

**THE HIGH COURT**

**[2023] IEHC 281**

**Record No: 2013/1670P**

**Between:-**

**DIARMUID VAUGHAN**

**(AS ADMINISTRATOR OF THE ESTATE OF DONAL VAUGHAN DECEASED)**

**Plaintiff**

**-and-**

**PHILIP ENGLISH AND BILL LEAHY PRACTISING UNDER THE TITLE AND  
STYLE OF ENGLISH LEAHY SOLICITORS**

**Defendants**

**Judgment of Mr Justice Cian Ferriter delivered this 19<sup>th</sup> day of May 2023**

**Introduction**

1. This is an application by the defendants to dismiss the plaintiff's case for want of prosecution on the grounds of inordinate and inexcusable delay. The present plaintiff is the son of the late Donal Vaughan and the administrator of his estate. The late Mr. Vaughan died in July 2020 and the proceedings were reconstituted in the present plaintiff's name in October 2021. The case is a professional negligence action concerning legal services provided by the defendant firm of solicitors to the late Mr. Vaughan in relation to the termination of his employment with Dublin Airport Authority ("DAA") in October 2007. For ease, and unless the context otherwise makes clear, I will refer to the late Mr. Vaughan as "*the plaintiff*".

2. There is no dispute as to the legal principles applicable to a strike out application of this type, which are well settled, but there is a dispute as to the correct application of those principles to the facts.

## **Background**

3. The late Mr. Vaughan was employed as a business intelligence manager with DAA from 7 August 2001 until the date of his negotiated discharge on 5 October 2007. His contract of employment with DAA included the following clause (“clause 12”):

*“Clause 12: Premature retirement due to Sickness or Disability of a Permanent Nature*

*In the event of you having to retire prematurely due to ill-health or injury which in either case renders you in the opinion of the Company permanently incapable of continuing to perform your normal duties, you will be entitled to receive from the company a lump sum equivalent to three times your annual salary as defined in the preceding paragraph...”*

4. The late Mr. Vaughan went out on sick leave from DAA in December 2004. It appears that the medical certificates supporting his sick leave indicated depression and anxiety as the reason for his inability to work during the sick leave period. It appears that he received treatment for depression from a consultant psychiatrist and also received treatment for alcohol abuse. He entered into negotiations with DAA in or about November 2006 with a view to terminating his employment with the company. He had a meeting with a senior executive in DAA on 24 November 2006 when the potential terms of his departure were discussed. He was then sent a “request for voluntary severance” document by DAA, with proposed departure terms, by letter of 15 December 2006. In that letter, he was advised that he should take legal advice prior to accepting the proposed severance package. He then engaged the defendant firm to advise him in relation to his severance. There ensued a period of negotiation between the first defendant and the DAA’s solicitors which culminated in the late Mr. Vaughan entering a “receipt and discharge” agreement with DAA in October 2007 which involved a one-off severance payment of €55,000 together with waiver of arrears of a loan and contribution to his legal fees. The agreement records that the repayments were “paid by way of severance on grounds of ill health”. The agreement was expressed to be without any admission of liability on the part of DAA.

## **Pre-proceedings steps**

5. No issue was raised by the late Mr. Vaughan with the severance in the years subsequent to his departure from DAA in October 2007. It appears that the late Mr. Vaughan made a subject access request to DAA in April 2012 seeking documents relating to the circumstances of his departure. He was furnished with documents in response to the request in August 2012 and he then issued these proceedings by plenary summons in February 2013 (having earlier issued proceedings against wrongly-named defendants in November 2012).

## **The proceedings**

6. The nub of the claim in negligence against the defendant is that the defendant failed to identify clause 12 of the employment contract, failed to inform the late Mr. Vaughan of this clause and failed to call upon DAA to furnish him his entitlements pursuant to clause 12 and/or to rely on this clause in the severance negotiation process.

7. The late Mr. Vaughan pleaded that he performed his duties with DAA *“with no complaint from either party up until 6 December 2004 from which date he was unable to perform his duties due to illness. This illness rendered it necessary for the plaintiff to leave his post due to ill health having rendered him incapable of continuing his normal duties on a permanent basis.”* (statement of claim, para. 4).

8. He pleaded that, in March 2007, he retained the defendants for the express purpose of taking all necessary steps in the negotiation of a severance package for his exit from the company. The severance package negotiated was a one-off payment of €55,000, together with a loan repayment waiver of €13,941 and the defendants’ legal fees of €1,500.

