THE HIGH COURT

DUBLIN CIRCUIT **COUNTY OF THE CITY OF DUBLIN**

[2020] IEHC 566

High Court Record No. 2019 No. 423 CA

Circuit Court Record No. 2013 No. 004737

BETWEEN

KESTUTIS NAUDZIUNAS

PLAINTIFF

AND

OKR GROUP

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Tuesday the 17th day of November, 2020

1. The defendant company operates Burger King fast food restaurants across Ireland including in Tallaght where the plaintiff worked. The plaintiff has brought the present proceedings seeking damages for injury said to have been occasioned by bullying and harassment. The defendant now seeks to have the plaintiff's proceedings dismissed on the grounds of delay.

Facts and procedural history

2. The plaintiff entered employment with the defendant in June 2008. He claims that he was harassed on various dates which are set out in the personal injuries summons between 22nd October, 2010 to 6th August, 2012. But in replies to particulars, which are undated, received on 27th November, 2013, he pushes the incidents back a little further to early 2010.

3. An application to PIAB was made on 4th February, 2013. The PIAB authorisation issued on 7th February, 2013 and a personal injury summons in the Circuit Court was issued dated 28th June, 2013. The main focus of the complaint is a tort claim regarding bullying, but it is also alleged that this is a breach of contract and he further claims failure to provide him with a written statement of his terms and conditions of employment.

4. The summons was served on 12th July, 2013. The defendant served a notice seeking further information on 22nd August, 2013 which ultimately was replied to quite some time later. On the same date, a notice was served seeking medical records. That was not replied to, but seems to have been superseded by a discovery process. The defendant then served a notice for particulars on 28th August, 2013. There was a delay in delivering the defence and the plaintiff had to bring a motion in late February 2014 which was ultimately struck out on consent. On 4th March, 2014 the defence was delivered.

5. The plaintiff issued a letter seeking discovery on 12th September, 2014. On 20th March, 2015 the defendant agreed to certain categories of discovery. The plaintiff replied on 28th May, 2015 regarding a disputed category and the defendant replied further on 23rd June, 2015. The plaintiff wrote again on 6th April, 2016 setting out the position regarding discovery and indicating that if consent to the disputed category was not forthcoming within 14 days, a motion regarding discovery would issue. The defendant replied seeking to negotiate the discovery on 15th June, 2016 and the plaintiff responded on 20th June,

2016 but this was followed by a further delay on the defendant's side in filing the affidavit of discovery.

6. The plaintiff replied to a request for further information on 18th August, 2016 and on the same date delivered a hotly contested document described as a notice of further particulars leading to the commission of the wrongs. This was accompanied by an affidavit of verification of the same date. The defendant's affidavit of voluntary discovery was sworn on 1st February, 2017.

7. Meanwhile on 27th January, 2017 the defendant sought voluntary discovery. On 23rd February, 2017 the plaintiff requested that that should be put on hold but ultimately swore an affidavit of discovery on 5th September, 2018.

8. On 6th September, 2018 the plaintiff wrote setting out a schedule of medical reports and also wrote on the same date giving notice of intention to serve notice of trial. The defendant wrote back on 19th September, 2018 stating that it was not appropriate to issue a notice of trial at the present time, complaining about further particulars of the plaintiff's case, the adequacy of discovery and the lack of a schedule of special damages. The plaintiff replied broadly disagreeing with that view of the case on 20th September, 2018 and on the same date the defendant wrote setting out particulars of the alleged infirmities in the plaintiff's discovery. The plaintiff replied by email of the same date stating that the documents discovered were those within the plaintiff's procurement or control. But there were further complaints from the defendant's side on 24th and 27th September, 2018 leading to a letter from the plaintiff on 1st October, 2018 saying that the affidavit of discovery would be amended and a schedule of special damages would be furnished together with an affidavit of verification. That letter stated that, *"[i]t would seem that your clients are seeking to raise a myriad of issues so as to prevent this case coming on for Trial."*

9. The defendant then issued a notice of motion to dismiss the proceedings on grounds of delay dated 3rd January, 2019 grounded on an affidavit of David John Harris of 2nd January, 2019. A replying affidavit was sworn on 8th February, 2019 and Mr. Harris further replied on 5th and 25th March, 2019.

