THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 222
Record Number: 2019/519

Edwards J.
Whelan J.
Faherty J.

BETWEEN/

SHAUNA REILLY

APPELLANT

- AND –

CAMPBELL CATERING LIMITED T/A ARAMARK

FIRST DEFENDANT

MOMENTUM PROPERTY SUPPORT SERVICES LIMITED

SECOND DEFENDANT

- AND –

OUR LADY'S CHILDREN'S HOSPITAL CRUMLIN

THIRD DEFENDANT

- AND –

ISS IRELAND LIMITED T/A ISS FACILITY SERVICES

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 4th day of August 2020

1. This judgment concerns an appeal brought by Shauna Reilly ("the appellant") against an order made by Barrett J. in the High Court on 28 November 2019 striking out her personal injuries proceedings against the respondent on grounds of inordinate and inexcusable delay.

Background

2. On 11 June 2015 the appellant was employed by the first defendant in the coffee shop it operated at Our Lady's Children's Hospital, Crumlin, when she sustained injuries having fallen on the stairwell. Replies to particulars indicate that she reported the accident to her supervisor, Victoria, and the following day she informed the managers. She was aged 22 years at the date of the accident. She sustained soft tissue injuries to her back. The personal injury summons dated 16 November 2017, delivered on her behalf, pleaded that her injuries had "the potential to cause her loss of earnings or affect her job opportunity in the future."

3. On 20 January 2017, pursuant to an application to the Personal Injuries Assessment Board ("PIAB") in respect of the first and third defendants, authorisation issued pursuant to s. 17 of the Personal Injuries Assessment Board Acts 2003 to 2019 ("the PIAB Acts"). Four months later, on 30 May 2017, an authorisation issued in respect of the second defendant, Momentum. It is noteworthy that on 16 March 2017, prior to authorisation being obtained from PIAB in respect of Momentum, the appellant's solicitor wrote to the National Treasury Management Agency ("NTMA") which acted on behalf of the hospital, enquiring whether any other party might have a potential liability for the maintenance of the *locus* of the accident or the condition of the stairs at the relevant time. The proceedings were instituted against the first-named defendant, her employer; Momentum, a cleaning services company; and, the hospital, as occupier of the premises wherein the accident occurred.

4. Once served with the personal injury summons, Momentum entered an appearance on 22 February 2018. By letter of 20 February 2018, solicitors for Momentum wrote indicating, *inter alia*, that they had not been providing cleaning services at the *locus* on the date of the accident. Beyond a bare assertion the correspondence did not disclose who had been providing such services and the matter was not further pursued on behalf of the appellant over the intervening months. On 6 March 2018 Momentum's solicitors wrote again, seeking confirmation that the appellant would discontinue proceedings against it. That did not occur. On 14 December 2018 Momentum's solicitors wrote seeking confirmation that a notice of discontinuance would be served within fourteen days. Unusually, on that date it served a notice for particulars.

5. On 30 January 2019 Momentum's solicitors wrote identifying for the first time that the entity providing cleaning services at the accident *locus* on the relevant date was the respondent, ISS Ireland Limited t/a ISS Facility Services. Barely two weeks subsequent to receipt of that letter, on 14 February 2019, an application was made to PIAB on behalf of the plaintiff requesting the addition of the respondent as a defendant pursuant to s. 46 of the PIAB Acts. On 20 February 2019 said authorisation issued. On 25 February 2019 a motion issued on behalf of the appellant in the High Court seeking an order substituting the respondent as defendant in lieu of Momentum. On 28 March 2019 the Master of the High Court struck out the claim against Momentum and made an order joining the respondent as a co-defendant to the proceedings. On 12 April 2019 an amended personal injury summons was issued and on 18 April 2019 the said personal injury summons was served.

Respondent's motion

6. Over three months later on 22 July 2019 the respondent issued a motion in the High Court seeking to strike out the claim against it for want of prosecution pursuant to O. 122, r. 11 and/or on the grounds of inordinate and inexcusable delay. It further sought an order striking out the appellant's claim in the interests of justice and pursuant to the court's inherent jurisdiction. That motion was grounded on an affidavit of Roger Martin, a claims manager with the respondent. He confirmed that the respondent accepted that it had been retained to provide contract cleaning services at Our Lady's Children's Hospital, Crumlin at the time of the alleged accident. Further, that its retainer in this regard had been operative between 1 February 2015 and 31 January 2018. He deposed at para. 7: -

> "…However, by reason of the matters set out herein, the fourth defendant is severely prejudiced in the defence of the plaintiff's claim and further the plaintiff has delayed unreasonably in seeking to join the fourth defendant to the within proceedings."

I will return to a consideration of the averments in the said affidavit hereafter.

7. The application was strenuously opposed. The affidavit of the appellant's solicitor, Mr. Tiernan, states that action was taken expeditiously as soon as he became aware of the identity of the correct contract cleaner and suggests that any difficulty encountered by the respondent could be resolved by *inter partes* discovery between the other defendants.

