



THE COURT OF APPEAL

Irvine J.

Mahon

Edwards J.

Appeal No.: 2014 232

[Article 64 Transfer]

Between

Dolores Mannion

Plaintiff

- and -

Padraig Brennan and Padraig Colum Ferry, practising under the style and title of Ferrys, and the Legal Aid Board

Defendants

Judgment delivered on 1st day of June 2016 by Mr. Justice Mahon

1. This is the plaintiff's (Ms. Mannion) appeal against Orders of the High Court made on 22nd November 2010 (Hanna J) and 1st December 2010 (Kearns P.) dismissing her action as against the third named defendants (the Legal Aid Board), by reason of her inordinate and inexcusable delay. Similar orders were also made in favour of the first and second named defendants, but this appeal proceeds only in relation to the orders made in favour of the Legal Aid Board.

2. The order of Hanna J. provided for a stay on his order dismissing the proceedings "*to 1st December 2010 and the trial judge assigned to the hearing of the action or further order of the Court*". In due course the matter came before Kearns P. on 1st December 2010, whereupon, on being informed by the plaintiff that she was not in a position to proceed with the hearing of the action on that date, he made an order dismissing the proceedings in accordance with the order of Hanna J. The plaintiff was also ordered to pay the defendants' costs, including all or any reserved costs.

3. It is acknowledged that the purpose intention and practical effect of Hanna J.'s order of 22nd November 2010 was to provide a final opportunity to the plaintiff to proceed with the hearing of her case on 1st December 2010, and failing doing so, the proceedings would stand dismissed for want of prosecution, as in fact occurred on that date. The plaintiff confirmed that she was not in a position to proceed with the hearing of the action on 1st December 2010.

The background facts

4. These proceedings were aptly described by Hardiman J. in his judgment of 26th February 2010 in related judicial review proceedings as having "*a long and tortuous history*".

5. The plaintiff purchased an apartment in Tralee, Co. Kerry in 1989. Subsequently, the plaintiff maintains that serious problems were identified in relation to the property and to its management company, and she instructed the first and second named defendants to represent her in proceedings against the vendor of the apartment and the solicitors engaged by her in relation to its purchase in August 1994. Those proceedings came on for hearing in the Circuit Court in Tralee in July 1998. The plaintiff was awarded damages of IR£8,750 as against the vendor, but the case against her solicitor was dismissed. These orders were appealed to the High Court, but that appeal was withdrawn by the plaintiff by letter dated 6th October 1999.

6. The plaintiff was unhappy with the outcome of Circuit Court proceedings, and on the 1st March 2001 she instituted proceedings in the High Court by way of Plenary Summons as against the first and second named defendants arising from their representation of her in the Circuit Court proceedings, and as against the third named defendant, the Legal Aid Board, arising from its involvement with her in relation to the said proceedings. In the prayer of her Statement of Claim, the plaintiff claims as against all defendants, damages for negligence of personal injuries in breach of contract and breach of duty.

7. While her proceedings as against the Legal Aid Board relate to its representation of the plaintiff in the Circuit Court proceedings, in 2005, she applied to the Legal Aid Board for legally aided representation in relation to her action against the Legal Aid Board.

8. Because the plaintiff had instituted proceedings against the Legal Aid Board, she objected to the decision of the Legal Aid Board to appoint one of its own solicitors to deal with her application for legal aid assistance. In this respect, the appellant was granted leave to seek judicial review by Peart J. on 23rd December 2006. *Inter alia*, the relief she sought in these proceedings was a declaration that in failing to assign an independent solicitor to process her application for free legal services, rather than a solicitor employed by the Legal Aid Board, the Legal Aid Board was acting contrary to the principles of constitutional justice and fair procedures, contrary to the provisions of the Legal Aid Act 1995, and contrary to the plaintiff's constitutional rights and her rights pursuant to Article 13 and 14 of the European Convention on Human Rights, and was acting contrary to its statutory duty.

9. The judicial review proceedings duly came on for hearing in the High Court before McGovern J. and were dismissed by him on 7th December 2007. The plaintiff appealed against the judgment of McGovern J., and that appeal was dismissed by the Supreme Court on 26th February 2010.

