



The risk of resting on your laurels



Introduction

Two years on from my last article concerning delays in litigation in the Irish courts, there have since been multiple judgments handed down in this area. This demonstrates a marked increase in defendants bringing applications to have claims dismissed on grounds of inordinate and inexcusable delay and/or for want of prosecution. Fortunately, many of these recent applications have been successful and long gone are the days when a plaintiff can sit back and do nothing. The Irish courts are no longer indulging inactivity and protracted delay on the part of litigants and their solicitors. Stale, protracted claims are of no benefit to anyone involved, least of all defendants and their insurers.

Relevant legal principles

As Justice Irvine enunciated: *"The rationale behind the jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard"*.¹

Generally, and to keep matters relatively simple, a defendant must meet a three-stage test in order to bring a successful application to dismiss on grounds of delay. The defendant must first prove that delay is (i) inordinate and (ii) inexcusable, otherwise the application will fail. If (i) and (ii) are established then the defendant will have to convince the court that (iii) the balance of justice favours the dismissal of the claim, unless of course the plaintiff can point to some weighty countervailing circumstances (e.g. a disadvantage or disability) to cancel out the effect of such delay. The court will also look to the actions of a defendant to ascertain if it were in any way responsible for delay. An accurate chronology of relevant events will be essential to the application.



To help tip the scales in the defendant's direction, evidence of prejudice caused by the delay can be helpful. I touch on some examples of prejudice below. However, each case involving an application to dismiss has to be assessed on its own particular facts.

Moreover, delay arising from the date of accrual of a cause of action and prior to issuing proceedings can be taken into account. As such, it is well established that any

¹ *Flynn v. Minister for Justice* [2017] IECA 178

late start creates a strong obligation on a plaintiff to proceed expeditiously.² Solicitors acting for plaintiffs should be well advised to warn the client of this.

Key takeaways from recent case law

There have been a few useful decisions in the High Court and Court of Appeal in the past few months setting out the well established principles governing the dismissal of a claim for want of prosecution and/or delay.

You may be happy to know that I do not intend to go into the nuts and bolts in terms of the facts and detail of those judgments. Instead, I have attempted to extract some useful practical points regarding what the court deemed as prejudice for defendants arising from the delay, as well as some other helpful issues.

From the recent cases, the following is evident:



- *Defendants involved in protracted litigation should monitor the impact claims have on their professional indemnity insurance. Ongoing and protracted proceedings may impact negatively on a defendant's insurance and general business position, which can constitute prejudice.*³
- *Defendants could keep track of the availability of potential witnesses with a view to looking at actual prejudice. Defendants may find that after Covid, former staff have moved away and out of the jurisdiction.*
- *Delays of four to five years as a matter of probability will reduce the ability for potential witnesses to give meaningful assistance or act as a witness.*⁴
- *Prejudice upon which a defendant could rely in support of an application may also include reputational damage, stress and inconvenience caused by being subject to ongoing litigation over an extended period. A number of cases have held that claims of negligence and wrongdoing hanging over the heads of professional persons over a protracted period of time are in themselves a source of prejudice, for obvious reasons.*⁵
- *Solicitors and their clients involved in claims should be proactive. If delay is a factor, then letters should carry warnings and be acted upon accordingly. Letting sleeping dogs lie may save costs in the short term, but this could ultimately prove very costly.*
- *Covid is no excuse for delay, and neither are staff shortages, over work, health issues and administrative oversights.*⁶ *Solicitors should not let correspondence go unanswered.*⁷ *Any delay caused by a plaintiff's solicitors is imputed to a plaintiff and is not excusable.*⁸
- *A Notice of intention to proceed, or Notice of change of solicitor, is not a pleading and will not excuse inaction. To the contrary a Notice of intention to proceed could evidence inaction.*⁹

² *William Connolly & Sons Ltd. v. Torc Grain and Feed Ltd.* [2015] IECA 142

³ *Treanor & Anor - v- 'Nutech Renewables Ltd, Forkin and Quigley.* [2022] IEHC 36

⁴ *Allied Irish Banks v. Boyle* [2020] IEHC 377 Heslin J.

⁵ *McGuinness v Wilkie and Flanagan Solicitors*, [2020] IECA 111; *Cabot Financial (Ireland) LTD v Heffernan & Ors* [2021]. IEHC 823

⁶ *Walsh v Mater Misericordiae University Hospital & Anor* [2022] IEHC 126 (08 March 2022)

⁷ *See Gibbons v. N6 (Construction) Ltd* [2021] IEHC 138, IECA 2021/100 16 May 2022

⁸ *McMenamin J. in McBrearty v. North Western Health Board* [2007] IEHC 431, *Padden v. Ireland* [2019] IESCDT 102

⁹ *Herbst v. McGuckian and Glenford Construction* [2022] IEHC 271

- *Solicitors for defendants in slow moving claims should check if the claim may arguably be statute barred or teetering on it. There may be an added bonus for defendants of a plaintiff having had a 'late start'.*
- *Solicitors acting for plaintiffs would be well advised to warn of the need to proceed diligently with the claim and in giving timely instructions or they themselves run the risk of a professional indemnity claim for failing to do so, in the event that a client's case is dismissed on grounds of delay.*

Conclusion



The current Professional Indemnity insurance market is extremely challenging for all professions. Many professionals have already seen a significant increase in their insurance costs and greater cover restrictions, with reduced market capacity. Stale claims certainly do not help bring down premium costs and only serve to incur unnecessary defence costs. Win or lose, often a defendant's personal or professional reputation may be badly scarred, and a plaintiff may be no mark for any award of costs.

It is very much welcomed and about time that judges are becoming less lenient with tardy plaintiffs. Justice delayed is indeed justice diminished. Moreover, the court acknowledged that it has an obligation to ensure that there will not be excessive indulgence of delay.¹⁰ Defendants and their insurers should evaluate dormant and/or slow-moving claims to see whether there is merit in bringing an application to dismiss. It is seldom that claims just wither and die. For solicitors on the plaintiff side, it would be best to warn the client of the consequences for failure to move claims proactively and, of course, to have a copy of that advice on the file.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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¹⁰ Per Clarke J, *Comcast International v. Minister for Public Enterprise* [2012] IESC 50