9. It is pleaded at paragraph 14 of the statement of claim that:

*“Negligently and in breach of duty the Defendants failed to call upon the Plaintiff’s employer to furnish the Plaintiff his entitlements as provided for pursuant to clause 12 of his contract of employment.”*

10. The plaintiff's claim in the proceedings is for the sum of €323,221 being the difference between three years' salary (said to amount to €398,221) and the severance payment of €55,000.

11. In their Defence, the defendants specifically deny the content of para. 4 of the statement of claim *"and in particular the statement that the plaintiff was unable to perform his duties due to illness and that this purported illness rendered it necessary for the plaintiff to leave his post due to ill health having rendered him incapable of continuing his normal duties on a permanent basis"*. The defendants plead that *"on the contrary the plaintiff was a recovering alcoholic on whose behalf a medical report was submitted to the human resources manager at DAA by Dr. Brendan Deasy on 2 June 2005 indicating that the plaintiff should be six months alcohol free before attempting to return to work"*.

12. The defendants also specifically plead in their Defence that the plaintiff entered into negotiations with DAA for voluntary severance of his employment and was offered a severance package in December 2006 in the sum of €25,000 to take account of the fact that he had moved to Tipperary and that it was no longer feasible for him to continue working for DAA, that DAA had presented the plaintiff with a document headed *"Request for voluntary severance"*, but was advised by DAA to take legal advice prior to accepting the package and that the plaintiff engaged the services of the defendants in that context (Defence, para. 3). This plea is said to be borne out by the contents of a letter of 15 December 2006 sent to the plaintiff by the group head of IT in DAA at the time. On this application, the defendants also referenced notes of a meeting between the plaintiff and that DAA executive on 24 November 2006. The defendants say that the contents of this attendance note made clear that the plaintiff was well aware of the terms of clause 12 of his contract as the note specifically records the plaintiff referring *"to an entitlement of 2-3 years salary for those on permanent illness"*.

13. It seems clear that the plaintiff was suffering from alcohol abuse problems at this time. This attendance note specifically references the opinion of Dr. Deasy of 2 June 2005 (adverted to at para. 2 of the Defence). That medical report noted while it was the plaintiff's desire to return to work immediately at that time, Dr. Deasy was of the opinion that the plaintiff *"should be six months in recovery from alcohol before he attempts to resume work"*. The attendance

note of the meeting on 24 November 2006 expressly notes the plaintiff acknowledging the contradiction between his view and Dr. Deasy's opinion at that time.

14. The defendants say that this is the essential context of the plea (contained in para. 4 of their Defence), whereby the defendants deny that the severance agreement involved DAA accepting that the plaintiff would exit the company prematurely on the grounds of ill health as alleged by the plaintiff. Rather, the defendants plead that *“on the contrary there was no medical evidence to show that the plaintiff had an illness such as would render him permanently incapable of performing his normal duties with [DAA]”*. The Defence goes on to plead that:-

*“Accordingly the defendants will submit that they negotiated to the best of their ability to secure a voluntary severance package for the plaintiff in the sum of €68,941 in circumstances where he was exiting his employment voluntarily for personal reasons including the fact that he moved to live in Tipperary. At no stage did the plaintiff instruct the defendants to negotiate an exit from his contract of employment with [DAA] on the basis that he had an illness or injury which rendered him permanently incapable of returning to work.”*

15. The last plea relevant to the issues on this application is found in para. 5 of the Defence, where it is pleaded that *“The defendants would submit that the plaintiff had already personally raised clause 12 of his contract of employment with [DAA] at a meeting in November 2006 but that since he was exiting the company voluntarily for personal reasons and not on the grounds of sickness or disability of a permanent nature it was explained to the plaintiff and the plaintiff knew full well that he could not meet the criteria required under this clause”*.

16. It has been necessary to set out in some detail the precise pleading of the parties in the proceedings as it is the issues joined on the pleadings which will inform the nature and range of evidence which the court would require to hear at trial in order to fairly determine the issues in the proceedings.

