

THE HIGH COURT

[2022] IEHC 442

2015 / 3343 P

BETWEEN

JUDI COSTELLO

PLAINTIFF

AND

**COLM MACGEEHIN, LILLIAN NAGLE AND BRENDAN TOALE PRACTICING UNDER THE STYLE AND
TITLE OF MACGEEHIN TOALE SOLICITORS**

DEFENDANTS

Judgment of Mr. Justice Mark Heslin delivered on the 23rd day of June, 2022

Introduction

1. By motion dated 22 April, 2021 the Defendants sought the following orders:

- i. An order striking out/dismissing the Plaintiff's claim for inordinate and inexcusable delay pursuant to the inherent jurisdiction of the court;*
- ii. Alternatively, an order striking out/dismissing the Plaintiff's claim for inordinate and inexcusable delay pursuant to O. 122, r. 11 of the Rules of the Superior Courts.*

2. That application was grounded on the affidavit sworn by Mr. Ruadhán MacAodháin, solicitor. A replying affidavit was sworn by the Plaintiff on 7 February, 2022. I have carefully considered the contents of both affidavits and the exhibits referred to therein. No other affidavits were sworn in respect of the present motion.

3. O. 122, r. 11 of the Rules of the Superior Courts ("RSC") provides that, where there has been no proceeding for a period of two years, a Defendant may apply to the court to dismiss a Plaintiff's claim for want of prosecution. On hearing such an application, the court may order the matter to be dismissed or may make such other order as to the court seems just. The authorities in this area are well known and there are two overlapping streams of jurisprudence stemming from the Supreme Court's decisions in *O'Domhnaill v. Merrick* [1984] IR 151 and in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. It is appropriate to consider the present application through the lens of *Primor* and the principles laid down in that decision.

4. Although I will return to *Primor* later in this judgment, it is sufficient for present purposes to say that *Primor* essentially lays down a three-part test, in that the court must ask (i) is the delay inordinate? (ii) is the delay inexcusable? (iii) if the delay is both inordinate and inexcusable, is the balance of justice in favour of, or against, the case being allowed to proceed?

5. There is no dispute between the parties that the foregoing represents an appropriate approach for this Court to take.

Certain relevant facts in chronological order

6. The Plaintiff is a businesswoman whereas the Defendants comprise a firm of solicitors.

7. The Plaintiff claims that, on or about 11 July, 2005 she suffered an injury to her left ankle as a result of a "trip and fall" outside the premises of a Mr. Ken McMahon. The Plaintiff alleges that she tripped and fell over a piece of masonry which fell onto the footpath as a result of building works being carried out by Mr. McMahon at his property.

8. It is not in dispute that the Plaintiff retained the Defendants to act for her, arising out of the aforesaid trip and fall.

9. The Plaintiff maintains that she suffered severe personal injury, loss, damage, inconvenience and expense arising out of negligence on the part of Mr. McMahon in, *inter alia*, creating a hazard and failing to exercise reasonable care.

10. The Defendants acknowledge that they were retained by the Plaintiff in or about the month of July, 2005, to act on her behalf for the purpose of providing legal advice and initiating and maintaining carriage of legal proceedings arising from the accident which befell the Plaintiff on or about 11 July, 2005.

11. It does not appear to be at all in dispute that the proposed proceedings were covered by the Personal Injuries Assessment Board Act 2003 ("the 2003 Act"). For the purposes of the present application, it does not appear to be in dispute that the Defendants failed to lodge the Plaintiff's claim with the Personal Injuries Assessment Board ("PIAB") and failed to issue any legal proceedings on behalf of the Plaintiff within the time-limit provided for by the Statute of Limitations Act 1957 ("the Statute").

12. At para. 5 of the Plaintiff's affidavit, sworn on 7 February, 2022, she makes, *inter alia*, the following averment as regards the injury suffered by her on 11 July, 2005:

"I say that I suffered a severe pain, swelling, oedema, skin changes and pain in the region of my ankle and was diagnosed with complex regional pain syndrome in or around early August 2005 by Dr. Declan O'Keeffe, consultant anaesthetist and pain specialist".

13. In circumstances where no replying affidavit has been furnished on behalf of the Defendants, the foregoing averment is uncontroverted. Furthermore, the Plaintiff's averment appears to be entirely consistent with para. 15 of the Defence delivered in the present proceedings on 19 January, 2016 wherein the Defendants make the following plea: -

"15. On 13 October, 2010 Dr. O'Keeffe responded stating that he had diagnosed the Plaintiff with CRPS 'around the time of her accident on the date in question which was 11 July, 2005'".

14. It does not appear to be in dispute, for the purposes of the present motion, that the Plaintiff attended the Merrion Medical Clinic and the accident and emergency department of St. Vincent's Hospital Dublin for treatment in July and in August 2005.

15. At paras. 7 and 8 of her affidavit sworn on 7 February, 2022 the Plaintiff makes the following averments: -

"7. I say and believe that the Defendants were negligent, in breach of contract and in breach of duty by failing to lodge my claim with the Personal Injuries Assessment Board, failed to obtain the appropriate medical reports prior to the expiration of the statutory time limit and further failed to issue the proceedings within the time limit provided by the Statute of Limitations Act 1957, thereby causing or permitting my claim to become statute barred. I further say and believe that between November 2007 and July, 2013, I contacted the Defendants by email, post, telephone and person at their offices on numerous occasions to discuss my personal injury case and the progress of same. I say and believe and as can be seen at para. 14 of the statement of claim, the Defendants made a number of false representations to this deponent concerning the status of my personal injuries case, inter alia, as follows: -

- *That the case was not statute barred;*
- *That the case was progressing as normal;*
- *That the claim had been lodged with the PIAB;*

- *That the relevant medical reports had been obtained;*
- *That there would be difficulty in establishing a causal link between the incident and a diagnosis of complex regional pain syndrome;*
- *That the delay in the case was due to the difficulty in proving that my injuries were attributable to the incident in July, 2005;*
- *That the medical reports obtained did not state that my diagnosis of CRPS was attributable to the incident;*
- *That there was insufficient evidence to mount a claim against Ken McMahon;*
- *That my claim was not worthwhile.*

8. *I say that on 22nd July, 2013 the Defendants wrote to this deponent to advise that there were no proceedings relating to the incident in being, that my case was statute barred and that they would be returning papers to me. I say and believe that this was on the date, almost eight years after my trip and fall incident, that I first discovered that the Defendants had concealed the truth about my (proposed) proceedings”.*

16. It is no function of this Court to determine any issues in dispute in the underlying proceedings. It is, however, appropriate to note that, in circumstances where no replying affidavit has been sworn on behalf of the Defendants, the state of the evidence insofar as the present application is concerned is that first, from 2007 to 2013, inclusive, the Plaintiff contacted the Defendants on numerous occasions to discuss the progress of her personal injury claim and, secondly, that it was not until 22 July, 2013 that the Defendants first wrote to the Plaintiff advising her that no proceedings were in being and that her claim was statute barred. That being so, it seems to me that, for the purposes of the present application, the entire period of eight years from July, 2005 to July, 2013 constitutes a period during which the Plaintiff cannot be accused of delay. Rather, and for the purposes of the present application, this was all delay on the part of the Defendants and the consequences of such delay could not fairly be ‘laid at the door’ of the Plaintiff.

17. On 30 April, 2015, the Plaintiff issued a plenary summons in which she makes a claim against the Defendants for “*damages to include aggravated damages, for negligence, breach of contract, breach of duty (including breach of statutory duty), misrepresentation, fraudulent concealment, and deceit*” as well as interest and costs. The plenary summons identifies experienced junior counsel and eminent senior counsel. Given the nature of the Plaintiff’s claim, it seems uncontroversial to say that, taking 22 July, 2013 as the date when ‘time’ began to ‘run’ against the Plaintiff insofar as commencing legal proceedings against the Defendants, she had six years to do so, terminating on 22 July, 2019. In fact, proceedings were bought by the Plaintiff far sooner i.e. one year and nine months after receipt of the Defendants’ letter dated 22 July, 2013.

18. It seems entirely fair to say that legal proceedings of this nature require the taking by any would-be Plaintiff of appropriate legal advice and it is plain from the contents of the plenary summons that the Plaintiff consulted, not only a firm of solicitors, but junior and two senior counsel. I am entitled to take it that it was necessary for the Plaintiff to give instructions and for relevant documentation to be provided by the Plaintiff to her legal advisers and for junior and senior counsel to be briefed, ultimately resulting in legal proceedings being drafted and settled. Plainly this took some time and it does not appear to me that, against the backdrop of a six-year statute of limitations period commencing in July, 2013 it could be fairly

said that the Plaintiff was guilty of pre-commencement delay insofar as issuing the present proceedings in April, 2015.

