

## THE HIGH COURT

[2015/3149 P.]

BETWEEN

JOHN FINTAN FANNING

PLAINTIFF

AND

PUBLIC APPOINTMENTS SERVICE, IRELAND

AND

THE ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Ms. Justice Reynolds delivered on the 10th day of July, 2019.**

1. In the within proceedings, the defendants have issued two motions against the plaintiff, the first of which is to strike out the plaintiff's claim for failure to deliver a statement of claim within the time permitted by the Rules of the Superior Courts. In the second motion, the defendants seek a declaration that the plaintiff's claim relating to non-disclosure of an anonymous letter dated the 13th of August, 2014 was brought outside the time limit applicable to such a claim by way of analogy to judicial review proceedings under Order 84 of the Rules of the Superior Courts.

**Background**

2. In the proceedings, the plaintiff seeks a number of declaratory reliefs to the effect that the process of recruiting and appointing two Deputy Commissioners of An Garda Síochána in or about March 2015 was in breach of, *inter alia*, his legitimate expectation and his constitutional right to fair procedures. The plaintiff also takes issue with the nature of the questions asked of him by the interview panel and seeks further ancillary relief.

3. The proceedings issued by way of plenary summons on the 23rd of April, 2015. An appearance was entered on the 27th of April, 2015, by the defendants herein.

4. The plaintiff also issued a motion seeking interlocutory relief restraining the continuation of the recruitment process pending the outcome of his proceedings. That application was unsuccessful and in the course of delivering his judgment, Keane J. noted that the plaintiff had failed to deliver a statement of claim.

5. Since that time, the plaintiff has engaged in correspondence with the first named defendant seeking records relating to the recruitment process under the Freedom of Information Act 2014. The plaintiff appealed a refusal to disclose certain records to the Information Commissioner and in a decision dated the 1st of July, 2016 the plaintiff was partially successful in that regard.

6. In November 2016, the plaintiff sought additional records from the first named defendant, which request was partially granted. Again the plaintiff sought a review in relation to the refusal to disclose certain records. By decision dated the 9th of November, 2017 the plaintiff's application was unsuccessful.

7. Thereafter, the plaintiff engaged in further correspondence with the first named defendant seeking additional information and failed to deliver a statement of claim.

8. On the 6th of March, 2018 the defendants issued a motion seeking to strike out the plaintiff's claim for failure to deliver a statement of claim and/or for failure to prosecute his case with due expedition.

9. The motion was returnable to the 13th of April, 2018. On the previous afternoon, the plaintiff's solicitor delivered the statement of claim in which a claim of conflict of interest and/or a breach of fair procedures relating to the non-disclosure of an anonymous letter dated the 13th of August, 2014 was made by the plaintiff for the first time.

10. On the 8th of June, 2018 the defendants issued a second motion seeking an order striking out this aspect of the statement of claim.

**First Motion**

11. By letters dated the 6th of April, 2016, 19th of April, 2017 and 6th of December, 2017 the defendants' solicitors wrote to the plaintiff's solicitors consenting to the late delivery of the statement of claim and advising of the possibility of the within motion in the event that no statement of claim was received.

12. On the 6th of March, 2018 the defendants issued a motion seeking to strike out the plaintiff's claim for failure to deliver a statement of claim and to prosecute the claim with due expedition. Moreover, the defendants contend that they have been prejudiced in their defence by reason of the delay in prosecuting the claim herein and rely on the following matters in this regard:

(a) The appointments made in the impugned 2015 competition remain the subject of proceedings and the reputation of the first named defendant and of the interview board remain under suspicion.

(b) Potential witnesses would be obliged to recollect what occurred at an interview conducted almost three years ago and any further delay can only be expected to diminish that recollection.

(c) One of the four members of the interview board has unfortunately passed away.

(d) Considerable resources have been required to deal with the very significant number of FOI and data protection requests made by the plaintiff to date.

13. In all the circumstances, the defendants contend that the plaintiff's delay in prosecuting his case is inordinate and inexcusable.