10. When the motion came on for hearing in the County Registrar's Court on 8th May, 2019 Mr. Roland Rowan B.L. appeared for the plaintiff and Mr. Gerard F. Burns, Solicitor, for the defendant. Her Honour Judge Verona Lambe, Specialist Judge of the Circuit Court, granted the relief sought in the motion together with costs of both the motion and the proceedings to that date including a certificate for counsel.

11. On 17th May, 2019 the plaintiff issued a motion appealing that order to the Circuit Court grounded on an affidavit of Mr. Burns of 16th May, 2019. That appeal came on for hearing on 10th October, 2019. Mr. Frank Beatty S.C (with Mr. Roland Rowan B.L.) appeared for the defendant and Mr. James Lawless B.L. for the plaintiff. Her Honour Judge Jacqueline Linnane dismissed the appeal, but varied the order by making no order as to the costs of the proceedings prior to the motion before the County Registrar's Court.

She also awarded the costs of the appeal to the Circuit Court to the defendant including a certificate for senior counsel.

12. The plaintiff appealed the decision on the motion to dismiss to the High Court on 18th October, 2019 and I am now dealing with that appeal, which of course is determined by way of rehearing. I have received helpful submissions from Mr. Frank Beatty S.C. (with Mr. Roland Rowan B.L.) for the defendant and from Mr. Darren Lehane S.C. (with Mr. James Lawless B.L.) for the plaintiff.

The note of the Circuit Court decision

13. Order 18, r. 7 of the Circuit Court rules provides for the appeal procedure from the County Registrar to the court to be by way of notice of motion to review the decision of the County Registrar. The rules don't specifically say that that is by way of rehearing and the submissions in the Circuit Court here did address the reasoning of the County Registrar rather than considering it irrelevant. In practice, the appeal is in fact by way of rehearing and it doesn't seem to be necessary or even appropriate to address the reasoning of the County Registrar in such a context. However, there can be no doubt about the situation in terms of the appeal from the Circuit Court to the High Court. A consequence of the rehearing nature of that procedure is that the moving party goes first even if that party won in the court below, which is what happened here. Indeed by far the best procedure in a Circuit Appeal (leaving aside cases where it is not appropriate to withhold such information, such as in family law), is simply not to inform the High Court of the decision below (see *Mulcahy v. Cork City Council* [2020] IEHC 547, [2020] 10 JIC 2104 (Unreported, High Court, 21st October, 2020)). Here that procedure wasn't adopted, but the information provided was limited to some extent, in that I wasn't given a note of the judgment below. That was probably a correct approach in the sense that, in a rehearing context, the less information the court has about the decision below, the better. Admittedly, after the decision is made and when one gets to costs, there may be relevance in looking at what happened in the Circuit Court (see *Doyle v. Donovan* [2020] IEHC 119 (Unreported, High Court, 28th February, 2020), *per* Simons J., at para. 7), but that only arises after the substantive decision. The notice of appeal, order and judgment if any needs to be lodged with the Central Office or county registrar as the case may be (O. 61, r. 3 RSC), but that doesn't mean those documents should be shared with the court. Considering the matter, to share such materials with the High Court could create the impression that they had some weight on the merits of the appeal, which they don't in a rehearing context. *Hay v. O'Grady* [1992] 1 I.R. 210 has no relevance to an appeal by way of rehearing. The court starts by turning a fresh page.

The notice of further particulars of circumstances surrounding the alleged wrongs

14. In the notice giving further particulars of the circumstances surrounding the alleged wrongs, the plaintiff contends that it is his belief that the reason for the *"aggressive and/or inappropriate behaviour to which he was subjected during the course of his work and less favourable treatment and the change in his rostering was due to issues about which he was concerned and which were raised by him with the management of the defendant … in particular the preparation and storage and sale of food therein and also*

the manner in which the management and staff of the defendant company failed to adhere to hygiene and other standards".

