THE HIGH COURT

[2024] IEHC 32

[RECORD NO: 2016/1839P]

BETWEEN

FIRST NAMES TRUST COMPANY (IRELAND) LIMITED

PLAINTIFF

AND

EDWARD KIRK AND JOHN PATRICK DONNAN

PRACTICING UNDER THE STYLE AND TITLE OF KIRK & ASSOCIATES

DEFENDANTS

Judgment of Mr. Justice Mark Heslin delivered on 24 January 2024

Introduction

1. On 11 July 2022 the defendants issued a motion, initially returnable for 7 November 2022, seeking the following relief:

(1) An order pursuant to the inherent jurisdiction of this court dismissing the plaintiff's claim against the defendants for inordinate and/or inexcusable delay;

(2) further, and/or in the alternative, an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts (as amended) dismissing the plaintiff's claim for want of prosecution;

(3) further, and/or in the alternative, an order pursuant to the European Convention on Human Rights Act, 2003, dismissing the plaintiff's claim as against the defendants as contrary to the defendants' right to a trial within a reasonable time frame pursuant to Art. 6 of the European Convention on Human Rights and Fundamental Freedoms;

(4) such further or other order as to this court shall deem meet;

(5) an order providing for the costs of and incidental to the within application, together with an order for the costs of these proceedings.

Primor 'test'

2. There was no dispute between the parties in relation to the legal principles applicable to an application to dismiss on delay grounds. The principal authority is the Supreme Court's decision in *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 ("*Primor*"). It was with reference to what I shall call the *Primor* 'test' that the matter proceeded before me. The *dicta* of Hamilton CJ (at pp. 475/76 of the reported judgment) has guided this court in deciding the present motion.

3. *Primor* requires this court to ask the following three questions, in sequence:

(1) Is the delay *inordinate*?

(2) If so, is the delay *inexcusable*?

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

The dispute

4. In essence, the defendants submit that the plaintiff has been guilty of pre-commencement delay; that their post-commencement delay is inordinate; is inexcusable; and the balance of justice strongly favours dismissal. The defendants contend that the very opposite is the position.

Submissions

5. Before proceedings further I want to express my thanks to Ms. Shanley BL (for the defendants) and Mr. de Blacam SC (for the plaintiff). Both made all submissions with clarity and skill during the hearing. These supplemented detailed written submissions of 13 and 14 November 2023, respectively. I have carefully considered all submissions and will refer to the principal of these during the course of this judgment.

Evidence

6. In terms of evidence, the defendants' motion was grounded on an affidavit sworn on 7 July 2022 (with exhibits "A" and "B" comprising of copy correspondence and certain accounts). A replying affidavit was sworn on 30 November 2022, by Mr. Con Quigley on behalf of the plaintiff (which referenced exhibits "A" to "J"). With respect to the conduct of the proceedings, the plaintiff also relies on the affidavit sworn on 30 November 2022 by Mr. St. John Dundon, solicitor, of Messrs. Dundon Callanan LLP Solicitors, on record for the plaintiff.

7. At para. 4 of his affidavit Mr. Dundon makes *inter alia* the following averments: *"I have prepared a Chronology of the events in this case, upon which Chronology marked with the letter 'A' I have signed my name prior to the swearing hereof. The events and dates referred to in the Chronology are I believe in all respects true and accurate."* (emphasis added).

8. Having regard to the foregoing averments made by an officer of this court, the contents of the aforesaid chronology comprise part of the evidence in relation to steps taken by the plaintiff.

9. In circumstances where, for the sake of clarity, this judgment will look at matters in chronological order, the matters which Mr. Dundon has averred to must form part of the analysis by this court, of the facts, in sequence. Exhibit "B" to Mr. Dundon's affidavit comprises of certain correspondence which passed between the parties following service by the defendants of their motion. I will refer to that to the extent relevant.

10. In addition to the foregoing, the court was provided with (i) a Book of Pleadings, including motion papers; (ii) a Book of Authorities; and (iii) a book of papers, prepared by the defendants,

which was provided to the court, without objection by the plaintiff, during the hearing before me. The said book (which runs to 356 pages) comprises of 48 items made up of pleadings and correspondence, in chronological order (being some of the items which appear on the defendants' averred chronology of the events in this case).

This Court's role

11. Nothing in this judgment purports to be a determination of any issue in dispute between the parties. However, in order to fairly decide on the present application it has been necessary to look in quite 'granular' detail at the sequence of events. The court has also been required to examine the nature of these proceedings, to the extent necessary to determine the motion. However, nothing said in this judgment is intended to, or can, usurp the role of any trial judge, including with respect to decisions concerning the admissibility of documents, were the case to proceed to hearing. Having made the foregoing clear, I now turn to the relevant background.

Background

12. The plaintiff is a trustee of designated investment funds including the "2007 Pyramus BES Investment Fund" ("2007 Fund") and the "2010 Pyramus Investment Fund" ("2010 Fund").

13. The defendants are partners in an accountancy firm which acted as the accountants for two related companies, namely, "Topsec Technology Limited" ("Topsec") and "Cyberkid Limited" ("Cyberkid"). At all material times Messrs. Emmet O'Rafferty and Fergus O'Rafferty were directors of both Topsec and Cyberkid and the plaintiff contends that both companies were under the ultimate control of Mr. Emmet O'Rafferty.

14. It is common case that in December 2008 the plaintiff (under its then name of "IFG Trust Company Limited") invested €1.5M in Topsec, from the 2007 Fund. That investment is not the subject of any dispute between the parties.

15. The plaintiff contends that, in 2011, it considered making a further investment in Topsec but decided not to do so because of concerns, in particular regarding the sum of €290,000 which Topsec had agreed to pay Cyberkid for a certain customer list.

16. The plaintiff contends that in November 2011 it agreed to invest €500,000 in Topsec from the 2010 Fund on the basis that, prior to this additional investment, the debt of €290,000 owed by Topsec to Cyberkid would be written off and would not be a liability of Topsec.

17. The plaintiff contends that the defendants, being auditors and accountants of both Topsec and Cyberkid, compiled management accounts for the nine months ending 30 November 2011 which accounts disclosed a nil balance in respect of associated company loan accounts (which would include the Cyberkid debt of €290,000). At para. 11 of his affidavit, Mr. Quigley exhibits a copy of those accounts which appear to be dated 22 December 2011.

18. The plaintiff contends that the defendants made express written representations, by email on 22 December 2011, to the effect that the Cyberkid debt had been written off and was no longer a liability of Topsec. At para. 11 of Mr. Quigley's affidavit he exhibits a copy email sent on behalf of the plaintiff, by a Ms. Maebh Gavin of Horwath Bastow Charleton, accountants, to the first named defendant, Mr. Kirk, which states:

> *"Subject: Re: Topsec Technology Limited*
> *Eddie,*
> *I am not 100% sure what happened with the liabilities.*
> *Can you explain very briefly?"*

The response from Mr. Kirk includes the following:

> *"Maebh,*
> *All related party debts due to group from Topsec Technology are either converted or w/off at 30th November 2011 …*
>
> *…*
>
> *protects shares with no downside on your investment.*
> *Regards,"*

19. This email exchange took place on 22 December 2011. The plaintiff contends that, acting on the faith of same, the plaintiff invested €500,000 in Topsec on 23 December 2011.

20. The plaintiff says that it had no reason to believe that the defendants' representations in relation to the Cyberkid debt were not accurate. It asserts, however, that on 13 November 2014 Topsec filed accounts for the year ended 28 February 2013 ("Topsec 2013 accounts") in the Companies Registration Office ("CRO"), a copy of which accounts Mr. Quigley exhibits at para. 13 of his affidavit. Mr. Quigley goes on to make the following averments at paras. 14 and 15 of his affidavit:

> "*14. Page 13 of the Financial Statements contains two paragraphs headed 'prior year adjustment'. The first paragraph states the following:- 'During the year an amount of €290,000 was paid to Cyberkid Limited in respect of a liability that had been written off in the financial statements for the year ended 28 February 2012'. The second paragraph states that the directors were of the view that this sum of €290,000 should be 'written back' to reflect this payment which had (sic) made.*
>
> *15. On the face of it, this note indicated to the plaintiff that a payment of €290,000 had been paid to Cyberkid, notwithstanding the defendants' representations to the effect that the Cyberkid debt had been written off.*"

21. Mr. Quigley goes on to aver at para. 16 that, on becoming aware of the foregoing, the plaintiff reviewed Cyberkid's accounts as filed with the CRO for the years ending 28 February 2011, 2012 and 2013 and none of these reflected the payment which, according to the 2013 Topsec accounts,

had been made. Mr. Quigley exhibits a copy of the foregoing accounts and avers at para. 16 of his affidavit that:

> *"It appeared, therefore, that there was an error in either the 2013 Topsec financial statements or in the financial statements for Cyberkid for the year ended 28 February 2013."*

22. As averred by Mr. Quigley at para. 17, the plaintiff wrote to the defendants on 5 December 2014 in relation to the foregoing discrepancy. A copy of that letter is exhibited, being a letter sent by a Ms. Noeleen Morris on behalf of Pyramus Capital Partners Limited (the fund of which the plaintiff is a trustee). That letter reads as follows:-

> *"Dear sirs,*
>
> *I* [am] *writing in connection with the audited accounts for the year ended 28 February 2013 received from Topsec Technology Limited ('Topsec') and I would like to bring to your attention our concern over the incorrect adjustment posted to these accounts. I was surprised to see a unqualified audit report following from this adjustment.*
>
> *These accounts reflect a prior year adjustment in respect of a payment to Cyberkid Limited. I was even more surprised that you signed off the audit of Topsec showing the liability to Cyberkid while also signing a 'clean' audit report for Cyberkid Limited which did not reflect any receivable/debtor from Topsec. On review of the Cyberkid accounts filed with the Companies Registration Office, there is no receivable in the accounts of Cyberkid Limited in the 2011, 2012 or indeed the 2013 accounts which are for the same year end as Topsec.*
>
> *As you are aware, prior to the investment made in the company on the 23rd December, 2011, we received an accountant's report and declaration dated 22nd December, 2011 which reflected the liability of €290,000 to Cyberkid Limited written off in 2011.*
>
> *Pyramus has initiated steps to address the serious representations and misdeed that are evidenced by the foregoing. Pyramus are reserving our position with the accountancy professional body, the Central Bank and the ODCE on the above matter.*
> *Yours faithfully"*

23. On any objective analysis, this was a letter in which the plaintiff identified a discrepancy and made allegations of a serious nature against the defendants. In oral submissions before me, counsel for the defendants skilfully pointed to the fact that there was no explicit request in this letter for a reply by the defendants. That may be so but, in substance, the letter accuses the defendants of misrepresenting the position to the plaintiff. It raises a very serious concern and ventilates a potential claim. In objective terms, it was a letter which required a response. In my view, the sender of such a letter could reasonably expect to receive at least some form of reply and could not be criticised for awaiting same. However, no response was ever furnished.

24. As Mr. Dundon avers at para. 10 of his affidavit:

"*On or about 26 February 2015, the defendants submitted an amended set of Cyberkid 2013 financial statements to the CRO.*

The amended statements refer to a payment of €290,000 received from Topsec in respect of a debt that had been provided for as a 'doubtful' debt in the statements for the previous year. (This statement, for which the defendants were responsible, is inconsistent with their previously made representations that there had been a write-off)."

25. At para 18 of his affidavit, Mr. Quigley exhibits the 26 February 2015 financial statements and he proceeds to make the following averments from para. 19 onwards:-

"*19. Paragraph 3 of the notes on page 9 of the Amended 2013 Cyberkid Financial Statements states the following in respect of the aforesaid alleged payment of €290,000 by Topsec to Cyberkid:-*

'During the year €290,000 was received from Topsec Technology Limited in respect of a debt that had been provided for as a doubtful debt in the financial statements for the year ended 28 February 2012'.

20. Whilst the correction referred to in the aforesaid note may have had the apparent effect of removing a discrepancy between the 2013 Topsec Financial Statements and the Cyberkid Financial Statements for the same period, the statement in the foregoing extract that the debt due to Cyberkid from Topsec had been provided for as a 'doubtful' debt in Cyberkid's own financial statements for the year ended 28th February 2012 was completely at odds with the aforesaid representations which had apparently been made by the directors of Topsec to the defendants that, in that accounting period, the said debt had, in fact, been written off.

21. It subsequently transpired that the original 2013 Cyberkid Financial Statements, which had been filed with the CRO ono 21st November 2013, were withdrawn from the CRO, are no longer on its records and were replaced by the Amended 2013 Cyberkid Financial Statements. The plaintiff is in a position to exhibit a copy of the original 2013 Cyberkid Financial Statements in these proceedings because when she originally accessed the accounts online, Ms. Morris printed and retained a hard copy thereof retained on file.

