but as set out above, parallel matters had to followed, in particular the Morris Tribunal evidence and reports, and other matters had to be attended to . . . .

I further say that the defendant's motion is ill conceived. I say that it was proper to await the findings of the Morris Tribunal, in particular in relation to Supt. Kevin Lennon who the defendants have joined as a notice party, as Supt. Kevin Lennon is a central figure in relation to the claims the plaintiff makes within the statement of claim."

Mr. O'Neill goes on to point out that a number of reports of the Morris Inquiry were published around October, 2008. It is also stated that in relation to the actions of Supt. Lennon very serious and adverse findings were made against him. Mr. O'Neill then outlined a number of matters in relation to the findings of the Morris Report in relation to the planting of ammunition and hoax explosives and in relation to the death of Mr. Richie Barron. Finally it was stated that the case brought on behalf of the plaintiff herein is difficult and complex. Mr. O'Neill had little option but to await the outcome of the final Morris Report. He added that the plaintiff's injuries are complex in that they involve depression and severe distress and that his progress is at all times being monitored for the purpose of the action. He added that he, Mr. O'Neill, has constantly maintained the file as an active file and has been consciously involved in the preparation of the case for trial. He notes that Ms. Burke in her affidavit stated that there is an inordinate and inexcusable delay because the events go back to the period 1993 to 1999, but he notes that no specific prejudice is referred to in her affidavit.

Ms. Burke in a replying affidavit made a number of points. The first of those is that the events giving rise to these proceedings go back to the period 1993 to 2000 and she reiterates her view that while Mr. O'Neill has given an explanation for the delay that nonetheless, there is inordinate and inexcusable delay in the prosecution of the proceedings. She points out that the initial delay mandated and required that the proceedings be prosecuted with all due dispatch.

She disagrees with the contention that it was necessary for the plaintiff to await the findings of the Morris Tribunal and she goes further and states that its deliberations have absolutely nothing to do with the plaintiff's alleged employment difficulties with his superiors. She points out that that Tribunal did not investigate or touch upon any of the claims alleged in these proceedings and therefore she states that the Morris Tribunal has nothing to do with these proceedings.

She refers to the difficulties that the plaintiff apparently had in relation to his retirement and gratuity/pension, the fact that Mr. O'Neill left Brophy Solicitors and subsequently took up the plaintiff's file and finally she refers to the libel action mentioned by Mr. O'Neill and she states that none of these matters provide an explanation for the delay in prosecuting this claim.

She then goes on to outline a number of matters relating to prejudice. She states that first of all the fact that there has been an inordinate and inexcusable delay in the prosecution of the case is in itself sufficient to have the case dismissed. She points out that a number of key witnesses in the case have been either dismissed or have retired from the Garda Síochána. In fact, it appears from the affidavit that of the members of the Garda Síochána who have left the Garda Síochána, only one appears to have been dismissed, Supt. Kevin Lennon; the others, being Supt. John Fitzgerald, Chief Supt. Denis Fitzpatrick, Supt. John McGinley and Det. Insp. Michael Keane, have all retired. She states that the defendants relationship with these individuals has changed over the period of time since the proceedings were instituted and that the defendants can no longer be assured that those witnesses would be willing to co-operate in the defence of these proceedings. Therefore, she states that the defendants have been prejudiced by reason of the dismissal and/or retirement of those witnesses.

I would just comment at this point, that in relation to the claim of prejudice in respect of the possible change in relationship by reason of the dismissal of Supt. Lennon, given that Supt. Lennon has been joined as a third party to these proceedings by the defendant, it is most unlikely that he would be appearing as a witness for the defendant in these proceedings, but in any event it is as likely as not that he will be participating in the proceedings given that he has been joined as a third party.

