

**THE HIGH COURT**

**[2023] IEHC 436**

**[Record No.] 2014 7727 P**

**FRANCIS MC GUINNESS**

**Plaintiff**

**-v-**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY  
GENERAL**

**Defendant**

**Judgment of Mr Justice Dignam delivered on the 29<sup>th</sup> day of June 2023**

**Introduction**

1. This matter comes before me by way of an application to dismiss the plaintiff's claim for inordinate and inexcusable delay or for failure to prosecute the claim or delay in the prosecution of his claim.

2. The proceedings arise from a search of the plaintiff's premises on the 23<sup>rd</sup> August 2014 by members of An Garda Síochána. The plaintiff claims, inter alia, that this search was unlawful in that it was conducted on foot of a warrant which was based on flawed sworn information, was conducted in an unlawful manner in that the warrant was not shown to the person on the premises at the time or at any time prior to the institution of proceedings and it involved disproportionately excessive numbers and the exercise of excessive force which caused avoidable damage to the plaintiff's premises. The plaintiff

also claims that business documents and two envelopes containing cash were seized and unlawfully retained.

3. The application arises in the following circumstances and against the following chronology:

23<sup>rd</sup> August 2014 - Date of the search of the plaintiff's premises;

2<sup>nd</sup> September 2014 – Plenary summons issues;

3<sup>rd</sup> September 2014- *Ex parte* Order of Cross J granting the plaintiff short service of a motion seeking Orders: compelling the first-named defendant to return items seized in the search; compelling the first-named defendant to furnish the plaintiff with a copy of any warrant authorising or purporting to authorise Garda entry to the premises; and restraining the first-named defendant from interfering with the plaintiff's property and/or premises or his person without notice to his solicitor that the first-named defendant requires access to his property and/or premises or requires to interview him. The plaintiff issued the motion on the same day;

8<sup>th</sup> September 2014 - Appearance entered on behalf of the defendants;

15<sup>th</sup> October 2014 - Order of Keane J striking out the plaintiff's motion of the 3<sup>rd</sup> September 2014;

22<sup>nd</sup> December 2014 – Defendants issue motion to dismiss the plaintiff's claim for want of prosecution for failure to deliver a Statement of Claim;

22<sup>nd</sup> January 2015 - Statement of Claim delivered;

26<sup>th</sup> January 2015 – Order of White J striking out the defendants' motion of the 22<sup>nd</sup> December 2014 seeking to dismiss the plaintiff's claim for want of prosecution, with costs to the defendants;

3<sup>rd</sup> February 2015 - Defendants serve a Notice for Particulars;

10<sup>th</sup> March 2015 – Plaintiff issues motion to compel the first-named defendant to furnish a copy of the sworn information grounding the application for a search warrant of the plaintiff's premises and a legible copy of the search warrant;

23<sup>rd</sup> March 2015 – Defendants issue motion to compel delivery of Replies to Particulars;

24<sup>th</sup> June 2015 - Order of Keane J striking out the defendants' motion to compel Replies to Particulars and extending the time for delivery of Replies by two

weeks. The plaintiff's motion to compel the first-named defendant to provide a copy of the sworn information and a legible copy of the search warrant is heard;

30<sup>th</sup> July 2015 – Defendants issue motion to dismiss the plaintiff's claim for failure to comply with the Order of Keane J of the 24<sup>th</sup> June 2015 in relation to the delivery of Replies to Particulars;

6<sup>th</sup> October 2015 - Plaintiff furnishes Replies to the defendants' Notice for Particulars;

12<sup>th</sup> October 2015 - Consent Order of Gilligan J striking out the defendants' motion to dismiss plaintiff's claim for failure to comply with the Order of Keane J of the 24<sup>th</sup> June 2015, i.e., for failure to deliver Replies to Particulars;

14<sup>th</sup> December 2015 - Defence delivered;

28<sup>th</sup> October 2016 - Order of Keane J refusing the plaintiff's motion to compel the first named defendant to furnish a copy of the sworn information;

14<sup>th</sup> December 2016 - Plaintiff files Notice of Expedited Appeal of the Order of Keane J of the 28<sup>th</sup> October 2016;

18<sup>th</sup> December 2017 - Order of the Court of Appeal dismissing the plaintiff's appeal against the Order of Keane J of the 28<sup>th</sup> October 2016;

19<sup>th</sup> December 2017 - Defendants write to plaintiff's solicitor advising of the outcome of the appeal;

24<sup>th</sup> November 2022 – Defendants issue motion to dismiss the plaintiff's claim for inordinate and inexcusable delay.

4. It is important to note that some of the steps and events in this chronology were overlapping. For example, while the defendants' motion to compel Replies to Particulars was before the Court the plaintiff's motion to compel the first-named defendant to provide a copy of the sworn information was also before the Court.