Judgment

8. The motion was heard on 11 November 2019 and judgment delivered thereafter by Barrett J. on 14 November 2019. The judgment, having outlined the facts, noted at para. 7 that the respondent claimed itself to be "irredeemably prejudiced by the delay in notification and prosecution of this claim, such that it cannot fairly or properly defend the claim…". The judgment identified four indicia of prejudice contended for by the respondent including: -

   (i) there being no report of the accident made by the appellant or on her behalf within two months of its occurrence in accordance with s. 8 of the Civil Liability and Courts Act 2004 ("the 2004 Act");

   (ii) first notification to the respondent of the occurrence of the accident was on or about 20 February 2019, approximately three and a half years after its occurrence;

   (iii) investigations and enquiries conducted had been "hindered by the passage of time since the alleged accident and the fact that the fourth defendant is no longer the contractor on site at the *locus* of the accident…"; and,

   (iv) the respondent had no record of the alleged accident and would "have significant difficulty in identifying, retrieving and accessing the relevant records of cleaning schedules, staff rotas and other documentation that would be necessary to defend the plaintiff's action."

9. At para. 8 of the judgment the court summarises the contentions advanced on behalf of the respondent as follows:

(a) that the appellant did not comply with the reporting obligations pursuant to s. 8 of the 2004 Act;

(b) thereafter the appellant failed to instruct solicitors until just prior to the expiry of the Statute of Limitations 1957;

(c) despite knowing that she had named the incorrect defendant in February 2018, the appellant delayed a further period in excess of one year in seeking to join and serve the respondent; and,

(d) the appellant was guilty of inordinate and inexcusable delay in prosecuting the proceedings and as a consequence the respondent was presented with difficulties in terms of its being able to fairly and properly defend the claim.

The judgment noted at para. 9 from a timetable of events that from 20 February 2018 the appellant was on notice of the issue as to whether the second defendant was the correct defendant and ought to have been concerned "…and to have taken active steps to clarify matters in this regard. It does not appear from the evidence before the court that, until receipt of the letter of 30.01.2019, any such steps were taken."

10. It was noted that on 6 March 2018 a letter was received from the second defendant seeking confirmation that the appellant would discontinue the proceedings against it. The court observed: -

> "…'alarm bells' ought now to have been sounding loudly that the second defendant was the wrong party to sue and that another party ought to have been sued in its stead."

11. The court noted that it was only upon receipt of a letter dated 30 January 2019 from the second defendant providing evidence to support the assertion that the second defendant was not the correct party to sue that the appellant acted: -

> "The court does not accept that, following the receipt of the letters of the 20.02.2018, 06.03.2018 and 14.12.2018, the plaintiff should have awaited proof of what the second defendant was asserting; or, at least, that the plaintiff could do so and expect that this would necessarily have no consequence when it came to suing the fourth defendant. The court also respectfully does not accept the contention made at the hearing that, until receipt of the letter of 30.01.2019, the plaintiff was being rightly circumspect as regards what the second defendant contended. Being rightly circumspect (and there is a place for circumspection) does not justify awaiting proof that one has sued the wrong defendant despite repeatedly being told by a reputable firm of solicitors that this is what one has done and despite repeated requests made to discontinue proceedings; and if one does delay in this regard…

one cannot so delay and also expect that this will necessarily yield no consequence when it comes to suing the correct defendant."

12. The trial judge rejected the contention of the appellant that the right of the respondent to seek *inter partes* discovery from the first and third defendants relating to the matters of concern resolved the respondent's contention that it was "irredeemably prejudiced": -

> "…For a plaintiff to seek that a belatedly-joined defendant should, in the particular circumstances here presenting, rest its defence on such documentation as one or more co-defendants who were sued in a timely manner may or may not possess when it should/would have been possible for that belatedly-joined defendant to structure its case otherwise had it likewise been sued in a timely manner (and when it ought to have been possible for the plaintiff to have proceeded, or at least taken steps to proceed, in a more timely manner) is not a fair or reasonable thing to ask of such a belatedly-joined defendant…" (para. 10).

13. The judge at para. 11 acknowledged that the appellant had proceeded in good faith to mistakenly sue the wrong party. He adopted authorities cited in argument on behalf of the respondent, and in particular the decisions of *Simpson v. Norwest Holst Southern Ltd.* [1980] 1 W.L.R. 968 and *Cressey v. E. Timm & Son Ltd.* [2005] EWCA Civ 763, [2005] 1 W.L.R. 3926, for the proposition that time, for the purpose of the Statute of Limitations, only starts to run from when a plaintiff should reasonably have discovered the correct identity of his employer which was after the mistake had been pointed out to the employee.