14. On the 12th of April, 2018 the day before the motion was returnable before the Court, the plaintiff's solicitor delivered the statement of claim.

#### **Principles governing delay in applications to dismiss**

15. The law in relation to delay is well settled. The legal principles to be applied were set out by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and can be summarised as follows: -

(1) The Court must first consider whether the delay complained of was inordinate and inexcusable, with the onus resting on the party seeking dismissal of the proceedings to establish such delay.

(2) Even where the delay has been inordinate and inexcusable, the Court must exercise its discretion to consider whether the balance of justice was in favour of allowing the case to proceed.

16. It is notable that Finlay P. observed that any delay on the part of the defendants in seeking a dismissal of the action may be an "ingredient" in the exercise by the Court of its discretion.

17. The *Rainsford* principles were approved and expanded upon by the Supreme Court. in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Hamilton C.J., having reviewed the relevant authorities, summarised the principles to be applied 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 a 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 judgment 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 are 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 weight to be attached to such conduct depending upon all the circumstances of the particular case,*

*(vi) whether the delay gives rise to a 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 a defendant's reputation and business."*

18. In *Desmond v. M.G.N. Limited* [2009] 1 I.R. 737, Kearns J. noted that the list of considerations relevant to ascertaining where the balance of justice lies is not intended to be exhaustive in nature, nor is a court precluded from dismissing proceedings where one or more of the factors outlined above are not present if the circumstances of the case otherwise merit dismissal. The court must give due regard to any particular matters which arise on the individual facts of the case.

#### **Alternative grounds: the O'Domhnaill Principles**

19. The alternative basis upon which a claim may be struck out as a result of delay is where there is a real risk that it will not be possible to have a fair trial and where the interests of justice require it. In *O'Domhnaill v. Merrick* [1984] I.R. 151 the plaintiff instituted proceedings in 1977, some sixteen years after she had suffered injuries as a three-year-old child. In dismissing the claim for want of prosecution, Henchey J. referred to "implied constitutional principles of basic fairness of procedures" which he stated supported a jurisdiction to dismiss an action where it places an "inexcusable and unfair burden" on a defendant.

20. The Court restated these principles in *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140 as follows: -

*"(3) The courts have an inherent jurisdiction to dismiss a claim in the interests of justice where the length of time which has elapsed between the events out of which it arises and the time when it comes on for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself..."*

21. In *Byrne v. Minister for Defence* [2005] 1 I.R. 577, Peart J. held that there were really two distinct tests in this area, the *Primor* Principles which applied to delay following the commencement of proceedings and what he termed a "wider discretion based on general fairness" derived from cases such as *O'Domhnaill v. Merrick*.

22. More recently, in *Mellerick v. Minister for Finance* [2016] I.E.C.A. 206, Irvine J. made it clear that the defendant did not have to establish prejudice in order to succeed in an application to dismiss but that this was one of the factors that the court would take into consideration. More generally, she stated the correct approach to be adopted as follows: -

*"18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature*

*of the proceeding and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach".*

23. It is clear from the authorities above that the courts have in recent years imposed a greater obligation on plaintiffs to proceed expeditiously. Further, the focus appears to have shifted onto the justice of allowing an action to proceed several years after the cause of action has accrued rather than on the traditional *Primor* considerations of blameworthy delay or prejudice to a defendant.

### **Conclusions**

24. In the instant case, the plaintiff instituted proceedings in April 2015. In delivering judgment in respect of the application for injunctive relief, Keane J. criticised the plaintiff for his failure to deliver a statement of claim prior to the hearing of that application in June 2015.

25. Thereafter, the defendants issued three letters on the 6th of April, 2016, 19th of April, 2017 and 6th of December, 2017 consenting to the late delivery of the statement of claim. The motion subsequently issued on the 6th of March, 2018.

26. It is regrettable that the defendants allowed such a prolonged period of time to elapse prior to issuing the within motion, a period of almost three years after the proceedings were instituted. The Court is satisfied that such conduct on the part of the defendants amounts to acquiescence on their part in the plaintiff's delay.

