THE HIGH COURT

[2023] IEHC 217

Record No. 2014/4029P

BETWEEN

OWEN CORKERY

PLAINTIFF

AND

MARINE MOTORS LTD, BOMBARDIER RECREATIONAL PRODUCTS INC ("BRP"), BRP US INC, BRP EUROPEAN DISTRIBUTION SA

DEFENDANTS

AND

GE COMMERCIAL DISTRIBUTION FINANCE EUROPE LTD

THIRD PARTY

JUDGMENT of Mr. Justice Mark Heslin delivered on the 28th day of April 2023

Introduction

1. The second, third and fourth named defendants (the "BRP defendants") issued a motion on 7 February 2022, which was initially returnable for 25 April 2022, seeking, *inter alia* the following relief:

1. an order dismissing the plaintiff's claim for want of prosecution due to the inordinate and inexcusable delay in the prosecution of these proceedings;
2. an order pursuant to Order 122, Rule 11 of the Rules of the Superior Courts ("RSC") 1986 (as amended) dismissing the plaintiff's claim for want of prosecution

Order 122, rule 11

2. Order 122, r. 11 of the RSC provides that where there has been no proceeding for two years, a defendant may apply to this Court to dismiss the claim for 'want of prosecution'. On the hearing of such an application, this Court may order that the matter be dismissed, or may make such other order as the Court deems just.

3. The approach which this Court should take to an application to dismiss on delay grounds is well-known. The touchstone remains the decision of the Supreme Court in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459. Almost a quarter of a century later, in *AIG v. Fitzpatrick* [2020] IECA 99 the Court of Appeal (Whelan J.) confirmed that:

> "*…the principles applicable in any consideration of an application to strike out proceedings on grounds of delay which occurs post-commencement are set out in the leading Supreme Court decision of Primor Plc v. Stokes Kennedy Crowley*" (see para. 16)

The *Primor* principles

4. The test as outlined by Hamilton CJ in *Primor* is 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 defendant's reputation and business." (see pp. 475, 476)

3-part test

5. *Primor* essentially lays down a 3-part test, in that this Court must ask:

(1) is the delay inordinate?;

(2) is the delay inexcusable?; and

(3) if the delay is *both* inordinate and inexcusable, is the balance of justice in favour of, or against, the case being allowed to proceed?

The *O'Domhnaill* approach

6. An alternative strand of jurisprudence derives from the decision in *O'Domhnaill v Merrick* [1984] I.R. 151 (see also *Toal v Duignan (No.1)* and *(No.2)* [1991] ILRM 135 [1991] ILRM 140*),* establishing a jurisdiction to dismiss a claim where the *interests of justice* require this, in particular, when the delay is likely to result in an *unfair trial*. In essence, the focus of the *O'Domhnaill* approach or 'test' is far less about culpability for delay, but on the core question of risk to a fair trial. As stated in *McBrearty v North Western Health Board & Ors.* [2010] IESC 27 "*Whilst frequently concerned with pre-proceedings delay, in fact, the test is not fault based but is rather focussed on the risk of an unfair trial".* Appropriate questions for this Court to ask (*per* the *O'Domhnaill* approach) were set out in the Supreme Court's decision (McKechnie J) in *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50 (at para. 40) as follows:-

"(i) Is there a real and serious risk of an unfair trial, and/or of an unjust result;

(ii) Is there a clear and patent injustice in asking the defendant to defend; or

(iii) Does it place an inexcusable and unfair burden on such defendant to so defend?"

Submissions

7. Before proceeding further, I wish to express my sincere thanks to Mr. Howard SC who moved the application on behalf of the BRP defendants, and to Mr. Sreenan SC, who opposed it on the plaintiff's behalf. Both made oral submissions with skill and clarity. Both also provided the Court with detailed written submissions which were of great assistance. Nothing I say in this judgment takes away from the foregoing. However, the outcome of this application falls to be determined, not by submissions, but by the very particular facts of the present case examined against well established principles.

8. There was no material dispute between learned counsel as to the appropriate legal principles, so recently set out with clarity in the Court of Appeal's decision of 28 October 2022 in *Cave Projects Ltd. v. Gilhooley & Ors.* [2022] IECA 245 (in particular, paras. 35–37). This Court's judgment has been guided by those principles. However, a central theme in the authorities is that each case is unique and must be assessed as such. Thus, regardless of how skilfully made,

submissions must yield to *facts*. For this reason, the focus of the Court's judgment is on the facts which I now propose to look at in chronological order.

Chronology

9. It was submitted on behalf of the BRP defendants that the plaintiff is guilty of pre-commencement delay and that all three elements of the *Primor* test are met. Whether this is so, requires a careful consideration of the pleadings and the evidence, comprising the affidavits sworn in the context of this motion together with the exhibits thereto. That careful consideration produces the following chronology (and, in addition to dates used as headings, certain dates have been underlined in the following text, for the sake of clarity).

9 June 2012

10. According to his pleaded claim, the relevant accident occurred on 9 June 2012. Briefly put, the plaintiff claims that, on 9 June 2012, he was using a rigid inflatable boat ("RIB") which was fitted with an engine purchased, in about 2007, by the plaintiff from the first named defendant. The plaintiff asserts that, towards the end of his day's outing, when at sea, he became aware that the "kill cord" on the engine was not working. He claims that, when travelling in conditions described as calm to light waves, the RIB appeared to hit an object in the water and went into a turn. He asserts that he was thrown from the RIB into the sea and that the RIB continued running, travelling in an approximate 50m turning-circle, and struck the plaintiff on numerous occasions, as a result of which he sustained personal injuries. Among the injuries for which the plaintiff seeks compensation is "*a traumatic amputation of his left arm above the elbow*"; as well as shock; anxiety; depression; phantom pain around the left stump; pain going down his right shoulder; and gross disruption of social, domestic, and vocational life, in addition to adverse impact on family relationships. The plaintiff also pleads that he can no longer work in the normal way as a self-employed plumber, and he seeks damages for loss of earnings. I will presently make reference to the personal injuries summons in which the foregoing is pleaded.

June 2012 – February 2013

11. At para. 6 of his 11 April 2022 affidavit, the plaintiff's solicitor, Mr Boland makes the following under to averments: "*The plaintiff had suffered life-threatening injuries and had almost died as a result of the incident herein. He was hospitalised for a considerable period initially."* I refer to the foregoing because it seems to me to be relevant to the question of when the plaintiff first gave instructions to a solicitor. The present case is not one where, for example, a plaintiff was unfortunate enough to sustain soft tissue injuries in a road traffic accident which, although painful, would not prevent their attendance at a solicitor's office soon after the index event. The circumstances in the present case are utterly different and it seems to me that it would be entirely unfair, given the nature and seriousness of the injuries sustained by the plaintiff, to criticise him for not instructing a solicitor sooner than he did. In the manner presently examined, instructions were first given to the plaintiff's solicitor some 8 months post-accident. Given the particular circumstances of this case, I cannot take the view that this amounted to pre-commencement delay. I will presently discuss what occurred *after* this initial 8 months in the

context of an assertion on behalf of the BRP defendants that the plaintiff made a 'late start' in this sense in which that term is used in the authorities. The significance of same is well known i.e. a 'late start' makes it all the more important that a plaintiff proceeds "*with expedition*" and a pace which might have been excusable if the proceedings had been commenced earlier may be inexcusable in light of the time which expired before the proceedings were issued [See the decision of Hogan J in *Tanner v. O'Donovan & Ors* [2015] IECA 24, citing with approval *Birkett v. James* [1978] A.C. 297, 322].

25 February 2013

12. The plaintiff's solicitor, Mr Boland makes, *inter alia*, the following uncontroverted averment, at para. 4 of his 11 April 2022 affidavit: "*I first received instructions in the case on the 25 February 2013 (some 8 months after the accident)"* (emphasis added). For the reasons given, I do not regard this as pre-commencement delay by the plaintiff who was so seriously injured and required hospitalisation.

13. Later in the same paragraph, Mr Boland avers *inter alia* that papers were sent to counsel; an originating letter was prepared; and that it was served on "*Bombardier Recreational Products Inc*" (hereinafter "*BRP*") after "…*enquiries had been made as to the corporate structure of BRP and its associated companies*" (emphasis added). At the risk of stating the obvious, the foregoing is an uncontroverted averment by an officer of the Court to the effect that enquiries *were* made as to the corporate structure of BRP and its associated companies. I am entitled to hold that these were enquiries made by the plaintiff's solicitors which were directed to identifying the appropriate defendant or defendants and it could hardly be suggested that it was not appropriate to make such enquiries.

14. At para. 8 of Mr. Boland's affidavit sworn on 11 April 2022, he makes the uncontroverted averment that he "*. . . had been corresponding with BRP at their Head Office in Canada as early as the 25th February 2013 and Byrne Wallace Solicitors finally came on record on the 17th July 2013, some five months later*". (emphasis added)

15. During oral submissions, counsel for the BRP defendants directed the Court's attention to, *inter alia*, a photograph which comprises exhibit "RJB4" to the affidavit sworn by Mr Roderick Burke, solicitor for the BRP defendants, on 16 December 2022. At paragraph 5 of his affidavit Mr Burke avers that this is "*… a true copy photograph taken by Mr Michael Connelly on behalf of the BRP defendants at an inspection attended by the plaintiff and his engineering expert on about 20 January 2014… This is a photograph of the engine ID plate which was fitted to the said engine and which clearly identifies the manufacturer of the engine as BRP US Inc. of Sturtevant, WI [Wisconsin] USA. At that time the engine was stored on behalf of the plaintiff at Haven Marine, Carrigaline, Co Cork".* (emphasis)

16. Mr Burke proceeds to exhibit ("RJB6") and to aver (at para. 6): "… *The owners registration card which was intended to be completed by the owner and sent to BRP US Inc for the purpose of*

registering the owner's details with that company. The 2nd page of this document sets out clearly the name and address of BRP US Inc. warranty registration as PO Box 597 Sturtevant, WI, 53177 USA" (emphasis added). Leaving aside the fact that there is no evidence before this Court as to whether the plaintiff actually sent the registration card to BRP US Inc., and the fact that "*it is a card that was made available in discovery, some time later, into the proceedings*" (averred by Mr Boland at para. 5 of his 30 January 2023 affidavit) the gravamen of Mr Bourke's averments and related submissions by Counsel during the hearing is that, (i) at all material times, the plaintiff/plaintiff's solicitor should have known that the proper defendant was "BRP US Inc." and; (ii) the plaintiff has been guilty of pre-commencement delay and made a 'late start' by not pursuing BRP US Inc. from the outset. For the following reasons, I do not accept that this is so.

17. With respect to the enquiries carried out, Mr Boland makes *inter alia* the following uncontroverted averments at para. 6 of his 30 January 2023 affidavit: "*I say that when your deponent first made enquiries it was with BRP USA Inc. I was redirected to the Canadian company. I say that this is evidenced in the email dated 25th February 2013 where this fact was recited and BRP Canada conveyed the impression that they were managing the case and continued to act as if they were handling the matter and it continued to deal with all the repair invoices and the preservation."* (emphasis added)

18. It is not in dispute that the reference by Mr Boland to "*the Canadian company*" and to "*BRP Canada*" is a reference to *"Bombardier Recreational Products Inc, 737 Saint Joseph Street, ValCourt, Quebec, Canada, J0E2L0"* (i.e. "BRP") and, in the manner presently examined, Mr Boland communicated with that company on the understanding that it was the correct BRP defendant. The aforesaid averments in para. 6 of Mr. Boland's 30 January 2023 affidavit receive objective support from the contents of an email sent by Mr Boland at the time, namely, in February 2013, which I now set out *verbatim,* as follows:

> ***"To: infobrpuk@brp.com***
> ***Date: 25.02.13***
> ***Re: Our client: Owen Corkery – Accident 9th of June 2012***
> ***Evinrude E-tec Engine Serial No. 05182044 – Model No. E250OPXSU***
> *Dear Sirs,*
>
> *We act for the above named who suffered personal injury, loss and damage in a boating accident in Ireland on foot of a defective Evinrude engine bearing the above serial number. Please furnish the full name and address of your company and a designated contact person for the service of correspondence and might we also suggest that you nominate Cork-based Irish solicitors at this juncture so that they can accept service of legal proceedings for High Court in Ireland as the plaintiff's doctors are largely based in Cork and the accident happened in Cork. We were in contact with your principal is in the United States and they referred us to you for the relevant information. Our client suffered the loss of his arm and we will have to apply immediately to the High Court in Ireland for an order for the preservation of evidence.*

We await hearing from you as soon as possible.

Yours faithfully,
Mark Boland
Boland and Quirke solicitors…" (emphasis added)

19. In light of uncontroverted evidence, I am entitled to hold that, far from ignoring the reference on the engine and elsewhere to *BRP US Inc.,* the plaintiff's solicitor promptly contacted that very entity, but was directed by same to another.

20. Indeed, it is noteworthy that, (i) the engine name; (ii) serial number; and (iii) model number which appear on the photograph exhibited by Mr Burke are the self-same details quoted by Mr Boland in his aforesaid email.

21. It can also be said that Mr Boland's 25 February 2013 email gave notice, to the BRP entity to which he had been directed, of all the following (i) the plaintiff's identity; (ii) that a serious accident had occurred; (iii) the nature of the plaintiff's injury; (iv) the specific engine and model; (v) that the plaintiff asserted that this engine was defective; (vi) that the plaintiff intended to issue proceedings; (vii) that the accident had occurred in Cork; (viii) that the plaintiff wanted to know the appropriate defendant for the purposes of legal proceedings; (ix) that the plaintiff wanted to know what firm of solicitors, ideally Cork-based, would accept service; and (x) that it was necessary to preserve evidence. In short, this was, in substance, a 'letter before action' which the plaintiff's solicitor, having made reasonable and appropriate enquiries, sent to the BRP entity to which he had been directed.

22. There is no averment made on behalf of the BRP defendants to explain *why* the plaintiff's solicitor, having initially contacted BRP USA Inc., was re-directed to a different BRP entity. I am entitled to hold that the fact the plaintiff's solicitor *was* re-directed caused delay. However, this was not delay for which the plaintiff or his solicitor could fairly be held responsible. I am fortified in this view by subsequent events.

4 March 2013

23. On 4 March 2013, Mr Boland sent a further email pressing for a response to his of 25 February communication, which also referred to a phone-call in the intervening period. This email stated:

"To: Steven Floin (steven.floin@brp.com)
Date: 04.03.13
Re: Our client: Owen Corkery – Accident 9th of June 2012
Evinrude E-tec Engine Serial No. 05182044 – Model No. E250OPXSU

Dear Mr. Floin,

Further to our recent telephone conversation I enclose copy email dated the 25th of February last to which I have received no response.

It would simplify matters greatly if your company nominated Irish solicitors to handle the legal proceedings. Please confirm the full name and registered address of your company as requested in this email. Please revert as a matter of urgency.

We await hearing from you.

Yours truly,
Mark Boland
Boland & Quirke Solicitors…" (emphasis added)

4 March 2013

24. On 4 March 2013 Ms Annie Gauthier, legal counsel for BRP sent an email to Mr Boland. I note that it is marked 'without prejudice', but it was not suggested to me during the hearing that I could not have regard to its contents. It began by stating "*We represent the interests of BRP*", but without identifying the 'correct' defendant, according to BRP if it was *not* Bombardier Recreational Products Inc. Among other things, the email asked for confirmation as to whether the plaintiff had already "*started legal proceedings against BRP?";* and requested additional detail, including with respect to "*the facts, injuries and defective engine you allege in your email*". A request was also made for reports, statements, and all medical records, as well as all available information about the engine. Given that the evidence allows for a finding that (i) the plaintiff's solicitor, having made enquiries as to the *correct* company, was directed to BRP; and (ii) by seeking the foregoing BRP were engaging with the plaintiff's solicitor in respect of the plaintiff's accident; (iii) there could be no criticism of the plaintiff for believing that BRP was the correct defendant; and (iv) the time spent engaging with BRP could not be said to be *delay* (still less, delay *caused* by the plaintiff, notwithstanding the submissions to that effect by the BRP defendants' solicitor and counsel, in the present motion).

8 March 2013

25. By letter dated 8 March 2013, the plaintiff's solicitor replied to Ms Gauthier's 4 March email, in a letter addressed by Boland & Quirke solicitors to *"Bombardier Recreational Products Inc, 737 Saint Joseph Street, ValCourt, Quebec, Canada, J0E2L0".* In the manner previously examined, this is the company which Mr Boland has also referred to as *"the Canadian company"* and "*BRP Canada"* (i.e. the company to which he was directed after initially contacting BRP USA Inc.). In the manner presently explained, this is the BRP company which was subsequently named as the second of the two defendants, against which proceedings were issued, initially, on 25 April 2014).

26. In their 8 March 2013 letter, the plaintiff's solicitors stated *inter alia* that: "*We have not filed proceedings at this juncture"*; "*under the Irish legal system the Defendant is not entitled to the*

level of detail and documentation that is sought in your letter; and "*You should retain Irish Counsel (Solicitors) to explain the legal system to you as it would be inappropriate that we do so"* (emphasis added). Given the addressee, it is perfectly clear that the reference by the plaintiff's solicitors to "*the Defendant*" was a reference to "*Bombardier Recreational Products Inc*" (referred to in this judgment as "BRP") being the party which, at that point, and having made enquiries, the plaintiff's solicitors understood, reasonably, to be the correct BRP defendant. Nor did Ms Gauthier reply to indicate that the plaintiff's understanding was *incorrect*. The 8 March 2013 letter from the plaintiff's solicitors also stated *inter alia* that: "*Different rules apply in Ireland as to the timing of discovery and disclosure and this can be explained to you by your Irish-based solicitors. The originating letter will be finalised by counsel once our preliminary investigations are completed".* The said letter concluded as follows: *"We repeat our request that you would please confirm that you have authority to accept service of the proceedings herein or that you nominate solicitors to accept service of same."*

27. I pause at this point to say that the foregoing is not evidence of *delay* by the plaintiff (as the BRP defendants contend) as opposed to the time which elapsed in the context of active steps being taken by the plaintiff's solicitors which, in my view, they could not fairly be criticised for taking, given the particular circumstances.

19 March 2013

28. On 19 March 2013, the plaintiff's solicitors wrote again to Ms Gauthier, and again that letter was addressed to "*Bombardier Recreational Products Inc*" in Canada which, at that point, the plaintiff's solicitors believed, entirely reasonably, to be the correct BRP defendant. There does not appear to have been any response.

14 May 2013

29. Mr Boland makes the following uncontroverted averment in para. 5 of his 11 April 2022 affidavit: "*Papers were sent to Counsel on 14 May 2013 to prepare a detailed originating letter".* In the manner examined, it was the understanding of the plaintiff's solicitor, at that point in time, that the correct BRP defendant was *"Bombardier Recreational Products Inc*" and I cannot take the view that this was an unreasonable belief for Mr Boland to have formed; or that he came to this view based on other than reasonable enquiries.

24 - 26 June 2013

30. On or about 26 June 2013, 'O'Byrne' letters, dated 24 June 2013, were served on both of the parties which, at that point in time the plaintiff, *via* his solicitor, believed to be the correct defendants (i.e. *Marine Motors Ltd,* as alleged seller of the engine, and *Bombardier Recreational Products Inc,* as alleged manufacturer of the engine). The letter to BRP specifically referred to the engine as having *"been manufactured"* by that entity.

31. With respect to the service of these letters, Mr Boland makes the following uncontroverted averments at para. 7 of his 30 January 2023 affidavit: *"I say that at a stage when the*

proceedings were very much 'up and running' Counsel was instructed to draft O'Byrne letters and these were served on Marine Motors and BRP on or about the 26 June 2013. It was clear at that stage that BRP USA were not named in that letter. The only defendants named were BRP Canada and Marine Motors. I say that no one from BRP Canada or indeed Byrne Wallace solicitors, who acted for BRP Canada, chose to advise that the "correct" Defendant was BRP USA." (emphasis added)

32. Although these letters were sent 12 months after the accident, I am entirely satisfied that this period cannot fairly be regarded as pre-commencement delay by the plaintiff, given (i) the serious nature of the injuries, and the plaintiff's need for hospitalisation; and (ii) the fact that, as soon as the plaintiff gave instructions to his solicitor (8 months post-accident) the latter acted appropriately, and with expedition, in terms of preparing the plaintiff's case, including by making relevant enquiries.

Plaintiff calls for evidence to be preserved

33. Before leaving the 'O'Byrne' letters, it is appropriate to note that in a *second* letter, to BRP, also dated the 24 June 2013, the plaintiff's solicitor called on the latter to preserve evidence. This letter began in the following terms:

"Dear Sirs,

We refer to our letter of even date. Please note that in the absence of an immediate admission of liability we require you in your capacity as company secretary of your company, the respondent herein, to immediately furnish an unqualified written undertaking to preserve, pending further determination by the Court the following documentation. In this regard the reference to documentation is all documentation in the respondent's respective power or possession which includes, but is not limited to, all notes, correspondence, emails, texts, memos, diary entries, minutes, reports, or other correspondence whatsoever including any drafts thereof, whether held electronically or in hard copy format:-

(a) All documentation (as defined above) in relation to:-

(i) the manufacturer of the Evinrude engine bearing serial number 05182044;

(ii) the repair of the Evinrude engine bearing serial number 05182044;

(iii) the servicing of the Evinrude engine bearing serial number 05182044;

(iv) warranty claims in relation to the Evinrude engine bearing serial number 05182044;

(b) All documentation (as defined above) in relation to or concerning in anyway accidents involving, arising out of, or in any way connected with, kill cords on Evinrude engines for the 10 years prior to the date of the incident referred to in the affidavit grounding this application.

(c) All documentation (as defined above) in relation to any advices or instructions in relation to the servicing or maintenance of Evinrude engines given to customers and sales agents.

(d) All documentation (as defined above) in relation to any investigations, reports or enquiries in relation to problems with the kill cord and the efficacy thereof on Evinrude engines.

(e) All documentation (as defined above) in relation to any design and specification in relation to the kill cords of Evinrude engines bearing model number E250DPXSU.

(f) All documentation (as defined above) in relation to any risk assessments or investigations in relation to the safety of using the Evinrude engine model number E250DPXSU the 10 years prior to the date of the incident..."

17 July 2013

34. On 17 of July 2013, Byrne Wallace, solicitors, wrote to the plaintiff's solicitors and confirmed that it was instructed by *"Bombardier Recreational Products Inc"* (which it referred to in this letter as "*BRP*").

24 July 2013

35. At para. 5 of Mr Boland's 11 April 2022 affidavit, he avers *inter alia* that "*An authorisation issued from the Injuries Board on the 24 July 2013 in respect of Bombardier Recreational Products against the companies concerned for the plaintiff to proceed against the Defendants. Papers were forwarded to Counsel to draft proceedings against Marine Motors Ltd and BRP based at their head office in Canada."* Again, this is uncontroverted evidence that, far from delaying, the plaintiff, *via* his solicitor, was progressing matters appropriately and with due expedition, bearing in mind that it very obviously took some time for the PIAB to process an application.

29 July / 1 August 2013

36. In response to a letter sent by the plaintiff's solicitors, on 29 July 2013, Messrs Byrne Wallace replied, on 1 August 2013, as follows:

"Our client: Bombardier Recreational Products Inc. ("BRP")
Matter: Accident: 9th June 2012
Your client: Owen Corkery

Dear Sirs,

Thank you for your letter of 29 July 2013.

We have heard back from Counsel in relation to your request for preservation of categories of evidence and have written today to our client with our advice in that regard and also in relation to the contents of your letter dated 24 July 2013. We have received an "out of office" email from the client advising us that he is on annual vacation until 19 August 2013. We would ask that you take no further steps to seek an interlocutory or other order threatened in your earlier letter of 24 June 2013 to our client for now and that you will notify us if you intend to press ahead with any such application. We will chase our client for his instructions on 19 August 2013 and would hope to be back to you with the reply that week.

Yours faithfully
Byrne Wallace" (emphasis added)

37. It will be recalled that in the 'O'Byrne' letter which was sent to BRP, the engine was specifically said to have *"been manufactured"* by that company. Despite this, there was no claim or suggestion made by Byrne Wallace that BRP was not the *correct* BRP defendant; or that it was not the appropriate party to be invited to preserve evidence.

2 August 2013

38. On 2 August 2013, the plaintiff's solicitor wrote again to Byrne Wallace expressing concern that an undertaking to preserve evidence "… *purports to allow Bombardier to decide what is relevant or potentially relevant in the context of the documents to be preserved*…". The said letter went on to press for documentation which the plaintiff's solicitors regarded as "…*essential for the purposes of our Engineer's inspection and to consider whether or not Marine Motors Ltd should be included in the proceedings*". The letter concluded by stating that: "The *repair file should be fast tracked to us so that we can finalise our engineers inspection".* In my view, this evidences the polar opposite of pre-commencement delay by the plaintiff. In other words, regardless of the undoubted skill with which counsel for the BRP defendants makes submissions to the effect that the plaintiff was guilty of pre-commencement delay, the facts utterly undermine such a proposition.

6 August 2013

39. By letter dated 6 August 2013, Byrne Wallace replied, on behalf of their client (identified in the letter as: "*Bombardier Recreational Products Inc. ("BRP")"*) to the 2 August letter from the plaintiff's solicitor. Under the heading of "*Request for repair file*", the 6 August 2013 letter indicated that their client would not return from holiday until 19 August 2013 and went on to state that *"…our client has advised that he will not be able to deal with the request until the week of 26 August 2013. In light of the time of year we believe that your request is being dealt with in a very reasonable timeframe…"* .

Undertaking by BRP to preserve evidence

40. Under the heading "*Request for preservation of evidence*", Byrne Wallace stated *inter alia*: "*We confirm that we will advise our client that the categories of documentation referred to in your letter of 24 June 2013 would be included in the undertaking they have given to preserve all relevant or potentially relevant documentation relating to this dispute in their possession until the determination of Mr Corkery's proposed proceedings or until further order.*" (emphasis added)

41. Several comments seem appropriate with regard to the foregoing: (i) this underlines the fact that, far from delaying, the plaintiff's solicitor was actively progressing this case in an appropriate manner (and was encountering delay on the BRP side); (ii) there was nothing in this letter from

BRP's solicitors which suggested that this was *not* the correct BRP defendant; (iii) on the contrary, to engage with the plaintiff's solicitors including on the issue of preserving evidence in response to correspondence in which BRP was identified as the manufacturer conveyed the clear impression, in objective terms, that BRP was the correct defendant; (iv) irrespective of the question of the correct BRP defendant, at the behest of the plaintiff's solicitor, an undertaking was secured that all relevant or potentially relevant documentation relating to the dispute would be preserved until a trial; (v) even if that undertaking was given by a BRP company which was subsequently said by its solicitors to have no liability, the preservation of evidence, from August 2013 (at the latest) onwards, was and remains of relevance and obvious benefit, in that this evidence continues to be available to the parties and a trial judge (subject to relevance in the discovery context).