14. The trial judge at para. 12 of the judgment reiterated that it was not prudent or proper for the appellant to do nothing until the letter of 30 January 2019 was received and in the circumstances the appellant could not properly expect that her delay in this regard would necessarily yield no consequence when it came to suing the correct defendant. The court concluded, having regard to the decisions in *Simpson and Cressey* (*ante*), that: -

> "…from sometime in the spring of 2018 it was possible for the plaintiff in these proceedings to start investigating who was the correct defendant, with the plaintiff being allowed a reasonable time to make and complete appropriate inquiries in this regard. Of course had the plaintiff so proceeded (and she did not) it is possible that she could have hit some 'road-block' in her inquiries that was not of her making, and which would perhaps have yielded the result that her case could now continue notwithstanding that she had still failed (if she had still failed) to discover the identity of the correct party to sue in place of the second defendant."

In conclusion, the court held that: –

> "…as contended by the fourth defendant, there has been inordinate and inexcusable delay in terms of the plaintiff's prosecuting the within proceedings against the fourth defendant, and that the balance of justice lies in favour of the court's now striking out the within proceedings as against the fourth defendant. To allow the

plaintiff's case now to proceed against the fourth defendant would be an abrogation of basic fairness."

Notice of Appeal

15. There are 39 grounds of appeal identified including in particular the following: -

(1) the judge erred in determining that there had been inordinate and/or inexcusable delay such as to warrant the dismissal of the appellant's action;

(2) the judge erred in determining that the balance of justice favoured dismissal of the action and failed to have any or any adequate regard to the submissions on behalf of the appellant including the fact that the appellant's prejudice was substantially greater in circumstances where she would be deprived of her constitutional right of access to the courts;

(3) the judge failed to have any regard to the constitutional principles of basic fairness of procedures and to the conduct of the defendants having contributed to some portions of the delay, including that each of the existing first, second and third defendants knew the identity of the cleaning contractors but had not furnished the appellant's solicitors with the information in question until 30 January 2019;

(4) the trial judge erred in failing to have regard to the fact that an issue of indemnity and/or contribution may arise as between the co-defendants;

(5) the effect of the striking out of the proceedings resulted in the appellant's constitutional right of access to the courts being revoked;

(6) there was an absence of any cogent evidence of actual prejudice as opposed to potential prejudice and the trial judge erred in failing to enquire and/or analyse whether the prejudice claimed by the respondent was real or potential;

(7) the trial judge failed to have due regard to the fact that the appellant had notified and pursued a claim against the hospital, the third named defendant, who had engaged the respondent as a contractor to clean the hospital;

(8) the burden of proving prejudice in this application lies with the respondent and the trial judge erred in fact and in law in determining that the evidence furnished in this regard was sufficient to discharge that burden;

(9) the trial judge erred in striking out the claim pursuant to the provisions of O. 122, r. 11 in circumstances where the appellant's replies to particulars had been furnished to the third named defendant on 28 November 2018;

(10) the trial judge erred in giving consideration to non-compliance with s. 8 of the 2004 Act;

(11) the trial judge conflated the issue of determining the "date of knowledge" of the appellant for the purposes of ascertaining whether a claim is statute barred with

jurisprudence on whether it was appropriate to dismiss a claim on grounds of delay or for want of prosecution and in particular erred in relying on the decisions in *Simpson v. Norwest Holst Southern Ltd.* and *Cressey v. E. Timm & Son Ltd.*;

(12) the trial judge erred in failing to consider or have regard to whether it was appropriate to dismiss the appellant's case solely for pre-commencement delay and the authorities relied upon had no application to the facts of this case;

(13) the trial judge erred in failing to apply the existing applicable principles laid down by the Supreme Court, particularly in *O'Domhnaill v. Merrick* [1984] I.R. 151, *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459;

(14) the trial judge erred in failing to consider prejudice that would befall the first and third defendants in the event that the order was made, in particular their right to serve notices of contribution and indemnity; and,

(15) the trial judge failed to have due regard to the lack of explanation for the failure of the respondent to ascertain whether the relevant documents referred to were in fact available.

Appellant's submissions

16. The appellant relied on *Cassidy v. The Provicialate* [2015] IECA 74, *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6 and *Collins v. Minister for Justice* [2015] IECA 27 in outlining the jurisprudence on the appellate jurisdiction to review decisions in applications to dismiss for inordinate and inexcusable delay. It was acknowledged that while due consideration must be given to the conclusions of the trial judge, it was open to this court to exercise its discretion in a different manner if it is satisfied that the interests of justice so require. The appellant submitted that the trial judge made "clear errors of principle" and that the interests of justice favour a reversal of his decision, given the duration of the delay, the fact that the delay was all pre-commencement, the conduct of the defendants, the fact that the claim is not time barred, and that there is no cogent or admissible evidence to support the respondent's assertion that their defence has been impaired by the delay.

17. The appellant submitted that the provisions of O. 122, r. 11 are not applicable in circumstances where the appellant's replies to particulars were furnished to the third defendant on 28 November 2018. However, it was accepted that the trial judge "made [no] specific determination under this provision."