### **Submissions and the applicable Law**

I now want to consider the applicable law in respect of the issue that arises in this case in the light of the submissions made to me. I was furnished with helpful written submissions by counsel on behalf of the defendants. In the written submissions, reference was made to a number of authorities of which the leading authority is *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459. The principles enunciated in the judgment in that case by Hamilton C.J. are so well known that it is not necessary to refer to them in detail here. Those principles were further distilled in the judgment of the Supreme Court in the case of *Stephens v. Paul Flynn Ltd.* [2008] 4 I.R. 31 in which Kearns J. set out a passage from the judgment of Clarke J. in the High Court, where the appropriate test was identified in the following terms at p. 37:-

"He thus concluded that the court should approach the issue before it having regard to two central tests, namely:-

(a) Ascertain whether the delay in question is inordinate and inexcusable; and

(b) If it is so established the court must decide where the balance of justice lies."

There was no disagreement between the parties as to the appropriateness of that test. In other words the court has to engage in a two stage process in considering an application to dismiss proceedings for want of prosecution by reason of inordinate and inexcusable delay. The first question to be considered is whether or not the delay in any given case has been inordinate and inexcusable. If so found, the court then proceeds to consider the question as to where the balance of justice lies. Counsel on behalf of the defendants referred to the recent Supreme Court decision in the case of *Desmond v. M.G.N. Ltd.* [2009] 1 I.R. 737. I was referred to a passage from the judgement of Kearns J. (as he then was) who delivered a minority judgement but on this point there was no disagreement between his judgment and that of the other members of the court. He stated at p. 752 as follows:-

"This is not a case where there has been any delay in issuing proceedings. Rather the delay has occurred because the plaintiff elected to park the proceedings pending the determination of certain matters by the Moriarty Tribunal in a particular module of that tribunal's work. An approach whereby a litigant in a defamation action opts to await to see which way the ball hops in the course of a tribunal of inquiry is not proceeding with his litigation in the manner outlined in the citation from Keane C.J. In fact the approach adopted by the plaintiff is the complete antithesis of that to which Keane C.J. was referring and I see no distinction between a requirement to institute proceedings speedily and a requirement to prosecute them vigorously and expeditiously. To my mind the excuse offered is not a valid one for the delay which has occurred in this case, amounting to a period of approximately seven years from the inception of proceedings, a delay which must in turn be referenced to the fact that the matters about which complaint is made occurred as far back as the late 80s or early 90s. I also see that period of delay as quite unacceptable having regard to the requirements of the Convention elaborated above. This is not a consideration to which the trial judge appears to have adverted.

Secondly, the defendant was never informed of the plaintiff's decision to 'park' the case nor was it invited to acquiesce in it. The lengthy delay almost certainly gave them reasonable grounds to believe that this litigation had simply 'gone away' and would never be brought before any court."

It was pointed out on behalf of the defendants that the plaintiff herein never gave any indication to the defendants that he was awaiting the outcome of the Morris Tribunal. Further comment was made by Macken J. to similar effect in the course of her judgment in the same case at p. 759, as follows:-

"I would wholeheartedly endorse such an approach. If a plaintiff in defamation proceedings has decided, even, as here without any suggestion of *mala fides*, although the defendant suggests it was a wholly tactical decision, and even on the recommendation or advice of his legal advisors, not to progress his proceedings at least within the normal time limits prescribed, the delay thereby caused may not be excusable. It is certainly a telling factor against excusing delay, if a party retains to himself, as the plaintiff did here, the right unilaterally to take no further steps in the proceedings for an indeterminate period into the future without, as a very minimum, notifying the other party of his intention to do so."

Accordingly it was strongly submitted on behalf of the defendants that the decision to monitor the events taking place at the Morris Tribunal did not provide an excuse for the delay in these proceedings, particularly as no communication of any kind whatsoever was made with the solicitors for the defendants indicating that such an approach was being taken by the plaintiff. A similar approach is apparent in the judgment of Gilligan J. in the case of *Comcast International Holdings Inc. and Ors. v. The Minister for Public Enterprise and Others* (Unreported, High Court, 13th June, 2007) where he stated at p. 38:-

"In this case there has been inordinate and inexcusable delay and the delay, in my view, on the part of the plaintiffs goes beyond the minimum which may be considered inordinate. There have been deliberate tactics in commercial litigation on the part of the plaintiffs to delay the proceedings to benefit their cause of action by awaiting developments at the Tribunal of Inquiry into Payments to Politicians and Related Matters. While no actual prejudice has been referred to, I am satisfied that there is presumed prejudice at a moderate level. There is, I am satisfied, evidence of active inaction on the

part of the defendants in failing to react to the delivery of the *Comcast* statements of claim in June, 2005 and further evidence of inactivity in not having brought this motion at an earlier stage, but I do not regard the inaction on the part of the State defendant as being of any real significance in the particular circumstances of this case against the plaintiffs' declared tactics of not taking any steps in the litigation while the Tribunal was continuing. I take the overall view that the excuse as offered on the plaintiffs' behalf fails by a significant margin to excuse the delay.

