THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 27
Appeal No. 2014/578
[Article 64 Transfer]

Peart J.
Irvine J.
Hogan J.

Carol Collins

Plaintiff/ Respondent

and

The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General

Defendants/Appellants

JUDGMENT of the Court delivered on the 19th day of February 2015 by Ms. Justice Mary Irvine.

1. This is an appeal against the judgment and order of the High Court (Cross J.) delivered on 23rd July 2012, in which he refused the defendants' application to dismiss the plaintiff's claim on the grounds of inordinate and inexcusable delay. The within appeal falls to be determined by this Court pursuant to a direction of the Chief Justice (with the concurrence of the other members of the Supreme Court) further to the provisions of Article 64 of the Constitution.

Relevant background facts

2. By plenary summons dated 16th August 2003, the plaintiff, a factory worker born in 1978, commenced proceedings seeking damages from the defendants for assault, battery, false imprisonment and breach of her constitutional rights. She alleges mistreatment at the hands of members of An Garda Síochána between 1998 and 2001, complaints first agitated on her behalf by her solicitor, Mr. Fitzpatrick of Smithwick Solicitors, in the months of January and February 2001.

3. The plaintiff purported to deliver a statement of claim on 1st June 2007 wherein she identifies some eighteen instances of abuse allegedly perpetrated by Gardaí. These include allegations of arrest and searches of her person, some of which were purportedly carried out when exercising their powers under the Misuse of Drugs Act 1997, as amended. She maintains that these incidents were motivated by spite and malice and were intended to humiliate her. The plaintiff contends that each arrest and detention was unlawful and amounted to false imprisonment. Her final claim relates to an incident which she maintains occurred in November 2000 when she was allegedly subjected to an unlawful and negligently performed highly invasive and terrifying internal examination which left her bleeding and requiring further medical treatment. All of these events, she maintains, have caused her great anxiety, loss of reputation, humiliation as well as other loss and damage.

4. The defendants' solicitors refused to accept delivery of the Statement of Claim in circumstances where a Notice of Intention to Proceed, which had been served on 8th February 2006, had expired. As a result a further notice of intention to proceed was served on 30th August 2007 and yet another on 3rd September 2007. However, notwithstanding the delivery of these documents the statement of claim was never served.

5. On 19th October 2009 the defendants brought an application seeking to dismiss the plaintiff's proceedings pursuant to O. 27 r. 1 of the Rules of the Superior Courts and/or O. 122 r.11 thereof and/or pursuant to the court's inherent jurisdiction to dismiss the claim on the grounds of inordinate and inexcusable delay.

6. At the hearing of that motion the plaintiff's solicitor sought to excuse the delay in the prosecution of the proceedings by relying upon a number of factors, namely:

> i. That there had been a delay in delivery of the plenary summons as it was expected that the defendants would forward to him the results of a Garda investigation which was taking place into the allegations made by the plaintiff in correspondence in January and February 2001.
>
> ii. That the plaintiff was out of contact because she had moved address twice between the time the plenary summons was issued and May 2007.
>
> iii. That the litigation file had been handed to another colleague within the same firm of solicitors after which it had been mislaid and then inadvertently closed when that solicitor left the firm.

7. It is not disputed that Quirke J, on the hearing of that application, concluded that the plaintiff had been guilty of delay which was both inordinate and inexcusable and that he had formed the view that the time that had elapsed *"was far too long for a fair trial to occur"*. However, having regard to the fact that the allegations made against the defendants were grave and the fact that the defendants had not referred to any particular prejudice arising from the delay, he felt the balance of justice lay in favour of allowing the claim to proceed. Consistent with his conclusion that her delay had been both inordinate and inexcusable, the learned High Court judge dismissed the plaintiff's claim *"for want of prosecution on the grounds of inordinate and inexcusable delay"* but put a stay on that order provided that she deliver her statement of claim (to include full particulars) on or before 21 January 2010. It is not disputed that he also advised the plaintiff that she must proceed expeditiously with her claim.

8. The statement of claim was delivered on 21st January 2010. A notice for particulars was then raised by the defendants on 4th May 2010 and a defence delivered on 12th October 2010. In their defence, the defendants admitted that records had been located detailing the detention of the plaintiff on eight occasions between August 1998 and February 2001. However, they went on to deny every allegation of impropriety and wrongdoing alleged against them in the Statement of Claim.

9. The plaintiff's solicitors replied to the defendants notice for particulars on 18th January 2011 and later served notice of trial on 21st July 2011. Given that the nature of the claim advanced by the plaintiff included an allegation of assault, that notice of trial sought that her action be determined by a judge sitting with a jury. Consequently, the proceedings appeared in the jury list to fix dates on 12th October 2011.

10. It is common case that the Notice of Trial was struck out on 12th October 2011 due to the fact that neither solicitor nor counsel

attended the list to fix dates on the plaintiff's behalf. While the defendants were represented before the court it remains unclear as to whether or not they asked the court to strike out the notice of trial or whether the court, of its own motion, decided upon such an approach. It is however accepted that in the aftermath of the event that the defendants' solicitor did not notify the plaintiff's solicitor as to what had occurred.

11. The next step in the proceedings was taken by the defendants on 23 May 2012. On that date they issued their second notice of motion seeking to dismiss the plaintiff's claim on the grounds of inordinate and inexcusable delay. That application was heard by Cross J on 23rd July 2012 and it is his judgment and order made on that motion that is the subject matter of the within appeal.

12. This Court has been furnished with a note of the *ex tempore* judgment of the learned High Court judge. That note, taken at face value, would suggest to the reader that the trial judge had confined his consideration to one issue, namely, whether or not there had been inordinate and inexcusable delay during the period post dating the order of Quirke J made on 14th December 2009. However, on the hearing of this appeal, counsel for the plaintiff maintained that Cross J. had in fact considered the entire period of delay, even though in pronouncing his decision he made reference only to the fact that he was satisfied that the plaintiff had established a valid excuse for the delay which had occurred subsequent to the hearing of the first motion, that being a mistake on the part of her solicitor which had resulted in the notice of trial being struck out for non attendance .

