

APPROVED

[2022] IEHC 265



THE HIGH COURT

BETWEEN

2013 No. 6806 P

VLADISLAV STRELET

PLAINTIFF

AND

OLESEA BABITCHI
KILDARE COUNTY COUNCIL
WALSH MOTORS LIMITED
ARGENT EQUIPMENT (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 June 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to dismiss the within proceedings on the grounds of inordinate and inexcusable delay. The proceedings take the form of a personal injuries action. Notwithstanding that the proceedings were instituted as long ago as 3 July 2013, matters have not progressed much beyond the service of the summons.
2. For the reasons set out herein, an order will be made dismissing the proceedings as against the first defendant.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

3. The plaintiff is a fifty-seven year old male and a national of the Republic of Moldova. These proceedings arise out of a road traffic accident on 7 June 2010. The plaintiff had been a passenger in a motor vehicle driven by his friend, the late Viorel Babitchi (“*the deceased driver*”). The case as pleaded is that the driver lost control of the motor vehicle and that same ended up in a field adjacent to the public road. Tragically, the driver died as a result of the injuries he received in the accident.
4. The plaintiff himself is said to have sustained serious personal injuries as a result of the accident. In particular, it is pleaded that the plaintiff had been rendered unconscious and had been brought to the emergency department of Naas General Hospital by ambulance. The plaintiff was discharged two days later on 9 June 2010. His treatment included analgesia, antibiotics, dressings and antibiotic eye ointment. The plaintiff is described as having been stable throughout his time in hospital. It appears from a subsequent medical report dated 14 February 2011 that the plaintiff had no neurological symptoms as of the date of the accident.
5. It is expressly pleaded that the accident occurred due to the driving of the deceased, taken in conjunction with the presence of an excessively worn rear offside tyre on the motor vehicle and the presence of an undue and improper amount of surface water on the public road.
6. The first defendant is the widow of the deceased driver and is sued in her capacity as his legal personal representative. The second defendant, Kildare County Council, is sued as the entity responsible for the maintenance, repair and upkeep of the public road. The third defendant, Walsh Motors Ltd, is alleged to have sold a motor vehicle in a defective condition to the deceased driver. In

particular, it is alleged that the motor vehicle had an excessively worn rear offside tyre which lacked traction on wet surfaces. The fourth defendant, Argent Equipment (Ireland) Ltd, provides services for the testing of motor vehicles. It is alleged that this company failed to properly inspect the motor vehicle which had been subsequently sold to the deceased driver. In particular, it is alleged that the company failed to notice the excessively worn rear offside tyre. It would appear from the content of the application form submitted to the Personal Injuries Assessment Board (“*PIAB*”) that the allegation is that the company had tested the vehicle and passed it as roadworthy for the purpose of the national car test (otherwise, the NCT) shortly before it had been sold to the deceased driver.

7. The plaintiff submitted an application for the assessment of damages to PIAB on 31 January 2012. It has since been explained on affidavit that although the plaintiff did not have formal legal representation at the time, the application had been made with “*some help*”. This arose in circumstances where the solicitor now acting for the plaintiff had been unable to come on record for the plaintiff at that time because of a potential conflict of interest.
8. It appears from the content of the PIAB application form that the plaintiff may have had the benefit of legal assistance in completing same. The document certainly reads as if it has been prepared by a lawyer, rather than by a lay person for whom English is not their first language. Relevantly, the application form identifies the respective insurance companies representing each of the four named respondents. As explained presently, this is inconsistent with the allegation since made that the plaintiff had been labouring under the misapprehension that he was suing the deceased driver’s widow personally.