What is, in my view, of particular significance is the failure on the part of the plaintiff after a late start to move on the proceedings expeditiously against a background where there is no onus on a defendant to force the plaintiff on with proceedings that have been instituted. The defendants have to be entitled to a trial within a reasonable period of time of the commencement of the proceedings . . . ."

Issue was also taken with the contents of the affidavit sworn by Mr. O'Neill herein. It was pointed out that although reference is made to the communications that took place with the Garda authorities in relation to the eventual retirement of the plaintiff and to the issues that arose in relation to the payment of his pension/gratuity there are no exhibits furnished in relation to correspondence that took place at that time and complaint was made that nothing was exhibited which would explain why this matter was relevant to the delay herein.

In relation to the ill health of the plaintiff, again it was pointed out that nothing has been exhibited on behalf of the plaintiff to demonstrate that he was in any way impeded by ill health from advancing these proceedings even though there is available to the plaintiff a report from a clinical psychologist as stated by Mr. O'Neill in his affidavit.

Further complaint was made that although one would expect some form of delay by reason of a change of solicitors the information set out in Mr. O'Neill's affidavit in regard to this aspect of the case was somewhat vague and again there were no exhibits to explain the nature of that part of the delay and how that impacted overall on the delay. Reference was made in that context to the decision in the case of *Gilroy v. Flynn* (Unreported, Supreme Court, Hardiman J., 3rd December, 2004) where the following comment was made:-

"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."

It was also submitted that the reference to the libel action and the matrimonial proceedings between the plaintiff and his estranged wife were irrelevant to these proceedings. Counsel observed that the plaintiff had cast his net wide in order to find events giving rise to delay, but it was submitted that those events relied on by the plaintiff did not prevent him from carrying on the proceedings. It was submitted that in truth there was no explanation for the delay.

The final authority opened to the court was the judgment of the Supreme Court in the case of *Anglo Irish Beef Processors Ltd. and Another v. Montgomery and Others* [2002] 3 I.R. 510. I was referred to two passages from the judgment of Fennelly J. in that case. At p. 518 he stated as follows:-

"It is no exaggeration, in these circumstances to say that the plaintiffs have not even made pretence of an attempt to explain, still less offered an excuse for their quite extraordinary delay in pursuing the claim. There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim. No comparable misfortune has been advanced in the present case. The claim is of a purely commercial character. On the plaintiffs' own version of it, it is perfectly straightforward. The plaintiffs are well-advised, well-known companies and are fully armed with all the means of pursuing its claim to judgment. Their stark failure to proffer even the vestige of an explanation for the delay is a circumstance which should not be overlooked. It looks like mute, not to say insolent, indifference, when a litigant, positioned as the plaintiffs are in this case, evince no consciousness of the need to explain their long and egregious periods of silence. The courts are entitled to expect something more from parties who crave its indulgence."

He continued at p. 519:-

"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 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."

Finally, counsel on behalf of the defendant said that a deliberate tactical decision not to proceed had been taken to await the outcome of the Morris Tribunal. The main reason for the delay was that the plaintiff had chosen not to progress his case. Nothing weighty or substantive had been put forward in this case to explain the delay. There was little to be said by way of the balance of justice on the part of the plaintiff.