27 August 2013

42. The plaintiff's solicitors wrote to Byrne Wallace solicitors stating *inter alia* that: "*We can see bona fide efforts are being made on the part of the Defendant to deal with this matter on a practical basis so we did not issue motions to date*". The reference to *"the Defendant"* was very obviously to Byrne Wallace's client as identified in the title of the letter (i.e. *"Bombardier Recreational Products Inc. (BRP)"*). This letter also stated *"Please confirm via your office that your client is prepared to furnish the repair file…".*

3 September 2013

43. The response from Byrne Wallace, dated 3 September 2013, began by stating "*… we are following up with our client in relation to your request for the repair file*", their client being identified in the letter as "*Bombardier Recreational Products Inc. (BRP)*". In my view, given the contents of this letter, they could not be criticised for believing that they were dealing the appropriate defendant.

18 September 2013

44. By letter dated 18 September 2013, Byrne Wallace, on behalf *of "Bombardier Recreational Products Inc. ("BRP"),* enclosed "*…the following documentation which our clients have located and furnished to us:".* This comprised documents concerning warranty claims (10) made between 28 September 2007 and 10 February 2010 in respect of "E250DPXSUA 05182044". It will be recalled that the foregoing comprise the engine model and serial number, respectively.

45. The significance of this documentation, in the context of the preparation by the plaintiff of proceedings, is made clear at para. 12 of Mr Boland's 30 January 2023 affidavit, where he makes the following uncontroverted averments: "…*your deponent could not serve the proceedings any earlier on Byrne Wallace initially because I only received the relevant documents to be given to our engineer from the then Defendants in September 2013."* In my view, the fact that BRP furnished this documentation was consistent with the plaintiff, through his solicitor, believing that he was dealing with the correct BRP defendant at that juncture.

2 December 2013

46. It is not in dispute that Byrne Wallace subsequently entered a formal Appearance, dated 13 May 2014, on behalf of the second defendant, "Bombardier Recreational Products Inc". In so doing, there was no suggestion made that this was the wrong BRP defendant.

Experts retained / joint inspection request by BRP

47. By letter dated 2 December 2013, Byrne Wallace, on behalf of *"Bombardier Recreational Products Inc. ("BRP")"*, wrote to the plaintiff's solicitors in a letter which began as follows:

> *"Dear Sirs,*
>
> *Our clients have instructed Michael Connolly, marine engineer of Ballycotton Marine Services and Kevin Breen research consultant engineer of ESI in Florida, USA in relation to this matter. Our clients wish to have the engineers inspect the engine and boat involved in Mr Corkery's accident on 9 June 2012. We assume you will want this inspection to take place in consultation with Mr Corkery's engineer and would expect that Marine Motors Engineers Limited will attend the inspection.*
>
> *Mr Breen will be travelling from Florida and he has advised that the weeks of 13 and 20 January 2014 would be suitable [for] him to make the journey. If possible, he asks that the inspection could take place at the beginning of a week i.e. a Monday or towards the end i.e. a Thursday so that he can travel over a weekend.*
>
> *We would be grateful if you would confirm that your engineer is available to attend such an inspection and let us have contact details, name, address, email and mobile number to arrange logistics.*
>
> *In advance of the joint inspection, our experts need to review the following records…"* (emphasis added)

48. There followed a list of 5 items comprising a request for repair, maintenance, and service records concerning the engine and RIB, as well as records concerning any modifications or alterations. Confirmation was also sought that the RIB and engine were in the same condition as they were on the date of the accident.

49. A central submission made by the BRP defendants is that it was "obvious at all times" that the plaintiff should have pursued BRP US Inc. and that this entity was the correct defendant, as manufacturer. The facts which emerge from a careful consideration of the contemporaneous correspondence paint an entirely different picture, in my view, the foregoing letter being a prime example. Far from even hinting that *Bombardier Recreational Products Inc.* was *not* the correct BRP defendant, that entity had (i) engaged an expert in Ireland and an expert from the USA; (ii) requested a joint-engineering inspection of the engine and RIB at a date convenient to their experts, and those retained by the plaintiff and the other party against which the plaintiff made

a claim (Marine Motors Limited) and; (iii) sought information relevant to the inspection. On any fair analysis the recipient of this letter could not but believe that it was engaging with the solicitors for the correct defendant, according to BRP.

Mr Connelly and Mr Breen

50. Before leaving this letter, it is appropriate to note that, notwithstanding the 'wrong defendant' issue, the BRP defendants (i.e. the second, third and fourth defendants) continue to rely on the evidence of both of the gentlemen referred to in the above letter sent by Byrne Wallace on 2 December 2013. In the manner presently discussed, in a witness schedule, dated 23 December 2020, furnished by McCann Fitzgerald solicitors for the BRP defendants in compliance with S.I. 391 of 1998, *"Michael Connelly (Ballycotton Marine Services)"* is identified as a witness of fact and *"Kevin Breen, Consultant Marine Engineer, Engineering Systems Inc ("ESI")"* is identified as an expert witness, indicating that both remain available for a future trial.

4 December 2013

51. The plaintiff's solicitors wrote to Byrne was on 4 December 2013 stating *inter alia*: *"…our client's Engineer is Mr Kevin O'Mahony, Marine Engineer, Marine Legal Limited…Cork".*

Report by plaintiff's engineer – Mr O'Mahony

52. The reason why the plaintiff's engineer (entirely reasonably in my view) deferred his report, is averred to as follows, at para 12 of Mr Boland's 30 January 2023 affidavit, wherein uncontroverted averments are made as regards the sequence of events: "*He was preparing his report but when Byrne Wallace solicitors for the defendant requested an inspection by letter dated the 2nd December 2013 which took place in January 2014, he decided to defer his report, pending the inspection. The inspection took place on the 20 January 2014. Counsel drafted proceedings initially because of a concern about the statute of limitations and I was just about to issue those proceedings against BRP and Marine Motors when the engineers report was furnished. Counsel redrafted the proceedings and returned same to us on the 14 April 2014."* Far from evidencing pre-commencement delay by the plaintiff, the foregoing speaks to appropriate steps taken with reasonable expedition.

53. It is also useful to note at this stage that the plaintiff continues to rely on this engineer, in that all witness schedules furnished by him (the first of which is dated 24 November 2020 and the latest of which is dated 10 May 2022) identify "*Mr Kevin P O'Mahony Consulting Marine Engineer"* as an expert witness i.e. available at a future trial. The plaintiff's disclosure schedule also refers to a total of 4 reports prepared by him, as expert (between March 2013 and February 2018) upon which the plaintiff intends to rely. In short, both this witness and his reports are available for a future trial. Furthermore, as the *plaintiff's* witness, his testimony is open to cross-examination on behalf of the defendants at any such trial.

54. The 4 December 2013 letter went on to indicate that the plaintiff's solicitors had not received co-operation from Marine Motors Ltd and stated that the latter would be notified of an inspection

and that it would be for them to decide whether they wished to engage an engineer. A request was also made that Byrne Wallace's client: "… *categorically confirm whether Marine Motors Ltd should have extra records beyond the records furnished by your client of the repair of our client's boat engine. Presumably your client would be in a position to confirm that they periodically inspect the records of their sales and repair agents and that Marine Motors Ltd as a matter of necessity should have records beyond the level of records furnished by way of voluntary discovery to the plaintiff. We will be seeking discovery in due course against the other defendant."* Although it involves repetition, given the submissions now made on behalf of the BRP defendants, it is appropriate to point out that the reference to "*your client*" was to "*BRP",* as so named by Byrne Wallace solicitors (i.e. "*Bombardier Recreational Products Inc.*") and it seems to me to have been entirely reasonable for the plaintiff to believe this to be the correct BRP defendant, given the fact and nature of the exchanges with Byrne Wallace up to that point, coming as they did after appropriate enquiries by the plaintiff's solicitors, and the plaintiff's solicitor being directed to BRP.

9 December 2013

55. The plaintiff's solicitors wrote to Byrne Wallace confirming *inter alia* that the plaintiff had no repair, maintenance or service records, going on to state that: *"Our client advises that he engaged Mr Joe McCallum of Excalibur Ribs trading as Gael Force Ventures… Carrigaline to install a sports front on the boat. These works will be visible at the inspection."*

Mr Joe McCallum

56. Before proceeding further, it should be noted that in the most recent Schedule served by the plaintiff, pursuant to SI 391 of 1998, (10 May 2022) "*Mr Joseph McCallum*" is identified as a non-expert witness (and he is similarly identified on earlier schedules, dated 26 April 2022; and 25 February 2022). This speaks to the point that relevant witnesses are available at a future trial and, once again, this gentleman's evidence would be open to cross-examination by the defendants.

57. The 9 December 2013 letter also stated that the plaintiff "… *also paid Marine Motors Ltd the sum of €247.39 to cover the labour costs of programming and EMN computer which was replaced on the boat. We understand that the computer was supplied by your company."* The letter went on to confirm that no repair documentation had been received from Marine Motors Ltd, despite a request for same on 27 February 2013 concerning these works, but that the computer would be visible on inspection of the boat and engine.

17 December 2013

58. The plaintiff's solicitors wrote to Byrne Wallace to confirm that the plaintiff's engineer would be "*as flexible as possible*" regarding inspection dates and that Mr Connolly could deal with him directly to make arrangements.

20 January 2014 - engineering inspection

59. At para. 12 of his 13 January 2023 affidavit, Mr Boland avers *inter alia* that the engineering inspection "*took place on 20th January 2014".* In the manner I will presently discuss, reports were subsequently prepared by the engineers, and remain available for any future trial.

11 March 2014

60. On 11 March 2014, the plaintiff's solicitors wrote to Byrne Wallace to confirm that High Court proceedings would be served very shortly, and requesting a letter to formally confirm the latter's authority to accept service.

21 March 2014

61. On 21 March 2014, the plaintiff's solicitors wrote again to Byrne Wallace, repeating the request for formal confirmation of their authority to accept service.

24 March 2014

62. By letter dated 24 March 2013, Byrne Wallace, on behalf of "*Our client: Bombardier Recreational Products Inc. ("BRP")"* replied to state: "*We confirm we have authority to accept service of proceedings in this matter on behalf of our client".* Again, there was no suggestion that *this* BRP was not the *correct* BRP defendant. In light of what had taken place up to that point, I do not accept that it was at all "obvious" that the plaintiff was pursuing the 'wrong' BRP, or that he should have known that a different BRP defendant, or defendants, ought to have been pursued. Thus, the progress of the matter by the plaintiff, via his solicitors, was not by any means, 'pre-commencement delay' and I feel bound to reject that characterisation, despite the skill with which counsel for the BRP defendants submits that the plaintiff is guilty of pre-commencement delay during this period.

14 April 2014

63. At para. 12 of his 30 January 2023 affidavit, Mr Boland avers that, after redrafting the proceedings to take account of the report provided by the plaintiff's engineer, counsel*:"… returned same to us on the 14 April 2014. These proceedings were subsequently checked with the client, reissued and served on the 25 April 2014. I therefore say that the plaintiff proceeded as quickly as possible"*(emphasis added). The foregoing is borne out by the facts which emerge from a consideration of the evidence before this Court in the present motion.

25 April 2014

64. The plaintiff caused a plenary summons to issue on 25 April 2014, which, at that point, named the first and second defendants only. The first named defendant was sued as, *inter alia*, the seller to the plaintiff of an allegedly defective engine. The second named defendant was pleaded, *inter alia*, to be the manufacturer. In my view, it would be entirely unfair to criticise the plaintiff/ plaintiff's solicitors for this, given the relevant history up to that point.

28 April 2014

65. The plaintiff swore an affidavit of verification in respect of the contents of the personal injury summons, on 28 April 2014.

8 May 2014

66. The plaintiff's solicitors served a copy personal injury summons by registered post on Byrne Wallace solicitors for the second defendant. This was accompanied by a letter consenting to the filing of an Appearance, by the second named defendant, up to and including 14 days from 8 May 2014 (i.e. to 22 May 2014). Meanwhile, Messrs. Coakley Moloney, solicitors for the first defendant, entered an Appearance, dated 8 May 2014.

12 May 2014

67. On 12 May 2014, the first defendant raised a Notice for Particulars comprising of 9 paragraphs (largely directed to the quantum of loss claimed; and whether the plaintiff had been involved in prior incidents and/or sustained prior injuries).

13 May 2014

68. The plaintiff's solicitors furnished Replies, dated 13 May 2014, to the first defendant's Notice for particulars

13 May 2014

69. An Appearance was entered, dated 13 May 2014, by Messrs Byrne Wallace, who were at that point, solicitors for the second defendant, BRP.

16 May 2014

70. Byrne Wallace solicitors sent a copy of the 13 May 2014 Appearance to the plaintiff's solicitors.

19 May 2014

71. The first defendant's solicitors sought Further and Better particulars from the plaintiff, namely, the identity of the person(s) who carried out works on the RIB engine prior to the date of the accident; and the identity of the persons who carried out the servicing of the engine/vessel for the same period, in particular, between the end of the three-year warranty for the engine, and 9 June 2012. A request was also made for all documents and records relating to servicing of the engine/RIB, and all works carried out by any party, other than the first defendant, since the purchase of the engine.

16 May 2014

72. The plaintiff's solicitors furnished a copy of the plaintiff's affidavit of verification to Byrne Wallace, under cover of a letter dated 16 May 2014.

11 June 2014

73. By letter dated 11 June 2014, the plaintiff's solicitors wrote to Byrne Wallace, following up on their 16 May letter, asking to receive the second defendant's "*Notice for Particulars and Defence as soon as possible".*

27 June 2014

74. On 27 June 2014, the plaintiff's solicitors wrote again to Byrne Wallace stating *inter alia* that "*…we will apply by way of notice of motion for judgement in default of defence unless the defendant's defence is filed within twenty one days…".* A letter consenting to the late filing of a defence by the second named defendant was enclosed.

18 July 2014

75. Mr Boland, solicitor for the plaintiff, swore an affidavit on 18 July 2014 in which he averred *inter alia* that Messrs Byrne Wallace, solicitors for the second defendant had been served with the personal injury summons on 8 May 2014; that the plaintiff's affidavit of verification had been served on 28 April 2014; that an Appearance for the second named defendant had been entered on 13 May 2014; and that, by letter dated 11 June 2014, his office had called for the filing of a Defence. He further averred that a warning letter had been served on 27 June 2014, yet the second named defendant's Defence remained outstanding. This affidavit was sworn to ground an application for judgment in default, against BRP.

Post - commencement delay by BRP

76. Recalling that proceedings were served on 8 May 2014, the foregoing illustrates that (i) the second named defendant was responsible for post-commencement delay; and (ii) as a consequence of that delay, the plaintiff was put to the additional time, effort and cost of bringing a motion.

21 July 2014

77. On 21 July 2014, the plaintiff's solicitors issued a motion seeking judgment in default of defence, as against the second defendant. That motion was given a return date on 13 October 2014. In the manner presently explained, the delay with respect to delivery, by the second named defendant, of a Defence did not end with the service by the plaintiff of this motion.

24 July 2014

78. On 24 July 2014, the plaintiff furnished Replies to the first defendant's request for further and better particulars. The plaintiff confirmed *inter alia* that the main work on the boat, prior to the expiry of the warranty, was carried out by Marine Motors Ltd dealing with warranty claims; that "*some further work of a very minor nature was carried out by Daniel O'Donoghue for the plaintiff both before and after the warranty period. This included rectifying inadequate repairs that were carried out by Marine Motors Ltd and other minor works*"; and that the servicing of the engine was carried out by the same individual. Those replies concluded by stating *inter alia* that: "*The defendant's own advertising literature clearly states that the boat only needed to be serviced*

after three years and 300 hours usage. It can be seen upon inspection that the boat was well maintained by the plaintiff through Mr O'Donoghue"

25 July 2014

79. On 25 July 2014, Byrne Wallace wrote to the plaintiff's solicitors in the following terms:

> *Dear Sirs,*
>
> *We are instructed by our client, Bombardier Recreational Products Inc. ("BRP"), that it is not the manufacturer of the engine, the subject matter of the above proceedings.*
>
> *BRP US Inc. is the manufacturer of the engine the subject matter of these proceedings. The name of the manufacturer of the engine is clearly displayed on the engine ID plate, and its registered business address in the United States is 10101 Science Drive, Sturtevant, Wisconsin, 53177-1757, USA.*
>
> *BRP has no involvement in these proceedings. Our client is satisfied that no liability attaches to it in respect of these proceedings and we would request that you immediately discontinue your client's proceedings against our client BRP.*
>
> *Please note that at present we are not instructed on behalf of BRP US Inc…"*
> (emphasis added)

Wrong defendant issue

80. The statement that "*BRP has no involvement in these proceedings*" can be contrasted with the very significant engagement by BRP, via their solicitors, Byrne Wallace, for an entire *year* (i.e. from July 2013 onwards) full in the knowledge of the plaintiff's intention to bring proceedings against BRP. In the manner examined, this included (i) undertaking to preserve evidence; (ii) appointing experts; (iii) arranging a joint-engineering inspection; (iv) seeking documentation and information relevant to the engine, the subject of the proceedings; (v) providing relevant documentation; and (vi) formally confirming, four months earlier, Byrne Wallace's authority to accept service (letter dated 24 March 2014).

81. No explanation has been given as to why a letter in these terms was sent in late July 2014 *after* legal proceedings had been issued and served on BRP and *after* the plaintiff had been forced to issue a motion seeking judgment in default of defence. The submissions made during the hearing on behalf of the BRP defendants (to the effect that it was the plaintiff's fault for proceeding against the wrong defendant/wasting time) echo precisely the statement in the 25 July 2014 letter that the *"The name of the manufacturer of the engine is clearly displayed on the engine ID plate".* However, the proposition that the plaintiff should have known to sue BRP US Inc. is utterly undermined by the uncontroverted averments which I have referred to earlier. To repeat these, for the sake of clarity, at para. 6 of his 30 January 2023 affidavit Mr Boland averred: "*I say that when your deponent first made enquiries it was with BRP USA Inc. I was redirected to*

the Canadian company" (emphasis added) and "*the Canadian company*" was, without doubt, Byrne Wallace's BRP client, "*Bombardier Recreational Products Inc*." (with a Canadian address), which company engaged with the plaintiff, via their respective solicitors. Thus, the submissions by the BRP defendants, regardless of the skill with which they are made, are undermined by the facts. The plaintiff was *not* at fault, nor did he delay.

82. At para. 9 of his 11 April 2022 affidavit, Mr Boland describes the contents of Byrne Wallace's 25 July 2014 letter as "*quite an extraordinary development*" and, given what had taken place beforehand, it is not difficult to understand why. Mr Boland makes clear (see para. 8 of his 30 January 2023 affidavit) that he does not accuse the BRP defendants of misinforming him. Nor is this Court making any such finding. That, however, is *not* the point, which *is* whether the plaintiff (i) made a 'late start' and (ii) can fairly be blamed for pre-commencement delay. For the reasons set out in this judgment, he did not, and cannot.

83. I accept as a fact that, until July 2014, the plaintiff was unaware that the BRP US Inc. was an appropriate defendant. This is in circumstances where averments to that effect are made by Mr. Boland, who is an officer of the Court, at para. 4 of his 30 January 2023. Furthermore, at para. 6 of the same affidavit, Mr. Boland avers *inter alia* that when he: ". . . *first made enquiries, it was with BRP USA Inc., I was redirected to the Canadian company".*

30 July 2014

84. On 30 July 2014 the first defendant's solicitors sought further particulars, including with respect to the "*minor nature"* of works; the alleged "*inadequate repairs*"; the number of times the engine was serviced and approximate dates; when the plaintiff first became aware that the kill cord was not working as alleged; what steps he took to have this rectified; when the vessel's original console was replaced, and by whom.

2014 joint – engineering inspection

85. Of the joint engineering inspection which took place in 2014, Mr. Boland makes *inter alia* the following uncontroverted averments at para. 18 of his 30 January 2023 affidavit:-

> "*At that inspection, the defendants had four engineers in the case, namely Damien Power and Mr. Cliff for Marine Motors and Eamon Breen and Michael Connolly for BRP. I say that the plaintiff had only one engineer. I say that Mr. Sullivan was retained at a later date following advices from senior counsel".*

September 2014 - Mr Breen's first report

86. It will be recalled that, on 2 December 2013, Byrne Wallace, acting for "*Bombardier Recreational Products Inc. (*"*BRP*")", notified the plaintiff's solicitors that two experts had been retained, one being Mr Kevin Breen, Research Consultant Engineer, of "ESI", Florida, USA (the other being Michael Connelly, Marine Engineer, of Ballycotton Marine Services). The Schedule, dated 23 December 2020, furnished by McCann Fitzgerald, solicitors for the BRP defendants, pursuant to SI 391 of 1998 contains *inter alia* the following entry:

"The BRP Defendants schedule of experts reports is as follows:

(a) Kevin Breen, Consultant Marine Engineer, ESI - draft report dated 29 September 2014…" (emphasis added)

87. Thus, the engineering inspection which had been discussed between (i) the solicitors representing the plaintiff and BRP, respectively, took place; and (ii) the outcome, from the perspective of all *three* BRP defendants, is a report by Mr Breen which all three continue to rely upon. Both Mr Breen and his report remain available in the context of a future trial.

30 September 2014

88. By letter dated 30 September 2014, the plaintiff's solicitor wrote to Byrne Wallace, taking issue with their 25 July 2014 letter. Among other things the 30 September letter stated: "*We immediately contacted Bombardier in the United States and it, in turn, referred us to your client whom we then contacted…*" (p.1); and "*We would strongly urge you, and your client to reconsider its position as to the necessity of compelling us to join BRP US Inc. as a co-defendant or alternatively, give our client an immediate assurance is that your client's wholly-owned subsidiary – BRP US Inc. will not be seeking to rely on the Statute of limitations in relation to this matter*" (p.2). This letter also stated *inter alia*: *"Furthermore, from our own Internet investigations, it would appear that the registered office of BRP US Inc. is based in Delaware not Wisconsin? We enclose herewith an extract from the Internet in that regard. Can you please clarify? Indeed, we note from the Internet searches that we cannot reference any registered office of a BRP company in Wisconsin for the service of proceedings although we note a plant does exist in Wisconsin."*

8 October 2014

89. On 8 October 2014, the plaintiff's solicitors replied to the first defendant's request for further particulars, confirming *inter alia* that, standard pre-season servicing was carried out by Mr O'Donoghue; that he "*carried out further repairs to the base–gasket which had already been repaired by your client";* and that "*The servicing would have taken place circa March/April every year"*. These replies also stated *inter alia:*

"4. The kill cord was working at the time of the pre-season check by Daniel O'Donoghue at the start of the 2012 boating season. The plaintiff estimates that this is the second time he used the boat. The plaintiff had driven his boat from Crosshaven to Cobh without incident. He had collected people in Cobh to bring them home and he discovered in Cobh that the kill cord was not working. He took the family back to Crosshaven and it was when he was travelling to Crosshaven to his own berth in Ringaskiddy that the accident occurred;

5.The plaintiff consulted Mr O'Donoghue by phone when he discovered that the kill cord was not working

6. The console was fitted by Joe McCallum of Excalibur Ribs in January 2009. It is submitted that this had no effect whatsoever on the kill cord."

10 October 2014

90. On 10 October 2014, Byrne Wallace replied to the 30 September 2014 letter from the plaintiff's solicitors. Much of the letter comprised a repetition of the assertion that because *"BRP US Inc."* appears, *inter alia*, on the engine "*plaque"* (in addition to the model and serial number) "*… the correct name of the manufacturer, BRP US Inc., has been available to your client from an early stage".* Having addressed this previously, it is not necessary to do so again. It is fair to say, however, that it was neither asserted in this 10 October 2014 letter, nor is it averred to in the context of affidavits exchanged for the present motion, that (i) Mr Boland did *not* contact BRP US Inc; and (ii) was *not* referred, by that company, to Bombardier Recreational Products Inc. On the contrary, the Court has before it the uncontroverted averments by an officer of the Court that he *did* and *was.* These facts were simply not addressed, then or now. What flows from that is not a criticism of any person within any BPR entity or any professionals acting for same, but a recognition of the fact that the plaintiff acted reasonably and moved with due expedition in trying to progress his case – something which involved no little complexity as well as various obstacles, in the particular circumstances. The aforesaid 10 October 2014 letter from Byrne Wallace also confirmed a registered address for BRP USA Inc. in Wisconsin, USA; and noted that the plaintiff "*will proceed with an application to the injuries Board".*

91. On the same date as the aforesaid letter, Byrne Wallace delivered a Personal Injuries Defence on behalf of the second defendant, dated 10 October 2014. A preliminary plea was made that the second defendant was not the manufacturer of the boat engine owned by the plaintiff; and it was pleaded that: "*The boat engine owned by the plaintiff was manufactured by BRP US Inc., of 10101 Science Drive, Sturtevant, Wisconsin, 53177-1757, USA".* The said Defence also included a plea that "*The plaintiff has instituted proceedings against the incorrect defendant".* It will be recalled, of course, that proceedings were served 5 months earlier, on 8 May 2014 and that, arising from the second defendant's failure to deliver a defence within time, despite reminders, a motion had issued on 21 July 2014. The foregoing was post-commencement delay by the second defendant.

13 October 2014

92. When the plaintiff's motion for judgment in default as against the second defendant came before the Court (Cross J) on 13 October 2014, an order was made that the motion be struck out, and that the second defendant pay the costs of the motion, to be taxed in default of agreement (with a stay on the costs order, pending the determination of the proceedings). Even if this was an order made on consent (and the words "on consent" do *not* appear) the fact that costs were ordered *against* the second defendant speaks to the reality of its delay and the appropriateness of the plaintiff's motion.

14 October 2014

93. A further Authorisation was issued to the plaintiff by the PIAB on 14 October 2014 (Number PL0718201324539). This Authorisation is specifically referred to in part [I] of the plaintiff's

Amended Personal Injuries Summons, which issued on 19 March 2015, pursuant to an Order of 6 March 2015, both of which are discussed below.

29 October 2014

94. A Personal Injuries Defence was delivered by the first named defendant, dated 29 October 2014. Apart from a very small number of matters (i.e. the plaintiff's occupation; the legal identity of the first and second defendants; the fact that the second defendant was the manufacturer of the engine fitted to the RIB; and the PIAB Authorisation) the first defendant put the plaintiff on 'full proof' of his claim. Pleas were also made, including that: the incident was caused by the plaintiff's negligence; the manner in which the boat was driven constituted a *novus actus interveniens;* if there was any defect in the engine/kill cord, it was not caused by any negligence or breach of duty by the first defendant; the plaintiff's claim lies against the second defendant and/or Excalibur RIB and/or Daniel O'Donoghue. A range of pleas of contributory negligence were also made against the plaintiff, including allegations of improper positioning in the boat; driving alone; driving at excessive speed; taking the vessel to sea when he knew the kill cord was malfunctioning; lack of training; failing to exercise due care and seamanship in the handling of the boat; and causing his claim against Excalibur RIB and/or Daniel O'Donoghue to become statute barred.