19. Again, without for a moment purporting to decide any issue in dispute in the underlying proceedings it also seems to me that, in addition to there being no question of any blame being attributed to the Plaintiff for the passage of time between her accident in July, 2005 and being notified in July, 2013 that no proceedings had been instituted and that her claim was statute barred, there is no question of the Plaintiff being responsible for any delay from July, 2013 until proceedings were issued in April, 2015 having, as I say, been drafted by counsel and settled by two eminent seniors. The foregoing seems to me to be of significance insofar as the timeline is concerned. In short, it means that, although a decade elapsed from the Plaintiff's initial accident, she could not fairly be blamed for any of this 'delay'. On the contrary, it seems to me that, for the purposes of the present application, this is delay which can fairly be laid at the door of the Defendants. I say this because (i) there can be no question of any delay on the Plaintiff's part prior to her receipt of the Defendants' letter informing her that no proceedings had been issued in respect of her accident; (ii) the time it took for the Plaintiff to obtain advice leading up to the issuing by the Plaintiff of proceedings was not *prima facie* unreasonable in my view; and (iii) the Plaintiff's proceedings, which necessarily involved time as regards the seeking and obtaining of legal advice and assistance, arose exclusively from the failure of the Defendants to issue proceedings on the Plaintiff's behalf with respect to the accident. Thus, the period from 2005 to 2015 does not constitute delay on the Plaintiff's part.

20. An Appearance was filed on 2 June, 2015. This Appearance was filed by "MacGeehin Toale", namely, the very firm of solicitors named as Defendants in the proceedings. This is not to suggest that the foregoing was in any way inappropriate. It is merely to observe that the Defendants were acting as their own solicitors. A statement of claim was delivered on 3 July, 2015. In addition to pleas concerning the July, 2005 accident, the medical treatment obtained, and details of the Plaintiff's personal injuries, loss and damage, the Plaintiff pleads that express and/or implied terms of the retainer of the Defendants included that the Defendants would exercise reasonable skill and care; would carry out the Plaintiff's instructions with reasonable diligence; would issue any proceedings within the period provided for in the Statute of Limitations Act 1957 (as amended) and in accordance with the PIAB Act 2003 (as amended); and that the Defendants would keep her informed as to the status of her case. A principal plea made by the Plaintiff is that, had the Defendants properly processed her claim, she would either (a) have settled her case against Mr. McMahon; or (b) have been offered a settlement from PIAB, or (c) have been awarded a sum in damages by the courts. The Plaintiff also seeks aggravated damages by virtue of what she alleges to have been "*the Defendants' conduct in concealing from the Plaintiff that her action had been statute barred and in respect of the false representations the Defendant made to her concerning the status or progress of the action. The Defendants' actions have caused the Plaintiff a great deal of stress and inconvenience*".

21. It does not appear to be in dispute that, whilst the Plaintiff delivered her statement of claim dated 3 July, 2015 the Defendants did not serve a defence within the time limited prescribed by the RSC. As a result of the ongoing failure on the part of the Defendants to deliver a defence, the Plaintiff issued a motion for judgment in default of defence, dated 30 October, 2015. It appears that when the Plaintiff's motion came before the court for hearing, a consent order was made by Cross J. extending time for the delivery by the Defendants of their defence, with an order for costs made in favour of the Plaintiff. That consent order was made on 23 November, 2015.

22. The Defendants delivered their defence on 19 January, 2016. It is appropriate to pause at this juncture to observe that, despite the Plaintiff delivering a statement of claim in early July 2015, the Defendants delayed until mid-January, 2016 before delivering their defence and it was necessary for the Plaintiff to go to the not inconsiderable trouble of drafting, issuing and serving a motion to compel the delivery of a defence. Thus, not only did a decade elapse from the Plaintiff's initial accident in July 2005 for which she cannot fairly be blamed, even after she commenced the present proceedings there was over six months' delay on the part of the Defendants, terminating on 19 January, 2016 with the delivery of their defence.

23. Just as with the Appearance, the firm of solicitors who signed the defence was Messrs. MacGeehin Toale, solicitors, namely the Defendants themselves. Again, this is not for a moment to suggest that this was impermissible. It is clear that the Defendants also retained junior counsel. There are, however, some noteworthy features of the defence. For instance, it contains, *inter alia*, the following pleas: -

"2. It is admitted that the Defendants were retained by the Plaintiff in or about the month of July 2005 to act on her behalf for the purpose of providing legal advice and initiating and maintaining carriage of legal proceedings against Mr. Ken McMahon or the appropriate person or persons responsible for a trip and fall accident which befell the Plaintiff on the 11th July, 2005 . . .";

"3. It is admitted that the Defendants were under a duty to exercise all due professional care, skill, and diligence as solicitors in relation to her said affairs and proposed proceedings and would act in an expeditious manner";

"6. The Defendants admit that an application was not made to the injuries board within the time provided by the Statute of Limitations Act 1957";

24. At paras. 22, 23 and 24 of the defence, it is expressly denied that the Defendants told the Plaintiff that medical reports had been obtained; or that an application in respect of her 2005 accident had been lodged with PIAB; or that proceedings had been initiated; or that her claim was progressing in the normal manner; and all allegations of deceit are denied.

25. At para. 5 of the defence the following is pleaded: -

"5. Any claim which the Plaintiff had arising out of her accident of 11 July, 2005 was not a significant one insofar as her injuries were concerned and would have been suitable for adjudication by the District Court. Further, any such claim was likely to be met by a full defence, inter alia, denying liability together with a plea alleging that the Plaintiff had been guilty of contributory negligence for failing to keep any or any proper look out on the said pavement".

26. There is an explicit denial that the Plaintiff suffered severe personal injuries, loss, damage inconvenience and expense as a result of the July 2005 accident and, at para. (a) to (q) of the defence, pleas are made with regard to the Plaintiff's health; allegedly pre-existing complaints; and treatment history. At para. 10 of the defence, the following is pleaded: -

"10. Chronic regional pain syndrome (CRPS) is a significant medical condition. In the event that the Plaintiff had CRPS and could establish that it developed as a consequence of the accident which befell her on 11 July, 2005 it would have been open to her to initiate legal proceedings and rely upon the provisions of the Statute of Limitations Act of 1991 to defeat a claim that her action was statute barred".

27. The foregoing was plainly a reference to 'date of knowledge' in the context of extending the statute of limitations period. As Counsel for the Plaintiff submitted during the hearing of this application, the

essence of the plea is to ask why the Plaintiff did not make a 'date of knowledge' argument. He went on to submit, with considerable force, that one might just as easily ask why the Defendants, as the Plaintiff's solicitors, did not initiate legal proceedings and rely on the 1991 legislation. He also pointed out that the plea made at para. 10 is difficult to reconcile with the plea made at para. 15 which I quoted earlier in this judgment but, for the sake of convenience, I now repeat:

"15. On 13 October, 2010, Dr. O'Keeffe responded stating that he had diagnosed the Plaintiff with CRPS 'around the time of her accident on the date in question which was 11 July, 2005'".

Once more, I emphasise that this Court is not purporting to determine any issue in the underlying proceedings, but it seems to me to be appropriate, and not at all inconsistent with the jurisprudence in respect of motions of this type, to look at the pleadings in this case to the degree necessary to understand the context in which the present motion is brought and to have a sense of the issues in dispute. I say this not least because engaging in this manner with the pleaded case allows this Court to understand what evidence is likely to be required, were the present proceedings to go a full trial. The foregoing has an obvious relevance insofar as the question of any risk to a fair trial being possible, given the issues in dispute and the nature of evidence likely to be required.

28. At this point, it is appropriate to make what is perhaps a very obvious observation, namely, that a central element of the present proceedings by the Plaintiff against the Defendants is to allege professional negligence on their part and, in addition to asserting breach of contract, breach of duty and misrepresentation, claims are made of negligent or fraudulent misrepresentation and deceit. The foregoing *nature* of the present proceedings can be contrasted with what the Plaintiff initially retained the Defendants to do, namely to act for her, as they acknowledge, with regard to personal injuries proceedings arising from injuries sustained in an accident which occurred in July, 2005. This is an issue I will return to later in this judgment. Before leaving the defence, it is also appropriate to quote para. 17 wherein pleas are made in the following terms: -

"17. The Defendants advised the Plaintiff on a number of occasions subsequent to July 2011 that there were no proceedings in being in respect of her accident of July 2005; moreover, that any such claim was now out of time. On 23 July,, 2013, they wrote to her once pointing out in writing that there were no proceedings in being and advised her 'as they had done on several occasions previously', that it would not be possible to review any such claim as it was long out of time. The Plaintiff was further advised to appoint a new legal advisor. . .".