Counsel on behalf of the plaintiff did take not issue with the arguments on behalf of the defendants in relation to the relevant legal principles. He accepted that it was a case in which there had been an inordinate delay, but contended that an excuse had been provided for the delay that has taken place. It was pointed out that the defendant was always aware of the nature of the claim in relation to systematic bullying which resulted in the plaintiff being declared unfit to continue his employment. Proceedings issued promptly after the plaintiff went on sick leave on a permanent basis. It was pointed out that the defendants could have served a notice of trial, having filed a full defence without raising any particulars. It was also pointed out that no effort had been made by the defendant to communicate with the plaintiff in relation to the proceedings. In making his submissions, counsel on behalf of the plaintiff referred to *Murray v. Devil's Glen Equestrian Centre* [2001] 4 I.R. 34, a decision of the Supreme Court, in which it was held that in a case where the delay on behalf of the plaintiff had been both inordinate and inexcusable, the seriousness of the case and any potential prejudice to the defendants were the factors to be taken into consideration by the court in its discretion in determining the issue of whether the balance of justice lay in favour of or against the proceeding of the case. It was also held that in the case of a relatively straightforward incident, where there was not much dispute about the facts, the fact that witnesses recollections of the alleged events might not be as clear as if there had been no delay in prosecuting the case was of much less significance than it would be in a case of a more complex nature.

In reply, counsel on behalf of the defendants reiterated that it was not enough for the plaintiff to say that the defendants should have brought an application at an earlier date or should have set the matter down for trial. Equally it was not sufficient for a plaintiff

to say that they are now ready to proceed and therefore should be entitled to proceed.

In considering the issue of the balance of justice it was emphasised that there has to be something weighty in the balance to allow the case to proceed and it was stated that there simply was no such matter in this case. It was noted that many of the cases referred to above were cases where a statement of claim had been delivered as is the position in these proceedings. It was pointed out that there are three parties to the litigation and that serious allegations are being made against someone who was not joined as a defendant to the proceedings. On that basis it was submitted that the court should dismiss the plaintiff's claim for want of prosecution.

### **Inordinate and Inexcusable Delay**

I have referred briefly in the outline of the submissions to the decision in the case of *Stephens v. Paul Flynn Ltd* and to the test identified in that case. The first question to be considered by the court is whether the delay in prosecuting these proceedings is inordinate. The answer to that question is in the affirmative as was conceded fairly by counsel on behalf of the plaintiff. The plenary summons issued on the 25th April, 2002 and ultimately following the order of the High Court on the 17th November, 2003, no further step appears to have been taken in the proceedings on behalf of the plaintiff, save for the service of a notice of change of solicitor on the 26th April, 2007, which was followed by the service of a notice of intention to proceed on the 3rd December, 2008. It appears from the papers herein, that the last time that the plaintiff or his representatives were actively engaged in the proceedings was in appearing before the High Court on the 17th November, 2003, when the order was made joining Supt. Kevin Lennon as a third party. I have no hesitation in coming to the conclusion that the delay is inordinate.

I now want to consider whether the delay is inexcusable or not. In considering this question, I think it important to bear in mind that the matters at issue in these proceedings go back to the year 1993 and cover a period up to approximately the year 2000. It has frequently been stated that in cases where the events at issue in the proceedings pre-date the commencement of proceedings by a considerable period of time, it is all the more important that the proceedings, once commenced, should be conducted expeditiously. In the case of *Stephens v. Paul Flynn Ltd*, the well known comment of Lord Diplock in *Birkett v. James* [1978] A.C. 297, was cited, where he stated as follows:-

"It follows a *fortiori* from what I have already said in relation to the effect of statutes of limitation upon the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied upon must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

That passage has been quoted with approval in a number of decisions in this jurisdiction. It is, of course, important to distinguish between pre-commencement delay and post-commencement delay. The application before the court in this case is an application in relation to post-commencement delay. That being said, the last part of the passage quoted above is of significance. Clearly, it behoves a plaintiff who brings proceedings long after the events complained of occurred, to ensure that there is no undue delay in the prosecution of the proceedings.

In this case, there has been a delay of some 3½ years between the date of the making of the third party order and the service of a notice of change of solicitor. A notice of change of solicitor is not a step in the proceedings. A further 1½ years approximately elapsed before a notice of intention to proceed was served by the plaintiff's solicitors on the 3rd December, 2008. Equally, the service of a Notice of Intention to Proceed is not a step in the proceedings. In any event, just over 5 years elapsed between the making of the third party order and the service of the notice of intention to proceed. As mentioned previously, the Notice of Motion herein issued on the 2nd April 2009, bringing the period of delay to 5 years and 5 months approximately.