15. Of course it has to be emphasised that the proceedings are at a stage where there is not much in the way of evidence backing this up beyond what the plaintiff says himself in the affidavit of verification, but that would not be unusual at this prehearing stage of the proceedings. The defendant rejects these claims and the entitlement of the plaintiff to serve such notice, claims that the contents are statute-barred and that it is an attempt to "*hijack the proceedings*" to procure a settlement, and in effect says that the plaintiff is seeking to create a "*media circus*". Mr. Lehane's counter-argument is that the reason for the application to strike out the proceedings is to prevent the plaintiff from giving evidence on the food safety issues. Ultimately, this is a matter for the trial, but in principle if a notice giving further particulars of the claim genuinely fleshes out points made in the summons, then it is legitimate and indeed to the benefit of a defendant by giving notice of what they need to meet. If the notice makes new substantive claims for relief that fall wholly outside the original summons, then it can't be relied on and the plaintiff would have to amend pleadings to advance such points. The legitimacy of the procedure of a notice of further particulars was acknowledged by the Supreme Court in *Quinn Insurance Ltd. (Under Administration) v. Pricewaterhousecoopers (A Firm)* [2019] IESC 13 (Unreported, Supreme Court, 8th March, 2019), *per* O'Donnell J., (Clarke C.J., MacMenamin, Charleton and O'Malley JJ. concurring), at para. 26: "*[i]t is to be anticipated that the focus of a case may change as further evidence is obtained, discovery reviewed, and the arguments refined, but that exercise can properly occur by the delivery of further particulars, or, if necessary, the amendment of pleadings*." I made the point, perhaps over-optimistically, in *Carter v. Minister for Education and Skills* [2018] IEHC 539, [2018] 10 JIC 0302 (Unreported, High Court, 3rd October, 2018), that the notice to provide further particulars causes no major difficulties in theory or practice.

16. The defendant claims that the plaintiff is now bringing in matters going back to the start of his employment which potentially could be as far back as 2006. But that somewhat misunderstands the nature of the procedure. There is no requirement to provide witness statements, and the plaintiff is entitled in his oral evidence to give the history and background of the matter even if that evidence relates to periods before the accrual of the cause of action. The coming into being of a cause of action may just be the tip of the iceberg in terms of a long prior narrative. That narrative is not excluded from relevance or from consideration by the court merely by reference to the Statute of Limitations or the law on delay. Mr. Beatty refers to the 15-year period between the start of the plaintiff's employment in 2006 and the likely date of a Circuit Court hearing in 2021. While 15 years sounds dramatic, that doesn't of itself determine the motion in favour of the defendant. On the face of it, no substantive claim for relief is made in the notice of 18th August, 2016. It simply sets out the plaintiff's belief as to the reason for the harassment or bullying. Ultimately the question of whether and to what extent it can be relied on is one for the trial.

Whether the proceedings should be struck out due to delay

17. In broad terms, there are three strands of jurisprudence on the question of delay:

    (i). the *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 test, which requires the delay to be inordinate and inexcusable and a showing that the balance of justice favours a strike out;

    (ii). *Ó Domhnaill v. Merrick* [1984] I.R. 151, where even if the delay is excusable, the court can strike out the proceedings albeit on the basis of a higher threshold of the requirements of justice and more than moderate prejudice; and

    (iii). *Byrne v. Minister for Defence* [2005] IEHC 147, [2005] 1 I.R. 577, where even if there is no prejudice, there is a fall-back jurisdiction to strike out on the basis of inordinate delay, although it is to be used sparingly.

18. While Mr. Lehane disputed the existence of such a third category, it has some support in caselaw, although Delany and McGrath, *Delany and McGrath on Civil Procedure*, 4th ed. (Dublin, Round Hall, 2018), refer to it as a jurisdiction "*in exceptional cases*" (p. 649, para. 15-47).