9. The plaintiff attaches some significance to the fact that the first defendant had seemingly informed PIAB that she was consenting to an assessment of the claim. I will return to this point at paragraph 71 below.
10. It appears from the exhibited correspondence that PIAB had arranged for the plaintiff to attend for a medical examination with an orthopaedic consultant and an ophthalmologist in November and December 2012, respectively. The orthopaedic consultant had recommended that the plaintiff undergo neurological assessment of his head injury. PIAB decided that it would not be appropriate to make an assessment because a final prognosis in relation to the injuries sustained would not be available within the timeframe allowed under the Personal Injuries Assessment Board Act 2003. Accordingly, PIAB issued an authorisation on 28 January 2013 which allowed the plaintiff to institute legal proceedings.
11. It is apparent from the exhibited correspondence that there had been difficulty in serving the authorisation by way of registered post, as required under the legislation, as the letters were returned by An Post marked as not having been called for. It seems that the authorisation was ultimately served upon the plaintiff on 11 March 2013.
12. The within proceedings were instituted by way of personal injury summons on 3 July 2013. For reasons which have not been explained, the summons was not ultimately served until 27 August 2014. It does not appear that an application had been made to renew the summons as required under Order 8 of the Rules of the Superior Courts.
13. The solicitor originally acting for the plaintiff in the proceedings ceased practice due to ill-health during the course of the year 2014. It seems that his practice files were transferred to another firm, Midland Legal Solicitors, in or about April

2014. This second firm of solicitors had, on 27 April 2016, purported to serve a notice of change of solicitor on the firm acting on behalf of the first defendant. It has been explained on affidavit that because of an “*administrative oversight*” the notice was not lodged in the Central Office of the High Court. In the event, a formal notice of change of solicitor was not filed until 24 August 2020.

14. A solicitor in the second firm of solicitors has outlined, on affidavit, the difficulties which his firm experienced in attempting to contact the plaintiff during the years 2015 to 2020. The solicitor has explained that the plaintiff lost his employment in early 2015 and returned to his home country of the Republic of Moldova. The solicitor states that “*in essence the case went cold from 2015*”. It was only in the first part of 2020, following the plaintiff’s return to Ireland, that the solicitor finally spoke to the plaintiff and confirmed his instructions.
15. An appearance had been entered on behalf of the first defendant by Ennis & Associates Solicitors on 28 August 2014. Shortly thereafter, on 16 October 2014, the first defendant’s solicitors had called upon the plaintiff to withdraw his proceedings on the basis that same were statute barred. In particular, it was contended that the proceedings had been issued outside the two-year period allowed for proceedings against the estate of a deceased person pursuant to section 9 (2)(b) of the Civil Liability Act 1961. This contention would appear to overlook the amendments introduced to section 50 of the Personal Injuries Assessment Act 2003 by the Civil Law (Miscellaneous Provisions) Act 2011. For present purposes, however, the significance of this correspondence is that the first defendant had been seeking to have the plaintiff address the question of compliance with the limitation period prior to the filing of a defence.

16. Despite their sending a number of reminders during the course of 2014 and 2015, the first defendant's solicitors received no response to the letter of 16 October 2014. Thereafter, in May 2017, the first defendant's solicitors wrote again and called upon the plaintiff to provide an explanation and justification in relation to the delay in the prosecution of the proceedings. The first defendant's solicitors subsequently became aware that the files of the plaintiff's original solicitor had been transferred to the second firm of solicitors. Accordingly, the first defendant's solicitors directed their correspondence to the second firm. By letter dated 21 December 2017, the second firm of solicitors sought forbearance. By further letter dated 18 September 2018, the second firm of solicitors explained that they had been unable to contact their client, i.e. the plaintiff, for a number of years and that they had no method of contacting him any further in relation to the matter.
17. The first defendant's solicitors attempted to issue a motion to dismiss the proceedings in May 2020 but ran into a practical difficulty in that a formal change of solicitor had not been filed in the Central Office of the High Court by the second firm of solicitors now acting for the plaintiff. This was rectified by the filing of the requisite notice in August 2020. The motion to dismiss the proceedings was duly issued in October 2020.
18. The motion to dismiss ultimately came on for hearing before me on 23 May 2022. Both sides had filed detailed written legal submissions which helpfully summarise the leading authorities on the dismissal of proceedings. Judgment was reserved until today's date.