The grounds of appeal in this court

10. The plaintiff's grounds of appeal as per the amended notice of appeal dated 10th December 2010 are:-

- (i) That the trial judge erred in law and/or in fact by prematurely dismissing the above entitled case before 1st December 2010, that being the date allocated by the High Court for its hearing.
- (ii) That the trial judge erred in law and/or in fact by failing to take proper account of the circumstances which caused the delay in the processing of the applicant's case in the above entitled matter. The respondents had ample time to put their case; (the plaintiff) had little time to offer a defence.
- (iii) That the statement of claim in the above entitled matter was not submitted to the High Court for the hearing of the motion for dismissal. Many relevant "books of pleadings" documents were absent.
- (iv) That the exhibit of Mr. Patrick McGonigal does show that there was discord between (himself and the plaintiff) but does not show the reason for that discord.
- (v) The (plaintiff) refers to the exhibit of Mr. McGonigal dated 2nd June 1995 and says that although he states that he had set her case down for trial, he had not done so. At the time, I felt compelled to complain to Ms. Linda Kirwin of the Law Society and asked her to intervene. (The plaintiff) distinctly remembers weeping through a telephone conversation with her such was her frustration. Mr. McGonigal had had her file since April 1993 and had not always been truthful with her.
- (vi) That (the plaintiff) had always been on extremely good terms with the clerical staff of Ferrys and found them to be consistently very courteous. Equally I always treated them with the same courtesy.
- (vii) That (the plaintiff) had an excess of written evidence against Ferrys and the Legal Aid Board showing gross negligence and questionable behaviour causing great distress to the (plaintiff).
- (viii) That regardless of anyone's recollection of this matter, the fact and the law can be clearly demonstrated by reading the existing documentation relating to it.
- (ix) That further to the ruling of a Supreme Court judicial review, I applied to the Legal Aid Board for assistance to bring my case to trial. As suggested by Judge Hardiman, I initially applied to the Tallaght Law Centre. They returned my application. I applied to North Brunswick Street in June 2010; they sent it to the County Mayo Law Centre, Castlebar. The managing solicitor at Castlebar manipulated my position into one of vulnerability and tried to leverage (the plaintiff) into a situation whereby her case would have been compromised. This man could have prevented her case being dismissed; he did not.
- (x) That the Legal Aid Board and the High Court are largely responsible for the hearing of my case.
- (xi) That the respondents, the Legal Aid Board and Ferrys Solicitors took full advantage of the very vulnerable legal position I was in at the time of dismissal.
- (xii) (The plaintiff) was extremely unwell and had problems with her vision.
- (xiii) That (the plaintiff) intends to exhibit documentation in support of her appeal.

The history of these proceedings

11. The history of the important events in these proceedings is as follows:-

- 1st March 2001: The plaintiff issues the plenary summons. Her solicitors are Brophys Solicitors.
- 3rd May 2001: An appearance is entered on behalf of the first and second named defendants (Ferrys Solicitors).
- 4th May, 2001: An appearance is entered by the Legal Aid Board.
- 28th June 2001: A notice of motion to dismiss for want of prosecution is served on behalf of the first and second named defendants.
- 19th July 2001: A motion to dismiss the proceedings for want of prosecution is struck out with costs awarded to the first and second named defendants. An order is made extending the time for the plaintiff to deliver a Statement of Claim.
- 16th October 2001: A Statement of Claim is delivered, some seven and a half months after the issue of the Plenary Summons.
- 7th January 2002: The plaintiff serves a Notice of Change of Solicitor. Her new solicitor is Dockrell Farrell.
- 24th January 2002: The plaintiff's solicitor writes to the defendants indicating her intention to apply for an early hearing date.
- 4th June 2002: The plaintiff serves additional particulars of negligence.
- 18th July 2002 The plaintiff brings a motion for judgment in default against the defendants in default of defences.
- 11th September 2002: The Legal Aid Board delivers its defence, some eleven months after service of the Statement of Claim.
- 26th November 2002: Notice for Further Particulars is served on behalf of the first and second named defendants.
- 2nd December 2002: The plaintiff's motion for judgment in default of defence as against the Legal Aid Board is struck out on consent.

10th January 2003: A defence is delivered on behalf of the first and second named defendants, some fifteen months after service of the Statement of Claim.

4th April 2003: The plaintiff replies to the Notice for Further Particulars served by the first and second named defendants.

30th September 2003: A Notice of Trial is served by the plaintiff.

9th October 2003: The plaintiff files a Certificate of Readiness. The listing of the case is adjourned from time to time before being listed for hearing on 18th November 2004.

17th October 2003: A Notice for Further and more detailed particulars is served on behalf of the Legal Aid Board, some twelve months after delivering its defence.