18. In addition to *Primor plc v. Stokes Kennedy Crowley*, the appellant cited *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50 and *Millerick v. Minister for Finance* [2016] IECA 206 as authorities which have developed the so-called *Primor* test to be applied in applications to dismiss for inordinate and inexcusable delay. The appellant also observed that the onus is on the respondent to prove that the delay is inordinate and inexcusable.

19. After outlining the history of this litigation, the appellant submitted that Mr. Martin, as a claims manager whose means of knowledge was not made clear, was not the appropriate witness to aver that the respondent was "irredeemably prejudiced" by the appellant's delay such that they could not fairly or properly conduct a defence. The appellant asserted that it is problematic to rely on the averments of Mr. Martin as his evidence of prejudice is "entirely speculative, despite being prefaced on the basis that a *thorough investigation* has been carried out." The appellant complains that Mr. Martin did not state whether any efforts were made by the respondent to retrieve relevant records and did not explain why there would be difficulty in obtaining such records.

20. The appellant submitted that it was reasonable for the appellant to assume that reporting the incident to her managers constituted due notice of the incident to the parties involved and that the matter would be recorded in accordance with the relevant legislation. The appellant contended that any prejudice arising from a failure to contact the correct contract cleaner could be fairly addressed at a full hearing and after exchange of discovery. It was further submitted that the trial judge failed to determine whether actual prejudice arose, as opposed to perceived or potential prejudice, and failed to balance any such prejudice against the appellant's constitutional rights of access to justice.

21. The appellant maintained that relevant records such as cleaning schedules or staff rotas, referred to in the affidavit of Mr. Martin, would likely be ascertainable from *inter partes* discovery and would likely be provided voluntarily and upon request.

22. It was argued that the respondent is a professional company and as such, the completion and retention of relevant records would be "standard practice". The appellant submitted that to deprive her of her right of action, the respondent must present cogent evidence of lost records and some effort to locate same.

23. The appellant submitted that s. 8(1)(a) of the 2004 Act indicates that an alleged failure by the appellant to produce a report of the incident was a matter for the trial judge hearing the action in due course, particularly where the uncontroverted evidence is that the incident was reported to the hospital and the respondent was not notified only because of the hospital's failure to identify the correct contract cleaner.

24. It was submitted that the trial judge failed to take into account the conduct of the existing defendants and the respondent, including that:

    (1) none of the initial defendants informed the respondent of the appellant's claim in circumstances where the appellant made it clear she intended to pursue the contract cleaner responsible for the *locus* of the accident;

    (2) the only evidence of lack of notice or knowledge of the respondent is an affidavit by a claims handler, which is "somewhat ambiguous" as to what the respondent knew and what evidence is or may be available to it;

(3) the appellant's application to PIAB on 17 January 2017 containing details of her claim was furnished to the parties named in Form A of that application;

(4) the appellant asked the NTMA on 16 March 2017 whether there was any other party who could potentially be liable;

(5) none of the initial defendants identified the respondent as being the correct contract cleaner until 30 January 2019, even though the appellant brought proceedings against the second defendant, believing it to be the correct contract cleaner;

(6) although the second defendant asserted that it was incorrectly named in the proceedings as early as February 2018, it did not provide documentation confirming that position until 30 January 2019, despite such documentation dating from December 2014 and January 2015; and

(7) in a defence delivered on 22 January 2019, the first defendant had pleaded that the second defendant was liable for the plaintiff's injuries as it was responsible for cleaning the *locus* of the accident.

Without prejudice, the appellant submitted that, if this court finds any portion of her delay to be inordinate, any such delay is excusable for the above reasons.

25. It was argued that the trial judge erred in dismissing the claim against the respondent in circumstances where the respondent conceded it was responsible for cleaning the *locus* of the accident. Further the appellant submitted that the trial judge failed to consider the prejudice that may be caused to the first and third defendants by striking out the claim against the respondent.

26. It was contended that the trial judge fell into legal error in applying dicta from *Simpson* and *Cressey*, irrelevant decisions which deal with determining the date of knowledge for the purpose of ascertaining whether a claim is statute barred.

Respondent's submissions

27. The respondent accepted the jurisdiction of this court as described in the legal submissions advanced by the appellant to review the decision of the High Court but asserted the well-established requirement for this court to pay due deference to the views of the High Court, in particular as to findings of fact by the High Court below. The pertinent findings of fact of the High Court were contended to be:

(a) that the appellant was on notice of an issue with regard to the correct identity of the proper defendant from 20 February 2018; and,

(b) the appellant took no active steps to investigate the identity of the correct defendant despite repeated correspondence throughout 2018 raising this issue.

28. It was accepted that the decisions of the courts of England and Wales relied on by the trial judge: –

"…deal with the issue of the commencement or running of time for the purposes of the accrual of the cause of action where a Statute of Limitations issue arises (which is not in issue in the present case), it is nevertheless submitted that the principles set out in these cases have particular salience for the question of the extent of and excuse for the appellant's delay."