## **Chronology**

17. Before coming to the issues in contention on this application, it is useful to set out a chronology of the various steps taken in the proceedings. Before setting out the chronology it

is relevant to note that the plaintiff originally issued a plenary summons on 16 November 2012 involving the same negligence claims but against wrongly-named defendants. Those proceedings were discontinued, after the plaintiff issued the present proceedings by plenary summons on 19 February 2013. The chronology of the material steps in the present proceedings is as follows:

Plenary Summons	19 <sup>th</sup> February, 2013
Statement of Claim	3 <sup>rd</sup> April, 2013
Affidavit of Verification	3 <sup>rd</sup> April, 2013
Appearance	8 <sup>th</sup> July, 2013
Notice for Particulars (by Defendants)	7 <sup>th</sup> August, 2013
Replies to Particulars	22 <sup>nd</sup> October, 2013
Notice for Further and Better Particulars (Defendants)	1 <sup>st</sup> November, 2013
Replies to Particulars	16 <sup>th</sup> January, 2014
Affidavit of Discovery of Donal Vaughan	19 <sup>th</sup> March, 2014
Defence of the First and Second Named Defendants	19 <sup>th</sup> May, 2014
Letter seeking voluntary discovery from the DAA	28 <sup>th</sup> May, 2014
Notice to Produce (Plaintiff)	5 <sup>th</sup> January, 2015
Notice for Particulars (arising from the Defence)	5 <sup>th</sup> March, 2015
Plaintiff's request for voluntary discovery	5 <sup>th</sup> March, 2015
Replies to Particulars	17 <sup>th</sup> April, 2015
Further Notice for Particulars	24 <sup>th</sup> August, 2015
Replies to Particulars	9 <sup>th</sup> September, 2015
Request for Further and Better Particulars	11 <sup>th</sup> September, 2015
Replies to Particulars	17 <sup>th</sup> November, 2015
Third Party Discovery (from DAA) completed	25 <sup>th</sup> October, 2016
Notice of Intention to Proceed	21 <sup>st</sup> November, 2017
Master's Order Re-constituting the Proceedings	5 <sup>th</sup> October, 2021
Notice of Intention to Proceed	15 <sup>th</sup> October, 2021
Notice of Motion (to dismiss for want of prosecution)	23 <sup>rd</sup> November, 2021
Replying Affidavit of Carl O'Mahony	4 <sup>th</sup> March, 2022
Motion first listed in Common Law Motions List	7 <sup>th</sup> March, 2022

## Applicable legal principles

18. The principles governing the court's inherent jurisdiction to strike out proceedings for want of prosecution are well settled and have been the subject of extensive discussion in the case law. The *locus classicus* in this area is *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 ("*Primor*" or "*Primor v. SKC*"). As put by Costello J. in her recent judgment in *Doyle v. Foley* [2022] IECA 193 ("*Doyle v. Foley*") (at para. 53), there are three limbs to the *Primor* test:

- (1) The defendant must establish that the delay on the part of the plaintiff in prosecuting the claim has been inordinate.
- (2) If that is established, then he must establish that the delay has been inexcusable.
- (3) If it is established or agreed that 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*". (*Primor* p. 475, para. (c))

19. As has been repeatedly emphasised in the authorities (see, for example, *Doyle v. Foley*, at para. 54), the matters listed by Hamilton C.J. in *Primor* as matters which the court is entitled to take into account when considering where the balance of justice lies (such as delay on the part of the defendant, any acquiescence in the plaintiff's delay and prejudice to the defendant) are not an exhaustive list or set of cumulative tests but, rather, operate as a guide to the court in determining where the balance of justice lies as between the parties in any given case. Each case will very much turn on its own facts.

20. As is clear from the jurisprudence subsequent to *Primor v. SKC*, the constitutional and Convention requirements that litigation is determined within a reasonable time are also material factors when assessing the balance of justice. A factor which has loomed large in the jurisprudence is that of the question of any prejudice to the defendant stemming from periods of inexcusable delay and I will address that issue when dealing with the balance of justice below.

### **Delay Inordinate and, if so, inexcusable?**

21. In my view, the delay in the prosecution of these proceedings particularly in the period between the notice of intention to proceed of November 2017 and the second notice of intention to proceed of October 2021, a period of some four years, is inordinate. Accordingly, it is necessary to turn to the question of whether that delay is excusable.

22. The plaintiff has not properly explained the delay of over five years between October 2007 (the date of the severance) and November 2012 (when the late Mr. Vaughan first issued a plenary summons in respect of the professional negligence allegations). The plaintiff's solicitor says that the late Mr. Vaughan made a data access request to DAA on 30 April 2012 and received documents on foot of that request on 16 August 2012 which included a copy of his employment contract and that it was only, at that stage, that Mr. Vaughan fully understood the importance of clause 12 of his employment contract. However, no explanation is provided as to why it took over four and a half years after his departure from DAA to seek to raise any issue with DAA at all. The proceedings here were issued very close to the expiry of the limitation period and after a period of considerable pre-commencement delay.