30th March 2004: The plaintiff replies to the request for further and more detailed particulars from the Legal Aid Board.

14th April 2004: An amended defence is delivered by the Legal Aid Board, some six months after its Notice for Further Particulars.

12th July 2004: Dockrell Farrell Solicitors are permitted to come off record, and on 4th October 2004, John L. Quinn Solicitor comes on record for the plaintiff.

4th November 2004: The plaintiff applies for legal aid to the Legal Aid Board and thereafter requests the appointment of an independent solicitor from the private sector to represent her in relation to her action against the Legal Aid Board.

12th November 2004: The plaintiff successfully applies to adjourn the hearing of the action scheduled for 18th November 2004.

15th November 2004: Paul Madden and Co. Solicitors come on record for the plaintiff in place of John L. Quinn Solicitor.

31st March 2005: The Legal Aid Board confirms that the plaintiff has been appointed a solicitor from within its organisation, and that there is no panel of independent solicitors available for use by her.

26th May 2005: The plaintiff is informed that the Legal Aid Appeal Committee has upheld the decision to grant her legal aid as of 19th May, with representation from within its own organisation.

10th August 2005: Madden and Co. Solicitors come off record for the plaintiff by order of the court.

18th August 2005: The plaintiff issues a Notice of Motion seeking to join the Minister for Justice and the State as parties to the action.

11th October 2005: The application to join the Minister for Justice and the State is refused by the Master of the High Court.

8th December 2005: The order of the Master of the High Court is appealed to the High Court, and the High Court upholds the decision of the Master of the High Court.

April 2005 to January 2006: The plaintiff engages in correspondence with the Legal Aid Board in relation to obtaining the services of an independent solicitor.

14th November 2005: The plaintiff is written to by the Legal Aid solicitor, Mr. Liam de Feu, in relation to her application for leave to issue judicial review proceedings against the Legal Aid Board.

December 2005: The plaintiff appoints Mr. Ken Smith, solicitor, to represent her in relation to her judicial review proceedings against the Legal Aid Board.

23rd January 2006: The plaintiff is granted leave to seek judicial review as against the Legal Aid Board. This occurs some fourteen months after the initial hearing date for her substantive action against the defendants.

27th October 2007: McGovern J. dismisses the plaintiff's judicial review proceedings.

7th December 2007: McGovern J. delivers his reserved judgment.

May 2008: Mr. Ken Smith comes off record in relation to the judicial review proceedings.

26th February 2010: In a judgment delivered by Hardiman J., the Supreme Court affirms the decision of the High Court dismissing the plaintiff's judicial review proceedings against the Legal Aid Board.

18th March 2010: The first and second named defendants threaten to bring a motion against the plaintiff to dismiss her proceedings for want of prosecution because of delay.

20th July 2010: The Legal Aid Board seeks a hearing date.

31st July 2010: The plaintiff submits an application for legal aid to the Brunswick Law Centre.

29th September 2010: The plaintiff is advised by the Legal Aid Board that her representation will be dealt with by the Mayo Law Centre. The plaintiff has her first consultation with the Mayo Law Centre solicitor, Mr. O'Mahony, on 14th October 2010.

21st October 2010: The first and second named defendants issue a Notice of Motion to Dismiss the proceedings for want of prosecution because of delay.

5th November 2010: The Mayo Law Centre solicitor, Mr. O'Mahoney, advises the plaintiff to seek an adjournment of the hearing of her case as she is awaiting the outcome of an application to the Legal Aid Board for representation.

10th November 2010: A Notice of Motion is issued by the Legal Aid Board seeking the dismissal of the plaintiff's proceedings for want of prosecution because of delay.

22nd November 2010: Application to dismiss for want of prosecution is heard by Hanna J. The matter is, in effect, put back to 1st December 2010 when Kearns P. dismisses the proceedings for want of prosecution because of delay.

10th December 2010: The plaintiff lodges a Notice of Appeal to the Supreme Court in relation to the orders of Hanna J. and Kearns P..

26th February 2016: The plaintiff's appeal is heard by the Court of Appeal and judgment is reserved.

The judgments of Hanna J. and Kearns P.