## **Principles**

5. There is a significant volume of judgments dealing with the question of the Court's jurisdiction to dismiss proceedings for delay and want of prosecution, some of which were very helpfully reviewed by Roberts J in her recent judgment of *Carroll v M &*

*P Sales and Marketing Limited & anor [2023] IEHC 54*. Many of the authorities are fact specific but the general principles applying to such applications are very well established and it seems to me that there is no significant dispute between the parties as to the principles to be applied. As is often the case, the dispute rather turns on what conclusion should be reached on the basis of those general principles on the precise facts of this case. I therefore do not propose to recite the applicable principles in great detail.

6. It was held in *Primor v Stokes Kennedy Crowley [1996] 2 IR 459*:

*“(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."*

7. This was summarised by Irvine J in *Millerick v The Minister for Finance [2016] IECA 206* at paragraph 18:

*"The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach."*

8. The approach was also very helpfully summarised by Barniville J at paragraph 79 of his recent judgment in *Gibbons v N6 (Construction) Limited & Galway County Council [2022] IECA 112* as:

- (a) that the delay on the part of the plaintiff in prosecuting their claim has been inordinate;
- (b) that the delay has been inexcusable;
- (c) where the defendant has established that the delay is both inordinate and inexcusable, the court must exercise its judgment whether, in its discretion, the balance of justice is in favour of or against allowing the proceedings to continue.

9. Overarching these principles is the constitutional and, indeed, European Convention on Human Rights imperatives to ensure access to the Courts and to ensure the timely administration of justice and to ensure the determination of civil proceedings

within a reasonable time. These imperatives are reflected in a number of judgments in which the court signalled a greater emphasis than had previously been the case on the need to ensure that proceedings are progressed with reasonable expedition. These include *Comcast International Holdings Inc & Ors v Minister for Public Enterprise & Ors* [2012] IESC 50 and, more recently, *Doyle v Foley* [2022] IECA 193 and *Gibbons v N6 (Construction)* in which Barniville J in the Court of Appeal approved the comments of Butler J in the High Court that there was a “*general consensus’ that while the fundamental principles have not changed since Primor, the weight to be attached to the various factors relevant to the balance of justice has been ‘recalibrated to take account of the court’s obligation to ensure that litigation is progressed to a conclusion with reasonable expedition.*” However, it is also important to note the comments of Collins J in his recent judgment for the Court of Appeal in *Cave Projects v Gilhooley* [2022] IECA 245 where he said at paragraph 36:

*“An order dismissing the claim is on any view a far reaching one. In Barry v Renaissance Security Services Limited, Faherty J endorsed the High Court’s characterisation of such an order as “a very serious remedy”. In Granahan t/a CG Roofing and General Builders v Mercury Engineering [2015] IECA 58, Irvine J (Peart and Mahon JJ agreeing) referred to the “terminal prejudice” to the plaintiff whose claim is dismissed (at para 46). Similarly, in Mangan v Dockeray [2020] IESC 67, McKechnie J (Clarke CJ, MacMenamin, Dunne and Baker JJ agreeing) referred to the “enormous” prejudice to the plaintiff in those proceedings should his claim be dismissed (at para 146). That being so, it would seem to follow that such an order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. Adapting slightly what was said by Barniville J in Gibbons v N6 (Construction) Limited, the court must be satisfied that the “the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be proportionate and just.”*

10. He also said at paragraph 37:

*“It is entirely appropriate that the culture of “endless indulgence” of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should*

*be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant.”*

11. The onus of proving the three limbs of the test rests on the defendants (Barniville J at paragraphs 79 – 80 of *Gibbons v N6 (Construction Ltd)*).
12. These are the general principles which must be applied to the case.

### **Application**

#### *Nature of the Delay*

13. I am fully satisfied that the delay in question in this case is both inordinate and inexcusable. The plaintiff accepts that the delay is inordinate.
14. The main period of delay is from the 19<sup>th</sup> December 2017 to the date of the issue of the current motion (the 30<sup>th</sup> November 2022) - almost exactly five years. The plaintiff did nothing at all in respect of these proceedings from the 19<sup>th</sup> December 2017 to the date of the issue of the motion by the defendant in November 2022. On any measure, a delay of five years without a single step being taken in the proceedings is inordinate.
15. The proceedings were issued on the 2<sup>nd</sup> September 2014 (just two weeks after the incident the subject of the proceedings) and were prosecuted by the plaintiff without any unreasonable delay up to the 19<sup>th</sup> December 2017. There were some short periods of delay between 2014 and December 2017; for example, a Statement of Claim was not delivered until the 22<sup>nd</sup> January 2015 after a motion had issued, and Replies to Particulars were not delivered until the 12<sup>th</sup> October 2015 and were only delivered after the Court made an Order compelling him to do so and the defendants had brought a motion to dismiss the claim for failure to comply with that Order. However I am satisfied

that having regard to the overall progress in the case and the fact that the plaintiff was taking other steps, such as his motion to compel the defendants to provide a copy of the sworn information, that these delays either taken separately or together are not inordinate. Thus, the culpable delay which the Court must consider is the period from the 18<sup>th</sup> December 2017 when the Court of Appeal gave its decision on the plaintiff's motion to compel the first-named defendant to furnish a copy of its sworn information (or the 19<sup>th</sup> December when the CSSO informed him of the outcome of the appeal).