CHRONOLOGY OF EVENTS

19. The chronology of the principal events in the proceedings is summarised in tabular form below:

7 June 2010	Road traffic accident
31 January 2012	Application to PIAB
28 January 2013	PIAB issues authorisation
3 July 2013	Personal injuries summons issued
April 2014	Solicitor's files transferred to second firm
27 August 2014	Summons served
28 August 2014	Appearance on behalf of first defendant
27 April 2016	Plaintiff's new solicitors write to first defendant
7 September 2018	Warning letter re: motion to dismiss
13 September 2019	Warning letter re: motion to dismiss
3 December 2019	Correspondence with Law Society
24 August 2020	Plaintiff's notice of change of solicitor filed
29 October 2020	Motion to dismiss issued
23 May 2022	Motion comes on for hearing

LEGAL PRINCIPLES GOVERNING APPLICATION TO DISMISS

20. The principles governing an application to dismiss proceedings on the basis of inordinate and inexcusable delay are well established. The leading judgment remains that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("**Primor**"). The Supreme Court summarised the position thus (at pages 475/76 of the reported judgment):

“The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:–

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution

on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,
 - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
 - (iii) any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,
 - (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
 - (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
 - (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
 - (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

21. As appears, a court must consider three issues in sequence: (1) has there been inordinate delay; (2) has the delay been inexcusable; and (3) if the answer to the

first two questions is positive, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed.

22. In a case where the entire responsibility for delay rests upon a professional advisor retained by a plaintiff, then the court can and should take into account the fact that a plaintiff may have an alternative means of enforcing his or her rights, i.e. by way of an action in negligence against that professional advisor (*Rogers v. Michelin Tyre plc* [2005] IEHC 294 (at pages 10 and 11), and *Sullivan v. Health Service Executive* [2021] IECA 287 (at paragraph 56)).
23. The *Primor* principles are complemented by a separate but overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial and/or an unjust result. This complementary jurisdiction had first been considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151.
24. The difference between the legal tests governing these two complementary jurisdictions has been explained with admirable clarity by the Court of Appeal (*per Irvine J.*) in *Cassidy v. The Provincialate* [2015] IECA 74 (at paragraphs 33 to 38). As appears from that judgment, the two principal distinctions are as follows. (For ease of exposition, I propose to adopt the same shorthand as employed by the Court of Appeal in *Cassidy*, and will describe the tests as “the *Primor* test” and “the *O'Domhnaill* test”, respectively.)
25. First, whereas it is a necessary ingredient of the *Primor* test to establish that the delay is “*inexcusable*”, the *O'Domhnaill* test does not require that there have been culpable delay on the part of a plaintiff. Secondly, whereas both tests require that some consideration be given to whether the delay has prejudiced the defendant in the defence of the proceedings, the degree of prejudice required

differs between the two tests. Under the *O'Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice.

26. The rationale for this distinction is described as follows in *Cassidy v. The Provincialate* (at paragraphs 37 and 38):

“Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill* jurisprudence. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?

Considering its jurisdiction having regard to the test in *O'Domhnaill*, a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result.”

27. The Court of Appeal has recently reaffirmed these principles in *Sullivan v. Health Service Executive* [2021] IECA 287 (at paragraph 52):

“The authorities cited to this Court are to the effect that:

- a) Regardless of whether the delay is pre or post commencement of proceedings, where a defendant establishes inordinate and inexcusable delay on the part of a plaintiff, the defendant may rely upon the third leg of the *Primor* principles to ask the court to dismiss the proceedings where the balance of justice requires this (a lesser standard than whether there is a real and substantial risk of an unfair trial or unjust result).
- b) Where a defendant cannot establish culpable delay on the part of the plaintiff prior to the commencement of proceedings, the defendant may nonetheless succeed in an application to dismiss the claim where he or she can establish on the balance of probabilities that there is a real and substantial risk of an unfair trial or unjust result.”

28. A pithy statement of the distinction between the two lines of authority is to be found in the judgment of the High Court (Butler J.) in *Carroll v. New Ireland Assurance Company* [2021] IEHC 260 (at paragraph 20) as follows:

“The difference between what the court is considering at the terminal phase of its analysis in each of the categories set out above has been recognised in a number of recent cases. The key factor is that where a plaintiff is responsible for inordinate and inexcusable delay, a defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be struck out. More modest prejudice may tip the balance of justice against allowing the proceedings to continue. Further, the court will in any event take account of the prejudice that inevitably results from a lengthy delay in the conduct of litigation, the prejudice being commensurately greater the longer the period of delay. In contrast, where a plaintiff has not been guilty of inexcusable delay, there is a positive onus on a defendant not only to establish prejudice but to establish that that prejudice is of a kind and a level which will, in fact, impede a fair trial.”

