[2019] IEHC 880

THE HIGH COURT

[RECORD NO. 2012/11791P]

BETWEEN

SEAN DES MULLIGAN

PLAINTIFF

AND

SURINDER SINGH

DEFENDANT

JUDGMENT of Mr. Justice Robert Eagar delivered on the 19th day of December, 2019

1. This is a judgment in respect of an application by notice of motion dated 26th November 2018 seeking:

    1) An order pursuant to the provisions of Order 36, rule 12 dismissing the plaintiff's claim for want of prosecution by reason of his failure to serve a valid Notice of Trial;

    2) Further or in the alternative, an Order pursuant to the provisions of Order 122, rule 11 dismissing the plaintiff's claim for want of prosecution where there have been no proceedings for two years;

    3) Further or in the alternative, an Order pursuant to the Court's inherent jurisdiction to dismiss the plaintiff's claim for want of prosecution on the grounds that the plaintiff's inordinate and inexcusable delay in prosecution the within proceedings;

    4) Such further or other orders as this Honourable court deems fit.

Facts

2. The proceedings before the court arise out of an accident which occurred on the 2nd December 2009 on a public highway near Calmont Road, Ballymount, Dublin whereby the defendant drove into or collided with the rear of the plaintiff's vehicle causing him injury. The plaintiff attended James Connolly Hospital suffering from panic attacks which caused him difficulty breathing. At James Connolly Hospital, the plaintiff had X-rays done and was subsequently discharged. Later, the plaintiff attended his General Practitioner and complained of a number of issues including headaches, several aches and pains in his shoulders and a chip in his upper right tooth.

Grounding Affidavit

3. The application before the court is grounded on the affidavit of F Gerard M Gannon, solicitor in the firm Claffey Gannon & Co., Solicitors who appear on record for the defendant.

4. The plaintiff applied to the Personal Injury Assessment Board (*hereinafter* PIAB) in respect of the facts outlined above on the 28th November 2011. PIAB issued an authorisation in respect of commencing proceedings pursuant to Section 14 of the Personal Injuries Assessment Board Acts 2003 and 2007 on the 13th June 2012. The plaintiff subsequently issued a personal injury summons on the 21st November 2012, some days before the expiration date pursuant to the Statute of Limitations 1957 (as amended). An appearance was entered to the proceedings on the 8th January 2013. On

the 4th July 2013, a Notice of Change of Solicitor was issued which stated that the firm Blasco Quinn now act for the plaintiff as opposed to Donal P Quinn & Co. On the 26th March 2013, Notice for Particulars was issued and initial replies delivered on 30th May 2014. The court notes that this is over fourteen months later. It would then appear that the replies were not satisfactory to the defendant. Therefore, a further Notice was sent by way of Rejoinder dated the 20th June 2014. The Notice was not replied to and the solicitors acting for the plaintiff appear to accept that this by letter dated 11th April in which it is stated "*it is likely a further Affidavit will be served in relation to some amended Replies and we would be grateful if you would please bear with us a short time longer in that regard"*. However, despite numerous attempts, the plaintiff failed to deliver a verifying affidavit regarding his original replies to particulars which were delivered in May 2014. A motion was issued and was returnable for the 1st February 2016 seeking an order directing the plaintiff to deliver the verifying affidavit. The motion was struck out on 14th March 2016 with an order for costs in favour of the defendant. Mr Gannon says that nothing was done by the plaintiff to progress the case.

5. On the 11th August 2017, the plaintiff again changed solicitors to the firm Quigley, Grant and Kyle. At that stage, it had been over three years since the plaintiff had replied to the original Notice for Particulars. Mr Gannon again says that nothing had been done to prosecute the plaintiff's claim.

6. On the 12th October 2017, an affidavit of verification had been sworn and amended replies to the original notice for particulars was delivered.

7. The plaintiff and defendant then entered in to correspondence in relation to the delay in the plaintiffs claim and the manner in which it had been dealt with by letters dated from 12th October 2017 to 31st August 2018.

