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## Delay and Prejudice

### Introduction

The ability for a defendant to dismiss a case on the grounds of delay is well established by the courts. However, there are high standards that the courts adhere to when considering whether the balance of justice lies in favour of dismissing a case.

These standards were first laid down in *Rainsford v Limerick Corporation* and then approved and expanded upon in *Primor PLC v Stokes Kennedy Crowley*. The main questions which the court must address are:

- (i) the party seeking dismissal must prove that the delay was both inordinate and inexcusable; and
- (ii) does the balance of justice lie in favour of proceeding with the case.

This article will focus solely on the issue of where the balance of justice lies.

### The balance of justice

In assessing the balance of justice the courts have regard to a range of factors including:

- ▣ constitutional principles of basic fairness and procedure;
- ▣ whether the delay and the resulting prejudice make it unfair to the defendant to proceed with the case;

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- ▣ any delay on the part of the party seeking to dismiss the case;
- ▣ does the delay give rise to the risk that it is not possible to have a fair trial; and
- ▣ has the delay caused a risk of prejudice to the defendant.

## Prejudice and recent judgments

The risk of prejudice causing an unfair trial is a key factor considered by the courts when they examine whether the balance of justice lies in favour of the dismissal of the case. If the delay has resulted in prejudice which would make it impossible to proceed with a fair trial, the courts have been more likely to find in favour of the defendant's application, provided that their conduct has not amounted to acquiescence i.e. – that they contributed to the delay.<sup>1</sup>

The question of prejudice was recently examined in the Supreme Court in the cases of *Desmond v Doyle* and *Desmond v Times Newspapers Ltd., Rory Godson and John Burns*. These were both defamation cases, where the High Court refused a motion to dismiss on the basis of delay and which were then appealed to the Supreme Court. The High Court and Supreme Court issued a combined judgement dealing with both cases.

The first case against Mr Tom Doyle related to a letter he had sent to the Moriarty Tribunal where he claimed that he, and not Mr Desmond, was responsible for the original idea behind the IFSC in Dublin.

The second case related to the publication of an article in the Sunday Times under the heading "*Desmond was not the Man behind the IFSC idea, Tribunal told*". The article reproduced the substance of Mr Doyle's letter.

There were three time periods of delay within these cases. The offending articles were published in February and March 1998. Proceedings were instituted pretty much immediately in both cases. From October 2000 to December 2005, there was no movement in the cases before a Notice of Intention to Proceed was served. A further eight months passed before discovery was sought in the Doyle proceedings and there was six months of inactivity which then followed until the discovery motions were issued. Therefore, there were three periods of delay; 5 years, 8 months and 6 months.

The plaintiff's counsels accepted the High Court's findings that there had been an inexcusable and inordinate delay in the commencement of proceedings, and that the only question to be considered by the Supreme Court on appeal was whether the balance of justice rested in favour of the defendant or the plaintiff.

It was stated in *Primor Plc* that generally where it is found that a case has been delayed to an extent which the court found to have been inordinate and inexcusable, '*the matter of prejudice seems to follow almost inexorably*'. This statement was approved in *O'Connor v John Player and*

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<sup>1</sup> *O'Connor v John Player and Sons Ltd* [2004] 2 ILRM 321, 336.

*Sons Ltd*, with the court concluding that the plaintiff's claim should be dismissed even though there was no concrete evidence of a specific prejudice against the plaintiff as a result of the delay in prosecuting the claim.

In the Desmond case however, the Supreme Court after finding that the delay in prosecution was inordinate and inexcusable, examined the issue of prejudice and concluded that the defendants in the cases had failed to establish any basis to show that their ability to defend the action or advance a mitigation plea had been prejudiced by the delay. The Supreme Court found that any prejudice could only be "*potential or marginal*", and that this was not enough to ground a dismissal due to delay.

Prejudice considerations are different in cases which require documentary evidence and those which place a greater reliance on the evidence of witnesses. Where matters in a case are covered largely by documentary evidence, it will be more difficult for a defendant to establish that he has been prejudiced by the passage of time.<sup>2</sup> While memories fade and witnesses can pass away, making evidence less reliable, documentary evidence does not become less reliable as time passes.

In his judgement, McKechnie J. refers to how the documentary evidence of Mr Doyle, who was looking to have the case dismissed, was entirely unsatisfactory. Mr Doyle claimed documents existed in 2001 which confirmed his assertion that he had come up with the idea for the IFSC. He could however provide no proof that these documents existed, and correspondence showed that Mr Doyle was not even sure if the documents existed.

The Supreme Court also found that he had made no effort to clarify the situation in relation to these documents between the High Court hearing and Supreme Court appeal. The Supreme Court found that due to Mr Doyle's lack of clarification on this matter, they would not go any further than the High Court had gone in finding that any prejudice caused by the delay was '*potential or marginal*'.

## Conclusion

Similarly to how the court will take the delay of both parties into account when they are applying to have a case dismissed for delay, the court in this case examined the actions of Mr Doyle as well as the plaintiff. Mr Doyle's behaviour and his failure to clarify the position on his purported documentary evidence was a factor in the court refusing to find that any significant prejudice arose in this case that could lead to a dismissal on the grounds of delay.

This, when examined with the other relevant factors the court looked at when deciding in whose favour the balance of justice lies, means that even after a court accepts that a delay is inordinate and inexcusable, it is still difficult for a court to accept that the balance of justice weighs in favour of the dismissal of a case without showing a real and substantial prejudice has resulted from this delay.

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<sup>2</sup> *Carroll Shipping Ltd. V Mathews Mulcahy & Sutherland Ltd.* [1996] IEHC 46 at 11

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