29. The application of the principles described in the case law above to the circumstances of the present case is considered under separate headings below.

APPLICATION OF PRINCIPLES

(I). INORDINATE DELAY

30. It is now twelve years since the date of the road traffic accident giving rise to these personal injuries proceedings. The proceedings themselves were instituted almost nine years ago. Notwithstanding this lapse of time, matters have not progressed much beyond the service of the summons.
31. The only procedural step of any significance since the service of the summons has been the belated filing of a notice of change of solicitor in August 2020. Even this was only done in response to the (then threatened) application to dismiss the proceedings. Nothing has been done to ready the proceedings for trial: no steps have been taken, for example, to pursue the other defendants for an entry of appearance or to seek judgment in default. A request for the first defendant to deliver her defence was only made for the first time on 21 October 2020, the week before the long threatened motion to dismiss had been issued.
32. The post-commencement delay of almost nine years is inordinate. Indeed, counsel for the plaintiff conceded as much in his submissions to the court.

(II). INEXCUSABLE DELAY

33. The next matter to be considered is whether or not the delay is inexcusable. Before turning to address this question in detail, however, it is necessary first to say something about the state of the evidence. The only affidavit filed in response to the application to dismiss the proceedings has been sworn by the plaintiff's solicitor. This is entirely unsatisfactory having regard to the nature of the excuses put forward in this case. These excuses all relate to matters within the peculiar knowledge of the plaintiff himself, and the solicitor has only been

in a position to provide hearsay evidence. Moreover, the failure of the plaintiff to swear an affidavit personally adds to the impression that, even now, he has not fully committed to progressing these proceedings.

34. One of the principal excuses offered for the delay is that the plaintiff's continued close friendship with the deceased driver's widow had presented him with a "*moral dilemma*". The solicitor, by way of hearsay evidence, has explained that the plaintiff had been very friendly with the deceased driver and his family. The plaintiff is described as having been under a misapprehension that by suing the widow, as personal representative of the deceased, he was suing the widow personally. The plaintiff is said to have been of the "*firm view*" that the widow would in some way be adversely affected by the process.
35. The solicitor states that this issue alone had a direct effect on the plaintiff's willingness to prosecute his claim in a timely manner. It is further stated that over time the plaintiff has obtained a better understanding of the process and now knows that the claim will not adversely affect the widow nor the relationship between them.
36. As correctly observed by counsel on behalf of the first defendant, the plaintiff's side has failed to identify, with any precision or at all, the period of time during which he was supposedly under this misapprehension nor when he supposedly obtained a better understanding of the process.
37. The fact—if fact it be—that the plaintiff may have been labouring under a misapprehension as to the implications of the proceedings for the widow cannot excuse the inordinate delay. The misapprehension could have been readily corrected by his solicitor explaining to the plaintiff that any claim against the deceased driver would be responded to by the insurance company which had

provided motor insurance in respect of the vehicle. This is not a difficult concept to grasp and is capable of being explained and understood in a matter of minutes. Indeed, most European countries, including presumably Moldova, have a system of mandatory motor insurance and most adults would have some awareness of this. Had the plaintiff had a genuine concern as to the implications of the proceedings for the widow, then this could and should have been addressed prior to the institution of the proceedings naming the widow as the first defendant.

38. It is telling that the PIAB application form, which had been submitted by the plaintiff personally, expressly identifies the deceased driver's insurance company as Aviva Insurance and provides details of the insurance policy number and the claim number. This suggests that, as early as January 2012, the plaintiff had been aware that the insurance company had a role in responding to his claim for damages.
39. The fact that the plaintiff had been prepared to submit a claim for the assessment of damages to PIAB in January 2012, and to institute these proceedings and to swear an affidavit of verification in July 2013, strongly suggests that the plaintiff had been disabused of any misapprehension by that stage. Accordingly, even if, contrary to my findings above, such a misapprehension could constitute an excuse for delay, it cannot explain the delay from July 2013 onwards.
40. The next matter relied upon as an excuse for the delay is the change in legal representation. The solicitor who had initially been on record for the plaintiff ceased practice due to ill-health. The files from his practice were transferred to Midland Legal Solicitors in 2014. The affidavit does not identify the precise date upon which this occurred, but it appears from the correspondence from the Law Society exhibited that the transfer may have taken place in April 2014.