12 November 2014

95. On 12 November 2014, the first defendant issued a motion seeking liberty to issue and serve a third-party notice on the following parties:

1. BRP US INC of 10101 Science Drive Sturtevant Wisconsin 53177 – 17576 USA;
2. BRP European Distribution SA of Chemin Messidor 5 1006 Lausanne Switzerland; and
3. GE Commercial Distribution Finance Europe Limited of Dashwood House, 5 Dahshwood Land Road Bourne Business Park Addlestone Surrey KT152NY

96. The said motion was grounded on the affidavit Mr Nicholas O'Keeffe, solicitor for the first named defendant, who averred at para. 3: "*I say and believe that my client instructs that it did not sell or supply the RIB or any part of it to the plaintiff. I say and believe the first named defendant did supply the engine of the RIB to a company called Excalibur/Gaelforce Ventures of Riverstick, County Cork*". Mr O'Keeffe went on to aver, at para. 4, that his client instructs that the engine in question was purchased by the first named defendant from "*BRP European Distribution SA of Chemin Messidor 5 1006 Lausanne Switzerland and/or GE Commercial Distribution Finance Europe Limited of Dashwood House, 5 Dahshwood Land Road, Bourne Business Park, Addlestone, Surrey KT152NY ENGLAND".* He averred, at para. 5 that the Defence delivered by the second defendant alleges that it was not the manufacturer of the boat engine owned by the plaintiff, and that the second defendant has pleaded that the boat engine owned by the plaintiff was manufactured by *"BRP US INC of 10101 Science Drive Sturtevant Wisconsin 53177 – 17576 USA".*

8 December 2014

97. By order made on 8 December 2014 (Cross J), the first defendant was granted leave to issue and serve a third-party notice on

1. BRP US INC of 10101 Science Drive Sturtevant Wisconsin 53177 – 17576 USA;
2. BRP European Distribution SA of Chemin Messidor 5 1006 Lausanne Switzerland; and
3. GE Commercial Distribution Finance Europe Limited of Dashwood House, 5 Dahshwood Land Road Bourne Business Park Addlestone Surrey KT152NY England

11 December 2014

98. The first named defendant issued third-party notices on 11 December 2014, as permitted by the aforesaid Order of 8 December.

5 January 2015

99. On 5 January 2015, the first defendant's solicitors issued a motion, initially returnable for 26 January 2015, seeking an order that the plaintiff be directed to make discovery of 5 categories of documents, namely:

1. All documentation provided by the plaintiff to the Marine Casualty Investigation Board, to include all statements made by the plaintiff to the Marine Casualty Investigation Board;

2. Any and all documentation concerning the purchase and/or acquisition of the rigid inflatable boat the subject of the proceedings, including any and all certification relating to the said vessel;

3. Any and all documentation by way of maintenance records and/or any documentation relating to the service history of the rigid inflatable boat, including its engine, since the date of its purchase and/or acquisition by the plaintiff;

4. Any and all documentation concerning any and all complaints made by the plaintiff to the first named defendant, and/or the second named defendant and/or Excalibur - the company from which the plaintiff purchased the vessel and/or Mr O'Donoghue concerning or relating to the vessel in question;

5. Any and all documentation concerning any and all power boat handling training that the plaintiff received prior to the accident the subject of the proceedings.

Marine Casualty Investigation Board

100. That application was grounded on an affidavit sworn by Mr O'Keeffe, the first named defendant's solicitor who, at para. 4, made *inter alia* the following averments with respect to the relevance of the first category: *"An Investigation was carried out into this incident by the Marine Casualty Investigation Board. The plaintiff participated in the investigation and may have supplied information by way of Statements and other documents to the investigation. If such documentation exists, it is highly likely that they relate to matters at issue in these proceedings."*

It seems appropriate to note at this juncture that it is not suggested that the results of the foregoing investigation have become unavailable due to any delay.

13 January 2015

101. A further Authorisation was issued by the PIAB to the plaintiff, on 13 January 2015 (Number PL0718201324539). This Authorisation is cited in part [I] of the plaintiff's Amended Personal Injuries Summons, which issued on 19 March 2015, pursuant to an Order of 6 March 2015. Both are referred to below.

26 January 2015

102. The Court (Cross J) ordered that the plaintiff, by consent, make discovery, within 8 weeks, of the 5 categories sought by the first defendant, and set out earlier (see 5 January 2015).

2 February 2015

103. On 2 February 2015, Messrs McCann Fitzgerald, solicitors, entered an Appearance for 'BRP US Inc.', which entity was, at that stage, the first Third Party in the action.

15 February 2015

104. By letter dated 5 February 2015, the first defendant's solicitors wrote to the plaintiff's solicitors indicating that the former's marine surveyor (identified as Damien Power of Inforisk Limited) had consulted a forensic locksmith (identified as Mr. R. E. Cliff of Hanwell, London) regarding the ignition switch and a request was made "*to examine the original ignition mechanism, which would require this mechanism to be forced open for an examination of the internal working parts*". In the manner presently discussed, Mr Cliff has since passed away. However, the first named defendant has not chosen to bring any application to dismiss on the basis that this causes any prejudice with respect to its defence of the proceedings.

9 February 2015

105. The plaintiff's solicitors replied to the first named defendant's solicitors on 9 February 2015 stating *inter alia* that: "… *our client's engineer Mr. Kevin O'Mahony has advised that the craft's original ignition switch which was subsequently found to be faulty is central to our client's case and is a vital piece of evidence. Mr O'Mahony has advised that the proposed investigations would in his opinion put the integrity of the switch in jeopardy and expose it to irreversible physical damage and possible partial disruption. The plaintiff is not prepared to accede to your request on the basis of Mr O'Mahony's advices."* (emphasis added)

106. As noted earlier, the plaintiff's disclosure schedules identify "*Mr. Kevin P. O'Mahony Consulting Marine Engineer*" as an expert witness and, under the heading of "*Expert Reports*" the plaintiff refers to: "*Mr Kevin P. O'Mahony - Report 06.03.14; Report 16.03.17; Report 04.07.17; Report 19.02.18*", making clear that Mr O'Mahony and his reports remain available for a future trial.

16 February 2015

107. On 16 February 2015, Messrs. Leman solicitors, entered an Appearance for "BRP European Distribution SA", which was, at that point, the second Third Party in the proceedings.

26 February 2015

108. The plaintiff's solicitor, Mr Boland, swore an affidavit on 26 February 2015 to ground an application to join "*BRP US Inc*." and "*BRP European Distribution SA*" as co-defendants in the action. Having referred to the accident, Mr Boland made the following averment from para. 6 onwards:

> "*6. I say and believe and have been so advised that the said engine was defective in that the kill cord (which is an essential and integral part of the safety features of the engine) was defective and not working.*
>
> *7.Accordingly, I say and believe that as a result of the investigations, I was instructed to institute proceedings against the first named defendant (who sold the engine to the plaintiff) and against the manufacturer. I say and believe and was led to believe, that the manufacturer was Bombardier a well-known international company which manufactures and sells such engines worldwide.*
>
> *8. My enquiries were initially directed to Bombardier in the USA, but I was redirected to Bombardier Recreational Products Inc which is incorporated in Canada.*
>
> *9. I say that my first communication with Bombardier in Canada (i.e. Bombardier Recreational Products Inc) was on the 25th of February, 2013 and continued thereafter until M/s Byrne Wallace, Solicitors, entered into correspondence with your deponent on 17th of July 2013 in which it confirmed that it was instructed by Bombardier Recreational Products Inc (which it simply referred to as "BRP"). At the time the significance of describing its client as "BRP" was not immediately apparent to me, but it perhaps now has assumed some significance.*
>
> *10. These proceedings were then subsequently drafted by Counsel against inter alia that Canadian company known as Bombardier Recreational Products Inc. However the title to the proceedings as issued differed and I accept that the title is somewhat unusual in that it names the second named Defendant as Bombardier Recreational Products Inc ("BRP"). The addition of the initials "BRP" was done in view of the fact that at all times Byrne Wallace described its client as "BRP"*. (emphasis added)

109. The foregoing underlines that the evidence before the Court allows for a finding that it was the manufacturer (i.e. the *correct* defendant) which directed the plaintiff's solicitor to BRP (the entity which, after 12 months of engagement with the plaintiff's solicitor, asserted for the first time that it was the *incorrect* defendant). In para. 13, of the aforesaid affidavit, Mr Boland averred

that: *"An issue has now arisen in relation to the identity of the manufacturer"*. He proceeded to make the following averments at para 14:

"14. I say and believe that…there has been considerable engagement between the parties since 25th of February 2013, in particular:

- *I initially contacted Bombardier in the USA and was directed to its Canadian headquarters…*

- *In my very first email of the 25th of February 2013 to Bombardier in Canada I advised it of the serial number of the engine.*

- *On the 24th of June, 2013, your deponent sought certain documentation in relation to the manufacturer, repair, servicing and warranty claims in relation to the specific engine bearing the serial number in question, all of which was provided by Bombardier in Canada.*

- *There was a joint inspection of the engine which was attended by inter alia, Mr Breen, an engineer who came from the United States for "Bombardier" and did not at any stage make any issue in relation to the identity of the manufacturer*."

110. From para. 15 onwards of his affidavit, Mr Boland went on to aver:

"[15] …thereafter, by way of a letter of 25th of July 2014…your Deponent was advised, in an unheralded fashion, that the named Defendant – Bombardier Recreational Products Inc. ("BRP") – was not the manufacturer of the engine but that BRP US Inc. was the manufacturer of the engine and that the name of the manufacturer was apparently clearly "displayed on the engine ID plate". I was advised that the registered business address of BRP US Inc. is 10101 Science Drive, Sturtevant, Wisconsin, 53177 – 1757, USA. Note there is no reference to Delaware. The letter goes on to state that:

"BRP has no involvement in these proceedings".

16. I say that the latter statement in itself only adds to the confusion as "BRP" is the name which Byrne Wallace ascribed to Bombardier Recreational Products Inc.; And in fact even by its own letter alleges that it is "BRP US Inc" which is the manufacturer.

17. I say and believe that I am astounded by the fact that Bombardier Recreational Products Inc. - through its agents in this jurisdiction, did not in any way disclose that it was not the manufacturer despite the fact that I have been in communication with them (and indeed initially with Bombardier USA) for some seventeen months prior to the date of this letter."

111. Mr Boland proceeded to make averments to the effect that counsel advised of the necessity to join BRP US Inc. as a co-defendant; that he obtained a further authorisation from PIAB; that he notified Byrne Wallace solicitors and BRP US, by correspondence dated 30 September 2014; that

by letter dated 10 October 2014, Byrne Wallace reiterated that the correct defendant is BRP US with a registered office in Wisconsin USA.

112. Mr Boland then referred to the order made on 8 December 2014 granting leave to the first defendant to join 3rd parties. At para. 22 Mr Boland averred that counsel *"advised that the plaintiff may also have a claim against BRP European Distribution SA pursuant to inter alia the liability for defective products act 1991. It would appear that GE Commercial Distribution Finance Europe Ltd is since dissolved."*

27 February 2015

113. On 27 February 2015, relying on the aforesaid affidavit of Mr. Boland, the plaintiff's solicitors issued a motion seeking to join "*BRP US Inc."* and "*BRP European distribution SA*" as co-defendants in the action (having been the second and third parties). That motion was made returnable for 6 March 2015.

114. On the same date, the plaintiff's solicitors wrote to Byrne Wallace enclosing a copy of the motion, affidavit, and exhibits; pointing out that an early return date had been obtained for same; and stating: "*Please confirm you are consenting to this Co-Defendant application".*

5 March 2015

115. By letter dated 5 March 2015 Byrne Wallace confirmed that their client consented to the plaintiff's application.

6 March 2015

116. With reference to Byrne Wallace informing the plaintiff's solicitors that the plaintiff had named the *wrong* defendant, Mr. Boland makes *inter alia* the following uncontroverted averment at para. 10 of his 11 April 2022 affidavit:-

> "*The plaintiff duly protested directly to BRP Head Office in Canada by letter dated the 30th September 2014. I further say that this had the effect that the plaintiff had to go back to the injuries board to get a further authorisation and counsel was instructed on the 23rd September 2014 to draft applications to join BRP USA and BRP European Distribution SA to amended proceedings. Proceedings were duly prepared on the 30th January 2015 and the Court duly made an Order for inclusion in the application for the Third Party Order and the Court duly made an Order on the 6th March 2015 to join the said parties as third parties to the proceedings".*

117. On 6 March 2015, an order was made by the Master, by consent, joining "BRP US Inc." and "BRP European distribution SA" as the third and fourth defendants (having previously been, as I say, the first and second named Third Parties, respectively).

118. The submission made by the BRP defendants is that the period from (i) the date of the accident, up to and including (ii) the joinder by the plaintiff of the third and fourth defendants as co-

defendants is simply one of delay by the plaintiff. I am entirely satisfied that the facts which emerge from a close consideration of the evidence allow for the opposite finding.

119. At para. 6 of his 11 April 2022 affidavit, Mr Boland avers that *"the corporate structure for the defendants took some time to investigate".* The foregoing is both an uncontroverted averment and one borne out by the chronology of events which I have thus far examined. Whilst also keeping in mind that this was not a situation where there was a lengthy 'statute of limitations' period (e.g. 6 years in a breach of contract scenario) a non-exhaustive summary of the chronology of relevant events is that it included appropriate and sustained efforts by the plaintiff's solicitor to (i) identify and communicate with the appropriate BRP defendant; (ii) preserve evidence; (iii) obtain relevant documents; (iv) retain and obtain expert advice from an engineer; (v) brief counsel; (vi) deal with assertions of a 'failure' to pursue the correct defendant; (vii) secure PIAB authorisations; (viii) and press the litigation forward both in as against existing defendants and new BRP entitles. In my view the foregoing was both reasonable and done with appropriate expedition.

Amended Personal Injuries Summons

120. By virtue of the joinder of the third and fourth defendants, an Amended Personal Injuries Summons formally issued out of the Central Office, on 19 March 2015, pursuant to the aforesaid Order of 6 March 2015. In order to better understand the composition of, and alleged role of, the various parties to the proceedings, as articulated in the Amended Personal Injuries Summons, it is useful to set out *verbatim* paras. 2 to 6, inclusive from part [A] of the Indorsement of Claim which is entitled *"[A] Description of the parties"* and contains the following pleas:

> *"2. The First Named Defendant is a limited liability company having its registered office at Marine Centre, Passage West, in the County of Cork, and was at all material times hereto a supplier within the meaning of the Sale of Goods and Supply of Services Act 1980.*
>
> *3. The Second Named Defendant is an incorporation having its registered address at 726 Saint-Joseph Street, Quebec, Canada JOE2LO (hereinafter "Bombardier Canada") and was at all material times hereto the manufacturer of the engine which was fitted to the rigid inflatable boat (hereinafter "RIB") owned by the plaintiff.*
>
> *4. The Third Named Defendant is a corporation having its registered business address in the United States at 10101 Science Drive, Sturtevant, Wisconsin, 53177 USA (hereinafter referred to as "Bombardier USA"). The Second Named Defendant has asserted that it is the Third Named Defendant which is the manufacturer of the engine which was fitted to the RIB referred to above and hence is named in the proceedings as such.*
>
> *5.The Fourth Named Defendant is a corporation having its registered business at Chemin Messidor 5, 1006 Lausanne, Switzerland (and is hereinafter referred to as "Bombardier Switzerland"). The First Named Defendant has asserted that Bombardier Switzerland and/or*

the Third Party supplied and sold the said engine to the First Named Defendant and hence is named on these proceedings as such.

6. The Third Party is a corporation having its registered business at Dashwood House, 5 Dashwood Lang Rd, Bourne business Park, Addlestone, Surrey, KT152NY, England. The First Named Defendant has asserted that Bombardier Switzerland and/or the Third Party supplied and sold the said engine to the First Named Defendant and hence is named on these proceedings as such".

121. Parts [B] and [C] of the Amended Personal Injuries Summons contain the following pleas:

"***[B] Nature of the claim:-***

1) *The plaintiff's claim is for negligence and breach of duty, breach of statutory duty (i.e. breach of the Liability of Defective Products Act 1991) and breach of contract, further and better particulars of which are set out below.*

[C] The Acts of the Defendants, and each of them, their servants or agents alleged to constitute a wrong, each instance of negligence by the defendants, and each of them, their servants or agents, all other relevant circumstances in relation to the commission of the said wrong and any other assertion or plea concerning same:

1. On or about the 9th day of June 2012, the plaintiff was using his RIB. The said RIB was fitted with an Evinrude E-tec Engine manufactured by Bombardier Canada and/or Bombardier USA and which engine was purchased in or about the year 2007 by the plaintiff from the first named defendant. On the said date the plaintiff was travelling on the water in his RIB in Cork Harbour. Towards the end of his days outing - when he was at Sea - he became aware that the "kill cord" on the engine was not working. He then however had to return the boat from Crosshaven to its moorings in Ringaskiddy, in Cork harbour. The plaintiff was travelling in conditions described as calm to light waves when at approximately 21.10 – when near a place known as "Paddys Point" – the RIB appeared to hit an object in the water and went into a turn. The plaintiff was thrown from the RIBA into the sea. As a consequence the RIB continued running, travelling in an approximate 50 metre turning circle and struck the plaintiff herein on numerous occasions.

2. The said incident herein before referred to was caused or occasioned by reason of the negligence and breach of duty, breach of statutory duty and breach of contract of the first named defendant and negligence and breach of duty and breach of statutory duty/breach of the Liability for Defective Products Act 1991 by the Second/Third/Fourth Named Defendants, further and better particulars of which are set out below.

3. By virtue of the foregoing, the plaintiff herein suffered and sustained severe personal injuries, loss and other damage, further and better particulars of which are set out below.

4. In addition, the plaintiff incurred certain items of special damage, further and better particulars of which are set out in the Schedule herein…"

26 March 2015

122. An Appearance was entered on behalf of the third and fourth named defendants, on 26 March 2015, by McCann Fitzgerald, solicitors.

30 March 2015

123. The plaintiff swore an Affidavit of Verification, on 30 March 2015, in respect of the contents of the Amended Personal Injuries Summons.

15 April 2015

124. Under cover of a letter dated 15 April 2015, the plaintiff's solicitor sent Byrne Wallace the Amended Personal Injuries Summons and the plaintiff's Affidavit of Verification, and requested that they endorse acceptance of service.

29 April 2015

125. On 29 April 2015, McCann Fitzgerald served a Notice of Change of Solicitors confirming that they were coming on record for the second-named defendant.

16 May 2016

126. By letter dated 16 May 2016, the second, third and fourth named defendants sought voluntary discovery from the first named defendant.

28 May 2015

127. The first named defendant delivered an Amended Personal Injuries Defence, dated 28 May 2015. Among other things, the first named defendant's Amended Defence now put the plaintiff on proof that the second defendant was the manufacturer of the engine fitted on the plaintiff's RIB. The grounds upon which the first defendant denied liability to the plaintiff included the plea (at para. 3.c) that "…*the plaintiff's cause of action (if any) lies against the second named Defendant and/or the third named Defendant and/or the fourth named Defendant and/or Excalibur RIB and/or Daniel O'Donoghue.*" As well as a full denial of liability, a range of pleas of contributory negligence were made.

21 June 2016

128. The plaintiff's solicitors issued a motion on 21 June 2016 seeking an order striking out the defence of the first named defendant for failure to comply with a 14 April 2016 agreement to make discovery.

24 June 2015

129. A Personal Injuries Defence, dated 24 June 2015, was delivered on behalf of the second, third and fourth named defendant, by McCann Fitzgerald solicitors. This put the plaintiff on full proof of all matters other than: *"(a) The personal details of the plaintiff. (b) That the Second, Third or Fourth Defendant manufactured the Evinrude E-Tec engine fitted to the plaintiff's RIB in or about the year 2007".* The grounds upon which the second, third and fourth Defendants claim they are not liable to the plaintiff are pleaded at para. 3 and include:

- The kill cord in the engine was not defective when supplied in 2007;
- Any defect (which is not admitted) was not caused by any defect in design, manufacture and/or construction of the engine by the second, third and fourth defendants;
- The second, third and fourth defendants are not liable for the consequences of any work carried out on the engine/console by parties other than them;
- Reliance is placed on s.35 of the Civil Liability Act, 1961;
- Particulars of special damage, loss, damage, inconvenience and expense are denied in full;
- It is denied the plaintiff suffered any loss;
- Negligence, breach of duty, breach of statutory duty and/or breach of the Liability for Defective Product Act 1991 are denied;
- If (which is denied) the plaintiff suffered the alleged loss, same was caused or contributed to by the plaintiff's own acts/omissions and/or the wrongful acts/omissions by third parties including but not limited to Dan O'Donoghue, Haven Marine and/or Gael Force Ventures who the plaintiff chose not to sue and who carried out construction, inspection, maintenance, repair and/or servicing of the engine which caused/contributed to the alleged failure of the kill cord to operate (which allegation is not admitted);
- Alternatively, if the plaintiff sustained loss, it was caused/contributed to by the negligent acts/omissions of the first-named defendant

130. A range of pleas of contributory negligence are also made at para. 4. These include pleas that the plaintiff was guilty of negligence and/or contributory negligence in:

- Failing to test the kill cord prior to his original departure from port;
- Using the RIB after he discovered the kill cord was not operational;
- Failing to remain seated in the boat when travelling;
- Driving the boat at excessive speed;
- Failing to have regard to the fact he knew the kill cord was not working and/or he was not wearing the lanyard connected to same;
- Causing or permitting the drainage for the mechanism to be obstructed / not properly cleaned / not properly checked and/or the kill cord mechanism not to be lubricated properly;
- Failing to carry out proper pre-season checks on the kill cord;
- If there was a defect in the kill cord mechanism, this was caused/contributed to by works by such third party or parties engaged by the plaintiff;
- Failing to take precautions for his own safety;
- Failing to profit from his experience and training in the management and operation of the RIB;

- Failing to observe "*Power Boating Sea Safety Guidelines"* or the "*Code of practice for the safe operation of recreational craft";*
- Failing to keep the kill mechanism in good working order;
- The plaintiff was the author of his own misfortune;
- Attempting to re-board the boat when he knew/ ought to have known it was dangerous/unsafe.

131. At para. 5 it is pleaded that if there was a defect in the kill cord (which is denied) the matters pleaded at para.4 (negligence/contributory negligence) constitute a *novus actus interveniens* caused by the plaintiff / Dan O'Donoghue / Haven Marine / Gael Force Ventures / any other third party who carried out construction, inspection, maintenance, repair and/or servicing of the engine, thereby severing the casual connection between any such alleged defect and the loss and damage alleged to have been suffered by the plaintiff.

30 June 2015

132. The second, third and fourth defendants served a Notice of Indemnity and Contribution, dated 30 June 2015, on the first named defendant (pursuant to Part II of the Civil Liability Act, 1961, in particular s.27 thereof).

16 July 2015

133. On 16 July 2015, Mr Yves St-Arnaud, Director of Legal Services for Bombardier Recreational Products Inc. swore an affidavit of affidavit of verification, on behalf of the second, third and fourth named defendants, with respect to the contents of their Defence as delivered on 24 June 2015.

19 August 2015

134. On 19 August 2015, the plaintiff's solicitors issued a Notice of Trial.

1 October 2015

135. As Mr. Boland avers (paras. 14.12 – 13 of his 11 April 2022 affidavit), after the plaintiff was released from Cork University Hospital, he came under the care of Dr. Andrew Hanrahan, vocational consultant who set out a treatment plan for the plaintiff and who arranged for the plaintiff to be seen by Dr. John Browne, consultant in pain relief. The plaintiff had a general medical card and was receiving treatment in the public system. Dr. Hanrahan left the system and was replaced by Dr. John McFarlane, who continued to review the plaintiff periodically. The plaintiff was transferred from Dr. Browne's list to Mr. Dominic Hegarty's owing to the plaintiff's ongoing phantom pain. The plaintiff's solicitor requested a report from Dr. Dominic Hegarty, consultant in pain relief, on 1 October 2015.

27 October 2015

136. At para. 14.13, Mr. Boland avers that the plaintiff was attending a psychiatrist to cope with his difficulties and that he was first seen by Dr. Mairead O'Leary on 27 October 2015.

3 November 2015

137. On 3 November 2015, the solicitors for the second, third and fourth named defendants served the plaintiff's solicitors with a detailed Notice for Particulars (comprising of 41 paragraphs, excluding sub-paras.)

16 December 2015

138. On 16 December 2015, the plaintiff's solicitor served a 'Notice of Further and Better Particulars of Negligence and Breach of Duty' on the solicitors for the second, third and fourth named defendants, pleading alleged failures:

(a) to properly warn the first defendant of the necessity of ensuring that the kill mechanism was sufficiently lubricated and that the drainage for the kill mechanism was kept clear and free from obstruction;

(b) to train the first named defendant to ensure that the first defendant, its servants or agents, were aware of the necessity of the foregoing;

(c) to properly supervise the first named defendant when carrying out repair works; and

(d) to impart such information advice and warnings to the first named defendant in relation to the defect and matters complained of by the plaintiff as was warranted in all the circumstances.

17 December 2015

139. The plaintiff's solicitors issued a Notice to Produce, dated 17 December 2015.

13 January 2016

140. Dr. Mairead O'Leary, psychiatrist, who first saw the plaintiff on 27 October 2015, furnished a report on 13 January 2016. This is averred by Mr. Boland at para. 14.13 of his 11 April 2022 affidavit.

26 January 2016

141. On 26 January 2016, the plaintiff furnished Replies to Particulars in response to the 3 November 2015 Notice for Particulars raised by the second, third and fourth named defendants. Given the significance of the kill cord to the dispute, the following are extracts from the Notice for Particulars raised by the second, third and fourth defendants (on 3 November 2015) and the Replies furnished by the plaintiff (on 26 January 2016). For ease of reference the defendants' queries are in bold, below which are the plaintiff's responses:

"20. Please specify precisely in what manner it is alleged that the kill cord and/or emergency stop clip/key switch was not properly sealed against the ingress of water."

"20. This is entirely a matter of evidence, however, without prejudice, the ignition switch unit consists of 2 components - the console mounting plate [65 x 65mm] which has male spigot on the forward side [as fitted] which houses a deep circular recess on its after face.

This latter houses the actual ignition switch c/w its cable entries all enclosed in a sealed unit when inserted through a suitably dimensioned hole in the spigot from forward.

The ignition switch once inserted in the mounting plate is secured in position by a hexagonal nut on the threaded end of the switch unit barrel being tightened which in turn draws the 2 components together into the single unit of the "ignition switch".

The console mounting plate is secured to the console by four c.s. screws and is provided with a 4 mm x 3mm through-drain hole in way of the bottom of the recess.

The exposed -"key"- end of the switch unit is open to the elements and notwithstanding its countersunk end, would, allow spray/rain/ingress over time."

"21. Please specify in what manner the positioning of the kill cord is alleged to have been deficient."

"21. See reply to query No. 22."

"22. Please specify the internal mechanical failure which is alleged and please specify precisely the alleged cause of the internal mechanical failure."

