

THE HIGH COURT

[2023] IEHC 718

[2019] 5553P

JOHN MULDOWNEY

PLAINTIFF

AND

**THE GOVERNOR OF MOUNTJOY PRISON, THE MINISTER FOR JUSTICE
AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND**

DEFENDANTS

Ex tempore judgment of Mr. Justice Mark Heslin delivered on 1 December 2023

1. On 20 July 2022, the defendants issued a motion seeking an order pursuant to s. 10 (3) (a) (ii) of the Civil Liability Act 2004 (“the 2004 Act”) seeking a dismissing the plaintiff’s claim; and further, or in the alternative, an order dismissing the plaintiff’s claim for want of prosecution, pursuant to this court’s inherent jurisdiction.

2. I have considered, with care, the contents of all the following:-

- (i) the pleadings in this case; in particular
- (ii) the affidavit grounding the present motion, which was sworn on 14 July 2022 by Ms Caoimhe Malone, solicitor in the State Claims Agency, being the solicitors on record for the defendants;
- (iii) exhibit CM1 to that affidavit;
- (iv) the affidavit sworn by Ms Malone on 23 March 2023;
- (v) exhibits CM1 and CM2 to that affidavit;
- (vi) the affidavit of Mr Brian Leahy, of Messrs Brendan T. Muldowney, the solicitors on record for the plaintiff, being an affidavit which was sworn on 20 April 2023;
- (vii) exhibits A to J to Mr Leahy’s affidavit; and
- (viii) the replying affidavit of Ms Malone, sworn on 12 May 2023.

3. Later in this ruling I will refer to certain averments and correspondence.

Legal principles

4. Before proceeding to look at the evidence and the facts which emerge from it, it is appropriate to make reference to relevant provisions and legal principles.

Civil Liability and Courts Act 2004

5. Section 10(2) of the Civil Liability and Courts Act 2004 (the "2004 Act") provides inter-alia that a Personal Injuries Summons shall specify the following:-

" (d) the injuries to the plaintiff alleged to have been occasioned by the wrong of the defendant,

(e) full particulars of all items of special damage in respect of which the plaintiff is making a claim"

I pause to say that no special damage is itemised in the personal injury summons. Subsections (f) and (g) are of particular relevance and I now quote them as follows:-

"(f) full particulars of the acts of the defendant constituting the said wrong and the circumstances relating to the commission of the said wrong,

(g) full particulars of each instance of negligence by the defendant".

6. Whilst I will presently look at the personal injuries summons, it is appropriate to note at this juncture that the plaintiff failed to comply with s. 10 (2) as a result of which an order was made on 21 June 2021 placing a stay on the plaintiff's proceedings until he complied with s. 10 of the 2004 Act.

7. In the manner I will presently return to, it was subsections (f) and (g) which the defendants put the plaintiff 'squarely' on notice of, as to the deficiencies in the personal injuries summons and that is clear from correspondence I will presently come to.

8. It is also appropriate to note that, despite the passage of almost two and a half years since this Court's order made on 21 June 2021, it remains the position that the plaintiff has failed to comply with s. 10 in particular subs. (2) (f) and (g).

9. Subsection 3 of s. 10 goes on to state:-

"(3) Where a plaintiff fails to comply with this section—

(a) the court may—

(i) direct that the action shall not proceed any further until the plaintiff complies with such conditions as the court may specify, or

(ii) where it considers that the interests of justice so require, dismiss the plaintiff's action".

10. In 'net' terms, an order has already been made under s. 10 (3) (a) (i) and, today, the defendants seek an order under s. 10 (3) (a) (ii) of the 2004 Act, as well as dismissal of the plaintiff's claim on delay grounds.

Delay

11. Turning to the principles governing this Court's approach to delay, recalling that relief under this heading is also sought in the alternative, the leading judgments remain, of course, the Supreme Court's decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("*Primor*"),

as well as an earlier decision by the Supreme Court in *O'Domhnaill v. Merrick* [1984] IR 151 ("*O'Domhnaill*").

12. *Primor* remains the 'touchstone', or the primary approach. The principles set out by Hamilton C.J. (at pp. 475/76 of the reported judgment) are well known and are set out in the written submissions. Therefore, it is unnecessary to quote them *verbatim*, but it is these principles which have guided this Court's approach to the defendants' application.

13. It is fair to say that *Primor* requires this Court today to ask three questions in sequence:-

(1) is the delay *inordinate*?

(2) if so, is it *inexcusable*?

(3) if the delay is both, is the *balance of justice* in favour of, or against, allowing the case to proceed?

14. There is a separate but somewhat overlapping jurisdiction to dismiss proceedings which arises where there is a real and serious risk of an unfair trial and/or an unjust result, namely, the principles which emerge from *O'Domhnaill*, and the authorities derived from same.

15. There are distinctions between *Primor* and *O'Domhnaill* 'tests'. Those distinctions were made clear in the Court of Appeal's decision in *Cassidy v. The Provincialate* [2015] IECA 74 (at paras. 33 to 38).

16. The first of those distinctions is that, whilst *inordinate* and *inexcusable* delay are essential elements of the *Primor* test, they are not so under the *O'Domhnaill* approach. Under the latter approach, it is not necessary for a defendant to meet the burden of proof of establishing 'culpable' delay on the plaintiff's part. In other words, even a plaintiff who is entirely blameless in relation to the delay can face their proceedings being dismissed if there is a real risk that a fair trial is no longer possible.

17. A second difference is that, under the *Primor* test, if *inordinate* and *inexcusable* delay have been established, then a case may, depending on the particular circumstances, be dismissed if what the authorities call "*moderate*" prejudice has been established.

18. In short, it is not necessary, *per* the *Primor* approach that what is often called "fair trial" prejudice be established. By contrast, under the *O'Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or an unjust result will be sufficient to justify dismissal.

19. Therefore, the *Primor* approach focuses 'squarely' on the plaintiff's action (or, inaction) before moving to a consideration of the balance of justice, if extraordinary inaction is established and is not excused. By contrast, *O'Domhnaill* focuses 'squarely' on whether a fair trial is possible, regardless of how blameworthy, or not, the plaintiff may be.

20. This court also has the benefit of written submissions by both sides in which they canvas a range of authorities and I have had careful regard to the submissions. It is fair to say that all those authorities are addressed in a very comprehensive decision by Collins J. in the Court of Appeal in *Cave Projects Limited v. Gilhooley & Ors.* [2022] IECA 245. In that judgment, Collins J. set out a comprehensive analysis of the jurisprudence in the area, in particular, at para. 36 (between pages 27 and 37, inclusive) wherein he referred to each of the authorities which the parties to this application have cited in their respective submissions.