19. The broad principles are well established and there are now so many cases implementing them that it is not difficult for both sides in a motion of this type to find authorities to suit their purposes. That is a problem that can only get worse as time goes by. Thus, I am not entirely sure that much is to be achieved by referring in detail to all of the cases cited by the parties, which I have considered, including:

    (i). *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290;

    (ii). *Stephens v. Paul Flynn Ltd*. [2008] IESC 4, [2008] 4 I.R. 31;

    (iii). *Quinn v. Faulkner t/a Faulkner's Garage* [2011] IEHC 103 (Unreported, High Court, Hogan J., 14th March, 2011);

    (iv). *Cassidy v. Provicialate* [2015] IECA 74 (Unreported, Court of Appeal, Irvine J. (Peart and McMahon JJ. concurring), 16th April, 2015);

    (v). *Flynn v. Minister for Justice* [2017] IECA 178 (Unreported, Court of Appeal, Irvine J. (Hogan and Hedigan JJ. concurring), 31st May, 2017);

    (vi). *Ruffley v. Board of Management of Saint Anne's School* [2017] IESC 33, [2017] 2 I.R. 596;

    (vii). *Breen v. Wexford County Council* [2019] IEHC 112 (Unreported, High Court, Noonan J., 29th January, 2019);

    (viii). *Fox v. Cherry Orchard Hospital* [2019] IEHC 285 (Unreported, High Court, Barrett J., 3rd May, 2019);

(ix). *Caulfield v. Fitzwilliam Hotel Group Ltd.* [2019] IEHC 427 (Unreported, High Court, Meenan J., 29th March, 2019);

(x). *Grant v. Minister for Communications, Marine and Natural Resources* [2019] IEHC 468 (Unreported, High Court, Pilkington J., 26th June, 2019);

(xi). *Sweeney v. Cecil Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd.* [2019] IECA 43 (Unreported, Court of Appeal, Baker J. (Irvine and Kennedy JJ. concurring), 20th February, 2019);

(xii). *Ahearne v. O'Sullivan* [2020] IEHC 46 (Unreported, High Court, Simons J., 6th February, 2020);

(xiii). *Pugh v. P.G.M. Financial Services Ltd.* [2020] IEHC 49 (Unreported, High Court, Sanfey J., 23rd January, 2020);

(xiv). *Palmer v. Palmer* [2020] IEHC 108 (Unreported, High Court, Meenan J., 31st January, 2020);

(xv). *Start Mortgages DAC v. McNamara* [2020] IEHC 187 (Unreported, High Court, Power J., 7th April, 2020);

(xvi). *Myrmidon CMBS (PROPCO) Ltd. v. Joy Clothing Ltd*. [2020] IEHC 246 (Unreported, High Court, MacGrath J., 23rd January, 2020);

(xvii). *Ulster Bank Ireland Ltd. v. Sutton* [2020] IEHC 426 (Unreported, High Court, MacGrath J., 7th August, 2020);

(xviii). *AIG Europe Ltd. v. Fitzpatrick* [2020] IECA 99 (Unreported, Court of Appeal, Whelan J. (Donnelly and Power JJ. concurring), 9th April, 2020);

(xix). *McGuinness v. Wilkie and Flanagan Solicitors* [2020] IECA 111 (Unreported, Court of Appeal, Noonan J. (Edwards and Costello JJ. concurring), 13th January, 2020); and

(xx). *Reilly v. Campbell Catering Ltd.* [2020] IECA 222 (Unreported, Court of Appeal, Whelan J. (Edwards and Faherty JJ. concurring), 4th August, 2020).

20. Many of these cases are ones in which the established tests are applied and which, therefore, turn on their own facts. In this sort of context, attempts at overarching jurisprudential disquisitions can fall somewhat flat. Particular reliance is placed by the defendant on the decision in *Caulfield v. Fitzwilliam Hotel Group*, but there are significant differences. The PIAB authorisation there was sought two years after the matters complained of, and there were also five years in which nothing happened other than a reply to a notice for particulars (see para. 4). So there is no analogy with the present case on either score.

Whether there was inordinate delay

21. Overall, there is probably not much argument that the delay overall is inordinate. That doesn't mean that there were small individual periods of delay which were not in themselves inordinate and I'll come back briefly to that issue below.