Evidence before Cross J.
13. The affidavit grounding the defendants second motion to dismiss the plaintiff's claim on the grounds of inordinate and inexcusable delay was sworn by Ms. Frederique Duchene. In that affidavit she referred to the history of the proceedings leading up to the first motion to dismiss the plaintiff's claim, which was heard by Quirke J. on 14th December 2009. She referred to in some detail to his ruling, details whereof have been referred to earlier in this judgement,

14. Ms. Duchene, for the purposes of demonstrating to the court the delay in the prosecution of the action, then set out a chronology of events post dating the order of Quirke J. on 14th December 2009.

i. 4th January 2010: Plaintiff delivers statement of claim

ii. 1st March 2010: Plaintiff's solicitors demand delivery of the defence

iii. 4th March 2010: Defendants serve a notice for particulars.

iv. 12th October 2010: The defendants deliver their defence.

v. 24th November 2010: The defendants send twenty one day warning letter in

respect of the notice for particulars served on 4th March

2010.

vi. 13th January 2011: A further warning letter is sent to the plaintiff's solicitors

regarding the defendants outstanding notice for

particulars.

vii. 18th January 2011: Plaintiff replies to the defendants notice for particulars.

viii. 26th January 2011: Defendants call for the service of a notice of trial.

ix. 21st July 2011: Notice of trial is served for a trial before a judge sitting

with a jury.

x. 12th October 2011: The proceedings appear in the jury list fixed dates.

Notice of trial is struck out as the plaintiff fails to

appear.

xi. 23rd May 2012: Defendants issue second motion to dismiss on the

grounds of delay.

15. In addition to the aforementioned delay, Ms. Duchene referred to the fact that since the first motion to dismiss the claim was brought, she had become aware of the fact, Dr. James Maloney, the general practitioner who had carried out an internal examination of the plaintiff in November 2000 and in respect of whose conduct the plaintiff makes her most serious allegation, had passed away in 2007. She stated that she had been unaware of this fact at the time that the first motion had been brought and that she only became aware of his death when she wrote to Dr. Maloney asking him to confirm his availability to give evidence at the hearing of the claim. In the light of all of the factors deposed to she maintained that the plaintiff's delay had been inordinate and inexcusable and that the balance of justice at that time favoured the dismissal of the claim.

16. In his replying affidavit, Mr. Fitzpatrick, stated that it had taken nine months for him to deliver a reply to the defendants notice for particulars due to the fact that he had had to meet with his client to seek clarification of certain matters raised therein and also to request her to obtain certain medical information from her gynaecologist in circumstances where she had advised him that she had been unable to have children and he felt clarification was required as to whether this might have been as a result of the internal examination complained of. He then served a notice of trial on 21st July 2011 seeking that the trial be heard before a judge sitting with a jury.

17. Mr. Fitzpatrick sought to excuse the delay following the service of the Notice of Trial on 21st July 2011 by reference to a misunderstanding on his part as to the appropriate procedure to be adopted when seeking to obtain a trial date for this type of

action. He said that he thought the procedure was the same as that which applied in respect of personal injuries actions where, following the service of a notice of trial, a date could be obtained by applying to the judge in charge of the list once proofs had been complied with. He was unaware that the case would appear in a list to fix dates. Consequently, he did not know the case was before the court in the jury list to fix dates on the 12th October 2011 and he complained that after the notice of trial was struck out that he was never informed of this fact. He said that had he been made so aware he would have immediately arranged to issue a fresh notice of trial so as to bring the matter on for hearing.

18. As to the prejudice alleged by the defendants arising from Dr. Maloney's death, Mr Fitzpatrick advised that Dr. Maloney was possibly close to eighty years of age when he attended the Garda station on 17th November 2000 and that consequently he may not, regardless of any delay, have been available to give evidence at the trial. He also stated that the plaintiff had been so traumatised by Dr Moloney's examination that another doctor, Dr. Declan Lawless, was called to the station later that night and that he would be available to give evidence, thus mitigating any potential prejudice as might arise from Dr Moloney's unavailability.

Submissions
19. Counsel for the defendants, Mr. McDermott, B.L. submitted that the trial judge erred in focusing only on the delay subsequent to Quirke J.'s order and in finding that this delay was excusable. He argued that the trial judge should have considered the delay that had occurred throughout the entirety of the proceedings. He should have paid particular regard to the 10 month delay for the reply to particulars, the 6 month delay from that reply to the service of the notice of trial and the original delay adjudicated upon by Quirke J., as well as the obligation on the plaintiff to proceed expeditiously thereafter.

20. In relation to the excuses proffered for the relevant delays, counsel contended that:

> (i) the excuse for the first period of delay, namely, that the file had been lost, was not acceptable as a copy could have been requested from the defence at any time.
>
> (ii) the explanation proffered for the 10 month delay for the delivery of the reply to the defendants notice for particulars, *i.e.* the procurement of medical evidence, did not withstand scrutiny as no medical issue had been raised in the notice,
>
> (iii) in relation to the final period of delay, counsel submitted that the plaintiff must take responsibility for the error of her legal team. That error in any event provided no explanation for the failure to call the case on for trial and there was no indication as to when, if ever, in the absence of the defendants' motion, that would have occurred.

21. In relation to where the balance of justice in the case lay, counsel emphasised that the defendants were not under any duty to progress the case, and that they had not acquiesced in the delay. There were numerous *indicia* such as the lack of an affidavit from the plaintiff to suggest that she did not, contrary to what was maintained by her solicitor, wish to progress the case.

22. In addition, counsel claimed that the defendants had suffered both general and particular prejudice arising from the delay. Counsel accepted that Dr. Maloney's death had occurred in 2007 and had only been discovered after the judgment of Quirke J. However, he highlighted the key role of Dr. Maloney in relation to the issue of consent to the internal examination complained of by the plaintiff and to her claim that this had been negligently carried out as a result of which she had sustained some bleeding and had required medical attention.

23. Finally, counsel emphasised the "tightening up" of the court's attitude to delay which was alleged to be inordinate following the decision in *Comcast v. Minister for Public Enterprise* (Unreported, Supreme Court, 17th October, 2012).

24. In response, counsel for the plaintiff, Mr. Treacy S.C., maintained that Cross J. had indeed considered the delay that had occurred throughout the entire proceedings. He highlighted the chronology of events that had been handed up by counsel for the defendant during the hearing and he asserted that the judge had engaged with counsel in relation to the delay from the inception of the claim.

25. Counsel submitted that the plaintiff's legal team had made a procedural error as a result of which the notice of trial had been struck out. He submitted that the defendants, who were in attendance when the court made this order, ought not to be allowed to rely upon any delay resulting therefrom, as they had not advised the plaintiff's solicitors as to what had occurred. Mr Treacy submitted that had the defendants made the position known to Mr Fitzpatrick the high likelihood is that he would have immediately endeavoured, by whatever means was necessary, to obtain a date for the hearing.

26. Mr Treacy also argued that the defendants should not be entitled to rely upon Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms in an attempt to reconfigure the law in that no reliance had been placed upon the Convention and it had not formed part of the courts consideration when it had dealt with the motion at first instance.