41. This second firm of solicitors had, on 27 April 2016, purported to serve a notice of change of solicitor on the firm acting on behalf of the first defendant but because of what is described as an “*administrative oversight*” a formal notice of change of solicitor was not lodged in the Central Office of the High Court until 24 August 2020.
42. It is apparent from the affidavit evidence that whereas this changeover in legal representation may have contributed to some of the delay in the period 2014 to 2015, the principal cause of the delay in the proceedings had been the inability of the second firm of solicitors to contact the plaintiff during the period 2015 to 2020. As the solicitor swearing the affidavit candidly put it: “*in essence the case went cold from 2015*”.
43. There has been no explanation forthcoming from the plaintiff personally as to why he did not contact his legal representatives during the period 2015 to 2020. The plaintiff has chosen not to swear an affidavit in response to the application to dismiss the proceedings. All that has been put before the court is a one-sided description of the delay from the perspective of the solicitor. The solicitor has explained the diligent efforts which he made to regain contact with his client, the plaintiff. No insight has been provided as to what steps, if any, the plaintiff had been taking to contact his solicitors.
44. Even allowing that the plaintiff had been resident outside of the jurisdiction in his home country of Moldova for much of the period 2015 to 2020, it would have been possible for him to contact his solicitors by telephone or email. There has been no explanation forthcoming as to why this did not happen. It has not been suggested, for example, that the plaintiff had been unaware of the fact that the second firm of solicitors had taken over the files when the first solicitor ceased

practice. This court can only act on the evidence adduced before it. In the absence of any explanation from the plaintiff, this court cannot but find that the post-commencement delay is inexcusable.

45. There was some suggestion in submission that it would be unfair to hold the plaintiff to a “*gold standard*” of legal representation. Counsel cited in this regard the following passage from the judgment of McKechnie J. in *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50 (at paragraph 33):

“[...] The same period of delay, in different cases, may demand different treatment. Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned.”

46. With respect, there is no question of the plaintiff in the present case being held to some unreasonable standard. The plaintiff had the benefit of legal representation from an experienced solicitor. There is an obligation on all litigants to pursue their claims with reasonable expedition. The very least that a litigant is expected to do is to remain in contact with his legal representatives and to provide instructions to them.

(III). BALANCE OF JUSTICE

47. Given my finding that there has been inordinate and inexcusable delay in the prosecution of these proceedings, it is necessary next to consider whether the balance of justice is in favour of or against allowing the proceedings to go to full trial. The type of factors to be considered in this regard have been enumerated by the Supreme Court in the passages from *Primor* cited at paragraph 20 above,

and in the subsequent case law discussed at paragraphs 23 to 28 above. As appears, the range of factors to be weighed in the balance is broad. The exercise is not confined to a consideration of the effect of the delay upon a defendant's ability to defend the proceedings. It can also include factors external to the defence of the proceedings, such as, for example, reputational damage caused by the prolonged existence of the proceedings.

48. In assessing where the balance of justice lies, it is necessary to have some regard to the legislative reforms introduced in respect of personal injuries actions. The limitation period for personal injuries actions has been reduced to two years under Part 2 of the Civil Liability and Courts Act 2004. The rules in relation to the service of proceedings have also been tightened up. Whereas the time period within which proceedings must be served remains the same, i.e. twelve months from the date of issue, the threshold to be met in an application to renew a summons outside that period has been raised under the amended Order 8 of the Rules of the Superior Courts. The court must be satisfied that there are "*special circumstances*" which justify an extension of time. A summons may only be renewed for a period of three months.
49. The default position, therefore, is that personal injuries proceedings will have been issued within two years of the date of the alleged negligent act, and that a defendant will have been served with the summons within a further period of twelve months. Put otherwise, the default position is that, at the very latest, a defendant will be on notice of the nature and extent of the claim against them within an aggregate period of three years. There would be little point putting in place procedural safeguards at the *outset* of the proceedings, only to allow those proceedings to drag on indefinitely thereafter. In the present case, at a remove

of some twelve years from the date of the road traffic accident, the proceedings have not moved much beyond the steps which were required to be completed within three years.