A number of matters have been outlined in the affidavit of Mr. O'Neill to explain the delay herein. Reference has been made to the issues in relation to the initial difficulties that occurred following the retirement of the plaintiff. On the face of the affidavit it is clear that those matters were concluded by December 2004. I am of the view that one could rely on those matters to deal with the period of delay up to December 2004.

Two specific matters were referred to and I want to deal with both of those matters together. One of those issues was the issue of libel proceedings by the plaintiff's estranged wife. The other was the reactivation of matrimonial proceedings involving the plaintiff and his estranged wife. It was stated in Mr. O'Neill's affidavit that those matters were relevant to these proceedings, but in truth it is extremely difficult on the basis of the affidavit before the court to see how that could be so. I do appreciate that it is alleged in the statement of claim herein that the said Supt. Lennon, "intermeddled" with the plaintiff's marriage, but having said that, it is very difficult to see what bearing that issue has on the delay. Indeed if one examines closely the affidavit of Mr. O'Neill in this regard, what is stated indicates a limited connection between the current proceedings and the divorce proceedings. What Mr. O'Neill had said in his affidavit was as follows:-

"I say that I also contacted Messrs Copeland McCaffrey, Solicitors of Strabane, who had been acting for Mr. Jackson with respect to matrimonial proceedings which the plaintiff had initiated in Northern Ireland but which had become dormant. I say that I was of the view that the said matrimonial proceedings were relevant to the proceedings herein and steps have been taken to deal afresh with plaintiff's divorce settlement, which will become relevant to the evidence tendered in this action or in any assessment of damages in the action."

That contact appears to have taken place according to the affidavit around October, 2005. It is not clear if those divorce proceedings have been concluded and if so, how the conclusion of those proceedings has any bearing on these proceedings. Similar observations can be made in relation to the libel action referred to above. It is the case that the plaintiff was a potential witness in those proceedings. Mr. O'Neill made the averment in his affidavit "I wanted to ensure the libel proceedings were disposed of without adverse repercussions for these proceedings." Having made that assertion, it is not clear how Mr. O'Neill could ensure that the proceedings were disposed of without adverse repercussions or indeed what those adverse repercussions might have been. I appreciate that those proceedings apparently involved the plaintiff's wife and her alleged relationship with Supt. Kevin Lennon, but notwithstanding that, it is difficult to see how the fact that the plaintiff might be a potential witness in those proceedings could have explained or excused the delay in respect of these proceedings. It is not stated for example that the plaintiff herein had been served with any witness summons in relation to those proceedings and in truth, on the basis of the evidence before this Court, it is very difficult to see how the existence of those proceedings could have delayed or prevented the plaintiff from prosecuting these proceedings. Neither of these matters explain nor excuse the delay.

The next issue I want to deal with briefly relates to the health issues of the plaintiff referred to in the affidavit of Mr. O'Neill. I have already referred to those and I do not need to reiterate what has been said in that regard. As I mentioned, counsel on behalf of the defendants referred to the fact that nothing was exhibited in the affidavit, for example, by way of medical reports in relation to this issue. It is sometimes the case that a plaintiff by reason of health problems is not fit to prosecute a case. Indeed it may also be the case that those health problems are alleged to be caused by the conduct of the defendant who is being pursued in the relevant proceedings. Whether it be the case that health difficulties arise as a result of the subject matter of the proceedings or otherwise, it does seem to me that in a case where a plaintiff seeks to justify or excuse the delay in prosecuting their case by reason of health difficulties, some concrete details should be given to establish the nature of the health difficulties and the extent to which those difficulties have had a bearing on the prosecution of the case. That could be done by, for example, the provision of an affidavit from a doctor, a psychologist or a psychiatrist or other relevant persons. It could be done in the course of an affidavit from the plaintiff in person spelling out precisely the nature of the health difficulties and how it has prevented the prosecution of the action. It could also be done by the exhibiting of a relevant report from an appropriate doctor, counsellor, psychologist or psychiatrist. It is not as though such reports are not available in this case. It appears that Mr. Dempsey, a clinical psychologist, furnished a report in relation to the plaintiff to Mr. O'Neill in early 2008. He is retained in the case. In addition a report was obtained from Ms. Brenda Keenan. Neither report has been exhibited. I accept that those reports may not be directed to this issue but it is often the case that such reports can be of assistance in dealing with issues such as the reason for the failure to prosecute an action. In my view, the plaintiff has simply failed to establish this aspect of the matter as a ground which would excuse the delay.