8. Keith Kyle, solicitor, for the plaintiff, states in his replying affidavit that the proceedings arise as a result of a road traffic accident whereby the defendant's vehicle was so negligently driven, managed and controlled that it collided with the rear of the plaintiff's vehicle. The matter involves a relatively simple accident. Gardai were called to the scene of the accident following same and there are independent witnesses available regarding the accident.

9. Mr Kyle agrees that there has been some delay regarding the proceedings. However, asserts that there is neither inordinate nor inexcusable delay and is not solely on the part of the plaintiff.

10. On the 21st March 2013, the plaintiffs solicitors wrote to the defendant to file his defence and consented to the late delivery of the defence. However, no defence has been delivered to date.

11. Mr Kyle asserts that on the 26th March 2013, the defendant served a notice for particulars which were responded to on the 3rd April 2013. However, not to the satisfaction of the defendant.

12. Mr Kyle said that no issue was raised by the plaintiff in respect of a notice which also included a request for discovery despite the fact that no request for voluntary discovery was sent and the notice included such request when it ought not to have done so.

13. He says that there was correspondence back and forth between the parties regarding the particulars, for example, the parties agreed to limit the defendant's request for voluntary discovery, contained in the notice for particulars to a period of six years and not nine years.

14. Furthermore, the plaintiff's solicitor at the time moved from one firm of solicitors to another and then back again necessitating two Notice of Change of Solicitors which caused some minor delay. He refers to letters dated 3rd April 2013, 11th April 2013, 17th July 2013 (two letters), 24th July 2013, 1st August 2013, 30th May 2014.

15. Mr Kyle suggests that no prejudice is caused to the defendant by a delay of the plaintiff to get medically examined by the defendant's expert. The delay was due to the death of the plaintiff's brother. The plaintiff was medically examined by the defendant's expert on the 12th May 2015.

16. Mr Kyle states that a motion was not brought in regard to the replies that the defendant was unhappy with. He says this is particularly significant given that there was a disagreement between the parties at the time as to whether an affidavit of verification was required to verify the contents of the plaintiff's replies. A motion was subsequently brought by the defendant seeking to compel delivery of such a document but no issue was made in respect of the adequacy or otherwise of the particulars.

17. He says what is not included in the defendant's affidavit is that the motion was struck out as the plaintiff had by the time the motion was heard filed the said affidavit. Therefore, he states that it is incorrect to say that "*during this time, nothing was done to progress the case".*

18. Mr Kyle states that the defendant's solicitor did complain in respect of the said rejoinders in 2016. The Plaintiffs solicitor at all times endeavoured to respond to the defendant's request. In particular, the plaintiff's solicitor by way of letter dated 6th October 2016, furnished the defendant with a copy of the plaintiff's medical records from James Connolly Memorial Hospital. Therefore, by letter dated 9th October 2016, the defendant's solicitor complained at the piecemeal fashion in which the medical records were being furnished. While it is accepted that it would have been better for such information not to be provided in such piecemeal fashion, firstly the information was being provided and secondly in a letter dated 2nd December 2016, the plaintiff's solicitor set out the difficulties he was encountering which were outside of his control and were hampering his ability to reply to said rejoinders. In particular, one of the plaintiffs treating doctors had emigrated.

19. Mr Kyle states that it was only on 17th January 2017 that the defendant had actually sought voluntary discovery in a manner which was compliant with the Rules of Superior Courts.

20. The letter dated 17th January 2017, was responded to on the 30th January 2017, where further particulars regarding the plaintiffs health since 2015 was outlined. It was also noted that the plaintiff intended to deliver an amended reply to particulars and noting that "*in light of the fact that we intend to deliver replies to particulars you may wish to amend your respect for discovery.*" Despite this, no amended voluntary discovery was sought.

21. The plaintiff's solicitors continued to provide the defendant with medical records which were sought and continued to engage with the defendant's solicitor. (Referred to letters dated 1st February 2017, 6th February 2017, 22nd February 2017).