29. The first thing to note in relation to the foregoing plea is that the Defendants' claim to have advised "*subsequent to July 2011*" that there were no proceedings in being. It will, of course, be recalled that the accident occurred in July 2005. Thus, insofar as the Plaintiff was advised, subsequent to July 2011, that there were no proceedings in being, she was so advised over six years *after* the accident in question and at a time when proceedings were already statute barred. It is also fair to say that, other than the specific reference to the Defendants' 23 July, 2013 letter, no detail is given in relation to when the Defendants claim to have advised the Plaintiff, subsequent to July 2011, that there were no proceedings in being concerning her July 2005 accident. It is also appropriate to note that, in the grounding affidavit sworn by Mr. MacAodháin, on 22 April, 2021 he makes no averment in relation to the issue. That is not a criticism. It is simply to say that Mr. MacAodháin does not aver, on behalf of the Defendants, that they ever advised the Plaintiff *prior* to 23 July, 2013 that no proceedings were in being and/or that her claim was statute barred. The foregoing fortifies me in the views expressed with regard to the Plaintiff having no responsibility

for the first eight, indeed ten, years since her accident in July 2005. Even if I am wrong to attribute the responsibility for the *entire* of that decade of 'delay' to the Defendants, the evidence allows me to find (i) that the *majority* of that 10-year period is certainly the Defendants' responsibility; and (ii) none of that 10-year period could fairly be described as 'pre-commencement' delay on the Plaintiff's part.

30. On 11 May 2016, the Plaintiff's solicitors raised a notice for particulars arising from the defence delivered on 19 January, 2016. The penultimate paragraph of the Plaintiff's notice for particulars made clear that, in default of replies being furnished within 21 days of 11 May 2016, a motion would issue. It seems clear that no replies were furnished within the said 21-day period.

31. On 30 June, 2016 the Plaintiff issued a motion seeking to dismiss the defence by reason of the Defendants' failure to deliver replies to particulars. That motion sought, in the alternative, an order to compel the delivery of replies to particulars. At first glance it might appear that the issuing of a motion on 30 June, 2016 in respect of a notice for particulars raised on 11 May 2016 was unduly hasty, but the context was, of course, significant delay on the part of the Defendants with regard to delivering their defence which delay necessitated the bringing of a motion by the Plaintiff. Viewed in the foregoing context, the Plaintiff's 30 June, 2016 motion was far more understandable. On a related point, a Plaintiff could hardly be criticised for trying to press her claim forward in accordance with the RSC and this evidences pro-activity on the Plaintiff's part, also signalling a very clear intention to maintain her claim against the Defendants.

32. Replies to particulars were delivered by the Defendants on 14 July, 2016 and, four days later, on 18 July, 2016, an order was made on consent, striking out the Plaintiff's motion against the Defendants and reserving the question of costs.

33. On 6 October, 2016 the Plaintiff's solicitors raised a notice for further and better particulars, arising from the replies to particulars dated 14 July, 2016. This was responded to promptly by means of replies to particulars, dated 29 November, 2016 which the Defendants delivered.

34. On 10 January, 2017, the Plaintiff made a formal request for voluntary discovery. On 6 February, 2017 the Defendants wrote to the Plaintiff's solicitors referring to the 10 January, 2017 letter and stating *inter alia*: "*We can confirm our agreement to making discovery in the terms of your letter. We would propose a period of six weeks to complete discovery. You might please confirm your agreement*". By letter dated 7 February, 2017 the Plaintiff's solicitors confirmed agreement to the six weeks proposed. Copies of the foregoing correspondence comprise part of exhibit "A" to the Plaintiff's affidavit sworn on 7 February, 2022.

35. Six weeks from 7 February, 2017 expired on 21 March, 2017. It is clear that, despite the foregoing agreement by the Defendants that discovery would be made within six weeks, this was not adhered to by the Defendants. Given the failure to make discovery within the said six-week period, the Plaintiff's solicitors wrote to the Defendants on 23 March, 2017 stating, *inter alia*, that: ". . . if we are not in receipt of affidavit of discovery together with all supporting documentation within 21 days from the date hereof we will proceed to issue our motion for discovery without further notice".

36. The Defendants replied over a fortnight later to state that there had been a delay in finalising the affidavit of discovery and that their client, Mr. MacGeehin, was on annual leave until 26 April,, but would arrange for the swearing and delivery of the affidavit on his return and the letter sought forbearance.

37. Despite the foregoing, it seems clear that no affidavit of discovery had been furnished by 23 May 2017 when the Plaintiff's solicitors again wrote to the Defendants stating, *inter alia*: "*We await hearing*

from you with a copy of a sworn and filed affidavit of discovery together with all documentations set out in the first schedule Part 1 within 21 days from the date hereof”.

38. On 25 May 2017, the Defendants wrote to the Plaintiff’s solicitors purporting to enclose an affidavit of discovery. On 30 May 2017, the Plaintiff’s solicitors wrote to the Defendants noting that the affidavit of discovery referred to in their 25 May 2017 letter had not been enclosed. On 13 June 2017 the Defendants wrote to the Plaintiff’s solicitors stating *inter alia*: “Herewith copy affidavit of discovery omitted from our previous letter. A hard copy together with the discovery documents will follow in the post”.

39. In light of the foregoing, the Defendants made discovery six months after it was requested and some three months later than the period which had been agreed for the making of same. It appears that the affidavit of discovery enclosed with the Defendants’ 13 June, 2017 letter was sworn on 10 May 2017.

40. It is fair to say that, up to this point, not only had there been no *pre*-commencement delay by the Plaintiff, there was no *post*-commencement delay by the Plaintiff. By contrast, the passage of a decade from the Plaintiff’s initial accident in July 2005, up to the point at which the present proceedings were issued, can in my view, be attributed in whole or in large part to the Defendants. Furthermore, even *after* the present proceedings were commenced, the delay in their progression was caused by the Defendants, not the Plaintiffs.

41. On 16 June, 2017 the Plaintiff’s solicitors wrote to the Defendants to state that they still awaited an indexed booklet of discovery documentation as requested and threatened a motion unless same was provided within 14 days. On 4 July, 2017 the Defendants enclosed the affidavit of discovery together with booklets of discovery documents.

42. On 6 July, 2017 the Plaintiff’s solicitors wrote to the Defendants with reference to the discovery documentation and the affidavit of discovery as sworn by Mr. MacGeehin on 10 May 2017. That letter listed 11 items which had been omitted from the documentation furnished.

43. On 19 July, 2017, the Plaintiff’s solicitors wrote again to request the outstanding discovery items.

44. On 24 July, 2017, the Defendants wrote to the Plaintiff’s solicitors enclosing all items requested with the exception of item no. 8, being records from St. Vincent’s Hospital.

45. On 28 July, 2017 the Defendants wrote to the Plaintiff’s solicitors enclosing the records from St. Vincent’s Hospital.

46. On 23 November, 2017 the Plaintiff’s solicitors served a notice of additional particulars of injuries on behalf of the Plaintiff. This 7-page document, comprising 25 paragraphs, detailed, *inter alia*, additional and updated particulars of injuries as well as setting out information with regard to the Plaintiff’s previous accident history and investigations of the Plaintiff to date.

47. On 8 December, 2017 the Defendants wrote to the Plaintiff’s solicitors stating:

“Further to your letter of 23 November, 2017 enclosing the notice of additional particulars of personal injury, could we please have the Plaintiff’s affidavit of verification”

48. On 17 January, 2018, the Plaintiff’s solicitors wrote to the Defendants stating *inter alia*: “We confirm that our client will of course verify all pleadings in advance of the hearing and copies of Ms. Costello’s affidavit of verification will be furnished to you in due course”.

49. On 26 January, 2018, the Plaintiff’s solicitors served an amended notice of additional particulars of injuries indicating that the amendment related to point 4 therein, with regard to the “Visual Analogue Scale”.

50. On 7 February, 2018 the Plaintiff's solicitors wrote to the Defendants enclosing the Plaintiff's affidavit of verification in respect of the statement of claim and amended particulars of injuries.

51. On 17 April, 2018 the Defendants raised a notice for particulars arising from the Plaintiff's notice of additional particulars dated 23 November, 2017. It is fair to say that there was some delay on the part of the Plaintiff with regard to furnishing replies, in that replies to particulars were delivered by the Plaintiff on 15 October, 2018. That said, the relevant period included the 'long vacation' and it is fair to say that the Defendants neither threatened nor issued any motion to compel delivery of the said replies.

52. On 26 November, 2018 the Plaintiff swore an affidavit of verification in respect of the replies to particulars furnished.

53. On 3 December, 2018 the Plaintiff's solicitors wrote to the Defendants enclosing the said affidavit of verification sworn by the Plaintiff in respect of the replies to particulars.

54. On 8 February, 2019 Messrs. Prospect Law (of which Mr. MacAodháin is identified as the principal and Mr. MacGeehin is identified as a consultant) wrote to the Plaintiff's solicitors enclosing a notice of change of solicitor.

55. It is entirely fair to say that, for more than two years afterwards, the Plaintiff's solicitors took no formal step to progress the proceedings. It is this period of delay which is the focus of the present application. On 3 March, 2021 the Plaintiff's solicitors served a notice of intention to proceed on Messrs. Prospect Law.