27. In relation to where the balance of justice in this case lay, counsel argued that such part of the defendants submission as related to plaintiffs likely whereabouts or which were destined to undermine her stated intention to progress her claim, were more suited to an application to dismiss a claim as being vexatious or an abuse of process rather than one based on delay

28. In considering where the balance of justice lay, Mr Treacy submitted that the court must take into account the extraordinarily serious nature of the plaintiff's claim and the public interest in proceedings concerning an allegation that a female member of the public had been subjected to a malicious, unwarranted and unlawful internal medical examination.

29. Counsel for the plaintiff further disputed the particular prejudice alleged by the defendants arising from the death of Dr Maloney in circumstances were a second doctor, Dr Lawless, was available to give evidence on behalf of either party. He further highlighted that, as was apparent from the defence, the defendants had available to them documentary records upon which they could rely in respect of the majority of the complaints made by the plaintiff.

Principles to be applied.
30. The defendants' application before Cross J. was based upon the submission that the plaintiff had been guilty of inordinate and inexcusable delay such that the balance of justice then favoured the dismissal of the action. In such circumstances it is worth reflecting briefly on the circumstances in which a court should exercise its jurisdiction in favour of granting relief of that nature.

31. The first matter of importance in relation to this jurisdiction is that the onus of proof to establish that the delay complained of has been both inordinate and inexcusable lies on the party who seeks to have the proceedings dismissed, as was advised by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM. If the court is satisfied that the delay can be so described it must then decide

whether the balance of justice is in favour of or against the case proceeding. This is a difficult task because it involves, as was stated by Henchy J. in *O'Domhaill v. Merrick* [1984] IR 151, the court in trying to "strike a balance between a plaintiff's need to carry on his or her delayed claim against the defendants basic right not to be subjected to a claim which he or she could not reasonably be expected to defend".

32. The principles which govern the circumstances in which proceedings may be struck out for delay were laid in some detail by Finlay P. in *Rainsford* and were approved of by the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 499 where they were expanded upon by Hamilton C.J. in the following manner: –

> "The principles of law relevant to the consideration of the issues raised on this appeal may be summarised as follows: –
>
> (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to:
>
> (i) the implied constitutional principles of basic fairness of procedures,
>
> (ii) whether the delay and consequent prejudice in the special facts of the case I such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
>
> (iii) any delay on the part of the defendant – because litigation is a two-party operation, the conduct of both parties should be looked at,
>
> (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
>
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the way to be attached to such conduct depending upon all the circumstances of the particular case,
>
> (vi) whether the delay gives rise to substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
>
> (vii) the fact that the prejudice to the defendant referred to in(vi) may arise in many ways and be other than that merely caused by the delay, including damage to defendant's reputation and business."

33. Another consistent principle which has been reinforced in many recent judgments of the Superior Courts dealing with the issue of delay is that in considering whether or not the delay has been inordinate the court may have regard to any significant delay prior to the issue of the proceedings: (see *Cahalane and another v. Revenue Commissioners and others* [2010] IEHC95 and *McBrearty v. North Western Health Board* [2010] IESC27. These decisions support the proposition that where a plaintiff waits until relatively close to the end of the limitation period prior to issuing proceedings that they are then under a special obligation to proceed with expedition once the proceedings have commenced.

34. It is also important to note, in the context of the Draconian nature of the type of relief claimed, that the use of this jurisdiction is not intended to be a punishment for a plaintiff's delay but rather to ensure that justice is done, as was advised by O'Flaherty J. in *Primor* where he stated at p.516 that:-

> "Courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them."

35. Finally, the rationale behind the court's jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay is as was stated by Diplock L.J. in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229 at p254:-

> "The chances of the courts been able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard."

36. In addition to its right to dismiss a claim on the grounds of inordinate and inexcusable delay, there is what was described by Geoghegan J. in *McBrearty .v. North Western Health Board* [2010] IESC 27, a jurisdiction which permits the court to dismiss a claim, even where there has been no fault on the part of the plaintiff, if satisfied that the interests of justice would require such an approach. This jurisdiction was first considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* where Henchy J. expressed himself satisfied that a court might dismiss an action if it was satisfied that to ask the defendant to defend the action would place that defendant under an inexcusable and unfair burden.

37. The courts' inherent jurisdiction to dismiss a claim where the length of time which has elapsed between the events giving rise to the claim and the date at which the action comes on for trial may only be exercised by the court, in the absence of culpable delay on the part of the plaintiff, where the delay is so great that it would be unjust to ask the defendant to defend the claim. As Henchy J. stated in *O'Domhnaill v. Merrick*:-

> "While justice delayed may not always be justice denied, it usually means justice diminished, and in a case such as this, it puts justice to the hazard to such an extent that to allow the case to proceed to trial would be an abrogation of basic fairness."

However, it is not this jurisdiction which the defendants seeks to invoke on the present application.

38. More recently, the constitutional imperative to end stale claims so as to ensure the effective administration of justice and basic fairness of procedures has been emphasised in a number of judgments dealing with cases of delay. In addition, it must be recalled that Article 34.1 of the Constitution requires the courts to administer justice and that Article 40.3.2 guarantees the citizen the right to protect their good name. Quite independently of guarantees of basic fairness of procedures, these specific constitutional obligations also pre-suppose that litigation will be conducted in a timely fashion. If, to adopt the graphic phrase of Henchy J. in *O'Domhnaill,* justice is put to the hazard in a given case by undue and excessive delay, how, then, can the courts fulfil their constitutional mandate under Article 34.1? Moreover, where – as in the present case – the right to a good name of individuals is potentially put at issue by the litigation, the effective protection of that right as guaranteed by Article 40.3.2 requires that such claims be adjudicated upon within a reasonable time.

39. In *Quinn v Faulkner t/a Faulkner's Garage and another* [2011] IEHC 103 Hogan J. criticised the courts' prior tolerance to inactivity on the part of litigants when he stated:-

> "While as Charlton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common: see, *e.g.,* the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Limited* [2010] IEHC465."

40. Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms is also now a material consideration on an application such as that under consideration. In *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 at pp.293-294 Hardiman J. stated as follows:-

> "[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attached to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued ….[F]ollowing such cases as *McMullan v. Ireland* [ECHR422 97/98 29th 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."

41. He also went on to state, albeit in an obiter comment, that he considered that the principles as outlined in *Primor v. Stokes Kennedy Crowley* [1996] 2.I.R.459 ought to be revised in light of Article 6.1 of the Convention.

42. Further consideration was given to the extent to which the *Primor* principles might need revision in *Michael McGrath v. Irish Ispat Limited* [2006] IESC 43 where Denham J. concluded that the court's discretion to decide whether it was in the interests of justice that a claim be dismissed for want of prosecution was to be exercised both in accordance with settled constitutional principles and "in light of developing European jurisprudence on reasonable time".