Whether there was inexcusable delay

22. The plaintiff's excuses in essence are:

    (i). this was not a situation where there was a long period of inactivity - various normal court procedures such as discovery and particulars were continuing; and

    (ii). much of the delay was down to the defendant.

23. In essence the process of exchanging pleadings and particulars took from 28th June, 2013 to 18th August, 2016. The process of the plaintiff's discovery request took from 15th September, 2014 to 1st February, 2017; and the process of the defendant's discovery request took from 22nd January, 2017 to 1st October, 2018 although that hadn't been completed by the time the motion to strike out issued.

24. Quite a number of these procedures were either initiated or contributed to by the defendants. In particular, the defendant:

    (i). issued a notice for particulars of 28th August, 2013;

    (ii). requested further information on 28th August, 2013;

    (iii). delivered a defence on 4th March, 2014;

    (iv). replied to the plaintiff's notice for particulars on 1st July, 2014;

    (v). replied to a discovery request on 26th September, 2014; 20th November, 2014; 20th March, 2015; 23rd June, 2015; and 15th June, 2016;

    (vi). swore an affidavit of discovery on 1st February, 2017;

    (vii). made a request for medical records on 22nd August, 2013;

    (viii). sought voluntary discovery on 27th January, 2017;

    (ix). complained about the discovery provided on 20th September, 2018 and 27th September, 2018; and

    (x). disputed that the matter was ready for trial on 19th September, 2018.

25. The defendant says that there is no evidence providing an excuse, but that over-determines the concept of evidence. Excuses for this purpose can appear from the sequence of events on the face of the papers, including the exchange of pleadings, correspondence and the engagement between the parties that appears therefrom. I consider having regard to the foregoing, that the large majority of the delay is excusable,

both by reference to the fact that the matter was not let lie and the procedures to progress the case were ongoing; and secondly, because quite a number of those procedures and the delays were caused or contributed to by the defendants. Such limited elements of the delay that are not thereby explained and excused are not in themselves inordinate. So on that basis I don't consider that the first two limbs of the *Primo*r test taken together are satisfied. If I am wrong about that for *Primor* purposes, and in any event for *Ó Domhnaill* and *Byrne* purposes, I will go on to consider the question of the balance of justice.

The balance of justice

26. As regards the balance of justice, there are a number of relevant factors. Of course, I fully take into account all points submitted by the defendant including the extent to which there is a certain onus on the plaintiff, as well as the impact on the defendant's reputation. It is also true that the plaintiff took some time in replying to some of the defendant's correspondence and notices although it wasn't the case that matters ground to a complete halt during those periods. There are, however, a number of countervailing factors of considerable significance to the balance of justice.

No undue pre-institution delay

27. There wasn't any significant delay before the institution of proceedings. The defendant's employment issues came to a head in August 2012 and PIAB authorisation was applied for in February 2013 with the proceedings instituted and served in June and July 2013 respectively.

The only evidence in favour of the plaintiff is hearsay

28. Mr. Lehane complains that the evidence on behalf of the defendant is second-hand hearsay, and should not be treated as being of great weight, particularly where it is not specific on a number of key issues. It appears to follow from *Minister for Agriculture v. Alte Leipziger* [2000] IESC 13, [2000] 4 I.R. 32, as applied in *O'Dwyer v. Daughters of Charity of St. Vincent de Paul* [2015] IECA 226, [2015] 1 I.R. 328, that an order striking out proceedings due to delay is a final order, so hearsay is not admissible. While the plaintiff didn't object to the admissibility of the affidavits as such, even bearing that in mind, hearsay allegations are of reduced weight in such a context.

This was not a case where nothing was happening

29. Baker J. in *Sweeney v. Keating* (at para. 27), noted the difference between a case where a plaintiff hadn't progressed matters beyond a statement of claim and where a claim "*became bogged down in interlocutory disputes concerning matters such as discovery, particulars, etc*." The implication is that there is a significant difference between complete indolence which may warrant a strike out and progressing interlocutory matters which falls into a different category where balance of justice might weigh differently. This case very much falls into Baker J.'s "*bogged down*" category rather than the not-being-progressed category.