16. The plaintiff's solicitor explains the five-year delay between December 2017 and November 2022 on behalf of the plaintiff (and points to "countervailing circumstances") by saying at paragraph 10 of his replying affidavit that:

*"Regrettably Mr Alan Toal Barrister at Law, who was retained by this office to represent the plaintiff, became very ill in June 2021 and was later hospitalised in February 2022, and later July 2022 and died suddenly on 24 of November 2022. Between the Covid 19 restrictions generally, his deepening illness and untimely death and the other litigation in which I have been retained by the plaintiff, I accept that a delay has occurred, however the matter will now prosecuted (sic) at haste following the re-briefing by this office with fresh Counsel."*

17. He therefore essentially offers three explanations for the delay: (i) the illness of the plaintiff's former barrister from June 2021 (leading to hospitalisation in February and July 2022) and his unfortunate death in November 2022; (ii) Covid restrictions generally; and (iii) other litigation in which the solicitor was retained by the plaintiff.

18. Covid restrictions could only relate to the period from March 2020 at the very earliest (the introduction of Covid-19 restrictions) and therefore do not even offer an explanation for the absence of any activity whatsoever from December 2017 to the 6<sup>th</sup> March 2020. Nor could they offer a full explanation even for the period after approximately May/June 2020 in circumstances where, after a brief period, the courts made arrangements whereby court business could proceed - albeit with some practical challenges - and where businesses, including solicitors' firms, made arrangements for the conduct of business. It is also important to note in the context of the plaintiff's reliance on the Covid-19 restrictions as an excuse for part of the delay in these proceedings that he was nonetheless able to prosecute another set of proceedings (issued in August 2021) within the court system and with the assistance of Senior Counsel.



19. I do not need to comment on whether a plaintiff can rely on his barrister's illness for his inaction for a period of well over a year because, even allowing for this as a proper explanation in this case, it only arose in June 2021 and therefore does not offer an explanation or an excuse for the inaction between December 2017 and June 2021. It also bears note that the barrister whose illness and death are offered as an explanation or excuse for the delay was not the barrister who had signed the summons. Thus, neither Covid or the plaintiff's barrister's illness properly explain or, more importantly and relevantly, excuse the delay between December 2017 and November 2022 save perhaps for very short periods.

20. The third explanation advanced is that the plaintiff's solicitor was retained by the plaintiff in other litigation. For the purpose of this discussion, I am prepared to accept that the plaintiff's involvement in other could in principle excuse **some** delay, particularly where it appears the same solicitor was engaged. However, the existence of other litigation brought by the plaintiff cannot excuse inactivity or delay for a very protracted period of time. Furthermore, the plaintiff's solicitor gives no details whatsoever in his affidavit of the other litigation and how it may have impacted on the plaintiff's prosecution of these proceedings particularly in the period after December 2017. A greater level of detail is given in the written submissions rather than on affidavit. This is not adequate or appropriate but, even on the basis of what is said in the submissions (paragraphs 10 to 24), the vast bulk of these other matters (some of which do not seem to have even given rise to litigation) were concluded before December 2017 so, while they may explain some of the periods of delay prior to that, they cannot excuse inactivity or delay after it. In paragraph 19, the submissions do refer to a set of proceedings which were issued in July 2017. One other set of proceedings could not excuse complete inactivity in the prosecution of the instant case from December 2017 onwards. Furthermore, these July 2017 proceedings were, according to the submissions, adjourned generally in November 2020. Reference is also made to new proceedings being issued in August 2021. Of course, this could not explain the delay in the proceedings up to August 2021. Nor can the existence of these proceedings, whether taken alone or with the other matters, excuse the inactivity in the instant case between August 2021 and November 2022. As noted above, even accepting for the purpose of this discussion that the existence of other proceedings could in principle offer an excuse for some delay, one set of proceedings is not enough to excuse the delay in the absence of some evidence or detail being given as to the pressure of time posed by those proceedings.

21. I am therefore entirely satisfied that the defendant has established that the delay is both inordinate and inexcusable.

#### *Balance of Justice*

22. I must therefore consider whether the balance of justice favours the dismissal of the proceedings. In doing so I am entitled (indeed required) to have regard to all the relevant circumstances, including those pertaining specifically to the proceedings such as delay or acquiescence on the part of the defendant and the potential prejudice resulting from the delay (per Irvine J in *Millerick v Minister for Finance* [2016] IECA 206).