43. *In Stephens v. Paul Flynn Ltd* [2005] IEHC 148 and *Rodenhuis & Verloop BV v. HDS Energy Ltd* [2011] 1.I.R. 611, Clarke J. also questioned whether there should be a recalibration or tightening up of the criteria by reference to which the actions of the parties might be judged. He stated that while the overall test and applicable principles remain the same, the application of those principles might require some typing up to avoid excessive indulgence: At para.11 of his judgment he stated as follows:-

> "It is necessary, in a system where the initiative has left largely up to the parties to progress proceedings, for the courts to make clear that there will not be an excessive indulgence of delay, because of the courts do not make that clear, it follows that the courts actions will encourage delay and, thus, will encourage a situation of cases will not be completed within the sort of times which would be consistent with compliance with Ireland's obligations under the European Convention on Human Rights."

44. To conclude on this issue it is perhaps worth referring to the fact that in *McMullen,* the court when considering a sixteen year delay in the context of Article 6.1 of the Convention gave some guidance as to what might be considered to be reasonable in terms of the duration of proceedings when it concluded that:-

> (i) Legal proceedings for determination of civil rights and obligations should be resolved within a reasonable time.
>
> (ii) Reasonableness is to be assessed by reference to the circumstances of the case, its complexity, the conduct of the applicant and of the relevant authorities and the importance of what is at stake.
>
> (iii) The state is obliged to organise its legal system to comply with the reasonable time requirement of Article 6.

43. As to what may be considered to be the guidance which emerges from the aforementioned decisions which make reference to Article 6 of the Convention, it appears to be the case that while it is necessary for the Irish courts to be vigilant about culpable delay and that when faced with an application to dismiss a claim on the grounds of delay, the Court should factor into its consideration Ireland's obligations under Article 6 of the Convention, there has been no major departure from the well established principles.

Scope of appeal from the decisions of the High Court

45. The first question which requires to be examined is the extent to which this Court can or should review the decision of the High Court judge not to strike out the present proceedings on the ground of undue delay. On the date on which the present appeal was lodged the appellant enjoyed a constitutional right of appeal from the High Court to the Supreme Court by virtue of Article 34.4.3 of the Constitution, subject to such exceptions and regulations as might have been "prescribed by law." Following the establishment of this Court on 28th October 2014, the provisions of the 33rd Amendment of the Constitution (Court of Appeal) Act 2013 took effect. Article 34.4.1 now provides that this appellate jurisdiction from decisions of the High Court is to this Court, save that Article 34.4.4 also allows the Supreme Court to entertain a direct appeal from the High Court to that Court where it is satisfied that there are "exceptional circumstances warranting a direct appeal to it."

46. In addition, Article 64.3.1 also permitted the Chief Justice with the concurrence of the other members of the Supreme Court to transfer certain categories of existing appeals to this Court. Where the cases were so transferred, then this Court was to have "jurisdiction to hear and determine each appeal the subject of that direction." As the present appeal was so transferred to this Court

pursuant to Article 64.3.1, it follows, accordingly, that the appellate jurisdiction of this Court *vis-à-vis* decisions of the High Court is co-extensive with that previously enjoyed by the Supreme Court pursuant to the (then existing) Article 34.4.3.

47. What, then, was that jurisdiction so far as decisions of this kind were concerned? As will next be seen, there are, in fact, two different strands of the Supreme Court authority on this point. We are accordingly obliged for present purposes – as the Supreme Court itself, but for the transfer of this appeal to this Court pursuant to Article 64.3.1 would have been obliged – to choose as between these divergent lines of authority.

48. In any consideration of this question, the starting point remains the decision of the Supreme Court in *In bonis Morelli, Vella v. Morelli* [1968] I.R. 11, a case where the scope of that Court's Article 34.4.3 jurisdiction was fully examined by both Walsh and Budd JJ. That case was a probate action where it was contended that a particular will had been irregularly executed. This claim was rejected by the High Court and the defendants (but not the plaintiffs) were awarded their costs. The plaintiffs appealed this costs order, contending that by reference to established practice, an unsuccessful party was entitled to be paid his or costs out of the estate where there were reasonable grounds for the litigation. The defendants contended in response that a decision of this kind should not be interfered with unless the trial judge erred in principle in some manner in the way in which his discretion was exercised.

49. In his judgment, Walsh J. traced the error in principle approach back to the practice which had emerged following the enactment of s. 52 of the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act"). Section 52 of the 1877 Act had provided that:

> "No order made by the High Court…being costs which by law are left to the discretion of the Court, shall be subject to any appeal, unless by leave of the Court or Judge making such order"

50. Where leave had been granted pursuant to the section, then the (pre-1922) Court of Appeal was at large and it had been held that it could exercise a discretion of its own and substitute its own decision for that of the court in which the costs order was made: see *Whitmore v. O'Reilly* [1906] 2 I.R. 357, 399 *per* FitzGibbon L.J.

51. Having described this practice, Walsh J. then examined the circumstances in which the old Court of Appeal entertained appeals against costs order, *even in the absence of leave pursuant to s. 52 of the 1877 Act.* While it might have been thought that a statutory court of this kind could never entertain such appeals in the face of a statutory requirement that leave be obtained, a practice had nevertheless evolved whereby such appeals were, in fact, entertained in cases where it was shown that the trial judge had erred in principle. Walsh J. then explained ([1967] I.R. 11, 20-21):

> "It is unnecessary here to describe the growth of the appeal jurisdiction in respect of the non-appealable discretionary order, that is to say where leave to appeal not been given by the court or by the judge. It is sufficient to indicate that appeals against such orders were entertained and decided, notwithstanding the absence of leave to appeal, if it could be shown that the judge had acted arbitrarily or capriciously or recklessly, or that he had based his decision upon ground which the law did not recognise, or that there was no evidence of the existence of any lawful ground for his decision. In many of these instances the judge was held to have 'gone wrong in principle' and thus there grew up the practice that the appellate tribunal would not interfere with the discretion of the judge 'unless he had gone wrong in principle.'"

52. Walsh J. continued by saying that the defendant's submission that the pre-1922 practice regarding discretionary orders of this kind had no application to the Supreme Court exercising its jurisdiction under Article 34 of the Constitution. This conclusion was reached by him for essentially two reasons. First, it was clear – and not really disputed – that s. 52 of the 1877 Act had not survived the enactment of the Constitution, because as the earlier decision in *The State (Browne) v. Feran* [1967] I.R. 147 had already made clear, the only restrictions on the right of appeal under Article 34.4.3 which could lawfully be imposed (*i.e.* an "exception" or "regulation" which might be "prescribed by law") were laws enacted by the Oireachtas *after* the coming into force of the Constitution itself and the 1877 Act quite obviously did not fall into this category. Second, a practice of this kind which restricted the right of appeal which had not been imposed by law would have been inconsistent with the very wording of Article 34.4.3.

