THE HIGH COURT

[2022] IEHC 414

CIRCUIT COURT RECORD NO. 5658/2011

HIGH COURT APPEAL NO. 2021/90 CA

BETWEEN

ADRIAN CAULFIELD

PLAINTIFF

AND

TONY GILLEN

DEFENDANT

JUDGMENT of Mr. Justice Heslin delivered on the 6th day of July, 2022

Introduction

1. On 2 June 2021 the Defendant issued a motion seeking an order pursuant to O.33, r.5 of the Circuit Court Rules and the inherent jurisdiction of the court (and, if necessary, O.67, r.16) dismissing the proceedings for want of prosecution and, in the alternative, an order pursuant to O.19, rr. 27 and 28 of the Circuit Court Rules (CCR) and the inherent jurisdiction of the court dismissing the proceedings on the basis that they were frivolous, vexatious, unnecessary and bound to fail.

2. The said motion was returnable for 25 June 2021 and on that date Her Honour Judge Hutton (i) granted the Defendant an order pursuant to O.33, r.5 of the CCR dismissing the proceedings for want of prosecution with costs of the motion to the Defendant to be taxed in default of agreement; and (ii) ordered that the reliefs sought in the Plaintiff's motion filed on 25 November 2020 be dismissed with costs of the motion to the Defendant to be taxed in default of agreement.

3. The Plaintiff was represented by solicitors and counsel in the Circuit Court. The matter came before this court on 28 April 2022 by way of the Plaintiff's appeal against the Circuit Court's 25 June 2021 order. The relevant notice of appeal, dated 1 July 2021, was made by the Plaintiff as a litigant in person and he represented himself at the hearing.

4. As to the hearing itself, the matter was due to commence at 11 a.m. but the Plaintiff was not present in court. Shortly after 10 a.m., the Plaintiff sent an email to the Courts Service indicating that he was travelling from Mullingar via public transport, would not arrive in Dublin until 12:10, apologised for his delay and indicated that he expected to be in court for 12:30. Although I was entitled to assume that the Plaintiff was well aware, in advance, that his appeal was due to be heard at 11 a.m., I felt that the interests of justice required that some latitude be afforded to the Plaintiff and in these circumstances I agreed to take up the matter at 12:35. It is important to note that nothing in the Plaintiff's communication flagged any intention to seek an adjournment. When I took up the matter again at 12:35 there was still no appearance by the Plaintiff. Nor had there been any further communication from him. However, I felt it would be appropriate to afford additional latitude to the Plaintiff in case he had encountered unforeseen difficulties, including difficulties with communication. I indicated that the matter would proceed at 2 p.m. and requested that the Defendant's solicitor email the Plaintiff accordingly. The Plaintiff arrived in time for the matter to commence at 2 p.m. He made an application to adjourn the case which I refused for reasons given in an *ex-temporae* ruling. On that issue, it should be noted that, at the "callover" the previous week, the Plaintiff had also made an application for an adjournment. Having considered the material proffered by the Plaintiff, Meenan J., who

having heard that application, was satisfied that the application to adjourn should be refused. It is also appropriate to note at this juncture that, during the hearing, the Plaintiff made an application to adduce some four large folders of additional material which was not before the Circuit Court. I heard that application and, for reasons given in an ex-tempore ruling, refused it. For the sake of clarity, those reasons comprised the following.

5. In essence, the Plaintiff sought to introduce additional material, which was in existence, and available to him, when the Defendant issued the 2 June 2021 motion. There was no suggestion of any of the material having been unavailable to him or to his then – legal advisors, had reasonable efforts been made to secure it. Furthermore, it was plain that the Plaintiff had every reasonable opportunity to oppose the Defendant's motion and that he took this opportunity in the form of swearing his 19-page affidavit of 17 June 2021, accompanied by Exhibits "AC1" to "AC5". I was also satisfied that the material sought to be introduced at the eleventh hour was not material likely to have any bearing on the outcome. Rather, as the Plaintiff made clear in his submissions, he wished to introduce same because it comprised what he called "*evidence which would go to refute Judge Hutton's decision*". As regards specific examples of the material which the Plaintiff sought to introduce, he referred *inter alia* to leases of 2006 and 2007; what he contended to be proof of trespass and harassment of him; as well as medical documents.