23. It is well established (see *Millerick v. Minister for Finance* [2016] IECA 206 at para. 21) that there is a particular onus on a plaintiff to prosecute his or her proceedings with expedition where the plaintiff has been guilty of pre-commencement delay. In my view, that onus was not discharged in this case in particular in the four year period between October 2017 and October 2021, for the reasons set out below.

24. The pleadings closed (with replies to further and better particulars) in November 2015. It is accepted that third party discovery (obtained from DAA) was completed at the end of October 2016. As explained by the plaintiff's solicitors in a detailed letter issued to the defendants on 1 December 2021 (in response to a letter from a number of weeks prior to then threatening a strike out motion, following receipt of the notice of intention to proceed dated 15 October 2021) that time was productively spent by the plaintiff from October 2016 to September 2017, in which there were consultations between solicitor and counsel and follow up with various treating doctors to obtain medical notes and records; and consultations between



the late Mr. Vaughan and his solicitor with treating doctors, all of which led to the plaintiff's Senior Counsel sending a certificate of readiness to the plaintiff's solicitor on 17 October 2017. I am satisfied there was no inexcusable delay in the prosecution of the proceedings up to that point.

25. However, in my view, there was inexcusable delay thereafter between October 2017 and the obtaining of an order on 5 October 2021 reconstituting the proceedings and the service of a notice of intention to proceed shortly thereafter on 15 October 2021. The delay in the period of four years from the point in October 2017 at which Senior Counsel for the plaintiff certified the case as ready for trial (a point at which all pleadings had closed, discovery had been completed and consultations had been had with medical advisors) to the reconstitution of the proceedings in October 2021 is largely inexcusable. While it is clear from the plaintiff's solicitor's narrative that there were attempts on the part of the plaintiff's solicitor to progress an appointment for the plaintiff with a medical expert during this period, no such appointment occurred prior to the plaintiff's death in July 2020. It seems that, despite reasonable efforts by the plaintiff's solicitor, the plaintiff himself was not accommodating in respect of attempts to set up an appointment with the medical expert. The plaintiff then sadly died on 10 July 2020. While I would make reasonable allowance for the time necessary to bring an application to reconstitute the proceedings following the death of the plaintiff, this in fact did not occur for some 15 months. Importantly, throughout the four-year period from October 2017 to October 2021 neither the late Mr. Vaughan nor the present plaintiff ever, at any point, through their solicitors sought to communicate the reasons for not setting the case down when, from the defendants' perspective, the matter was long since ready for trial. Accordingly, in my view, it is proper to approach this application on the basis that a good portion of the four-year delay between October 2017 and October 2021 is not excusable for the purposes of the application of the *Primor* test.

26. It is necessary therefore to turn to the question of the balance of justice

### **Balance of Justice**

27. Both parties relied on different aspects of the analysis of the question the balance of justice, when exercising the *Primor* jurisdiction, as set out by Collins J. in his recent judgment in *Cave Projects v. Gilhooly* [2022] IECA 245 ("*Cave Projects*"). I considered that analysis

(in particular as to the question of the degree of prejudice required to be shown by a defendant applicant when seeking to demonstrate that the balance of justice favours strike out of proceedings) in my recent judgment in *Kelleher v. Tallis & Co. & ors* [2023] IEHC 212 and concluded (at para. 85) that Collins J. held that applicant defendants have an onus of demonstrating to the court that there is some likely prejudice to them which is moderate (in the sense of not insignificant), which arises from the nature of the matters which will have to be addressed at trial and which is attributable to periods of the plaintiff's inexcusable delay.

28. The defendants' core point on this application is that the death of the late Mr. Vaughan (which, they say occurred at a time when there had been some four years of inexcusable delay post-commencement of proceedings, and some five and a half years of inexcusable delay pre-issue of proceedings) means that they will now suffer the significant prejudice of not being able to cross-examine the late Mr. Vaughan to test him on the core premises of his case. In particular, the defendants submit that they will be deprived of advancing their defence by subjecting him to cross-examination on issues highly relevant to liability, causation and damage including the late Mr. Vaughan's knowledge and understanding of clause 12 and whether it could have been availed of by him at all; his dealings with DAA on this issue prior to his engagement of the defendants; and issues related to the true extent of the plaintiffs' illnesses and whether it could be said that he was "*permanently incapable of continuing to perform*" his normal duties such that DAA would have been required to form the opinion that he was entitled, in accordance with clause 12, to receive a lump sum of three years of his annual salary for premature retirement due to ill health causing permanent incapacity.