29. It was observed that it is common case that the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim where the interests of justice require them to do so, and reliance was placed on *Primor plc v. Stokes Kennedy Crowley* in that regard. The process under the *Primor* jurisprudence was set out whereby in an application to strike out a claim on grounds of inordinate and inexcusable delay a court must first determine whether the plaintiff's delay has been inordinate. Thereafter the court must determine whether any reasonable and sufficient excuse is available to the plaintiff to justify the delay: -

"If having determined that the delay is both inordinate and inexcusable, the court must determine where the balance of justice lies having regard to factors including:

(i) the nature of the delay and reasons advanced for it;
(ii) whether the defendant has caused or contributed to the delay or acquiesced in it;
(iii) the extent of the prejudice that arises;
(iv) any special circumstances concerning the case or the parties;
(v) the general duty of the court to ensure constitutional and ECHR rights of parties to litigation are protected, as well as an obligation to ensure justice is administered in accordance with efficient procedures."

30. Reliance was placed on the decision of Clarke J. (as he then was) in *Comcast International Holdings Inc. v. Minister for Public Enterprise* where he noted at para. 4.3:-

"…the threshold which must be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff must necessarily be more onerous than that which applies in the case of culpable delay."

31. Counsel acknowledged that the burden rested with the respondent to establish that the delays on the part of the appellant were both inordinate and inexcusable. In written legal submissions it was stated at para. 2.6: -

"…while the respondent is prepared to accept that there was no culpability in relation to the delay in issuing the proceedings in 2017 – albeit that this occurred towards the end of the limitation period with the subsequent consequences that that entails – there was clear and obvious culpability on the part of the appellant in the period February 2018 – April 2019. Accordingly, it is submitted that there is no requirement that the court be satisfied that this is an 'exceptional' case."

The delay at issue is clearly identified in the submissions of the respondent as being fourteen months between the letter contending that the appellant had sued the incorrect

defendant in February 2018 and service of the amended proceedings on the respondent in April 2019.

32. Emphasis was laid on the fact that during the period of the appellant's delay in this case, the respondent was unaware of the existence of the proceedings. As a consequence the respondent was prejudiced in the defence of the claim, it was contended. It was argued that: -

> "…the appropriate reference point in a case where it is sought to join a co-defendant can be more appropriately measured by reference to the jurisprudence with regard to the commencement of proceedings or indeed the joinder of third parties to proceedings where periods of several months have regularly been determined to be excessive."

It was contended that the delay in prosecuting the claim against the respondent was inordinate and no good reason had been identified to explain it, and it was therefore also inexcusable.

33. The prejudice contended for by the respondent included the following:

(a) no contemporaneous record of the occurrence of the accident was now available to the respondent;

(b) in the intervening time the respondent had ceased to provide services at the *locus* of the accident with the consequent loss or dispersal of witnesses or records that the respondent might have previously had available to it to defend the action and/or seek indemnity had the accident been notified to it in a timely way.

It was contended that inordinate and inexcusable delay had been established and so the respondent was required to demonstrate only a moderate level of prejudice, *per* Irvine J. (as she then was) in *McNamee v. Boyce* [2016] IECA 19 at paras. 34 and 35. The respondent contended, therefore, that the balance of justice favoured dismissal of the appellant's claim.

34. It was pointed out that there was no delay on the part of the respondent, who moved promptly to have the appellant's claim struck out, and so there was no conduct on the part of the respondent which may have swayed the balance of justice in the appellant's favour.

35. The respondent referred to a number of decisions for the proposition that a claim may be dismissed for inordinate and inexcusable delay even where moderate prejudice is not made out in line with the third limb of the *Primor* test, in particular the remarks of Hogan J. in Quinn v. *Faulkner t/a Faulkner's Garage* [2011] IEHC 103 at paras. 13 and 14 which outline the public interest in not permitting claims which have not been brought in a timely fashion.

Discussion

Standard of review

36. The order of the High Court judge dismissing the within proceedings involved an exercise in his discretion. Whilst an appellate court is understandably slow to intervene in such exercise, it is clear, particularly since the decision of the Supreme Court in *Vella v. Morelli* [1968] I.R. 11, that the exercise of discretion by a trial judge must remain reviewable and where same has been incorrectly premised this court is entitled to substitute its own discretion in place of that of the High Court judge notwithstanding that great deference will normally be accorded to the view of the trial judge. That position was reiterated by McMenamin J. in *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* at para. 4. The scope of such an appeal has been the subject of detailed consideration in the judgment of Irvine J. (as she then was) in *Collins v. Minister for Justice* where she considered that the structure and language of Article 34.4.3° presupposed that the right of appeal from the High Court would be a full one and any *ex ante* limitation on the scope of this jurisdiction suggested in some of the jurisprudence would need to be imposed by legislation rather than by judicial decision. The authors of *Delany and McGrath on Civil Procedure* (4th edn., Round Hall, 2018) observe at para. 15-82 regarding this decision:-

> "…she pointed out that in cases of this nature where the evidence is invariably set out on affidavit and much turns on the documentary record, it is difficult to suggest any reason why the merits of the High Court decision should be not fully re-considered on appeal, given that the appellate court would be in as good a position as the court of trial to arrive at an appropriate conclusion."