21. Having set out the landscape or position in terms of legal principle, it is now appropriate to look at the particular circumstances of this case and that is, of course, vital because while the principles I have touched on refer to *all* cases in delay applications across the board, this particular case is *unique*.

22. Therefore, this Court's role must be, in the present application, to provide a 'bespoke' response to the specific facts and circumstances, guided by the *interests of justice*. I emphasise the interests of justice because there is a commonality as between (i) the legislative provision in terms of s. 10 (3) (a) (ii); and (ii) the third limb of the *Primor* test. Both make explicit that the underlying question is the interest of justice.

The Personal Injuries Summons (issued on 12 July 2019)

23. Turning to the pleadings, a personal injuries summons was issued on 12 July 2019. It pleads that the plaintiff was at all material times employed as a prison officer at Mountjoy prison, having commenced employment on or about 21 August 2006.

24. The wrong alleged against the defendants is, *per* paragraph 8: "*Negligence and breach of duty to include breach of statutory duty and breach of contract*".

25. At para. 10 of the Personal Injuries Summons, the plaintiff pleads: "*From in or about the year 2010 the plaintiff was subjected to ongoing and repeated bullying behaviour by the governors at Mountjoy prison*".

26. I pause at this stage to say that, whilst it is not a criticism at all of the submissions made with such skill and force this morning by the plaintiff's solicitor, any attempt to suggest that the 'clock' does not 'start' in 2010 for the purposes of a consideration of relevant events is, with respect, a submission which ignores the explicit plea that, from in or about the year 2010, the plaintiff was subjected to ongoing and repeated bullying behaviour.

27. At this juncture it is appropriate to recall what section 10 (2) (f) and (g) of the 2004 Act require, namely "*full particulars of the acts of the defendant constituting the wrong*"; and of the "*circumstances relating to the commission of the wrong*"; as well as "*particulars of each instance of negligence by the defendant*".

28. Despite these requirements, para. 10 goes on to plead:

"This unwarranted and bullying behaviour consisted of the plaintiff being bullied and harassed on a continual basis by the governors of Mountjoy Prison" (emphasis added)

29. This is with respect a 'circular' plea, namely, that the bullying consisted of being bullied. It gives no indication of what, where, when or how the bullying is said to arise, nor indicates who is said to have been involved.

30. In short, the personal injuries summons fails to plead the plaintiff's case with anything like the requisite specificity. The following can be said of the Personal Injuries Summons:-

- i. The Plaintiff failed to provide *full particulars of the acts of the Defendants constituting the wrongs* of which he complains;
- ii. The Plaintiff failed to provide full particulars of *the circumstances relating to the commission of the alleged wrongs*;
- iii. He has not provided *full particulars of each instance of negligence by the Defendants*;
- iv. Other than stating that it was *"From in or about the year 2010"*, the plaintiff has given no indication whatsoever as to *when* the alleged wrongs are said to have occurred.
- v. Lacking details as to by whom, where, when, and how the plaintiff says he was bullied, there is insufficient detail to enable the defendants to identify, for example, potential witnesses; take instructions from those; identify potentially relevant documents; investigate the claim against them; or prepare a defence in any meaningful way.

31. Under the heading *"Particulars of the personal injuries to the plaintiff occasioned by the wrong of the defendants"*, paragraph 16 of the personal injury summons begins as follows:-

"(a) The plaintiff as a result of the continued bullying and harassment behaviour of the defendants, attended to his general practitioner. He related that he felt that he was bullied by management in the workplace and as a result felt stressed with disturbed sleep, headaches and generally feeling unwell".

32. I pause here to say that the plaintiff does not even say *when* he attended his general practitioner. This observation seems entirely appropriate given that the personal injuries summons was issued in July 2019, which is 9 years after the plaintiff pleads that he was subjected to ongoing and repeated bullying behaviour from 2010.

Timeline

33. I now turn to the 'timeline' which emerges from an analysis of the pleadings and affidavits. The relevant timeline begins in **2010** when, according to the personal injuries summons, ongoing and repeated bullying behaviour commenced. The personal injury summons issued in **July 2019**, some 9 years later.

34. Whilst the plaintiff does not plead *when* he first attended his general practitioner, he pleads, at paragraph 16 (a), that his GP felt that he needed to attend a psychiatrist; and he goes on to plead, at para 16 (d), that he attended a consultant psychiatrist in **February 2016** which is very obviously some 6 years after the alleged bullying and harassment began.

35. Thus, insofar as one can glean it from the personal injuries summons, on the plaintiff's case he certainly saw his GP at some unspecified time, but before February 2016.

36. It seems to me appropriate to say that even if the plaintiff is making the case that, although bullying and harassment allegedly commenced in 2010, he suffered no alleged injury until 2016, as a result of which he first sought medical attention at that point, it can also fairly be said that a further 3 ½ years elapsed between February 2016 and these proceedings being issued in July 2019.

Pre-commencement delay

37. This is relevant because on any objective analysis there has been very significant pre-commencement delay on the part of the plaintiff, who asserts that he was bullied from 2010 onwards, but did not issue proceedings until July 2019, despite having sought medical attention in February 2016 and at some unspecified point in advance of that.

38. I am not for a moment purporting to determine the issue, but a very obvious question around the statute of limitations arises.

Late start

39. Of more relevance to this application is that by making a 'late start' in the sense that term is used in the authorities, the plaintiff was under an added obligation to prosecute his claim in a timely manner. That principle reflects the approval in this jurisdiction of the following *dicta* from Lord Diplock's decision in *Birkett v. James* [1978] AC 297, 333: "*A late start makes it the more incumbent on the Plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.*" (See, for example, the Court of Appeal's decision (Hogan J.) in *Tanner v. O'Donovan & Ors.* [2015] IECA 24, at para. 26).

40. In the manner presently examined, the plaintiff has most certainly *not* prosecuted his claim with all due speed once proceedings issued in 2019. In the manner presently seen he has utterly failed to prosecute his proceedings with even minimal speed.

Post-commencement delay

41. Continuing with the 'timeline' but looking now at the post-commencement position, these proceedings were served on **26 June 2020**. I pause to say that this is almost a year after the

personal injuries summons issued, and within weeks of the one-year period allowed for service expiring.

42. By contrast the defendants promptly entered an appearance on **8 July 2020**. Very promptly thereafter, by letter of **20 July 2020**, the defendant's solicitors wrote to the solicitors for the plaintiff pointing out the failure to comply with s. 10 of the 2004 Act.