22. It also transpired that abridged financial statements for the year ended 28th February 2014 in respect of Cyberkid were filed with the CRO on or about 25 November 2014. I beg to refer to a copy of the said accounts (hereinafter the 'original 2014 Cyberkid Financial Statements') upon which marked 'F' I have signed my name prior to the swearing hereof. Investigations carried out by the plaintiff's solicitors indicate that on 16 February 2015, the Annual Return with which the said statements were filed was returned by the CRO to the defendants at their own request. Subsequently, on or about 16 March 2015, an Annual Return with amended financial statements for the year ended 28th February 2014 in

respect of Cyberkid were filed with the CRO. I beg to refer to a copy of the said amended financial statements which were delivered with the said annual return (hereinafter, the 'Amended 2014 Cyberkid Financial Statements') upon which marked 'G' I have signed my name prior to the swearing hereof. A review of the entry for 'profit and loss account' in respect of the year 2013 in the abridged balance sheet of each of the said statements indicates that there is a difference of €290,000 in the figure given for this entry in the original statements and the figure given for this entry in the amended statements (€6,470,738 in the original statements and €6,189,738 in the amended statements). I say and believe that it is reasonable to infer from this figure and from other information provided therein that the amended 2014 Cyberkid Financial Statements were prepared and filed to account for the payment of €290,000 which was apparently received by Cyberkid from Topsec in the year ended 28th February 2013 (and which had not been accounted for in the Original 2014 Cyberkid Financial Statements).

23. The information set out in the foregoing paragraph in respect of the submission to, withdraw from, and resubmission to, the CRO of the returns and financial statements referred to therein is based on information provided to the plaintiff's solicitors by the CRO …"

26. The averments made by Mr. Quigley and the correspondence and accounts exhibited by him are reflected, albeit far more succinctly in Mr. Dundon's chronology, wherein the period from 2011 to 2016 is dealt with as follows:

"Chronology of principal actions relevant to proceedings

Date	***Event***
2011	
22 December 2011	*Making of representations by defendants.*
2012	
2013	
13 November 2013	*2013 Topsec Financial Statements (containing "prior year adjustment" filed with CRO.*
21 November 2013	*2013 original Cyberkid Financial Statements filed with CRO.*
2014	
25 November 2014	*Original 2014 Cyberkid Financial Statements filed with CRO.*
5 December 2014	*Letter from plaintiff to defendants identifying discrepancy between Topsec accounts and Cyberkid accounts.*
2015	
16 February 2015	*Annual return and original 2014 Cyberkid Financial Statements returned by CRO to Defendants.*

26 February 2015	*Amended 2013 Cyberkid Financial Statements filed in CRO.*
16 March 2015	*Amended 2014 Cyberkid Financial Statements filed in CRO.*
14 December 2015	*Plaintiff's solicitors instructed by plaintiffs.*
21 December 2015	*Initial letter of claim sent to defendants by plaintiff's solicitors.*
2016	
29 February 2016	*Plenary summons issued.*
30 June 2016	*Independent expert report issued by Liston Lonergan Meade.*
2 and 6 December 2016	*Plenary summons served on defendants by summons server."*

27. I pause here to make what are perhaps obvious comments. Whilst the investment was made by the plaintiff in December 2011 the discrepancy was not known to the plaintiff until some three years later. There would not appear to have been *any* delay on the part of the plaintiff in raising concerns with the defendants by means of the 5 December 2014 letter aforesaid. In a manner previously discussed, it was not at all unreasonable to await a response. Even if I am wrong in that view, further events occurred throughout 2015, *i.e.* filings in the CRO, which are of obvious relevance to such claim as the plaintiff then contemplated.

28. To have instructed solicitors in December 2015 did *not* involve delay by the plaintiff. Furthermore, given that the present proceedings involve allegations of professional negligence, it was entirely appropriate that no writ would be served and no statement of claim would be drafted without the plaintiff having obtained an independent report from an expert. It is a statement of the obvious that providing instructions to solicitors, particularly in relation to a claim of some complexity, takes time. For counsel to be properly briefed takes time. For an independent expert to be identified, briefed, and for them to produce a report, takes time. Bearing the foregoing in mind, para. 15 of the defendants' written legal submissions begin as follows:

> *"15. The relevant periods of delay in this case are as follows:*
>
> *(1) The proceedings issued four years and two months after the alleged negligent misstatement (December 2011 to 29 February 2016).*
>
> *(2) There was a delay of approximately 15 months between 5 December 2014 (when the plaintiff first wrote to the defendants) and 29 February 2016 when the plenary summons issued.*
>
> *(3) There was a further post-commencement delay of 9 months from 29 February 2016 to December 2016 when the summons was served. At this stage, it was five years since the events at issue in the proceedings …"*

29. Regardless of the skill with which this court is urged to regard the above as delay on the part of the plaintiff, I cannot agree. An examination of the facts paints an entirely different picture. It allows this court to hold that the plaintiff moved with due expedition. Furthermore, in circumstances where the defendants accept that they never replied to the plaintiff's letter of 15

December 2014, it seems to me that the defendants could have, but chose not to, contribute to matters progressing more quickly.

30. In short, I must reject the submission that the plaintiff made a 'late start' and I reject the submission that there was any delay on the part of the Plaintiff up to service of the proceedings, in early December 2016. I now turn to what occurred thereafter, per the averments made by the plaintiff's solicitor:

"Date	***Event***
2017	
17 January 2017	*The defendants entered an appearance on 17 January 2017*
31 January 2017	*The plaintiff delivered a statement of claim which is dated 31 January 2017."*

Statement of claim

31. Para 8 of the statement of claim begins as follows:

> "*Acting in their capacity as auditors to the Company, on or about 22 December 2011, the defendants represented to the plaintiff, its servants and agents, inter alia, that:*
>
> *(a) all the company's debts to related parties had been written off at 30 November 2011;*
>
> *(b) In particular, the liability of €290,000 to Cyberkid had been written off at 13 November 2011; and*
>
> *(c) that the plaintiff's proposed investment would be protected with no downside thereon…*"

32. In particularising these representations, the statement of claim referred to and quoted from *inter alia* the 22 December 2011 email from the first named defendant to Ms. Gavin, (which I quoted *verbatim* earlier in this judgment). Other alleged written representations made by the defendants are pleaded in the following terms:

> *"(ii) they were expressly made in an email dated 22 December 2011 (at 15:18) from the second named defendant to, inter alia, Colm Lardner and Maebh Gavin of Horwath Bastow Charleton, accountants who were at all material times acting for and on behalf of the plaintiff, which stated the following:-*
>
> *'I attach consolidated management accounts for the top mail group for the nine months ended 30 November 2011.*
>
> *Please confirm whether you are happy that these meet the requirements of point 18 & 36 on the checklist and I will proceed to get them signed off.'*
>
> *(The 'checklist' referred to in the foregoing email was a checklist prepared by Horwath Bastow Charleton identifying matters to be attended to prior to the aforesaid proposed investment. Point 36 of the checklist stated:-*

'Management accounts for the Top Group evidencing the conversion/right of related party balances')."

…

"(iv) they were expressly made in an email dated 22 December 2011 (at 16:49) from the second named defendant to Maebh Gavin of Horwath Bastow Charleton which stated the following:

> *'Securekom balance of €55K transferred to Top Mail Limited and transferred from Top Mail to Topsec Security systems (IOM).*
> *As you can see from the debtors note to the accounts that there are no balances owed to related party companies at 30 November 2011. The only group balance is the loan to Topsec Security Systems Limited of €1.456K*
> *Hope this clarifies this'."*

33. I pause to observe that, whilst the said representations are pleaded to be made partly orally and partly in writing, this is certainly a case where contemporaneous documentation is available and is being relied upon, in particular, (i) communication sent by the defendants to the plaintiff and (ii) accounts prepared by the defendants for Topsec and Cyberkid, as filed by the defendants in the CRO.

Documents

34. The significant role which documentation has to play in any future determination of the present proceedings can also be seen from para. 24 of Mr. Quigley's affidavit wherein he makes reference to copies of letters to the defendants (obtained by the plaintiff in replies to particulars). Mr. Quigley's averments at para. 24 include the following:

"…*The said replies identified these letters as written representations from Mr. O'Rafferty as an alternate director of each of Topsec and Cyberkid to the defendants, which were provided in connection with the preparation by the defendants of the financial statements referred to above. These letters of representation can be divided into two categories (i) letters of representation dated 21 December 2011 from the directors of both Cyberkid and Topsec to the defendants (their respective auditors) confirming that the Cyberkid debt had been written off by Cyberkid; and (ii) letters of representation dated 28 October 2014 from the directors of both Cyberkid and Topsec to the defendants indicating that the said write-off of the Cyberkid debt had been an error…*"

35. With regard to the foregoing letters, Mr. Quigley proceeds, from para. 27 onwards of his affidavit, to make the following averments:

"*27. Page 3 of the six page letter (dated 28 October 2014) from Cyberkid to the defendants refers (under the heading 'related party transactions') firstly to the payment by Topsec of €300,000 to creditors of Cyberkid on behalf of Cyberkid, then to the write-off in the financial statements for the year ended 28 February 2011 of the Cyberkid debt and then states that this was 'an error made by the company' and characterises the error as being one of a 'fundamental nature'. The next paragraph of the letter states that the*

directors of both Topsec and Cyberkid gave representations to the defendant that the balance of €290,000 had been written off. The said letter then contains the following statement:

> *'The subsequent event of (Topsec) paying creditors of (Cyberkid) on its behalf a total of €300,000 informed the directors of both (Topsec) and (Cyberkid) that it had been an error to have stated that this liability between the companies had been written down to nil, it was therefore necessary to reinstate the asset of €290,000 between the companies' (Emphasis added)*

28. Similar wording appears in each of the other three letters contained in the aforesaid exhibit 'J' (i.e. the second letter from the directors of Cyberkid and the two letters from the directors of Topsec).

29. I say and believe that this statement does not stand up to scrutiny as the directors of Cyberkid and Topsec were, at all material times the same persons, Emmett O'Rafferty and Fergus O'Rafferty, who were also the persons who had given the original representations to the defendants regarding the write-off of the Cyberkid debt. It is not clear at all how a payment made by the directors themselves could, of itself, have 'informed the directors' (namely themselves) that there had been an error in giving the original representations. Nor is it apparent how this statement could of itself and, without any explanation as to how the apparent error had come about, have been relied on as a representation by the Defendants for the purposes of (in the case of Topsec) preparing and reporting on audited accounts which contain a prior year adjustment and (in the case of Cyberkid) preparing and reporting on amended audited accounts.

30. Further, the information available in respect of the recipient of the aforesaid payment of €290,000 is unclear and inconsistent. As noted above, the 2013 Topsec financial statements stated that the €290,000 was paid to Cyberkid and the Amended 2013 Cyberkid accounts indicated that Cyberkid had received €290,000 from Topsec. On the face of it, these statements suggest that the money was actually paid to and received by Cyberkid itself. However, on page 3 of each of the letters of representation dated 28 October 2014, it is stated that Topsec paid €300,000 to creditors of Cyberkid on behalf of Cyberkid and not (as is suggested in the above financial statements) to Cyberkid itself. (The letter goes on to state that this payment was accounted for as a loan repayment of €290,000 and an advance to Cyberkid of €10,000). Further, it appears from the Replies to Particulars that the Defendants are now contending that this money was, in fact, paid into the client account of a firm of solicitors who paid it on to another firm of solicitors to be paid to the former shareholders of a company called Eurokom Limited. However, it is not apparent from the wording of the relevant reply (para. 12(8) of the Replies to Particulars dated 3 December 2018) whether the defendant is contending that it was Eurokom Limited which was the creditor or whether it was the former shareholders of Eurokom who were

the creditors. If it is being contended that it was Eurokom which was the creditor, it is not apparent on what basis the payment was made to its former shareholders and not to it.

31. In addition, the information available in respect of the treatment of the Cyberkid debt by Cyberkid within its own records is contradictory. The letter of representation dated 21 December 2011 in respect of Cyberkid (as exhibited above) states that the Cyberkid debt 'has been written off in full during the period to 28th February 2011' (emphasis added). However, note 3 of the 2013 amended Cyberkid Financial Statements states (at page 9 thereof) that the Cyberkid debt had been provided for as a 'doubtful debt' for the year ended 28 February 2012. I say that it does not make any sense that a debt which had been written off in full in one year (the year ending 28 February 2011) would be provided for as a doubtful debt in financial statements for the following year."

36. Without this court purporting to offer any view whatsoever in relation to the underlying merits of the claim, the foregoing averments underline the availability of contemporaneous documentation relevant to the central issues in dispute. In other words, whilst this is not a dispute which hinges upon, for example, the interpretation of a contractual provision in a commercial agreement, contemporaneous documentation, all of which is available, will play a central role as well as constituting an *aide-mémoire* with respect to oral testimony by relevant witnesses. Whilst I will presently return to the issue, the defendants neither suggest that any witness is missing or unavailable, nor that the memory of any specific witness is in any way impaired. Indeed, counsel for the defendants, very appropriately, makes clear that her clients do not assert that there is any risk of an unfair trial. The availability of the aforementioned documents and the central role which documentation will doubtless play in any future trial speaks to this reality.