The final matter raised by way of providing an excuse for the delay relates to the reports of the Morris Tribunal. I think it is clear from the decisions such as that in *Desmond v. M.G.N. Ltd.* and *Comcast* to which I have referred to above, that it is not open to a plaintiff to unilaterally decide to "park" proceedings to await the outcome of a Tribunal. Here, for tactical reasons it was decided that it was "proper to await the findings of the Morris Tribunal, in particular in relation to Supt. Kevin Lennon". Clearly that decision was made for tactical reasons and it is also clear that the decision to await the findings of the Morris Tribunal was not communicated to the defendants. One need only look again at the passages referred to in the judgment of the Supreme Court in the *Desmond* case to see that such an approach is to be deprecated.

I have considered the matters relied on by the plaintiff in seeking to excuse or justify the delay that has taken place in prosecuting this claim. I bear in mind that the delay in practical terms is a delay of some 5 years. In truth I cannot see how the matters relied on by the plaintiff could be said to excuse or justify the delay. In the circumstances I have reached the conclusion that the delay herein is inexcusable.

### **Balance of Justice**

Given that I have decided that the delay in the case has been inordinate and inexcusable it is necessary to consider the balance of justice. I think it is important to have regard to the nature of this particular case. This is a case in which the proceedings arise out of the alleged persistent and serious bullying of the plaintiff while he was a member An Garda Síochána and it is further alleged that as a result of that he was retired from the Garda Síochána on health grounds in or about the 14th August, 2004. In the course of his affidavit, Mr. O'Neill described these proceedings as being complex and difficult. No issue was taken on this point. I think it is fair to say that proceedings such as this are indeed more complex and difficult than is the case with what might be described as an ordinary action for damages for personal injuries. Usually in such actions one is dealing with a specific incident, for example, a road traffic collision on a given date. The nature of a claim in respect of bullying is that it tends to involve a course of conduct or behaviour that goes on over a period of time, often quite lengthy, and is made up of a series of incidents or events. It is clear from the affidavits sworn herein and from the pleadings herein, that the nature of this case is one that will cover a period beginning around February 1993, involves the service of the plaintiff in the Garda Síochána at Letterkenny and Ramelton Garda stations, will involve a number of incidents in relation to internal Garda matters such as the disciplinary action taken against the plaintiff and the circumstances surrounding the allegations relating to the Orange parade in Newtowncunningham in August 1996. In addition it appears that there will be allegations in relation to the conduct of the third party vis-à-vis the plaintiff's wife. That in turn may raise issues in relation to an alleged assault by the plaintiff on his estranged wife. I mention these matters to illustrate the range and breadth of the issues likely to arise if these proceedings are permitted to continue.

There is no need to explain or outline the nature of the prejudice to a plaintiff whose proceedings have been dismissed for want of prosecution. Mr. Lyons on behalf of the plaintiff in the course of his submissions described it as the "nuclear option". There can be no doubt that the decision to dismiss proceedings for want of prosecution is a serious step to take, ending as it does a plaintiff's right to pursue another party in vindication of a right or in furtherance of a claim.