The authors consider in particular para. 79 of the said judgment: –

> "…the true position is that set out by McMenamin J. in *Lismore Homes*, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any *a priori* rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in cases where an error of principle was disclosed."

37. I would respectfully adopt that analysis as a correct statement of the law and whilst giving all due respect to the conclusions reached by the trial judge, it is open to this court in the exercise of its own discretion to reconsider those conclusions and set aside the orders made by him if the interests of justice so warrant.

***Primor* test**

38. The three-step *Primor* test may be summarised in the following terms:-

a. having regard to the nature of the proceedings and all of the relevant circumstances, is the plaintiff's delay to be considered inordinate?

b. if the plaintiff's delay is inordinate, can it be excused?

c. if the plaintiff's delay is inordinate and inexcusable, does the balance of justice favour the dismissal of the proceedings, having regard to all of the relevant

circumstances including matters such as delay or acquiescence on the part of the defendant and the potential prejudice resulting from the delay?

Pre-commencement delay

39. At issue in the instant case is pre-commencement delay and particularly a period of fourteen months which can be divided into two distinct tranches. The extent of the appellant's delay rested on a failure to take active steps to investigate the identity of the appropriate on-site cleaning company at the *locus in quo* between February 2018 and January 2019 in light of the correspondence received from the second defendant.

20 February 2018 to 30 January 2019

40. A salient fact in contextualising the conduct of the appellant is that on 16 March 2017 her solicitor wrote to NTMA enquiring whether any other party might have potential liability in respect of the *locus* of the accident or the condition of the stairway at the accident date. The failure of NTMA, a body charged with managing public liabilities commercially and prudently, to respond at all to this critical inquiry informing the appellant's solicitors of the circumstances obtaining at the time of the incident may well have played some part in lulling the appellant's legal advisors into a false sense that they had identified the correct defendants.

41. Eleven months later, solicitors on behalf of the second defendant, Momentum, wrote indicating that they had not provided cleaning services at the *locus* at the relevant time. Such bare denials are not unusual and are to be treated with some degree of circumspection in the absence of supporting evidence of any kind. An unusual feature of the letter is that it failed to identify who was providing the cleaning services at the relevant date. Whilst with the benefit of hindsight the appellant's solicitor might prudently have written seeking further clarification and/or also renewed enquiries to NTMA, that oversight must be evaluated in the context of all the relevant circumstances. Momentum entered an appearance on 22 February 2018, followed by a letter of 6 March 2018 seeking confirmation that the proceedings would be discontinued against it. It is clear that beyond bare denials contained in the letters of 20 February and 6 March 2018 it was only after a new firm of solicitors came on record for Momentum on 18 November 2018 that a more robust approach was adopted on behalf of Momentum to demonstrate to the appellant's solicitors that there had been a misjoinder and to enable them to promptly take steps to rectify the position.

30 January 2019 to 18 April 2019

42. Considering then the second tranche of delay contended for between 30 January 2019 and the service of the amended personal injuries summons on 18 April 2019, a period of approximately two and a half months, it is clear that once put in possession of the relevant information solicitors for the appellant acted with reasonable expedition, applying within two weeks to PIAB requesting the addition of the respondent as a defendant pursuant to s. 46 of the PIAB Acts. Once the said authorisation issued on 20 February 2019, a motion was issued seeking an order substituting the respondent for the erroneously joined defendant, Momentum. The relevant order was obtained from the

Master of the High Court on 28 March 2019. The amended personal injuries summons was thereafter issued and served on the respondent within three weeks

43. Generally, the period of time elapsing between the date when the cause of action arose and the issue of the personal injuries summons does not fall to be taken into account when determining whether or not inordinate delay has occurred but rather should be treated as a relevant consideration in assessing the conduct of the plaintiff prior to the institution of the proceedings. Clarke J. (as he then was) in *Stephens v. Paul Flynn Ltd.* [2005] IEHC 148 observed that inordinate delay in the commencement of proceedings is not of itself a factor to be considered in determining an application to dismiss for delay however "it may colour what happens later." It is clear from the jurisprudence that delay in the period prior to the issuing of proceedings does impose a significant onus on a plaintiff to proceed with extra diligence in progressing matters thereafter.

44. In the overall context of events, the failure of NTMA to signal that a different entity than Momentum had responsibility for maintenance of the *locus* of the appellant's accident or even to respond to a very clear and targeted enquiry made to it on 16 March 2017 had potential to cause the appellant's advisors to be less vigilant. More relevantly it was the generalised and exiguous nature of the denials by Momentum of liability for the accident between February 2018 and 30 January 2019 which had the primary and significant bearing on the conduct of the appellant. No reason has been identified as to why the clear relevant factual information provided on 30 January 2019 following a change of solicitors taking place was not disclosed between February 2018 and 30 January 2019.