37. As the statement of claim makes clear, the plaintiff alleges that it relied on representations made by the defendants, including the defendants' emails of 22 December 2011, but for which they would not have invested €500,000 in Cyberkid on 23 December 2011. The plaintiff pleads that the defendants were negligent and in breach of duty to the plaintiffs in making representations by failing to obtain proper confirmation from Cyberkid that Topsec's debt to it had been written off; making representations and statements they knew or ought to have known were not correct; failing to obtain proper information and confirmations when compiling accounts; failing to have proper regard to the fact that Cyberkid had not written off the Topsec debt but had provided for it as a *"doubtful debt"*; and failing to inform the plaintiff of the true position regarding Topsec's debt to Cyberkid in a timely manner (see para. 13 of the statement of claim). Having pleaded (at para. 15) that the representations made by the defendants were false and untrue, the statement of claim goes on to include the following:

" *PARTICULARS*

The debt to Cyberkid had not in fact been written off as of the date of the aforesaid investment or at all and remained a liability of the company. In the year ended 28 February 2012, the company paid the sum of €290,000 to Cyberkid in discharge of this

debt. The falsity and untruth of the aforesaid representations were expressly acknowledged by the defendants in the accounts of the Company for the year ended 28 February 2013 which were audited by the defendants. The said acknowledgment is made in the following terms:-

> *'Prior Year Adjustment*
>
> *During the year an amount of €290,000 was paid to Cyberkid Limited in respect of a liability that has been written-off in the financial statements for the year ended 28 February 2012.*
>
> *The directors are of the view that the sum of €290,000 owing to Cyberkid Limited which was written off in the year ended 28 February 2012 should be written back to reflect the payment which was subsequently made in respect of this debt during the year ended 28 February 2013.*
>
> *As a consequence thereof the loss for the last year ended 28 February 2012 was understated by €290,000 and reserves at 28 February 2012 were overstated by €290,000.'*

The falsity and untruth of the aforesaid representations were also expressly acknowledged by the defendants in the amended accounts of Cyberkid for the year ended 28 February 2013 which were audited by the defendants and in which they set out at note 3 to the restated comparative balance sheet as at 29 February 2012 contained therein a prior year adjustment disclosure in the following terms:

> *'During the year, €290,000 was received from Topsec Technology Limited in respect of a debt that had been provided for as a doubtful debt in the financial statements for the year ended 28th February 2012. The directors are of the opinion that the doubtful debt provision made in the 2012 financial statements should be reversed by way of a prior year adjustment in order to (sic) for the financial statements to be given a true and fair view.'*

15. As a result of the aforesaid negligence and breach of duty, the plaintiff has suffered loss and damage.

PARTICULARS

The plaintiff made an investment of €500,000 in the Company which it would not have made if it had been aware that the aforesaid liability to Cyberkid remained outstanding as of the date of this investment or if it had been aware that there was a risk that the said liability was outstanding. The said investment has since performed very poorly due to a significant extent to the subsequent discharge by the Company of the said liability and the value of the shares representing the said investment is now materially adversely affected…"

38. The nature of the dispute is clear from the foregoing as is the central role of documentation, none of which is said to be missing, to a fair determination of the dispute at a future trial. Satisfied that there was no delay on the part of the defendant up to the delivery of this statement of claim, dated 31 January 2017, I propose to continue examining the progress of the proceedings in chronological terms.

16 March 2017

39. The defendants raised a notice for particulars, dated 16 March 2017. I pause to say that this was some 2 months after the statement of claim.

25 May 2017

40. The plaintiff delivered replies to particulars dated 25 May 2017. The availability of contemporaneous documentation is further underlined by the contents of para. 2 of the plaintiff's replies to particulars wherein the plaintiff identified and furnished copies of relevant communication between 30 March 2011 and 22 December 2011. The replies furnished by the plaintiff concluded with the following statement: *"We await delivery of the defendants' defence herein."*

9 June 2017 'warning letter'

41. In circumstances where the defendants had not delivered a Defence, a warning letter, threatening a motion, was issued, dated 9 June 2017.

5 October 2017 Plaintiff's first motion

42. The defendants did not deliver a defence within the time prescribed by the Rules. In these circumstances, on 5 October 2017, the plaintiff motioned for judgment in default of defence. The said motion was returnable for 27 November 2017.

27 November 2017

43. By order made by this court (Cross J.) on 27 November 2017 the defendants were afforded a further three weeks for the delivery of a Defence and, by consent, were ordered to pay the plaintiff the costs of the motion, to be taxed in default of agreement.

19 December 2017

44. The defendants delivered their Defence, dated 19 December 2017. Certain observations can fairly be made at this point.

Delay by Defendants

45. The defendants are guilty of post-commencement delay with respect to serving a defence. The defence came almost 11 months *after* the statement of claim. Such was their delay that the plaintiff was required, having previously put the defendants on notice of same, to go to the trouble and expense of a formal motion. It was not until 2 months after the statement of claim that the defendants sought particulars. Following the delivery, on 25 May 2017, of the

plaintiff's replies to particulars, it took a further 7 months, approximately, for the Defence to be delivered.

21 December 2017

46. On 21 December 2017, the solicitors for the plaintiff sought detailed instructions from the plaintiff on the Defence delivered by the defendants (*per* steps averred to by Mr. Dundon).

16 January 2018

47. On 16 January 2018, the plaintiff's solicitors wrote to the defendants' solicitors regarding expert evidence. That letter stated, in relevant part:

> *"We refer to your letter of the 19th December 2017 and confirm that the plaintiff intends to offer expert evidence of relevant matters at the trial of this action. The field of expertise concerned relates to accountancy and auditing matters relevant to the trial of the action. It is intended that such evidence would relate to the standard of practice and work of the defendants in the matters the subject matter of the proceedings. You might please note the position…"*

5 February 2018

48. On 5 February 2018 the plaintiff's solicitors have a consultation with the plaintiff and brief counsel with updated papers (*per* steps averred by Mr. Dundon).

26 February 2018

49. On 26 February 2018 the plaintiff's senior counsel furnishes an Advice on Proofs *(per* steps averred by Mr. Dundon).

5 March 2018

50. On 5 March 2018 the plaintiff serves a notice for particulars in respect of matters pleaded in the defendants' Defence.

8 March 2018

51. On 18 March 2018, updated instructions are given to Mr. Brian Lonergan, independent expert (*per* steps averred by Mr. Dundon).

9 May 2018

52. The defendants' reply to the plaintiff's notice for particulars, on 9 May 2018. The said replies include copies of the written representations referred to by the defendant (copies of which letters Mr. Oliver referred to from para. 24 onwards of his affidavit). The appendices to the defendants' replies comprises in excess of 40 pages of documentation.

10 May 2018

53. On 10 May 2018 further updated instructions are given to Mr. Brian Lonergan, the plaintiff's independent expert (*per* steps averred by Mr. Dundon).

21 August 2018

54. On 21 August 2018 the plaintiff served a notice for further and better particulars arising out of the replies to particulars received from the defendants, dated 9 May 2018.

12 September 2018

55. By letter dated 12 September 2018, Mr. Dundon wrote to the defendants' solicitors and advised them that unless replies to the plaintiff's notice for particulars, dated 21 August 2018, were received within a period of 21 days, the plaintiff would issue a motion to compel replies (*per* averments made by Mr. Dundon in an affidavit sworn by him on 3 October 2018).

4 October 2018 Plaintiff's second motion

56. In circumstances where the defendants had not provided replies to particulars, the plaintiff issued a motion, on 4 October 2018, seeking an order to compel replies. The said motion was made returnable for 10 December 2018 and was grounded on Mr. Dundon's affidavit.

9 October 2018

57. On 9 October 2018 the plaintiffs' solicitors had a consultation with junior counsel (*per* steps averred by Mr. Dundon).

19 November 2018

58. On 19 November 2018 the plaintiffs made an inquiry to the CRO regarding filing of Cyberkid financial statements (*per* steps averred by Mr. Dundon).

3 December 2018

59. On 3 December 2018 the defendants furnished replies to particulars.

10 December 2018

60. On 10 December 2018 the plaintiff's solicitors give instructions to junior counsel requesting advice on issues arising from documents received with the defendants' replies to particulars (*per* steps averred by Mr. Dundon).

10 December 2018

61. By order made by this court (Cross J.) on 10 December 2018, the plaintiff's motion was struck out with costs reserved.

Defendants' delay

62. I pause to say that, where it was necessary for the plaintiff to issue and serve a motion in order to obtain replies to particulars, the defendants can fairly be said to be responsible for *further* post-commencement delay (recalling their earlier delay in relation to delivering their defence, as a result of which the plaintiff had to issue a motion). Given that (i) 11 months elapsed between the statement of claim and the defence; (ii) the Defence was only provided as a result of the first motion issued by the plaintiff; (iii) 4 months elapsed between the

particulars sought by the plaintiff and the replies to same; and (iv) the defendants' replies came as a result of the plaintiff's motion, it seems to me that, of the 15 months, the defendants can fairly be held exclusively responsible for 12 months of post-commencement delay.

2 motions – 1 year's delay

63. Therefore, 'taking stock' of the situation, as 2018 became 2019, there had been no delay on the part of the plaintiff, whereas the defendant was responsible for (i) a year of post-commencement delay; and (ii) had caused the plaintiff to bring two separate motions to this court arising out of the defendants' delay. Indeed, it does not seem unfair to say that it was the bringing of these 2 motions by the plaintiff which brought an end to those periods of delay by the defendants, which might otherwise have been greater. In short, the plaintiff was at least progressing their case expeditiously, in contrast to the defendants' delay.

11 March 2019

64. On 11 March 2019 junior counsel provides detailed advices to the plaintiff's solicitors on issues arising regarding documents furnished with the defendants' replies to particulars, identifying eight further items of information requested, or issues to be addressed (*per* steps averred by Mr. Dundon).

21 March 2019

65. On 21 March 2019 information and views as sought by the plaintiff's solicitors arising from junior counsel's advices (*per* steps averred by Mr. Dundon).

29 March 2019

66. On 29 March 2019 further oral opinion is sought from the independent expert, arising from junior counsel's advices (*per* steps averred by Mr. Dundon).

5 April 2019

67. Further information is provided to junior counsel by the plaintiff's solicitors (*per* steps averred by Mr. Dundon).

2 May 2019

68. By letter dated 2 May 2019, the defendants made a request for voluntary discovery. The letter runs to 8 pages and comprises a request for a range of categories which can be summarised in the following terms:-

> Category 1 - all documentation relating to the plaintiff's investment of €1.5M into Topsec on 19 December 2008 (the "First Investment") to include but not limited to … This is followed by sub-categories (i) to (viii);

Category 2 - All documentation relating to the approach made by Topsec to the plaintiff in 2010 for further funding of €500,000 to include but not limited to the following …This is followed by sub-categories (i) to (vii);

Category 3 - All documentation relating to the plaintiff's decision to invest a further €500,000 in Topsec in December 2011 (the "Second Investment") to include but not limited to …This is followed by sub-categories (i) to (viii);

Category 4 - All documentation evidencing the following:

(i) the defendants' knowledge or awareness that it was an essential term of the second investment that all debts of Topsec to related parties would be written off prior to the plaintiff's investment; and

(i) The defendants' knowledge or awareness that the plaintiff, its employees, servants, agents and advisors, required to see the updated management accounts of Topsec to determine whether or not it would make the second investment;

Category 5 - A copy of the management accounts referred to at para. 7 of the statement of claim;

Category 6 - All documentation evidencing representations made by the defendant to the plaintiff, as referred to at para. 8 of the statement of claim, and in particular the following …This is followed by sub-categories (a) to (c);

Category 7 - All documentation evidencing the defendants' knowledge that the plaintiff would rely upon any alleged representation made by the defendants and/or be induced thereby to invest the sum of €500,000 in Topsec;

Category 8 - The Investment Agreement and Options Agreement referred to at para. 12 of the statement of claim;

Category 9 - The documentation referred to in the particulars of para. 15 of the statement of claim …

(i) the accounts of Topsec for the year ended 28th February, 2013; and

(ii) the amended accounts of Cyberkid for the year ended 28th February 2013;

Category 10 - All documentation evidencing the safeguards that the plaintiff put in place to prevent Topsec from transferring sums invested by the plaintiff into an insolvent related company, to include but not limited to …This is followed by sub-categories (i) to (vi); and

Category 11 - All documentation evidencing the poor performance of the investment and the adverse effect on the value of the shares representing the said investment.

On any analysis, the defendants' request for discovery, which also set out the reasons said to underpin the relevance and necessity of each of the categories, including sub-categories, was a detailed request which would very obviously require time to consider.

69. Before leaving the defendants' request for voluntary discovery, it is appropriate to quote verbatim the final paragraphs of same:

"CONCLUSION

For these reasons, it is submitted that the discovery of these documents is necessary for the fair disposal of these proceedings. In addition, discovery of these documents will reduce costs as the adducing and testing of oral evidence will be related to documentary material.

Please be advised that if you fail to agree to make voluntary discovery, as requested, an Application will be made to the High Court for an order for discovery in these terms and this letter will be used to fix you with the costs of any such application." (emphasis added)

Oral evidence will be related to documentary material

70. Two observations can fairly be made in relation to the foregoing. First, and speaking to the nature of the dispute and the type of evidence which any future trial judge would be presented with, the defendants make clear that *"oral evidence will be related to documentary material"*. Thus, there is simply no question of this being a case where the memory of witnesses might be compromised by delay so as to prejudice the ability of the defendants to meet the plaintiff's claim.

An application to court "*will be made*"

71. Second, the final paragraph of the said letter dated 2 May 2019 makes explicit that if the plaintiff does not agree to make discovery in the manner requested, an application *"will be made to the High Court for an order for discovery in these terms"* (emphasis added). In the manner presently examined this explicit threat to issue a motion was not 'followed up' by the defendants.

72. It can also be said that nowhere in this lengthy letter do the defendants suggest that they regard the plaintiff as guilty of any delay. Nor did the defendants purport to reserve their rights with respect to delay on the plaintiff's part.

73. Why no reference to delay appears in this, or in any other correspondence up to this point, seems to me to be very obvious, namely, because there was no delay by the plaintiff.