56. On 1 April, 2021 the Plaintiff's solicitors served a notice of additional particulars of loss. That document, which is dated 25 March, 2021 runs to 13 pages and contains a very significant amount of detail including no less than 6 schedules identifying estimated costs of nursing consultant care by reference to specified dates; number of hours; rate; number of days; number of weeks; and the total. Costs in respect of future care are also given and details are pleaded in respect of the Plaintiff's attendance at an occupational therapist for examination on the 10th October, 2019 with details set out in respect of the assessment. It is clear from the foregoing that, whilst the Plaintiff's solicitors did not take a formal step in the proceedings during 2019, work was nonetheless ongoing in respect of progressing the Plaintiff's case.

57. In the Plaintiff's replying affidavit of 7 February, 2022 she makes the following uncontested averments: -

"18. In the period from January, 2019 to February, 2021, I was proactively engaging with my solicitors and my various medical practitioners in particular, my nursing consultant and consultant occupational therapist so that the appropriate reports could be taken up to progress my claim.

Prior to the within motion issuing, the Defendants were clearly on notice of this as a notice of additional particulars of loss dated 25th March, 2021 was delivered on foot of the updated reports from: -

(a) Ms. Noreen Roche, nursing consultant, ergonomist and safety advisor dated 21st September, 2018 and 11th March, 2021 and

(b) Ms. Catriona Sweeney, consultant occupational therapist dated 25th October, 2019.

19. In relation to Ms. Roche's reports, I say that the first report dated 21st September, 2018 was prepared on the basis of a visit and assessment of this deponent dated 31st July, 2018. (I say for completeness that there is an error in the aforementioned pleading in that it states I was assessed on 31st July, 2017 but this is incorrect and it was in fact the 31st July, 2018). I say that Ms. Roche's second report dated 11th March, 2021 was prepared on the basis of subsequent telephone

conversations and observations of this deponent on 20th September, 2018 and 5th November, 2020.

In relation to the occupational therapy report, I say that it took my solicitors some time to secure an appropriate expert occupational therapist as several occupational therapists were not prepared to prepare a report on the basis that they were not suitably experienced in the area of Complex Regional Pain Syndrome. Ms. Catriona Sweeney's report was prepared on the basis of an assessment of this deponent on 10th October, 2019 but said report was not received by my solicitor until 9th July, 2020 some eight months later.

20. I say that rather than updating particulars one medical report at a time, we appropriately awaited the updated report of Ms. Roche, which was finalised and furnished to my solicitor almost four months after my last attendance with her, in order to update particulars on the Defendants in one pleading. I further say that these aforementioned reports were also prepared upon a consideration of the multiple medical reports already commissioned on my behalf in the course of these proceedings by Dr. O'Keeffe, consultant in pain management, Dr. Enda Ryan, general practitioner, Prof. Flavin, consultant orthopaedic surgeon, Dr. Andreas Goebel, pain consultant, and Prof. Michael Hutchinson, consultant neurologist. I say and as can be seen from the updated particulars based on the aforementioned reports, the experts had a great deal to consider and clearly required a significant period of time in order to finalise their reports.

21. I say that I have attended numerous appointments and reviews over the last number of years in order to expeditiously prosecute my claim. I say that I have done so notwithstanding I have two children with their own complex conditions and whom need close supervision as well as doing so with the various symptoms and sequelae I experience on a daily basis. I say that I was caused to travel to Guy's and St. Thomas' Hospital London for surgery (removal of a tumour in my eardrum) on 18th October, 2018 and that I had to return for a follow up review on 1st November, 2018. I say that I have also continued to attend Dr. O'Keeffe at his clinics throughout 2019, 2020, 2021 and 2022 and he referred me to a consultant plastic surgeon and Prof. Flavin for further reviews. I say that I am also attending my GP Dr. Marie Louise Murphy for regular treatment and I attended Dr. Patrick J. Byrne, periodontal and oral surgeon for treatment and review in 2020". (emphasis added)

58. For the purposes of the present application, the foregoing are uncontested averments. From these, a number of facts emerge including the following: -

- (i) It took the Plaintiff's solicitors some time to secure an appropriate expert occupational therapist;
- (ii) Several occupational therapists were not prepared to prepare a report because they were not suitably experienced in the area of CRPS;
- (iii) Ms. Catriona Sweeney, consultant occupational therapist, was secured and agreed to assess the Plaintiff and prepare a report;
- (iv) The assessment by the occupational therapist took place on 10 October, 2019;
- (v) The occupational therapist's report was not made available to the Plaintiff's solicitor until 8 months later on 9 July, 2020;
- (vi) Ms. Noreen Roche, nursing consultant, ergonomist and safety advisor, provided two reports;
- (vii) The first report by Ms. Roche was dated 21 September, 2018 based on an assessment of the Plaintiff conducted by Ms. Roche on 31 July, 2018;

- (viii) The second report prepared by Ms. Roche is dated 11 March, 2021;
- (ix) This second report by Ms. Roche was based on her assessment of the Plaintiff almost four months earlier, i.e. circa November, 2020;
- (x) Rather than updating particulars one medical report at a time, the notice of additional particulars of loss dated 25 March, 2021 was based, *inter alia*, on the assessment of the Plaintiff carried out by the occupational therapist on 10 October, 2019 (but not available until July 2020) and on the assessment of the Plaintiff by the nursing consultant four months later in November 2020 (her report being dated 11 March, 2021).

59. Although it was not until 1 April, 2021 that the Plaintiff's solicitor served the notice of additional particulars of loss (thereby taking a formal step in terms of pleading the Plaintiff's case) it is perfectly clear that significant and meaningful steps were taken during the preceding two years to progress the Plaintiff's claim in a practical sense. By that I mean the very contents of the 25 March, 2021 notice of additional particulars of loss comprise and reflect the assessments conducted by the consultant occupational therapist and nursing consultant (in October 2019 and November, 2020 respectively) and the reports furnished by those two experts (in July 2020 and March, 2021 respectively).

60. It also seems to me that it would be utterly unfair to criticise the Plaintiff for delay which resulted from the fact that it took time to secure an appropriate expert occupational therapist because several occupational therapists were not prepared to furnish a report, by reason of the fact that they were not suitably experienced in CRPS.

61. It is true that the Plaintiff is not specific as to how much time this took but, having regard to her uncontested averments, it plainly took some. Even if this Court were to assume (i) that the time this took could be measured in minutes or hours, as opposed to days, weeks or months; and (ii) that it took no time whatsoever to secure an appointment with Ms. Catriona Sweeney, consultant occupational therapist (and that seems unlikely), it is incontrovertible that the Plaintiff had to wait from 10 October, 2019 until 9 July, 2020 to receive the occupational therapist's report. I do not see how the Plaintiff could be blamed for that delay.

62. Similarly, there was a further period of four months when the Plaintiff was waiting for Ms. Roche's second report dated 11 March, 2021. Again, I do not see that it would be fair to blame the Plaintiff for that delay.

63. The Plaintiff can certainly be criticised, however, for not having her solicitors write to the Defendants to inform them, *inter alia*, of (i) the difficulties encountered in securing an appropriate occupational therapist willing to assess and report; (ii) the delays in obtaining the occupational therapist's report; (iii) the fact that a second report was being sought from the nursing consultant; and (iv) the delays encountered in respect of receiving that report. That said, it is also appropriate to note that at no stage did the Defendants' solicitors contact the Plaintiff's to make any inquiry; or to object to ongoing delay; or to seek to set the case down for trial.

64. In saying the foregoing, I am not suggesting that the Defendants had any obligation to do so. These were, and remain, the Plaintiff's proceedings and the primary obligation rests on the Plaintiff to progress them. I am, however, simply noting what did and did not happen. In other words, the present motion was not issued in response to a period of silence on the part of the Plaintiff. On the contrary, it was issued after the Plaintiff's solicitors, relying on work which had been done in 2019 and 2020, delivered a very detailed notice of additional particulars of loss.

65. On 26 March, 2021 the Plaintiff swore an affidavit of verification in respect of her additional particulars of loss. On 6 April, 2021 the Plaintiff's solicitors served a copy of the Plaintiff's affidavit of verification on the solicitors for the Defendants.

66. On 13 April, 2021, the Defendants' solicitors wrote to the Plaintiff's giving notice of their intention to bring a motion to dismiss the Plaintiff's claim for want of prosecution and inviting the Plaintiff to withdraw her claim.

67. By letter dated 19 April, 2021 the Plaintiff's solicitors wrote to the Defendants' confirming that they were arranging to brief senior counsel to prepare an advice on proofs in advance of setting the matter down for trial and indicating that any motion of the present type would be strenuously opposed.

68. The present motion was issued on 22 April 2021 and served under cover of a letter from the Defendants' solicitors dated 28 April, 2021.