12. Unfortunately transcripts are unavailable in respect of either judgment. In relation to the hearing before Hanna J. on 22nd November 2010 there is a "Note" of what transpired in court on that day, and a "Draft Note of Judgment". It does not appear to be an agreed note of the judgment, or the reasons therefore. The penultimate paragraph of the "Note" purports to indicate what Hanna J. intended when he made an order to dismiss the plaintiff's proceedings for want of prosecution subject to the stay which he granted until 1st December 2010. It states:-

"The plaintiff is obsessed by her case, and the defendants had the right to have the case held expeditiously. A colleague of his, Mr. Justice O'Neill, had indicated that she was on her last chance. This was something he could not disregard. He said he was satisfied that the delay was inordinate and he has not heard an excuse. Mrs. Mannion is on her own. She has not had a good strike rate with solicitors. No doubt, she is completely convinced about her own position. However the court rooms are bulging with other people prepared to run their cases themselves. She was in the last chance saloon and he was prepared to make an order on the terms of the Notice of Motion but impose a stay, that if on 1st December she sought to prosecute these proceedings or if she convinced the judge that she was entitled to one further chance, then the judge on 1st December could extend the stay."

13. In relation to the decision of Kearns J. on 1st December 2010, there is a sparse "Note of Judgment by Plaintiff". Again, it does not appear to be an agreed note of the judgment. In any event it states, in part:-

"The applicant indicated to the court that she was not in a position to proceed with the hearing of the action on that day as she had no one to represent her... Kearns P. indicated that she would have to appeal to the Supreme Court."

14. The central issue in this appeal is the undoubted delay, and the extent of that delay, in the processing of these proceedings since their commencement approximately fifteen years ago. For the purposes of examining the history of the proceedings in the context of the appeal it is suggested by the plaintiff that their duration should be considered by reference to three separate time periods, namely:

- (i) March 2001 to March 2005
- (ii) March 2005 to February 2010
- (iii) March 2010 to December 2010

15. The exercise of closely examining specific time periods for the purposes of identifying activity within each in order to establish if there was undue delay, and if there was, the party or parties responsible for such delay, is useful. It is of course also appropriate to consider the overall delay in the processing of a claim from the date of the cause of action, having regard to its complexity, and indeed, pre-commencement delay.

16. However, ultimately, the court must, in accordance with the principles set out in *Primor v. Stokes Kennedy Crowley* [1996] 21.R.459, decide whether the overall delay should be considered inordinate and inexcusable. It is only if the court's answer to both of these questions is in the positive that it has to decide, in accordance with the third leg of the *Primor* test, whether the balance of justice warrants the dismissal of the proceedings in light of that delay. However, in deciding where the balance of justice lies the court is obliged to consider, *inter alia*, the conduct of the defendant, including its responsibility for any part of that delay. However, as it is convenient, I will at this juncture express my views as to the responsibility of the respective parties for the delay over these three periods.

17. Adopting the approach suggested by the plaintiff, the position is as follows. In general terms, there have been delays experienced in litigation in the High Court over the past fifteen years or so, and certainly during the period 2000 to 2010, through no fault of parties to that litigation. Litigation is, by its nature, slow moving and cumbersome, as it necessarily involves compliance with rules and regulations. The greater the complexity of an action, the longer will be those delays. It is nevertheless obligatory on every party to proceedings to participate in same with reasonable haste.

March 2001 to March 2005:-

18. Within this first four year period commencing with the issue of the Plenary Summons, there were undoubtedly significant periods of delay, including, in particular, the following:-

- The seven and a half months it took to deliver the Statement of Claim. This delay was entirely that of the plaintiff.
- The periods of eleven months and fifteen months it took for the Legal Aid Board and the first and second named defendants to deliver their defences. These delays were principally the responsibility of the defendants. The plaintiff could nonetheless have motioned the defendants to procure an earlier delivery of their respective defences.
- The service, some twelve months after the delivery of its defence, by the Legal Aid Board of a Notice for Further Particulars. It was served after the plaintiff had obtained a hearing date for the 18th November 2004. The responsibility for this period of delay rests primarily with the Legal Aid Board.

- Six months later, on 12th April 2004, an amended Defence is delivered by the Legal Aid Board.

19. It is reasonable to conclude that responsibility for much of the delay in the prosecution of the proceedings prior to mid-2004 must rest with the Legal Aid Board. In any event, had the hearing of the action materialised on its scheduled hearing date of 18th November 2004, some three and a half years after the commencement of the proceedings, there would have been no basis for complaints of delay. It is also noteworthy that by the end of this three and a half / four year period the plaintiff was represented by her fourth solicitor.