43. That letter pointed out inter-alia that, without compliance with section 10 (2) (f) and (g) the defendants would not be in a position to deliver a defence. It is appropriate to quote verbatim from it as follows:-

"Dear Sirs,

We refer to the above. The personal injuries summons does not comply with s. 10 of the Civil Liability and Courts Act 2004. Section 10 (2) (f) and (g) of the Civil Liability and Courts Act 2004 require a plaintiff in a personal injury summons to provide full particulars of the acts of the defendant constituting the said wrong and the circumstances relating to the commission of the said wrong and particulars of each instance of negligence by the defendant. The purpose of pleadings generally and of s. 10 is to enable an opposing party, the defendant, is put on notice of the claim it has to meet at trial. This enables that party to prepare appropriately to meet the claim by identifying and taking instructions from the appropriate witnesses, bringing the appropriate witnesses to court, bringing the appropriate documentation to court. In paras. 10, 11 and 12 of the summons the plaintiff has made general allegations of repeated bullying behaviour and harassment without providing any specific particulars of the acts of the defendant constituting the said wrong and the circumstances relating to the commission of the said wrong....." (emphasis in original)

44. The letter went on to say that the plaintiff was called upon to comply within s. 10 (2) (f) and (g) within 21 days, in default of which an application would be made to stay or dismiss the plaintiff's claim.

45. Somewhat surprisingly, there was no reply to this 20 July 2020 letter by the plaintiff, as a result of which the defendant's solicitors wrote again on **23 November 2020**.

46. This produced a response sent by the plaintiff's solicitors on **11 December 2020** in which the plaintiff, through his solicitors, asserted that there were no deficiencies in the personal injuries summons.

47. Unsurprisingly, the defendants issued a motion of the type threatened. It was issued and served in **March 2021** and returnable for 21 June 2021.

48. The primary relief sought an order staying the plaintiff's proceedings until the plaintiff complied with section 10 of the 2004 act. Alternatively, relief was sought to dismiss the claim

pursuant to section 10; and dismissal for want of prosecution was also pleaded in the motion. It is fair to say that the relief urged on the court was to stay the proceedings.

49. In the manner touched on earlier, this Court made an order on **26 June 2021** staying the plaintiff's claim until he complied with section 10. That order was never appealed.

50. The said order did not specify a period for compliance by the plaintiff with his s. 10 requirements. This is for the very obvious reason that, at all material times, in particular, from the issuing of the writ on 12 July 2019, the plaintiff was under the obligation to comply with s. 10 of the 2004 Act. Furthermore, being someone who at all material times has been legally represented, he was fully aware of that obligation.

51. Therefore, if one wanted to look at the 'state of play', as of this Court's order of **June 2021**, the plaintiff was 'full square' on notice of at least the following:-

- (i) he had failed to comply with section 10 of the 2004 Act, specifically s. 10 (2) (f) and (g);
- (ii) the defendants also regarded his proceedings as constituting a claim which was liable to be dismissed on delay grounds;
- (iii) the 'ball' was 'firmly' in his 'court' both to (a) to ensure compliance with s.10 of the 2004 Act; and (b) to ensure the speedy progression of his claim, without any further delay.

52. In the manner presently examined, the plaintiff has done no such thing, and we find ourselves at the end of 2023 in a situation where the plaintiff's claim remains as articulated in the personal injury summons of June 2019, namely, a claim which does not comply with s. 10 (2) (f) and (g) of the 2004 Act and, moreover, a claim which has not been progressed in any material way since the proceedings were first issued, some 4 ½ years ago .

After this Court's order of 21 June 2021

53. I now return to the 'timeline', in particular, what happened, or not, in the wake of this Court's order staying the proceedings.

54. By letter dated **12 July 2021** the plaintiff's solicitors wrote to the defendant's solicitors enclosing a medical report from a Dr. Cox and indicating that they might have to obtain further reports and records under the Freedom of information Acts and Data Protection Acts, the reason given in the letter being:- "*in view of the fact that some of the medical practitioners involved on behalf of our client may have moved or retired or as the case may be*" (emphasis added). Three brief comments are appropriate in relation to the foregoing.

55. First, a medical report tells the plaintiff nothing in relation to what *he* says were the wrongs which the *defendant* perpetrated against him.

56. Second, the fact that doctors may have moved or retired reflects the very significant passage of time since, on the plaintiff's case, bullying and harassment began (in the context of how 'late' a

'start' the plaintiff made to his claim). Indeed, without for a moment determining the question, given that the plaintiff, through his solicitors, was raising the possibility of some of his doctors having moved on or retired, there is at least a 'question mark' in relation to the potential availability of all relevant witnesses for any future trial.

57. Third, and insofar as the plaintiff regards his medical records as required, nowhere is it explained why, 11 years after the alleged wrongs began, the plaintiff still has not obtained such medical records as he regards as relevant.

58. Continuing with the 'timeline', on **10 August 2021**, the defendant's solicitors wrote to the plaintiff's solicitor confirming that they would forward a copy of this court's order as made on 21 June of that year, as soon as it could be taken up.

59. Furthermore, the letter specifically invited the plaintiff to furnish a draft amended Personal Injuries Summons in compliance with s. 10 of the 2004 Act.

60. By letter dated **16 November 2021** the defendant's solicitors wrote to the plaintiff's solicitors enclosing a copy of this court's 21 June 2021 order; and also enclosing a copy of the letter of 10 August 2021, which called for the plaintiff's amended summons in compliance with s. 10.

61. By letter dated **12 January 2022**, the plaintiff's solicitors acknowledged the 11 November 2021 correspondence and indicated that they were waiting for the plaintiff to furnish all medical notes and records. The letter suggests the plaintiff was having "difficulty" but did not explain these in any detail whatsoever, other than to make reference to "*the exigencies caused by Covid*".

62. I pause to make the point that the exigencies caused by covid plainly were not such as to prevent progress by the defendants who, very understandably, were required to bring the motion which this Court heard and determined, resulting in the June 2021 order.

63. Moving on with the chronology, by letter dated **11 April 2022**, the plaintiff's solicitor wrote to say that the plaintiff was still waiting to hear from his GP in relation to an appointment with a psychiatrist and psychologist. The letter also stated inter-alia:-

"We do not know the cause of this delay but we can only assume that our client is a public patient and cannot afford to be a private one and also due to the vicissitudes of life and the existences of the situation caused by Covid et cetera, that that may be the explanation". (emphasis added)

64. I pause here to make a number of points. First, and as the plaintiff's solicitor's letter very appropriately acknowledged, they were not at all aware of the *reason* for the delay. Second, the plaintiff did not explain, and has never explained, the reason. Third, whilst the plaintiff's solicitors engaged in speculation, this court must determine the present motion on the basis of evidence, not guesswork. Fourth, (and it will be a topic that I will return to) the plaintiff has chosen to swear

no affidavit in response to the Defendants' motion. Fifth, there has been no evidence to explain that choice by the plaintiff. Sixth, there is no evidence that the plaintiff was unable at any point in time to give instructions to his solicitor or to swear an affidavit. Seventh, and leaving to one side the entirely unexplained reason for delay (be that in relation to obtaining medical records or medical appointments), the records concerning medical treatment and the views of medical practitioner cannot be in any way required in order for a plaintiff to meet their obligations under s.10 (2) (f) and (g).