74. Rather, the evidence paints a picture of the plaintiff progressing complex litigation with at least reasonable expedition. Moreover, given the seriousness of alleging professional negligence, it is plain that the plaintiff was, very appropriately, ensuring the involvement of an independent expert in addition to solicitors and counsel. I now continue with the 'timeline'.

15 May 2019

75. By letter dated 15 May 2019, the plaintiff's solicitors acknowledged receipt of the 2 May voluntary discovery request and confirmed that *"once we have considered your request we will respond to you"*.

4 June 2019

76. By letter dated 4 June 2019, the plaintiff's solicitors wrote again to the defendants' solicitors stating *inter alia "Your request is being actively considered and we will respond in early course. Please hold off issuing any motion in the meantime"*.

18 June 2019

77. On 18 June 2019, the plaintiff's solicitors request junior counsel to furnish advices in respect of additional information provided (*per* steps averred by Mr. Dundon).

23 August 2019

78. On 23 August 2019 further advices were received from junior counsel for the plaintiff regarding documents provided with the defendants' replies to particulars (*per* steps averred by Mr. Dundon).

25 September 2019

79. On 25 September 2019 the defendants' solicitors wrote to the plaintiff's solicitors referring to the latter's letters of 15 May and 4 June and going on to state:

> *"Your client has had ample opportunity to consider the request for voluntary discovery. In the circumstances should a response not be forthcoming within 21 days of the date hereof we are instructed to proceed to issue a Motion against you seeking to compel the agreement to make voluntary discovery in the categories requested and to seek an application be made to the High Court for an order for discovery in these terms. We will use this letter and previous correspondence to fix you with the costs of any such application."* (emphasis added)

80. Just as the defendants had done in their 2 May 2019 voluntary discovery request, 5 months earlier, a motion was threatened. Furthermore, the threat concerned a motion of one and only one type, namely, a motion seeking an order for discovery of the categories requested. This reflects the reality that the Plaintiff had not been guilty of any delay which might justify the bringing of any motion to dismiss on delay grounds.

25 September 2019

81. By letter dated 25 September 2019 the plaintiff's solicitors replied in the following terms:

"We are actively considering your application for voluntary discovery with the client and our counsel and hope to be in a position to revert to you with our views prior to the expiry of 21 days from the date of this letter. In the circumstances we would ask you not to proceed with your threatened motion and we will hope to revert to you within this period. Thank you."

14 October 2019

82. By letter dated 14 October 2019 the plaintiff's solicitors wrote to the defendants' solicitors stating *inter alia*:

"Further to our letter of the 25th September we wish to advise that Counsel has been in touch with us and we expect to be in a position to give you a comprehensive reply to your request for voluntary discovery by close of business on Friday next 18th October and we would ask you to hold off issuing any motion in the meantime. We will be in touch with you by then. Thank you."

15 October 2019

83. On 15 October 2019 written advices from junior counsel are received by the plaintiff's solicitors regarding the defendants' request for discovery (*per* steps averred by Mr. Dundon).

21 October 2019

84. By letter dated 21 October 2019, the plaintiff's solicitors reply to the defendants' request for voluntary discovery. The aforesaid response by the plaintiff to the 11 categories of discovery sought by the defendants was as follows:

"1. We object to making discovery in the terms of this paragraph for the following reasons:-

(a) The category is drafted in such broad and general terms as to make it almost impossible to comply with. The category seeks all documentation relating to the plaintiff's investment of €1,500,000 to include a very broad range of documents including 'all documentation generated, received, reviewed and/or relied upon by the plaintiff to the first investment' and 'all communications exchanged between the plaintiff and the company' and 'any other third parties' relating to the first investment. This would obviously apply to an enormous number of documents and, as well as being almost impossible to identify all documents to which it did apply, it would undoubtedly impose an oppressive, disproportionate and unfair obligation on the plaintiff.

(b) The reason given for discovery of this documentation is that it is necessary to 'ascertain whether there was any reliance upon the defendants'. With respect, this does not follow in that it is not explained how it is necessary

to view documents passing between the plaintiffs and other parties (such as KPMG) to see what reliance was placed upon the defendants.

(c) The aforesaid reason states that discovery of the documentation is necessary to ascertain whether there was 'any' reliance upon the defendants. However, the plaintiff's claim against the defendants as set out clearly in the statement of claim is specifically that the plaintiffs acted on the faith of the representations made by the defendants as set out in paragraph 8 of the statement of claim. We do not see how the very extensive documentation sought in paragraph 1 is relevant to the question of what reliance was placed by the plaintiff on these particular representations.

2. This category is refused for the reasons set out in the foregoing paragraph.

3. This category is refused for the reasons set out in paragraph 1.

4. This category is agreed.

5. This category is agreed.

6. This category is agreed.

7. This category is agreed.

8. This category is agreed.

9. This category is agreed.

10. The category at sub-paragraphs (i) and (ii) are agreed. The category at (iii) is not agreed as its relevance is not immediately apparent. The categories at sub-paragraph (iv) to (vi) (inclusive) are not agreed as same are too broad.

11. The reference to 'all documentation' is too broad although the plaintiff would agree to this category if the word 'all' were deleted and the sentence commenced 'Documentation evidencing the poor performance …'.

The conclusion

Please indicate your agreement to the foregoing replies following which we shall arrange for our client to deliver an affidavit of discovery within eight weeks of the date of your reply …" (emphasis added)

85. At para. 12 of Mr. Donnan's affidavit, grounding the defendants' motion herein, the following averments are made:

"*12. The last step taken in these proceedings was by the defendants by the service of a letter requesting voluntary discovery. The plaintiff has failed to engage in the said request for discovery and has failed to furnish discovery as requested. By its actions, the plaintiff has failed, refused and/or neglected to progress the proceedings …*" (emphasis added)

86. The facts undermine entirely the averment which I have highlighted. There was no failure on the part of the plaintiff "*to engage*" in the defendants' request for discovery. On the contrary, there was absolute engagement on the plaintiff's part. The 21 October 2019 letter is capable of no other interpretation, given that (i) Categories 4 to 9, inclusive, were agreed without amendments; (ii) Parts of category 10 were agreed and reasons were given for the plaintiff's

attitude in relation to the balance; (iii) Category 11 was agreed subject to the deletion of the word *"all"*; and (iv) In respect of categories 1, 2 and 3, detailed reasons were set out in relation to the plaintiff's unwillingness to make the discovery as sought. I now propose to continue with the chronology of steps taken thereafter.

5 November 2019

87. By letter dated 5 November 2019, the plaintiff's solicitors wrote to the Registrar of Companies at the CRO. That was a detailed letter which, among other things, enclosed a copy of Cyberkid's accounts for the year ended 28 February 2014 which had been marked by the CRO as received on 25 November 2014. The letter proceeded to explain that the said accounts appeared to have been returned by the CRO to the defendants on 16 February 2015 and that, on 26 February 2015 amended accounts for the same year end were filed in the CRO. The letter proceeded to detail enquiries made and set out information obtained as a result of those enquiries. The penultimate paragraph of the letter to the CRO stated:

> *"The foregoing sequence of events seems to us to have been highly irregular. Our purpose in writing to you is to seek a written explanation as to how the financial records referred to were successfully withdrawn from the Companies Registration Office and as to why they are no longer available on the CRO website."*

7 November 2019

88. By letter dated 7 November 2019 the defendants' solicitors replied to the plaintiff's solicitors' letter dated 21 October 2019. This was a detailed letter running to four pages and it set out amendments to the categories of discovery proposed by the defendants. Category 1 now comprised sub-categories (i) to (ix). Category 2 comprised of sub-categories (i) to (viii). Category 3 comprised of sub-categories (i) to (viii). The letter noted that categories 4 to 10(i) and (ii) were agreed. A request was made for Category 10(iii) and the defendants acknowledged that categories 10(iv) to (vi) were no longer required, being encompassed in previous categories. Furthermore, an amended category 11 was agreed. The 7 November 2019 letter concluded as follows:

> *"Please be advised that <u>if you fail to agree to make voluntary discovery as requested, an Application will be made to the High Court for an order for discovery in these terms</u> and this letter will be used to fix you with the costs of any such Application."* (emphasis added)

89. At the risk of stating the obvious, this was not a letter which accused the plaintiff of any delay. There had been none on the plaintiff's part. The contents of this letter further undermine the defendants' assertion that the plaintiff failed to engage with the defendants' voluntary discovery request. On the contrary, as a result of *active* engagement by the plaintiff, the defendants altered their stance in relation to categories originally sought and, as well as noting the agreement on the part of the plaintiff to make discovery of numerous categories, amended categories were also sought.

90. As of 7 November, 2019 the defendants made very clear that the plaintiff was at risk of a High Court application, *not* with respect to alleged delay, but to require the plaintiff to make discovery if it did not agree to make voluntary discovery in terms of the amended categories. Indeed, the defendants made explicit that, in default of such agreement *"an application will be made to the High Court for an order for discovery in these terms"* (emphasis added). Again this speaks to the reality that the plaintiff had been progressing these proceedings with at least reasonable expedition.

11 November 2019

91. By letter dated 11 November 2019, the plaintiff's solicitors replied stating:

> *"It will take us some time to consider what you are now seeking in terms of the revised categories of discovery and once we have had an opportunity to take our clients further instructions in the matter we will revert to you."*

22 November 2019

92. By letter dated 22 November 2019 the plaintiff's solicitors sent a reminder to the CRO, enclosing a copy of their 5 November 2019 letter.

3 January 2020

93. By letter dated 03 January 2020 the defendants' solicitors wrote to the solicitor for the plaintiff stating *inter alia*:

> *"Please note that should you fail to respond to confirm that your client will make discovery of the revised categories as set out in our letter of 07 November 2019 within 21 days from the date hereof we will proceed to issue a motion against your client without further warning. We will use this letter along with previous correspondence to have any costs associated with the motion held against your client."* (emphasis added)

The *status quo*, as of January 2020, was not that the plaintiff was failing to progress its claim or that the defendants regarded the plaintiff as guilty of delay. Rather, the defendants were making clear their intention to issue a motion to this court to compel the plaintiff to make discovery of revised categories unless the plaintiff agreed to do so, within 21 days, i.e. by 24 January 2020.

24 January 2020

94. In other words, as of 24 January 2020, and beyond, the plaintiff was 'full square' on notice that it was at risk of being met with a discovery motion unless it agreed to the revised categories. It was not threatened with a motion to dismiss on grounds of delay. It is easy to understand why, because there had been no delay. However, in the manner presently examined, the defendants failed to 'follow up' on their commitment to issue a motion. I deliberately use the word commitment because the words *"we will proceed to issue a motion against your client without further warning"* admit no other interpretation. In the manner

presently examined, months turned into years without the defendants ever issuing the discovery motion which they had committed to bringing.

3 January 2020

95. On 3 January 2020 junior counsel provided written advices to the plaintiff's solicitors regarding the defendants' request for discovery dated 7 November 2019 (see steps averred by Mr. Dundon).

6 January 2020

96. By letter dated 6 January 2020 the plaintiff's solicitors wrote again to the Registrar of the CRO.

7 January 2020

97. On 7 January 2020 a detailed letter was sent by the plaintiff's solicitors, to the plaintiff, concerning the defendants' voluntary discovery request (see steps averred by Mr. Dundon).

8 January 2020

98. By letter dated 8 January 2020 the CRO replied to the letter from the plaintiff's solicitors dated 5 November 2019.

13 January 2020

99. On 13 January 2020 a written request was sent to senior counsel to advise on information provided by the CRO in their letter dated 8 January 2020 (see steps averred by Mr. Dundon.

20 January 2020

100. Senior counsel's initial written reply to the above request was received on 20 January 2020. It should be noted that, four days later, the deadline given by the defendants expired (i.e. on 24 January 2020) and the defendants committed to issuing a motion for discovery upon the expiry of that deadline. Thus, from 24 January 2020, the onus was on the defendants to take the next steps in relation to the discovery process, given the clarity and detail with which the plaintiff had responded to the defendants' discovery request (i.e. agreeing to the majority of categories, and specifying detailed reasons for not agreeing to others).

February 2020

101. Written and oral communications between the plaintiff's solicitors and counsel (involving the preparation of a detailed draft affidavit [23 paragraphs] furnished to counsel on 13 February 2020) regarding retaining additional expert to provide computer/forensic accounting expertise (see steps averred by Mr. Dundon).

17 February 2020

102. The plaintiff's solicitors filed a statutory declaration as to compliance with s. 4 of the Mediation Act 2017. That declaration was sworn by Mr. Dundon on 17 February 2020 (see steps averred by Mr. Dundon).

24 February 2020

103. The plaintiff's solicitors instructed junior counsel to provide advices regarding the defendants' amended discovery request contained in the letter dated 5 November 2019 (*per* steps averred by Mr. Dundon).

12 March 2020

104. The plaintiff's solicitors instructed Grant Thornton Corporate Finance Limited to provide additional specialist forensic accounting expertise [13 pages in instruction letter] (*per* steps averred by Mr. Dundon).

17 March 2020

105. As few of us will be unaware, in the run up to 17 March 2020, this country was informed about what transpired to be the first national 'lockdown' as a result of restrictions introduced by the government in response to the Covid-19 Pandemic. This court is entitled to take judicial notice of the fact that citizens were instructed to stay at home. Offices closed and there was a very significant interruption in national life, including, as regards the hearing of motions. I mention this in circumstances where, as examined earlier, the defendants made clear that if, by 24 January 2020, there had not been a positive response to their amended discovery request, a motion would issue without warning. Despite this, they delayed in issuing any such motion throughout February and into March and no such motion issued by the commencement of pandemic lockdown restrictions. However, in view of the introduction of the latter, it would be entirely unfair not to take due account of Covid-19 pandemic restrictions when considering the steps taken by *both* parties to these proceedings.