23. It has been emphasised in a number of recent judgements including *Cave Projects v Gilhooly* and *Gibbons v N6 (Construction) Ltd* that the onus of proof in respect of all three elements of the test rests on the defendant - this includes the onus of proving that the balance of justice favours the dismissal of the proceedings. Barniville J discussed the onus of proof in detail in paragraph 80 and 81 of his judgment in *Gibbons*:

*"80. As the moving party on the application to dismiss, the defendant also has the burden of proving that the balance of justice favours the dismissal of the claim (see, for example, per Irvine J. in Cassidy at para. 35)... Although it did not feature in the written or oral submissions on this appeal, on one reading of paras. 21, 29 and 30 of her judgment, the judge might be understood as stating that once inordinate and inexcusable delay is established by the defendant, the plaintiff bears the onus of proving that the balance of justice lies in favour of allowing the claim to proceed. While nothing turns on this in terms of the outcome of the appeal, if and insofar as the judge may have felt that the plaintiff bore that onus of proof, I do not believe that that would be correct. The onus remains on the defendant to establish that the balance of justice favours the dismissal of the case. The position in fact is, as was stated by Fennelly J. in the Supreme Court in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 IR 510 ("AIBP"), citing what Henchy J. stated in *O'Domhnaill*, that a person responsible for delay which is found to be inordinate and inexcusable:*

*"Will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration...namely whether 'on the*

*facts the balance of justice is in favour of or against the proceeding of the case’.*” (per Fennelly J at p.519)

81. *Such countervailing circumstances would have to be “weighty to cancel out the effects of the plaintiffs’ behaviour” and would include any disadvantage or disability affecting the plaintiff or delay or acquiescence by the defendants which might “redress the balance of fault” (per Fennelly J. at p.519). While these are matters which the plaintiff would have to point to in order to redress the balance of fault or cancel out the effects of its delay, they do not mean that a plaintiff bears the burden of proving that the balance of justice favours the case proceeding. That burden of proof remains with the defendant as the moving party who seeks to have the claim dismissed. I do not believe that O’Flaherty J. in Primor intended to suggest otherwise when, at the conclusion of his judgment when summing up counsel’s submission, said that there was much in the suggestion that “once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably” (at p. 521). Ultimately, however, any possible disagreement with the judge on where the burden of proof lies when considering the balance of justice is not in any way material to the outcome of this appeal as I am quite satisfied that the judge was correct in concluding that the various elements of prejudice raised by N6 were made out and that she correctly concluded that, by reason of that prejudice, the balance of justice lay in favour of dismissing the case against N6 rather than permitting it to proceed.”*

24. Collins J in the first bullet point of paragraph 36 of his judgment in *Cave Projects* said:

*“The onus is on the defendant to establish all three limbs of the Primor test, ie. that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim: see e.g. Gibbons v N6 (Construction) Limited, para 80, Barry v Renaissance Security Services Limited, para 48 and Greenwich Project Holdings Limited, para 89.”*

25. He also emphasised in the second bullet point that, given the nature of an Order dismissing a claim and the consequences for the plaintiff, the Order should only be made where:

*"...there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. Adapting slightly what was said by Barniville J in Gibbons v N6 (Construction) Limited, the court must be satisfied that the "the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be proportionate and just".*

26. The question of prejudice is a central consideration in the assessment of the balance of justice. As Collins J noted on page 29 of his judgment in *Cave Projects* "[t]here are many statements in the authorities to the effect that, in the exercise of the *Primor* jurisdiction, the question of prejudice is central." He later (page 36) considered a suggestion that a defendant might succeed in having a claim dismissed in the absence of evidence of prejudice and, while he did not reject the suggestion (indicating that it might perhaps be best explored in a case where the point was pressed) he did cast doubt on it as a proposition, describing it as a departure from existing jurisprudence and appearing difficult to reconcile with the consistent emphasis in the authorities that the jurisdiction is not punitive or disciplinary in character.

27. As noted in *Cave Projects* and *Gibbons*, an Order dismissing proceedings causes a very serious prejudice to the plaintiff in that the effect of such an Order is to deprive the plaintiff of the ability to maintain the proceedings for relief. This was described by Irvine J in *CG Roofing Builders v Mercury Engineering [2015] IECA 55* (referred to in *Cave Projects*) as "terminal prejudice". Access to the court is, of course, a constitutional right. However, Costello J held in *Doyle v Foley [2022] IECA 193* (referred to in paragraph 33 of *Carroll v M & P Sales and Marketing Ltd [2023] IEHC 54*) that all parties also have a constitutional right to fair procedures and a timely resolution of their litigation. In addition, there is a public interest in ensuring the timely and effective administration of justice. However, in general, there must be some prejudice to the defendant (over and above the mere fact of the delay itself – though in certain cases the delay itself may be sufficient) which must be weighed against the "enormous prejudice" (*Mangan v Dockeray [2020] IESC 67*) or 'terminal prejudice' of a dismissal before the Court could conclude that the balance of justice favours the dismissal of the proceedings. That prejudice to the defendant will generally be required follows from the long-established principle that the court's jurisdiction to dismiss proceedings is not punitive or disciplinary (see, for example, O'Flaherty J at page 516 of *Primor* and page 36 of Collins J's judgment in *Cave Projects*) but rather is a means by which the court can ensure fairness as between the parties and that the interests of justice are met.