20. I am satisfied that such delay as may be attributed to the plaintiff over this period was not inordinate.

March 2005 to February 2010

21. This second period is largely taken up by the plaintiff's unsuccessful attempts to join the Minister for Justice and Equality, and the State as parties to the proceedings, and the unsuccessful judicial review application in both the High Court and the Supreme Court. The Legal Aid Board submit that this period of almost five years was a period of significant delay, and a delay in which they share no responsibility, and which was in all the circumstances inordinate. I agree with that submission.

22. Was this inordinate delay excusable? On 9th October 2003, the plaintiff filed a Certificate of Readiness. The listing of the case was then adjourned from time to time, before being listed for hearing on 18th November 2004. It was listed on the basis that the case was ready to be heard. However, approximately one week prior to the scheduled hearing date, the plaintiff applied to adjourn the case. Within the three to four month period prior to the plaintiff's application to take the case out of the list for 18th November 2004, the plaintiff changed solicitors, with J.L. Quinn Solicitor coming on record on 4th October 2004. On 4th November 2004 the plaintiff applied to the Legal Aid Board for the appointment of an independent solicitor from the private sector to represent her in relation to her proceedings against the Legal Aid Board.

23. Over the next twelve months or so, up to the end of 2005, further changes of the plaintiff's legal representation took place and two further solicitors were appointed, one to replace the other. During this period the plaintiff applied unsuccessfully to join the Minister for Justice as a party to the proceedings and she also engaged with the Legal Aid Board in relation to the issue of the appointment of a solicitor to represent her in relation to her action against the Legal Aid Board.

24. Other than being granted leave to seek judicial review as against the Legal Aid Board on 23rd January 2006, nothing else of significance occurred in relation to the proceedings in the year 2006. In 2007, the judicial review proceedings were dismissed. In 2008 the plaintiff's then solicitor, Mr. Ken Smith, came off record. In 2010 the plaintiff's appeal against the decision of the High Court dismissing her judicial review proceedings was itself dismissed by the Supreme Court. On 20th July 2010 the Legal Aid Board sought a hearing date for the case.

25. Towards the end of 2010 the Legal Aid Board brought a motion to dismiss the plaintiff's proceedings for want of prosecution because of delay.

26. While undoubtedly during this approximately five year period more might have been done by the Legal Aid Board in order to bring these proceedings to a conclusion. It is evident that the greater responsibility for this five year delay must rest with the plaintiff. This five year delay has to be considered against a background of the four year delay between 2001 and 2005 and also the considerable pre commencement delay. In these circumstances the plaintiff was under a duty to prosecute her proceedings with due diligence at all times, but certainly during the period 2005 and 2010.

27. I am satisfied therefore that the period during this second approximate five year period up to February 2010 was both inordinate and inexcusable.

March 2010 to December 2010

28. Much of this third period appears to have been taken up with the plaintiff's efforts to secure legal aided representation from the Legal Aid Board. Because of the efforts by the Legal Aid Board to create and maintain what was in effect a Chinese wall given its dual involvement in the proceedings, that is as a party to the proceedings, and as the statutory provider of legally aided representation to the plaintiff, in the same proceedings. During this period of eighteen months the plaintiff was required to deal with, initially Tallaght Law Centre, then Brunswick Law Centre and finally the Mayo Law Centre in Castlebar, a scenario which understandably presented some practical and logistical difficulties for her as a Dublin based plaintiff. Regardless of such difficulties, this period of delay cannot be blamed on the defendants.

29. The delay in this period was undoubtedly, also, inordinate and inexcusable. However, it is a relatively short period in the overall life of these proceedings and for the reasons explained below does not provide in itself a basis for the dismissal of the proceedings for want of prosecution.

The legal principles

30. The principles governing the exercise of the jurisdiction to strike out on the grounds of inordinate and inexcusable delay are well established. As already referred to, they were set out at length by the Supreme Court in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and in a number of other decisions of the Superior Courts. *Primor* set down a three pronged test, namely:-

(i) Was the delay inordinate?

(ii) If so, was the delay inexcusable?

and

(iii) Even if the answer to these two questions is in the affirmative, does the balance of justice require the proceedings to be dismissed.

31. In *MC v. Provinciate* [2015] IECA 74, Irvine J. observed:-

"It is clear from this decision that the third leg of the Primor test requires the court to carry out a balancing exercise in the course of which it will put the interests of each of the parties and their conduct into different sides of a scales for the purpose of deciding whether the balance of justice favours allowing the case to proceed to trial. In this regard it is to be noted that one of the factors that may go into that scales is whether the delay relied upon gives rise to a real risk that it is not possible to have a fair trial."