"22. This is a matter of evidence but entirely without prejudice we reply as follows:-
The precise nature of the mechanical failure of the ignition switch to perform as designed and as manifested when subjected subsequently to examination was where the ignition switch barrel was noted stiff/ rough in axial operation as against normal smooth movement and where the condition resulted in the random failure in service of the ignition switch to cut out when the kill-cord was operated.

It was noted that the application of WD40 to the key slot resulted in the normal smooth and consistent operation of the ignition switch.

This appeared to be a transient result in that following a short interval and re-test the operation of the ignition key reverted to random failure on withdrawal of the kill-cord.

A spare ignition key unit was fitted, engine rust on test and observed to cut out consistently using the kill-cord.

It would appear from the foregoing that the ignition switch unit had developed internal wear related friction over time resulting in the stiffness/ roughness found in operation. Given that the Engine hours had been established as 424 hours this would appear to be inconsistent with purely service were and tear.

We refer to our response to 20 above in this regard - where such weather-related ingress to the key mechanism could affect its operation."

"23. Please specify each and every alleged defect in the kill cord mechanism alleged."

"23. Refer to response to 22 above."

"24. Please specify and provide full particulars of each and every complaint made by the plaintiff to the Second, Third and/or Fourth Defendants concerning the kill cord on the RIB."

"24. No complaint was made as the issue did not arise. The defect in the kill cord was only noted on the day of the accident."

…

"27. Please provide full and detailed particulars of the alleged failure of the 2nd, 3rd and/or 4th named defendants to have any or any proper system of quality control in or about the manufacture of the kill cord."

"27. To ensure clarity and the avoidance of ambiguity – the Kill Cord per se – i.e. the coiled red plastic 600mm / 1420mm long lanyard c/w with 'horse-shoe' end fitting and safety clip – is not an issue in this matter.

The issue here is the malfunction of the Ignition Switch mechanism in normal service.

It is designed that when fitted with a 'kill-cord' it will ensure that the operation of that kill cord will cause the engine to cut out.

The Console Ignition Switch is original Evinrude / BRP equipment supply and a matter for their concern."

…

"30. Please provide precise particulars of the actual cause of the alleged failure of the kill cord to operate."

"30. Refer to previous response to 22 above."

"31. Please state precisely how it is alleged the kill cord was defective."

"31. Refer to previous response to 22 above."

29 January 2016

142. Dr Dominic Hegarty, consultant in pain relief, continued to review the plaintiff periodically and first reported on 29 January 2016. At para. 14.13, Mr. Boland avers *inter alia* that: -

"*Dr. Hegarty had been looking at the option of neuromodulation for severe phantom pain within the constraints of the GMS system, but this was not forthcoming due to lack of funding. The plaintiff suffered severe phantom pain and this continued to be a serious ongoing issue for the plaintiff in terms of his rehabilitation and recovery*".

January – March 2016

143. At para. 14.1 of his 11 April 2022 affidavit, Mr Boland avers *inter alia* that: "*A letter seeking voluntary discovery was furnished on 15 January 2016 and the defendants replied at various intervals and clarified that they would make discovery in terms of their letter dated 14 March 2016*." (emphasis added)

12 March 2016

144. At para. 14.14 of Mr. Boland's 11 April 2022 affidavit, he avers *inter alia* that: -

"*The plaintiff had been attending Mr. Dino Christodoulou, Prosthesist, in the public system. He had looked at various options but the funding was limited and the plaintiff even had to fight for liners to stop himself from being infected with his present prosthesis. Your deponent sought a report from Mr. Christodoulou and a report was furnished on the 12th March 2016".* (emphasis added)

15 September 2016

145. On 15 September 2016 Mr Charles-Andre Girard, legal counsel of Bombardier Recreational Products Inc., swore an affidavit of discovery on behalf of the second, third and fourth named defendants (referred to, collectively, therein as the "BRP defendants"), with respect to 10 categories of documents, namely:

1. *"All documents in relation to the repair of the Evinrude E-tec engine number E250DPXSU / Serial Number 05182044.*

2. *All documents in relation to the proposed replacement of the said engine by the BRP defendants in or around the year 2010/2011.*

3. *All technical bulletins issued by the B or defendants relevant to a Kill cord failure on any outboard engine manufactured by them from the 1 January 2007 to 9 June 2012 (the date of the accident).*

4. *All Evinrude E-tec 250 engine Operator Guides from 2007 to 2012 (inclusive), Evinrude brochures relevant to the Evinrude E-tec 250 engine and all Evinrude publications or publications by or on behalf of the BRP defendants relevant to the servicing of the Evinrude E-trec engine E250DPXSU.*

5. *All documents in relation to the training, instructions and supervision provided by the BRP defendants to their alleged authorised agents Marine Motors relevant to the inspection repair service and maintenance of the said Evinrude E-tec engine type the subject of the proceedings (type E250DPXSU) from 1 January 2007 to 9 June 2012.*

6. *All documents published posted or issued by the BRP defendants (either to Marine Motors or otherwise) in respect of any outboard engine manufactured by the BRP defendants prior to the date of the incident (9 June 2012) in relation to the alleged necessity to lubricate the kill cord mechanism and/or the alleged necessity to ensure that the drainage for the kill cord mechanism is cleaned and/or the alleged necessity for ensuring that the drainage for the mechanism is kept free from obstruction.*

7. *All documents in relation to the design of the kill cord mechanism for any outboard engine manufactured by Bombardier from the 1 January 2007 to the date of the incident (9 June 2012).*

8. *All documents in the possession of the BRP defendants which refer to any notifications or complaints made under warranty relating to defects or malfunctioning in the kill cord mechanism of any outboard engine manufactured by Bombardier from 1 January 2007 to 9 June 2012.*

9. *All documents in relation to the commercial relationship between Marine Motors Ltd and the BRP defendants for the period 2007 to 2010, both years inclusive, relevant to the appointment of Marine Motors Ltd as agent for the defendants, including copy of the most recent deed of appointment or contract governing the relationship between the parties in February 2007.*

10. *All documents in relation to the allegation that the plaintiff Owen Corkery failed to cause the ignition mechanism to be fitted properly or in accordance with the manufacturer's instructions and/or caused the ignition mechanism to be fitted at an angle of 45 degrees."*

146. At paragraph 14.1 of his 11 April 2022 affidavit Mr Boland avers *inter alia* that: "…*the defendants duly filed their first affidavit of discovery on the 15 September 2016 with boxes of exhibits with thousands of entries. The plaintiff duly furnished the copious discovery to the plaintiff's engineer who perused same and ultimately advised further and better discovery."* (emphasis added)

147. It is common case that the initial discovery made by the BRP defendants, per Mr Girard's affidavit, comprised 3,838 pages (see 12 October 2017 affidavit sworn by Ms. Chantal Gagnon on behalf of the BRP defendants, by which the BRP defendants made discovery of 17 additional documents). Plainly, it would have taken some time to review the quantum of documents initially

discovered and I cannot regard it as other than appropriate for the plaintiff's solicitor to have furnished same to the plaintiff's engineer to review. It is clear that this review was completed by April 2017 (see 11 April 2017 letter, referred to below, sent by plaintiff's solicitor, raising issues with this Discovery and calling for further and better discovery by the BRP defendants).

20 September 2016

148. On 20 September 2016, the plaintiff served a 'Notice of Further Particulars of Personal Injury' upon the respective solicitors for all parties. This document states *inter alia*:

- *"The plaintiff has been under the continuous care of his general practitioner Dr Murphy"* (para.1);
- "*The plaintiff has been under the care of a consultant psychiatrist*" (para.2);
- "*The plaintiff has been under the care of the POLAR (prosthetic orthotic and limb absence rehabilitation) Department in the Mercy University Hospital specialising in rehabilitative medicine"* (para.3);
- *"Within the POLAR Department, the plaintiff was under the care of a clinical psychologist"* (para.3);
- *"The plaintiff has been assessed by a consultant in pain management and neuromodulation"* (para.3);
- *"The plaintiff underwent an assessment with an upper limb Prosthetist"* (para.5);
- *"The plaintiff was assessed by a vocational rehabilitation consultant"* (para.6)

(emphasis added)

The foregoing indicates that the plaintiff was under the care of a number of medical practitioners in the context of receiving care in respect of personal injuries for which the plaintiff seeks compensation. There is no suggestion that any medical practitioner, record or report would be unavailable at a future trial, as a consequence of any delay.

18 January 2017

149. The plaintiff swore an affidavit of discovery, on 18 January 2017, which referred to the following categories:

1. Construction, inspection, maintenance and repairs;
2. Training and instruction including manuals and course content;
3. Product literature;
4. (a) all medical details for 5 years preceding the accident;
   (b) all medical records post-accident.

16 February 2017

150. On 16 February 2017, Mr Kevin Higgins, director of Marine Motors Ltd, swore an affidavit of discovery on behalf of the first named defendant. As averred at paragraph 3 thereof, this was in response to a voluntary discovery request made by the second, third and fourth named defendants, by letter dated 16 May 2016.

Discovery analysis by plaintiff

151. At para. 14 of his 30 January 2023 affidavit, the plaintiff's solicitor, Mr. Boland, avers *inter alia* that:-

> "*…it took a long time to review the Discovery. I say that for a large solicitor's firm it may not appear to be a large suite of discovery documentation, but I can assure the Court that discovery in this case was extensive, vitally important to the liability issues and required forensic assessment. As Mr. Bourke says himself, it was 'sizeable'. I say that it wasn't within my remit to deal with the technical areas of the discovery and was really a matter for our experts and I assisted where I could".*

11 April 2017

152. By letter dated 11 April 2017 to McCann Fitzgerald, the plaintiff's solicitor referred to alleged deficiencies in the discovery, as made by the BRP defendants, and called upon same to make further and better discovery. A challenge to a privilege claim was also made.

16 May 2017

153. The plaintiff's solicitor, Mr Boland, swore an affidavit on 16 May 2017, in which he averred that voluntary discovery was requested of the second, third and fourth named defendant's, by letter dated 15 January 2016 and that, ultimately, discovery was agreed on a voluntary basis. At para. 9, he set out the 10 categories agreed. At para. 10 he averred *inter alia* that: "*regrettably, having pursued the documentation discovered, it would appear to me that the Bombardier Defendants failed to make full discovery and that further and better discovery is required for the following reasons as identified by me in correspondence of the 11 April 2017…"* The alleged deficiencies related to categories 5, 8, 9 and issue was also taken with a privilege claim. At paragraph 11, he averred that no response had been received to his letter. This affidavit was to ground plaintiff's application for further and better discovery.

17 May 2017

154. The plaintiff issued a motion, on 17 May 2017, seeking to compel the second, third and fourth named defendants to make further and better discovery. This motion was returnable for 26 June 2017, but was ultimately dealt with by order made on 18 December 2017 (referred to below).

12 October 2017 – additional documents found

155. On 12 October 2017, Ms. Chantal Gagnon "a *Director Quality and Aftersales at BRP US Inc. since June 2014*", swore an affidavit on behalf of the second, third and fourth named defendants (referred to, collectively therein as "BRP"). This affidavit was sworn in response to the 16 May 2017 affidavit sworn by Mr Boland which set out complaints in relation to the discovery, as made by BRP (*per* the 15 September 2016 affidavit sworn by Mr Girard, which, as averred by Ms Gagnon, comprised 3,838 pages). At paragraph 7, Ms Gagnon averred: *"BRP has searched for but has not identified any further documents under categories 5 and 9".* With respect to category 8, Ms Gagnon made the following averments from para. 21 onwards:

"*21. BRP has carried out further inquiries and searches for other electronically stored information or documents under this category. BRP has found additional electronically stored information and documents in relation to complaints made under warranty in respect of ignition switches similar to the ignition switch used in the engine of the plaintiff's RIB. Such additional electronically stored information and documents are listed in the schedule to this affidavit. These items either had been misfiled or were found in databases which BRP had previously considered unlikely to contain any responsive documents or electronically stored information.*

22. The first and second items in that schedule, entitled "SAP Claims Report (July 2017)" and "Mainframe Report" respectively are reports containing electronic information extracted from BRP's databases in respect of all international and North American warranty claims processed between 3 January 2007 to 23 June 2016 where either the component keyswitch (part number 5005801) is listed as a defective part; or the item is a supplemental part which was changed in the course of repair work performed under warranty; or the item is a part contained in a kit supplied pursuant to a warranty claim. Entries in these documents which are assigned the serial number 1111111 referred to claims which BRP could not attribute to a specific engine serial number.

23. BRP has also identified further electronically stored information about warranty claims which is set out in three Excel spreadsheets listed at items 3 to 5 of the schedule to this affidavit. These spreadsheets include information on claims logged by BRP's customer care agents.

24. Where a field in the report or spreadsheets referred to above is blank, this probably is because it appears that no information for the field was supplied by the dealer at the time the dealer communicated the warranty claim to BRP. In other instances, dealers probably gave BRP some limited details. This is not surprising as the cost of replacement of switch parts is modest, and so claims usually were agreed without difficulty. BRP does not have further information about these claims.

25. Twelve additional documents given to the safety subcommittee for the purposes of their meeting in September 2010 and November 2010 have also been found. These are listed in the schedule to this affidavit at items 6 to 17. The documents listed at items 12 to 15 of the schedule are those documents which are embedded in the PowerPoint document named Pollak Switch Update 091410, listed at item 11 in the schedule to this affidavit.

26. All of these documents either had been misfiled or were found in databases which BRP had previously considered unlikely to contain any responsive documents or electronically stored information…" (emphasis added)

156. The averment made on behalf of the second, third and fourth defendants that: "*documents either had been misfiled or were found in databases which BRP had previously considered unlikely to contain any responsive documents or electronically stored information"* allows for a finding that the initial searches carried out by the BRP defendants were defective. Inadequate searches by these defendants cannot conceivably be the fault of the plaintiff. The result of these inadequate searches was delay, in respect of which the following seems to me to be relevant:

- The plaintiff made a voluntary discovery request on 15 January 2016;

- The ensuing correspondence between the parties, which ultimately gave rise to an agreement by the BRP defendants to make discovery in terms of their letter dated 14 March 2016 does not constitute delay on the plaintiff's part;

- The time it took the BRP defendants to make their initial discovery, by means of the 15 September 2016 affidavit sworn by Mr Girard, did not constitute delay by the plaintiff;

- Given the nature of the dispute and the quantum of the documentation, I take the view that: (i) for the plaintiff's solicitor to send same to the plaintiff's engineer for consideration was plainly reasonable; (ii) given that it comprised 3,838 pages and included technical information, its consideration would very obviously have taken some time; (iii) it was necessary for the engineer to revert to the plaintiff's solicitor before a view could be taken as to whether proper discovery had been made; and (iv) the foregoing does not constitute delay by the plaintiff;

- In view of what subsequently occurred, it was appropriate for the plaintiff's solicitors, having heard from the plaintiff's engineer, to write on 11 April 2017, pointing to what they regarded as deficiencies in the discovery as originally made by the BRP defendants. Doing so did not constitute delay on the plaintiff's part;

- When the 11 April 2017 letter did not produce a response, it was appropriate for the plaintiff to issue a motion seeking further and better discovery and doing so involve no delay by the plaintiff. In short, none of the foregoing amounts to delay on the part of the plaintiff;

- Having been put by the BRP defendants to the additional time and effort of having to press for further and better discovery and having to issue a Motion in that regard, the Court subsequently made an order, on consent, that the second, third and fourth named defendants pay the plaintiff's costs of that motion (on 18 December 2017). This underlines the appropriateness of the plaintiff's approach and highlights that the delay with regard to the making of full and proper discovery by the BRB defendants was *not* the plaintiff's delay;

- Ms Gagnon's affidavit of 12 October 2017 made discovery of documents which *should* have been but were *not* included in the first affidavit of discovery provided by the BRP defendants;

Further post - commencement delay by the BRP defendants

- It took one year and 9 months for the BRP defendants to make proper discovery (i.e. 21 months from the initial request to the second of the affidavits of discovery). The plaintiff was not responsible for any delay during that period, in my view;

- A sub-set of the aforesaid 21 months is the period of 13 months between the *first* affidavit of discovery sworn on behalf of the BRP defendants (Mr. Girard's of 15 September 2016) and their *second* affidavit of discovery (Ms Gagnon's of 12 October 2017). This delay was *exclusively* the fault of the BRP defendants in my view.

- It is common case that the further and better discovery made by the BRP defendants comprised 17 items and some emphasis was placed during oral submissions on behalf of the BRP defendants on that relatively small number. In my view, nothing turns on the figure itself. The point is, rather, the crucial role which discovery plays in the litigation-process by ensuring that documents which are relevant and necessary are made available to the parties and, ultimately, to the Court, in furtherance of the interests of justice. Thus, whether a defendant omits to make discovery of 1 document, which is relevant and necessary to a fair disposal of matters in dispute, or 101 such documents, or, in this case, 17, the central point is a failure to discharge, at the first time of asking, the important duty to make full discovery. Whilst there is no suggestion whatsoever of the omission being other than an innocent mistake as to the scope of searches, it was *not* the plaintiff's mistake and responsibility for the delay with regard to the making of full and proper discovery must rest with the BRP defendants, in my view.

13 October 2017

157. By letter dated 13 October 2017, McCann Fitzgerald wrote to the plaintiff's solicitors with respect to the plaintiff's motion for further and better discovery returnable as of 16 October 2017. The said letter enclosed a copy of Ms. Gagnon's 12 October affidavit and went on to state *inter alia* that: *"Our client's additional discovery is downloadable from a secure online platform, the details of which have been emailed to your company email… You will have a period of 7 days from today's date in which to download the documentation, after which the link will expire. Please arrange to have the motion struck out on 16 October 2017 on the basis that we do not object to your client getting the costs of that motion"* (emphasis added). The foregoing recognises (i) the fact that it had been necessary for the BRP defendants to make *additional* discovery; and (ii) the reality that the plaintiff's motion for further and better discovery was appropriate; and that (iii) the BRP defendants' were responsible for the additional cost to which the plaintiff had been put (also involving, self-evidently, additional time).

18 December 2017

158. On 18 December 2017, the plaintiff's motion seeking Further and Better Discovery as against the BRP defendants came before the Court. In the manner examined previously, that motion gave rise to an affidavit (sworn on 12 October 2017 by Ms. Gagnon) in which further and better

discovery was made by the BRP defendants. Against that backdrop, the Court (Cross J) ordered, by consent, that the motion be struck out and that the second, third and fourth named defendant pay the costs of the motion to the plaintiff to be taxed in default of agreement.

The position at the end of 2017

159. I pause at this juncture to make the following observations regarding the *status quo* as the year turned:

(i) The plaintiff had progressed his case with, at least, the expedition one would reasonably expect;

(ii) By contrast, there had been a considerable period of delay by the BRP defendants;

(iii) Leaving aside the fact that it took the BRP defendants a full 8 months to make discovery, a *further* 13 months elapsed between the first and second affidavits of discovery, which delay was exclusively the fault of the BRP defendants, who failed to make full and adequate discovery at the first attempt;

(iv) The BRP defendants' failure to make full discovery on the first occasion necessitated the bringing of a motion by the plaintiff;

(v) Prior to that, the second defendant (one of the three moving parties in this dismissal motion) delayed in the delivery of its defence (5 months having elapsed between service of the Personal Injuries Summons and the second defendant's Defence);

(vi) This, too, had required the plaintiff to bring a motion;

(vii) The evidence before the Court does not allow for any finding that the plaintiff was not simultaneously taking steps relevant to the progress of his case, despite being met with the foregoing delay and increased burden on it, in terms of procedural motions;

160. It seems to me that for the BRP defendants to have consented to an order for costs *against* them, on 18 December 2017, was for them to acquiesce in respect of any *prior* delay by the plaintiff (even though, in the manner examined in this judgment, I do not regard the plaintiff as being guilty of such delay, as 2017 became 2018). Having made those observations, I now continue with the chronology.

13 February 2018

161. It will be recalled that the plaintiff was under the care of *inter alia* Mr. Dominic Hegarty, consultant in pain relief, who first reported on 29 January 2016. At para. 14.13, Mr. Boland avers that:-

"*The plaintiff was reviewed on several occasions thereafter by Dr. Hegarty. Your deponent took up a follow up report on the 2nd February 2018 and a follow up report dated the 13th February 2018 was furnished by Dr. Hegarty. Unfortunately, Dr. Hegarty left the public system and proceeded to practice on a private basis only which meant that he was unable to provide any major interventions to the plaintiff which left the plaintiff in limbo for some time and he found himself in the unenviable position where nobody was treating him within the public system for his severe pain. The plaintiff was eventually placed on Dr. Paul*

Murphy's neuromodulation list in Dublin as he was deemed to be a very severe case". (emphasis added)

25 May 2018

162. On 25 May 2018, the plaintiff filed an Affidavit of Verification with respect to the contents of the plaintiff's 'Notice of Further and Better Particulars of Negligence and Breach of Duty' dated 16 December 2015; the plaintiff's 'Replies to Particulars' dated 26 January 2016; and the plaintiff's 'Notice of Further Particulars of Personal Injury' dated 20 September 2016.

18 June 2018

163. With respect to the plaintiff's claim for loss of earnings, as of June 2018 the plaintiff had obtained a report from Mr. Peter Lally of O'Brien Cahill & Co. and these details were particularised by letter dated 18 June 2018 (see averments by Mr. Boland at para. 14.15 of his 11 April 2022 affidavit).

164. On 18 June 2018, the plaintiff's solicitors also served 'Updated Particulars of Loss and Damage' on the solicitors for the BRP defendants. This 4-page document referred *inter alia* to: *"The analysis that has been prepared by the plaintiffs experts";* considerations by *"the plaintiff's actuary;* as well as to *"the advices of the Rehabilitation Consultant retained"*. It set out, *inter alia*, projected profits in relation to the plaintiff's business (2012 to 2017); a computation of loss of earnings, including calculations in respect of taxation, PRSI and USC; and specified the assumptions relied upon. A calculation was also given in respect of "*Future prostheses costs*".

2018 – 3 outstanding issues

165. At para. 14.14 of his 11 April 2022 affidavit, Mr. Boland avers *inter alia* that:-

"*It was felt in the course of an aids & appliances review with Ms. Fiona Barry in 2018 that other options should be explored to include lighter options that would help significantly to alleviate phantom pain and significantly increase functionality"* (emphasis added). He proceeds, at para. 14.15, to aver *inter alia* that: *"At this stage of the proceedings there were three major outstanding issues, namely, (i) quantifying the loss of earnings, (ii) finalising the liability evidence and (iii) exploring and costing the prosthetics".*

3 July 2019 – first reservation of rights regarding delay

166. By letter dated 3 July 2019, McCann Fitzgerald wrote to the plaintiff's solicitors, on behalf of the BRP defendants, in the following terms:-

"*Dear sirs,*

The accident in this case occurred on 9 June 2012, proceedings were issued on 25 April 2014 and notice of trial was served by you on 19 August 2015. We understand that the solicitors for the first defendant are still awaiting replies to particulars regarding your client's claimed loss of earnings. We note also that you have not served on us a schedule pursuant to O. 39,

r. 46 (1) or served on us the documents and information referred to in s. 45 (1) (a) (iii), (iv) and (v) of the Courts and Courts Officers Act 1995.

We reserve our client's rights in respect of the delay in prosecution of these proceedings.

Yours faithfully".
(emphasis added)

167. The foregoing letter did a number of things: -

(i) The BRP defendants reserved their rights in respect of the plaintiff's delay (namely, their entitlement to seek a *dismissal* of the case without a trial); and simultaneously

(ii) Drew the plaintiff's attention to two matters which required to be done in the context of progressing the case to *trial,* namely:

(iii) Replies to the first named defendant's Notice for Particulars in respect of the plaintiff's loss of earnings claim remained outstanding; and

(iv) Compliance with the provisions of SI 391 of 1998, had not yet occurred.

24 July 2019

168. On 24 July 2019, the plaintiff's solicitors furnished Replies to Particulars to the solicitors for the first named defendant, with respect to the plaintiff's loss of earnings.

November 2019 – Prosthetics – UK review

169. At para. 15 of his 11 April 2022 affidavit, Mr. Boland avers that the plaintiff was assessed by Mr. Ian Jones, prosthetist, who looked at various options and who referred the plaintiff to Dorset Orthopaedics in order to review the plaintiff's suitability for what is described as "*. . . possible higher Targeted Muscle Reinnervation and Osseointegration given that phantom pain was a large problem for the plaintiff and this problem was not being alleviated by medication alone and the plaintiff was waiting for years for treatment on a public neuromodulation list and all the limitations that this entails*". Mr. Boland proceeds at para. 16 of the same affidavit to aver that he duly briefed Dorset Orthopaedics with a complete file to enable them to review the plaintiff and that, in November 2019, the plaintiff travelled to England and received an initial review. Mr. Boland proceeds to aver that the plaintiff:

"*…was told that he could go for a formal MDT assessment which would involve photographic investigations, x–rays and tissue sampling to decide if his system was suitable for targeted muscle reinnervation and osseointegration which had huge potential to limit his phantom pain and give him much more increased functionality if sensors were applied*".

170. It seems to me that the foregoing represented a material step to progress the plaintiff's treatment, and one of relevance to any future trial. I say this because there is plainly a difference between a plaintiff who presents, at trial, as someone who claims to be suffering long–term pain and decreased functionality, as opposed to someone who, due to specialist medical-intervention in the form of more advanced prosthetics, is suffering reduced pain and increased functionality.

The distinction between those scenarios would seem to me to speak directly to issues including the quantum of general damages in those two different scenarios. As to what subsequently happened, see the entry for 2 February 2020.

2 - 5 February 2020 – multidisciplinary team reviews – UK

171. Having travelled to England in November 2019, and having been reviewed by Dorset Orthopaedics, the plaintiff was told that he could go for a formal multidisciplinary team assessment. At para. 16 of his 11 April 2022 affidavit, Mr. Boland makes the following averments with regard to the prosthetic treatment suggested by Dorset Orthopaedics:-

"*The plaintiff was suffering from very bad phantom pain, and he was clinging to the fact that this prosthetic treatment might reduce his pain. He duly discharged approximately €4,000 for an MDT assessment which occurred on the 2nd February 2020 and he was further reviewed on the 5th February 2020 in England".* (emphasis added)

29 April 2020

172. In the manner explained earlier, the plaintiff was initially reviewed by Dorset Orthopaedics in England in November 2019 and subsequently underwent a multidisciplinary team assessment on 2 February 2020 and a further review on 5 February 2020 in England. At para. 16 of his 11 April 2022 affidavit, Mr. Boland proceeds to aver that:-

"*Further details were furnished to Mr. Moose Baxter, prosthetist, of Dorset Orthopaedics and a report finally issued on the 29th April 2020".* (emphasis added)

173. At para. 17 of his affidavit, Mr. Boland proceeds to make the following averments: -

"*I say that senior counsel advised it was essential, now that Mr. Baxter's report was available, that a report recommending targeted muscle reinnervation and osseointegration would have to be supported by the plaintiff's medical team. I commenced with Dr. Dominic Hegarty, being the plaintiff's key pain relief doctor…".*

174. I am entitled to take it that it took some time to review Mr. Baxter's report; to brief senior counsel; to receive advice from him; and to secure an appointment for the plaintiff with Dr. Hegarty. It will also be recalled that Mr. Baxter's 29 April 2020 report came during the first national "lockdown" as a result of the Covid–19 pandemic and government restrictions.