6. It was clear that all of these long predated the Defendant's motion. It also seemed to me that the Plaintiff had every reasonable opportunity to exhibit such medical documentation as he wished to rely on in opposing the Defendant's motion. I took this view not least because in a 27 February 2018 letter sent by the Plaintiff's then – solicitor, Ms. Rosemary Rogers of the Law Centre (Montague Court), which was sent to the Defendant's solicitors, she stated inter alia that: "*The matter did not progress as quickly as we would have envisaged owing to* ***health difficulties*** *experienced by our client which delayed his ability to give instructions"* (emphasis added). In the foregoing circumstances, the case proceeded on the basis of the evidence which was before the Circuit Court, in the form of the pleadings, affidavits and exhibits. The case proceeded before me as a hearing *de novo* and this is something I explained to the Plaintiff.

<u>Background</u>

7. The Plaintiff was a tenant of the Defendant in a two-bedroom apartment in Dundrum, Dublin 14 ("the property"). On or about 4 July 2008, two young female students who were residing in the second bedroom left the property. At para. 6(b) of his 2 June 2021 affidavit, the Defendant avers that these students informed him that they were leaving the property because they felt threatened and harassed by the Plaintiff. At para. 6(b) of his replying affidavit sworn on 17 June 2021, the Plaintiff, having averred that he is a stranger to any conversation between these students and the Defendant, did not accept that he threatened or harassed or caused any upset or fear to these persons. He went on to aver that, as an older, quiet, mature student finishing off his studies, as opposed to the younger female students with active social lives, his lifestyle and that of the two young women in question were not compatible and the Plaintiff averred that he found it hard to live with them at times, giving examples of late night socialising.

8. I want to emphasise, at this juncture, that where conflicting averments are made as to matters of fact, it is neither possible nor appropriate for the court to prefer one version of events over another in the context of dealing with the present motion. It is clear, however, that the Defendant regards these two female students as relevant witnesses, both in respect of the Plaintiff's credibility, in circumstances where the Plaintiff denies making them upset or fearful, as well as in circumstances where the Defendant asserts that

their evidence would demonstrate that what were described as the Plaintiff's paranoid symptoms, for which he seeks damages in the present proceedings, pre-date the relevant incident of 23 September 2008.

9. It is not in dispute that on 22 September 2008, the Defendant attended the property with a Mr. Paul O'Brien. The Defendant avers at para. 6(c) of his affidavit that Mr. O'Brien was interested in renting the bedroom which had been vacated by the two students. At para. 6(d) the Plaintiff avers that he and Mr. O'Brien were accosted by the Plaintiff and that he approached them aggressively with what was described as a "large baton". The Defendant avers that he reported the Plaintiff's threatening behaviour to Gardaí in Dundrum Garda Station. This account is disputed by the Plaintiff who alleges that Mr. O'Brien became aggressive towards him, followed him to his bedroom door and placed his foot against the door to prevent him from closing it and threatened the Plaintiff. The Plaintiff goes on to aver *inter alia* that:

> "*This is when I produced part of wooden stick measuring about 30 to 40 cm and held it in front of my face in self-defence to shield myself from being struck by Mr. O'Brien*".

The Plaintiff also avers that two members of An Garda Síochána called to the property after that incident and he estimates that they arrived at approximately 9:30 p.m. averring that: "*Ultimately, they did not get involved as they viewed the incident as a civil matter*".