27. The plaintiff's response to the motion has been to deliver his statement of claim within a matter of weeks of the motion issuing and indeed prior to its first return date. It is accepted by the plaintiff that there has been delay on his part but it is contended that this was contributed to by the extensive and prolonged efforts by him in progressing Freedom of Information and Data Protection requests.

28. The Court's first consideration in dealing with this application is to determine whether the delay complained of is inordinate and inexcusable. Having regard to the facts as set out above, a delay of almost three years after the proceedings have been commenced to the delivery of the statement of claim, prompted by the within application, is clearly inordinate. The plaintiff's contention that the delay is excusable for the reasons relied upon does not find favour with this Court in circumstances where it is at all times open to a plaintiff to amend their proceedings, if necessary, where additional and relevant information comes to light.

29. The Court must then consider its discretion to consider whether the balance of justice favours allowing the case to proceed. The defendants maintain that they have exercised considerable forbearance and restraint in refraining from issuing the within application as already outlined. However, it is difficult to comprehend the purpose of such forbearance. On the one hand, the defendants complain of the plaintiff's delay in progressing his claim but on the other, they themselves are guilty of precisely the same shortcoming.

30. In considering the defendants' contention that they have been prejudiced by the delay, the Court has to be mindful of the fact that the defendants themselves have contributed to this delay. The Court accepts that the defendants are now deprived of the witness testimony of one of the members of the interview board, due to his untimely death but is equally cognisant of the fact that there are three other board members available to it. In the circumstances, the Court is not satisfied that the defendants are seriously prejudiced in this regard.

31. Equally the Court accepts that it is unsatisfactory that the reputation of the first named defendant and the interview board remain under suspicion and that the recollection of witnesses tends to diminish over time, all the more reason why the defendants ought to have acted with due expedition in bringing this application before the Court.

32. The basic principles of fairness require that the Court considers the conduct of both parties to these proceedings in reaching its determination.

33. In all the circumstances, this Court is of the view that it would be a great injustice to the plaintiff to accede to the application to dismiss on the grounds of delay, where the defendants have been guilty of the same conduct. In circumstances where the statement of claim has now been delivered, the Court will dispense with the necessity of service of a notice of intention to proceed with a view to progressing matters between the parties.

### **Second Motion**

34. In the second application, the defendants seek a declaration that the plaintiff's claim relating to non-disclosure of an anonymous letter dated the 13th of August, 2014 was brought outside the time limit applicable to such a claim by way of analogy with judicial review proceedings under Order 84 of the Rules of the Superior Courts.

35. The defendants contend that the plaintiff's claim has now altered considerably from the complaint made in the plenary summons issued on the 23rd of April, 2015 and as disclosed in the course of his failed application for interlocutory relief in June 2015.

36. In the statement of claim the plaintiff now seeks to make a claim of conflict of interest and/or breach of fair procedures relating to non-disclosure of an anonymous letter dated the 13th of August, 2014, notwithstanding the defendants' contention that he was aware of the existence of the said letter since the 22nd of June, 2015.

37. The defendants contend that the plaintiff's claim should more properly have been advanced by way of judicial review and furthermore if it is to be advanced in plenary proceedings, the same time limits apply as in judicial review proceedings. In the circumstances, the defendants contend that the plaintiff's claim relating to the said anonymous letter is out of time.

38. Moreover, the defendants contend that having regard to the plaintiff's delay in prosecuting his case, the addition of a wholly new ground at this late stage should not be permitted and would prejudice the defendants in their defence of these proceedings.

39. The plaintiff's position is that the within application is not consistent with any provision in the Rules of the Superior Courts and is more properly a matter for the Defence of the proceedings.

40. In the ordinary course, such objection to the issues raised in the statement of claim are dealt with by way of delivering a defence and if necessary, thereafter seeking a ruling on a preliminary issue.

41. The defendants have not set out any basis for their departure from the Rules of the Superior Courts save and except for the issue of delay upon which this Court has already ruled. Indeed, in maintaining the within application further delay has accrued.

42. In the circumstances, the Court will refuse the relief sought and direct the defendants to file their defence without any further delay.