53. As Walsh J. then explained ([1967] I.R. 11, 21):

> "Apart from the fact that no such restriction existed in respect of appeals taken by leave of the High Court of Justice under the Act of 1877 or in respect of appeals where no leave was necessary, such a submission, if accepted, would restrict the appellate jurisdiction of this Court which by the terms of the Constitution can only be restricted within the limits permitted by the Constitution by a law enacted subsequent to the coming into force of the Constitution; and no practice could be permitted to restrict litigants from exercising the right of resort to this Court guaranteed to them by the Constitution. Furthermore, it would be quite anomalous to seek to restrict an unrestricted appellate jurisdiction by the imposition of a practice invented by the courts to circumvent and evade the restrictions placed upon a former appellate jurisdiction."

54. Budd J. also spoke to the same effect ([1968] I.R. 11, 29):

> "…the plaintiff's appeal to this Court against the President's order for costs is, by virtue of the provisions of the Constitution, a full and open appeal, untrammelled and unfettered by such principles practice as previously applied to appeals against discretionary orders; and applies notwithstanding also the provisions of the Rules of the Superior Courts which state that the costs of the proceedings shall be in the discretion of the Court.
>
> That is not to say that this Court will not give great weight to the views of the trial judge and to any reasons stated by him for the course he has taken with regard to costs…"

55. The analysis contained in *Vella* is most instructive as it shows the historical origins of the error in principle approach.

56. As it happens, in the aftermath of *Vella,* there were a number of authorities dealing with applications for security for costs under s. 390 of the Companies Act 1963 which confirmed that the Supreme Court was free to exercise its own discretion in the matter and that it was not confined to those cases where it could be shown that the High Court judge had erred in principle. Some of this case-law can now be briefly mentioned.

57. In *Jack O'Toole Ltd. v. MacEoin Kelly Associates* [1986] I.R. 277, 283 Finlay C.J. dealt with this argument in the following terms:

> "It was contended on behalf of the plaintiff in this Court that the exercise of the discretion, which undoubtedly exists under s. 390 of the Act of 1963, by the High Court judge should not be set aside unless this Court was satisfied that he

had erred in principle. For the reasons set out in detail in the judgment which is about to be delivered by McCarthy J., I am satisfied that this contention is unsound and that this Court has a right and an obligation to substitute its discretion for that of the learned High Court judge, if it is satisfied that it should do so."

58. McCarthy J. delivered a concurring judgment in which he referred at length to the decision in *Vella,* adding ([1986] I.R. 277, 287):

> "This submission is based upon what appears to have been the long-established practice of the Court of Appeal in England and, certainly in respect of costs, of the like court in Ireland since the turn of the last century. Whether or not the use of this discretion touches upon orders for costs or otherwise, I reject the submission that any such qualification lies upon the appellate jurisdiction of this Court. [In *Vella v. Morelli*] it was stated…in the most emphatic terms that such an assumed restriction on the appellate jurisdiction of this Court could not survive the enactment of the Constitution."

59. This approach was followed by Barron J. in *Lismore Homes Ltd. v. Bank of Ireland* [1999] 1 I.R. 501, 529 where he stated:

> "It is clear therefore that the court has a discretion. This discretion must be exercised independently of the manner in which the discretion has been exercised in the court below."

60. It is against this general background that the comments of Lynch J. *in Martin v Moy Contractors Ltd.* [1999] IESC 14 now fall to be considered. In that case the plaintiff had sued a variety of defendants in respect of a foot injury which was said to arise from an industrial accident which had occurred in August 1988. The plaintiff commenced proceedings towards the close of the limitation period. There had already been one motion to dismiss for want of prosecution and there was a further delay of just four years in replying to a notice for particulars. In the meantime, the consulting engineer who supervised the construction project had died.

61. In the High Court Morris P. struck out the proceedings on the ground on inordinate and inexcusable delay. The relevant defendants had suffered prejudice in that the supervising engineer who was responsible for safety at the time had since died. This decision was upheld by the Supreme Court, with Lynch J. stating:

> "The High Court has a measure of discretion in these applications to dismiss actions for want of prosecution. Provided that the High Court decision is within the limits of reasonable discretion this Court should not interfere with it. In this case the learned President gave a reasoned judgment and his reasoning is clearly valid. His decision naturally followed from such reasoning and is also therefore clearly valid. There is accordingly no basis on which this court should interfere with the judgment of the learned President…."

62. As it happens, no authority for this proposition was cited by Lynch J. and nor was there any reference to the earlier decision in *Vella v. Morelli* or, for that matter, subsequent cases such as *Jack O'Toole Ltd.*

63. The matter was considered again by the Supreme Court in another undue delay case, *Stephens v. Paul Flynn Ltd.* [2008] IESC 4, [2008] 4 I.R. 31. In that case, Clarke J. had struck out the proceedings on the grounds of inordinate and inexcusable delay. In the Supreme Court Kearns J. dismissed the appeal, saying:

> "While counsel for the plaintiff has urged this Court to treat this appeal as a completely fresh hearing of the original application, I am satisfied that this is not a correct approach where a discretionary order of the High Court is under review by this Court. Where, as in this case, a judge of the High Court makes a discretionary order, I am firmly of the view that this Court should not interfere with such order unless it is clear that the discretion has not been exercised within the parameters of what might be described as a reasonable exercise of that discretion."

64. This issue was further considered by the Supreme Court in *Desmond v. MGN Ltd.* [2008] IESC 56, [2009] 2 I.R. 737 where there was a clear difference of opinion on this topic. This was an application to strike out a libel action on the grounds of undue delay. The article in question had been published in January 1999, but the plaintiff elected to await the deliberation of the Moriarty Tribunal before advancing the matter to trial. In the High Court, Hanna J. had refused to strike out the proceedings, even though he accepted that the delay was inordinate and inexcusable.

65. A majority of the Supreme Court (Geoghegan and Macken JJ., Kearns J. dissenting) dismissed the appeal. On the question of the scope of review, Kearns J. adhered to the view which he had expressed in Stephens. Having quoted the words of Lynch J. in *Martin* (which has been quoted above), Kearns J. continued:

> "…. an exercise of discretion by a High Court judge must remain reviewable where it is incorrectly premised. Therefore nothing in *Martin v Moy Contractors* should be taken, nor could it be taken, as overturning the jurisprudence established by the seminal decision of a five judge court in *In bonis Morelli: Deceased; Vella v. Morelli* [1968] I.R. 11."