29. The defendants submit that these issues in the case would require extensive cross-examination on the state of the late Mr. Vaughan's health, the medical treatment he had received and the prognosis in the period up to October 2007 as to his future health; the late Mr. Vaughan's own express views in June 2005 that he was fit to return to work at that point; Dr. Deasy's view in June 2005 that he should be fit to resume work within six months and any other issues germane to the establishment of the high bar of permanent incapacity to work required by clause 12. They submit that issues would also need to be explored on cross-examination in relation to the late Mr. Vaughan's expressed reason for seeking a severance from the company at that point (being his relocation to Tipperary), a reason which featured in the DAA's letter to him of 15 December 2006 and also a letter from DAA's solicitors to the defendants of 3 April 2007 in which it was stated that the late Mr. Vaughan's reason for it being

no longer feasible for him to work in Dublin was the fact that he had moved to Tipperary and that DAA was approaching the severance offer issue based on that reason.

30. The present plaintiff, for his part, says that the trial of this action can fairly proceed, following his late father's death, on a documents-only basis. He submitted that the plaintiff's expert had provided an expert opinion supportive of the case in negligence which was based on a consideration of the documents uncovered by discovery and, in particular, the documents on the defendants' file. In his expert opinion, the plaintiff's expert stated that:

*“In this case, if [the first defendant] had reviewed [the plaintiff's] contract of employment, he would have discovered that [the plaintiff] was entitled to three years' salary should he retire on the grounds of ill health. Given that [the plaintiff] was a director with Aer Rianta, and therefore a high earner, three years' salary would have far exceeded the €55,000 termination payment achieved by the defendant on behalf of [the plaintiff].”*

31. The plaintiff's expert expressed the opinion that the defendants' failure to establish if the plaintiff had a contract of employment and his failure to review that contract amounted to professional negligence.

32. In a supplemental opinion (January 2018), the plaintiff's expert stated that:-

*“I am given to understand that [the plaintiff] suffered from severe depression, he had been treated by his GP and a psychiatrist and had been admitted to a psychiatric unit for treatment. If [the first defendant] reviewed his contract and established the right to retire on ill health grounds, then it is reasonable to assume he would have sought medico-legal reports from [the plaintiff's] treating physicians, including in particular [the plaintiff's] GP and psychiatrist(s). There is no doubt in my mind that such medical evidence would establish beyond doubt the entitlement of [the plaintiff] to retire on ill health grounds, and as a consequence is entitled to be paid by his employer three years' salary.”*

33. The defendants say that the premise of the plaintiff's expert opinion (i.e. that the alleged negligence in the failure to raise clause 12 in the negotiations led to the failure to secure three

years' salary on severance) is premised on the highly contentious proposition that the plaintiff's medical position was such that the plaintiff would have satisfied the permanent incapacity requirement of clause 12 such that DAA would have been required to honour that clause.

34. In my view, it is not correct to characterise these proceedings as principally a "documents only" case. While the plaintiff might well be in a position to present his case on the basis of the documents on the defendants' file and his expert's opinion on those documents and the consequences of what they reveal, that would be to ignore the issues raised by the defendants' Defence and the entitlement of the defendants to an opportunity to fairly advance their defence through challenging key factual aspects of the basis of the plaintiff's case. On the defendants' side, on the issues joined by them in their Defence, the case is far from a documents-only case.

35. The plaintiff emphasises the "*terminal*" nature of the prejudice suffered by him in the event that the proceedings were dismissed (as emphasised by Collins J. in *Cave Projects* at para. 36, p. 27) and I, of course, approach my assessment of the balance of justice mindful of the consequences of a strike out of the proceedings for the plaintiff.

36. The plaintiff says that it is he who is prejudiced in the event that the matter goes to trial, by reason of his late father's death, in his ability to effectively challenge the defendants (and, in particular, the first defendant) on the evidence which they might give on these matters. However, fundamentally, in my view, the material question that arises in weighing the balance of justice here is whether it can be said that the defendants will suffer at least moderate prejudice in seeking to defend the claims made against them by reason of the non-availability of the late Mr. Vaughan as a witness at trial. The claim is for damages for well in excess of €300,000 for alleged professional negligence. While one might legitimately question how the plaintiff would be able to prove causation in particular in the absence of the late Mr. Vaughan to give evidence (and, as appropriate, to be medically examined), the real disadvantage is to the defendants in being able to fairly meet the claims against them in the absence of an opportunity to properly test Mr. Vaughan's case by cross-examination. The centrality of cross-examination to a fair trial is well established: see, for example, the discussion in the judgment of Hardiman J. in *Maguire v. Ardagh* [2002] 1 IR 385 at 794 to 798. As counsel for the defendants pithily put it, "*effective cross-examination requires the availability of a witness to challenge*", a central procedural protection which his clients are entitled to in defence of the