10 September 2020

106. On 10 September 2020 a conference call takes place with Grant Thornton. It will be recalled that Grant Thornton had been instructed, in advance of the first national lockdown, to provide specialist forensic accounting expertise to the plaintiff (*per* steps averred by Mr. Dundon).

8 October 2020

107. Grant Thornton's preliminary opinion and request for further information and discussion occurs on 8 October 2020.

19 October 2020

108. On 19 October 2020 senior counsel furnished written advices on Grant Thornton's preliminary opinion (*per* steps averred by Mr. Dundon).

27 October 2020

109. Junior counsel provided written advices on Grant Thornton's preliminary opinion on 27 October 2020 (*per* steps averred by Mr. Dundon).

8 December 2020

110. A consultation with the plaintiff takes place on 8 December 2020 with regard to Grant Thornton's preliminary opinion and advices from counsel and matters arising therefrom. I pause here to observe that, as 2020 became 2021, the plaintiff continued to take steps, on a number of fronts, to progress its claim. In relation to the pleading of the case as between the parties, there had been no change to the defendants' position as articulated in the 3 January 2020 letter from their solicitors. In other words, they had made clear that a motion for discovery would issue unless, by 24 January 2020, the plaintiff had agreed to the revised categories sought. It is fair to say that the plaintiff continued to live under threat of that motion. It is equally fair to say that they were not living under threat of any other action. None had been flagged. Furthermore, given that the defendants, for whatever reason, (i) failed to 'make good' on their threatened motion prior to the commencement of Covid-19 restrictions; and (ii) failed to make good on the threat by the end of 2020, the plaintiff might well have considered the threat of any motion to be somewhat 'hollow'. I now proceed to look at what occurred in 2021.

19 February 2021

111. Further contact took place with Grant Thornton regarding their preliminary opinion and matters arising therefrom, on 19 February 2021 (*per* steps averred by Mr. Dundon).

3 March 2021

112. Further contact with Grant Thornton (*per* steps averred by Mr. Dundon).

8 March 2021

113. Further contact with Grant Thornton (*per* steps averred by Mr. Dundon).

29 April 2021

114. Further contact with the plaintiff regarding issues (*per* steps averred by Mr. Dundon).

5 May 2021

115. Further contact with Grant Thornton (*per* steps averred by Mr. Dundon).

8 June 2021

116. The plaintiff's solicitor spends two hours reviewing papers and has a one hour conference call with the plaintiffs (*per* steps averred by Mr. Dundon).

10 June 2021

117. The plaintiff's solicitor writes to Grant Thornton on 10 June 2021 (*per* steps averred by Mr. Dundon).

18 June 2021

118. Grant Thornton furnish advises on 18 June 2021 (*per* steps averred by Mr. Dundon).

24 June 2021

119. On 24 June 2021 an update is sent by the plaintiff's solicitors to the plaintiff regarding open issues/instructions and letters regarding discovery from defendants (*per* steps averred by Mr. Dundon).

24 June 2021

120. On 24 June 2021 the plaintiff's solicitors instruct junior counsel to draft documents arising out of Grant Thornton's advices, dated 18 June 2021 (*per* steps averred by Mr. Dundon).

4 August 2021

121. On 4 August 2021 the plaintiff's solicitors send written reminders to junior counsel regarding the instructions provided on 24 June 2021 (*per* steps averred by Mr. Dundon).

4 August 2021

122. On 4 August 2021 the plaintiff's solicitors send a reminder letter to the plaintiff regarding discovery requests by the defendants (*per* steps averred by Mr. Dundon).

26 August 2021

123. Further correspondence is received from Grant Thornton on 26 August 2021.

6 September 2021

124. An email was sent by the plaintiff's solicitors to the plaintiffs regarding Grant Thornton request on 6 September 2021.

28 September 2021

125. On 28 September 2021 further advices were given by the plaintiff's solicitors regarding Grant Thornton's preliminary assessment and issues arising (*per* steps averred by Mr. Dundon).

30 September 2021

126. The plaintiff's solicitors sent a further email to Grant Thornton on 30 September 2021 (*per* steps averred by Mr. Dundon).

5 October 2021

127. On 5 October 2021 the plaintiff's solicitors sent a further written reminder to junior counsel (*per* steps averred by Mr. Dundon).

8 October 2021

128. On 8 October 2021 the plaintiff's solicitors sent a further written reminder to junior counsel (*per* steps averred by Mr. Dundon).

20 October 2021

129. On 20 October 2021 the plaintiff's solicitors conducted a 50 minute telephone consultation with the plaintiff (*per* steps averred by Mr. Dundon).

29 October 2021

130. On 29 October 2021 the plaintiff's solicitors sent a further written reminder to junior counsel (*per* steps averred by Mr. Dundon).

6 December 2021

131. On 6 December 2021 the plaintiff's solicitor sends instructions to junior counsel regarding notification of meeting of creditors of Topsec, dated 2 December 2021 (*per* steps averred by Mr. Dundon).

Forensic accounting expertise

132. I pause here to observe that there is evidence before this court that, throughout 2021, the plaintiff was taking steps to progress its claim. Given that these are professional negligence proceedings in respect of which the contents of certain accounts play a very relevant role, it could not be disputed that it was appropriate for the plaintiff to obtain specialist forensic accounting expertise. The steps taken by the plaintiff throughout 2021 reflect the importance of independent expert evidence to any future determination of the matter. The fact that Grant Thornton provided (i) a preliminary opinion in February 2021; and (ii) provided advices in June 2021; as well as (iii) further correspondence in August 2021 would appear to represent material progress, given the role of independent expert evidence at a future hearing.

133. It can also be said that, at no stage during 2021, did the defendants 'make good' in relation to their explicit commitment to issue a motion for discovery. It will be recalled that this threat was contained in the letter from the defendants' solicitors dated 3 January 2020. Thus, throughout 2021, the plaintiff continued to live under threat of a motion from the defendants. However, the threat was of a very specific motion, *i.e.* a discovery motion with respect to the defendants' revised categories.

134. It will also be remembered that, as of 3 January 2020, the defendants' solicitors stated *"we will proceed to issue a motion against your client without further warning"*. By December 2021, almost two years had elapsed since the defendants threatened to issue the motion for discovery. However, at no stage did the defendants do any of the following:

(i) Issue the motion for discovery threatened in their 03 January 2020 letter;

(ii) inform the plaintiff that they had changed their mind and no longer intended to issue any motion;

(iii) tell the plaintiff that, in view of what the defendants regarded as the plaintiff's delay, the defendants no longer intended to issue a motion for discovery, but were reserving their rights to issue a motion in respect of delay.

The foregoing represented the 'state of play' as the year turned and I now propose to look at what occurred in 2022.

7 January 2022

135. On 7 January 2022 the plaintiff's junior counsel provided detailed written advices on issues arising out of Grant Thornton's advices dated 18 June 2021 (*per* steps averred by Mr. Dundon).

13 January 2022

136. On 13 January 2022 senior counsel provided written advices on issues addressed in junior counsel's advices dated 7 January 2022 (*per* steps averred by Mr. Dundon).

13 January 2022

137. On 13 January 2022 the plaintiff's solicitors wrote to Grant Thornton with advices received from counsel (*per* steps averred by Mr. Dundon).

17 January 2022

138. By letter dated 17 January 2022 the plaintiff's solicitors wrote again to Grant Thornton with advices from senior counsel (*per* steps averred by Mr. Dundon).

19 January 2022

139. A further letter was sent by the plaintiff's solicitors to Grant Thornton, on 19 January 2022 (*per* steps averred by Mr. Dundon).

24 January 2022

140. Further advices were given on 24 January 2022 by the plaintiff's solicitors with regard to the voluntary liquidation of Topsec-letter from liquidator 20 January 2022 (*per* steps averred by Mr. Dundon).

8 April 2022

141. On 8 April 2022 a conference call took place between the plaintiff's solicitors and the plaintiff regarding developments in the case and update (*per* steps averred by Mr. Dundon).

11 July 2022

142. By letter dated 11 July 2022 the defendants' solicitors wrote to the plaintiff's solicitors enclosing their motion to strike out the plaintiff's claim on grounds of delay. It seems to me that, in circumstances where, by letter dated 3 January 2020, the defendants' solicitors stated that they would: *"proceed to issue a motion against your client without further warning"* (namely, a *"discovery"* motion unless *"within"* 21 days" the plaintiff agreed to the *"revised categories"*) fairness required that the defendants (if they were *not* going to 'follow through' on the foregoing, but intended to motion for dismissal on delay grounds) at least put the plaintiff 'on notice' of this material change of position. They did not do so.

143. To look at matters another way, and conscious that litigation is a 'two way process', it seems to me that, at all material times from 3 January 2022 onwards, it was reasonable for the defendants to believe the following:

(i) they were at risk of a discovery motion (because such a motion, and *only* such a motion had been threatened);

(ii) given that the plaintiff was, as a matter of fact, taking what might be called 'internal' steps to progress its claim, and the last it had heard from the defendants was to threaten a discovery motion, it was hardly reasonable for the plaintiff to believe that it was at risk of a delay motion, given that:

(iii) the defendants never once complained of delay on the part of the plaintiff and, with respect to the discovery motion threatened in their 3 January 2020 letter, the defendants themselves can fairly be accused of delay in relation to issuing same; and

(iv) in the manner previously examined, the defendants have been responsible for delay, so much so that the plaintiff was required to bring not one but two motions to this court.

15 July 2022

144. The plaintiff's solicitors wrote to junior counsel on 15 July 2022 (*per* steps averred by Mr. Dundon).

19 July 2022

145. The plaintiff's solicitors wrote to Grant Thornton regarding an 'in person' consultation post-Covid lockdown (*per* steps averred by Mr. Dundon).

25 July 2022

146. The plaintiff's solicitor sought further instructions from the plaintiff regarding the unagreed parts of the defendants' discovery request (*per* steps averred by Mr. Dundon).

28 July 2022

147. The plaintiff's solicitors gave further advice to the plaintiff regarding the defendants' voluntary discovery request (*per* steps averred by Mr. Dundon).

4 August 2022

148. Detailed instructions were received from the plaintiff by the plaintiff's solicitors (*per* steps averred by Mr. Dundon).

9 August 2022

149. Following receipt by the plaintiff of the defendants' dismissal application, the plaintiff's solicitors wrote, in detail, to the defendants' solicitors by letter dated 9 August 2022. That letter began by stating *inter alia* the following:

"In the first instance we wish to advise that we are most surprised to receive such an application from you without any prior warning whatsoever or indication from you that you intended to make such an application. This is all the more surprising in circumstances where the defendants have themselves failed to take steps to progress their application for discovery notwithstanding the plaintiff's meaningful engagement with this request (as evidenced in the detailed correspondence exchanged between our respective firms on this issue)."

I pause to observe that the foregoing statements appear to me to be entirely reasonable and reflective of the facts. The letter continued:

"We believe that any fair and balanced analysis of the conduct of this litigation to date indicates that there are no grounds for a court to, prevent, at this point, the plaintiff from pursuing its claim which it has, to date, pursued in a bone fide and diligent manner notwithstanding the somewhat unusual elements in the background to this matter. The purpose of this letter is to give you a brief outline of the plaintiff's approach to this application to strike out and to invite the defendants to withdraw this application at this point on the basis that each of the parties would bear their own costs of the application."

150. For the reasons set out in this judgment it seems to me that the foregoing invitation was entirely appropriate and its refusal by the defendants was unreasonable in my view.

151. The letter went on to set out, in some detail, the work done by the plaintiff in respect of what are, as the letter indicated *"professional negligence proceedings"* with *"unusual elements in the factual background"*. From the third page of the letter the plaintiff's solicitors commented as follows in relation to the issue of the plaintiff's discovery, stating:

"As a result of receiving no response or information from the Companies Registration [Office] *concerning these matters, the plaintiff was left in a situation whereby notwithstanding the fact that accounts from the Companies Registration Office were no longer available from that source, it had to instruct a firm of forensic accountants with regard to the matters at issue in the absence of such accounts and information and seek direction from this firm in the first instance as to what additional materials and documents it would need by way of discovery from the defendant to be in a position to complete its review of records to ascertain what had taken place with regard to the Company* [Topsec] *and Cyberkid and the role of the defendants in such matters. Very significant time and expense was incurred by the plaintiff in this exercise. The preparation of a very detailed letter of instructions to take account of matters at hand and matters arising therewith based on partial information that was available was prepared. It was necessary also to seek advices from counsel. A declaration pursuant to s. 14 of the Mediation Act, 2017 was filed with the court on the 17 February 2020 to progress the proceedings and in or about this time the plaintiff instructed its forensic accountants to proceed with a detailed investigation of matters based on information to hand.*

Obviously, these instructions are a matter of legal privilege, but these instructions were provided to the plaintiff's forensic accountants on the 12 March 2020 with very detailed information and prepared thereon and detailed and further engagement took place with the plaintiff's forensic accountants thereafter. This coincided with the commencement of the pandemic and Covid-19 lockdowns and it was impossible to progress matters during this period with the said firm of forensic accountants. The forensic accountants carried out a review of the partial documentation available to it in the Autumn of 2021 based on the information to hand (partial). Further work was required to be done by this firm thereafter and once the pandemic had abated, this firm have completed their review of the documents that are available to hand and have given certain advices as to what additional documents and accounts and other materials will be necessary for them to have sight of to enable them to carry out their analysis of the plaintiff's claim and the accounts, materials and letters of representation being relied upon by the defendants.