28. The threshold of prejudice to the defendant which must be established is "moderate prejudice arising from the delay" (paragraph 114 of *Gibbons v N6 (Construction Ltd)* ) and paragraph 35 of Irvine J's judgment in *Millerick*). Collins J qualified this to some extent in *Cave Projects* where he said on page 35 that "...whether "moderate prejudice" will warrant the dismissal of a given claim, or whether something more serious must be established will depend on all of the circumstances, including the nature and extent of the delay involved, the nature of the claim and of the defence to it and the conduct of the defendant." I return to this below.

29. The types of prejudice which may warrant the dismissal of proceedings are not limited to "fair trial" type prejudice and may include, for example, damage to a defendant's reputation (paragraph 98 of *Gibbons* and page 31 of *Cave Projects*). The defendants only rely on "fair trial" type prejudice and essentially point to two types of "fair trial" prejudice: firstly, it is stated in the affidavit of the defendant's solicitor grounding the application that three members of An Garda Síochána, who were involved in the search, the subject of the proceedings, have retired; secondly, the defendants point to the general prejudice caused by the passage of time and the impact that has on witnesses' memories.

30. In respect of both of these, the defendants point out that this is not a "documents case" and will require oral testimony so these factors are particularly important. It seems to me that there are in fact two separate parts to the plaintiff's case. Firstly, it is alleged that the search warrant was procured on the basis of flawed sworn information; and secondly, it is alleged that the search was conducted in an unlawful manner, using excessive personnel and force and that items were seized and not returned. It seems to me that the first of these is not dependent to any great extent on oral evidence whereas the second is largely dependent on such oral evidence. Indeed, it was not really disputed by the plaintiff that the case will turn on oral evidence.

31. I must assess each of these on the basis that the burden of proof rests on the defendant.

32. In relation to the retirement of the three members, I do not believe that there is sufficient evidence before the Court upon which I could conclude that I should dismiss the proceedings on this basis. Firstly, there is no evidence as to the role that these members played in the search and therefore what relevance or importance their evidence might have. They may have been central or peripheral to the events. Counsel for the defendants very persuasively argued that I should accept from the fact that they

were mentioned in the affidavit that they have relevant evidence which is of some importance. However, in light of the very significant consequences for the plaintiff of the case being dismissed and the onus resting on the defendants, I do not believe that this is sufficient. Secondly, even if I were to accept that these witnesses have relevant and important evidence, there is no evidence that these witnesses will not be willing to come to give evidence in light of their retirement or that they do not recall the search. In any event, there is no evidence that their notes are not available to them. Of course, there is an inconvenience to such retired members at being called to give evidence during their retirement. It can be assumed that they gave An Garda Síochána and their community long years of service and the inconvenience of having to give evidence when their period of service is over is a form of prejudice. However, I do not believe that it amounts to moderate prejudice to the defendants such as to outweigh the prejudice to the plaintiff in having his proceedings dismissed. Finally, I am conscious of what Collins J says at page 38 of his judgment in *Cave Projects* that *"where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied upon for the purpose of establishing that the balance of justice warrants the dismissal of claim"*. I do not believe such a causal connection has been established in circumstances where there is no evidence as to when these members retired. They may, for example, have retired in 2016 or 2017, in which case there would be no link between the delay and the specific alleged prejudice caused by their retirement.

33. The second type of *"fair trial"* prejudice relied upon by the defendants is the general prejudicial effect which the passing of time has on witnesses' memories. It is well-established that such general prejudice may be sufficient and that it is not necessary to establish specific prejudice (though the absence of such prejudice may be a material factor in the court's assessment of the balance justice). Collins J puts it as follows at page 33 of his judgment in *Cave Projects*:

*"... The absence of any specific prejudice (or, as it is often referred to in the caselaw, "concrete prejudice") may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice. The case law suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence - and the difficulty that courts may have in resolving conflicts of evidence - relating to events that may have taken place many years before an action gets to trial. That such difficulties may arise cannot be gainsaid."*

34. The defendants rely on this general type of prejudice. As discussed above, they point to the fact that oral evidence will be required and, therefore, the recall of witnesses will be particularly important. I accept that this is the case in relation to the second aspect of the plaintiff's claim. Indeed, this is not disputed by the plaintiff. The defendants argue that the memory of the members who were involved in the search will naturally have faded somewhat and will continue to do so before the trial takes place. I accept that there is considerable strength to this. Many of the members involved in the search, the subject of these proceedings, were probably involved in many other searches during their careers – that is part of the role of members of An Garda Síochána. Human nature and experience being what it is there is a real possibility that recollections of different searches could merge or blur into each other and the further removed the hearing is from the particular search the more likely this is.