What the plaintiff says were the wrongs against him

65. At the risk of stating the obvious, why is this so? It is because those sub-sections oblige the plaintiff to specify not the injuries occasioned by the wrongs of a defendant (that is dealt with in subsection (d) of section 10 (2)), subsections (f) and (g) require the plaintiff to specify the acts of the *defendants* which *he* says constitute the *wrongs* against *him*; and the *circumstances* relating to the commission of the alleged wrongs; and each instance of *alleged negligence* by the defendants.

66. At the risk of repetition, it will be recalled that it was these subsections (f) and (g) which underpinned the application in the first motion. They were specifically referred to in the first relevant letter, namely, the letter of 20 July 2020 from the defendant's solicitors to the plaintiffs.

67. Again, although perhaps a statement of the obvious, this Court is entitled to take it that, at all material times, irrespective of what medical record or medical report the defendant did or did not have access to, the plaintiff has had known what *he* says the defendants did wrong.

68. Despite this, he has *never* complied with s. 10(2) (f) (g) of the 2004 Act.

Failure to comply with s.10 (2) (f) & (g)

69. He did not do so when he issued the Personal Injuries summons, 9 years after the commencement of the alleged wrongs.

70. He did not do so when the deficiencies in his claim were pointed out, in correspondence of July 2020 and, again, in November 2020, when a motion was threatened.

71. He did not do so when this Court made an order in June 2021 staying his proceedings, pending compliance.

72. He has not done this since, i.e. he did not do so when he was called upon to deliver a draft amended personal injuries summons, in August 2021.

73. He did not do so when that call was repeated, in November 2021.

74. Nor did he do so, in April 2022, when his solicitors made reference to medical reports which, as I say, cannot be essential for the plaintiff to comply with s. 10 (2) (f) and (g) (by specifying, adequately, what *he* says the *defendants* did *wrong*).

75. Continuing with the chronology, the defendants very understandably issued the present motion on **20 July 2022**, which was originally returnable for 7 November 2022, being just over a year ago.

76. That motion was served on the plaintiff's solicitors on **4 August 2022**, as averred by Ms Deirdre Kerrigan in an affidavit, sworn on 28 September 2022.

No affidavit by the return date for this motion

77. Surprisingly, to say the least, no affidavit was sworn by the plaintiff in advance of the original return date for the motion. This is, of course, ongoing post-commencement delay even in the face of a motion to dismiss. Unfortunately, and no pleasure is taken in saying so, it is emblematic of the plaintiff's approach to the progression of his own claim. Rather than filing an affidavit, the plaintiff, through his solicitors, sought an adjournment.

Plaintiff to swear affidavit within 6 weeks

78. By letter dated **4 November 2022**, the defendant's solicitors wrote to the solicitors for the plaintiff, referring to discussions the previous day and confirming their clients' instructions to consent to an adjournment on the basis that the plaintiff's replying affidavit would be filed *within 6 weeks* of Monday 7 November 2022.

79. That letter also pointed out:- "*a draft amended personal injuries summons in compliance with section 10 remains outstanding*". It remains outstanding to this day, over a year later.

80. In the foregoing context, on **7 November 2022**, this motion was adjourned, on consent, with the plaintiff to deliver a replying affidavit within 6 weeks.

Plaintiff's failure to deliver affidavit by agreed deadline

81. Despite this and surprisingly, to say the least, the plaintiff failed to deliver any affidavit within that 6 week period.

82. As a result, on **30 January 2023**, the defendant's solicitors wrote to the plaintiff's solicitors, pointing out the failure to deliver an affidavit within the agreed 6 weeks; and reserving the right to object to any affidavit produced outside the agreed timeline. At that juncture, the return date for the motion was **27 March 2023**.

Failure to swear affidavit by adjourned return date

83. By the return date, the plaintiff had delivered *no* affidavit. To say this is surprising does not do the word justice, given the chronology which preceded it.

Order the plaintiff swear an affidavit within 4 weeks

84. In any event the matter came before me in that state, on 27 March, when this Court ordered that “*the plaintiff file a replying affidavit within 4 weeks*” of 27 March; and the defendants were given liberty to file a replying affidavit, if necessary, within 3 weeks thereafter.

Final relief

85. The motion was then adjourned to Monday, 22 May 2023, on a peremptory basis as against the plaintiff. Despite this motion being one which seeks to dismiss the proceedings on two separate bases, namely, a motion which very obviously seeks *final* as opposed to interlocutory relief; and despite this Court’s order that the plaintiff file a replying affidavit, he has chosen to file none.

No affidavit from plaintiff

86. Rather, on **21 April 2023** the plaintiff’s solicitor, Mr Leahy swore an affidavit, in which he made inter-alia the following averments at paragraph 1:-

“I say that I make this affidavit for and on behalf of the plaintiff, and with the plaintiff’s permission and authority, and from facts within my own knowledge, save where otherwise appears I say and believe the same to be true and accurate”.

Solicitor’s affidavit

87. None of what I am about to say is a criticism of the plaintiff’s solicitor, who doubtless is acting to the highest standards of his profession in the best interests of a client. However, several points must be emphasised.

88. The solicitor does not aver to his source of knowledge. He does not aver that he is advised by the plaintiff and believes, that the matters deposed to are true.

89. Nor has the plaintiff ever sworn even a verifying affidavit in relation to his deficient personal injuries summons.

90. The entire substance of the affidavit comprises of matters which are very obviously not within the solicitor’s own knowledge. That is not a criticism of him, but it is a fact and why is this so? Because, other than referring to this Court’s order of 21 June 2021 (in para 2); and purporting to reserve the plaintiff’s right to seek further information from the Prison Service (at para.3) the remainder of the affidavit comprises a narrative of events which are said to have occurred, from 21 August 2006 onwards, after the plaintiff commenced employment.

91. The latest date referred to in Mr. Leahy’s affidavit relates to a letter of 11 April 2019 concerning the plaintiff’s increments. It is a statement of the obvious that Mr. Leahy had no first-hand involvement in any of the narrative spanning the approximately 13 years, between August 2006, and April 2019, and which is set out in some three and a half pages.