175. Although the plaintiff can fairly be criticised for not keeping the BRP defendants updated, the evidence examined thus far allows for a finding that during the delay period, the plaintiff (and his solicitors, medical advisors, and counsel) were taking steps which were relevant to progressing the case and material to issues, such as quantum, which a trial Court would be asked to decide.

30 June 2020

176. The Forensic Accountants retained by the BRP defendants (Hyland & Co) produced a report, dated 30 June 2020 (see the BRP defendants' disclosure schedule, dated 23 December 2020).

20 October 2020

177. It will be recalled that, in the wake of the 29 April 2020 report by Mr. Baxter, prosthetist, of Dorset Orthopaedics, the plaintiff's solicitor obtained advice from senior counsel who opined that it was essential that Mr. Baxter's recommendations would have the support of the plaintiff's medical team. It will further be recalled that the plaintiff's solicitor commenced with Mr. Dominic Hegarty, the plaintiff's key pain relief doctor. At para. 17 of his 11 April 2022 affidavit, Mr. Boland avers that Mr. Hegarty "*duly saw the plaintiff on the 20th October 2020".* (emphasis added)

27 October 2020 – second reservation of rights regarding delay

178. By letter dated 27 October 2020, McCann Fitzgerald, solicitors for the BRP defendants, wrote to the plaintiff's solicitor in the following terms:-

> "*These proceedings were instituted over six years ago and concern an accident which occurred in 2012. The ongoing delay is both inordinate and inexcusable.*
> *Strictly without prejudice to our clients' rights in that regard, we await hearing from you about exchange of experts' reports within 14 days.*
> *Yours faithfully".*(emphasis added)

179. It is fair to say that, by means of the 27 October 2020 letter, the BRP defendants put the plaintiff on notice of *two* potential scenarios. In the first scenario, the BRP defendants would apply to dismiss the proceedings on delay grounds. That is a very obvious inference from the use of the words "*the ongoing delay is both inordinate and inexcusable*" and "*strictly without prejudice to our clients' rights in that regard*….". The second potential scenario is that the case would run to a full trial. That is a very obvious inference to be drawn from the use of the words "*we await hearing from you about exchange of experts' reports within 14 days*".

180. It is equally uncontroversial to say that, when the BRP defendants gave instructions to send this letter, dated 27 October 2020, they did so full in the knowledge of (i) the delay on the plaintiff's part, of which they complained; and (ii) the effect on them (in terms of asserted prejudice etc.) of that delay. In other words, whilst making clear that one option available to the BRP defendants was to seek the dismissal of the proceedings on delay grounds, the alternative option of defending the case fully at a future trial, notwithstanding such prejudice as allegedly suffered by the BRP defendants, was also communicated.

The position as of October 2020

181. With respect to the 27 October 2020 letter, the position can be summarised as including the following:-

(i) 15 months earlier (by letter dated 3 July 2019) McCann Fitzgerald reserved their clients' rights in respect of delay;

(ii) The BRP defendants could have brought a motion to dismiss the proceedings on delay grounds, in July 2019, or at any time between then and October 2020;

(iii) For whatever reason, the BRP defendants chose not to;

(iv) As the various entries in the aforesaid chronology demonstrate, the plaintiff took meaningful steps to progress his case before and *after* July 2019;

(v) The BRP defendants could have brought an application to dismiss the plaintiff's claim on grounds of delay immediately after their solicitors served the said 27 October 2020 letter;

(vi) For whatever reason, no such motion was issued;

(vii) In the manner presently explained, this is not a situation where the letter of 27 October 2020 fell on 'deaf ears';

(viii) On the contrary, both the plaintiff and the BRP defendants took active steps to progress the case towards a trial *after* the 27 October 2020 letter.

24 November 2020

182. At para. 14.2 of Mr. Boland's 11 April 2022 affidavit, he makes inter alia the following uncontroverted averment:-

"*Dr. John O'Mahoney SC advised in November 2020 that Mr. John Sullivan, automotive assessor, should be enlisted to assist Mr. Kevin O'Mahoney, marine engineer, who would be dealing with three or four engineers for the defendants. Mr. John Sullivan was briefed on the 24th November 2020".* (emphasis added)

24 November 2020 – Plaintiff's Disclosure Schedule (SI 391/98)

183. On 24 November 2020, the plaintiff's solicitor delivered the plaintiff's first disclosure schedule in compliance with S.I. 391 of 1998. It is appropriate to set out its contents *verbatim* as follows:-

"TAKE NOTICE that the following are the details required by the above statutory instrument of the plaintiff's witnesses and reports in respect of these proceedings.

Non-expert witnesses

1. Plaintiff
2. Plaintiff's wife
3. Mr. Daniel O'Donoghue
4. Mr. Brendan Murphy
5. Mr. Paul Byrans
6. Mr. Dick Gibson

Expert witnesses

1. Ms. Patricia M. Coughlan	*rehabilitation consultant*
2. Seagrave Daly Lynch	*consulting actuaries*
3. Mr. Kevin P. O'Mahony	*consulting marine engineer*
4. Mr. Peter Lally	*O 'Brien Crowley accountants*
5. Ms. Fianna Barry	*occupational therapist*
6. A prosthetist	
7. Technomarine Ltd	
8. Mr. Padraig Murphy	*consulting engineer*

9. Mr. John G. O'Sullivan	*automotive engineer*

Medical witnesses

1. Dr. Greg Murphy	*general practitioner*
2. Dr. John McFarlane	*rehabilitation consultant*
3. Mr. Pat Fleming	*consultant orthopaedic surgeon*
4. Dr. Mairead O'Leary	*psychiatrist*
5. Dr. Dominic Hegarty	*pain relief consultant*
6. A radiologist	
7. Dr. Paul Murphy	*pain relief consultant*
8. Dr. Fiadhnait O'Keeffe	

Expert reports

1. Patricia Coughlin	*Report 01.04.16*
2. Seagrave Daly Lynch	*Report 15.01.18*
3. Mr. Kevin P. O'Mahony	*Report 06.03.14*
	Report 16.03.17
	Report 04.07.17
	Report 19.02.18
4. Technomarine Ltd	*Report 23.07.12*
	Report 28.08.12
5. Mr. Peter Lally	*Report 06.11.17*
	Letter 24.07.19
6. Ms. Fianna Barry	*Report 27.08.18*
7. Prosthetist	*Report unavailable*
8. Mr. Padraig Murphy	*Report unavailable*
9. Mr. John G. O'Sullivan	*Report unavailable*

Medical reports

1. Dr. Greg Murphy	*Report 30.05.13*
	Report 14.07.15
2. Dr. John McFarlane	*Report 13.01.20*
3. Mr. Pat Fleming	*Report 24.03.16*
4. Dr. Mairead O'Leary	*Report 27.10.15*
	Report 13.01.16
	Report 22.06.18
	Report 06.10.19
5. Dr. Dominic Hegarty	*Report 22.02.16*
	Report 22.06.18
	Report 24.09.18
6. A radiologist	*Report unavailable*
7. Dr. Paul Murphy	*Report unavailable*

8. Dr. Fiadhnait O'Keeffe *Report unavailable*

Special Damages

Travel & miscellaneous	*€3,000*
Maher Sports Therapy	*€600*
Aids and appliances	*€7,486.56*
Dr. Hegarty consultations	*€400*

The plaintiff reserves the right to furnish further details of Special Damages as same arise

Loss of earnings
Losses to 30.12.17 after taxation amount to €173,519.00

Continuing losses per annum at that time amount to €59,416.00 and €39,595.00 before and after tax, respectively.

Present weekly net losses are estimated at €850/€900 per week before deduction of Social Welfare.

The plaintiff reserves the right to add or delete from this Schedule.

Dated the 24th day of November 2020"

184. In the manner I will return to later, it is clear from the contents of this Schedule that, even though the plaintiff had not delivered formal pleadings from December 2017 onwards, it is certainly not the case that he was taking no steps to progress his case. The dates of the reports, listed in the aforesaid Schedule, illustrate this (including reports dated 2018; 2019; and 2020).

23 December 2020 – BRP Defendants' Disclosure Schedule (SI 391/98)

185. The BRP defendants delivered their disclosure schedule, on 23 December 2020, pursuant to S.I. 391 of 1998. It stated the following:-

"Pursuant to SI 391 of 1998, we inform you that the BRP defendants will call the following witnesses at the hearing of the action:

Witnesses of fact
1. Toddcraft (BRP US, Inc.)
2. Mike Loach (BRP UK and Ireland)
3. Michael Connelly (Ballycotton Marine Services)

Experts
4. Kevin Breen, consultant marine engineer, Engineering Systems Inc. ("ESI")
5. Mr. James Colville, orthopaedic surgeon

6. Ciara McMahon, vocational consultant

7. Sarah Kearns, Hyland & Co., consultant forensic accountants

8. Mr. Stephen Young, neurosurgeon

9. Mr. Jack Phillips, neurosurgeon

10. Professor T. Dinan, consultant psychiatrist

The BRP defendants' schedule of expert reports is as follows:

- *Kevin Breen, consultant marine engineer, ESI – Draft Report dated 29 September 2014 and Report dated 12 June 2019*
- *Ciara McMahon, vocational consultant – Report dated 31 July 2017*
- *Sarah Kearns, Hyland & Co., consultant forensic accountants – Report dated 30 June 2020*
- *Mr. James Colville, orthopaedic surgeon, Report dated 5 September 2016 and Addendum dated 21 September 2016*
- *Mr. Jack Phillips – neurosurgeon – Report dated 9 May 2018*
- *Mr. Stephen Young – neurosurgeon – Report dated 13 March 2019*
- *Professor T Dinan, psychiatrist – Report dated 24 January 2018…"*

Please note that the BRP defendants expressly reserve the right to alter the schedule of reports and witnesses pursuant to SI 391/1998 and do not waive the confidentiality and privilege that attaches to these reports by giving you copies of the reports pursuant to Order 39, rule 46(6).

Note also that we will serve on you a copy of the above experts' reports subject to your duty and undertaking pursuant to Harrington v. Cork County Council not to share in any way or to any extent a report with an expert for whom you are not simultaneously exchanging a report with us, until after you have served on us a report from that expert.

We note from your schedule that in one instance you list an expert merely as "A Prosthetist" without saying who the individual is or whether he or she has done a report. In the case of "Technomarine Ltd", which you also list as an expert, you do not say what this expert is or the date of its/his/her report. We reserve our clients' right to serve report(s) in respect of these reports, or either of them, if served by you.

We propose to exchange our clients' reports listed above simultaneously with yours by email on Tuesday 12 January 2021 at 10.30 am. Please let us know whether that time and date suit." (emphasis added)

186. A disclosure schedule is prepared and served in the context of preparing for a *trial.* It has no other function.

187. As is clear from the foregoing, *"Michael Connelly (Ballycotton Marine Services)"* is identified as a witness of fact and *"Kevin Breen, Consultant Marine Engineer, Engineering Systems Inc ("ESI")"* is identified as an expert witness.

12 January 2021 – exchange of experts' reports

188. Expert's reports were exchanged as between the plaintiff and the BRP defendants, on 12 January 2021, in the manner *proposed* by McCann Fitzgerald in the final paragraph of their client's S.I. 391/1998 disclosure schedule, dated 23 December 2020.

189. It is clear that the delivery of this disclosure schedule and the furnishing, to the plaintiff, of the reports averred to therein represents steps of the most material sort to progress the proceedings towards a trial. Notwithstanding the foregoing, the BRP defendants submit that this exchange of disclosure schedules and experts' reports occurred during a period of inordinate and inexcusable delay by the plaintiff. I do not agree. In my view the plaintiff's delay terminated with the service of their Disclosure Schedule on 24 November 2020 to which the BRP defendants responded.

Said v. Did

190. Some 18 months earlier (by letter dated 3 July 2019) the BRP defendants *reserved* their rights in respect of the plaintiff's delay in prosecuting the proceedings (and did so again by letter dated 27 October 2020). However, it seem to me that the Court must have regard, not only to what the BRP defendants *said*, through their solicitors, but what they *did.* Without doubt, what they did was to progress the case towards a trial, whilst taking no action whatsoever on foot of the delay 'rights' repeatedly reserved.

191. It also seems fair for the Court to ask the following question: what would a reasonable party, possessed of the information available to the plaintiff, make of the exchange of experts' reports by the BRP defendants in January 2021? It seems to me that someone in that position could be forgiven for believing that the reservation of rights with respect to delay made a year and a half earlier no longer had meaning. Why? Because, subsequent to 3 July 2019:-

(i) the plaintiff had taken active steps to progress his claim, as the BRP defendants well knew, including service of the plaintiff's disclosure schedule, dated 24 November 2020, pursuant to S.I. 391/1998;

(ii) the BRP defendants had called for the service by the plaintiff of such a schedule;

(iii) the BRP defendants had delivered their own disclosure schedule, pursuant to S.I. 391/1998;

(iv) the BRP defendants had 'followed up' by proposing to exchange and then exchanging with the plaintiff the expert's reports referred to in the respective schedules; and

(v) during the 18 months which elapsed between 3 July 2019 (first reservation of rights with respect to delay) and 12 January 2021 (exchange of expert's reports) there had been no 'follow through' whatsoever, by the BRP defendants, by way of action with respect to the delay issue.

192. With reference to the old adage that 'actions speak louder than words', it is fair to say that the only *actions* taken by the BRP defendants after 3 July 2019 were directed at progressing the case towards a trial, even though *words* were used on that date (and, again, on 27 October 2020), reserving the right to take action with respect to delay.

193. As will presently be seen, this distinction between what the BRP defendants said, as opposed to what they did, remained the case for a period of over two years and seven months i.e., from 3 July 2019 (the first time rights were reserved with respect to the plaintiff's delay) to 7 February 2022 (when the BRP defendants finally issued a motion seeking to dismiss the plaintiff's claim on delay grounds). It is uncontroversial to say that the BRP defendants were (i) fully aware of that two year and seven month 'gap'; and (ii) equally aware of the steps taken by the plaintiff and by them during that gap, before they decided to issue the present motion.

29 January 2021

194. In circumstances where the plaintiff's senior counsel advised, in November 2020, that Mr. John Sullivan, automotive assessor, be retained in addition to the plaintiff's marine engineer, Mr. O'Mahoney, an initial report was furnished by Mr. Sullivan on 29 January 2021. This is averred at para. 14.2 of Mr. Boland's 11 April 2022 affidavit, wherein he also avers that Mr. Sullivan was briefed on 24 November 2020 and that he reviewed all documentation and discovery prior to furnishing his initial report.

15 February 2021

195. Mr. Boland avers at para. 14.3 of his 11 April 2022 affidavit that:-

"*Liability evidence was duly exchanged by the parties on foot of simultaneous disclosure by letter dated the 15th February 2021*". (emphasis added)

19 February 2021

196. By letter dated 19th February 2021 the plaintiff's solicitor wrote to the first named defendant's solicitors stating *inter alia: "… we will only be able to confirm the position about Mr Padraig Murphy once your engineers have reverted to us with their comments as to the updated engineering evidence and counsel considers whether we should instruct Mr Murphy to prepare a report for disclosure purposes. Please revert as to whether you will agree the Technomarine report. Otherwise we may have to bring the report writer from abroad to give evidence which will be costly"* (emphasis added). For the sake of clarity "*Mr Padraic Murphy Consulting Engineer*" is listed as an expert witness on the plaintiff's disclosure schedule.

5 March 2021 – BRP defendants' accountants agree Plaintiff's loss of earnings figures

197. Mr. Peter Lally, who prepared the first report in respect of the plaintiff's loss of earnings "*Left employment with O'Brien Cahill and Mr. Edward Cahill prepared a further report on the 5th March 2021 where the figures therein were agreed in amount with the defendant's accountants"* (emphasis added). The foregoing is averred by Mr. Boland at para. 14.15 of his 11 April 2022 affidavit. Under cover of a letter, dated 5 March 2021, Mr Cahill (of "O'Brien Cahill & Co, Accountants, Auditors, Tax Advisers & Forensic Accountants"), wrote to the plaintiff's solicitor

enclosing his final report. That letter stated, *inter alia* that: *"I calculated plaintiff's pre-accident earnings in the sum of €40,613. James Hyland & Co. are in agreement with this figure. I used an annual sales uplift of 10% per annum whereas James Hyland and, have used CSO average construction earnings figures. In retrospect, I agree that the CSO approach is probably more suitable…"* (emphasis added). The reference to James Hyland & Co is a reference to the Forensic Accountants retained by the BRP defendants.

198. It seems to me that for loss of earnings figures to be *agreed* between the accountants representing the plaintiff and BRP defendants, respectively, constitutes material progress directed towards a future *trial.* Regarding the reference to "*James Hyland and Co*", that the second page of the 23 December 2020 Schedule furnished by McCann Fitzgerald, to the plaintiff's solicitors, pursuant to S.I. 391 of 1998, identifies, inter alia the following expert: "*Sarah Kearns, Hyland & Co, Consultant forensic accountants report dated 30 June 2020."* (emphasis added)

15 March 2021

199. The plaintiff's solicitor contacted Mr. John McFarlane, the plaintiff's vocational consultant, on 15 March 2021. The latter responded to say that he could not comment, because he did not have medico–legal insurance (see averments by Mr. Boland at para. 17 of his 11 April 2022 affidavit).

19 March 2021 – Plaintiff's updated Disclosure Schedule

200. By letter dated 19 March 2021, the plaintiff's solicitors wrote to McCann Fitzgerald stating:

> "*Further to our exchange of reports on 19 January 2021, we now enclose updated Disclosure Schedule together with report of Edmond P. Cahill, O'Brien & Cahill & Co. dated 5 March 2021, pursuant to Statutory Instrument no. 391 of 1998".*

201. It will be recalled that the "expert witnesses" section of the plaintiff's first disclosure schedule (dated 24 November 2020) contained *inter alia* the following entry: "*4. Mr. Peter Lally – O'Brien Crowley Accountants",* and reference was made to Mr. Lally's "*report 06.11.17; letter 24.07.19*". This updated disclosure schedule of 19 March 2021 referred *inter alia* to the following expert witnesses:-"*4. Mr. Peter Lally/Edmond P. Cahill – O'Brien Cahill Accountants*". The "*expert reports*" section contained *inter alia* an updated entry as follows:-

"*5. Mr. Peter Lally*	*Report 06.11.17*
	Letter 29.03.19
	Letter 10.07.19
Edmond P. Cahill	*Report 05.03.21".*

202. The fact and content of this updated disclosure schedule of 19 March 2021 allows for a finding that the plaintiff was actively progressing his claim, with a focus on a future trial and that the BRP defendants were well aware of this. Indeed, in the manner previously examined, their actions were similarly directed.

March, April, May 2021

203. Earlier, I made reference to the recommendations by Mr. Baxter, prosthetist, of Dorset Orthopaedics, and subsequent advice from senior counsel as to the need for the plaintiff's medical team to support those recommendations. At para. 17 of his 11 April 2022 affidavit, Mr. Boland avers *inter alia* that:-

> "*Mr. Fleming, orthopaedic surgeon with a speciality with upper limb injuries (who carried out the initial operation) was canvassed on the 15th March 2021 and he responded to the effect that he would support this treatment regime if the plaintiff felt that he could benefit from it. Mr. K. Mahalingam, orthopaedic surgeon, was canvassed on the 20th April 2021 and he reviewed the plaintiff on the 12th May 2021 and he reported on the 12th May 2021 that he would support the targeted muscle reinnervation and the osseointegration. I say that in the interim, the plaintiff had been waiting, as already explained, on Dr. Paul Murphy's neuromodulation list in Dublin and he was reviewed by Dr. Murphy's team in April 2021. It was decided that he should continue with his prosthetic investigations".* (emphasis added)

16 April 2021 – BRP defendants' requirements regarding proposed inspection

204. On 16 April 2021, Mr. Bourke, solicitor for the BRP defendants, sent an email (16:51) to the plaintiff's solicitor in relation to the then–proposal "to open up the switch to inspect its inside" and the importance of ensuring that an engineer from the BRP side was present the contents were as follows:-

> "*Dear sirs,*
>
> *We refer to your correspondence saying that your client's engineer proposes to open up the switch to inspect its insides. You did not tell us when the inspection is proposed to take place. Please ensure that we have adequate notice so that a person can attend on behalf of our client we need to know the proposed location, date and time, and to have adequate notice so that arrangements can be made if the proposed date and time is suitable.*
>
> *We reserve our client's rights about the continuing delay in the case".* (emphasis added)

Third reservation of rights regarding delay

205. Although this communication plainly *reserved* the right of the BRP defendants to apply to dismiss these proceedings on delay grounds (just as previous correspondence dated 3 July 2019 and 27 October 2020 had done) it is equally clear that it also constituted engagement between the BRP defendants and the plaintiff which focused on a highly relevant aspect of the case and sought to *progress* matters in the context of a trial (specifically a joint engineering inspection at which the engine's switch would be opened up – something utterly unnecessary if no trial was ever to take place). In the manner presently explained, the 'opening up' ultimately occurred over 6 months later, on 1 October 2021.

206. It is also fair to say that the contents of this 16 April 2021 email speak to the logistical difficulties of arranging a date and time which would suit all parties. In other words, although there was a delay between the suggestion of opening up the switch and the point at which it

was, in fact, opened up, it is not the case that all of this delay could fairly be attributed to the plaintiff (as opposed to the delay being a function of the diary-requirements of the relevant parties, as well as the unfortunate passing of one of the first named defendant's experts, Mr. Cliff, as will be referred to again presently).

22 April 2021

207. On 22 April 2021, McCann Fitzgerald sent an email (11:57) to the plaintiff's solicitors as follows:-

> "***OUR CLIENT: BRP***
>
> *Dear Sirs,*
>
> ***Opening of device***
>
> *We learnt on Tuesday afternoon, 20 April 2021, from Michael Connolly that he had heard from your engineer that the opening up of the device has been organised for 11 May 2021. This date was set without any consultation with us and is unsuitable, because our expert Kevin Breen has other professional commitments on that day which he cannot get out of. Mr. Breen will attend the opening up of the device by video link on a suitable time and date. Would you please propose to the parties' solicitors by email alternative dates and times, so that each party's experts can attend. We also intend to have Mr. Michael Connolly there as a witness of fact, but counsel has directed that it is essential that Mr. Breen attend by video link, given that he is our client's listed expert.*
>
> *We are copying the solicitors for Marine Motors.*
>
> *We note that you await further expert report or reports. Please inform us who are the experts, when are their reports expected to be delivered, and are the conditions of Harrington undertakings being applied in instructing them?*
>
> *We continue to reserve our client's rights in every respect, including the ongoing extraordinary delay in the prosecution of this case, almost 9 years after the accident.*
> *We also reserve our client's right to serve further reports in response to your client's awaited reports.*
>
> *Yours faithfully,"* (emphasis added)

Fourth reservation of rights regarding delay

208. The foregoing can be said in relation to this communication: (i) once again, the BRP defendants *reserved* their rights to bring an application to dismiss these proceedings on delay grounds (just as their solicitors had done on 3 July 2019; 27 October 2020; and on 16 April 2021) but without *acting* on those 'rights' reserved; (ii) it is equally clear that the BRP defendants were simultaneously engaging with the plaintiff's solicitors on the preparation of the case towards a *trial*; (iii) furthermore, a certain amount of delay was caused by the necessity for an inspection

to suit the experts retained by the BRP defendants themselves; and (iv) effort and cost was being incurred by the plaintiff as a direct consequence of the engagement by the BRP defendants (e.g., the costs of having an expert attending the joint–engineering inspection as well as the cost of furnishing to the BRP defendants the expert's report(s), to which the BRP defendants reserved a right to respond by means of the service of "*further reports*").

209. Even if the use of *words (*reserving the BRP defendants' rights with respect to delay) prevent this Court from describing the *actions* of the BRP defendants, as of April 2021, and the consequence of those actions for the plaintiff, as 'acquiescence', it is something so close to acquiescence as makes no difference, in my view.

May – July 2021

210. Between paras. 14.4 and 14.6 of Mr. Boland's 11 April 2022 affidavit, he makes averments with regard to efforts made "*. . . to open the very fragile ignition system within the engine*". Mr. Boland avers *inter alia* that ". . . *this was a pivotal moment in terms of the litigation, and all were in agreement that this needed to be approached with care. Therefore, the inspection was again, like much of the litigation, not just a matter of a typical engineering inspection in a personal injuries case".* The letter sent on behalf of the BRP defendants, dated 22 April 2021, is entirely consistent with the foregoing averments. After referring to communication between engineers retained by the various parties, Mr. Boland and makes, inter alia, the following averments: -

> "*Matters dragged on over months and during the summer months, Mr. O'Mahoney became totally frustrated by his inability to organise a time with the various parties. He had tried to organise the 18th May 2021 and the 1st July 2021 but these were unsuitable and when the summer months intervened the momentum was lost because various parties at various intervals were unavailable".* (emphasis added)

13 July 2021 – Fifth reservation of rights regarding delay

211. By letter dated 13 July 2021, McCann Fitzgerald, solicitors for the BRP defendants, wrote to the plaintiff's solicitors as follows: -

> "*Dear sirs,*
>
> *Please let us know when you expect to be able to serve your client's outstanding reports. Please also let us know when you expect to apply for a trial date. As we have previously pointed out, our client's expert, Kevin Breen, is based in Florida so it will be essential that his availability is taken into account when you seek a trial date.*
>
> *We continue to reserve our client's rights in connection with the extraordinary delay in the prosecution of this case.*
>
> *Yours faithfully".*(emphasis added)

Form v. Substance

212. By means of the foregoing letter, the BRP defendants reserved, yet again, their right to apply to dismiss these proceedings on the grounds of delay. However, it seems to me that, by July 2021, this was a hollow *form* of words, when compared to the *substance* of what both parties to the proceedings were doing. I say the foregoing in circumstances where this was the fifth time, over the course of a two–year period, that the BRP defendants reserved their rights in respect of delay (see communication from McCann Fitzgerald dated 3 July 2019; 27 October 2020; 16 April 2021; 22 April 2021; and this letter of 13 July 2021) without ever applying to dismiss on delay grounds.

213. Furthermore, it is perfectly clear that, during this two year period, between July 2019 and July 2021, meaningful steps had been taken by the BRP defendants and by the plaintiff (including at the *behest* of the BRP defendants) to progress the proceedings towards a trial. The chronology of relevant events which I have set out heretofore, certainly allows for such a finding.

BRP defendants make enquiries concerning a trial date

214. Significantly, whilst the 13 July 2021 letter reserved (for the fifth time in two years) rights with respect to delay (whilst producing no application to dismiss the plaintiff's claim on delay grounds) the BRP defendants simultaneously asked about the timing of an application "*for a trial date*" (emphasis added). Not only that, the 13 July 2021 made clear that their expert witness, Mr. Breen, is based in Florida, and, thus, it would be "*essential that his availability be taken into account when you seek a trial date*" (emphasis added). Thus, whilst in *form* there was a further reservation of rights with regard to delay, in *substance,* both parties were focussing on a trial, taking steps towards same, and communication with each other in that regard.