22. Mr Kyle says that thereafter the plaintiff changed solicitor and the deponent's firm came on record on the 14th August 2017. Although, an indication to come on record for the plaintiff was notified to the defendant's solicitor by letters dated 4th May 2017 and 9th May 2017.

23. In respect of this motion to dismiss the plaintiff's case for want of prosecution, Mr Kyle says the deponent was aware that such a motion had been threatened by the defendant and in circumstances where the deponent was in the process of coming on record, the deponent sought forbearance in respect of same. By letter dated 3rd August 2017, such forbearance was granted.

24. On 12th October 2017, the plaintiff provided the defendant with amended replies to particulars together with an affidavit of verification.

25. Mr Kyle addresses the issue raised in regard to the swearing of an affidavit of verification and admits that it was sworn in the presence of a Northern Irish solicitor and not a solicitor qualified to practice in Ireland. However, he says the affidavit of verification was sworn and filed without difficulty.

26. Mr Kyle says that there has been copious correspondence dated 5th October 2018 from the deponent to the defendant calling upon the defendant to file his defence. On 10th October, 2018, a response was delivered whereby no reassurance was proffered that a defence will be filed.

27. Mr Kyle submits that the plaintiff has engaged with corresponded with and attempted to answer the defendant's queries, requests for information and discovery of documents. He submits that when the deponent took over the plaintiff's file from his previous solicitor it was initially assumed that a defence had been filed. In those circumstances a notice for trial was served. It can be seen from this course of action that at all times the plaintiff wishes to prosecute his claim. Once the oversight was noticed in respect of the defence the defendant was called upon to deliver a defence which the defendant has failed, refused or neglected to do. Therefore, while there have been no pleadings in over two years, the defendant is also in default of providing his defence.

Submissions

28. Counsel for the defendant stated that the accident occurred on December 2nd 2009 which is coming up to the 10 year anniversary. He states that there was in or about a nine year delay up to that point when this motion was issued. The defendant is currently at a stage whereby the defence has not been delivered yet. In the plaintiff's replying affidavit, issue is taken with this but Counsel for the defendant submits that there is no obligation for the defendant to take positive steps. Furthermore, he submits that the defendant would have to respond if a motion had been issued but no motion was ever delivered in this regard.

29. He states that it is quite clear in a case of this nature that the delay is inordinate and inexcusable. He asserts that it could have easily been resolved within two or three years of the accident. He states there is no reason set out apart from the plaintiff changing solicitors. There is no reason that the injury sustained by the plaintiff would have delayed the proceedings. It is submitted by Counsel that it seems to be a delay in the procedural steps taken to proceed the case such as deliver replies to particulars, discovery requests made by the defendant and dealing with the various correspondence. There have also been at least three sets of solicitors represented the plaintiff and none of those issues excuse the plaintiff from proceeding the case in a hasty manner. He also states that the lack of a defence raises issues as to the trial and this is addressed in the replying affidavit, but a motion to dismiss for default of defence could have been brought and it was not.

30. In terms of the balance of justice, he submits that it is not addressed in the replying affidavit of the plaintiff and does not address why the balance of justice favours him. It is stated in the replying affidavit that the delay is not inordinate or inexcusable but does not provide a reason as to why it is not.

31. Finally, he submits that the accident is a straightforward road traffic accident and the injuries are straightforward. Ultimately, the court should dismiss the proceedings for failure to prosecute the case speedily.

32. Counsel for the plaintiff submits that there has been constant communication between the parties and they sought to satisfy all the queries in relation to particulars and discovery. He accepts that there has been delay, but submits that he would not put it as there being ten years delay. He submits that the case has been in being for six years to the date of this motion.

33. He states that no motion was brought by the defendants in relation to the piecemeal fashion in which particulars and discovery were delivered. In that vein, he says that the plaintiff has been given everything. He points to the plaintiff's omission to provide a defence despite being called on to deliver a defence on numerous occasions. In that regard he says that no explanation has been proffered by the defendant as to why no defence had been delivered. He says that had a defence been delivered prior to the Notice of Trial in May 2018, we would not find ourselves in this position today.