92. It will of course be recalled that it was not until July 2019 that the personal injuries summons was issued. It is appropriate to point out that when it was issued, Mr. Leahy's firm was not acting for the plaintiff. Rather, Messrs Hennessy Perrozzi Solicitors are named on the writ as being, then, on record for the plaintiff.

Hearsay

93. For the avoidance of doubt, I want to make clear that even if the plaintiff's solicitor had averred that the plaintiff was his source of knowledge, it would not render the contents of the affidavit probative of anything for the purposes of this application. The reasons flow from what I have already said. In short, the contents of this affidavit comprise entirely of hearsay. By that I mean, even if one safely assumes that what the solicitor has set out represents an exact recording of a narrative in precisely the terms given to him by his client, it is *not* the solicitor's narrative.

94. Thus, this court has no evidence from the plaintiff whatsoever in relation to any matter.

No compliance with s.10 (2) (f) & (g)

95. Nor, let me say, does this affidavit comprising of hearsay constitute compliance with s. 10 (2) (f) and (g) of the 2004 Act in respect of the requirements imposed as regards a personal injuries summons.

96. Nothing averred to or exhibited by the plaintiff's solicitor engages in any way with the plaintiff's delay, nor does it suggest that there was any impediment to the plaintiff swearing any affidavit.

97. I have to say that his failure to do so is as remarkable as it is inexplicable, when faced with an application to dismiss on two grounds, and in the wake of this Court's order that the *plaintiff* swear an affidavit.

98. By contrast, his ability to swear an affidavit had he wished to do so is self – evident, given that his solicitor could only act on instructions from his client and Mr. Leahy has averred very appropriately that he was authorised to swear this affidavit on behalf of the plaintiff.

Expediency of time

99. During the course of Mr. Leahy's very clear submissions, he suggested that the reason why he swore the affidavit was due to "*the expediency of time*". The gravamen of his submission was that, due to the expedience of time, he took instructions from the plaintiff and swore the affidavit, as opposed to the plaintiff swearing an affidavit himself. Without intending any disrespect, I fail to see how this saved any time whatsoever.

100. It must also be recalled that the plaintiff had not weeks, but month after month, to swear a replying affidavit. It will be recalled that he did not do so in advance of the first return date – rather, an adjournment was sought. Nor did he do so within the six weeks which was the *quid pro*

quo of the adjournment on consent with respect to the first return date. He did not do so in advance of the second return date, when I directed that he swear an affidavit.

101. Again, no disrespect to Mr. Leahy is intended, but although he cannot prove the contents of any of the documents which comprise exhibits to his affidavit, it seems appropriate for this Court to make reference to them, lest I be wrong not to.

Exhibited documents

102. The exhibits to Mr Leahy's affidavit can be summarised as follows:-

- a copy letter dated 11 April 2019 to the plaintiff from the prison service human resources department in relation to his incremental progression history;
- a copy letter dated 25 June 2015 in which the plaintiff complains to the governor that on the morning of 31 May 2015 an unnamed officer refused repeatedly to serve him breakfast in front of work colleagues and inmates in the canteen;
- a copy letter from the plaintiff 22 August 2016 requesting an update regarding an investigation requested from an unnamed governor in relation to the canteen breakfast incident;
- a copy letter dated 7 September 2016 from an assistant governor which informed the plaintiff that there was a pattern of non-reciprocation in his attendance, in respect of an "Exchange of Duty" scheme; advising that any further detection by management of any exchange of duty not reciprocated would not be tolerated; and warning that the privilege of exchange of duties may be withdrawn for a period.
- A copy letter from the plaintiff to a governor dated 5 September 2016 in which the plaintiff referred to a meeting on 29 August 2016 with an unnamed chief officer who, according to the letter, accused the plaintiff of colluding with other staff members and conducting practices forbidden within the print prison service; in which letter the plaintiff stated that he had never partaken in any such activities;
- a copy of an undated letter from the plaintiff to a governor seeking clarification of three matters namely (1) a prisoner complaint against him; (2) late for morning parades; and (3) leaving St. Patricks to change in Mountjoy locker room.
- A copy of a 3 June 2016 letter to a governor from a named "ACO", responding to the three issues raised in the plaintiff's letter.
- A copy letter dated 15 September 2016 in which the plaintiff complained that while on night duty on 9 November 2016 he was the subject of retaliation bullying from an ACO.
- A copy medical report dated 16 December 2015 from a Dr. Shortall GP to a Dr. Eustace, Consultant Psychiatrist, in which the former states that the plaintiff reports ongoing problems at work for some time; a difficult working atmosphere related to management; feels he is being bullied; and reports that he is having problems at work in relation to the amount of sick leave he has taken.

- a copy medical report dated 29 February 2016 from Dr Eustace to Dr Shortall, which letter sets out what the plaintiff reported to Dr Eustace; the plaintiff's refusal of medication; and the treatment recommended, being "CBT".
- A copy medical report from a Dr Cox, dated 14 June 2021, (and it will be recalled that a report from a Dr. Cox featured in the correspondence in the chronology I have referred to) wherein the doctor referred to the plaintiff having been a patient of his since 2010; and stated inter alia: "*during 2014, when the Plaintiff was working in Mountjoy Prison, work-related incidents of a stressful nature occurred. This bullying continued on over the next 2 years approximately which resulted in the plaintiff suffering stress and anxiety for which he had to take time off work on many occasions*". The report sets out a diagnosis and prognosis, including, that the plaintiff needs further treatment for at least another 4 to 6 months, and that his recovery will depend on how he responds to same.
- A copy medical report dated 15 November 2022 from Dr. Daly, consultant psychiatrist, addressed to the solicitors for the plaintiff; which *inter-alia* sets out what the plaintiff reported to Dr. Daly; the doctor's findings on a mental state examination and the doctor's summary and impression; the recommendation being CBT.

103. Given the contents of the foregoing, it would certainly appear that the plaintiff ceased working for his employer from 2016. That also chimes with a submission made today to the effect that the plaintiff has not worked for the defendants since December 2016.

2010 - 2016

104. Therefore it would appear that the relevant events in terms of allegations of bullying and harassment are 'book-ended' by on the one hand, 2010 and on the other 2016 and span that period.