In the absence of pre-institution delay, the critical period is between the commencement of proceedings and the bringing of the motion to strike out

30. While Mr. Beatty tried to point to an alleged 15-year delay between the plaintiff starting employment in 2006 and a likely trial in 2021, he placed most emphasis on an alleged 10-

year delay between the events said to give rise to the cause of action and the date of the hearing of the application to strike out. However, in the absence of any pre-institution delay one has to focus primarily on the level of delay between the bringing of the proceedings and the bringing of the motion to strike out which in effect pauses matters and prevents other aspects of the case from proceeding. Here, that is about a five-and-a-half-year delay, the proceedings being issued mid-2013 and the motion to strike out brought on 3rd January, 2019. While by no means acceptable, that is a long way off many of the delays that have been dealt with in some of the caselaw.

Conduct of the defendant

31. The defendant's conduct clearly contributed to significant delay as referred to above and insofar as this is also relevant to the balance of justice I will take it into account under this heading. Indeed, one could make a plausible case that almost the entirety of the delay was down to the defendant. The plaintiff served a personal injury summons in July 2013, but a defence was not delivered until March 2014 after a motion. The plaintiff sought discovery in September 2014, which was not provided until the affidavit of 1st February, 2017. When the plaintiff proposed serving a notice of trial in September 2018, the defendant objected to that and then moved within a couple of months to bring the present motion on 3rd January, 2019. Furthermore, the very fact that the defendant asked the plaintiff not to serve notice of trial amounts to an element of acquiescence. That very point was relied on by Pilkington J. in *Grant v. Minister for Communications, Marine and Natural Resources* (para. 53). While reliance was placed on *Myrmidon per* MacGrath J., in a contrary sense, Pilkington J.'s judgment in *Grant* doesn't seem to have been open to the court in *Myrmidon* and seems a preferable approach. Even leaving that aside, the defendant acquiesced in the continuation of the proceedings at a number of levels, a point I will now turn to.

The defendant's conduct was not just to do nothing, but to take active steps

32. The fact that the defendant took active steps in the proceedings is a major distinction with the case of *Caulfield v. Fitzwilliam Hotel Group*. In *Millerick v. Minister for Finance* [2016] IECA 206 (Unreported, Court of Appeal, 11th July, 2016), Irvine J. (Ryan P. and Peart J. concurring), said (at para. 39), that mere inactivity on the part of a defendant is not conduct that should be weighed against it, but for that conduct to be taken into account, "*[s]uch inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay*." Here, the defendant *both* raised a notice for particulars and sought discovery.

Claim of prejudice has not been made out

33. One of the central points on affidavit by the defendant's solicitor is that the fast food industry is one with transient staff who work on short term contracts with a high turnover. Many of them are nationals of other EU countries who return to their own jurisdictions. The defendant claims prejudice because staff working from 2010 to 2012 in

the Tallaght restaurant are not currently available. But this falls short in a number of respects.

34. First of all, it is not in principle impossible for an employer, even in a transient industry, to ensure it retains proper records for the contact details of former employees so that they can be contacted if necessary.

35. Mr. Harris's original affidavit (at para. 34) only refers to seeking follow-up on the basis of records of mobile phone numbers rather than giving any evidence as to having recorded other means of contacting staff and even then the defendant doesn't seem to have recorded mobile numbers for some of the staff. The inference from this is that the only means of contacting its former staff that was actually retained by the defendant was mobile phones, which is clearly a hit and miss way of retaining such information. That cannot be visited on the plaintiff. That's leaving aside *post hoc* attempts to find people through social media rather than using information already stored. The fact that no number at all was recorded for four of the people suggests a strong inference of inadequate record-keeping.