32. As already stated in this judgment, yet another factor that must be considered by the court when seeking to ascertain where the balance of justice lies, is the extent to which the defendant was culpable in respect of any portion of the delay which the court determined to be inordinate and inexcusable.

33. Undue delay in concluding proceedings should be avoided if at all possible. Justice delayed is justice denied, not just for a plaintiff, but also for a defendant. In *O'Domhnaill v. Merrick* [1984] 1.R. 151, Henchy J. made the following remarks:-

"While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant, who has not in any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial."

Balance of justice

34. Having found that the plaintiff was guilty of inordinate and inexcusable delay it is necessary to consider the final leg of the *Primor* test; namely, whether the balance of justice favours dismissing the claim or allowing it to proceed to trial notwithstanding the delay so found.

35. One of the questions which a court is obliged to consider when dealing with the issue of the balance of justice is whether or not a defendant has been prejudiced as a consequence of the delay. Various reasons may give rise to prejudice for a defendant, including the non availability of important witnesses because of death or emigration, destruction of documentation, lack of or reduced recollection because of the passage of time or a belief that the proceedings have been long since abandoned. Even where witnesses are still available to give evidence, the quality of such evidence may have deteriorated because of the passage of time. In *Manning v. Benson and Hedges* [2005] 1 ILRM 180, 208, Finlay Geoghegan J. remarked that:-

"Delays of four to five years as a matter of probability will reduce the potential of such witnesses to give meaningful assistance or to act as a witness."

36. Only moderate prejudice needs be established, as suggested by Kearns J., (as he then was), in *Stephens v. Flynn Limited* [2008] IESC4. In the course of his judgment, Kearns J., (as he then was), summarised the findings made by Clarke J. in that case in the court below as follows:-

"In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the defendant in exercising his right to apply for the dismissal of the action for want of prosecution."

37. In a judgment in this court delivered on 3rd March 2015, in the case of *Gorman v. The Minister for Justice, Equality and Law Reform and Others*, Irvine J. commented as follows:-

"In terms of looking at where the balance of justice lies in this case it is important to recognise that in dismissing this plaintiff's claim the decision of the High Court has the effect of ending his constitutional right of access to the courts. However that is not an unqualified right, and is one which must be balanced against the right of the defendants to protect their good name as is their entitlement under Article 40.3.2 of the Constitution. These constitutional obligations presuppose that litigation will be conducted in a timely fashion."

38. In this case there is little evidence that the Legal Aid Board will suffer prejudice of any consequence in the event that the plaintiff's action against it is permitted to continue. The case against the Board is in respect of professional negligence concerning the manner in which it represented the plaintiff's interest in her earlier circuit court proceedings which were listed for hearing in the Circuit court in 1998. As a statutory board, they have access to all their own historical correspondence and records. There is no suggestion that the plaintiff's file in respect of these proceedings is no longer available or that for any reason it is not in a position to retain an expert to give evidence to the court as to whether or not it complied with its obligations as the solicitor acting on behalf of the plaintiff at the relevant time. If it were so, such prejudice would undoubtedly have been set out by Mr Peter O'Reilly, solicitor, in his grounding affidavit of 19 November 2010. This is not a case that appears to be particularly witness dependant from the perspective of the Legal Aid Board.

39. Reference is made by the Legal Aid Board's solicitor, Mr. O'Reilly, in his aforementioned affidavit to the fact that a Legal Aid Board solicitor, Mr. Griffin, who had represented the plaintiff in the Circuit Court action died in 2003. However, he does not aver that the late Mr. Griffin was an essential witness without whom a fair trial cannot be secured. Furthermore, Mr. Griffin died in 2003, just two years following the institution of the High Court proceedings, so that such prejudice as might result from his absence as a witness at this point in time was equally a factor at a very early stage in the proceedings, and at a time when a delay issue could not reasonably have been a factor.

40. It is also noteworthy that the process of applying to dismiss the proceedings because of delay was not instigated by the Legal Aid Board. As is apparent from Mr. O'Reilly's affidavit, the Legal Aid Board in effect tagged on to the application to dismiss brought by the other defendants (who are no longer parties to this appeal), merely adopting the reasons articulated by those defendants.

41. I am satisfied that the balance of justice marginally favours the continuance of the proceedings notwithstanding that there has been inordinate and inexcusable delay on the plaintiff's behalf.

42. I would therefore allow the appeal, but on the basis that a suitable undertaking will be given to the Court by or on behalf of the plaintiff that these proceedings will now be processed with considerable haste.