No impediment

105. In addition to the fact that the plaintiff's solicitor was the author of none of this correspondence and therefore simply cannot prove it, none of the documentation, including the 15 November 2022 medical report, states or even suggests that the plaintiff was, at any time, incapable of, or impeded in any way from: first, progressing litigation and giving instructions to his legal representatives to do so as to ensure compliance with s. 10 of the 2004 Act; second, there is no suggestion in any of that documentation that the plaintiff was, or is, not in a position to ensure compliance with s. 10 (3) (f) and (g) of the 2004 Act; third, progressing his claim with due expedition.

106. Nor, for the sake of completeness, is there any suggestion in any of that documentation that the plaintiff was in any way impeded from swearing an affidavit in response to the defendants motion, so that this Court would have his evidence.

107. Just how sub-optimal this situation is, can be illustrated by the following. At paragraph 13 of his affidavit, the plaintiff's solicitor makes the following averment:

"13. The plaintiff was involved in a separate incident where he received injuries as a result of a fire in a prison cell during the course of his duty from which he received injuries, which case is at present before the appropriate Injuries Board and the plaintiff is also of the opinion that because he made this claim it is part of his victimisation". (emphasis added)

108. In a replying affidavit sworn on 12 May 2023 the defendants' solicitor makes inter alia the following averments in response:-

"3. At para. 13 of his affidavit Mr. Leahy states that the plaintiff alleges that he received injuries as a result of a fire in a prison cell during his employment duties which are presently before the appropriate Injuries Board. I say (a) your deponent is aware of two other claims for damages made by the plaintiff which were processed through the Personal Injuries Assessment Board and dealt with on behalf of the defendants by the State Claims Agency; (b) your deponent is not aware of any application to the Personal Injuries Assessment Board relating to a fire in a prison cell, (c) that the incident relating to a fire appears to be the fire of the 15th of February 2013 referred to in the report of Dr. Denis Eustace which is at Exhibit G of Mr. Leahy's affidavit". (emphasis added)

109. I want to emphasise again that there can be no criticism of Mr. Leahy, but he has, in para. 13, doubtless reflecting the narrative given to him, sworn in relation to a separate claim *currently* being before the Injuries Board in relation to a fire, and sworn that, insofar as the plaintiff's claim is concerned, he regards that *current* claim as interlinked with bullying of him.

110. However, if one turns to the report by Dr Eustace, dated 29 February 2006, which Mr. Leahy has exhibited, bearing in mind the averment that this would appear to be a 2013 claim, namely, a whole decade ago, the following is said in Dr. Eustace's report dated 29 February 2016, Dr. Eustace being a consultant psychiatrist, and I quote:

"Incident- John, who was not a particularly good historian when I originally saw him told me that on the 15th of February 2013 there was a fire in the early hours of the morning in the lower corridor of Mountjoy West. This complex used to house the adolescent group known as St. Patricks. Apparently, a prisoner had set fire to his cell, and John was told to extract him. In the course of the melee the prisoner struck him but was not seriously injured. With the help of another prison officer, the offender was subdued and then John was ordered by another senior officer to extinguish the fire. John makes the point that at no time was he wearing any fire protection gear. John then went to the Mater Hospital as he had been having breathing difficulties relating to the smoke inhalation. It would appear from this time on that John developed significant problems of respiratory and cardiovascular nature. As you are aware, he has attended both disciplines since this time and blames it on the fire". (emphasis added)

111. This of course highlights that we are in the very unfortunate situation where the only *source* of evidence, *qua* sworn averments (the plaintiff), has (i) chosen not to swear any affidavit, despite being (ii) 'full square' on notice of this application to dismiss his claim for well over a year and (iii) despite having every opportunity afforded to him not only by the defendants, who were willing to agree to an adjournment on the basis that he swear an affidavit within six weeks, but (iv) by this Court, which directed, months later, that the plaintiff to swear an affidavit within four weeks.

112. The foregoing is the evidence which is, or is not, before the court.

Inordinate delay

113. Having looked in some detail at all the court has, to put it crudely, to 'work with', I now return to the *Primor* test, beginning with the question of whether the plaintiff's delay is inordinate.

114. With respect to the meaning of the term "inordinate", Cooke J. held, in *Framus Limited v CRH plc* [2012] IEHC 316 (at para. 23) that: "*In its ordinary meaning delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive*".

115. In the present case no meaningful step has been taken by the plaintiff since the personal injury summons issued almost four and half years ago and I am entirely satisfied that the plaintiff's delay *is* inordinate.

116. Furthermore, not having sworn any affidavit in response to this application, there is simply no evidence before the court that the plaintiff intends to bring any end to his delay.

117. On the contrary, if one adopts that old principle that 'actions speak louder than words', this is a plaintiff who has chosen *inaction*. He has had four and half years to comply with s. 10 but has not done so. Two and a half of these years have been since this Court stayed his proceedings pending compliance. Despite this, he chose not to comply, and he chose to continue to delay. He chose not to cause an amended personal injuries summons to be delivered even up to today, when this Court is sitting at the end of November 2023. Not having done so even at the 'eleventh hour', this Court can have no confidence as to when, if ever, the plaintiff's inaction will end.

118. In *McNamee v. Boyce* [2016] IECA 19, Irvine J. (as she then was) at para. 36 of the Court of Appeal's decision stated:-

"...in considering whether or not the post commencement delay has been inordinate, the court may have regard to any significant delay prior to the issue of the proceedings: (see Cahalane and Anor v. Revenue Commissioners and Ors [2010] IEHC 95 and McBrearty v. North Western Health Board [2010] IESC 27). These decisions support the proposition that where a plaintiff waits until relatively close to the end of the limitation period prior to issuing proceedings that they are then under a special obligation to proceed with expedition once the proceedings have commenced."

119. Even of itself, and excluding all other considerations, four and a half years delay is out of the ordinary and it is excessive. The guidance given by the former President in *McNamee v Boyce* fortifies me in the view that the plaintiff's delay is most certainly inordinate for the purposes of the first limb of *Primor*.

Inexcusable delay

120. Turning to the question of inexcusable delay, in the Court of Appeal's decision in *Cave*, Collins J. emphasised that there needs to be a causal connection also between (i) such excuses or explanations as are proffered, on the one hand, and (ii) the delay they are said to excuse, on the other.

121. However, in the present case, the following can be said. First, the plaintiff has sworn no affidavit and has proffered no explanation whatsoever for his delay. Second, the affidavit sworn by his solicitor proffers no explanation or excuse for the plaintiff's delay.

122. Apart from paragraph 13 concerning the fire incident, the following is the 'sum total' of what the plaintiff's solicitor says (other than a narrative account of matters he cannot have any knowledge of) and I now quote para 12 of Mr. Leahy's affidavit *verbatim* and in full:-

"12. I beg to refer to a booklet of medical reports furnished herein. These show that the plaintiff has sought medical help in relation to the bullying and harassment within the prison system. It must also be noted that the plaintiff remains out of work on medical certificates furnished by his general practitioner Dr. Edward Cox. The plaintiff also remains under psychiatric psychological care. The said booklet prior to the swearing hereof has been marked by me and I beg to refer to same as being marked with the letter G".