69. From the foregoing, it is fair to say that the present motion was a response and reaction to the service by the Plaintiff's solicitors of a very detailed notice of additional particulars of loss, reflecting the views of the Plaintiff's occupational therapist and nursing consultant. In other words, the evidence before this Court is that it was the Plaintiff who brought to an end the period of over two years' delay with regard to the formal prosecution of the proceedings; and the response by the Defendants was to bring the present motion which, of course, they were perfectly entitled to issue. Having looked at the facts in some detail I now turn to the principles and their application.

The Primor principles

70. In *Primor*, Hamilton CJ set out the relevant legal principles with regard to an application to strike out proceedings for want of prosecution and it is appropriate to quote from p. 475 of the judgment in *Primor* as follows:

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

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,*
 - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the Defendant to allow the action to proceed and to make it just to strike out the Plaintiff's action,*
 - (iii) any delay on the part of the Defendant — because litigation is a two party operation, the conduct of both parties should be looked at,*
 - (iv) whether any delay or conduct of the Defendant amounts to acquiescence on the part of the Defendant in the Plaintiff's delay,**

- (v) *the fact that conduct by the Defendant which induces the Plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the Defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
- (vi) *whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the Defendant,*
- (vii) *the fact that the prejudice to the Defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a Defendants' reputation and business".*

Is the Plaintiff's delay inordinate?

71. In the present case, there was no formal step taken in the proceedings for a period of over two years. In circumstances where the Plaintiff's solicitors served, under cover of a letter dated 3 December, 2018 the Plaintiff's affidavit of verification in respect of the Plaintiff's replies to particulars, it seems to me that the relevant period runs from 3 December, 2018 to 3 March, 2021 (the latter date being when the Plaintiff's solicitors served a notice of intention to proceed). It is true that Messrs. Prospect Law served a notice of change of solicitors on 8 February, 2019 but that was plainly not a formal step taken by the Plaintiff to progress the claim. Thus, the period of delay seems to me to be one of two years and three months. In *Framus Ltd. v. CRH plc.* [2012] IEHC 316, Cooke J. stated (at para. 23) that: "*In its ordinary meaning delay is "inordinate" when it is irregular, outside normal limits, immoderate or excessive*".

72. In submissions made on behalf of the Defendants, reference is made to the decision in *Diamrem Ltd. v. Clare County Council* [2021] IEHC 408 where Twomey J. held that delay of 22 months in delivering the statement of claim was inordinate. The Defendants also point to the Court of Appeal's decision in *Kenny v. Motor Network Ltd. & Anor* [2020] IECA 114, where that court held that delay of 26 months in replying to particulars was inordinate. This Court's attention is also drawn by the Defendants to the judgment of Barr J. in *The Governor and Company of the Bank of Ireland v. Wilson* [2020] IEHC 646 wherein it was held that a delay of 18 months from the date of issuing a plenary summons was inordinate. The Defendants also referred to the decision in *Governor and Company of the Bank of Ireland v. Kelly* [2017] IECA 288 where the Court of Appeal held that a delay of two years and six months was inordinate.

73. Although each case falls to be considered in light of its particular facts and circumstances, it does seem to me to be appropriate to have regard to the foregoing authorities. That is not to suggest that there can be any 'hard and fast' rule but there certainly has been delay in excess of two years in the present case and for this Court to consider such a period to be inordinate would hardly represent an outlier in terms of the jurisprudence. It seems to me that the Plaintiff's delay is capable of being considered inordinate.

74. The Defendants also draw this Court's attention to the decision of Simons J. in *Ahearne v. O'Sullivan* [2020] IEHC 46 wherein the learned judge stated (at 14):

"Whereas the traditional view had been that delay had to be assessed by reference only to delay in the prosecution of the proceedings, i.e. by reference to delay subsequent to the institution of the proceedings, the more recent case law indicates that both pre- and post-commencement delay can be considered. See, for example, Cassidy v. The Provincialate [2015] IECA 74 [32]".

75. As I have set out earlier in this judgment, I am satisfied that the Plaintiff is not responsible for pre-commencement delay, whereas the Defendants in my view, are. In the Defendants' written submissions, it is stated that: "*Nearly 17 years have passed since the tripping accident, and approximately seven years have passed since the plenary summons issued. In the circumstances, it is submitted that the delay has been inordinate*". In the manner explained, the first ten or the majority of those expired due to no fault of the Plaintiff. It is also fair to say that, prior to the Plaintiff's delay commencing from December 2018, the Defendants were guilty of post-commencement delay, the most obvious examples being (i) delay in delivering a defence which necessitated a motion and (ii) delay in the making of discovery notwithstanding the period agreed in respect of same. In addition, and against the backdrop of the Defendants' delay with regard to delivering their defence, the Plaintiff's solicitors felt obliged to issue a motion to compel replies to particulars when the Defendants had not delivered those within the period specified.

76. Having regard to the analysis conducted earlier in this judgment, it is fair to say that if one looks at the period from June,, 2015 (when the Defendants entered an Appearance) to December 2018 (when the Plaintiff's affidavit of verification in respect of her replies to particulars was served) there was cumulative delay of in excess of a year for which the Defendants are exclusively responsible.

77. It is also appropriate to say that none of the foregoing delay on the Defendants' part arose out of any acquiescence by the Plaintiff. Quite the contrary. Up to December 2018 it is fair to say that it was the Plaintiff who had made 'all the running'. It was the Plaintiff who had pressed the litigation ahead and issued two separate motions against the Defendants arising out of the latter's delay.

78. The Plaintiff refers in submissions to the decision of O'Dhalaigh C.J. in *Dowd v. Kerry County Council* [1970] IR 27 wherein the learned judge stated (at p. 41) that: -

"In weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution. . . . The adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances, it is acted upon by a Defendant in the hope that he will 'get by'. without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at".

79. The foregoing statements of principle seem to me to be particularly relevant given the facts in the present case. I say that because it was the Plaintiff, not the Defendant, who brought the period of delay with regard to the formal prosecution of this claim to an end. She did so by means of the service of a very detailed 13 – page notice of additional particulars of loss, dated 25 March, 2021. It was in response to the foregoing that the Defendants brought the present motion. That being so, it seems entirely fair to say that, insofar as the Plaintiff's delay from December 2018 was concerned, the Defendants took a 'wait and see' attitude. In other words, the adage concerning 'sleeping dogs' applies in the present case. In short, the canine awoke, and the present motion was a reaction to, rather than a proactive step by, the Defendants. I emphasise again that this is not a criticism, but it is a fact, and one appropriate to highlight in circumstances where many cases come before this Court where it is the Defendants who have 'taken the initiative' and brought to an end an extensive period of delay by bringing a motion of the present type. Such is not the position here.

80. Having carefully considered all relevant matters, I have come to the view, albeit with very considerable reluctance, that the Plaintiff's delay in the present case was inordinate in the sense in which

that term is used in *Framus Ltd. v. CRH plc*. The reasons for my reluctance will be obvious from the foregoing analysis, not least because when one compares the Plaintiff's delay of two years and three months (December 2018 to March, 2018) it is dwarfed by delay for which the Defendants can fairly be held responsible, even if one were to say that the Defendants' delay is 'only' or 'merely' the eight years from July 2005 to July 2013 (pre-commencement) as well as the in excess of one year of post-commencement delay (taking into account the delay in delivering a defence; replying to particulars; and furnishing discovery). I now turn to the next question which this Court must ask, pursuant to the *Primor* approach.

Is the Plaintiff's delay inexcusable?

81. In relation to whether the Plaintiff's delay is or is not inexcusable, the following seems to me to be particularly relevant.

82. As of 3 December, 2018 when the Plaintiff's solicitors served her affidavit of verification in respect of the Plaintiff's replies to particulars, the Defendants could have been in no doubt about the fact that the Plaintiff was intent on maintaining her claim. Similar comments apply as of 8 February, 2019 when Messrs. Prospect Law came on record for the Defendants (Mr. Colm MacGeehin of Prospect Law also being the first named Defendant) in the present proceedings against Messrs. MacGeehin Toal Solicitors.

83. Furthermore, up to that point, it is fair to say that the Plaintiff's proceedings had been progressed by her solicitors with diligence and efficiency. In the manner examined earlier in this judgment and taking full account of any delay on the part of the Plaintiff, it is a matter of fact that the Plaintiff issued two separate motions with a view to actively progressing the proceedings and bringing an end to the Defendants' post – commencement delay, whereas the Defendants did not issue a single motion. This was the status as of 8 February, 2019.