Ultimately the firm of forensic accountants have advised the plaintiffs that additional documentation by way of discovery will be required from the defendants given the confusion of the public records available in the matter and the partial nature of those records and the fundamental errors referred to in letters of representation being relied on by the defendants. The plaintiff hopes to be shortly in a position to formulate its application for further and better discovery of the documentation that is required to give full and proper instructions to its forensic accountants to enable it to advance this litigation."

152. From the bottom of the fourth page of the letter, the plaintiff's solicitors referred to the defendants' request for discovery, including the amended request, the status in early 2020 being that a number of categories remained to be agreed. The letter went on to state:

"Thereafter at no point did you seek to advance your application for voluntary discovery with us in any way whatsoever. Nor did you seek copies of the documentation which the plaintiff had agreed to discover."

153. The foregoing seems to me to be a significant point. As will be recalled, the plaintiff had agreed to make voluntary discovery of the majority of the 11 categories sought (see the letter from the plaintiff's solicitor dated 21 October 2019 offering to furnish an affidavit of discovery in respect of the categories agreed by the plaintiff). In circumstances where the defendants neither called for any of the documentation which the plaintiff was willing to provide, nor issued the motion to compel discovery which the defendants committed to issuing, it seems to me that the defendants' delay motion runs entirely contrary to their expressed position and ignores their own delay.

154. Meanwhile, and not having heard anything from the defendants with respect to the discovery motion, the plaintiff had, in fact, been progressing its case, in particular, on the topic of obtaining independent expert (forensic accounting) evidence, of obvious relevance to a fair

determination of the matters in dispute at a future trial. The 9 August 2022 letter from the plaintiff's solicitors concluded as follows:

> *"Summary*
> *From the above we trust that you will see that in the first instance the plaintiff has worked consistently over the last period of time since March 2020 to advance its case with the aid of its forensic accountants to seek to identify the additional documents that it will need by way of discovery to formulate its request and enable its experts to consider the issues arising further for the trial of the action. This work is ongoing and progress is being made.*
>
> *The matters are extremely complex and have not been assisted by the defendants' refusal to supply documents requested in its last notice for further and better particulars. Nor has it been assisted by the fact that enquiries to the Companies Registration Office have not resulted in any clarification being provided. Matters have also been significantly delayed by the pandemic and this is regretted but this has been beyond the control of the plaintiffs. The plaintiffs have endeavoured to move matters on as best they could with the partial information that they have had with their firm of forensic accountants in what has been a very challenging situation.*
>
> *In so far as the defendants' position is concerned, it sought discovery from the plaintiffs by letter of 19th November 2019 which was a revised application in light of it prior request and engagement from the [plaintiffs] but has chosen not to advance its application for discovery any further. It could have done so at any stage but chose not to. In the circumstances it would be most unjust to the plaintiffs to allow the defendants to seek to take advantage of its own failure to prosecute its request for discovery.*
>
> *In the circumstances we would invite the defendants to reconsider their application. The delay that has occurred is neither inordinate nor inexcusable. The plaintiffs have sought to move matters on over the last period of time in a diligent manner as set out herein. The plaintiff is faced with an extremely complex and difficult situation and with only partial information to hand and is doing its best in such circumstances. We would invite you to confirm that you will not proceed with your application. In the event that you do not provide such confirmation we will have no option but to file a replying affidavit to same which is needlessly going to add to the costs of the case. Our client will also rely on the terms of this letter to fix your client with the costs of defending such application.*
> *Thank you.*
> *Yours faithfully."*

155. In the foregoing manner, the defendants were put 'squarely' on notice of the fact that, if they insisted on pressing their dismissal application, it would *"needlessly"* add to the costs of the case and, in those circumstances, the plaintiff would be seeking its costs. For the reasons set out in this judgment, I entirely share the view that proceeding with this application has added,

unnecessarily, to the costs of these proceedings. It has, of itself, created unnecessary and entirely avoidable delay. I now propose to continue with the 'timeline'.

18 August 2022

156. The plaintiff's solicitors contacted senior and junior counsel regarding an 'in person' consultation with Grant Thornton (*per* steps averred by Mr. Dundon).

19 August 2022

157. The plaintiff's solicitors contacted the plaintiff regarding consultation arrangements (*per* steps averred by Mr. Dundon).

24 August 2022

158. By letter dated 24 August 2022 the defendants' solicitors insisted on the entitlement to apply to dismiss the proceedings rather than pursuing discovery and reliance was placed on the decisions in *McMullin v Farrell* [2004] 2 IR 328 and *Millerick v Minister for Finance* [2016] IECA 206. The letter also asserted that there was nothing particularly unusual in the claim and asserted that *"the plaintiff has not materially advanced its claim for a period of over four years"*.

159. Before proceeding further, it should be noted that the underlying claim in *Millerick* was personal injuries to the plaintiff's right leg and left knee, allegedly sustained in a March 2007 accident when, according to the Personal Injury Summons, an unmarked Garda vehicle swerved in front of the plaintiff's motorcycle. The present dispute is utterly different, being one where documents are at the heart of the dispute. Furthermore, Mr. Millerick issued separate proceedings against the Minister for Finance and the MIBI. In her judgment Irvine J. (as she then was) described the claim as *"relatively straightforward"* and the same cannot be said about the present dispute, in my view. As the former President observed, counsel for the plaintiff *"does not seek to contend that there was anything troublesome from an evidential perspective in the present case"* whereas, and without purporting to determine any issue in the proceedings, from an evidential perspective much would appear to hinge on a less than straightforward sequence of events concerning financial accounts in respect of two entities, including accounts which, it is contended, were at one stage registered in the CRO but no longer appear to be.

160. Furthermore, in *Millerick*, the plaintiff advanced inconsistent claims in two sets of proceedings regarding the ownership and driving of the offending vehicle. Whilst the learned judge made clear that a defendant does not have an obligation to bring proceedings to hearing, it does not seem to me that a commitment to issue a motion for discovery, as made by the defendants in this case constitutes the *"silence"* which the learned judge referred to in para. 36 of *Millerick*.

161. At para. 39 the former President gave an example of a defendant raising a notice for particulars or seeking discovery *"during a lengthy period of delay"*. However, in the present case, what is said to be the plaintiff's inordinate delay began with a careful setting out by the

plaintiff of those categories of discovery it was willing to provide voluntarily, as well as the reasons for the discovery it was unwilling to make, in response to which the defendants demanded revised categories and stated, in no uncertain terms, that a motion for discovery will issue, yet failed entirely to issue that motion and never wrote to indicate that the plaintiff should no longer expect it. I now propose to continue with the chronology.

26 August 2022

162. The plaintiff's solicitors contacted the plaintiffs by email (*per* steps averred by Mr. Dundon).

11 September 2022

163. The plaintiff's solicitors contacted the plaintiff by email on Sunday 11 September 2022 (*per* steps averred by Mr. Dundon).

12 September 2022

164. The plaintiff's solicitors sent updated papers to junior counsel (*per* steps averred by Mr. Dundon).

12 September 2022

165. By letter dated 12 September 2022, the plaintiff's solicitor stated *inter alia* that:-

> *"The plaintiff shall continue to bring the proceedings which are complex and unusual to hearing once discovery has been completed.*
>
> *The plaintiff has taken all such reasonable steps as outlined to you in our previous correspondence to progress this complex claim on behalf of the small investors which it represents. The circumstances surrounding the case are both complex and unusual and have required a very significant amount of time and effort to attempt to get to the bottom of. These investigations are ongoing.*
>
> *In the circumstances the plaintiff will have no option but to file a replying affidavit in due course to your motion and the plaintiff will rely upon the terms of this letter and previous correspondence to fix your client with the costs of such motion."*

166. Once again, the defendants could have been in no doubt about the fact that persisting with this application would give rise to a costs liability.

28 September 2022

167. The plaintiff emailed the plaintiff's solicitors (*per* steps averred by Mr. Dundon).

29 September 2022

168. The plaintiff's solicitors provided further advice regarding notice received from liquidator of Topsec re. meeting of creditors, by notice dated 22 September 2022 (meeting 14 October 2022) (*per* steps averred by Mr. Dundon).

30 September 2022

169. A detailed 'in person' consultation took place between the plaintiff, legal representatives and independent experts (*per* steps averred by Mr. Dundon).

2 October 2022

170. The plaintiff's solicitors gave instructions to junior counsel and senior counsel on Sunday 2 October 2022 (*per* steps averred by Mr. Dundon).

3 October 2022

171. A response was furnished by senior counsel on 3 October 2022 (*per* steps averred by Mr. Dundon).

10 October 2022

172. Detailed memorandum from senior counsel (*per* steps averred by Mr. Dundon).

11 October 2022

173. Plaintiff's solicitors wrote to junior counsel and to the plaintiff regarding senior counsel's memo (*per* steps averred by Mr. Dundon).

7 November 2022

174. This was the first return date for the defendants' dismissal motion.

24 November 2022

175. By notice dated 24 November 2022 the plaintiff delivered additional particulars of negligence and breach of duty. In summary these plead that the defendants:

(f) exceeded their role by providing investment advice which was inaccurate;

(g) failed to consider and/or advise on the lawfulness of Cyberkid's actions in purporting to write off the relevant debt;

(h) failed to investigate, adequately or at all, the circumstances surrounding the purported payment in the year ended 28 February 2013 of €290,000 on behalf of Topsec to the *"creditors of Cyberkid"*;

(i) failed to investigate whether the recipients of €290,000 were in fact creditors of Cyberkid;

(j) accepted a nonsensical, implausible and wholly unsatisfactory explanation from the directors of those companies for that payment;

(k) failed to examine and consider the breach by the directors of Topsec of their duties in making the payment and failing to report thereon;

(l) having been given that unsatisfactory explanation, causing permitting or allowing accounts for Cyberkid for 2014 to be filed in the CRO which were inconsistent with the explanation;

(m) certified company accounts as giving a true view, based on implausible and unsatisfactory letters of representation;

(n) causing or permitting inaccurate and misleading accounts for Cyberkid to be filed in the CRO;

(o) having received a complaint from the plaintiff about the said payment, procured the CRO to engage in the unusual and irregular steps of permitting Cyberkid accounts to be replaced by other Cyberkid accounts relating to the same period, without reference to the earlier accounts and without reference to any explanation for the need for replacements;

(p) colluded with the directors of Topsec and Cyberkid to conceal from the public, including the plaintiff, the improper nature of the payment by Topsec to persons alleged to be creditors of Cyberkid;

(q) failing, despite their knowledge of the reliance by the plaintiff on representations made by the defendants in December 2011, to inform the plaintiff that, in the year ended 28 February 2013, a payment of €290,000 had been made by Topsec to persons alleged to be creditors of Cyberkid, as soon as the defendants became aware of the payment.

13 November 2022

176. By letter dated 13 November 2022 the plaintiff furnished a detailed request for voluntary discovery of the following certain categories:

Category 1 - All documentation received, created and/or compiled by the defendants (including, but not limited to engagement letters, written communications to and from Topsec and/or Cyberkid, their respective servants agents and employees and audit files) for the purposes of (i) preparing management accounts in respect of Topsec for the nine month period ended 30 November 2011 (the *"management accounts"*) and (ii) making the representations pleaded at para. 8 of the statement of claim that all Topsec's debts to related parties (including Cyberkid) had been written off at 30 November 2011;

Category 2 - All documentation relating to the audit of Cyberkid and the audit of Topsec by the defendants in respect of each of the years ended 28 February 2011 and 29 February 2012;

Category 3 - All documents relevant to the defendants becoming aware that during the period to 28 February 2013, Topsec had allegedly paid €300,000 to creditors of Cyberkid on behalf of Cyberkid and all documents relevant to actions taken by the defendants following receipt of this information including but not limited to communicating with Topsec and Cyberkid, their respective directors, employees and agents in respect of the said payment, preparing audited financial statements and amended audited financial statements, filing same with the CRO and (in the case of the audited financial statements in respect of Cyberkid for the year ended 28 February 2014) withdrawing same from the CRO;

Category 5 (sic) - the full financial statements in respect of Cyberkid and Topsec for the years ended 28 February 2010, 28 February 2011, 29 February 2021 and 28 February 2013;

Category 6 - All communications between the defendants and the directors of Topsec and/or Cyberkid relating to the plaintiff's investment of €500,000 in Topsec in or about December 2011.

177. The plaintiff's (8-page) letter proffered detailed reasons in relation to why the foregoing categories were said to be relevant and necessary.

5 December 2022

178. By letter dated 5 December 2022 the plaintiff's solicitors furnished the defendants solicitors with the sworn affidavits of Mr. Quigley and Mr. Dundon together with exhibits.

8 December 2022

179. By letter dated 8 December 2022 the defendants' solicitors wrote to the plaintiff's solicitors stating *inter alia*:

"As you are aware, should a Motion to strike out your client's proceedings be successful, the necessity for discovery will be vitiated.
In any event, the plaintiff requires the leave of the court at this remove to serve further particulars and seek discovery. Such leave will only be forthcoming in the event of your client defeating the motion to strike out its proceedings.
In the circumstances, we will not be responded (sic) *to the request for discovery pending the determination of the motion to strike out your client's claim and in the event of a motion to compel discovery issuing, we will rely on this correspondence to fix your client with the costs thereof."*

180. I pause to observe that, as a result of this attitude by the defendants to the plaintiff's request for discovery, there has been no further progress on that issue during the more than 11 months which elapsed between the said letter dated 8 December 2022 and the hearing before me which took place on 16 November 2023.