50. Counsel on behalf of the plaintiff submitted that the prejudice which his client would suffer if unable to pursue a claim for damages in respect of what are said to be "*life altering injuries*" outweighs any prejudice supposedly suffered by the first defendant. It is said that the underlying claim for damages has "*considerable merit*" and that the trial of the action should be confined to an assessment of damages only. The solicitor on behalf of the plaintiff has offered the opinion, on affidavit, that it is an incontrovertible fact that the motor vehicle crashed due to the negligence of the deceased driver.
51. With respect, the various strands of the foregoing submissions are supported by neither the pleadings nor the evidence. The case, as pleaded, is that the road traffic accident had been caused by a combination of factors. In particular, it is alleged that the motor vehicle had not been in a roadworthy condition in that the rear offside tyre had been excessively worn and lacked traction on wet surfaces. Complaint is also made as to the state of repair of the public road. It is precisely because the plaintiff's case is that the cause of the accident was multifaceted that it had been necessary to join four defendants, namely the deceased driver's personal representative, the roads authority, the vendor of the vehicle and the entity said to have inspected and passed the vehicle prior to its sale. It appears from the pleadings that the deceased driver had only taken delivery of the vehicle a short number of days prior to the accident.
52. Given the manner in which the plaintiff has chosen to plead his case, it is not now open to his side to suggest that there is an incontrovertible claim as against

the deceased driver alone. Indeed, the plaintiff's own solicitor has averred, at a later point in his affidavit, that he believes that the cause of the accident was a combination of driver negligence by way of speed, poor road conditions and the poor condition of the vehicle.

53. In the event the case were to proceed to full hearing, it would be necessary for the trial judge to consider the factual circumstances leading up to the sale of the vehicle to the deceased driver shortly before the day of the accident and the nature of any inspection carried out. It would also be necessary for the trial judge to consider the state of repair of the public road. It is incorrect, therefore, to suggest that this is a case in which witnesses as to fact will not have a significant role to play. This court is entitled to take judicial notice that memories fade over time and that the delay in prosecuting these proceedings will have affected the ability of the witnesses of fact to recall events from June 2010.
54. It is also incorrect to suggest that the claim has such obvious merit that this court should assume that liability will not be in issue and that the matter will proceed by way of an assessment of damages only. Counsel for the first defendant has made it clear in submission that his side has not conceded liability.
55. The ability of the first defendant's insurers to secure a contribution or indemnity from the other three defendants—should this arise as an issue—will also have been prejudiced by the delay. Whereas the precise apportionment of liability between the defendants *inter se* may not directly concern the plaintiff provided that he succeeds as against at least one of the defendants, the apportionment will be of real significance to the defendants themselves. The precise circumstances in relation to the condition of the vehicle, the pre-sale inspection of same and the knowledge of the deceased driver are all heavily fact dependent. They will

depend on the recollection of witnesses from, for example, the car sales company and the testing company. A similar position applies in respect of the state of the public road.

56. Even if, contrary to my findings above, it were reasonable to assume that the action would proceed as an assessment of damages only, the delay has, again, caused prejudice. It would appear from the limited medical records which have been adduced in evidence that the plaintiff had made a good recovery from the road traffic accident. The plaintiff had been reviewed on 8 February 2011 by the consultant breast and general surgeon under whose care he had been in the immediate aftermath of the accident. This is the most up-to-date medical report which has been exhibited. The consultant's report states as follows:

“In general, [the plaintiff] appears well, is eating normally, is working and doing all activities of daily living independently. On examination his cranial nerves are grossly intact. He can see well enough to be fully independent, having problems only with reading. His sense of smell is intact. His eye movements are normal, his facial sensation and expression are normal. He has no problem with his hearing. On examination of his neck and back, he has a good range of movement. The only abnormality was that he complained of reduced vision on looking upwards. On examination of his upper limbs the sensation, tone, power and co-ordination were normal. On examination of the lower limbs the sensation, tone, power and co-ordination were normal.”