66. Kearns J. then set out the background to *Vella* and he then observed:

> "It may be seen therefore that this decision related, firstly, to the entitlement to bring an appeal which up to that point had been precluded and, secondly, it was a case concerned with costs only and not with discretionary orders generally. I do, of course, accept that it was a decision which strongly asserted the principle that discretionary orders could be challenged afresh in this Court, albeit…. that this Court will always give due weight and importance to the views of the trial judge who makes the initial decision. It is really a question of deciding the circumstances in which a discretionary order should be reversed. For my part I prefer the approach outlined by Lynch J as to how this Court should exercise its jurisdiction when determining such appeals: that it should be slow to interfere unless there has been an unreasonable exercise of discretion or the discretion has been incorrectly premised. Such an error would include a failure to take into account a relevant consideration."

67. However, Geoghegan J. expressed a different view on this topic ([2009] 1 I.R. 737, 742, 743):

> "Traditionally the common law view was that a discretionary order should not be interfered with by an appellate court unless the judge at first instance made an error of law in the exercise of the discretion. In a landmark case cited by Kearns J. in his judgment, *In bonis Morelli: deceased; Vella v. Morelli* [1968] I.R. 11, it was pointed out by this Court that an appeal lay from every decision of the High Court to the Supreme Court unless otherwise provided for by law. Any rule by which the court was inhibited from interfering with a discretionary order was not therefore compatible with the Constitution. However, in the *Morelli* case as Kearns J. points out, Budd J. indicated that the court would have to give "great weight to the views of the trial judge". I think that that is the true legal principle in the light of the Constitution

> now. But there is an added factor in my opinion. The expression "discretionary order" can cover a huge variety of orders, some of them involving substantive rights and others being merely procedural in nature including mundane day to day procedural orders such as orders for adjournments etc. I think that in reality over the years since *Morelli* this Court has exercised common sense in relation to that issue. The Court would be very slow indeed to interfere with the High Court judge's management of his or her list, but in a case such as this particular case where much more substantial issues are at stake the Court, while having respect for the view of the High Court judge, must seriously consider whether in all the circumstances and in the interests of justice it should re-exercise the discretion in a different direction."

68. Macken J. expressed no view on this question.

69. This is issue was further considered, albeit briefly, by MacMenamin J. in *Lismore Builders Ltd (in Receivership) v. Bank of Ireland Finance Ltd.* [2013] IESC 6. That case concerned an appeal from the decision of Quirke J. in the High Court dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay. Delivering the judgment of the Supreme Court, MacMenamin J. dealt with the circumstances in which an appellate court might review an order made by a High Court judge in the exercise of his discretion in the following manner: –

> "Although great deference will normally be granted to the views of the trial judge, this court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgement of Geoghegan J. in *Desmond v. MGN* [2009] 1 I.R 737…."

70. In our view, whatever doubts and differences might have existed on this point prior to the judgment in *Lismore Homes* have really been dispelled by that decision. In any event, we consider that the views expressed by MacMenamin J. are those which best accord with the balance of authority and, indeed, with first principles.

71. So far as the balance of authority is concerned, it must be noted that neither judgments in *Martin* or *Stephens* had referred to the earlier judgment of a five member Supreme Court in *Vella* where the point had been examined in almost exhaustive detail. Nor was there any reference to *Jack O'Toole Ltd.,* another judgment of a five member Supreme Court where the issue received extensive consideration.

72. It is not, with respect, easy to see how the dictum of Lynch J. in *Martin* can be satisfactorily aligned with these earlier decisions. While different views were expressed in *Desmond,* the approach of Geoghegan J. was approved in unequivocal terms by the Supreme Court's most recent decision in *Lismore Homes*.

73. This view is, we think, also supported by first principles. First, while the scope of the right of appeal conferred by the Constitution from decisions of the High Court to the Supreme Court prior to the establishment of this Court in October 2014 was not defined by Article 34.4.3, it may be assumed that it was intended that this right of appeal would be an effective one. As O'Higgins C.J. said in *The People (Director of Public Prosecutions) v. O'Shea* [1982] I.R. 384, 406:

> "If the Constitution confers on the [Supreme] Court a particular appellate jurisdiction, it may be assumed that it also confers the necessary powers to make that jurisdiction effective to remedy that which is complained of."

74. If, however, the scope of appellate review was to be confined to demonstrating that there had been an error of principle on the part of the trial judge, then, as was pointed out in *Lismore Homes,* this might have compromised the ability of the Supreme Court to do justice or to provide an effective remedy in any given case.

75. Second, the very structure and language of Article 34.4.3 pre-supposed that the right of appeal from the High Court to the Supreme Court would be a full appeal, subject only to limitations necessarily inherent in the appellate process. If it were thought desirable that the scope of that appeal should be restricted in some fashion then, as both Walsh and Budd JJ. pointed out in *Vella,* this would have to be done by means of legislation to the this effect enacted by the Oireachtas which sought to "regulate" that jurisdiction in the manner expressly permitted by Article 34.4.3. An *ex ante* limitation on the scope of that jurisdiction of the kind suggested in *Martin* requires to be imposed by legislation and not by judicial decision.

76. Third, in any event, as Geoghegan J. pointed out in *Desmond,* the decision to strike out proceedings could not properly be described as a discretionary decision in this sense. Questions such as whether, for example, the delay has been inordinate or inexcusable or whether the delay has been prejudicial to the defendant are mixed questions of law and fact, not presenting discretionary questions *as such.*

77. Fourth, the reason for any supposed restriction on the scope of appeal in this manner is not immediately apparent. There are, of course, limitations inherent in the appellate process, as any court hearing the appeal is denied, for example, the benefit of hearing and seeing witnesses, so that the court of trial is much better placed to assess credibility: see generally the judgment of Henchy J. in *Northern Bank Finance Co. v. Charlton* [1979] I.R. 149, 190-195.

78. Nevertheless, in cases of the present kind where the evidence is invariably set out on affidavit and where much generally turns on the documentary record, it is hard to suggest any reason why the merits of the High Court decision on this question should not be fully re-considered on appeal, given that this Court (or, as the case may be, the Supreme Court) will be in as a good a position as the court of trial to arrive at the appropriate conclusion: see, for example, the comments of McCarthy J. in *Jack O'Toole Ltd.* [1986] I.R. 277, 288. It is, of course, entirely accepted that the views of the trial judge will carry great weight. Yet if the interests of justice require that a different conclusion should be reached on appeal, it would be wrong and purely formalistic to suggest that that first instance should remain invulnerable to appeal simply because no error of principle was disclosed.

Conclusions on the scope of appeal

79. For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in *Lismore Homes,* namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.