35. However, Collins J went on in *Cave Projects* to say:

*"But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the plaintiff is responsible ought to be taken into account in this context. Many of the cases appear to proceed on the basis that, once there is any period of inordinate and inexcusable delay, general prejudice should be assessed by reference to the entire period between the events giving rise to the claim and the date of trial. That does not appear to me to be the appropriate approach. Furthermore, as Irvine J noted in Granahan v Mercury Engineering, "many cases of great complexity are, for reasons unconnected with any default on the part of the parties, heard at a significant remove from the events concerned and the Court is left with the task of trying to achieve a just result" (at para 46). Perfect justice is rarely, if ever, achievable. As Cross J observed in Calvert v Stollznow [1980] 2 NSWLR 749, "[o]f course justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice." Those observations have been cited with evident approval in this jurisdiction, including by Murphy J in Hogan v Jones [1994] 1 ILRM 512 (at page 519) and, more recently, by Geoghegan J in McBrearty v North Western Health Board (at page 41) and by McKechnie J in Mangan v Dockeray, at para 110. To this it may be said that where a plaintiff has been guilty of significant default in the prosecution of a claim, it is that plaintiff – and not the defendant – that should*

*bear the consequences of such default. No doubt that is correct at the level of general principle. Nevertheless, the observations of Cross J in Calvert v Stollznow provide a salutary warning against the application of unduly elevated and unrealistic standards of justice in this context, such that, in effect, an immediate presumption of prejudice arises whenever there is any material default on the part of a plaintiff in prosecuting a claim. Prejudice is not to be presumed: AIG Europe Limited v Fitzpatrick [2020] IECA 99, per Whelan J (Donnelly and Power JJ agreeing).*

36. I have to, as Collins J puts it, carefully and fairly assess this claim of general prejudice in the particular circumstances. It seems to me that relevant to a consideration of the question of a risk of memory-fade and of one search merging or blurring into another is the fact that the plaintiff instituted proceedings within two weeks of the search and, indeed, then brought an interlocutory application to attempt to obtain the sworn information. In such circumstances, it seems likely that steps were taken within An Garda Síochána to investigate or enquire into the plaintiff's claims, including directing members to retain any notes and possibly even including taking statements. If such steps were taken, it is likely that this would set this search somewhat apart from other searches and make it somewhat more likely that members' memories would be less adversely affected by the passage of time and that they would continue to have access to contemporaneous material. I am conscious that there is no evidence of such steps having been taken. However, these are basic steps where a legal claim is brought and, in circumstances where the onus of proof is on the defendants, it seems to me that if such steps were not taken and the defendants wished to argue that therefore the members' memories would have naturally faded to a prejudicial extent then evidence that such steps were not taken would be required. To this must be added that members of An Garda Síochána frequently have to give evidence in criminal trials at some remove from a particular event and they are assisted by their notes and contemporaneous documents. This was a point made by the plaintiff in his written submissions where it was stated: *"Members of An Garda Síochána would otherwise be professional witnesses, well used to Court proceedings and fully briefed through the use of their contemporaneous investigation notes, legal files and operational records which may assist as aide memoirs, such as they are frequently used in the ordinary course of prosecuting Criminal proceedings"*.



37. However, the role that notes or contemporaneous statements might play in offsetting any general prejudice to the defendant in civil proceedings was addressed in *Gorman v The Minister for Justice, Equality and Law Reform & ors* [2015] IECA 41. In that case it was estimated that the trial would probably take place twelve years after the incident the subject of the proceedings. The period of time before the trial of this action in this case will be at least as long. Irvine J, on behalf of the Court of Appeal, said at paragraphs 60-61 that:

*"60. This Court is satisfied that if this historic claim were to be permitted to proceed to trial, that the defendants would likely suffer general prejudice over and beyond what might be described as moderate, even though they have not been in a position to contend for any specific prejudice as might often arise in proceedings where, by reason of the passage of time, essential witness or documents are no longer available.*

*61. The fact that the defendants have available to them a number of witness statements taken in the aftermath of the plaintiff's allegations, does not mean that they would not be prejudiced in meeting a claim of this nature some twelve or more years after the events in question, 2013 being the year in which the learned High Court judge concluded the case was likely to be heard.*

*62. While such statements would of course assist their authors to refresh their memories of the events recorded, it is inevitable that in the course of the trial evidence would be led or allegations made concerning circumstances not captured in those documents. In that event the defendant's witnesses might not be in a position to answer or challenge such allegations. Anything which goes beyond that referred to in the witness statements would likely pose problems of a type that would not have been encountered had the action been determined while matters remained reasonably fresh within the minds of those concerned. In this regard this court agrees with the conclusions of the High Court judge when he stated that he was in no doubt that the delay would have impacted upon the defendant's ability to test the veracity of the claim. As Finlay Geoghegan J said in *Manning v Benson & Hedges Ltd* [2005] 1 ILRM 180, 286:*