57. The consultant went on to state that the plaintiff has residual symptoms since the road traffic accident, and she recommended that he should have a further follow-up examination with a neurologist. The plaintiff is recorded as having declined any referral to a specialist neurology service in Ireland, saying that he had arrangements in Moldova.
58. The personal injuries summons cites a number of other medical reports. In particular, it is pleaded that a consultant ophthalmologist had offered the opinion

that the plaintiff has no evidence of any permanent damage to his eyes or eyesight as a result of the road traffic accident. It is further pleaded that a consultant nose ears and throat surgeon has offered the opinion that the plaintiff's symptoms of nasal blockage and tinnitus were caused by the road traffic accident. The surgeon is also reported as having explained that the plaintiff would need septoplasty surgery of his nasal septum to release the nasal blockage. Counsel on behalf of the plaintiff was unable to confirm whether or not, some ten years later, this surgery has yet been carried out.

59. It appears that if and insofar as the plaintiff has been examined by any medical practitioner since 2011 or 2012, same would have occurred in the Republic of Moldova. This court has not been told whether such medical examinations took place or whether, if they did occur, written records are still available in respect of same.
60. The course of the plaintiff's symptomology and the extent to which any medical complaints can be attributed to the accident, as opposed to underlying age related conditions, is fact-specific. The delay in prosecuting the proceedings will have prejudiced the ability of all of the defendants to test the medical evidence and to trace the course of the plaintiff's injuries.
61. On the other side of the scales, it is necessary to weigh the prejudice to the plaintiff. In the event that the proceedings are dismissed, then the plaintiff will have lost the opportunity to pursue a claim for damages arising out of what he alleges had been the negligent driving of the deceased. The proceedings will have been dismissed without any adjudication—one way or another—on the merits of this aspect of his overall claim. A decision to dismiss the proceedings will thus engage the plaintiff's constitutional right to litigate, i.e. his right to

achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law (*Tuohy v. Courtney* [1994] 3 I.R. 1 at 45). However, the right to litigate is not absolute: it must be balanced against other rights, including, relevantly, the right of defence. This is reflected, in part, by the imposition of limitation periods. It also underlies the inherent jurisdiction to dismiss proceedings on the grounds of delay.

62. Whereas the loss, by a plaintiff, of the opportunity to pursue a claim for damages is undoubtedly a significant detriment, it does not automatically trump the countervailing rights of a defendant. There is an obligation upon a plaintiff to pursue their claim with reasonable expedition. By definition, the carrying out of the *Primor* balancing exercise will only ever arise where a finding of culpable delay has been made against a plaintiff and/or their agents. A defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be dismissed in circumstances where a plaintiff is responsible for inordinate and inexcusable delay. More modest prejudice may tip the balance of justice against allowing the proceedings to continue.
63. (The threshold for the dismissal on the grounds of delay is higher in cases where a plaintiff has been or continues to be under a disability: see, most recently, *Sullivan v. Health Service Executive* [2021] IECA 287).
64. As emphasised by the Court of Appeal in *Sweeney v. Keating* [2019] IECA 43 (*per* Baker J., at paragraph 26), a *laissez faire* attitude to the progress of litigation cannot be tolerated:

“Material also to an application to dismiss proceedings for inordinate and inexcusable delay is the fact that the court itself is obliged, in furtherance of its constitutional obligations to administer justice and its obligation to have regard to the European Convention on Human Rights (‘ECHR’), to ensure that litigation is concluded in an

expeditious manner (see, for example the decision in *Quinn v. Faulkner* [2011] IEHC 103). A *laissez faire* attitude to the progress of litigation by the plaintiff cannot be tolerated given that delay may constitute a violation of Art. 6 ECHR rights.”

65. The importance of the constitutional imperative to bring to an end the culture of delays in litigation, so as to ensure the effective administration of justice and the application of procedures which are fair and just, has been recently reiterated by the Court of Appeal in *Gibbons v. N6 (Construction) Ltd* [2022] IECA 112 (at paragraph 93). At the conclusion of his survey of the relevant authorities, Barniville J. approved of the trial judge’s observation that while the fundamental principles to be applied have not changed since *Primor*, the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court’s obligation to ensure that litigation is progressed to a conclusion with reasonable expedition.
66. To summarise: the balance of justice requires the court to consider a range of matters. It is not simply an exercise in weighing (i) the potential loss to the plaintiff of an opportunity to pursue a claim, against (ii) the ability of the defendant to defend the proceedings notwithstanding the delay. Other factors including, relevantly, the conduct of the respective parties and the constitutional imperative of reasonable expedition in litigation must be assessed as part of the *Primor* test. The acts or omissions of the parties’ solicitors, as agent, will be imputed to the parties to the litigation. The parties have a right of action if their solicitors have been negligent.
67. Here, the plaintiff had, in effect, abandoned his proceedings for a period of time between 2015 and 2020. The failure of the plaintiff to swear an affidavit in

response to the application to dismiss adds to the impression that, even now, he has not fully committed to progressing these proceedings.