36. The defendant's solicitor averred (at para. 25 of his affidavit), that a witness who had gone back to Romania was "*not compellable*". But that averment doesn't appear to reflect a correct understanding of the law. Council Regulation EC No. 1206/2001 of 28th May 2001, which of course is directly applicable, allows for such evidence to be taken in other EU Member States. The Courts Service has been designated as the central authority under the European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 (S.I. No. 126 of 2013). The regulation is implemented in the High Court in O. 39, r. 5 RSC. The Circuit Court rules only expressly deal with incoming requests in O. 23A rather than outgoing ones, although the jurisdiction to make outgoing requests arises under the EU regulations. Perhaps the Circuit Court Rules Committee should consider a provision along the lines of O. 39, r. 5 of the RSC. But the absence of a rule doesn't prevent the EU regulation from being operated.

37. Even if a staff member is not compellable in a particular case, there is no prejudice to the defendant if the witness would come voluntarily and there is nothing in the defendant's solicitor's affidavit to say that that wouldn't happen.

38. Perhaps most fundamentally of all, the transient nature of the fast food industry was there from the word go. There is nothing to suggest that there are witnesses who are not available now, but who would have been available, say, two or three years ago. That is a fundamental weakness in the defendant's prejudice argument which is pitched at quite a high level of generality rather than engaging in sufficient detail with the precise facts. Rather, the only details engaged were those that superficially favour the defendant rather than answering a number of quite obvious and relevant shortcomings in that evidence.

39. The defendant's solicitor also goes on to aver that that "*the witness' difficulty is as a direct result of a delay in the prosecution of the within proceedings.*" That is an extremely vague assertion and in no way made out. First of all, it assumes that there is a

"*witness difficulty*" which is based on the false premise that the witness is not compellable and the possibly false premise that she wouldn't come voluntarily. More fundamentally, it doesn't say when she went to Romania or how her going there is due to the delay in the prosecution of the proceedings. There is no analogy with *Cassidy v. Provicialate*, where there was just one central witness who was unavailable.

40. The balance of justice clearly favours the proceedings continuing. The defendant's allegations of prejudice based on the transience of the industry could be used to defeat any claim against a fast food company or similar low-pay-type employment situation where there was a fast turnover of workers. The allegation of prejudice due to delay on the part of the plaintiff is not made out in the sense that while the defendant may have some difficulties now, they are not as great as averred to. But either way the defendant hasn't established any additional prejudice, say for example, the proceedings not being called on for hearing immediately after the defendant's affidavit of discovery in 2017.

41. The defendant was served with the claim in July 2013 and could have started to track down witnesses and get proper ongoing contact details for those persons specifically at that point. There is no evidence they did anything effective or even anything at all until it suited them to have the trail go cold for the purposes of demonstrating prejudice in the context of a motion to strike out.

42. Thus, the motion fails whatever approach is adopted, *Primor, Ó Domhnaill* or *Byrne*.

Order

43. This motion has now had very thorough consideration having been heard in three different courts. It doesn't raise any strikingly novel issues of law and is more about the application of existing jurisprudence to the facts of this particular case. There is nothing particularly exceptional about either the facts, the legal principles in issue or their application. Some of the vast number of strike-out cases fall on the side of granting such an order, some on the side of refusal. This happens to be one of the latter. The defendant's evidence in this case is relatively selective, of a hearsay nature and relatively vague, and fails to engage with the granular detail of the facts as to how the defendant is precisely prejudiced when compared with a situation if the plaintiff had tried to serve notice of trial in 2017, for example. Furthermore, as noted above, at least one element of the alleged legal prejudice to the defendant averred to is simply not correct. That conclusion is not in any way to condone excessive delays, but it is probably worth saying that much of the fault of that lies with the architecture of the system, the rules of court and the generally party-led determination of the pace of litigation. Those are problems that need to be tackled at source rather than the court contentedly feeling that it was chalking up a major achievement by striking out individual cases where delay is objected to.

44. Having regard to all the foregoing, the order will be:

(i). that the appeal be allowed and the order of Her Honour Judge Linnane vacated; and

(ii). that the defendant's motion dated 3rd January, 2019 be dismissed.

45. As regards costs, the costs order in favour of the defendant for costs in the County Registrar's Court and the Circuit Court will be vacated and, subject to any submissions to the contrary, the plaintiff will have an order for his full costs in all three courts.