*"Delays of four to five years as a matter of probability will reduce the potential of such witnesses to give meaningful assistance or to act as a witness."*

*Regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the*

*more fragile and unreliable the evidence becomes. This is of particular concern in cases where there is no documentary or other objective evidence to support a claim where there is conflicting oral testimony. As has been stated so often on applications such as the present one, memories fade and justice is put to the hazard."*

38. I am, of course, bound by these comments as they are directly on point but in any event it seems to me that they are correct. Indeed, the logic applies with even greater force in this case because the incident, the subject of the proceedings, i.e. a search, is a much more routine event than an alleged assault in a Garda station and, as noted above, there is therefore a greater risk of memory fade and of memories of different searches becoming blurred.

39. In those circumstances I must conclude that there is a risk of memory-fade which may not be fully ameliorated by access to notes and contemporaneous documents and therefore there is a risk of moderate prejudice arising from the passage of time.

40. However, as Collins J states in *Cave Projects* the existence of moderate prejudice is not necessarily determinative and I must consider the risk of moderate prejudice in the overall circumstances of the case, including the nature and extent of the delay, the nature of the claim and of the defence and the conduct of the defendants. In other words, the existence of a risk of moderate prejudice is just one factor (though the central factor) in the assessment of the balance of justice.

41. In respect of the balance of justice, the plaintiff submits that I should refuse the relief having regard to the fact that the defendants brought their motion without any warning and had raised no complaint about the plaintiff's delay or any prejudice which might be caused before issuing that motion. This was raised by counsel for the plaintiff in oral and written submissions (paragraphs 25-27). Irvine J dealt with the question of possible acquiescence at paragraph 36-39 of her judgment in *Millerick*. She concludes at paragraph 39:

*"For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words, a simple failure on the part of the defendant to bring an application to strike out the*

*proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."*

42. In this case there was no culpable delay on the part of the defendant at any stage of the proceedings. Nor can I see any evidence of any step by the defendant which could be said to have led the plaintiff to believe that the defendant was acquiescing in the plaintiff's delay. Inactivity on the part of the defendant is not sufficient

43. The plaintiff also points to the fact that the first-named defendant is taking a diametrically different position in relation to the memories of Garda witnesses in a judicial review concerning a prosecution of the plaintiff in 2013 or shortly thereafter. In paragraph 3 of his written submissions it is stated "*The Court should be mindful that on the same day as the within proceedings...An Garda Síochána and the State have instructed, separately, the Chief State Solicitors office and separate Counsel to oppose the Plaintiff in a Judicial review hearing in relation to a prosecution and conviction in 2013, in which no prejudice or memory fade has been conceded, in fact nothing less than strident and resolute evidence has been submitted by the State in relation to events more than a decade ago and a point which resulted in judicial review proceedings following a Circuit Court Appeal heard in 2019. The juxtaposition in legal positions arising from instructions by the Commissioner of An Garda Síochána to separate Solicitors from the National Treasury Management Agency, the Chief State Solicitors office, and Solicitors from the Director of Public Prosecutions seems bizarre, when contradictions are being advanced before separate High Court Judges on the same day, in court rooms not metres apart.*" The submissions go on to state at paragraph 7 that "*The plaintiff in separate High Court proceedings [record number 2021/795] is due to be heard on the 23<sup>rd</sup> May 2023. In that case the State is relying on the evidence of several Gardaí submitted on behalf of the Commissioner of An Garda Síochána in relation to the Plaintiff's conviction for Driving with no insurance in 2013. Due to delays for several reasons including inter alia the outcome of a Supreme Court case, the Circuit Court only heard the appeal 2019. Issue would arise thereafter which resulted in the matter coming before the High Court in 2021. The matter is being fully contested, without any suggestion that the Gardaí involved suffered any memory fade whatsoever, even though a full decade has passed since the conviction. An Garda Síochána has not conceded that their evidence is weakened due to the 'effluxion of time since the incident.'*" [emphasis in original]

44. It will, of course, be noted that this is contained in submissions and is not on affidavit. Neither party chose to give any detail in relation to these other proceedings (either the District Court, Circuit Court or Judicial Review proceedings) or to exhibit or otherwise open the Judicial Review papers. While the burden of proof is on the defendants, where the plaintiff wishes to rely on certain factual matters it is incumbent on him to ensure that they are in evidence. However, for the purpose of this discussion I am going to treat the above contents of the submissions, particularly where they concern other court proceedings and are not disputed by the defendant, as though they have been given in evidence.