34. He says the balance of justice favours the plaintiff in progressing and that the claim be prosecuted in the normal manner. He says it may take a motion to achieve progression of the case but will be done if necessary.

35. He submits that the erroneous Notice of Trial that was issued on the 21st of May 2018 demonstrates the plaintiff's intent to continue the prosecution of the case.

36. He asserted that the only prejudice that can be suffered, is on the plaintiff. This was an accident where the plaintiff was driving an Audi A6 car and was rear ended. The car was deemed written off by the defendants. He says there were no complications in regard to the injuries that would cause delay to the proceedings. He says that it is clear that work was being done in the case at all times from 2012 to 2018.

37. Finally, he says that the balance of justice lies in favour of the plaintiff and that the court should dismiss the application to allow the plaintiff to proceed with the prosecution of the case.

Applicable Principles

38. The principles to be considered in relation to delay are found in the judgements of *Rainsford v Limerick Corp* [1970] IR 27 which was later approved in the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 (hereinafter *Primor*). The test to determine delay is a three-tier test laid down in Primor which requires the court to determine whether the delay is inordinate; whether the delay is inexcusable and; if the delay is both inordinate and inexcusable, whether the balance of justice lies in favour of or against the case being allowed to proceed. A number of considerations arise for the court when determining where the balance of justice lies: Hamilton C.J. summarised the principles in *Primor* as follows:

> *1) that the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice so required;*
>
> *2) that the party who sought the dismissal on the ground of delay in the prosecution of the action must establish that the delay had been inordinate and inexcusable;*
>
> *3) that even where the delay had been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice was in favour of or against the case proceeding;*
>
> *4) that when considering this obligation the court was entitled to take into consideration and have regard to —*
>
> > *a) the implied constitutional principles of basic fairness of procedures,*
> >
> > *b) whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action,*

c) *any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at,*

d) *whether any delay or conduct of the defendant amounted to acquiescence on the part of the defendant in the plaintiff's delay,*

e) *the fact that conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not, in law, constitute an absolute bar preventing the defendant from obtaining a dismissal but was a relevant factor to be taken into account by the court in exercising its discretion whether or not to dismiss, the weight to be attached to such conduct depending on all the circumstances of the particular case,*

f) *whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant,*

g) *the fact that the prejudice to the defendant referred to in (f) might arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.*

Furthermore, as Kearns J. pointed out in *Desmond v MGN Ltd* [2008] IESC 56, the list of considerations are not exhaustive in nature and agreeing with the dicta of Clarke J. in *Stephens v Paul Flynn ltd* [2005] IEHC 148 and stated at para. 28 that

> *"the requirements of the Convention add a further consideration to the list of factors which were enumerated in Primor as factors to which the court should have regard when deciding an issue of this nature".*

Similar views were articulated by Hardiman J. in *Gilroy v. Flynn* [2005] IEHC 98 whereby he stated:

> *"[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attached to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued…Following such cases as McMullin v Ireland [ECHR 422 97/98 29th July 2004] and the European Convention on Human Rights Act 2003, the courts, quite independently of the action and liabilities, civil or criminal, are determined within a reasonable time".*

In McMullen the European Court of Human Rights (ECtHR) provided that:-

> *"reasonableness is to be assessed by reference to the circumstances of the case, its complexity, the conduct of the applicant and of the relevant authorities and the importance of what is at stake"*

Furthermore, the court emphasised the state's obligations to comply with the "*reasonable time requirement of Article 6"* of the European Convention on Human Rights (ECHR). Irvine J. echoed those sentiments in *Granahan v Mercury Engineering* [2015] IECA 58 stating that:-

> *"any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its consideration, not only its own constitutional obligations but Ireland's obligations under Article 6 of the Convention".*

Additionally, Clarke J. in *Stephens* stated that:-

> *"Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing a greater obligation of expedition and against the same level of prejudice as heretofore."*

The court is satisfied that the principles and considerations outlined above are the appropriate test to be employed. Accordingly, the court will need to determine firstly, if the delay complained of is inordinate.

