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Courts Continue to Crack Down on Litigation Delays

Two recent judgments of the High Court, dismissing proceedings for inordinate and inexcusable delay, are indicative of the courts' continuing approach to the failure to observe time limits in litigation.

In *Kennedy v. Wexford County Council and Priority Construction Company Limited* [2021] IEHC 187, the High Court struck out, on the grounds of inordinate and inexcusable delay, a plaintiff's action claiming damages for trespass and nuisance. In his judgment, Owens J. observed that *"all plaintiffs are taken to know that where an action is commenced long after the events giving rise to the cause of action, they have a positive obligation to advance proceedings to trial with expedition."*

The plaintiff's proceedings concerned the alleged unauthorised dumping of waste on the plaintiff's field in late 2001 and early 2002 and whether the first defendant could be deemed to be responsible for the act of an independent contractor. Proceedings were commenced in October 2007 in circumstances where the claim was due to become statute-barred in May 2008.

Pleadings were exchanged between the parties until May 2014 and the last letter from the plaintiff's solicitor to the second defendant was in May 2015. No further steps were taken until a notice of intention to proceed issued in February 2018 and updated particulars of loss and damage were served in February 2019. In June 2019 the second defendant advised the plaintiff of their intention to issue an application to have the action dismissed.

Owens J. considered the applicable rules to be clear: The second defendant must establish that the delay of the plaintiff in prosecuting www.dilloneustace.com

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his claim was both inordinate and inexcusable, and that the balance of justice favoured the dismissal of the claim. The court relied on the leading Supreme Court decision of *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in assessing the balance of justice principle applicable.

Ultimately, the court held that there was an inordinate delay in the proceedings, noting in particular that as the cause of action was nearly statute barred the plaintiff had a “*self-serving duty to advance it to trial with all reasonable expedition*”. Instead, there had been long periods of time when little to nothing was done to pursue the claim. Owens J. did not agree that the delay by the second defendant in delivering their defence and responding belatedly to an application for discovery excused the plaintiff’s delay, nor should it be regarded favourably for the plaintiff in an assessment of the balance of justice. On that basis the delay was also held to be inexcusable, with Owens J. stating “*a defendant owes no positive duty to advance the proceedings to a hearing.*”

Even more recently, in [*Diamrem Limited v Clare County Council* \[2021\] IEHC 408](#), the High Court dismissed proceedings relating to the lawfulness of the use of a car park adjacent to the Cliffs of Moher by the defendant local authority, on the basis that there was an inordinate and inexcusable delay of some 22 months by Diamrem in delivering its statement of claim. In his judgment, Mr Justice Twomey cited favourably the call by the Supreme Court, nearly a decade ago, in *Comcast International Holdings Incorporated & Ors v Minister for Public Enterprise & Ors* [2012] IESC 50 for “*a sea-change in the indulgent attitude of the courts to litigants who are guilty of delay in the prosecution of their proceedings*”. The court noted in particular that Diamrem had complied with a very tight 28 day deadline to file a notice of appeal in a separate application related to the same dispute and took the view that Diamrem chose to devote its resources to that requirement as there was a very real consequence for failing to do so – namely, the loss of its right to appeal. The fact that there was no equivalent direct consequence for the failure to deliver its statement of claim within the time prescribed by the rules was taken by the court as the reason for Diamrem’s failure to deliver it, which “*flies in the face of numerous other judicial calls for the days of indulging late litigants to be over*”.

Comment

These decisions provide further clarity in respect of what will be considered ‘inordinate and inexcusable delay’ in litigation. This is of particular relevance in light of Mr. Justice Peter Kelly’s Review of the Administration of Civil Justice Report 2020, in which an automatic discontinuance procedure was recommended for dormant proceedings that have not been set down for trial within 30 months of their commencement.

For further reading on topics raised in this article, please see the following previous publications:

- ▣ [*Impact on professional indemnity insurance a factor in dismissal of negligence claim*](#)
- ▣ [*Expert evidence required to proceed in professional medical negligence action*](#)
- ▣ [*Professional negligence claim dismissed on grounds of delay*](#)

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