Decision

80. In giving its decision the Court is mindful of the fact that the defendants' motion was heard in the course of a lengthy Monday Common Law List. It is accordingly acutely aware of the difficulty faced by any judge asked in such circumstances to assimilate all of

the material facts and then to correctly apply to those facts the relevant legal principles.

81. Having considered the submissions of the parties and the evidence that was before him when he made his decision, the court is satisfied that Cross J. fell into error when he concluded that the plaintiff had not been not been guilty of inordinate and inexcusable delay, a finding without which an application to dismiss on grounds of delay must fail. While he may well have engaged with counsel in relation to all of the delay since the commencement of the proceedings, the court is satisfied that when he came to make his decision he incorrectly focused entirely on the delay post dating the order of Quirke J. in December 2009 or alternatively attributed insufficient weight to a number of factors namely:

(i) the delay preceding the Order of 14th December 2009,

(ii) the conclusions of Quirke J. on that application and the nature of the order which he made,

(iii) the direction given by Quirke J. that the plaintiff should pursue her claim with expedition and

(iv) the fact that there were three separate periods of substantial delay post 14 December 2009.

82. The Court is also satisfied that, on the evidence, it was not open to the learned High Court Judge to excuse the delay subsequent to the 14th December 2009 by reference to the mistake on the part of the plaintiff's solicitor as to his understanding concerning the manner in which a date might be obtained for the trial of the action.

83. A brief analysis of the overall delay in these proceedings is warranted to explain the Court's conclusions.

84. Given that the complexity of the proceedings is a factor for the court, not only in considering whether or not delay is inordinate and inexcusable, but whether having regard to the importance of the issues raised, the balance of justice would favour allowing the action proceed, it is relevant to identify the particular claims being put forward by the plaintiff.

85. The first claim advanced on the plaintiff's behalf, relates to an assertion that she was maliciously harassed by members of An Garda Síochána who subjected her to a series of arrests on innumerable occasions between 1998 and 2000. She maintains that she has a claim for assault, battery and false imprisonment in relation to each of such events as are set forth in her statement of claim.

86. The second aspect of the plaintiff's claim relates to an alleged assault and breach of her right to bodily integrity arising from the fact that whilst in Garda custody she was, at the defendants' direction, allegedly and without justification subjected to an internal physical examination by a Dr. Maloney, in November 2000. Implicit in the plea relating to this claim is the fact that she did not consent to the procedure and that it had been represented to her that the defendants were entitled to remove her undergarments and carry out such an examination without her consent for the purpose of carrying out a drugs search.

87. The final claim made is one allegedly arising from negligence concerning the manner in which the aforementioned internal examination was conducted by Dr. Maloney, for whom she maintains the defendants are vicariously liable. She contends that he inserted a long probe like instrument in a manner that caused her internal bleeding and that this resulted in her receiving medical treatment at Clonmel hospital, where she was admitted some hours later.

88. From the evidence that was before the Court it is clear that the plaintiff had engaged a solicitor, at the very latest, by early January 2001 given that he wrote two letters on her behalf dated the 16th day of January and the 7th day of February 2001 setting out all of the complaints which later became the subject matter of the present proceedings. Further, as appears from the correspondence exhibited on this application, as of May 2001 the plaintiff's solicitor was in possession of all of his client's custody records which he had sought in a letter of 16 January 2001.

89. Against the aforementioned backdrop, it took a further two and a half years for the plaintiff to deliver what can only be described as the sparsest possible plenary summons. This was not issued until 16th July 2003. No further step was taken to advance the proceedings in 2004, 2005 or 2006. Then, on 1 June 2007, more than six years after the events complained of, the plaintiff's solicitors endeavoured to serve a statement of claim. Having had the service of that document rejected on the basis that no notice of intention to proceed had been served, it is remarkable that it was not served expeditiously following the service of a further notice of intention to proceed in September 2007. The statement of claim had still not been served two years later even though it was clearly available for service.

90. In circumstances where the statement of claim had not been delivered six years following the delivery of the plenary summons the defendants issued their first motion to dismiss the plaintiff's proceedings on the grounds of delay which was returnable for hearing in October 2009. It is hardly surprising that in light of the time that had elapsed between the events the subject matter of the claim and the bringing of that motion that Quirke J. came to the conclusion that the plaintiff had been guilty of inordinate and inexcusable delay. This was not a case in which the plaintiff had maintained that the delay in the delivery of the statement of claim had been because of the complexity of the proceedings or due to the fact that she had been frustrated or delayed, as often happens in more complex proceedings, due to any number of factors including the disappearance of witnesses, documents or the unavailability of expert evidence.

91. From the nature of the order made by Quirke J, whereby he actually dismissed the plaintiff's claim on terms that she deliver her statement of claim including full particulars by the 21st January 2010, it could not have been clearer that the court was resolute that no further delay would be tolerated. Indeed, it is not disputed that the trial judge actually stated as much when he warned that the plaintiff's claim had to be pursued thereafter with all due expedition.

92. Far from pursuing her claim with expedition, the plaintiff still had not brought her action to trial some two and a half years later when the defendants issued their second motion to dismiss her claim on the grounds of delay. The court is satisfied that this period of delay, when viewed against the backdrop of the earlier delay in the proceedings prior to the order of Quirke J can only be described as inordinate and inexcusable.

93. In respect of the aforementioned two and a half years, three significant periods of delay emerge. The first is a ten month delay in replying to a notice for particulars served by the defendants on 4th March 2010. In his effort to explain this delay, Mr. Fitzpatrick advised that he had received a draft reply to that notice from counsel on the 18 May 2010. However, because he was then advised by his client that she had suffered significant gynaecological problems and as a result would not be able to have children he wanted her to clarify with her doctor the cause of her condition prior to asserting any nexus between this state of affairs the assault of November 2000.

94. However, as counsel for the defendants pointed out in the course of his submissions, the defendant's notice for particulars had not raised any query concerning any injury sustained by the plaintiff. Accordingly, while Mr. Fitzpatrick may have wanted to investigate the potential nexus between the plaintiff's inability to have children and the assault, that does not provide a valid excuse, having regard to the earlier history of the proceedings, for failing to deliver the replies that were to hand in May 2010 until 18 January 2011, some eight months later.

95. The second period of delay relates to service of the notice of trial. In this regard, the defendants' solicitors, having received the replies to particulars the previous week, called for the service of a notice of trial by letter dated the 26th of January 2011. A further period of six months was allowed to elapse before the notice of trial was ultimately delivered on the 21st July 2011. While at para. 13 of Mr. Fitzpatrick's affidavit of the 19th July 2012 he maintained that his client had at all times remained anxious to pursue her claim and had been available to render assistance and deal with any enquiries in relation thereto, the timeline of the proceedings would suggest otherwise.