68. The ability of the first defendant's insurers to defend the proceedings and/or to pursue a claim for indemnity and contribution against the other defendants has been prejudiced by the delay. The point has now been reached where the balance of justice demands that the proceedings against the first defendant be dismissed. It would be inconsistent with the constitutional rights of the first defendant, and, more generally, with Article 6 of the European Convention on Human Rights, to do otherwise.
69. Finally, for completeness, it should be noted that no argument was addressed to the court on behalf of the plaintiff to the effect that the first defendant had been guilty of acquiescence. This seems a sensible approach on the part of the plaintiff. Whereas the first defendant did not deliver a defence, it is apparent from the exhibited correspondence that this is because her legal representatives were seeking to have the proceedings discontinued voluntarily. As explained at paragraphs 15 and 16 above, the first defendant's side took the view that the proceedings were statute barred. No substantive response was ever made to this correspondence.
70. Thereafter, the first defendant's side expressly raised the issue of delay, in correspondence from May 2017 onwards, and had received a response to the effect that the plaintiff's new solicitors had been unable to contact their client for a number of years. In the circumstances, it was entirely reasonable for the first defendant to pursue an application to dismiss the proceedings rather than deliver a defence. Indeed, it was only in late October 2020 that the plaintiff's

side first called for the delivery of a defence. By this date, the motion to dismiss had already been prepared and was formally issued the following week.

CONSENT TO ASSESSMENT UNDER PIAB ACT 2013

71. For completeness, it should be recorded that no significance attaches to the fact that the first defendant had, seemingly, indicated to PIAB in May 2012 that she would consent to an assessment being made by the board. The fact that a respondent to a claim for assessment by PIAB consents to an assessment does not affect their right to defend any legal proceedings subsequently taken against them. This is expressly provided for under section 16 of the Personal Injuries Assessment Board Act 2003. Relevantly, that section provides that consent to the carrying out of an assessment shall not constitute an admission of liability by the respondent concerned, nor be capable of being used in evidence against him or her in any proceedings nor operate in any manner to prejudice any proceedings.
72. The scheme of the Personal Injuries Assessment Board Act 2003 is that the assessment process only ever becomes legally binding upon a respondent in circumstances where PIAB has made an assessment and both the claimant and the respondent have accepted that assessment. Even then, the assessment may be subject to court approval in certain instances.
73. On the facts of the present case, matters never proceeded as far as the making of an assessment by PIAB. Even if an assessment had been reached and accepted by both parties, however, this would not have precluded the first defendant from pursuing a separate claim for indemnity and contribution as against the other alleged wrongdoers, i.e. the roads authority, the vendor of the vehicle and the

entity said to have inspected and passed the vehicle prior to its sale. Such proceedings would remain open under the Civil Liability Act 1961, by virtue of the provisions of section 42 of the Personal Injuries Assessment Board Act 2003.

CONCLUSION AND FORM OF ORDER

74. For the reasons set out herein, I am satisfied that the plaintiff has been guilty of inordinate and inexcusable delay in the prosecution of these proceedings. The balance of justice lies against allowing the proceedings as against the first defendant to go to full trial. Accordingly, an order will be made dismissing the proceedings as against the first defendant.
75. As to costs, the default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been entirely successful in proceedings is entitled to recover its measured costs from the other side. If this default position were to obtain, then the first defendant would be entitled to her costs. If either side wishes to contend for a different form of order, they should email written legal submissions to the registrar assigned to this case by 30 June 2022. Such submissions should be filed in the Central Office of the High Court and also exchanged with the other side.
76. The case will be listed before me, remotely, on Monday 4 July 2022 at 10.45 am for final orders.

Appearances

Jack Fenton (and Lauren Dempster) for the Plaintiff instructed by Midland Legal Solicitors

Brendan Savage for the first named Defendant instructed by Ennis and Associates

Approved
Gemma S. Mans