Inordinate Delay

39. The burden lies with the party seeking to dismiss a claim on grounds of inordinate and inexcusable delay, that being the defendant in the present case. The court cannot assess whether the delay is inordinate by reference to the length of the delay alone. In *Tesco Ireland v McNeill* [2014] IEHC 438, Barrett J. stated that "*no universal benchmark exists*" in determining whether a particular period of time constitutes an inordinate delay although the period of time in the jurisprudence may be of some assistance.

40. In *Framus v C.R.H. Plc* [2012] IEHC 287 at para. 293, Cooke J. held that "*in its ordinary meaning, delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive".* In this light, acts must be taken to progress the proceedings and the court considers the judgement of Gibson J. in *Allen v Redland Tile Co. (Northern Ireland) Ltd* [1973] NI 75 whereby he stated that:-

> *"a proceeding is an act which has some degree of formality and significance and which is done in furtherance of an action…something in the nature of a formal step being either an application to the court or at least a step which is required by the rules".*

Additionally, in *Allen*, it was held that neither a notice of intention to proceed nor a notice of change of solicitor constitute a proceeding for the purposes of the rules. On the other-hand, a delivery of a pleading would satisfy the requirement.

41. The present case was commenced on the 21st November 2012 for an accident that occurred on 2nd December 2009. The plaintiff had applied to the Personal Injuries Assessment Board (PIAB) in respect of the accident on the 29th November 2011. This is a mere few days before the case would have been statute barred. The court is of the view

that this is a factor relevant in the determination of whether the delay can be described as inordinate. In that vein, I refer to *Collins v Dublin Bus* [1999] IESC 69 whereby Murphy J. stated:

> *"The delay of eight years in delivering the Statement of Claim, particularly having regard to the tardiness in instituting the proceedings, must be designated as "inordinate".*

The defendant entered an appearance in Central Office on the 8th January 2013. The defendant issued notice for particulars on the 26th March 2013. The defendant maintains that initial replies were furnished over 14 month later on the 30th May 2014. However, the plaintiff in his replying affidavit states that replies were in fact initially replied to on 3rd April 2013. The letter of correspondence enclosing Notice for Particulars is dated 3rd April 2013 and is exhibited in Mr Kyle's affidavit as "KK2". The replies to notice for particulars contained in exhibit "KK2" is dated 30th May 2014 and appear to be the same answers given in other replies to particulars exhibited in other exhibits such as "KK4" and "FGMG2" of the defendant's grounding affidavit. Therefore, the court is of the view that the initial replies to particulars was furnished initially on 30th May 2014 as no replies dated 3rd April 2013 is before the court. Usually, replies to particulars would be expected to be delivered 21 days from the issue of the notice for particulars. The court is of the view that replies were initially delivered over fourteen-months after the notice was issued. The defendant, being unhappy with the replies to particulars issued a further notice that was sent by way of rejoinder dated the 20th June 2014 which the defendant asserts had not been replied to at the time. The solicitor's for the plaintiff appear to accept this by their letter dated 11th April. On 12th October 2017, amended replies to particulars were delivered to the defendant. On the 17th October 2017, the defendant's solicitors raised an issue with the original replies dated 30th May 2014, that the affidavit of verification was sworn in Derry, in the presence of a solicitor not qualified to practice in the Republic of Ireland..

42. On the 4th July 2013, a notice of change of solicitors was issued informing that Blasco Quinn now act for the plaintiff as opposed Donal P Quinn & Co. A notice of change of solicitors was issued again on 30th May 2014 and another on 11th August 2017 whereby the plaintiff changed solicitors from Blasco Quinn to Quigley, Grant and Kyle. The replying affidavit provides that the plaintiff's solicitor moved from one firm to another and then back again which caused some minor delay. A motion was then issued in respect of delivering a verifying affidavit on 1st February 2016 which was struck out on the 14th March 2016 with an order for costs in favour of the defendant. The parties then engaged in correspondence via letters thereafter. In a letter dated 17th October 2017, the defendant raised issues as to the piecemeal fashion in which the medical reports were being furnished which caused further delay. On the 21st May 2018, a Notice of Trial was issued incorrectly as the defendant had still not delivered his defence.