It is necessary to consider the effect of delay on the defendants and the extent to which the defendants have been prejudiced by that delay. The first affidavit of Aoife Burke, sworn herein, did no more than to say "it is prejudicial and unfair to require the defendants to have to defend these proceedings". She went into more detail in her replying affidavit sworn on the 2nd July, 2009. I have already referred in detail to the comments made by her in that affidavit as to the prejudice caused by reason of the dismissal and or retirement of key witnesses in the case. The main point made by her was that she believed that the defendants could no longer be assured that the witnesses referred to would be willing to co-operate in the defence of these proceedings. As I have already pointed out, one of the witnesses expressly mentioned is Supt. Kevin Lennon who is, as I have mentioned already, someone joined as a third party to these proceedings. To that extent and having regard to the nature of the allegations made against him in these proceedings, one might observe that the defendants would not have been guaranteed of his co-operation in any event. No doubt the position has been complicated by his dismissal arising out of the matters dealt with before the Morris Tribunal. In considering the issue of prejudice and delay, a relevant factor is the question as to whether it is the delay that is responsible for the prejudice. This is not a case in which the defence has lost a vital witness, for example, through death of the witness by reason of the lengthy delay in prosecuting proceedings. It cannot be said that the dismissal of Supt. Lennon was caused by the delay. To the extent that he may be unavailable to the defendants, it is clear that it has nothing to do with the delay. The position is somewhat different in relation to the other potential witnesses mentioned in the affidavit of Ms. Burke. Presumably had the proceedings been dealt with at an earlier stage, some of those members of An Garda Síochána would have been serving members at the time of the hearing of the action. Having said that I find it somewhat difficult to understand how it could be said that witnesses who are still available, (there is no suggestion to the contrary), would be unwilling to co-operate in the defence of the proceedings merely by virtue of the fact that they have retired from the force. To that extent any prejudice by reason of the retirement of members of An Garda Síochána seems to me to be very slight indeed. I accept that a defendant in the ordinary course of events will be prejudiced by the lapse of time between the events complained of and the hearing of the action as a general proposition. It is inevitable that witnesses called on either side will no longer have the same degree of recall as they would have had, had the action been prosecuted with appropriate speed and diligence. I accept that to that extent, the defendants herein will have suffered some degree of prejudice. Further, one must bear in mind the difference in position of the plaintiff and the defendants. The defendants have access to far greater resources than the plaintiff herein. Overall, I am of the view that the prejudice suffered by the defendants herein as a result of the delay on the part of the plaintiff is at the moderate end of the scale.

I have mentioned before the principles applicable to the issues arising herein contained in the *Primor* judgment. A number of criteria were listed in the course of that judgment by Hamilton C.J. as I have mentioned above. In considering the facts of that particular case, Hamilton C.J. went on to consider the issue of delay on the part of the defendants and whilst that is not a feature of this particular case, a comment made by him in the course of that part of his judgment emphasises the purpose of the exercise being carried out by a court on an application such as this. I want to refer to a passage at p. 490, where he stated:-

"Being satisfied that in each case there was inordinate and inexcusable delay on the part of the plaintiff, I must now consider whether on the facts in this case the balance of justice is in favour of or against the proceeding of the case. Delay on the part of a defendant seeking a dismissal of the action and to some extent a failure on his part to exercise his right to apply at any given time for the dismissal of an action for want of prosecution are ingredients in the exercise by the court of its discretion.

But they are not the only such ingredients. The court is obliged to consider whether the total delay has been such that a fair trial between the parties cannot now be had and whether the defendants have been prejudiced by the continued delay."

As I have already said I am not concerned with the issue of delay on the part of the defendants. That may be an issue in some cases, but it has not been raised as an issue of significance in the course of these proceedings. The only point made was that the defendants could have served a notice of trial and that the defendants did not make any attempt to communicate with the plaintiff during the period when the proceedings were, in effect, dormant. However, I do think it is important to emphasise the point noted by Hamilton C.J., which is at the root of an application such as this, namely, whether the total delay has been such that a fair trial between the parties cannot now be had and whether the defendants have been prejudiced by the continued delay. I accept as I have indicated above that there must be some prejudice to the defendants by reason of the delay in prosecuting these proceedings. I have placed that prejudice at the moderate end of the scale. However, there is nothing on the application before me to suggest that a fair trial between the parties cannot now be had, because of the total delay herein. Therefore, I am of the view that the defendants' application to dismiss for want of prosecution cannot succeed. Accordingly I am refusing this application.