serious allegations against them. In my view, that right will be denied to the defendants here by reason of the death of the late Mr. Vaughan in a way that can only cause them significant prejudice in defence of the serious claims against them. The defendants would be significantly prejudiced in defending the claims without having the opportunity to advance their defence through cross-examination of the late Mr. Vaughan, on issues to do with both liability and causation, in particular, the late Mr. Vaughan's understanding of clause 12 when negotiating his severance from DAA and the extent to which he at all believed that he could come within its terms; the nature of the engagement between the late Mr. Vaughan and the defendants and instructions given in the context of the negotiation of the severance package; and, most particularly, on the question as to whether the late Mr. Vaughan's health circumstances in 2006/7 were such that there was any realistic prospect that he would qualify under the permanent incapacity provisions of clause 12.

37. I am also quite satisfied, as recently reiterated by Collins J. in *Cave Projects* (at para. 36, p. 28) that there is a causal connection between the inexcusable delay and the matters relied on by the defendants for the purposes of establishing that the balance of justice warrants dismissal of the claim. In particular, if the matter had been set down for trial much earlier, when it should have been, the trial could have been concluded well prior to the late Mr. Vaughan's death.

38. The defendants also sought to rely, in the balance of justice, on the fact that the proceedings concerned allegations of professional negligence and, therefore, that the continued existence of the proceedings is damaging to their reputation. There was, however, no evidence before me that the existence of the proceedings had caused the defendants any specific harm, such as losing any client or opportunity for business, or causing an increase in their professional indemnity insurance. In the circumstances, I adopt a similar approach to that adopted by Heslin J. in *Cullen v. Dore* [2022] IEHC 525 (at para. 112) in not placing any material weight on this factor in weighing the balance of justice.

39. The plaintiff also emphasises that the case is now ready for hearing and that this is a significant factor in assessing where the balance of justice lies. The fact that the proceedings are ready for hearing or, indeed, listed for hearing can make it more difficult on the part of an applicant to have the proceedings struck out: see, for example, *Grant v. Minister for Communications* [2019] IEHC 468 (Pilkington J.) (at paras. 47 and 53) and *Power v. Creed*

[2018] IEHC 688, cited with approval by Collins J. in *Cave Projects* at para. 44, p. 43. However, there is an ultimately dispositive countervailing factor here, being the significant and undoubted prejudice which would be caused to the defendants by the unavailability through death of the late Mr. Vaughan at the hearing of the action.

40. The plaintiff argues that it should be left to the trial judge to factor in any actual prejudice in weighing up the evidence of the various witnesses at the hearing and, indeed, that, the first defendant would be able to give evidence and it would be the plaintiff who would then face difficulties in respect of his cross-examination, potentially to the benefit of the defendants. However, I do not believe that justice should be put to the hazard in that way. In my view, it can be safely said, at this juncture, that the defendants will be, at the very least, moderately prejudiced in advancing their defence in light of the absence of the late Mr. Vaughan and that this prejudice tips the balance of justice in favour of dismissing the proceedings. It would subvert the whole basis of the *Primor* jurisdiction if, once such moderate prejudice is established and is regarded on the facts as being sufficient to tip the balance of justice in favour of dismissal of the proceedings, the question of such prejudice could nonetheless be left to be dealt with by the trial judge seeking to take it into account at the trial. The whole point of the *Primor* jurisdiction is that a defendant should not be put in a position where he or she has to undergo the hazard of such a trial where there has been inordinate and inexcusable delay and where the level of likely prejudice to the defendant resulting from such delay is such that the balance of justice favours the dismissal of the proceedings at the point of the strike out application.

41. In my view, the balance of justice on the facts here in light of the likely prejudice to the defendants flowing from the unavailability through death of the late Mr. Vaughan is such as to favour dismissing the proceedings.

## **Conclusion**

42. In conclusion, given that there has been inordinate and inexcusable delay in the prosecution of these proceedings, and given my view that the balance of justice favours their dismissal, I will make an order striking out the plaintiff's proceedings.