45. I am entirely satisfied that the taking of different or inconsistent positions, particularly in relation to the central issue of the general impact of the passage of time on memory, is a matter which can properly be considered in any assessment of the balance of justice. However, it is not in fact apparent from the information given about these other proceedings that conflicting or inconsistent positions are being taken in similar circumstances. For example, from the limited detail that has been given, it is clear that there was a trial in 2013 and an appeal in 2019. Presumably, evidence was given by the relevant Gardaí in both of these. The giving of evidence relatively shortly after the relevant incident (at the District Court trial) and again within six years of the relevant incident (at the appeal) is directly relevant to the question of the likelihood or extent of memory-fade and appears to be a significant point of difference between the two cases. In this case, witnesses have not yet given evidence despite the passage of almost nine years since the search and five and a half years since activity in the prosecution of this claim ceased. Thus, on the basis of the information that the parties have chosen to put before the Court, it could not be concluded that the defendants are saying two inconsistent things about the effect of the passage of time on memory. I am conscious that the onus of proof is on the defendants. However, it is not a shift of the burden to say that where the plaintiff makes an assertion as to a particular state of affairs, he must lay the evidential basis for, or to support, that assertion. He has sought to do so in the submissions (which I have taken as evidence) but that evidence is not sufficient to support the assertion.

46. The plaintiff also relies on the public interest in submitting that the balance of justice favours the refusal of an Order dismissing the proceedings. The public interest is undoubtedly a relevant and important factor. However, there are a number of aspects to the public interest. There is an undoubted public interest in litigation being prosecuted efficiently and reasonably expeditiously. There is also, of course, a very significant public

interest in alleged wrongdoing or abuse of power by An Garda Síochána being investigated. This was considered by Irvine J in *Gorman v The Minister for Justice, Equality and Law Reform* in which the plaintiff alleged that he had been assaulted and falsely imprisoned in Dundalk Garda Station. It was submitted on behalf of the plaintiff that the allegations the subject matter of the claim were grave and there was a public interest in having such serious allegations fully investigated. Irvine J on behalf of the Court of Appeal held at paragraph 58 that "*[i]n determining where the balance of justice lies it is, of course, of particular importance to have regard to the fact that the allegations upon which the claim is founded are extremely grave. An allegation of a brutal assault allegedly perpetrated by members of An Garda Síochána, the authority charged with upholding and protecting the rights of citizens in the State, ought to be investigated and dealt with expeditiously. Clearly, the public interest is best protected by the earliest possible appraisal of the truth or otherwise of such a serious complaint. It is nevertheless not in the public interest that such an important allegation be resolved in circumstances where, by reason of the passage of time, there is a real possibility of an unjust and unsatisfactory outcome.*"

47. Thus, these factors do not outweigh the risk of moderate prejudice to the defendants.

48. However, while the argument was not specifically made, I am also required to have regard to the nature of the claim being advanced. It seems to me that it is of significance that part of the plaintiff's claim is for the return of property that was allegedly seized during the search. It is stated in paragraph 5 of the plaintiff's solicitor's affidavit that "*Following the injunction motion being set down for the 9<sup>th</sup> of September 2014, the State Claims Agency engaged with the Plaintiff's representative and only then disclosed the search warrant and returned the copies of company documentation taken and one set of keys. The State however retained the envelopes of petty cash, one set of vehicle keys and the log book to a Renault truck, which belonged to a customer of the Plaintiff.*" If it is correct that property was seized and has not been returned then the effect of the proceedings being dismissed would be to deprive the plaintiff of the opportunity to obtain the return of that property. It seems to me that this must be of considerable weight in the assessment of the balance of justice. Of course, the effect of the dismissal of any proceedings is to deprive the plaintiff of the opportunity to obtain a remedy but there seems to me to be a qualitative difference between relief directed towards compensation, for example, and relief which is directed towards the return of property which the plaintiff claims is his property. In my view, when account is taken of this, it is not established that the balance of justice is clearly against allowing the claim

to proceed or that the hardship of denying the plaintiff access to a trial of his claim would be proportionate and just (*Cave Projects and Gibbons v N6 (Construction Ltd)*) notwithstanding the risk of moderate prejudice to the defendants.

49. Thus, it seems to me that I must refuse to dismiss the proceedings. However, I must emphasise that even with the assistance of notes or reference to contemporaneous materials memories are likely to continue to fade. This leads to the following. Firstly, if there is any further significant delay it would be entirely open to the defendant to make a fresh application to have the proceedings dismissed. Secondly, it is essential to move these proceedings on with dispatch to minimise the risk of increasing the likelihood of prejudice and unfairness and I propose to make directions to achieve that end. I will in the first instance give the parties an opportunity to agree directions but I emphasise that the obligation to move the proceedings on with dispatch is primarily that of the plaintiff, particularly where he has already been guilty of inordinate and inexcusable delay. I envisage a very tight timeline. It would seem to me that against the background of this case a failure to comply with any such direction by the plaintiff without good reason would have to place the plaintiff at very significant risk of the proceedings being struck out. Finally, by the time the matter comes on for trial, the balance of justice and in particular the question of prejudice may have altered and it will be a matter for the trial judge to determine whether, at that point, based on the recollection of witnesses, the delay is such that the continuation of the proceedings must be dismissed on that ground.