Akin to acquiescence

215. Thus, I take the view that, as of 13 July 2021, the position of the BRP defendants was, in substance, one of acquiescence in respect of prior delay by the plaintiff, even if, in form, they continued to reserve their rights to seek a dismissal of the plaintiff's proceedings on delay grounds. I describe this as akin to acquiescence, but it is materially the same. The reason I take this view includes:-

(i) The BRP defendants were engaging with the plaintiff, including through their respective engineers, to progress the case towards a trial;

(ii) To ask the plaintiff to take into account logistical issues faced by a Florida-based expert witness for the BRP defendants', with respect to a *trial* date was to co-operate with the plaintiff on progressing the case to a trial which both sides anticipated;

(iii) Although rights with respect to delay were "*reserved*" no less than five times over a two-year period, no application to dismiss the proceedings on grounds of delay was made during that period;

(iv) The court is entitled to take it that engagement by the BRP defendants resulted in the plaintiff incurring further costs;

Two horses

216. It seems to me that by causing their solicitors to write to the plaintiff is reserving delay by letters dated 3 July 2019; 27 October 2020; 16 April 2021; 22 April 2021; and 13 July 2021, the BRP defendants were trying to 'ride two horses'. The destination of the first was an application to dismiss the proceedings on delay grounds. The destination of the second was a trial (and the BRP defendants purported to reserve their rights to elect between these two destinations). However, I am entirely satisfied that, by virtue of what in fact occurred between 3 July 2019 and 13 July 2021, it was no longer possible for the BRP defendants to cling to both mounts. Given the very obvious focus in the 13 July 2021 letter on a *trial* date and the logistics, insofar as the expert witness for the BRP defendants was concerned, I cannot accept that a fifth reservation of rights with respect to delay operates as some 'magic formula' which insulates the BRP defendants against a finding of acquiescence (or something akin to, or so close to same as makes no difference).

217. In short, I am satisfied that, as of 13 July 2021 (if not before), there was something which amounted to acquiescence by the BRP defendants. In my view, this is a very significant and very weighty factor in the particular circumstances of the present case. Given that, at all material times, the BRP defendants were aware of what steps they took (and did not take), it is plainly a factor they were very well aware of before they chose to issue the present motion, some 7 months later.

16 August 2021 – first defendant's reservation of rights

218. By letter dated 16 August 2021, Coakley Moloney, solicitors for the first defendant, wrote to the plaintiff's solicitors to say that their client's forensic locksmith, Mr. Cliff, died some weeks earlier. The letter went on to reserve the first named defendant's rights in respect of delay and the following two points were made at the end of the letter:-

> "*…. the proposed dismantling of the ignition mechanism is further delayed, which is most unsatisfactory, which means a further delay.*
>
> *We will have to assess the position now in the light of this development, and we will certainly have to contemplate a Motion to dismiss the claim for want of prosecution and delay".*
>
> (emphasis added)

219. Several comments seem appropriate at this juncture: -

(i) The unfortunate passing of Mr. Cliff resulted in further delay as regards the efforts to arrange a joint inspection (at which the ignition mechanism would be 'opened up') on a date and time convenient to *all* engineers (including the BRP defendants';

(ii) There is no question of the plaintiff being responsible for this delay;

(iii) This Court is entitled to hold that the first named defendant did, in fact, consider whether any alleged prejudice to it was such as would merit the bringing of a motion to dismiss the plaintiff's proceedings on delay grounds;

(iv) The first named defendant plainly decided that no such motion was appropriate (because no such motion was issued by the first named defendant); and

(v) In light of the foregoing, I cannot accept that the passing of Mr. Cliff can be relied upon by the BRP defendants as prejudice to *them* (given that Mr. Cliff was never their witness and the first named defendant, having contemplated the matter, has brought no motion of the present type).

19 August 2021

220. By letter dated 19 August 2021, the plaintiff's solicitors replied to the first named defendant's solicitors in a letter which began as follows:-

"*We refer to your letter of the 16th August 2021. This is indeed a very unfortunate situation. It is also very unfortunate that your principals dragged their heels in making a decision as to paying the costs of their own witness Mr. Cliff for the inspection which led to the postponement because there wasn't enough time to finalise matters. Furthermore, Mr. Kevin O'Mahoney BE has spent a huge amount of time trying to coordinate Mr. Breen's remote attendance from the USA at a time to dovetail with actual time in Ireland, not to mention facilitating Mr. Cliff's attendance from England so that he could travel to and from Ireland on the day…."* (emphasis added)

221. It will be recalled that Mr Breen is the BRP defendants' expert witness. The foregoing speaks to active engagement by the plaintiff's engineer to try and arrange a joint inspection with participation by engineers representing the first defendant and the BRP defendants, respectively. This comprises efforts to progress the claim towards a trial. The 19 August 2021 letter continued by stating *inter alia* the following: "*we have done our best in difficult circumstances within the Covid pandemic to arrange for the opening up of the system herein…"* Thus, the evidence allows for a finding that, not only was the plaintiff attempting to progress matters with the knowledge and participation of the BRP defendants' expert, restrictions in response to the Covid–19 pandemic caused at least some delay with respect to setting up a joint engineering inspection at which the ignition would be 'opened up'.

222. The said letter concluded in the following terms:-

"*It appears to us that the manufacturers of the system should have representatives in situ to open the system as they designed the system, but we are open to any other suggestions with a view to finalising matters. This would be the ideal solution as this considerably lessens the danger of damaging the internal evidence.*

Alternatively, our Mr. Kevin O'Mahoney BE is prepared to open the lock without prejudice to any internal evidence being compromised or damaged which would compromise the defendant's case in the act of opening the lock. This is not ideal, but at least it will move matters forward. Perhaps you might collaborate with the other defendant and revert too us".

223. The foregoing allows for a finding that the plaintiff, through his solicitors, was actively attempting to 'move matters forward' toward a trial (the specific issue being a joint inspection involving engineers for all parties, including Mr. Breen for the BRP defendants).

19 August 2021

224. By letter dated 19 August 2021, the plaintiff's solicitors wrote to McCann Fitzgerald, solicitors for the BRP defendants stating *inter alia*:-

> "*It appears that the ignition barrel system is so intricate that it is impossible to source anybody to open this within the country as far as we can ascertain at this point in time. The completion of this inspection is in everybody's interest to finalise this inspection. We would suggest if the matter is to complete that BRP should arrange for somebody from their company, with sufficient expertise, to travel to this country to open the lock at the time of the inspection. You will appreciate that both the plaintiff and the other defendant have done their best to source suitable personnel to open this lock and the onus lies on the manufacturers to produce somebody suitable to do this at this stage".*

225. The letter went on to suggest that, in the alternative, the plaintiff's engineer, Mr. O'Mahony, would be prepared to open the lock and the BRP defendants were invited to collaborate with the first named defendant and to revert to the plaintiff.

25 August 2021 – Plaintiff's updated Disclosure Schedule

226. An updated disclosure schedule, pursuant to S.I. 391 of 1998, was prepared by the plaintiff's solicitors, dated 25 August 2021.

31 August 2021 – Sixth reservation of rights regarding delay

227. By letter dated 31 August 2021, McCann Fitzgerald, solicitors for the BRP defendants reserved (for the sixth time) their rights with respect to the plaintiff's delay. However, no motion issued at that juncture. For the reasons explained, the objective observer aware of the history (in particular, from the first such reservation of rights in July 2019) could readily believe this to be no more than a formulaic statement, in stark contrast to the BRP defendants' actions, in terms of preparing for a trial (reflecting the plaintiff's actions as regards progressing the case to trial, the latest example being the following entry).

3 September 2021

228. On 3 September 2021, the plaintiff's solicitor sent an email to McCann Fitzgerald which stated *inter alia*:-

> "*Our Mr. Sullivan is hoping to conduct the inspection in September, and he will contact your Mr. Breen & Mr. Connolly to make arrangements once Marine Motors confirm their representative, now that Mr. Cliff has passed away. Mr. Sullivan is anxious to keep the momentum as to the inspection as he is fully engaged in the High Court for the month of October and we wish to avoid if at all possible, having the matter drift into November. Please confirm that your client accepts that Mr. Kevin O'Mahoney will open this lock without prejudice to any damage that might be caused to the mechanism itself as he is not an experienced locksmith. We are exchanging prosthetic evidence with the other defendants at 12 p.m. on Monday next. Do you have prosthetic reports to exchange? We await hearing from you".* (emphasis added)

7 September 2021

229. Mr. John Sullivan, one of the plaintiff's engineers, sent an email on 7 September 2021 (7:16 a.m.) to Mr. Kevin Breen, one of the engineers retained by the BRP defendants. In this email, Mr. Sullivan stated the following:-

> "*I am acting for plaintiff in the above matter. Kevin O'Mahoney is also acting for plaintiff, and he was, until recently, attempting to arrange an inspection regarding dismantling the ignition switch of the boat. I have recently been instructed by plaintiff solicitor to try and arrange such a joint inspection for the purpose of dismantling the ignition switch".*

230. The email went on to refer to the passing of Mr. Cliff and to attempts by the first named defendant to find a suitable individual to take over his role. Mr. Sullivan went on to propose that a joint inspection take place during the last week of September and stated *inter alia*:-

> "*Would any day, the week of 27th September to the 1st October suit you? The proposed inspection would be in Cork, probably at a hotel near the airport for convenience of all".*

8 September 2021

231. Mr. Breen sent an email to Mr. Sullivan (which was copied to the first defendant and to Mr. Bourke, solicitor for the BRP defendants) at 16:57 which stated *inter alia*:-

> "*First, as I am based in the US, the original plan was for me to attend the inspection and disassembly via a video conference. We can set up a call that would necessitate someone at the inspection to have a computer/camera focused on the activity. In terms of schedule, October 1st would be OK on my calendar. However, given the time zone differences, it would be best to arrange to start mid–afternoon Irish time. Secondly, is there a proposed procedure or protocol to conduct this disassembly. To access the internal parts will require some cutting and permanent alteration of the parts*". (emphasis added)

232. The foregoing comprises an exchange between engineers for the plaintiff and BRP defendants, respectively, with regard to a joint-inspection the sole purpose of which was to prepare for a trial. It fortifies me in the view that by July 2021 if not before (e.g. January 2021 when experts' reports were exchanged) there was something akin to acquiescence on the BRP defendants' part with respect to any prior delay by the plaintiff and that remained the position thereafter.

Seventh reservation of rights with respect to delay

233. Later, on 8 September 2021, Mr. Bourke of McCann Fitzgerald sent an email (17:32) to the plaintiff's solicitors in the following terms:-

> "*We seeking (sic) advice from counsel, and then taking instructions from BRP, about a motion to dismiss for delay and want of prosecution of this litigation, and it will take at least a week or two to come back to you about that. We understand that the solicitors for Marine Motion (sic) (copied) are taking similar steps. In principle we do not see a difficulty with the inspection and disassembly proceeding on 1 October or some other agreed time according to a protocol or procedure which can be agreed among the experts (see below), provided it*

is accepted by the solicitors in the litigation that it would take place strictly without prejudice to the entitlement of any defendant(s) to bring application(s) to dismiss."(emphasis added)

234. If one were to read this email in isolation, it would not allow for a finding of acquiescence, or something akin to acquiescence on the part of the BRP defendants. However, this Court must look at the entire facts and circumstances and, in the manner previously explained, the reality is that, although the BRP defendants had been reserving their rights with respect to delay since July 2019, they had also engaged with the plaintiff, in material ways, as regards progressing these proceedings towards a trial, without ever taking any action on foot of the 'rights' reserved with respect to delay, as months turned into years. In the manner previously explained, if it was ever possible for the BRP defendants to 'ride two horses', that was no longer a legitimate position given their actions which were directed towards trial-preparation (agreeing to the opening up of the mechanism on 1 October 2021, being the latest).

9 September 2021- Eighth reservation of rights regarding delay

235. On 9 September 2021, McCann Fitzgerald sent an email to the plaintiff's solicitors, in response to the latter's of 3 September 2021, wherein the solicitors for the BRP defendants stated:-

"*To avoid a proliferation of prosthetic expert evidence, we do not have a prosthetics expert's report of our own and will rely on that of the co–defendants, Marine Motors.*

Regarding your point below about inspection of the kill switch, it is up to your expert for propose (sic) a satisfactory protocol or procedure so that relevant evidence is not damaged or lost. The expert retained on behalf of our client, Mr. Breen, will give his views on any proposed protocol or procedure to your expert with a view to seeking to proceed with the inspection, strictly without prejudice to our client's rights in respect of your client's delays and the consequence of those delays".

236. At the risk of repetition, the foregoing was yet another example of the BRP defendants engaging with the plaintiff to progress the claim towards a trial. No other inference can be drawn from the reference to "*prosthetic expert evidence*" and the intention of the BRP defendants to "*rely on that of the co-defendants*". The said reliance was plainly in the context of an anticipated trial. There is simply no other context in which the BRP defendants would need "*to rely*" on same. This Court cannot ignore that reality, even though the BRP defendants continued to "*reserve*" their rights to dismiss the proceedings on delay grounds (just as they had used those *words* on multiple occasions during a 27–month period, going back to July 2019, but without ever taking any *action* to dismiss on grounds of delay).

10 September 2021 – Plaintiff's updated Disclosure Schedule

237. By letter dated 10 September 2021, the plaintiff's solicitors wrote to McCann Fitzgerald, solicitors for the BRP defendants in the following terms:-

"*We enclose the following pursuant to Statutory Instrument no. 391 of 1998: -*

(i) Updated disclosure schedule dated 25th August 2021;

(ii) Report of Mr. Moose Baxter, Registered Prosthetist, Dorset Orthopaedic, June 2020.

(iii) Report of Mr. Dominic Hegarty, 8th January 2021.
(iv) Report of Mr. K. Mahalingam, 12th May 2021.
Please now let us have the defendants' reports".

238. Two comments seem to me to be appropriate with respect to the foregoing. First, the fact and content of this correspondence and the accompanying updated disclosure schedule pursuant to S.I. 391/1998 allows for a finding that the plaintiff was continuing to progress his claim towards a trial, with the full knowledge of the BRP defendants. Second, it will be recalled that, in the 23 December 2020 letter from McCann Fitzgerald which contained the BRP defendants' disclosure schedule, attention was drawn to the fact that, in the original disclosure schedule provided by the plaintiff (dated 24 November 2020), reference had been made to "*A Prosthetist*" without that expert having been identified. The 10 September 2021 correspondence identified this expert as Mr. Moose Baxter, registered prosthetist, of Dorset Orthopaedics. In other words, by means of this letter the plaintiff 'filled the gap' previously identified by the BRP defendants, with respect to an expert witness whom the plaintiff intended to rely upon at trial. This court is also entitled to take it that retaining Mr Baxter's expertise came at some cost to the plaintiff. This seems to me to be another example of the plaintiff taking a material step to prepare for a trial (and incurring costs), not only with the full knowledge *of*, but in response to a specific query *by,* the BRP defendants, and fortifies me in the views expressed about acquiescence, or its equivalent, on the part of the BRP defendants in the present motion.

239. Furthermore, this Court is entitled to infer that an experts' report involves time and effort to prepare, as well as communication between relevant parties (such as the plaintiff, his solicitor and the relevant expert). The dates of the experts' reports referred to in the updated disclosure schedule of 10 September 2021 (i.e., June 2020; January 2021; May 2021; and August 2021) illustrate the reality that the plaintiff was actively progressing his claim, even if his efforts were not reflected in terms of the delivery of formal pleadings between June 2020 and August 2021.

April – October 2021

240. On the topic of arranging a joint engineers' inspection to 'open up' the device, Mr. Boland makes *inter alia* the following uncontroverted averments at para 21 of his 30 January 2023 affidavit: "*…the interval between 13th April 2021 and the 1st October 2021 was due to the fact that it was difficult to schedule both of the BRP defendant's engineers and the plaintiff's engineer. I am not suggesting that this delay was due to the defendants alone".*

241. The foregoing averment is borne out by the contemporaneous correspondence which is exhibited, and which also refers to the delays which resulted from the passing of Mr. Cliff, the first defendant's engineer.

Sept/Oct 2021

242. As the evidence examined thus far illustrates, efforts were being made by the plaintiff's engineer to try and organise a joint-inspection with the defendants' engineers to 'open the lock'.

Doing so was relevant to the proceedings and if such a joint inspection could be arranged, it would represent material progress. Mr. Boland also avers, *inter alia,* that Mr. Sullivan canvassed the parties to arrange a date in September 2021. It is also averred that the first named defendant's ignition system expert, Mr. Cliff, passed away and that this was communicated by letter dated 16 August 2021. Mr. Boland goes on to aver that, ultimately, Mr. O'Mahoney agreed to try and open the lock and that:-

> "*. . . on the 1st October 2021 in the presence of everybody, either remotely or otherwise, the lock was opened by Mr. O'Mahoney. I say that everyone had sight of the inside of the ignition system. The ignition system is available for inspection in its opened state if the defendants need a further inspection of the system by a substitute expert".*(emphasis added)

1 October 2021

243. Thus, the inspection and disassembling of the ignition switch used in the RIB engine, the subject of these proceedings, which the plaintiff's solicitors and engineers had been trying to arrange, ultimately took place on 1 October 2021. In the manner explained, this was attended by engineers representing the BRP defendants and the plaintiffs, either physically or virtually.

244. Having regard to the foregoing, it seems to me that the following facts emerge:-

(i) The plaintiff's engineers tried to arrange a joint engineering inspection in 2021;

(ii) Such efforts took several months, as a result of the need to try and facilitate *all* engineers;

(iii) It would not be fair to blame the plaintiff for the time this took (to which the unfortunate passing of the first named defendant's engineer contributed);

(iv) The lock/ignition system was, in fact, 'opened up' on 1 October 2021 with the knowledge and/or participation of engineers for all parties;

(v) The foregoing was, and remains, relevant to any future trial and meant that the engineers representing each party to these proceedings were, and are, in a position to provide to a trial judge *additional* engineering evidence, in the wake of the 1 October 2021 joint-inspection, which they could not have given prior to the 'opening up' of the lock on that date;

(vi) There is no question of any material evidence being missing, in that the ignition system remains available for further inspection, and for a future trial;

(vii) Despite repeatedly reserving their rights with respect to delay, the BRP defendants did nothing between July 2019 and October 2021 (other than engage with the plaintiff's solicitors to progress the case towards trial).

29 December 2021

245. As averred by Mr. Boland at para. 14.7 of his 11 April 2021 affidavit, a report dated 29 December 2021 by Mr. Sullivan, the plaintiff's automotive assessor, was furnished by email to the plaintiff.

7 January 2022

246. In the wake of receiving Mr. Sullivan's final report, dated 29 December 2021, the plaintiff's solicitor briefed Mr. Kevin O'Mahoney, the plaintiff's marine engineer, on 7 January 2022 and on 12 January 2022, and requested a report from him. The latter reviewed the documentation and advised, on 26 January 2022, that, having reviewed everything there was no need for a further report from him. The foregoing is averred at para. 14.7 of Mr. Boland's 11 April 2022 affidavit.

21 January 2021

247. Mr. Boland makes the following averment at para. 18 of his affidavit: -

> "*I say that the Covid pandemic also delayed a number of the examinations for the prosthetics both in England and Ireland where we had to canvas six medical attendants for their views. This also meant that we had to update the prosthetic figures again from Dorset Orthopaedics and we also had to write to Relimb Hospital by letter dated 21st January 2022. They furnished updated figures in respect of the hospital component of the prosthetic work whereas Dorset advised that their figures were little changed".* (emphasis added)

248. It is a statement of the obvious that the plaintiff cannot be held responsible for delays caused by a global health crisis.

2 February 2022

249. Mr. Boland contacted the High Court Central Office in order to identify when the next trial dates were available, subject to the defendant's agreement. He made this contact *prior* to the present motion being issued by the BRP defendants. The foregoing is clear from Mr. Boland's averments at para. 26 of his 30 January 2023 affidavit and from the correspondence exhibited, which includes the following.

250. In an email sent at 17:00, on 2 February 2022, the plaintiff's solicitor contacted a named Registrar in the High Court Central Office, quoting the title of the proceedings as well as *"Set Down No. PI 94535b DN".* After referring to prior communication, the plaintiff's solicitor stated *inter alia*: "*I wonder could you suggest some dates for this 3-week Personal Injury hearing in Dublin with liability very much in issue".* Having gone on to refer *inter alia* to the plaintiff's engineer, who was said to be elderly, and to logistical issues, the said email concluded as follows: "*We will then put your suggested options to the other 2 sides for their agreement as they are likely to have similar foreign-based expert witnesses".* At 17:35, the Registrar replied to say; "*What about a date in March or April?"*

3 February 2022 – Trial date assigned: 16 June 2022

251. The plaintiff's solicitor responded at 10:33, on 3 February 2022, saying: "*Thanks for coming back so quickly. Would start of term in June be an option?".* At 11:27, the Registrar replied as follows: *"DATE ASSIGNED===15/06/2022==LIBERTY TO APPLY!!".*

252. It will be recalled that, in correspondence of 13 July 2021, McCann Fitzgerald made specific reference to a "*trial date"* in the context of logistical difficulties which would need to be taken into account, in circumstances where Mr. Breen, engineer for the BRP defendants, is based in Florida. There is no evidence of any failure on the part of the plaintiff to take same into account

253. In my view, there was nothing inappropriate about the enquires by the plaintiff's solicitor, who (i) did not ask for a date to be assigned, as opposed to making enquires as to available dates; and (ii) made clear that any date was subject to agreement by all other parties in order to suit the respective witnesses, including those coming from abroad, such as the BRP defendants' Florida-based engineer, Mr Breen.

254. At para. 26 of his 30 January 2023 affidavit, Mr. Boland avers that, once the Central Office assigned a trial date:-

> "*I immediately replied that I needed to check with the defendants to ensure that the trial date suited. Unfortunately, the listing came to the defendant's knowledge before I could contact them, and I was advised by Mr. Bourke that unless I voluntarily vacated the trial date, that he would bring a motion to vacate same. Accordingly, I vacated the trial date for June 2022 in pursuance of that threat. This is important as I was ready for trial in January 2022, before this motion was served on the plaintiff on the 7th February 2022…".* (emphasis added)

Trial date assigned before the present motion issued

255. The evidence before the Court in the present motion allows for a finding that a trial date for these proceedings was given by the Central Office *before* the BRP defendants issued the present motion to dismiss.

7 February 2022 – dismissal motion issued

256. On 7 February 2022, the BRP defendants issued a motion out of the Central Office seeking to dismiss the plaintiff's claim on delay grounds, which motion was grounded on an affidavit sworn on the same date by Mr. Roderick Bourke.

Trial date *vacated* at the insistence of the BRP defendants

257. But for the insistence by the BRP defendants that a trial date (which was assigned by the Central Office on 3 February 2022 be vacated) the underlying proceedings could well have been heard and determined in June 2022 (namely, eight months before the hearing of the present motion to dismiss). In other words the evidence allows for a finding that the stance adopted by the BRP defendants has resulted in *additional delay* insofar as trial is concerned.

8 February 2022

258. Having received Mr. Sullivan's final report dated 29 December 2021, and having received from Mr. O'Mahony, on 26 January 2022, confirmation that the latter did not need to provide a further report, the plaintiff's solicitor wrote to McCann Fitzgerald solicitors, on 8 February 2022: "*…to*

confirm that John Sullivan's report could be exchanged with any updated liability evidence from the defendants…". The forgoing is averred at para. 14.7 of Mr. Boland's 11 April 2022 affidavit.

259. The plaintiff's solicitor also wrote to McCann Fitzgerald, on 8 February 2022, expressing disappointment that a motion to dismiss had been issued. The letter pointed went on to state *inter alia*:

> *"Over the last few weeks we have been trying to deal with the logistics of fixing suitable dates given our lengthy witness list. We enclose copy correspondence with the registrar and you will see that the provisional date that was allocated by the registrar was clearly subject to the availability of counsel and further collaboration with the defendants. We believe that the registrar booked the date in an effort to facilitate us in case the dates were reserved by someone else and there is clear liberty to apply without any difficulty.*
>
> *We were only able to move forward with a date once it was clear that John Sullivan's report (the main outstanding report) which issued on 29 January 2022 finalised the engineering evidence.*
>
> *We had actually dictated a letter to Mr Sullivan yesterday morning as to his availability and we were checking with him as to the length of the trial given that he initially indicated 3 weeks when our motion issued yesterday afternoon.*
>
> *Could you please let us know if you have further engineering reports and we can exchange John Sullivan's report.*
>
> *We expect to have 2 more medical reports from the GP and Dr Paul Murphy, consultant in pain relief shortly and that should complete the plaintiff's reportage.*
>
> *Could you please revert to us and advise if the 15 June 2022 onwards is suitable for Mr Breen and your other witnesses and if not, we can review the matter collaboratively.*
>
> *We have been working as fast as we can to bring this matter to trial, as you can see from the sequencing of the correspondence and we trust in the circumstances that you will strike out, or at least adjourn the motion with cost reserved as it is now clear that the plaintiff doing everything possible to proceed to a hearing"* (emphasis added)

6 January - 11 February 2022

260. It will be recalled that Mr. Ian Jones, prosthetist, referred the plaintiff for review by Dorset Orthopaedics in England and that the first such review took place in November 2019, following which an MDT assessment occurred in February 2020, and a report dated 29 April 2020 was issued by Mr. Baxter, prosthetist, of Dorset Orthopaedics. Subsequent to that, the plaintiff's senior counsel advised of the necessity that the plaintiff's Irish medical team would need to be supportive of the proposals. Earlier, reference was made to the views of Dr. Hegarty (pain relief

doctor); Mr. McFarlane (vocational consultant); Mr. Fleming (orthopaedic surgeon); Mr. Mahalingam (orthopaedic surgeon). At para. 17 of Mr. Boland's affidavit he averred *inter alia* that, having been waiting on Dr. Paul Murphy's neuromodulation list, the plaintiff was reviewed by Dr. Murphy's team in April 2021. Mr. Boland went on to aver that:

> "*We duly briefed Dr. Paul Murphy with all of the medicolegal prosthetic reports, and he reviewed the plaintiff on the 6th January 2022 and he duly reported. . . (received 11th February 2022) to the effect that he was quite prepared to agree to the phantom pain being managed by Dorset Orthopaedics and neuromodulation could be considered if this treatment wasn't successful".* (emphasis added)

261. The foregoing seems to me to constitute further steps of a material kind, taken *prior* to the issuing of the present motion, of obvious relevance to issues for any future trial, in particular quantum.