45. As is clear from the proactive conduct of the appellant following receipt of the letter of 30 January 2019 identifying the correct defendant, once the bare denial of liability was clothed in fact the appellant acted immediately. Even assuming that the initial period of delay could be characterised as "inordinate", which is doubtful, it is difficult to see how the elapse of time between 30 January 2019 and 18 April 2019, the second period of delay contended for, could in any way be characterised as constituting "delay" in the conventional sense in which that concept is construed in the context of an application to strike out for inordinate and inexcusable delay. Irrespective of when the appellant discovered the identity of the respondent, the necessary procedural steps would have to be undertaken and I am satisfied that they were undertaken with significant expedition on behalf of the appellant resulting in the proceedings being served on the respondent on 18 April 2019.

46. Matters were compounded by the failure of Momentum in the first instance until 30 January 2019 to competently engage with the appellant, providing some factual information on which the appellant could rely, suggesting that Momentum was in fact not responsible for the cleaning of the stairways at the relevant date and identifying that the respondent had such responsibility.

47. On the material facts obtaining I am satisfied that neither period of delay in question in the instant case was, having due regard to all of the relevant circumstances outlined above, either inordinate or inexcusable.

48. However, for completeness it is appropriate that consideration be given to the balance of justice and whether the trial judge erred in ordering the dismissal of the proceedings in circumstances where he had concluded that the delay was both inordinate and inexcusable.

Section 8 of the Civil Liability and Courts Act 2004

49. A significant factor reiterated by the trial judge was that there had been non-compliance by the appellant with the reporting obligations pursuant to s. 8 of the 2004 Act. In my view, that reporting obligation was wholly immaterial to the exercise to be undertaken by the trial judge. It is clear from replies to particulars that the appellant had reported the accident to her supervisor and also to the workplace managers.

50. Section 8(1) was amended by s. 13 of the Central Bank (National Claims Information Database) Act 2018 which came into effect on 28 January 2019. It is clear from the jurisprudence, including *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21, that s. 8 of the 2004 Act entitles a trial judge hearing the action in certain instances to draw inferences from a failure to comply with its terms. I am satisfied that the trial judge erred in attaching any weight to s. 8 in the context of the application under consideration.

Statute of Limitations – commencement of running of time

51. Consideration of excerpts from Martin Canny's text *Limitation of Actions* (2nd edn., Round Hall, 2016) and in particular the authorities *of Simpson v. Norwest Holst Southern Ltd.* and the more recent decision of *Cressey v. E. Timm & Son Ltd.* led the trial judge into further error insofar as the said judgments, when viewed in their totality, are not relevant to the issue which was before the trial judge as to whether there had been an inordinate and inexcusable delay on the part of the appellant in bringing the proceedings against the respondent, and if so, whether the balance of justice and evidence of prejudice favoured the dismissal of the action against it. The respondent was not contending that the claim was statute barred and would have no basis for such a proposition. At issue in the said jurisprudence was the question of when time commences to run against an employer and the principles governing when the date of knowledge may be postponed; issues immaterial to the application before the court. I am satisfied that the trial judge misled himself as to the relevant jurisprudence in that regard.

Prejudice asserted by the respondent

52. Beyond bare assertions on the part of the respondent there was no evidence before the trial judge to support a conclusion at para. 7 that: -

> "Despite carrying out …inquiries and investigations, the fourth defendant has no record of the alleged accident and (by virtue of no longer being the contractor *in situ*) will have significant difficulty in identifying, retrieving and accessing the relevant records of cleaning schedules, staff rotas and other documentation that would be necessary to defend the plaintiff's claim."

When one carefully analyses the affidavit of Roger Martin sworn in support of the motion of 22 July 2019, insofar as he contends that the respondent is "irredeemably prejudiced by the delay", it is merely claimed at para. 11 that investigations had been greatly

hindered by the passage of time. However, such a contention is not understood. The passage of time *per se* could not give rise to any relevant hindrance in the context of these proceedings. Beyond the assertion that the respondent is not the contractor on site, the relevance of that fact is not addressed at all. The nature of the "full and thorough investigations" said to have been carried out by the respondent are not disclosed.

53. The fact that the respondent has "no record of the alleged incident" calls for an explanation and none is forthcoming in the affidavit. It is clear that the appellant reported the incident, not alone to her immediate supervisor but also to the managers. There is no evidence to suggest that any meaningful effort whatsoever has been taken by the respondent to ascertain what records do in fact exist or to procure same. There is no suggestion that the respondent communicated either with the hospital or their successor with regard to the relevant records. No such letter is exhibited. Where were such records habitually maintained? The affidavit is silent. A bare assertion that the respondent "will encounter significant difficulty in identifying, retrieving and accessing the relevant records of cleaning schedules, staff rotas and other documentation that would be necessary to defend the plaintiff's claim" is no more than a self-serving prediction made without any effort having been undertaken to identify, retrieve or access the relevant records. The affidavit fails to cogently demonstrate evidence to clearly support the existence of actual prejudice. That information deficit fatally undermines the conclusion of the trial judge that the balance of justice favoured granting the order sought in circumstances where the burden of proof rested with the respondent at all times.