84. As I have already observed, the Plaintiff can be fairly criticised for not keeping the Defendants updated in relation to the steps which were being taken to progress her claim from January 2019 onwards. Indeed, this failure to keep the Defendants updated fed into my finding that the Plaintiff's delay with regard to the formal prosecution of her claim was inordinate. However, this is not a situation where no steps were being taken by the Plaintiff to progress her proceedings in 2019 and 2020. On the contrary, in the manner examined earlier, uncontested averments by the Plaintiff, specifically those from paras. 18 to 21 of her 7 February, 2022 affidavit reveal at least the following: (i) By 10 October, 2019 the Plaintiff had been assessed by a consultant occupational therapist, Ms. Catriona Sweeney; (ii) it had taken the Plaintiff's solicitors some time to secure an occupational therapist willing to prepare a report; (iii) this was because several occupational therapists were not prepared to do so, on the basis that they were not suitably experienced in the area of Complex Regional Pain Syndrome.

85. Leaving aside entirely such time as it took to be rejected by several occupational therapists; to secure the willingness of Ms. Sweeney to report; and to obtain an assessment on 10 October, 2019 it is a matter of fact that Ms. Sweeney's report was not available until some eight months later on 9 July, 2020. Even if the Plaintiff and her solicitors are given no 'credit' whatsoever for any time devoted to progressing the Plaintiff's case in 2019 prior to 10 October, 2019 the eight – month period from 10 October, 2019 to 9 July, 2020 has been explained clearly and cogently and, in my view, that delay is understandable and excusable.

86. It is also a matter of fact that the Plaintiff secured a second report from Ms. Noreen Roche, nursing consultant, ergonomist and safety advisor. The uncontroverted evidence is that it was finalised and furnished to the Plaintiff's solicitor almost four months after the Plaintiff's last attendance with her. The

Plaintiff avers, *inter alia*, that Ms. Roche spoke with and observed her on 5 November, 2020. This was, of course, four months after the Plaintiff's solicitors had received the consultant occupational therapist's report on 9 July, 2020. The uncontroverted evidence is that both the occupational therapist's and the nursing consultant's reports were also prepared upon a consideration of the multiple medical reports already commissioned on the Plaintiff's behalf during the course of the present proceedings, by Dr. O'Keeffe, consultant in pain management; Dr. Ryan, general practitioner; Prof. Flavin, consultant orthopaedic surgeon; Dr. Goebel, pain consultant; and Prof. Hutchinson, consultant neurologist.

87. In addition, it is averred that, rather than updating particulars, one medical report at a time, the Plaintiff awaited Ms. Roche's second report before preparing what was plainly a very comprehensive document in the form of the Plaintiff's notice of additional particulars of loss, dated 25 March, 2021.

88. What emerges from the foregoing is that, even though an option which the Plaintiff could have taken from October 2019 onwards, was to prepare and serve a notice of additional particulars of loss based on the expert occupational therapist's report, the decision was made to secure a second report from the nursing consultant and to include the views of both in the relevant notice.

89. With the benefit of hindsight, had the Plaintiff's solicitors written to the Defendants' in October 2019 to notify them of the receipt by the Plaintiff of an expert occupational therapist's report and to further notify them that, rather than deliver a notice of additional particulars of loss based exclusively on the occupational therapist's report, the Plaintiff proposed to secure an updated report her nursing consultant, it hardly seems likely that the present motion would have issued. The failure on the part of the Plaintiff to write in those terms seems to me to speak to the delay being inordinate insofar as the formal prosecution of the proceedings is concerned. However, the failure to keep the Defendants updated does not undermine the reality that work was in fact being done and decisions were in fact being made with regard to the onward progression of the Plaintiff's claim in a very material way. In my view the Plaintiff has explained in a clear and cogent fashion that the four months' delay from November 2020 to 11 March, 2021 when Ms. Roche's second report became available.

90. It is also perfectly clear from the contents of the detailed notice of additional particulars of loss dated 25 March, 2021 that it reflects the contents of the occupational therapist's and nursing consultant's reports. It self-evidently took some time to prepare this notice of additional particulars of loss and, in my view, that accounts for the period from 11 March, 2021 onwards. It will be recalled that the Plaintiff's solicitors served a notice of intention to proceed under cover of their 3 March 2021 letter. Then, under cover of their 1 April, 2021 letter, the Plaintiff's solicitors served the 13-page notice of additional particulars of loss.

91. It can be seen from the foregoing that, whereas the Defendants served a notice of change of solicitors under cover of a letter dated 8 February, 2019 and which appears to have been received on 11 February, 2019 eight months to the day later, the Plaintiff was being assessed by an expert occupational therapist, in the wake of difficulty securing such an expert.

92. The following eight months' delay cannot be laid at the door of the Plaintiff in circumstances where the occupational therapist's report was received on 9 July, 2020.

93. Having decided against updating particulars with reference to the occupational therapist's report alone, the Plaintiff was seen by Ms. Roche, nursing consultant, just less than four months later, on 5 November, 2020.

94. Thereafter any delay has been explained and, in my view, is both understandable and excusable.

95. In short, one is left with approximately twelve months of delay on the part of the Plaintiff even if she is given no 'credit' for the time it took to secure the participation of Ms. Sweeney, consultant occupational therapist (even if one is critical of the Plaintiff's decision not to update particulars as of July 2020 but to wait until all reports are available).

96. It also seems to me that the Plaintiff's delay of approximately one year which emerges from the forgoing analysis reflects a similar amount of post – commencement delay for which the Defendants were exclusively responsible. I say this in light of the earlier analysis concerning the Defendants' delay with regard to (i) delivering a defence (which was furnished after the Plaintiff's motion); (ii) replying to particulars, furnished after a second motion by the Plaintiff); and making discovery (furnished months after the agreed deadline and after motions were threatened by the Plaintiff).

97. It does not seem to me that the Defendants' reliance on the Court of Appeal's decision in *Gallagher v. Letterkenny General Hospital* [2019] IECA 156 avails them. In that case, the court felt that financial difficulty, specifically an inability to pay for medical reports, did not excuse the relevant delay. The position in the present case is wholly different. There is no evidence in the present case that the delay was due to the Plaintiff's inability to pay for either the consultant occupational therapist's or the nursing consultant's reports. There is no evidence that these reports were delayed by virtue of financial difficulties on the part of the Plaintiff. There is no evidence that they would have been furnished by those experts sooner, but for the Plaintiff's financial difficulties. In addition to the foregoing, there is an uncontested averment that in the period from January 2019 to February 2021 the Plaintiff was "*proactively engaging with my solicitor and my various medical practitioners, in particular, my nursing consultant and consultant occupational therapist so that the appropriate reports could be taken up to progress my claim*".

98. It also has to be said that, although the primary obligation rested on the Plaintiff to formally progress her claim and, as I have said more than once, she can fairly be criticised for failing to keep the Defendants updated, it is also true to say that throughout the relevant period, the Defendants made no complaint and issued no motion. Nor, it seems, did they ever write to inquire as to the status, or to refer to, still less object to delay. In the manner examined earlier, another feature of this case is that the period of delay as regards the formal progression of the case was brought to an end by the Plaintiff herself, not by the Defendants.

99. In the manner explained, not only is there evidence that, in fact, the Plaintiff was progressing her claim during the relevant period of delay, at least a year of that delay resulted from the need to await two separate reports from two separate experts. Moreover, it cannot be disputed that the work done by these experts is reflected in a formal step which was taken by the Plaintiff in the present proceedings prior to the Defendants issuing the present motion, namely, the delivery of the Plaintiff's very detailed notice of additional particulars of loss dated 25 March, 2021.

100. It will be recalled that in the Defendants' submissions, emphasis is laid on the fact that "*nearly 17 years have passed since the tripping accident*" and the thrust of the submission was to suggest that the Plaintiff is responsible for all or the majority. This is not so. However, if one compares (i) the Plaintiff's post – commencement delay with (ii) the cumulative total of the Defendants pre and post commencement delay, the latter very far exceeds the former.

101. Carefully considering all relevant facts and circumstances in the present case, I have come to the view that the Plaintiff's delay is not inexcusable. Lest I be entirely wrong in that view, I now propose to look at the third aspect of the *Primor* test, namely, the balance of justice.

Where the balance of justice lies

102. Among the submissions made with great skill on behalf of the Defendants was to suggest that the court should give little or no weight to the Plaintiff's assertion that she was engaging with her solicitors and with experts in 2019, 2020 and 2021. In furtherance of that submission, the court's attention was drawn to the judgment of Simons J. in *Ahearne v. O' Sullivan & Ors* [2020] IEHC 46, wherein, at para. 22, the learned judge referred to the Court of Appeal's decision in *Sweeney v. Keating t/a Keating Transport and McDonnell Commercial (Monaghan) Ltd.* [2019] IECA 43. At para. 28 of the decision in *Sweeney*, the Court of Appeal stated the following: -

"28. In his affidavit sworn for the purposes of opposing the application brought to the Supreme Court to strike out Mr Sweeney's appeal, Mr Kennedy mentions the 'complexity of the proceedings', the difficulty of his researches, and his engagement with potential experts. However, these are no more than bald averments unsupported by any evidence or details concerning these difficulties. He talks of 'expending' a great amount of time on 'research and making enquiries of experts'. He furnishes no dates, copy correspondence, etc. to establish his engagement with any of these experts or indeed junior counsel".