123. Even if taken at their 'height', those averments do not explain or excuse the plaintiff's delay. At most, they say that the plaintiff is (i) out of work on medically certified leave; and (ii) is under the care of doctors. Without for a moment wishing to appear disrespectful or unkind, those two elements are entirely commonplace across a range of proceedings being progressed through the Court system. They are true in respect of many 'live' legal claims, but those factors do not of themselves explain, still less excuse, the complete failure of the plaintiff to progress his claim with anything approaching reasonable expedition.

124. There is simply no evidence before the court which would allow it to hold that there is any 'inequality of arms' as between the plaintiff, on the one hand, and the defendants, on the other; or, for that matter, that such accounts for the plaintiff's delay and failure to comply with section 10 of the 2004 Act. I make this point because it featured in the very comprehensive, detailed and lengthy submissions which were made with obvious skill by the plaintiff's solicitor, doubtless wanting only to do the best by his client. However, in essence, Mr. Leahy had an impossible task because he can only go so far as the material allows him to go.

125. With respect to the second limb of *Primor*, I am entirely satisfied that the plaintiff's delay is inexcusable.

Balance of justice

126. Turning then to the balance of justice, I want to make clear that I have undertaken the balance of justice assessment very much aware of the constitutionally-protected right of access to the courts to bring litigation. A corollary of that is that, as I am also very well aware, if these proceedings are dismissed, it will create a *terminal* prejudice for the plaintiff.

127. However, this factor alone cannot be the determinative. Why? Because terminal prejudice will *always* face a plaintiff who finds themselves in the position this plaintiff finds himself, namely, facing a dismissal application. If terminal prejudice was always an answer, no proceedings would ever be dismissed, and this analysis seems to me to be just as valid when looking at matters through the 'lens' of s. 10 of the 2004 Act, which in the manner examined creates a jurisdiction pursuant to s. 10 (3) (a) (ii) for this Court to dismiss proceedings where it considers that the interests of justice so require.

128. For this reason, and as I touched on earlier in this ruling, it seems to me that the balance of justice assessment which I am undertaking with reference to the *Primor* test is of equal relevance when one looks at the matter through the lens of s. 10 and the application to dismiss on those grounds.

129. Insofar as the plaintiff purports to rely, for the purposes of this motion, on the documents exhibited by his solicitor, it will be recalled that one of those comprises a copy letter, dated 25 June 2015, from the plaintiff to a Prison Governor. That letter begins in the following terms:-

"Dear Governor sir,

I am writing to you in relation to an incident that occurred in the staff canteen on the morning of 31st of May 2015 involving officer REDACTED and myself. Officer REDACTED refused serving me my breakfast numerous times in front of my work colleagues and inmates working in the canteen. I was humiliated by officer REDACTED's treatment of myself and deeply upset and stressed".

130. The first observation to make is that nowhere in the personal injuries summons is any such incident referred to, and this of course underlines the complete failure of the plaintiff to plead his case in compliance with s. 10 (2), in particular, subsections (f) and (g) of the 2004 Act, up to and including today.

131. However, leaving that point aside for the moment, to the extent that the plaintiff complains that the aforesaid incident was bullying and harassment of him and occurred "*in front of work colleagues and inmates working in the canteen*", in order for a future trial judge to make findings of fact on this issue, she or he would be relying, to a material extent, on the oral testimony of

those present at the time. It is a statement of the obvious that 31 May 2015 is already eight and a half years ago.

132. Furthermore, this case is nowhere near being ready for trial. In fact, if the first stage in proceedings is the service of a personal injuries summons, it has not yet even reached that very first stage, given that the personal injury summons has never complied with section 10 of the 2004 Act, nor, as I observed earlier, has the plaintiff ever sworn an affidavit of verification, even in respect of his suboptimal and deficient personal injuries summons.

133. Given that we find ourselves in December 2023, and the only step taken has been the service of a writ (which does not comply with s.10), I cannot see how any trial could be expected to take place until the end of 2025 or perhaps more realistically the start 2026 at the earliest. That would be over a *decade* after the incident said to have occurred on 31 May 2015, and over *15 years* after the bullying and harassment of the plaintiff is said to have started.

134. Under the *Primor* principles, where a defendant has established both inordinate and inexcusable delay (and these defendants have) *moderate* prejudice is sufficient to 'tip the scales' in favour of dismissal. See for example the Court of Appeal's decision in *McNamee v. Boyce* [2016] IECA 19 wherein, at para. 45, former President Irvine stated:-

"...where a Plaintiff has not been guilty of inordinate and inexcusable delay, the Defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the Defendant proves culpable delay on the part of the Plaintiff in maintaining the proceedings, the Defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test".(emphasis added)

135. This case is not what could be called a 'documents case'. In other words, it is not a dispute the outcome to which will be determined by, for example, expert evidence and legal submissions (e.g. with respect to the interpretation of a particular clause in a commercial agreement or suchlike).

136. On the contrary, a future trial judge would have to make findings of fact based on the memories of witnesses in respect of events going back to 2010.

137. In *Ahearn v. O'Sullivan & Ors* [2023] IECA 134, the Court of Appeal considered an appeal against a decision by this Court (Simons J.) dismissing proceedings on delay grounds. At para. 72, Edwards J. stated:-

"72. The High Court Judge said that he was taking judicial notice that the passage of time of between fourteen and twenty five years since the events occurred would potentially impact on the accuracy and reliability of those individuals' memories. I am satisfied that he was entitled to do so.... There are numerous statements in the jurisprudence of the Irish courts recognising the general proposition that memories fade and become less

reliable with time. Reflecting that, Keane J. observed in Maxwell v Irish Life Assurance plc [2018] IEHC 111 that:

'80. In Superwood Holdings plc v Scully [1998] IESC 37, the Supreme Court (per Murphy J; Flaherty and Lynch JJ concurring) acknowledged the general proposition that memories fade and become less reliable with time. In Robert McGregor & Sons (Ireland) Ltd & Anor. v The Mining Board & Ors. ([2002] IESC 28 Unreported, Supreme Court, 6th April 2002), that Court (per Keane CJ; Murphy and Hardiman JJ concurring) identified the unarguable prejudice caused by delay, given the frailty of human memory. And in Manning v Benson and Hedges Ltd, Finlay Geoghegan J. concluded (at 574) that delays of four to five years would, as a matter of probability, reduce the potential of persons to give meaningful assistance or act as witnesses. It need hardly be added that there was no suggestion of requiring those persons to aver to that fact to enable the court to take it into consideration'.