43. The proceedings before the court is not a complex one. It is relatively straightforward in nature and the progress that has been made thus far is not satisfactory. The court is

satisfied that the delay in issuing replies to particulars initially on the 30th May 2014 was inordinate. Furthermore, amended replies were delivered on the 12th October 2017, in excess of three-years which the court considers undoubtedly inordinate. The piecemeal fashion in which discovery was furnished albeit that correspondence took place regularly in this regard, in the court's opinion, caused a delay in the proceedings. The three Notice of Change of Solicitors caused a delay in the proceedings.

44. In those circumstances, the court is satisfied that the defendant has discharged the burden of proof that the delay complained of is inordinate.

Inexcusable Delay

45. The court will now proceed to the next step in the test to be employed. That being, whether the delay is inexcusable or whether the plaintiff has established that the delay is excusable. The onus of establishing whether the delay complained of has been inexcusable rests upon the party so alleging. The onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered to excuse the delay.

46. The explanations for the delays can be summarised as follows:

    1) In relation to the delay delivering discovery materials: The solicitor provides that the plaintiff's doctor, Dr Muneer had emigrated and it proved difficult to obtain medical records. It appears that the plaintiff addresses this shortfall by showing that solicitors for the plaintiff had engaged in correspondence re the particulars at all times.

    2) In relation to the delay delivering particulars: The replying affidavit sets out at paragraph 11 that the solicitor sets out difficulties he was encountering by letter dated 2nd December 2016. However, the only difficulty set out in this letter is that Dr Muneer left the country and it proved difficult to obtain medical records and receipts for the plaintiff's attendance. Furthermore, it is noted in the replying affidavit that they continued to engage with the defendant's solicitors in regard to particulars.

47. The fact a defence has not been delivered was addressed by the plaintiff, not as an excuse for the delay but to demonstrate that the trial, would have gone on had a defence been delivered prior to the Notice of Trial in May. The court does not accept this line of reasoning. The plaintiff had an entitlement to bring a motion in respect of the plaintiff delivering a defence prior to issuing a Notice for Trial. It appears to the court that the issue of the Notice of Trial was a mere attempt to appear ready for trial. However, it is clear, even after 10 years since the cause of action accrued, that these proceedings are still not ready to go to trial.

48. In the court's view the plaintiff has not explained to the court's satisfaction a reason for the delay in regard to the particulars. The court accepts that discovery was furnished to

the defendant eventually, but the delay it had caused is not proportionate to the nature of the case.

Balance of Justice

49. I have listed the considerations above to take account of when determining the issue as to where the balance of justice lies. Furthermore, Quirke J. in *O'Connor v John Player and Sons Ltd* [2004] 2 ILRM 135, laid out the issues to be considered having approved the principles laid down in *Primor* by Hamilton C.J. Quirke J stated:

> *1) "The conduct of the defendants since the commencement of the proceedings for the purpose of establishing, (a) whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and (b) whether the defendants were guilty of any conduct which induced the plaintiff to incur further expense in pursuing the action;*
>
> *2) Whether the delay was likely to cause, or has caused, serious prejudice to the defendants, (a) of a kind that made the provision of a fair trial impossible or (b) of a kind that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action and;*
>
> *3) Whether, having regard to the implied constitutional principle of basic fairness, the plaintiff's claim against the defendants should be allowed to proceed or should be dismissed".*

50. In that vein, it is necessary to assess the extent of prejudice in which would likely be caused to the defendant should the plaintiff be allowed to proceed with their claim. In *Collins v Minister for Justice Equality & Law Reform* [2016] IECA 27, (hereinafter *Collins*) Irvine J. stated that:

> *"of significant relevance to that issue must be the nature of the claim being advanced by the plaintiff".*

Therefore, the court will look to the nature of the claim being pursued by the plaintiff. It is a personal injury claim, arising from an accident whereby the plaintiff was rear-ended by the defendant. Counsel has indicated that there have been no complications from the injuries sustained. Therefore, the court is of the view that it is an extraordinarily straightforward case. The cause of action accrued on the 2nd of December 2009 and the hearing of this motion took place a few days before its tenth anniversary, on the 25th November 2019. The court also places significant emphasis on the date in which the claim was submitted to PIAB for assessment. The date in question is the 28th November 2011. This is a few days before the limitation period expired which is provided for in the Statute of Limitations concerning personal injury actions. There are authorities which state that dilatory institution of proceedings warrant expedition in the prosecution of their claim once commenced. In Collins, Irvine J stated:

> *"where a plaintiff waits until relatively close to the end of the limitation period prior to issuing proceedings that they are then under a special obligation to proceed with expedition once the proceedings have commenced."*

The issue of delay in instituting proceedings, albeit within their statutory entitlement, taints the proceedings with the burden of putting "justice to the hazard" as the "chances of the courts been able to find out what really happened are progressively reduced as time goes on". (per Henchy J. in O'Domhnaill v Merrick [1984] IR 151). As Irvine J. stated in Collins where a summons is issued:

> *"close to the expiration of the limitation period… there is an onus on that plaintiff to proceed with greater diligence or with more expedition than they had commenced the proceedings."*

51. It is clear that the plaintiff has not acted with greater diligence where the defendants issued a notice for particulars on the 26th March 2013 which were replied to initially on the 30th May 2014. It would appear that the initial replies were not sufficient and on the 20th June 2014 Notice was sent by way of Rejoinder. It appears to be accepted that no reply was sent in regard to this notice. In that light, the court is satisfied that the defendant omitted to reply to this notice. It was not until the 17th October 2017 that amended particulars were delivered. It is the court's view that the plaintiff did not act with greater diligence or more expedition in prosecuting his claim.

52. Secondly, the court must consider the conduct of the defendant in the proceedings as Ó Dálaigh C.J. commented in *Dowd v Kerry County Council* [1970] IR 27 *"litigation is a two party operation*" but as Irvine J. commented in a number of her decisions, the defendant's conduct must be taken in to consideration when their conduct has been "culpable" and only when the defendant's conduct is *culpable*, can it be said to affect the interest of justice. The defendant in this case has failed to deliver a defence. The plaintiff had called on the defendant to deliver their defence a number of times. However, this has not been done. Counsel for the plaintiff asserted that had a defence been delivered when requested, the case would have been ready for trial and the Notice for Trial would have been valid. The court does not accept this argument. The case is clearly not ready to proceed. There are still issues pending in regard to the particulars. Additionally, the defendant was entitled to bring a motion to dismiss the case in default of defence which the plaintiff omitted to do. Currently, there is some debate in regard to whether or not the defendant should take positive steps to progress a case. The court is of the view that the defendant did not acquiesce in part of the delay on part of the plaintiff. The defendant's conduct cannot be categorised as culpable and therefore has not out-weighed the plaintiff's conduct when considering where the interests of justice lies.

Decision

53. The court having concluded that the delay was inordinate and that no reasonable excuse had been proffered by the plaintiff for that inordinate delay must conclude that the balance of justice favours the dismissal of this action. The court comes to this conclusion on grounds which arise from a delay in replying to particulars, furnishing discovery

materials, the indulgent changing of solicitors and the lapse of time from the cause of action to the motion before the court in what is blatantly a straightforward case. Additionally, consideration of the plaintiff's failure to bring motions where he was entitled to do so was brought in to account.

54. Those factors will undoubtedly cause the defendant to suffer prejudice which hinders the prospect of a fair trial. The court must strike out the proceedings by virtue of its inherent jurisdiction for want of prosecution and by reason that the plaintiff is guilty of inordinate and inexcusable delay.