103. The position in the present case is utterly different. The Plaintiff has identified two specific experts. She avers that she was assessed by both and there can be no dispute about that fact in circumstances where the 'fruit' of the Plaintiff's assessment by both experts is reflected in a very detailed pleading which was delivered before the Defendants issued the present motion. That there was also engagement between the Plaintiff, her solicitors and counsel is manifests from very detailed 13 – page Notice, dated 25 March, 2021.

104. I am satisfied that in this judgment I should approach the issue of the balance of justice on the assumption that I am entirely wrong in the view that the Plaintiff's delay is excusable on the particular facts and circumstances of the present case. For the purposes of the analysis, it is appropriate to begin by setting out, *verbatim*, the entire of what is averred on the 'balance of justice' issue by the Defendants. It comprises para. 14 of Mr. MacAodháin's 22 April, 2021 affidavit, wherein he makes the following averments: -

"14. In the circumstances I say and believe that the delay is both inordinate and inexcusable. I further say that balance of justice is against the proceeding of this case. The Defendants will be prejudiced in the defence of this case which arises out of an incident that took place in 2005. As can be seen at para. 7 of the defence, the Defendants allege that the Plaintiff was suffering from a number of complaints at the time of the trip and fall. It will be necessary to call those professionals to give oral evidence at the trial of this matter and the interlude of time necessarily means that memory of those medical witnesses as to the Plaintiff's complaints and as to the facts surrounding it must of necessity be impaired. By reason of the time that has passed, the Defendants will be inhibited in making a proper defence to the claim".

105. Several comments can fairly be made in relation to the foregoing. First, the averments base the alleged prejudice on the fact that the trip and fall in question took place in 2005. This ignores the fact that, for the purposes of the present application, there is uncontroverted evidence, in the form of the Plaintiff's averment at para. 8 of her replying affidavit, to the effect that it was not until the Defendants wrote to her on 22 July, 2013 that she first discovered that there were no proceedings were in being relating to the incident and that her case was statute barred.

106. For the reasons set out earlier in this judgment, the first eight years post – dating the accident are the responsibility of the Defendants, not the Plaintiff and, in circumstances where the present proceedings flow from the acknowledged fact that no PIAB claim was submitted within the relevant time period, and no proceedings were instituted on behalf of the Plaintiff by the Defendants whom she had retained, there can be no criticism of the Plaintiff for delay up to April, 2015 when the present proceedings were instituted.

107. The foregoing comments seem to me to be highly relevant to the question of alleged prejudice. To the extent that it could be said that witness memories may have degraded between 2005 and 2015, that cannot fairly be laid at the door of the Plaintiff in my view, given the particular facts and circumstances of this case.

108. Another comment which seems fair to make is as follows. At para. 7 of her replying affidavit, the Plaintiff makes a positive averment that, between November 2007 and July 2013 she contacted the Defendants by email, post, telephone and in person at their offices on numerous occasions to discuss her personal injury case and the progress of same. She goes on to aver that, as pleaded at para. 14 of her statement of claim, the Defendants made a number of what she describes as “false representations” to her concerning the status of her case. She details these at para. 7, and it is fair to say that they reflect the contents of para. 14 of her 3 July, 2015 statement of claim in which allegations are made against the Defendants of, *inter alia*, misrepresentation, fraudulent concealment and deceit. Furthermore, at the end of para. 8 of her affidavit, the Plaintiff makes a positive averment that it was by virtue of the 22 July, 2013 letter from the Defendants “...almost eight years after my trip and fall, that I first discovered that the Defendants had concealed the truth about my [proposed] proceedings”.

109. There is no direct averment made by the solicitor who represented the Plaintiff with regard to her proposed proceedings which takes issue with what the Plaintiff has averred at para. 8. This is not a criticism, but it is a fair observation to make for the purposes of the present application. Again, I emphasise that in pointing out the foregoing, I am not for a moment purporting to decide any issue in the underlying proceedings. What is said on this issue can be seen from the averment made at para. 6 of Mr. MacAodháin’s which is in the following terms: -

“6. The Plaintiff claims that the Defendants told her that they had initiated proceedings and that this deceit had been confirmed in communications between the Defendant and the Plaintiff. At paras. 22, 23 and 24 of the Defendants’ defence, these allegations are expressly denied”.

110. It is absolutely the case that the defence contains a denial of the pleaded allegations of deceit etc., but what is clear from a comparison of the averments made on both sides in the context of the present application is that a central feature of the Plaintiff’s proceedings concerns her claim against the Defendants for, *inter alia*, misrepresentation, deceit and fraudulent concealment. Nowhere in para. 14 of Mr. MacAodháin’s 22 April, 2021 affidavit is it suggested that there is any difficulty with the availability of witnesses in respect of that central aspect of the Plaintiff’s claim.

111. The alleged prejudice is said to relate to the impairment of the memories of medical professionals. No suggestion is made that any or all solicitors who were retained to act for the Plaintiff would not be available. No assertion is made that the Plaintiff’s then – solicitors did not maintain a file and did not retain it. There is no suggestion that any essential records are missing. There is no allegation whatsoever that, insofar as the issue of the retainer by the Plaintiff of the Defendants, that any prejudice whatsoever exists or potentially arises.

112. It is also of relevance to recall that a very fulsome and detailed defence has been delivered which is replete with information and speaks to the ability on the part of the Defendants to mount a proper defence to the claim. In addition, there is the fact that at no stage have the Defendants ever stated, prior to April, 2021, that they envisage any difficulty in making a proper defence to the Plaintiff's claim.

113. It is also fair to say that the averments as to prejudice made in para. 14 of Mr. MacAodháin's affidavit, as well as being confined to medical professionals required to give oral evidence, are in the most general of terms.

114. It seems to me that, at the level of principle, there is a material difference between, on the one hand, a witness as to fact who is, for example, asked to recall, many years later, an accident which they witnessed, and, on the other hand, a medical professional who treated or reviewed a patient and who, in that context, created contemporaneous medical records, to which they can speak years, often many years after the relevant treatment or review. It seems to me that the averments made by Mr. MacAodháin at para. 14 do not address at all the question of the availability of medical records in the present case. By contrast, the question of available records is dealt with comprehensively by means of paras. 24 and 25 of the Plaintiff's replying affidavit wherein she avers as follows: -

"24. I say and believe that what Mr. MacAodháin fails to mention is that this deponent, by way of a very detailed discovery request, sought six categories of documents to include this deponent's file in respect of my personal injury claim as compiled by the Defendants to include all attendances, correspondence, and notes in relation to communications between the parties, all correspondence passing between the Defendants and this deponent's medical advisors and treating doctors subsequent to July 2005 relating to my injuries sustained and the diagnosis of CRPS and all medical reports in respect of my injuries that were sustained prior to the incident of the 11th day of July 2005 from the Defendants. I say that on 10th May 2017, the Defendants swore an affidavit of discovery and a significant amount of documentation was furnished to include but not limited to the totality of my file to include attendances and correspondence in relation to the trip and fall incident of July 2005, some twenty-six different medical reports from my treating doctors prior to the incident, various medical records, numerous tests and scan results.

25. I say that not only will the Defendants and any medical practitioners called on their behalf, have available to them, for the purpose of dealing with the issues of causation and quantum, the aforementioned objective evidence to be found in this discovery but the said documentation will also be available to the trial judge to guide a just and fair result. I say that, in the circumstances, the affidavit of Mr. MacAodháin fails to cogently demonstrate or support the existence of any likely prejudice on the part of the Defendants as this is a case in which documents will be much more important than oral evidence. I say that the extent of recollection of witnesses in this case will not be an important feature given the existence of the aforementioned relevant documentation".

115. The foregoing averments are uncontested and they seem to me to entirely undermine the proposition advanced by the Defendants that they have suffered or are likely to suffer prejudice, as well as the submission made on their behalf that a fair trial is no longer possible or that there is a substantial risk that this is so.

116. Among the submissions made on behalf of the Defendants was with reference to the decision of Irvine J. (as she then was) in *Cassidy v. The Provincialate* [2015] IECA 74, wherein the learned judge made clear that the third aspect of the *Primor* test requires: -

"... the court to carry out a balancing exercise in the course of which it will put the interests of each of the parties and their conduct into different sides of a scales for the purpose of deciding whether the balance of justice favours allowing the case to proceed to trial. In this regard it is to be noted that one (emphasis added) of the factors that may go into that scales is whether the delay relied upon gives rise to a real risk that it is not possible to have a fair trial".

117. The evidence before this Court does not establish that there is any real risk that it is not possible to have a fair trial.