Indeed, one has only to state the proposition to recognise and appreciate the correctness of it".

- 138.** In the present case, not only did the plaintiff make a 'late start' (so late that an obvious question arises in respect of the Statute of Limitations) he is responsible for four and a half years of post-commencement delay.
- 139.** Guided by those authorities I have referred to, I regard myself as entitled to hold that this delay of four and a half years, even of itself, and being delay for which the Plaintiff is exclusively responsible has, as a matter of probability, reduced the potential of relevant witnesses to give assistance to a future trial judge as a result of the degrading of memory. This is, in my view, at the very least, *moderate* prejudice in the sense in which that term is used in the authorities. This is, in my view, sufficient to 'tip the scales' decidedly in favour of dismissal of these proceedings, and I say that giving due weight to the terminal prejudice which will arise for the plaintiff.
- 140.** How far away we are from any conceivable trial date adds further weight in favour of dismissal. As I say, even if a trial were to take place at the end of 2025 or early 2026 it would be a decade after the last of the relevant events, and some 16 years since the first of them.
- 141.** I am also satisfied that in the particular facts of this case, and in accordance with s. 10 (3) (a) (ii) of the 2010 Act, it is in the interests of justice for the plaintiff's claim to be dismissed by reason of the plaintiff's failure to comply with s. 10 (2) (f) and (g) of the 2004 Act.
- 142.** Mr. Leahy very appropriately describes in his comprehensive written submissions the dismissal of proceedings as the 'nuclear option'. I entirely agree, but it has to be recognised that this was an option which the defendants did not press when they issued the *first* motion in March 2021 which is now two years and eight months ago.

- 143.** But where are the defendants *now* after the expiry of those two years and eight months? In short, they are in the self-same position, namely, with (i) an unparticularised personal injuries summons; (ii) no verifying affidavit from the plaintiff; (iii) no replying affidavit from the plaintiff; (iv) and despite the 'benefit' for the past two and half years of an order staying the proceedings, pending the plaintiff complying with his s. 10 (2) (f) and (g) requirements; (v) the plaintiff still has failed to 'mend his hand'; and (vi) has proffered no evidence to explain or excuse a blatant and ongoing failure to comply with s. 10 obligations.
- 144.** For the sake of completeness, let me also say the submission that the Defendants could raise a notice for particulars is no answer. It was no answer to the first motion. It is certainly no answer to this application.
- 145.** Even if I were wrong in my view that it is in the interests of justice to dismiss pursuant to s. 10 (3) (a) (ii) alone, it seems to me that the plaintiff's inaction with respect to 'mending his hand' during the two and a half years since this Court's order made in 2021, adds further weight in favour of dismissal under the *Primor* test.
- 146.** It must also be said that, because the plaintiff has never provided sufficient particulars to comply with section 10 of the 2004, Act necessarily means that the defendants have never had sufficient particulars for the purposes of investigating the claim in the context of a preparing a defence. Some three and a half years ago, by letter dated 20 July 2020 - portions of which I have quoted earlier in this ruling - the defendant's solicitors wrote to the plaintiff's solicitors stating inter-alia the following:-
- "Few if any facts are pleaded in respect of the incidences of alleged bullying such that would identify who is alleged to have bullied the plaintiff, where this occurred, when it occurred and what kind of behaviour they are alleged to have engaged in. The particulars of bullying pleaded are general in nature and do not provide sufficient information or detail. The defendant is not in a position to deliver a defence to the plaintiff's claim without the plaintiff complying with s. 10 (2) (f) and (g) of the Civil Liability Act 2004".*
- 147.** Three and a half years of further inaction by the plaintiff since that letter was written means that the defendants are still not on notice of the full extent of their alleged wrongdoing, and, as a consequence, still have not been able to identify even potentially appropriate witnesses, nor to identify potential appropriate documentation, or to progress any potential defence. This is real prejudice, i.e., the inability to investigate an unarticulated claim. This also seems to me to weigh in favour of dismissal; particularly given the fact that there is simply no question whatsoever of 'acquiescence' on the part of the defendants. Rather, as the analysis of the timeline displays, it was the defendants who at all material times 'made the running'.
- 148.** For that reason, it is entirely understandable why the defendants do not point to any specific or concrete prejudice in relation to, for example, a specific witness being no longer available. In other words, whether or not all potential witnesses will be available is entirely unknown

because, as a result of the plaintiff's inaction, it cannot be known due to the plaintiff's failure to comply with the 2004 Act. This is not a factor I am giving any weight to. My point is that there can be no criticism of the defendants for not pointing to specific concrete prejudice, as opposed to the submissions made by the defendants in relation to moderate prejudice due to the passage of time.

149. It seems to me that the defendant's rights to have a fair trial within a reasonable period of time, in the context of Article 6 of the ECHR, are also engaged and add further weight in favour of dismissal.

150. The authorities make clear that, where inordinate and inexcusable delay has been established, it behoves the plaintiff to put forward a material consideration or considerations of a 'weighty' type which would 'tip the balance' in favour of the proceedings being allowed to continue. That is not to suggest that the defendant does not have the obligation to meet the burden of proof under all three limbs of *Primor*. They do and they have met that burden of proof. It is to say that this Court has nothing before it which would constitute any consideration, still less anything weighty, to 'place in the scales' in favour of the proceedings being permitted to continue other than, as I mentioned earlier in this ruling, terminal prejudice which is certainly not sufficient to save the plaintiff's claim.

Risk of unfair trial

151. It also seems to me that as well as meeting all three limbs of the *Primor* test, 'fair trial prejudice' arises within the meaning of the *O'Domhnaill* principles. I am satisfied that the passage of time of up to 16 years from relevant events would constitute prejudice likely to lead to a real risk of an unfair trial or unjust result, and that fair trial prejudice seems to me to be manifest.

152. For these reasons, I am acceding to the reliefs sought by the defendants under *both* headings.

153. I want to thank the parties for their patience, but the length of this ruling flows from the significance of the issues at play in light of the constitutionally-protected right of access to justice. It was a ruling which had to engage in a granular way with what was put before the court, and what was not. That is the court's decision and the reasons for it.

154. Finally, I want to express my thanks to the defendant's counsel and plaintiff's solicitor, respectively. They articulated their clients' positions with great skill, clarity, and professionalism. However, submissions must yield to facts, and it is the facts which emerge from the evidence before this Court which have resulted in this decision.