28 February 2023

181. By letter dated 28 February 2023 the plaintiff's solicitors wrote to the defendants' solicitors in the following terms:

"Further to the above and your letter of the 8 December last, we note that your motion to strike out our client's proceedings has now been listed for hearing on Thursday 16 November next.
Whilst it might be reasonable to await developments in the case pending your motion in circumstances where such a motion would be dealt with expeditiously, it

normally is the case that almost a further year will be lost in this case if no further steps are taken in the interim".

182. The letter went on to invite the defendants to agree to make voluntary discovery. On the same date the plaintiff's solicitors wrote to the defendants' solicitors in relation to the additional particulars of negligence and breach of duty delivered on 24 November and requesting consent to the plaintiff's application to amend the Statement of Claim in this regard. It is clear that, had the defendants chosen to engage on the discovery and particulars issues, progress could have been made toward the hearing and time could have been saved.

28 February 2023

183. By letter dated 28 February 2023 the plaintiff's solicitors wrote to the defendants' solicitors in the following terms:

"We refer to the above entitled matter and note that the court has fixed half a day for the hearing of your motion to strike the matter out for failure to prosecute the case for Thursday 16 November next.

We also note in prior correspondence that you have stated that you would not be responding to our requests for discovery pending determination of your motion. While this might be a reasonable position to adopt as of the 8 December last when it would have been assumed that your motion would be dealt with in a reasonable timescale, it is now apparent that almost a further year will be lost with nothing happening in the action should matters not be progressed in the interim. We do not think that this is in the interests of either party.

In the circumstances we wish to advise you firstly that we have reviewed your client's request for discovery set out in your letter of the 7 November 2019 and we wish to advise that our client is agreeable to provide discovery in the amended terms as sought by you in this letter. It is our intention therefore to proceed to provide you with discovery as requested of the categories of documentation set out therein. Once our client's affidavit of discovery is being prepared currently in this regard we will deliver it to you in due course.

Insofar as other matters are concerned with the case we will write separately to you in that regard."

1 March 2023

184. By letter dated 1 March 2023 the defendants' solicitors wrote to the plaintiff's solicitors in the following terms:

"As you know, if our application to strike out your client's proceedings is successful, then that will be the end of the litigation. Therefore to embark on

Discovery and the proposed (and very belated) amendment of the statement of claim at this stage will result in our client unnecessarily incurring costs.
Without prejudice to the foregoing, our motion to strike out your client's claim was issued and served in July 2022 and it was not until November 2022 that your client attempted to further advance its proceedings some five months later.
As we received no communications at all seeking to advance the issue of discovery in three years between November 2019 and November 2022, it is difficult to see why your client now wishes to progress matters in advance of the motion to strike out for delay. It is also worth noting that our clients may require to file an amended defence if the statement of claim is amended and that in turn may result in alternative discovery being sought…"

13 March 2023

185. The plaintiff's solicitors replied on 13 March 2023 to indicate that they did not agree with the views expressed on behalf of the defendants.

Inordinate?

186. Having previously found that the plaintiff is not guilty of any pre-commencement delay, and having looked in some detail at the chronology of steps taken, I am not convinced that the defendants have established inordinate delay on the part of the plaintiff.

187. In the manner examined earlier in this judgment, as of January 2020, the plaintiff had not been guilty of either pre or post-commencement delay. It will be recalled that the plaintiff had engaged, fully, with the defendants on the topic of discovery and had earlier agreed to make discovery of the majority of categories sought by the defendants, but declined to make discovery of other categories and set out the reasons for this stance. This prompted the defendants to deliver an amended request for discovery (dated 7 November 2019) which the plaintiffs were considering as of the end of 2019 (see their letter dated 11 November 2019). As previously seen, 2020 began with the defendants' letter dated 3 January 2020 calling upon the plaintiff to agree to the amended categories of discovery and making clear that unless such an agreement was furnished within 21 days a discovery motion *"will"* issue without further warning.

188. It seems uncontroversial to say that no party to proceedings who has taken a stance, for specified reasons, in respect of the documentation it is, and is not, prepared to furnish by way of voluntary discovery, is under an obligation to abandon that stance when threatened with a motion. Thus, failure to agree to alter their stance, by the 24 January 2020 deadline, does not in my view amount to *delay* on the part of the plaintiff.

189. What, then, was the position as of the end of 24 January 2020 and thereafter? Put simply, the 'ball' was very 'firmly' in the defendants' 'court'. Why? Because the defendant had made explicit that, without the plaintiff's agreement to make discovery of the revised categories, the

defendants would issue a discovery motion without further notice to the plaintiff. That remained the position throughout February 2020 and up to the Taoiseach's announcement to the nation of the most dramatic public health response in the history of the State to a global pandemic for which, at that stage, there was no vaccination and none in prospect.

190. I regard myself as having to provide a response to this particular application which takes due regard of the relevant facts. Given that when the first 'national lockdown' came into force, the plaintiff was *not* in delay, can it be at all fair to calculate the plaintiff's delay from, say, 17 March 2020? I do not believe so. Rather, if this court does no more than hold the defendants to their word, as the first national lockdown came into force, the defendants were in delay in relation to the discovery motion which they had committed to issue.

191. Fairness also requires that due allowance is given *to* the defendants for the effect of Covid-19 restrictions on their ability to progress the discovery motion which they committed to bring, just as the same allowance must be given to the plaintiff.

192. As all of us who lived through the pandemic are well aware, the following dates are of relevance:

- On 12 March 2020 the first restrictions were announced by government and the Courts Service announced that only urgent cases would go ahead.
- On 27 March 2020 the entire State entered its first 'lockdown' and the population was told to stay at home.
- 18 May 2020 saw very minor easing of restrictions, *e.g.* the permitted exercise limit increased from 2k to 5k of home.
- On 29 June 2020 there was a further easing of restrictions including the lifting of travel restrictions and indoor gatherings permitted of up to 50 people.
- However, as of 18 August 2020, new restrictions were implemented, including indoor gatherings reduced to six people from no more than three households.
- On 5 October 2020 the country entered a second 'lockdown'. One of the consequences was that many court sittings were adjourned until early December.
- As of 1 December 2020 There was some easing in lockdown measures but, from 22 December 2020 a full nationwide lockdown was re-instated. Whilst the court continued to hear urgent applications and any applications that could be heard remotely, there continued to be a very material adverse effect on the hearing of legal proceedings due to the necessary public health response.
- On 10 May 2021 some restrictions were lifted and inter-county travel was permitted.
- The Courts Service announced that witness actions would resume from 2 June 2021. Further easing of restrictions took place on 26 July 2021 including the resumption of indoor dining.
- On 3 December 2021, new restrictions were announced including in respect of household visits, whereas on 22 January 2022, most restrictions were eased.

193. In light of the foregoing, at what point does the plaintiff's delay begin? Given the particular facts of this case, as looked at in some detail earlier in this judgment, it would be entirely unfair to say that the plaintiff was any culpable delay on the part of the plaintiff at any stage up to and including the announcement in March 2020, of Covid19 restrictions.

194. What, then, of the position during national 'lockdowns'? Not being guilty of delay as of the coming into force of the first national lockdown, how can it be fair to say that the plaintiff was in delay throughout same? Even if the foregoing arose, can it be fair to regard the plaintiff as being in delay throughout national lockdowns whilst also taking the view that the defendants were not in delay during the very same period, in respect of issuing their discovery motion? These questions arise in circumstances where the plaintiff has made explicit averments to the following effect:

> *"34. The instruction of Grant Thornton in February 2020 coincided with the commencement of the Pandemic and this inevitably led to a delay in some matters being attended to. However, since all the information outlined above has been received, there has been extensive engagement with the plaintiff's solicitors, counsel and independent experts to seek to understand the information and to identify how the proceedings should be properly progressed*." (para. 34 of Mr. Quigley's affidavit sworn on 13 November 2022)

195. In considering the first question in the *Primor* test, it seems to me that fairness requires this court not to ignore the three national lockdowns which, between them comprised some 12 months, *i.e.*:

- first national lockdown (mid-March 2020 to end June 2020) three and a half months;
- second national lockdown (mid-August 2020 to start December 2020) three and a half months; and
- third national lockdown (late December 2020 to end May 2021) five months.

196. For the reasons explained, I cannot regard the plaintiff as guilty of delay for not agreeing, by the 24 January 2020 deadline imposed by the defendants, to make discovery of revised categories (in circumstances where the plaintiff had confirmed its agreement to make discovery of the majority of categories sought and, with respect to the balance, had set out in some detail the reasons for its refusal).

197. Thus, as of the end of January 2020 the 'state of play' was that the defendants were to issue a discovery motion, having made explicit that such an application to this court *"will"* issue *"without further warning"* to the plaintiff. Given that it was entirely reasonable for the defendants to wait until the 24 January 2020 deadline had come and gone, before commencing work on the motion for discovery and affidavit to underpin it, it would hardly be fair to criticise the defendants for the fact that, as February became March of 2020, their motion had not yet been issued.

198. However, it would be equally unfair to suggest that, at this point in time, it was the *plaintiff* who was in delay. On the contrary, the plaintiff had engaged on the question of discovery and had taken matters as far as it felt it could. Doing no more than holding the defendants to their

word, as per the statements made in their correspondence, it was up to the *defendants* to issue a motion seeking an order for discovery.

199. As the State entered the first national lockdown, this was the situation. Given that the first national lockdown did not end until the end of June 2020, it seems to me that this period could not constitute delay, either (i) on the part of the defendants with respect to issuing a discovery motion; or (ii) on the part of the plaintiff with respect to progressing their proceedings.

200. What, then, was the position as the country emerged from the first national lockdown at the start of July 2020? In essence, the 'ball' was still in the defendants' 'court', given that they had neither issued the motion for discovery, nor had informed the plaintiff of any alteration in their position. For its part, the plaintiff was, as a matter of fact, taking steps to progress its case, in particular with Grant Thornton, independent forensic accounting experts.

Communication

201. It does seem to me that it would have been better had the plaintiff written to the defendants to inform them that, whilst the nature of the communication with Grant Thornton was privileged, work was ongoing to properly instruct and secure advice from an independent expert. That said, the defendants never wrote to explain why, if it be so, they were having difficulties issuing the discovery motion or, for that matter, that they had materially altered their position and, instead of requiring discovery, regarded the plaintiff as in delay. In other words, it seems to me that there were communication 'gaps' on both sides.

202. For the reasons explained, I cannot regard the three and a half months of the first national lockdown as delay on the part of the plaintiff or, for that matter, as counting against the defendants with respect to issuing their discovery motion.

203. What then of the period between the first and second national 'lockdown'? It fair to say that from the start of July 2020 the stated position of both sides remained as it had been when the country entered the first 'lockdown' in March of that year, namely, (i) the plaintiff had articulated clearly what categories of discovery it was and was not prepared to provide on a voluntary basis and had made clear its willingness to swear an affidavit and, thus, facilitate access by the defendants to this documentation; and (ii) the defendants made explicit their intention to issue a discovery motion without further notice and had not sought any documents from the plaintiff (even in relation to the agreed categories).

204. Against this backdrop, the defendants did not issue their long-threatened discovery motion at any stage during the 'window of opportunity' presented by the month of July and half of August 2020 (at which point the country entered a second 'lockdown', which lasted until early December of that year).

205. Nor did the defendants issue their discovery motion in December 2020, before the third 'lockdown' came into effect, which commenced in late December and ended approximately five months later.

206. Whilst, for the reasons explained, I believe it would be unreasonable to regard the plaintiff's delay as commencing at the end of March 2020 (at which point the country entered the first national lockdown and the defendants had still not made good on their threat to issue a discovery motion) even if I *were* do so, the following would appear to be the appropriate calculation.

207. From the end of March 2020 to 11 July 2022 (when the present motion was issued) represents a period of just in excess of 27 months. However, some 12 months of that period represented three national 'lockdowns' in response to the Covid-19 pandemic. Fairness seems to me to require that this 12 month period be taken account of, meaning that the maximum delay period is just in excess of 15 months.

208. Even if I ignore, entirely, the fact that, throughout this entire period, the 'ball' was in the defendants' 'court' , in that it had committed in writing to issue a discovery motion (in response to the stance adopted by the plaintiff which engaged actively and meaningfully with a detailed discovery request), I am not satisfied that, in the very particular circumstances of this case, the defendants have established that the plaintiff's delay is inordinate.

209. For the reasons set out in this judgment, I am satisfied that the defendants have failed to meet the burden of proof under the first 'limb' of the *Primor* test.

Inexcusable?

210. Lest I be entirely wrong in that view, I want to make clear that I am satisfied that the plaintiff's delay *is* excusable. I take this view for several reasons including the following:

(1) The facts which emerge from a careful analysis of the evidence allow this court to hold that there was no pre-commencement delay and no post-commencement delay by the plaintiff at least up to the end of 2019 and, with respect to 2020 and thereafter, the evidence discloses that the plaintiff *continued to take steps* to progress the claim during the period which the defendants categorise as delay (being a period throughout which the defendants were in delay as regards progressing discovery);

(2) In other words, even though the plaintiff might be criticised for not keeping the defendants abreast of the steps which it was, in fact, taking (*e.g.* the various interactions with Grant Thornton / the CRO) material progress was being made and the 'fruits' of that progress, in the form of the views of an independent expert forensic accountant, will undoubtedly be *of benefit to a trial judge* in the future;

211. Whilst I am not suggesting that, were it fair to regard the plaintiff as guilty of inordinate delay, the defendants delay excuses it (given that excuses must relate directly to the delay under

consideration) it nonetheless seems appropriate to repeat that the defendants' delay has caused the plaintiff to issue two motions and comprises a period of approximately 12 months (not dissimilar to the period, 'net' of national 'lockdowns' discussed earlier).