54. It is clear from the evidence that the respondent provided services during the years from 1 February 2015 to 31 January 2018. It must therefore, having due regard to its obligations including to its own staff and employees, have had a system for the recording of accidents. The mere fact that its cleaning contract with the hospital was not renewed was accorded disproportionate weight and undue relevance by the trial judge and could not absolve it from taking reasonable steps to engage with the hospital, the NTMA, and/or its successor to procure the material in question. As the state of the evidence stood, there was no, or no sufficient, evidence of irredeemable prejudice and any such difficulty as suggested in the affidavit in question was readily remediable by taking reasonable steps to procure same. The "significant difficulty" alluded to at para. 7(iv) of the trial judge's decision was not clearly articulated and did not meet the required threshold to grant the order sought.

55. The fact that the plaintiff failed to instruct solicitors until just prior to the expiry of the limitation period was accorded undue weight by the trial judge.

56. The trial judge at para. 10 of the judgment entered into impermissible conjecture when he concluded that: -

> "…For a plaintiff to seek that a belatedly-joined defendant should, in the particular circumstances here presenting, rest its defence on such documentation as one or more co-defendants who were sued in a timely manner may or may not possess when it should/would have been possible for that belatedly-joined defendant to

structure its case otherwise had it likewise been sued in a timely manner (and when it ought to have been possible for the plaintiff to have proceeded, or at least taken steps to proceed, in a more timely manner) is not a fair or reasonable thing to ask of such a belatedly-joined defendant…"

57. There was no evidence of a probative nature before the court to enable the trial judge to conclude that the respondent enjoyed access to relevant records from 1 February 2015 onwards but that such access ceased and it was deprived of such access on and after the 31 January 2018. Whilst the affidavit of Roger Martin implies such a state of affairs, where it was sought to be relied upon as such the affidavit ought to have demonstrated with far greater particularity that the respondent had been deprived of a reasonable request for access to the said material.

58. Further it is noteworthy that in written submissions it was contended by the respondent that there was a "consequent loss or dispersal of witnesses or records that the respondent might have previously had available to it to defend the action and/or seek indemnity had the accident been notified to it in a timely way". This assertion was entirely novel, was not deposed to anywhere in the affidavit grounding the application, and although it was contended by counsel that such a state of affairs could be said to follow on from the fact that the respondent was no longer on the site, such a contention cannot be accepted nor does it meet the standard of proof required on the part of a defendant who invokes the inherent jurisdiction of the court to strike out proceedings for inordinate and inexcusable delay based on the *Primor* principles.

Conclusion

59. In the circumstances it is necessary that the order of the trial judge be set aside, he having misdirected himself as to key considerations including the operation of the third limb of the *Primor* test and it is clear that the interests of justice so dictate. The relative prejudice to the parties demonstrate that the hardship of denying the appellant access to a proper trial of her action in regard to workplace injuries is, in all the circumstances, disproportionate and unjust.

60. The jurisdiction to strike out for delay is clearly confined to exceptional cases. The claim could not fairly be characterised as constituting a "stale claim" as the respondent argued in submissions. There was undoubtedly some delay but nothing such as could warrant the permanent and irrevocable exclusion of the appellant from a right of access to the courts to have her claim determined.

61. The balance of justice favours permitting the action to proceed against the respondent. Arguments regarding s. 8 of the 2004 Act fall to be made at the trial of the action. The relative prejudice to the appellant flowing from the order sought is absolute and certain whereas the prejudice contended for by the respondent is largely hypothetical and such as is routinely resolved by means of discovery, including non-party discovery.

62. The appeal ought to be allowed and the order of the High Court set aside.

63. In the premises it is not necessary to consider the appellant's further arguments that the trial judge erred in dismissing the claim against the respondent in circumstances where it had conceded it was responsible for cleaning the *locus* of the accident and as such has potential liability to the appellant and to the other defendants, in respect of any claims for indemnity and/or contribution.

64. Edwards J. and Faherty J. have confirmed their agreement with this judgment and with the order I propose allowing the appeal and setting aside the High Court order. Costs will normally follow the event. It is the intention of the court to so order in favour of the appellant fourteen days from the date of this judgment unless either party applies within that time requesting that the court should otherwise order. If so applying, the respondent must first notify the Office of the Court of Appeal in writing of its intention to object within the fourteen-day period and should file short written submissions, and at all events no longer than 2,000 words, within one week of it so notifying the court, sending same to the appellant at the time of filing. The appellant will then have a further week to file her submissions, which are to be no longer than 2,000 words.