When is a delay so inordinate and inexcusable that the balance of justice favours striking out a claim?

A recent decision of the newly-established Court of Appeal, in Tom Tanner v Aidan O’Donovan and Elaine O’Donovan trading as Construction Design Studio and Timothy P Murphy\(^1\) has confirmed the approach that will be adopted by Irish Courts when determining when a Defendant is entitled to have proceedings that have been issued against them struck out for inordinate and inexcusable delay.

**Establishment of Court of Appeal**

The Court of Appeal was established and came into operation on 28 October 2014. The purpose of the Court of Appeal is to reduce the length of time within which appeals against decisions of the High Court will be heard and ensure that the limited resources of the Supreme Court are utilised for cases of significant public importance.

As a new court of intermediate jurisdiction the Court of Appeal is bound by previous Supreme Court decisions but is entitled to overturn long-applied High Court jurisprudence and, in effect, create new law. The Court of Appeal has been dealing with outstanding criminal appeals as a priority but decisions on civil appeals are now beginning to emerge.

**Facts**

In this instance the first and second defendants had been retained as architects (“the architects”) and the third defendant as engineer (“the engineer”) (together “the defendants”) by the plaintiff in relation to the construction of a hotel in and around 1997. The construction had completed in

\(^1\) [2015] ICA 24
1999 and the plaintiff had issued proceedings in 2003 claiming damages for breach of contract, negligence and negligent misstatement.

The plaintiff did not prosecute his claim with any urgency and in the period between September 2003 to March 2009 there were eight separate occasions on which the defendants brought applications before the High Court to compel the plaintiff either to take specific steps necessary for the prosecution of his claim or to comply with orders previously made by the High Court. After an application by the defendants in 2009 the High Court, applying the test set down by the Supreme Court in Primor plc v Stokes Kennedy Crowley² ("Primor") made two orders striking out the proceedings for want of prosecution due to inordinate and inexcusable delay in 2010. The plaintiff had originally appealed those orders to the Supreme Court and those appeals were remitted to the Court of Appeal upon that court’s establishment.

Grounds of Appeal/Defendants’ Position

The plaintiff’s appeal was grounded on the delays of the defendants, in particular the delay of the engineer, in dealing with the proceedings and asserted that even if there had been delay on his part it had not and would not cause any prejudice to the defendants.

The defendants’ position was that the High Court had been correct in its application of the test in Primor and submitted that severe prejudice would be caused to them because of the reliance on oral evidence and that Manning v Benson & Hedges Limited³ should be applied. The architects also argued that as the jurisdiction to dismiss for inordinate or inexcusable delay was a discretionary one the Court of Appeal should only intervene in exceptional circumstances or where there was an obvious error.

Decision

Mr Justice Hogan began by noting that the High Court had identified three periods of possible delay which it had been required to examine in order to determine whether the delays in question were “inordinate and inexcusable” within the meaning of the test set down by the Supreme Court in Primor. The first of these had been the delay prior to instituting proceedings between 1999 and 2003 which it was found could possibly have been inordinate and inexcusable. The second had been the September 2003 and May 2007,  

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² [1996] 2 IR 459
³ [2005] 1 ILRM 190

Mr Justice Hogan considered the Plaintiff’s grounds of appeal and defendants’ submissions and, finding that the three headings under the Primor test were satisfied, upheld the orders of the High Court.
during which there had been three separate applications by the defendants to compel the plaintiff to take various necessary steps. The third had been between May 2007 to August 2009 (when the defendants had issued their strike-out applications) during which there had been no action in the proceedings. The third period was held by the High Court to have been inordinate and inexcusable and that the balance of justice favoured the dismissal of the plaintiff’s claim. Particular emphasis was put on the fact that the defendants were being sued in their professional capacity and that the claims had been hanging over them for a number of years.

Mr Justice Hogan considered the plaintiff’s grounds of appeal and defendants’ submissions and, finding that the three headings under the Primor test were satisfied, upheld the orders of the High Court. The decision can be analysed under two separate headings as follows.

Scope of Appeal

Mr Justice Hogan held that the jurisdiction of the Court of Appeal in considering substantive decisions is not confined to those cases where an error of principle is shown and it is free to exercise its own independent judgment and in so doing will pay particular attention to the manner in which the High Court has exercised its own discretionary jurisdiction.

Substantive Grounds

Mr Justice Hogan applied the Primor test and noted that the relevant period of delay for the purpose of that test is the period running from the commencement of proceedings up to the hearing of application to dismiss but that stated that the pre-commencement delay could also be relevant in assessing whether the relevant period of delay was inordinate and inexcusable.

Mr Justice Hogan was in no doubt that the relevant period of delay should be categorised as inordinate and held that it was also inexcusable, notwithstanding that the defendants, and the engineer in particular, had undoubtedly contributed to that delay. Mr Justice Hogan stated that as a general principle the inactivity of a defendant does not excuse a plaintiff from the obligation of prosecuting a claim with the appropriate vigour. That obligation carries more weight when a Plaintiff has delayed in instituting proceedings.
In considering the third limb of the *Primor* test Mr Justice Hogan stated, as a general principle, that when assessing where the balance of justice fell regard should be had to (1) the obligation on a plaintiff who had delayed in commencing proceedings to prosecute those proceedings expeditiously and (2) the potential impact of proceedings on the reputation and good name of a defendant sued in their professional capacity. Mr Justice Hogan held that the pre-proceeding delay of the plaintiff and the potential impact of the proceedings on the reputations of the defendants meant that the balance of justice was in favour of dismissing the plaintiff’s proceedings. Interestingly Mr Justice Hogan was willing to find that there was the potential for damage to the defendants’ professional reputation and/or livelihood notwithstanding that the evidence adduced by the defendants in respect of that consideration was relatively sparse. Mr Justice Hogan stated that the express right to a good name found in Article 40.3.2 of the Constitution implies that claims against a professional should be heard and determined within a reasonable time.

**Comment**

The decision is interesting from a number of viewpoints. It provides guidance as to the width of grounds on which the Court of Appeal will consider an appeal from the High Court. Secondly, it shows that there is an obligation on a plaintiff to prosecute their case with reasonable expediency and that a plaintiff is expected to avail of all tools available to it when faced with a ponderous defendant or face sanction. Finally, it shows that a defendant sued in their professional capacity is entitled to have that claim determined within a time period that takes account of the potential damage that can be caused to their reputation through the mere existence of legal proceedings.

Professionals, and their insurers, should be mindful of this when faced with a claim that has arisen either from a long-completed project or one that has been prosecuted in a lackadaisical manner by a claimant. In particular, when considering how to best show that the third limb of *Primor* test has been satisfied professionals should consider proffering evidence of a drop in business or increased costs of professional indemnity insurance.

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