212. For the reasons set out, I am satisfied that the defendants have failed to meet the burden of proof under the second 'limb' of the *Primor* test.

213. Lest I be entirely *wrong* in the foregoing views, I now turn to the third 'limb' of *Primor.* For the purposes of underlining the proper role of this Court, under this aspect of *Primor*, the following extract from the judgment of Barniville J (as he then was) in the Court of Appeal's decision in *Gibbons v N6 (Construction) Ltd* [2022] IECA 112

> "*82. In considering whether the balance of justice lies in favour of or against permitting the case to proceed, Hamilton C.J. in Primor stated that the court was entitled to take into consideration and to have regard to the following matters:*
>
> > *'(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.' (per Hamilton C.J. at pp. 475-476)*
>
> *83. In AIBP, Fennelly J. observed that: 'The separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just.' (p. 518)*
>
> *84. I agree with the judge when she stated (at para. 10 of her judgment) that the factors set out by Hamilton C.J. (quoted above) 'are intended to guide a court in determining where the balance of justice lies as between the parties, they are not intended as an exhaustive list of all of the factors that a court is permitted to consider.' As the judge also observed (at*

para. 10 of her judgment), and as the plaintiff's counsel correctly submitted, each case very much depends on its own facts.

85. Both Hamilton C.J. and O'Flaherty J. in Primor referred to the relevance of the Constitution in assessing the balance of justice. Hamilton C.J. referred to the 'implied constitutional principles of basic fairness of procedures' as being a matter to which the court should have regard in assessing the balance of justice (at p. 475). O'Flaherty J. referred to the 'constitutional obligations to make sure that justice is neither delayed or denied' (p. 521). Subsequent decisions have stressed the constitutional dimension as noted by the judge at para. 11 of her judgment."

214. Guided by the foregoing and the principles set out with clarity in the Court of Appeal's decision in *Cave*, I am satisfied that the balance of justice favours, by an *extremely* wide margin, the continuation of the present proceedings. I take this view for several reasons including the following.

215. Against the backdrop of constitutionally protected rights of access to justice, the plaintiff will suffer *"terminal prejudice"* (see *Granahan t/a CG Roofing and General Builders v Mercury Engineering* [2015] IECA 58, at para. 46) if these proceedings are dismissed. Although not determinative of the outcome (given that such "*terminal prejudice"* potentially faces every plaintiff in this situation) it is nevertheless a significant consideration weighing against dismissal.

216. The very height of the alleged prejudice to the defendants is put as follows by Mr. Donnan:

"10. The defendants have been particularly prejudiced by the delay in these proceedings as they are professional individuals and, accordingly, have a professional reputation to maintain. A serious consequence of the plaintiff's delay is that outstanding claims interfere with the defendants' reputation and has an ongoing effect on their professional indemnity insurance. I say that the plaintiff has delayed inordinately and inexcusably in the prosecution of the within proceedings.

11. I say and believe that the plaintiff has failed, refused and/or neglected to prosecute its claim in a timely and/or efficient manner such that the delay is inordinate and inexcusable and as a result of which the defendants will be unduly prejudiced in their defence of the within proceedings. In and of itself, these proceedings relate back to an investment made in 2011. When proceedings commenced in 2016, some five years after the events in issue, I say that there was a particular onus on the plaintiff to expedite the prosecution thereof. The failure on the part of the plaintiff to progress the matters means that it would now be unfair and prejudicial to the defendants to have to defend these proceedings, given the amount of time that the plaintiff has allowed to elapse …

…

14.I say that the plaintiff's failure to prosecute the within proceedings in a timely manner has prejudiced the defendants' right to a fair trial and their ability to fully defend same in circumstances where the events, the subject matter of these proceedings, date back to 2011. It is self-evident that with the passage of such a period of time, the memories of the relevant parties and/or witnesses will be compromised by such inordinate and inexcusable delay." (emphasis added)

217. It seems to me that the foregoing averments are made, either in the most general of terms, or are entirely undermined by the facts. The authorities also make clear that alleged prejudice to reputation should be approached cautiously because the law does not confer on any particular category of persons, such as professional defendants, "*some form of privileged status"* (see *Cave,* p.31). Whilst it is averred that outstanding claims interfere with the defendants' "*reputation"* as professionals, no details whatsoever are provided in relation to the interference. For example, it is not averred that the defendants have lost a single client or business opportunity as a result of the existence of these proceedings.

218. It must also be borne in mind that the alleged prejudice to a defendant must relate to the delay on the part of the plaintiff. Therefore, and for the sake of illustration only, even if this court were to regard the plaintiff as guilty of inordinate and inexcusable delay from, say, 2 January 2020 (when the defendants called upon the plaintiff to agree, within 21 days, to make discovery of the amended categories, in default of which a discovery motion would issue) to 11 July 2022 (when the defendants issued the present strike-out motion, *without* ever having issued their discovery motion) there has been no 'linking' by the defendants of any alleged reputational damage to such 'delay' by the plaintiff. For the reasons set out earlier in this judgment, I do not regard the foregoing as being the appropriate period, but it illustrates that, even if it were, no prejudice with respect to the defendants' reputation has been established.

219. Similar comments apply in relation to what Mr. Donnan calls the *"ongoing effect on"* the defendants' professional indemnity insurance. No details are given with respect to this effect. If it is suggested that the effect is a negative one, no details whatsoever are provided, be they with respect to an increased insurance premium, and if so, the quantum of that increase. In short, no specific prejudice with respect to the defendants' professional indemnity insurance has been established.

220. As Collins J. emphasised in the Court of Appeal's decision in *Cave Projects Limited v Gilhooley and Ors* [2022] IECA 245:

" *The court's assessment of the balance of justice does not involve a free-floating inquiry divorced from the delay that has been established. The nature and extent of the delay is a critical consideration in the balance of justice. Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim."* (See p. 28, para. 35 of the judgment)

221. In the present case the defendants have established no such connection between any delay on the part of the plaintiff and any alleged *interference* with their reputation or *effect* on their professional indemnity insurance. It is also appropriate to state that, as Collins J. emphasised in *Cave*, prejudice is not to be presumed. It seems to me that, without providing any evidence of prejudice, the defendants are inviting this court to do precisely what the Court of Appeal cautioned against.

222. Whilst it is averred *inter alia* that delay on the part of the plaintiff *"has prejudiced the defendants' right to a fair trial and their ability to fully defend same"* (see para. 14 of Mr. Donnan's affidavit) the evidence before this court does not at all support such an averment. On the contrary, counsel for the defendants, very appropriately, indicated in oral submissions that this is *not* a situation where fair trial prejudice arises.

223. Insofar as Mr. Donnan avers that it is *"self-evident"* that *"the memories of the relevant parties and/or witnesses will be compromised"* by the plaintiff's delay, two comments are necessary. First, documentation is at the heart of the present dispute. Nor is it contended by the defendants that any relevant documentation is missing. Earlier in this judgment I referred to the plaintiff's replies to particulars, wherein reference is made to specific communication said to constitute the representations relied upon. Of fundamental relevance will also be copies of financial accounts with respect to Topsec and Cyberkid, all of which are available and it is plain that, being professional negligence proceedings, expert evidence will feature.

224. There is no question of any expert not being available. Indeed, during the period of alleged delay, the plaintiff was, as a matter of fact, actively progressing its claim by sourcing, briefing and obtaining advice from such an expert in the form of Grant Thornton. In addition, whereas the defendants rely, in their Defence, on representations made to them by the company directors, the defendants' 9 May 2018 replies to particulars enclose copies of such written representations.

225. Insofar as the defendant relies *inter alia* on a letter of engagement of 12 December 2011, there is no question of that letter of engagement not being available. The defendants also rely on the statements contained in the management accounts themselves which, as I say are all available.

226. It bears repeating that in the defendants' initial request for voluntary discovery (of 2 May 2019) in the context of asserting the relevance and necessity for discoveries of all categories sought, the defendants' solicitors stated *inter alia*: *"The adducing and testing of oral evidence will be related to documentary material".*

227. The defendants have never suggested that any witness is uncontactable, still less unavailable. The defendants do not suggest that any specific witness has, in fact, any difficulty recalling relevant matters or, more accurately, has any difficulty speaking to the available documentary evidence.

228. In short, prior to bringing the present motion the defendants knew or ought to have known that there was simply no question of prejudice arising with respect to witness memory, given how 'document heavy' the present dispute.

229. Nor has any effort been made by the defendants to relate any alleged prejudice insofar as witness memory is concerned, to any specific period of alleged delay on the part of the plaintiff.

230. Bearing in mind that, as the defendants knew or ought to have known at all material times, there was no pre-commencement delay by the plaintiff and there has been no delay whatsoever by the plaintiff until, at the earliest, 2020, there was never any question of prejudice to the defendants being made out.

231. Rather, it seems to me that the very 'height' of the defendants' application in respect of the third 'limb' of *Primor* was to invite this court to presume prejudice, something which is entirely impermissible.

232. Having regard to the foregoing analysis, I take the view that the defendants have not established *any* prejudice and have utterly failed to establish moderate prejudice.

233. Before issuing the present application, the defendants were well aware that, in exercise of the *Primor* jurisdiction, the question of prejudice to the defendants would play a fundamentally important role.

234. Indeed, when Hamilton CJ explained the balance of justice assessment which this court must carry out, the learned judge specifically stated (para. (d)(ii) at pp. 457 - 476) that an important consideration was *"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"* (emphasis added).

235. Despite the foregoing it seems to me that the defendants brought the present application in circumstances where they knew or ought to have known that there was no prejudice to the defendants, still less, such prejudice as would make it unfair to the defendant to permit this action to proceed.

236. In the manner previously examined, the defendants have been guilty of some 12 months of post-commencement delay and, in these particular circumstances, this also weighs in favour of the proceedings being permitted to continue.

237. At all material times from 24 January 2020, the defendants' stance has been that it will issue a motion for discovery. The fact that the defendants never (i) issued any such motion; or (ii) notified the plaintiff that it had altered its position, seems to me to add weight in favour of the proceedings continuing, albeit that this is certainly not a determinative factor.

238. At all material times from October 2019, it was open to the defendants to obtain, from the plaintiff, copies of the discovery documentation which the plaintiff had agreed to provide. The failure of the defendants to do so, whilst also failing to issue the motion which they threatened, seems to me to add further weight in favour of these proceedings continuing.

239. The defendants refused to progress the case, despite the urging of the plaintiff, until the determination by this court of their motion and this stance has resulted in delay of approximately one more year. In these very particular circumstances and, again, whilst not determinative, this seems to me to add further weight in favour of the proceedings continuing.

240. If nothing else, it counterbalances any weight which this court might have placed on how far things are from a full trial. In other words, with due expedition, it seems to me that the case would be ready for trial at the end of a further 12 months. However, that factor and any weight it might have deserved seems to me to 'fall away' given that, for the last 12 months, the defendants have refused to permit progress towards a trial.

241. By contrast, and again adding very considerable weight in favour of these proceedings continuing, is the fact that there is no conceivable risk of an unfair trial (despite, it has to be said, the 'bald' averment made at para. 14 of Mr. Donnan's affidavit to the effect that there has been prejudice to the defendants' right to a fair trial and their ability to fully defend the claim). The said averments are, with respect, no more than bare assertions, devoid of evidential underpinning.

242. This decision did not come down to 'fine margins'. For the reasons set out in this judgment, I am satisfied that the defendants have failed to meet all 3 limbs of the Primor test. Furthermore, whatever about believing that inordinate or inexcusable delay might be established, the defendants could not have believed that they were in any way prejudiced in the defence of these proceedings. Despite this, they spurned an opportunity to withdraw the motion on the basis that each side bear their own costs and insisted on running this motion which, in addition to making demands on necessarily scarce court resources (Courtroom; Registrar; and Judge) has required very considerable work by the court post the hearing to produce this decision. Greater care needs to be taken by defendants before insisting on this course. Why? Because every defendant will be aware, in advance of issuing such an application, that Primor is a 3-part test with the burden of proof resting on the defendant to establish all 3 limbs. In the present case, I fail to see how the Defendants could have believed that the 3rd limb of Primor was met. I am fortified in this view by the appropriate concession made during the hearing that there was *no* question of fair trial prejudice (despite averments made on behalf of the defendants that there *was* such prejudice). Thus, before the hearing, with the bald assertion of fair trail prejudice having fallen away, the 'sum total' of the prejudice asserted was the vaguest of averments in relation to effect on reputation and insurance which, in truth, invited the court to presume prejudice where none was made out.

243. My preliminary view is that the justice of the case is best met by following the 'normal' rule as regards costs (which rule, has been given statutory expression in s.169 of the Legal Services Regulation Act, 2015).

244. The parties are invited to submit an agreed draft order reflecting this court's decision, within 14 days of the delivery of this judgment and, in default of agreement on any matter, short written submissions by the same deadline.