Delays in litigation are inevitable, however courts are becoming less tolerant of unnecessary deferrals. Mary Smith, Associate at Beale & Company explains the grounds for striking out stale claims based on recent case law.

1. INORDINATE DELAY
Case law has provided some guidance as to the periods of delay likely to be considered inordinate. Generally, delay of two or more years delay is required before such delay is considered inordinate.

In a recent claim for professional negligence against a firm of solicitors, an application was brought to dismiss the proceedings on grounds of delay and want of prosecution. The court held that a delay of 3 years and 4 months was inordinate and the defendant was successful in having the proceedings struck out.

2. INEXCUSABLE DELAY
Even if the delay has been inordinate this will not of itself suffice to ground a successful application - the court will look to see if the delay is in any way excusable. It is for the defendant to convince the court that no reasonable explanation exists to excuse the plaintiff’s delay.

Explanations for delay should relate to the actual claim itself. For example, a case can often get parked because a party is busy with other unrelated matters. In the case of Machinery Sales Ltd v. General Accident Fire and Life Assurance Plc [1999] IESC 201 the plaintiff submitted that the delay was excusable because it was tied up in other litigation. The court’s view was that it did not expect a defendant to wait on the side-lines while the plaintiff resolves other unrelated problems.

It was previously the case that hardship was deemed to be a valid excuse for delay. However, the court’s approach appears to be changing in this regard. Earlier this year the High Court refused to deem hardship as a valid excuse for delay stating that while solicitors who take on the claims of impecunious plaintiffs are to be commended for the service they provide to the interests of justice, once they do so, they must ensure that those proceedings are conducted with reasonable dispatch.

Recently, the Court of Appeal gave another stark decision holding that a plaintiff is not entitled to stall the proceedings indefinitely while he/she searches for a new legal team and there comes a point that the proceedings must be dealt with even without a legal team. In this decision the solicitor defendant was successful in striking out the case against the plaintiff lay litigant who had difficulty in getting legal representation which in turn delayed the proceedings. Again this is another example that hardship
The court will look to see if a plaintiff is changing solicitors and there is delay in transferring over the file to the new solicitor then this may not excuse the delay. The Court of Appeal recently held that where the delay is attributable to the failure of the solicitors to pass over the papers then a plaintiff must take responsibility for the failure of its agents. However, despite that the Court ordered that the action proceed.

3. BALANCE OF JUSTICE

In the third and final step, the court carries out a balancing exercise as to the balance of justice. The court will look at the character of the claim, the character of the plaintiff and whether serious prejudice was caused to the defendant by the delay.

The court will also look to see if the defendant has engaged in any delay. A recent High Court decision held against the defendants because it found them to have engaged in a deliberate stringing out of the proceedings perhaps in the hope that the case would simply fade away, possibly on account of the elderly age of the plaintiffs. It also found there was no complaint at any stage by the defendant in respect of any delay up to the point of application for a date for trial. The court found that the defendant by its action in allowing that to occur without complaint has disentitled itself to complain at this juncture.

The court will look to see if a defendant has suffered from the delay. In the Court of Appeal decision of Farrell v Arborlane Limited & Ors in which Beale & Company successfully obtained the order to dismiss the court stated that prejudice was suffered by the defendant appellant by having a professional negligence case hanging over him for so long and because he had encountered difficulty with his insurance company concerning the renewal of his professional indemnity insurance.

CONCLUSION

Whilst delays in litigation do inevitably occur (on both sides), the courts strive to seek a balance. That said, there are clearly limits as to what the courts will tolerate and defendants can take some comfort from the courts’ increasing willingness to strike out stale claims. Cases in which plaintiffs do nothing to progress their claims are unfair on defendants who need to make long-term financial provision for a stale claim. Stale claims can also lead to an increase in a defendant’s insurance premium and cause reputational damage so these recent decisions will hopefully help curtail this practice.

Insurers should be aware that the success or failure of applications to strike out for want of prosecution or delay depends very much on the facts of each individual case.

Other examples of likely prejudice would include fading recollections of witnesses, their availability, interests and destruction of records. The High Court recently took a strict approach on the availability of witnesses as a ground of prejudice. It rejected the absence of witnesses as likely prejudice because no evidence of attempts made to establish contact with such witnesses was submitted.

In contrast, earlier this year the Court of Appeal held that no specific prejudice was required at all to be established due to the significance of the delay involved (15 years since the alleged injury).

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1. McAndrew v Egan (t/a Egan Daughter & Co. Solicitors), [2017] IEHC 345
2. Corcoran v Moore [2005] IEHC 185
3. Farrell v Arborlane Limited & Ors, [2016] IECA 264
7. McAndrew ibid
9. McNamara ibid
10. McNamara ibid
11. Carroll ibid

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