23 February 2022

262. The plaintiff filed a Notice of intention to Proceed dated 23 February 2022

25 February 2022

263. The plaintiff's Notice of Intention to Proceed, dated 23 February 2022, was filed in the High Court Central office on 25 February 2022. By letter dated 25 February 2022, the plaintiff's solicitors wrote to the solicitors for the BRP defendants, referred to the Notice of Intention to proceed, and stated, *inter alia:*

> *"There have been no pleadings to serve in this case for the last 18 months because we were waiting for John Sullivan's final reports so that particulars of negligence could be drafted. Furthermore we were waiting for expert medical and other reports for counsel to guide as to the actuarial claim.*
>
> *Senior counsel has rebuked us for succumbing to pressure on the part of the defendants to vacate the Court date on the basis that notwithstanding it was clearly provisional, the parties could have worked together as to the availability of witnesses and manage the case to trial. Counsel has also advised that the correct course on our part would have been to apply at the motion to vacate to have the motion to dismiss heard on the first day of the trial if the defendant is not prepared to relent.*
>
> *We say this because the plaintiff was at the back-end of finalising engineering and actuarial reports now that reports from John Sullivan and Mr Paul Murphy surgeon finally became available on 10 January 2022 and 11 January 2022 respectively. When John Sullivan's report became available, we reverted to Mr Kevin O'Mahoney B.E. for his separate report which was originally intended. Mr O'Malley considered the matter and felt that Mr Sullivan's report was so comprehensive that he didn't need to intervene any further. Counsel was then briefed to update particulars of negligence, which were then reviewed by Mr Sullivan and past by*

him on the 22nd inst. Steps to file the pleadings are sequential and we can only proceed at the pace of the plaintiff's experts.

It is therefore clear that the defendant's motion is entirely premature and is very frustrating for the plaintiff that this motion was served just as the plaintiff was making real tangible progress.

We are calling upon the defendants to revisit the trial date of the 15th June as the potential date or at least make some constructive alternative suggestions as to trial dates outside of the Cork and Limerick sessions. We further call upon the defendant to strike out the motion or at least defer the hearing of the motion to the trial date at the time to be agreed.

Indeed, it is clearly accepted that the provisional trial date of the 15th June next was obtained before the motion was served on the plaintiff and this clearly indicates that the plaintiff was taking and continues to take every step possible to move to a trial date…" (emphasis added)

264. The letter proceeded to enclose*: "advance copy Particulars of Negligence"* and went on to state, *inter alia*: "*having recently received Mr Paul Murphy's medical report, and now that it has been reviewed by senior counsel, and having received guidance from senior counsel, we expect to receive the final actuarial report very soon. At that stage, we will furnish advance particulars of injury and loss in a similar manner*."

265. For the sake of clarity, all of the foregoing comprise expert witnesses who are listed in the plaintiff's disclosure schedules. Mention has already been made of Mr O'Mahoney (the plaintiff's Consulting Marine Engineer and the 4 reports prepared by him. The plaintiff's disclosure schedules also refer, *inter alia*, to:

- *"Mr. John G Sullivan Automative Engineer"* and the plaintiff relies on his: "*Report 29.01.21; Report 29.12. 21";*
- *"Dr Paul Murphy Pain Relief Consultant"* and reference is made to his: "*Report 06.02.22*";

266. The aforesaid letter to McCann Fitzgerald, of 25 February 2022, enclosed the plaintiff's 'Updated Particulars of Negligence' also dated 25 February 2022. The plaintiff's solicitors also sent a copy of the said letter and updated particulars to the first named defendant's solicitors, under cover of a 25 February 2022 letter.

25 February 2022 – Plaintiff's updated Disclosure Schedule

267. Under cover of a letter dated 28 February 2022, the plaintiff furnished an updated Disclosure Schedule pursuant to S.I. 391/1998, which is dated 25 February 2022. Among other things, it identified Technomarine Ltd. as "nautical assessors" (thereby 'filling in the gap' referred to in the BRP defendants' disclosure schedule). Among the additional reports referred to are those of Technomarine Ltd. (23.07.21 and 28.08.21).

268. If one compares the 25 February 2022 disclosure schedule to the previous version, dated 25 August 2021, one can also see that the following *additional* medical expert witnesses were listed:-

"*10. Mr. Alex Woolard* *Surgeon Relimb Hospital London*
11. Mr. Norbert Kang *Surgeon Relimb Hospital London*
12. Mr. Edward Hogan *Psychologist".*

269. Furthermore, all of the following comprised *additional* experts' reports: -

"*2. Seagrave Daly Lynch* *Report 20.04.21*
Report 02.09.21
….
8. Mr. Moose Baxter *Letter 13.01.22*
…
10. John G. O'Sullivan *Report 29.01.21*
Report 29.12.21".

270. Apart from the foregoing the schedule listed *additional* medical reports, as follows: -

"*1. Dr. Greg Murphy* *Report 19.02.22*
…
7. Dr. Paul Murphy *Report 06.02.22*
…
10. Mr. Norbert Kang *"Received June '20"*
- *Letter 01.02.22*
- *Letter 08.02.22".*

271. It is plain from the dates of these additional reports (6 June 2020; 29 January 2021; 20 April 2021; 2 September 2021; 29 December 2021; 13 January 2022; 1 February 2022; 6 February 2022; 8 February 2022; and 19 February 2022) that work had been ongoing on the plaintiffs' side between June 2020 and August 2022 i.e. well *before* as well as *after* the present motion.

28 February 2022

272. The plaintiff's solicitor wrote to the first named defendant's solicitors, on the 28 February 2022 serving the updated disclosure schedule.

273. The plaintiff's solicitor also wrote to both Coakley Moloney and McCann Fitzgerald, on 28 February 2022, enclosing a copy of the plaintiff's 23 February 2022 Notice of Intention to Proceed.

16 March 2022

274. By letter dated 16 March 2022, the plaintiff's solicitors wrote to McCann Fitzgerald, solicitors for the BRP defendants, stating: "*We enclose advance copy of updated particulars of injury which*

we will be serving on you on the expiry of the notice to proceed as already indicated in previous correspondence". The plaintiff's "Updated Particulars of Injury", dated 16 March 2022, included reference to the following:

-*"The plaintiff has remained under the care of his consultant in pain management and neuromodulation. By way of clinical update in February 2018…"* (p.1)*;*

-*"The plaintiff also remained under the care of his consultant psychiatrist. He was reviewed in June 2018…* (p.2)*;*

-*"During this time, the plaintiff has been attending his consultant pain Specialist to the public system. During this time, unfortunately, his consultant ceased working with the HSE and there was no replacement for him. The plaintiff found it deeply frustrating as he had been on a waiting list for spinal stimulation. Ultimately, the plaintiff was transferred to Dublin for further care under Dr Paul Murphy. However, the change in consultants and the delay caused obvious frustration and upset and disappointment for the plaintiff"* (p.3)*;*

-*"The plaintiff again attended for assessment with his consultant psychiatrist in October 2019"* (p.3)*;*

-*"The plaintiff's consultant in rehabilitation medicine assessed the plaintiff and reported in January 2020 that the plaintiff continued to have ongoing phantom pain all of the time"*(p.4)*;*

-The plaintiff continued to have discussions with his consultant pain management specialist in St Vincent's University Hospital, Dublin, in relation to the proposal to insert a spinal-cord stimulator at the cervical level. The plaintiff had discussed this in detail but was a bit reluctant to go ahead with the procedure. The plaintiff had in the meantime, explored alternative pain and advanced prosthetic options in the UK he attended to orthopaedic consultants in the UK and had discussed targeted muscle reinnervation for pain relief and also osteointegration with the use of an advanced nerve controlled electrical prosthesis (bionic arm)" (p.4)*;*

-*"The plaintiff was assessed again by his consultant in pain management in January 2021. At this stage, nearly 8 years post accident, it was reported that the chronic pain and phantom pain symptoms experienced by the plaintiff in the past have continued. It was reported that these are likely to persist at approximately the same level and intensity into the future. The plaintiff continued to be dependent on oral medication. As previously noted, the plaintiff had been advised regarding the spinal-cord stimulator. However, the spinal-cord stimulation was likely to only provide a 50% reduction in the neuropathic pain intensity, 50% reduction in the need for oral analgesics with an improvement in quality-of-life by 30%. The impact that the spinal-cord stimulation would have on the phantom pain was very unpredictable and at best a 30%-50% reduction in these symptoms would be all that could be hoped for. The plaintiff was advised that he had a choice in terms of his prosthetic devices going into the*

future. He was advised that there were 3 possible prosthetic devices to be considered, namely (1) a basic device (2) a partially functional device and (3) an advanced functional capacity and pain relief device. The basic device was a basic, heavy piece of kit, supplied as per the HSE/GMB budget. The plaintiff was using this device and it is reported that this basic equipment is without doubt, contributing to the ongoing muscoskeletal pain that the plaintiff continues to experience and ideally, this must be upgraded as it is not fit for purpose. His expert concludes that this is not a viable option to continue using this equipment. The partially functional devices effectively a more advanced prosthesis which would improve function at the fingers/wrist. It's a significant improvement on the basic version, but this device relies on the ability of the plaintiff to make a significant physical effort for maximum outcome. The plaintiff was advised that taking into account the extent of the injury and the increased musculoskeletal weakness that had occurred over the past 8 years, it was likely that the pain associated with the daily use of the equipment would limit the functional progress. Furthermore, the neuropathic and phantom pain are highly unlikely to be reduced with this equipment. It is not designed to address the pain issues. The plaintiff was advised that this partially functional device would create several more issues for the plaintiff, including increasing long-term pain and will only partially resolve the functional inability. The 3rd option, the advanced functional capacity and pain relief device is a combined solution of using targeted muscle reinnervation (TMR) and Osteointegration (OI) to provide the maximum functional improvement and significantly improve the pain aspect. This was described as a comprehensive surgical solution and the TMR is the key step for improving both function and reducing pain. The plaintiff was advised that TMR also has a significant role to play in pain management. The plaintiff was advised that the data suggests that near complete resolution of neuroma pain after treatment, as well as a complete prevention of chronic pain, is possible if TMR is used as a prophylactic measure during the index amputation or as a follow-up treatment. Accordingly, the 3rd option gives the plaintiff the best choice of making the best recovery possible in all aspects." (pp. 4-5)*;*

-"The plaintiff was assessed by his consultant orthopaedic surgeon in May 2021. Again, the plaintiff reported continuing pain and an inability to function properly. Having reviewed the plaintiff and spoken with the plaintiff, it was the consultant orthopaedic surgeon's opinion that the plaintiff was an ideal candidate for and TMR surgery for his left upper limb amputation." (p.6)*;*

-"The plaintiff was assessed by his vocational rehabilitation consultant and having assessed the plaintiff, it was concluded that although he currently uses a prosthetic limb that gives some limited function, he could be fitted with a more sophisticated prosthetic (i.e. option 3 above) that would give him an even wider range of functions and independence but would never replace the full functioning skill range of his missing limb" (p.6)*;*

-"The plaintiff has remained under the care of his general practitioner throughout the past number of years. When most recently examined and assessed in February 2022, it was noted

that the plaintiff had struggled for the past number of years with the severe phantom limb pain and other ongoing pain that he has suffered" (p.6); (emphasis added)

275. The foregoing (with specific reference to steps taken as of February 2018; June 2018; a change in consultants and delay; October 2019; January 2020; exploration of alternatives in the UK; January 2021; May 2021; and February 2022) allows for a finding that, whilst the plaintiff did not serve formal pleadings, work was ongoing, from the start of 2018, which was of fundamental relevance to the plaintiff's injuries and to the determination of issues at a trial, in particular, the question of quantum.

27 April 2022

276. By letter dated 27 April 2022, the plaintiff's solicitor wrote to McCann Fitzgerald in the following terms:-

"*We enclose the plaintiff's updated disclosure schedule in compliance with S.I. 391 of 1998 and you might please note the following new reports/letters.*

(a) Seagrave Daly Lynch reports dated 03.03.2022; 10.03.2022 & 29.03.2022.

(b) Mr. Patrick Fleming letter dated 10.04. 2021.

(c) Bone density scan, X – rays to right & left humerus, CT scan, left elbow & shoulder dated 05.02.2020.

(d) Dr. Fiadhnait O'Keeffe letters dated 04.01.2013; 08.02.2013 and 16.04.2013.

(e) Dr. Norbert Kang & Relimb Hospital quote June 20202 & emails dated 01.02.2022; 08.02.2022 & 09.03.2022 as to the hospital part of the prosthetics costings.

(f) Mr. Alex Woolard report 05.02.2020 as to the MDT assessment".

277. The fact and content of the foregoing demonstrates that the progress which the plaintiff had been making well *before* the present dismissal motion continued *after* that motion was issued by the BRP defendants.

6 May 2022

278. The plaintiff furnished 'Updated Particulars of Injury' dated 6 March 2022, which included (in addition to the particulars delivered on 16 March 2022) reference to the following:

"*The plaintiff was reviewed again by Mr Edward Hogan in April 2022. Mr Hogan noted that very little had changed. He noted that the plaintiff was in constant pain which was not being satisfactorily alleviated by conservative management. The plaintiff in accordance with his medical and prosthetic advice is hoping that surgical intervention and prosthetic management by way of the OI and TMR procedures will alleviate his acute pain and afford him better use of his arm thus allowing the plaintiff a better quality-of-life than his present miserable existence"* (p.8) (emphasis added).

279. For the sake of clarity Mr Edward Hogan is identified in the plaintiff's disclosure schedule as an expert "*Psychologist*" and the plaintiff relies on his "*Report 05.04.2022".*

280. On 6 May 2022, the plaintiff also swore an Affidavit of Verification (with respect to the contents of Updated Particulars of Negligence dated 6 May 2022; and Updated Particulars of Injury, dated 6 May 2022).

10 May 2022 – Plaintiff's Updated Disclosure Schedule

281. The latest iteration of the plaintiff's disclosure schedule pursuant to S.I. 391 of 1998 is dated 10 May 2022 and it seems appropriate to quote its contents *verbatim,* because the dates of the numerous reports prepared by a host of experts not only speak to the complexity of the case from an engineering and medical perspective, but also illustrate the plaintiff's efforts to progress his case towards a trial *before, during* and *after* periods which have not seen the delivery of formal pleadings. The plaintiff's latest disclosure schedule states the following:-

"*TAKE NOTICE*

That the following are the details required by the above Statutory Instrument of the plaintiff's witnesses and reports in respect of these proceedings.

Non–expert witnesses

1. Plaintiff.
2. Plaintiff's wife.
3. Mr. Daniel O'Donoghue.
4. Mr. Brendan Murphy.
5. Mr. Paul Bryans.
6. Mr. Dick Gibson.
7. Mr. Joseph McCollam

Expert witnesses

1. Ms. Patricia M. Coughlan	*Rehabilitation consultant*
2. Seagrave Daly Lynch	*Consulting actuaries*
3. Mr. Kevin P. O'Mahony	*Consulting marine engineer*
4. Mr. Peter Lally/Edmund P. Cahill	*O'Brien Cahill Accountants*
5. Ms. Fianna Barry	*Occupational therapist*
6. Mr. Moose Baxter	*Prosthetist*
7. Yachtsman Marine Ltd.	*Nautical assessors*
8. Mr. Padraig Murphy	*Consulting engineer*
9. Mr. John G. Sullivan	*Automotive engineer*

Medical witnesses

1. Dr. Greg Murphy	*General practitioner*
2. Dr. John McFarlane	*Rehabilitation consultant*
3. Mr. Pat Fleming	*Consultant orthopaedic surgeon*
4. Dr. Mairead O'Leary	*Psychiatrist*
5. Dr. Dominic Hegarty	*Pain relief consultant*
6. A Radiologist	
7. Dr. Paul Murphy	*Pain relief consultant*
8. Dr. Fiadhnait O'Keefe	*Psychologist*
9. Mr. K. Mahalingam	*Consultant orthopaedic surgeon*

10. Mr. Alex Woolard	*Surgeon Relimb Hospital London*
11. Mr. Norbert Kang	*Surgeon Relimb Hospital London*
12. Mr. Edward Hogan	*Psychologist*
Expert reports	
1. Patricia M. Coughlan	*Report 01.04.16*
2. Seagrave Daly Lynch	*Report 15.01.18*
	Report 30.04.21
	Report 02.09.21
	Report 03.03.22
	Report 10.03.22
	Report 29.03.22
3. Mr. Kevin P. O'Mahoney	*Report 06.03.14*
	Report 16.03.17
	Report 04.07.17
	Report 19.02.18
4. Yachtsman Marine Ltd.	*Report 23.07.12*
	Report 28.08.12
5. Mr. Peter Lally	*Report 06.11.17*
	Letter 29.03.19
	Letter 10.07.19
6. Edmund P. Cahill	*Report 05.03.21*
7. Ms. Fianna Barry	*Report 27.04.18*
8. Mr. Moose Baxter	*Report June 2020*
	Letter 13.01.22
9. Padraig Murphy	*Report awaited.*
10. John G. O'Sullivan	*Report 20.01.21*
	Report 29.12.21
Medical reports	
1. Dr. Greg Murphy	*Report 30.05.13*
	Report 14.07.15
	Report 19.02.22
2. Dr. John McFarlane	*Report 03.01.20*
3. Mr. Pat Fleming	*Report 23.03.16*
	Letter 10.04.21
5. Dr. Mairead O'Leary	*Report 27.10.15*
	Report 13.01.16
	Report 22.06.18
	Report 18.10.19
5. Dr. Dominic Hegarty	*Report 22.02.16*
	Report 13.02.18
	Report 24.09.18
	Report 08.01.21

6. A Radiologist Radiological aspects will be managed by Mr. K Mahalingam, Mr. Fleming, Mr. Kang & Mr. Woolard.
Bone density scan, X – Rays to right & left humerus, CT scan left elbow & shoulder dated 05.02.2020.
7. Dr. Paul Murphy Report 06.02.22
8. Dr. Fiadhnait O'Keeffe Clinical letter 04.01.2013
Clinical letter 08.02.2013
Clinical letter 16.04.2013
9. Dr. K. Mahalingam Report 12.05.21
10. Mr. Nobert Kang & Relimb Hospital "Received June '20"
Email 01.02.22
Email 08.02.22
Email 09.03.22
11. Mr. Alex Woolard Letter dated 05.02.20
12. Edward Hogan Report 05.04.22
Special damages
See separate Schedule to follow.
LOSS OF EARNINGS
Net earnings losses to the 30.12.2019 amount to €259,963.
Please see Schedules of Loss as to future losses.
The plaintiff reserves the right to add to or delete from this Schedule.
Dated the 10th May 2022"

282. The fact and contents of the foregoing illustrate that the plaintiff has continued to prepare his case for trial, just as he was doing well in advance of the present motion, with the full knowledge of the BRP defendants who waited over 2 years and 7 months to bring the present dismissal motion in February 2022, despite first reserving their right to do so in July 2019 (during which period they participated in progressing the case towards a trial).

26 August 2022

283. The plaintiff's solicitors furnished 'Updated Particulars of Loss' dated 26 August 2022, which stated *inter alia* the following:

"The plaintiff originally attended Mr Dino Christodoulou who was reviewing the plaintiff within the GMS system in the Mercy Hospital in Cork. He furnished an initial report setting out a very basic form of prosthesis and these costs were particularised to the defendant's by letter dated the 18 June 2018 and it was also pointed out at that time that the plaintiff retained the right to furnish the prosthetic details as further professional expert investigations were carried out in the rapidly developing prosthetic market…"

Discussion and decision

284. It is settled law that the BRP defendants face the onus of establishing all three elements of the *Primor* test (see *Gibbons*).

285. It is equally well established that each case turns on its own facts and circumstances (see *McBrearty v. North Western Health Board* [2010] IESC 27, wherein Geoghegan J. made clear that "*Every case is different. Factual resemblances are only of limited value*").

286. Having regard to the analysis of events in chronological order as set out in this judgment, am very satisfied that, despite submissions to the contrary on behalf of the defendants, there was no pre–commencement delay on the part of the plaintiff and this is not a case where the plaintiff made a "late start" (in the sense outlined by Hogan J. in *Tanner v. O'Donovan & Ors.* [2015] IECA 24).

287. Insofar as assessing inordinate delay, it could hardly be fair to hold the plaintiff responsible for delay as regards the *hearing* of the motion. Thus, it seems to me that the relevant period, for the purposes of this Court's determination, is the period which expired as of 7 February 2022 (i.e. the date when the BRP defendants *issued* the present motion).

Inordinate?

288. Turning to the first element of *Primor,* it is fair to say that what constitutes *inordinate* delay is not a particularly difficult concept. As Mr Justice Cooke made clear in *Framus Ltd v. CRH* [2012] IEHC 316: *"In its ordinary meaning delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive".* Having regard to the chronology outlined earlier in this judgment, I am satisfied that there was no inordinate delay by the plaintiff prior to January 2018. It was not strongly argued that there was *no* inordinate delay on the plaintiff's part thereafter.

289. It will be recalled that December 2017 saw an order for costs being made *against* the BRP defendants arising out of their failure to make proper discovery at the first attempt (something which resulted in delay attributable to the BRP defendants). Looking, as I feel I must, at such *pleadings* as were delivered by the plaintiff from January 2018 onwards, I am forced to conclude that there was inordinate delay on the plaintiff's part up to 24 November 2020 (when the plaintiff's solicitor delivered the plaintiff's first disclosure schedule in accordance with S.I. 391 of 1998). The period which commenced with the costs order against the BRP defendants (December 2017) and ended with the delivery of the said disclosure schedule (November 2020) amounts to some 23 months. Although not at the extreme end, I am satisfied that, strictly speaking, this constituted inordinate delay insofar as delivering pleadings in the case is concerned.

290. Given (i) the exchange of disclosure schedules and expert reports which took place from 24 November 2020 onwards; (ii) the plaintiff's efforts made to progress his claim from that point; and (iii) the communication between the solicitors for the plaintiff and BRP defendants, respectively, thereafter, I am not satisfied that there was inordinate delay from December 2017 to January 2022, inclusive. In my view, what can be called inordinate delay by the plaintiff ended in November 2020.

291. I recognise that there were certain 'gaps' after November 2020, for example, the period of almost six months between the service by the plaintiff's solicitors of an updated S.I. 391/1998 disclosure schedule, under cover of their letter dated 19 March 2021 and the service of a further updated disclosure schedule, pursuant to S.I. 391/1998 under cover of a letter from the plaintiff's solicitors dated 10 September 2021. Similarly, almost five months elapsed between the service by the plaintiff's solicitor of the 10 September 2021 disclosure schedule and the issuing, by the BRP defendants, of the present motion to dismiss, on 7 February 2022. However, as set out in the chronology, the plaintiff continued to progress his claim from November 2020 onwards and there was communication between the parties *during* those 'gaps', which communication was directed towards preparing for a trial. Without repeating the analysis which is set out in the chronology, the period *after* November 2020 saw, inter alia, the following:

- Service by the BRP defendants of their SI 398/91 Disclosure Schedule (December 2020);

- Exchange of experts' reports between the parties (January 2020);

- The plaintiff pursuing prosthesis expertise, including in the United Kingdom;(November 2019; February 2020; April 2020; June 2020; April 2021)

- Agreement between the expert accountants representing the Plaintiff and BRP defendants, respectively, on loss of earnings figures (March 2021);

- The solicitors for the BRP defendants calling on the plaintiff to furnish outstanding experts reports and stating *inter alia*: "*our client's expert, Kevin Breen, is based in Florida so it will be essential that his availability is taken into account when you seek a trial date".* (July 2021);

- Efforts to arrange a joint engineers' inspection to 'open up' the mechanism at a time which would suit, inter alia, the BRP defendants' engineer (April – October 2021);

- A trial date (15 June 2022) being assigned for the case (on 3 Feb 2022), prior to the present motion being issued, which date the BRP defendants required the plaintiff to vacate.

Inexcusable?

292. Turning to the second element of *Primor,* I am satisfied that, in light of the steps taken by the plaintiff to progress his case, as examined in the chronology, the plaintiff's delay is excusable. Whilst I do not regard the period from November 2020, onwards, as one of inordinate delay by the plaintiff, even if the period from January 2018 to January 2022, inclusive, could fairly be called inordinate delay by the plaintiff, it is excusable, in my view.

293. As the chronology illustrates, this is certainly not a situation where the plaintiff was taking no action during the 'delay period' (irrespective of whether it is calculated from January 2018 to

November 2020, or from January 2018 to February 2022). On the contrary, throughout both periods, issues of fundamental relevance to a future trial were being progressed in the background, albeit not reflected in the delivery of pleadings. Indeed, had the plaintiff kept the BRP defendants fully updated on the extent of progress being made, as well as delays encountered, this Court's finding on the first element of the *Primor* test might well have been different.

294. The reason I consider the plaintiff's delay to be excusable flows from the very particular facts and circumstances which I have looked at in some granular detail *per* the chronology of relevant events set out earlier in this judgment. It is not necessary to repeat that analysis again. Suffice to say that, between January 2018 and January 2022, the plaintiff took a range of material steps to progress his case.

295. For example, the contents of the plaintiff's 24 November 2020 SI 391 disclosure schedule illustrates that efforts were ongoing *during* the delay period to progress the plaintiff's claim towards a trial i.e., all the following reports became available to the plaintiff *during* the 'delay period':

- the report by Seagrave Daly Lynch, consulting actuaries (15 January 2018);
- the fourth report of Mr. Kevin P. O'Mahony, consulting marine engineer (19 February 2018);
- the report by Ms Fianna Barry, occupational therapist (27 April 2018);
- the third report of Dr. Mairead O'Leary, psychiatrist (22 June 2018);
- the second report of Dr. Dominic Hegarty, pain relief consultant (22 June 2018);
- and the third report of Dr. Hegarty, pain relief consultant (24 September 2018).
- the letter from Mr. Peter Lally of O'Brien Crowley accountants (24 July 2019);
- the fourth report of Dr. O'Leary, psychiatrist (6 October 2019);
- the report of Dr. John McFarlane, rehabilitation consultant (30 January 2020);

296. It is also clear from the contents of the BRP defendants' disclosure schedule, dated 23 December 2020 that it references reports which were generated *during* the delay period. This is obvious from the date of the reports in question which include:

- report by Professor Dinan, psychiatrist (24 January 2018);
- report by Mr. Jack Phillips, neurosurgeon (9 May 2018)
- report by Kevin Breen, consultant marine engineer (12 June 2018);
- report by Mr. Stephen Young, neurosurgeon (13 March 2019);
- report by Hyland & Co., forensic accountants (30 June 2020).

Medical

297. One key theme in terms of the plaintiff's efforts to progress his case during the delay period involved the efforts to secure treatment; obtaining such treatment; and securing experts reports, both medical and engineering.

298. A sub-set of medical treatment and expertise involved trying to source and engage with an expert in the field of prosthetics. Although liability is entirely disputed, it is common case that the plaintiff sustained horrific injuries. In the manner explained in the chronology, he ultimately had to go to the United Kingdom for assistance in terms of prosthetics. In the manner touched on earlier, it seems to me that, to the extent the plaintiff, *via* engagement with prosthetics specialists, could reduce his pain and increase his mobility, this was progress of fundamental relevance to *quantum* at any future trial.