118. Although O'Flaherty J. stated (at p. 512) in *Primor* that, once it is established that delay has been inordinate and inexcusable "*the matter of prejudice seems to follow almost inexorably*", it seems to me that the question of the balance of justice falls to be determined in each particular case, having regard to its unique facts and circumstances. In the present case, the Defendant has not established any specific prejudice. I also take the view that they have not established that prejudice is likely or even probable. Baker J's decision in *Boliden Tara Mines Ltd. v. Irish Pension Trust Ltd.* [2014] IEHC 488 indicates that "[t]he law does not go so far as to say that there must be actual prejudice and it is sufficient that prejudice be likely or probable", but the Defendants have not established the foregoing in my view. Such is the position here.

119. On the topic of prejudice, at para. 26 of her 7 February, 2022 affidavit, having contended that the balance of justice lies in favour of her being allowed to pursue her proceedings, the Plaintiff goes on to make the following averments:

"... I say that my life has changed drastically following the fall in July 2005 when I injured my left ankle and that I am confined to a wheelchair for a large amount of time due to swelling and pain. I say that I suffer from CRPS and that my experts are of the view that I would benefit from the implementation of various aids, appliances, supports, accommodation adaptations and care to increase my independence and safety in activities of daily living. I say as matters stand, I am heavily reliant on my family to assist with activities of daily living. Were the proceedings to be dismissed, I say this would have the effect of restricting my right of access to the courts, for the second time and I would be deprived of any remedy for the significant injuries occasioned to me".

120. Obviously, the question of where the balance of justice lies is a matter for this Court to determine, but it is fair to say that the foregoing averments in para. 26 of the Plaintiff's replying affidavit are uncontested. They illustrate very clearly what is at stake for the Plaintiff and I am satisfied that this can legitimately form part of the court's consideration as to where the balance of justice lies. I am fortified in that view by the decision of Allen J. in *South Dublin County Council v. CF Structures Ltd.* [2021] IEHC 5, wherein, at para. 49, the learned judge stated the following: -

"In *McNamee v. Boyce* [2017] IESC 24 Denham C.J. (in a judgment with which O'Donnell, Clarke, MacMenamin and Dunne JJ. agreed) recalled that in her judgment in *Comcast International Holdings Inc. v. Minister for Enterprise* [2012] IESC 50 she had found that the factors to be considered in Irish law – as stated in *Primor* – were not dissimilar to the criteria which had been laid down by the European Court of Human Rights in *Price and Lowe v. The United Kingdom* 43185/98, **which criteria included the importance of what is at stake for the Applicant in the litigation**". (emphasis added)

121. If this Court were to dismiss the Plaintiff's claim, not only would she fail to be compensated for allegedly serious injuries suffered in the accident in question, she would also be deprived of an opportunity

to prosecute her claim against the firm of solicitors who acknowledge that she retained them in the context of bringing proceedings concerning the relevant accident. By contrast, were the proceedings to be permitted to proceed, it would leave the Defendants in materially the same position they have been since proceedings were instituted, i.e. they would be in a position to defend the claim on the basis pleaded so comprehensively and in circumstances where no prejudice to the defence of the proceedings has been established or can, in my view, be presumed.

122. Another feature which seems to me to be of some relevance is that, not only did the Plaintiff not 'sit on her hands' from January 2019 onwards, the claim has now been extensively pleaded and the *status quo* is that the Plaintiff, if permitted to continue prosecuting the claim, is in a position to set the matter down and to apply for a trial date at the first available opportunity. Thus, not only did the Plaintiff bring an end to her own delay, in the sense of formally prosecuting the proceedings (given the service by the Plaintiff's solicitors of the very detailed notice of additional particulars of loss, dated 23 March, 2021), the current position is that the pleadings have been updated and a trial in the relatively near term could reasonably be anticipated. I say this in circumstances where this is not, for example, a set of proceedings which are only at a very early stage as is sometimes the case in applications of this type.

123. In the manner previously examined, another factor to be taken into account in the court's balancing exercise is the undoubted fact that the Plaintiff cannot be held responsible for the first eight (but more likely ten) years commencing in July 2005. Furthermore, the Defendants have been guilty of at least one year's post commencement delay since after the present proceedings commenced.

124. It is not in dispute that, in the present proceedings, the Defendants have not sought discovery from the Plaintiff. It appears the Defendants instructed their own medical advisors to review the Plaintiff. Thus, the Defendants have been in a position to consider and advise on causation, having regard to medical reports generated both prior to and subsequent to the 2005 accident. This is perfectly clear from the pleas made in the detailed defence delivered by the Defendants on 19 January, 2016 (in particular paras. 7(a) – (q) to 20 inclusive). In short, a careful consideration of the evidence before the court allows it to hold that no evidential deficit has been established. This is also true as regards the question of quantum. This is clear, including from para. 5 of the defence delivered, wherein it is pleaded that: -

"5. Any claim which the Plaintiff had arising out of her accident of 1 July, 2005 was not a significant one insofar as her injuries were concerned and would have been suitable for adjudication by the District Court".

The foregoing is once more confirmed to be the Defendants' defence by means of para. 5 of Mr. MacAodháin's affidavit wherein he makes averments reflecting para. 5 of the defence.

125. It also seems to me to be of relevance to an assessment of the balance of justice that (i) being the solicitors who were originally retained by the Plaintiff in 2005, as regards the investigation of her claim and (ii) being the solicitors to whom the Plaintiff initially reported her accident, the Defendants cannot claim to be at a disadvantage in assessing the likelihood of the Plaintiff being successful in her claim.

126. Quite apart from the foregoing, it is clear from the discovery provided by the Defendants and from the pleas made in the defence which they have delivered, that the Defendants are in a position to fully contest the issues of both causation and quantum. Furthermore, and as mentioned earlier, whereas quantum relates, *inter alia*, to injuries flowing from the 2005 accident, there is no evidence from which the court can conclude that there is an evidential deficit in respect of determining the liability issue as between the Plaintiff and Defendants.

127. In the Supreme Court's decision in *Desmond v. MGN Ltd.* [2008] IESC 26, Macken J. stated: "In assessing where the balance of justice lies as between the parties, I consider also that the scope and ambit of the defence as filed by the Appellant is a factor which, in an appropriate case, may be taken into account". In the present case, the Plaintiff's claim alleges, not only negligence and breach of contract, but fraud and deceit by an officer of the court. These serious allegations have been expressly denied by the Defendants, including at paras. 21, 22, 23 and 24 of the defence delivered. Were this Court to dismiss the proceedings at this juncture, it would deprive the Plaintiff of the opportunity to prosecute her claim and to seek to establish in evidence the various pleas made. Indeed, it would also deprive the Defendants of the opportunity to establish, in evidence, the pleas made in their defence which comprehensively deny, *inter alia*, all alleged deceit. Given that the Defendants are anxious to have the proceedings dismissed at this juncture, I am not giving any weight whatsoever to the fact that a trial would allow the Defendants to meet very serious allegations 'head on'. I am, however, giving some weight to the *nature* of these proceedings and to the consequences for the Plaintiff if proceedings of this nature are dismissed.

128. The relevant authorities make clear that where inordinate and inexcusable delay has been established, a Plaintiff is required to point to "countervailing circumstances" which would tip the balance in favour of the claim being allowed to proceed (see Henchy J. in *O'Domhnaill v. Merrick* [1984] IR 151 and Fennelly J. in *Anglo Irish Beef Processors Ltd. v Montgomery* [2002] IR 510 at p. 519; and Irvine J. (as she then was) in *Millerick v. Minister for Finance* [2016] IECA 206 at 32).

129. I am satisfied that, on the facts of the present case, countervailing circumstances have been put forward. These include (i) the pre – commencement delay for which the Defendants are, for the purposes of the present application, exclusively responsible; (ii) the Defendants' post – commencement delay of at least a year; (iii) the nature of the case; (iv) what is at stake for the Plaintiff; (v) the absence of any evidential deficit, (vi) the availability of extensive records and report; (vii) the absence of any prejudice, specific or presumed; and (viii) the fact that the case is ready to be set down for trial.

130. Carefully considering all relevant matters and guided by the principles which emerge from *Primor* and have been discussed in numerous judgments since, I have come to the view that the balance of justice decidedly favours the case being allowed to proceed. Thus, even if I am wrong in holding that the Plaintiff's delay is excusable (and for the reasons set out earlier in this judgment I am satisfied that the Defendants have not discharged the relevant onus of proof in that regard), I take the view that the Plaintiff has demonstrated that the balance of justice favours the continuance of the within proceedings.

131. In conclusion, I have held albeit with reluctance that the Plaintiff's delay could be described as inordinate but I am satisfied that the second and third limbs of the *Primor* test have not been satisfied. Thus, the Defendants' application falls to be dismissed.

132. On 24 March, 2020 the following statement issued in respect of the delivery of judgments electronically: "*The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.*" The Plaintiff/Respondent has been entirely successful and my

preliminary view is that the justice of the situation is met by not departing from the 'normal' rule that 'costs' should 'follow the event'. The parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.