96. Finally, there is a 10 month period of delay between the service by the plaintiff of the notice of trial on 21st July 2011 and the 23rd May 2012 when the defendants issued their second motion to dismiss the claim on grounds of delay.

97. Mr. Fitzpatrick sought to excuse this period of delay by reference to his misunderstanding as to the procedure which pertained for obtaining a date for a jury action. He stated that he thought that the procedure was the same as that which applies in a personal injuries action; namely that an application is made to the judge in charge of the personal injuries list when one is ready to seek a date. He did not understand that this, being a jury action, would be listed, following the service of the notice of trial, in the next jury list fixed dates. This is why nobody attended on the plaintiff's behalf when the case was struck out for non-attendance at the call over of such list in October 2012.

98. While Mr. Fitzpatrick complains that the defendants solicitors had not appraised him of the fact the notice of trial was struck out for non attendance - a sentiment with which this Court is sympathetic - he nonetheless fails to explain in his affidavit why, at no stage, during the ten month period prior to the issue by the defendants of their second motion to dismiss the claim, he had made no application to obtain a date for the trial of the action. While in the course of the hearing on this appeal is was mooted that counsel's advice on proofs was outstanding as a potential reason for why no date had been obtained for the action, there is no mention of this fact at all in Mr Fitzpatrick's affidavit notwithstanding the fact that in respect of other periods of delay he refers to his engagement with counsel.

99. It is, of course, completely understandable that a solicitor might not understand the procedure for obtaining a date for a jury action, particularly given that such actions are not regularly dealt with otherwise than by specialist practitioners. However, the fact that the notice of trial was struck out is somewhat of a red herring as the plaintiff took no step to obtain a date for the hearing between the date of the service of the notice of trial and the issue of the defendants' second motion.

100. There is authority for the proposition that where a plenary summons is issued close to the expiration of the limitation period provided for the bringing of a particular type of claim, that there is an onus on that plaintiff to proceed with greater diligence or with more expedition than had they commenced the proceedings at an earlier date. As Henchy J. said in *Sheehan v. Amond* [1982] I.R. 235:

> "…when the period of limitation for instituting proceedings has been all but allowed to expire, a plaintiff's solicitor should thereafter be astute to ensure that he is not dilatory in regard to any of the further procedural steps that are necessary to avoid the taint of prejudicial delay."

101. By analogy, it would seem to follow that where a plaintiff has already been found culpable in respect of inordinate and inexcusable delay and a court is later asked to consider a complaint of further delay, what might be considered excusable in terms of delay must be viewed through the prism of the court's earlier findings and directions.

102. The delay in the prosecution of this claim is hard to understand or excuse. On any analysis, this claim is not a complex one. Counsel for the plaintiff has accepted that this is so. It is a claim which effectively rests upon the credibility of the plaintiff's own evidence when compared to the evidence that may be advanced by the defendants in relation to certain specified events. Such records as the plaintiff identified that she needed to pursue her claim were forwarded by the defendants to her solicitor in May 2001 and the relatively straightforward nature of this claim is perhaps evidenced by the fact that no formal application for discovery has ever been pursued by the plaintiff. Further, she has not considered it necessary to seek any particulars arising from the defence which was delivered by the defendants on 12 October 2010.

103. It is also, in this Court's view, extremely material that every reason advanced to excuse the delay in these proceedings, relates to matters concerning the plaintiff and her own advisors. This is not a case where the plaintiff maintains that her inability to pursue the action has been thwarted by the actions of the defendants or those of third parties such as witnesses as to fact or expert witnesses. Further, from the affidavit of Mr Fitzpatrick it is clear that the plaintiff has at all times, at least since the order of Quirke J. in December 2009 been available to give instructions in relation to her claim.

104. Finally, it is probably worthy of comment that at no stage subsequent to the order of Quirke J. did the plaintiff at any stage write to the defendants solicitors indicating that they were encountering any difficulties in progressing the case for trial.

105. Overall, Mr Fitzpatrick has failed to satisfy this court that Cross J. had evidence before him sufficient to conclude that the totality of the delay in the proceedings was anything other than inordinate and inexcusable. This is particularly so in light of the fact that some 2 ½ years previously Quirke J had already come to that conclusion.

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. 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.

108. Having considered the affidavit of Ms. Duchene, the court is satisfied that the defendants have established that they would have been significantly prejudiced in their ability to defend all claims arising out of the events of November 2000 if this action had been allowed to proceed to trial, as was intended by Cross J.

109. 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 noting 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. He is not in a position to give any evidence as to how the procedure was preformed, the condition of the plaintiff during that procedure or as to the environment in which the same was carried out. Further, he could have nothing to offer in terms of evidence on the issue as to whether or not the procedure was carried out with or without the plaintiff's consent or the circumstances in which any purported consent was obtained.

110. The court rejects the inference that it was asked to draw from the fact that at the time they brought their first application the defendants were not aware of Dr. Maloney's death that he was not viewed as an essential witness. At the time that motion was issued a statement of claim had not been delivered by the plaintiff and in those circumstances it would be unrealistic to have expected that the defendant's solicitors would necessarily have been in contact with Dr. Maloney. Further, the fact that Ms. Duchene in her affidavit makes it clear that she only found out about Dr. Maloney's death when she sought to contact him to ascertain his availability for the trial would support the defendant's contention that he was advised as an essential witness for the defence of the claim. The Court is therefore satisfied that the delay by the plaintiff in prosecuting her case was causative of the prejudice contended for by the defendants at the hearing before Cross J.

111. 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. From the earliest of times the defendants made it clear that they expected that the rules of court would be complied with. They sent back the first statement of claim delivered in 2007 because it was not delivered further to the service of a valid notice of intention to proceed. Further, by its conduct in bringing the first motion to dismiss before the court in December 2009 they made it abundantly clear that there were not prepared to acquiesce in the plaintiff's delay in advancing her claim. The defendants, moreover, as referred to in Ms. Duchene's affidavit, delivered their defence on 12th October 2010 notwithstanding the fact that they had not at that time received a reply to their notice for particulars which had been raised on 4th March 2010. Further, they had pursued the plaintiff's solicitors for replies to the notice for particular by warning letters delivered on 24th November 2010 and 13th January 2011. In addition, having received the replies to particulars the defendants, by letter dated 26th January 2011, called upon the plaintiff to serve her notice of trial which was not then delivered until 21st July 2011.

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. 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.. 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.

114. Accordingly, having reconsidered all of the evidence before the High Court judge and having given due weight to his conclusions, this court is satisfied that the within proceeding must be dismissed and we will therefore allow the appeal.