Engineering

299. Another key theme which emerges from the chronology of relevant events is the engagement between the engineers representing all parties, including the BRP defendants. These proceedings are far from straightforward but, as made clear in the chronology, the plaintiff's efforts during the 'delay period' have resulted in the availability of numerous reports by a range of experts, all of which have been listed in a series of disclosure schedules. Indeed, expert's reports have been exchanged. As noted earlier, one issue, which was 'live' from April to October 2021, concerned the 'opening up' of the relevant mechanism, on terms and at a point suitable to *all* engineers including those of the defendant.

Covid-19

300. Furthermore, at para. 25 of his 30 January 2023 affidavit, and whilst not asserting that *most* of the plaintiff's alleged delay was caused by the Covid–19 pandemic, Mr Boland goes on to aver *inter alia* that: "*…the pandemic led to disruption from March 2020".* Although certainly not determinative of matters, such delay as resulted from global health crisis and severe restrictions in response to Covid–19 is not the plaintiff's fault. At para. 14.8 of his 11 April 2022 affidavit, Mr. Boland makes reference to constraints under which the plaintiff was labouring "*as to speedy examinations during the Covid pandemic, not to mention cross–jurisdictional difficulties".* All of us will recall the various national "lockdowns" in response to the Covid–19 crisis, the first of which began in March 2020. Whilst the plaintiff has not provided specifics in relation to which examinations or inspections, be they engineering or medical, were delayed due to Covid–19 restrictions, the averment made by Mr. Boland allows for a finding that there was *some* delay in this regard caused by Covid–19.

Resources

301. The evidence before the Court also allows for a finding that there have been some delays in respect of the plaintiff's ability to obtain medical treatment and reporting in respect of same which is of relevance to the proceedings, as a consequence of the finite resources of the medical system in this State (as opposed to any fault on his part). This is clear from the uncontroverted averment made at para. 14.9 of Mr. Boland's 11 April 2022 affidavit, wherein he states: "*…apart altogether from liability, the plaintiff's treatment and reportage throughout the case has been largely constrained by the speed in which the plaintiff has been dealt with in a tardy manner within the general medical system with its limited resources".*

302. In short, even though a significant period of time elapsed between the service of formal pleadings, the reality is that, in the background, the plaintiff was continuing to try and progress his claim on a range of fronts. Not only that, certain of the delays were not at all his fault, examples being:

(i) delay in the public health system;

(ii) delay caused by the need to coordinate the diaries of multiple engineers, including those of the BRP defendants, as regards joint-inspection;

(iii) the seriousness of the plaintiff's injuries and the need to seek specialist prosthesis expertise outside this jurisdiction;

(iv) periods of time waiting for experts to revert either with appointments or reports;

(v) the contribution to delay of Covid–19 restrictions.

Failure to meet second part of the *Primor* test

303. Furthermore, and with respect to the period from November 2020 onwards, not only did the plaintiff take steps to progress his case, he did so with the full knowledge of, and in a number of instances, at the behest of, the BRP defendants. In short, the BRP defendants have failed by a wide margin to meet the second element of the *Primor* test. However, lest I be entirely wrong in that view, I now proceed to the third element of *Primor*.

Balance of Justice

304. A submission was made to the effect that the *plaintiff* was guilty of delay with respect to compliance by the BRP defendants with their discovery obligations. I reject that submission. Nor can the requirement that the BRP defendants make *full* and adequate discovery be treated as some sort of 'aside', which the plaintiff ought to ignore whilst progressing his case. To examine the BRP defendants' discovery; to find it wanting; to call for proper discovery to be made; and to press that this occur *was* for the plaintiff to progress his case.

305. In the manner examined earlier, the BRP defendant's failure to make proper discovery at the first time of asking caused delay and resulted in additional cost. I am entitled to take this into account in the balance of justice assessment. It will be recalled that, quite apart from any delay with respect to the initial discovery made by the BRP defendants, they are exclusively responsible for 13 months delay (namely the period which expired between the first of their affidavits of discovery and the second). It will also be recalled that the BRP defendants' failure to make full discovery on the first occasion caused the plaintiff to have to issue a motion (just as the plaintiff was caused to issue a motion arising out of the second defendant's delay with respect to delivering a defence). The foregoing is appropriate to take into account in the balance of justice assessment and weighs against dismissal. This is to say nothing of the delay with respect to the delivery of a defence by the second named defendant which gave rise to a motion brought by the plaintiff (note the costs order made on 13 October 2014 (Cross J) in the plaintiff's favour).

306. This is far from a situation where a plaintiff 'went to sleep' and did nothing (be that from January 2018 onwards, or from November 2020 onwards). The chronology of relevant events demonstrates that the plaintiff was, in fact, taking steps to progress his claim, even though this

was not reflected in the delivery of pleadings. The reality of this work by the plaintiff and the progress made weighs against dismissal.

307. By way of a general comment, it seems to me that if a defendant *reserves* their rights to apply to dismiss a case on delay grounds but instead of making such an application, permits further time, measured in months (or, in this case, years) to elapse, they leave themselves open to the charge of acquiescence concerning the delay in respect of which they purported to reserve their rights. This seems to me all the more true if, when reserving those rights, they called upon a plaintiff to progress his or her case (as was done here). The charge of acquiescence seems to me to be unavoidable if, in response to such a call by a defendant, the plaintiff does progress his or her claim (as the plaintiff did, also incurring cost in so doing). In such a scenario, the reservation of rights cannot 'set at nought' the focus by both sides on a trial and the progress made towards same. If it were otherwise, it would permit a defendant to submit, in a balance of justice assessment: *"It would be unjust to permit this case to proceed to the trial which I have been actively preparing for, and which I have called on the plaintiff to progress towards, and which the plaintiff has in fact been actively working towards and devoting resources to, including at my behest".* To permit the foregoing would be inimical to justice in my view, yet such is the reality of the BRP defendants' position, according to the facts found

308. General comments aside, and for reasons set out when examining the chronology, I am satisfied that the BRP defendants can fairly be accused of something akin to acquiescence, or so close to acquiescence as makes no difference. On 8 occasions during the course of over more than two years (i.e. 3 July 2019; 27 October 2020; 16 April 2021; 22 April 2021; 13 July 2021; 31 August 2021; 8 September 2021; and 9 September 2021) the BRP defendants *reserved* their rights with respect to delay. However, not only did they fail to *act* on those rights reserved, they simultaneously invited the plaintiff to progress his case towards a trial, which is precisely what he did, as did the BRP defendants. By way of just one example, the joint engineering inspection to 'open up' the relevant mechanism, ultimately took place with the full participation of the BRP defendants' engineer, Mr Breen, on 1 October 2021 (i.e. post-dating all 8 aforesaid reservations of delay 'rights' letters). In my view this is a factor which weighs very heavily against dismissal.

309. It is not necessary or appropriate to repeat the analysis in the chronology, but the following few examples serve to illustrate the point:

- For the BRP defendants to deliver their Disclosure Schedule (December 2020) and to exchange experts' reports with the plaintiff (January 2021) was to progress the case towards trial;

- For the BRP defendants' expert accountants to agree loss of earnings figures with the plaintiff's expert (March 2021) was to progress the case towards a trial;

- For the BRP defendants to insist (April 2021) that any inspection "*to open up the switch"* take place on adequate notice to their engineer, so that the latter could attend, was to progress the case toward a trial;

- To call for the plaintiff to furnish outstanding experts' reports (July 2021) was to progress the matter towards a trial, especially given that the BRP defendants, through their solicitors, also stated (in July 2021):
  "*Please also let us know when you expect to apply for a trial date. As we have previously pointed out, our client's expert, Kevin Breen, is based in Florida so it will be essential that his availability is taken into account when you seek a trial date.*" (emphasis added)

- For the BRP defendants' engineer, the same Mr Breen, to participate in the 'opening up' of the lock (October 2021) was to progress the case towards a trial.

310. In other words, when it comes to the balance of justice assessment, it seems to me that this Court is entitled, indeed required, to take into account the reality that both the plaintiff and the BRP defendants were actively preparing for a trial, as both sides were well aware, in the months (indeed, years) leading up to the present application to dismiss. Judging the BRP defendants by their *actions* (progressing the case towards trial) rather than by their *words* (repeatedly reserving rights with respect to delay, from July 2019 onwards, but taking no action with respect to those reserved 'rights', for over two and a half years, until February 2022) weighs very heavily against dismissal (something the BRP defendants, ought, in my view, to have known *before* they caused the present application to issue).

311. A further factor weighing against dismissal is the reality that the proceedings are ready for trial. Indeed, the evidence before the Court is that it was the BRP defendants who insisted, in February 2022, that a trial date (June 2022) be vacated. The foregoing seems to me to weigh against dismissal.

312. The nature of what were life-changing injuries for the plaintiff also seems to me to be a factor to be given due weight in the balance of justice assessment. Indeed, there would appear to me to be a direct link between the nature of the injuries and the time it has taken for the case to be ready for trial. Although unnecessary to repeat the contents of the chronology, it will be recalled that an aspect of this case was the plaintiff's attempt to secure a more appropriate prosthetic device which might offer the prospect of reduced pain and increased mobility (issues speaking to the question of quantum). Thus, although every plaintiff served with a motion to dismiss on delay grounds faces the prospect of 'terminal prejudice', this prejudice seems to me to be of the most acute kind for this plaintiff, having regard to the nature of the injuries sustained by him. The foregoing weighs against dismissal. This brings me to look at the prejudice asserted by the BRP defendants.

313. The prejudice asserted by the BRP defendants is set out at paras. 14–17 of Mr. Bourke's affidavit sworn on 7 February 2022:-

"*14. These proceedings were issued almost two years after the accident in question. Given the passage of almost two years before the proceedings were issued, the plaintiff was under*

a heightened obligation to expeditiously prosecute these proceedings. A full Defence was delivered by the BRP defendants over 6 years ago putting liability firmly in issue. The BRP defendants will be prejudiced by a trial at this remove as they will be hampered in their ability to explore the works done on the boat between 2007 and 2012 due to the passage of time.

15. The BRP defendants are at an information and evidential deficit concerning the time period in question as they had no involvement with the engine at issue during that period and it appears that undocumented works were carried out on the boat. The plaintiffs and third parties engaged by him hold the information in relation to what was done to the boat during the period. As a result, the BRP defendants would have intended to extract information from witnesses in the course of the hearing concerning the maintenance regime, works done and servicing of the engine in the period from 2007 to 2012. That process of extracting relevant facts and information from witnesses in the course of the hearing has been rendered more difficult as a result of the plaintiff's delay in prosecuting these proceedings. Inevitably, the memories of the witnesses as to fact concerning what works/checks/maintenance were done prior to the accident will have faded".

314. Whilst I am satisfied that the BRP defendants have *not* met the second element of the *Primor* test, the foregoing averments do not identify any specific or concrete prejudice. I say this in circumstances where all witnesses as to fact remain available, as do all expert witnesses retained by the plaintiff and the BRP defendants, respectively.

315. There is no evidence of any (i) *witness*; (ii) *report*; or (iii) *document* being unavailable to the BRP defendants or to the plaintiff, as a consequence of any delay. All will be available to a trial judge. It is also noteworthy that, from the very outset, it was the plaintiff who took steps to ensure that evidence, including documentary evidence, would be preserved (see entries for June 2013). It will also be recalled that joint engineering inspections have taken place (including during the period which the BRP defendants characterise, wrongly in my view, as the plaintiff's delay) and the results of those inspections remain available to the experts and to a trial Court.

316. There is a surface attraction to the argument that the BRP defendants are in some way hampered because they had no involvement with the engine in the period between 2007 and 2012. However, that was *always* the case, regardless of when the case went to trial. The more important point seems to me to be the fact that those who carried out the works remain available as witnesses at the trial and, thus, the BRP defendants can cross–examine them.

317. Insofar as it was submitted during the hearing that the BRP defendants are prejudiced because there was no independent witness to the incident itself, again, this was *always* the case. However, the plaintiff remains available to be cross–examined.

318. Insofar as it is submitted on behalf of the BRP defendants that witness memories may have faded, the following observations by Dignam J at para. 46 of his 15 March 2022 decision in *Bergin v. McGuinness* [2022] IEHC 151, seem apt:

> *"I think it is fair to say that the grounding affidavits in very many applications to dismiss for want of prosecution contain a general averment to the effect that given the passage of time a fading memory is likely to prejudice their defence (this is so common that Birmingham J described it in* [*O'Riordan v. Maher & ors* [2012] IEHC 274] *as "little more than formulaic")"*. (emphasis added)

319. With respect to what, in fact, occurred on the day, not only is the sole witness (i.e. the plaintiff) still available, the day of his accident was one in which he sustained very serious and life-changing injuries. That being so, it seems uncontroversial to suggest that the plaintiff is more likely to recall that particular day than many other uneventful days in his life. Quite apart from that observation, there is no evidence before the Court which would allow for a finding that the plaintiff's memory is, in fact, impaired (such as a medical report in which that view is expressed). In relative terms, the plaintiff is a young man, and there is no evidence of any cognitive impairment before this court.

320. Furthermore, and significantly, the plaintiff's solicitor makes the following averment at para. 29 of his 30 January 2023 affidavit:-

> "*29. The plaintiff is acutely aware of what occurred on the day. It was one of the most traumatic moments of his life and was quite simply life changing for him. The BRP defendants now assert that the plaintiff has an inaccurate memory. Again, at the risk of stating the obvious that is really for the plaintiff and no doubt his recollection will be challenged by the BRP defendants at the trial if the application herein is dismissed".* (emphasis added)

321. In light of the foregoing, I am satisfied that the BRP defendants have not established even general prejudice consisting of the presumption of a faded memory of the sole witness to the incident itself, i.e. the plaintiff. Indeed, having regard to his solicitor's averments, the evidence is to the contrary.

322. I also feel bound to reject the submission that, because the plaintiff has not chosen to sue those who carried out maintenance works etc. between 2007 and 2012, the BRP defendants have been unable to speak with them and are, therefore, prejudiced in some way. Furthermore, Mr. Boland makes the following averments at para. 28 of his 30 January 2023 affidavit: -

> "*I say that Mr. Bourke avers that any prospect that the plaintiff, Mr. O'Donoghue or Mr. McCallum have a clear recollection of the events relevant to the case is greatly diminished and that I have not confirmed whether or not I interviewed Mr. McCallum. I say that I have interviewed both parties and I say and believe that they are capable of giving clear evidence. In any case I say that this is really a matter for the plaintiff as (at the risk of stating the obvious) it is the plaintiff that bears the burden of proof".* (emphasis added)

323. It will be recalled that Mr. O'Donoghue and Mr. McCallum are the parties said to have carried out works. Both are named on the plaintiff's disclosure schedule. There is no evidence before the Court in the present motion which allows for a finding that there was anything to prevent the BRP defendants from contacting Mr. O'Donoghue or Mr. McCallum, at any stage. No explanation has been given by the BRP defendants for why they apparently decided against making such contact.

324. Even if the BRP defendants made a decision not to subpoena either Mr. O'Donoghue or Mr. McCallum, this does not appear to me to be an answer as to why they were not contacted, and it certainly does not provide an evidential basis for a finding that their memories are impaired. Both gentlemen remain available as witnesses, and it will be open to the BRP defendants to cross–examine them. There is simply no evidence before the Court that these gentlemen had, for example, clear memories in January 2018 which, by November 2020 (or February 2022) had faded. On the contrary, a positive averment by the plaintiff's solicitor to the effect that he has interviewed both these individuals and that they are capable of giving clear evidence seems to me to mean that the BRP defendants have not established any prejudice with respect to these witnesses, specific or general.

325. It is also fair to say that there is simply no evidence that any of the BRP defendants' witnesses as to fact, claim to have impaired memories as a result of any delay on the plaintiff's part. It will be recalled that the BRP defendants' disclosure schedule, per S.I. 391/1998 was served on 23 December 2020. Three witnesses of fact were named, i.e., (i) Todd Craft (BRP US Inc.); (ii) Mike Loach (BRP UK and Ireland); and (iii) Michael Connelly (Ballycotton Marine Services). None of these have sworn any affidavit and none are said to have fading memories. Not only is the same true in respect of all of the BRP defendants' experts, plainly all experts have access to their various reports and can speak to those.

326. In short, there is no evidence before this Court that any witness is unavailable or that any witness has, in fact, an impaired memory as a result of any delay by the plaintiff.

327. In the manner discussed earlier, and despite the skilled submissions on behalf of the applicants, I simply cannot accept that the passing of Mr. Cliff causes any prejudice to the BRP defendants. He was never their witness. He was an expert retained by the first named defendant on the question of liability. Indeed, on one reading of the situation, his unavailability might inure to the benefit of the BRP defendants (who have served a notice claiming contribution and indemnity from the first named defendant). More to the point, the first named defendant, who is plainly aware of such prejudice as Mr. Cliff's death is said to cause them, has chosen not to bring any application to dismiss.

328. A consideration of the evidence before the Court allows for a finding that a fair trial remains entirely possible. To say the foregoing is not to suggest that the BRP defendants were under an obligation to prove the contrary in order to succeed (this court is applying the *Primor* test, not

the *O'Domhnaill* approach). Nonetheless, the reality that a fair trial remains possible seems to me to be a very important factor, which argues against a dismissal of the proceedings.

329. At para. 16 of Mr. Bourke's 7 February 2022 affidavit, he avers that the BRP defendants have also suffered reputational damage as a consequence of the plaintiff's delay. This is put in the following terms:-

> "*16. In addition, the BRP defendants have been and continue to be exposed to the reputational consequences associated with the plaintiff's allegations in these proceedings. The plaintiff's claim does not seek to simply impugn the quality of the BRP defendants' product but further the plaintiff's claim involves an allegation of producing an unsafe product. I am instructed that safety is a priority of the BRP defendants. The plaintiff has made serious allegations concerning the safety of the engine in question in these proceedings which serves to heighten the obligation of the plaintiff to prosecute the proceedings. It is unfair for the BRP defendants to be forced to wait indefinitely for the plaintiff to prosecute these proceedings which seek to undermine the safety of the BRP defendants' product and consequently the BRP defendants' reputation".* (emphasis added)

330. It seems to me that the foregoing averments are made in the most general of terms. By that I mean, there is no evidence before the Court of any specific adverse consequences in respect of the reputation of the BRP defendants. For example, there is no averment that any business has been lost, or that the BRP defendants have received adverse media publicity as a consequence of these proceedings (or, more to the point, any delay in having the proceeings determined).

331. Nor is there any averment that, for example, the cost of any insurance premium has been increased as a consequence of the proceedings. Furthermore, the reputational prejudice alleged is squarely linked by the BRP defendants to "*serious allegations concerning the safety of the engine*". In short, the prejudice is said to arise because the plaintiff's proceedings "*seek to undermine the safety of the BRP defendants' product*". Those averments must, however, be seen in light of what Mr. Bourke subsequently averred at para. 52 of his 16 December 2022 affidavit. For the sake of clarity, that paragraph was in the following terms: -

> "*BRP defendants' products*
>
> *52. In my grounding affidavit I referred at para. 16 to the unfairness of the BRP defendants having to defend their and their product's reputation after so much delay in the prosecution of these proceedings. I have since learned that the companies have discontinued production and sale of outboard engines. Nonetheless, I am instructed that the BRP defendants continue to be a manufacturer and vendor around the world of recreational watercraft as well as other recreational vehicles and therefore remain concerned about their reputation in defending a stale case of this nature".* (emphasis added)

332. The present proceedings do not concern "*recreational vehicles*". Nor is there any issue in the present proceedings regarding the safety of "*recreational watercraft*". At the heart of the proceedings is an allegedly defective engine, of which a 'kill cord' and switch were components.

However, in the manner Mr. Bourke very appropriately avers, the BRP defendants no longer sell any such engines. In my view, this utterly undermines the claim that any prejudice has been suffered of the type asserted at para. 16. In short, it was asserted in the most general of terms, but it now seems to me to lack any evidential basis whatsoever.

333. Insofar as it is submitted that the mere existence of the proceedings 'hanging over' the BRP defendants causes reputational damage, there is, as I say, no evidence of any actual prejudice of this sort. Nor does it seem appropriate for this Court to operate on the basis that certain prejudice inevitably arises, despite the absence of evidence. As Collins J. stated recently in the Court of Appeal's decision in *Cave Projects Ltd v. Gilhooley & Ors* (p. 34 of 67): "*Prejudice is not to be presumed: AIG Europe Ltd v. Fitzpatrick [2020] IECA 99, per Whelan J. (Donnelly and Power J.J. agreeing).*" Moreover, it is appropriate to recall that these are proceedings which could well have been concluded last year, but for the insistence on the part of the BRP defendants in February 2022, that the trial date (June 2022) be vacated. Thus, no prejudice of this type has been established in my view.

334. In *Minister for Justice, Equality and Law Reform v. Gorman* [2015] IECA 41 (concerning an appeal of a dismissal of an assault and false imprisonment claim), Irvine J. (as she then was) stated that:-

> *"in dismissing this plaintiff's claim the decision of the High Court has the effect of ending his constitutional right of access to the Courts. However, this not an unqualified right and is one which must be balanced against the right of the defendants to protect their good name."*

335. In the present case, the BRP defendants have not established any damage whatsoever to their good name or reputation, whereas the success of the present motion would terminate the constitutionally protected right of access to the Courts of an individual who has sustained life changing injuries.

336. There is no evidence before this Court that any delay has prejudiced the assessment of quantum, be that in relation to general or special damages. There is no evidence that as a result of delay, any evidence, be it documentary or physical, which was once available, has been mislaid or destroyed. Rather, the 'landscape' as regards physical evidence remains precisely as it was before the plaintiff's delay.

337. The BRP defendants have not established any causal connection between the delay of which they complain and any specific prejudice.

338. I accept entirely that, under the *Primor* test, a defendant does not have to show the type of prejudice necessary to be established for a dismissal of proceedings per the *O'Domhnaill* principles but, in my view, the BRP defendants have not established fair trial prejudice and if any prejudice whatsoever has been established it is minor in nature and of a general, as opposed to 'concrete' sort.

339. Although satisfied that the BRP defendants have not established what is often referred to in the authorities as "moderate" prejudice (and lest I be entirely wrong in my findings as regards prejudice to the applicants) I have conducted the balance of justice assessment on the assumption that moderate prejudice *has* been established.

340. The jurisprudence makes clear that moderate prejudice may (*not* must) 'tip the balance' in favour of dismissal. I am entirely satisfied that it does *not* do so in the present case. This is because of the number and weight of countervailing circumstances which argue for a dismissal of the present motion.

341. I have no hesitation in saying that, even if moderate prejudice to the applicants *is* taken into account, the scales tip overwhelmingly *against* granting the relief sought by the BRP defendants when all relevant matters are taken into consideration *per* the guidance given by Hamilton C.J. in *Primor*. I emphasise again that the BRP defendants fell well short of meeting the second element of *Primor,* but they have also failed to meet the third element by an even more substantial margin, in my view.

342. In the balance of justice assessment, this Court attempts to aim at a *"global appreciation of the interests of justice"* (per Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 IR 510 at 518). I have no hesitation in expressing the view that the interests of justice require the dismissal of the present motion. It would neither be just, nor proportionate, to do otherwise.

343. I am very conscious that, as Butler J. noted in *Gibbons v. N6 (Construction) Ltd and Galway County Council* [2022] IECA 112 *"the Court's obligation* [is] *to ensure the efficient conduct of litigation"*, but the foregoing statement of principle must interact with the specific facts. Nor is there anything in the decision of the learned judge in *Gibbons* to suggest that fairness and the interests of justice must yield to efficiency. On the contrary, as Collins J put it (at p. 27) in the Court of Appeal's recent decision in *Cave:*

> *"…an order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the Court is satisfied that the balance of justice is clearly against allowing the claim to proceed. Adapting slightly what was said by Barniville J in Gibbons v N6 (Construction) Limited, the Court must be satisfied that the 'the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be [.]proportionate and [.]just' (at para. 86)."* (emphasis added).

344. The balance of justice is clearly in favour of the case proceeding. Whereas the BRP defendants bore the burden of demonstrating that, as a consequence of delay, the balance of justice clearly favours dismissal, they have fallen very far short of discharging that burden.

345. In *Cave*, Collins J stated (p. 36 of 67):

> "*The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue*

legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening Court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that Courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant." (emphasis added)

346. Having looked closely at the facts which emerge from an analysis of the evidence in the present application, I am very satisfied that permitting the plaintiff's claim to proceed would not result in "*some real and tangible injustice"* to the defendant.

347. The present application has, without doubt, caused further delay and has added to the burden on what are finite Court resources. Given the fact that, prior to insisting that the trial date be vacated and prior to issuing the present application, the BRP defendants knew, full well, that, despite having reserved their rights with respect to delay as far back as July 2019, they took no action whatsoever on foot of those reserved 'rights' for over two and a half years (during which period they progressed the case towards trial and engaged with the plaintiff to that end) it seems to me that this is an application the BRP defendants ought not to have brought.

348. In saying this, I do not direct criticism at any individual. I accept entirely that, in our adversarial system, there is no 'bar' to bringing an application of this sort and, once brought, it was perfectly legitimate for counsel to press the application with such sophistication, skill and force. My point, however, is that the outcome of an application of this type will not be determined by legal principle, or legal submissions, but by the *facts* found. In other words, this Court's obligation is to deliver a 'bespoke' response to the very specific facts and circumstances of the individual case, guided by the well-established principles and underpinned by the interests of justice. Importantly, however, no one will know those very specific facts and circumstances better than a would-be applicant; and no submissions, however skilled, can set aside key facts known to a would-be applicant (such as, in the present case, what I have described as so close to acquiescence as makes no difference).

Greater care

349. In other words, their own actions were known to the BRP defendants at all material times *prior* to their decision to bring this application (despite being something this Court could only ascertain *after* devoting time to a day-long hearing followed by the considerable additional time required for a necessarily 'granular' analysis of the relevant evidence). In short, and by way of a general point, it seems to me that greater care is required by would-be applicants, lest what Collins J described as "*unmeritorious applications*" be brought which seek to dismiss proceedings on delay grounds, but which fall well short of meeting the *Primor* test (as this application did) given facts known to the applicant prior to the motion being issued.

350. For the reasons expressed in this judgment, the BRP defendants are not entitled to the relief sought. In my view, the BRP defendants failed, by a wide margin, to meet the second element of the *Primor* test and, without prejudice to that view, a consideration of the balance of justice very decisively favours the dismissal of the present application.

Costs

351. In light of the findings in this judgment, my preliminary, but strongly held view, is that the justice of the situation is best met by applying the *"normal rule"* that *"costs"* (to be adjudicated in default of agreement) should *"follow the event"*. In circumstances where some inordinate delay was established, and, with respect to the period up to November 2020, the plaintiff did not keep the BRP defendants updated on such steps as they were taking, it would seem appropriate to place a 'stay' on the execution of such a costs order, in favour of the plaintiff, until the determination of the underlying proceedings. If either party contends for a different outcome to the costs issue, the following is of particular relevance.

352. In the event of either party taking issue with my preliminary views on the question of costs, short written submissions should be filed in the Central Office within fourteen days. The parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs. The parties are also invited to agree any steps by way of a 'directions timetable' which, on the basis of such agreement, can be included in the Court's order.