10. There is clearly a stark dispute as to what was or was not said or done on 22 September 2008.

11. At para. 6 (e) of his affidavit, the Defendant avers that Mr. O'Brien agreed to move into the property but was unable to access it that evening because the apartment door had been barricaded by the Plaintiff who had also locked the door in such a way that it could not be unlocked from outside. Although there is, once more, a stark dispute as to what was said and done, the Plaintiff makes *inter alia* the following averment at para. 6(e) of his affidavit:

> ". . . *I accept that I did use an improvised door security bar to prevent intruders from accessing the property*"

12. At para. 6(f) the Defendant avers that it was necessary for him to call the Gardaí who attended and assisted Mr. O'Brien in accessing the property and who confiscated the baton which the Defendant had produced in the earlier incident. Although the Plaintiff denies shouting at the Gardaí for a prolonged length of time, he acknowledges that three Gardaí arrived at the property and he avers that he let them in. He also avers *inter alia* that the Gardaí:

> ". . . *proceeded to let Mr. O'Brien into the property against my wishes and they confiscated the stick that I had in my bedroom before leaving*".

It is not in dispute that Mr. O'Brien spent the night in the property and the Plaintiff avers that Mr. O'Brien left the property at approximately 9 a.m. the following morning.

13. At para. 6(g) the Defendant avers that Mr. O'Brien was once again locked out of the property by the Plaintiff and that he reported the matter to the Gardaí in Dundrum, who advised him to arrange for a locksmith to assist him. The Defendant goes on to aver that the Gardaí agreed to attend the property at the same time as the locksmith, because of the Plaintiff's previous behaviour. At para. 6(g) of his affidavit, the Plaintiff avers that he is a stranger to discussions or arrangements between the Defendant, Mr. O'Brien, the locksmith and/or the Gardaí. He does however, make the following averment: -

> "*The following evening, I prevented what I saw as a further trespass on to the Property by Mr. O'Brien. I did not alter the locking mechanism of the door. However, I did use an improvised door security bar to stop intruders from gaining access to my property".*

14. At para 6(h) of the Defendant's affidavit, he avers that three Gardaí attended while a locksmith allowed the Defendant and Mr. O'Brien to gain access to the property in circumstances where the Plaintiff had the door barricaded to stop Mr. O'Brien being able to enter and the Defendant's key would not work in the lock. The Defendant avers that he requested the Plaintiff on numerous occasions to open the door, but he refused. The Defendant also avers that, before the locksmith removed the lock, he warned the Plaintiff on several occasions that this was about to happen and the Defendant avers that the Plaintiff shouted aggressively in response. At para. 6(h) of his affidavit, the Plaintiff takes issue with the Defendant's account but he does aver *inter alia* that:

> "*. . . I again had an improvised door security bar in place to prevent intruders from entering into the property".*

His account of what occurred is in the following terms:

> "*Nobody warned me that the lock on the door was about to be removed. I dispute that the warning outlined by the Defendant or any such similar warning was given. I was not asked to open the door. Everything was quiet for a moment or two. Then I heard a voice say 'Do it' and tools were used around the locking mechanism of the door. I was still positioned inside the front door at this point. Then the locking mechanism of the door broke, the lock went flying through the air past my left hand side. A chisel was left poking through the space where the door's locking mechanism had been and the chisel struck the web spacing on my left hand. I felt a sharp pinch and saw that the chisel had struck my hand. At this stage, the security bar was still in place. However, those outside began to kick in my front door. As the door was being kicked in I began to go into a heightened state of fear for my personal safety, my heart was racing and I began to panic. I was worried about what would happen to me if they gained entry. I remember shouting out 'Stop, please stop', but as my panic began to take hold I found it increasingly difficult to speak. My pleas were ignored by those persons outside the front door. It took five or six kicks and the door came flying in. Just before the door came flying in, I remember being forced backwards, losing my balance and ending up falling against the wall which is when I injured my back".*

15. Once more, there are sharply contrasting accounts of what was or was not said and done. There is no CCTV footage of the incident in question. There is no contemporaneous recording of what was said. It seems to me that, at any future trial, a judge would have to rely, to a material extent on the recollection of witnesses as to what was or not said and done on that evening in September 2008.

16. At para. 6(h) the Defendant identifies one of the Gardaí involved at the time as being as a Sgt. Kevin Duggan, accompanied by two other uniformed Gardaí.

17. There is also a dispute about what occurred once the Defendant and Mr. O'Brien were able to gain access to the property after the lock was removed by the locksmith. At para. 6(i) the Defendant avers that he and Mr. O'Brien were immediately attacked by the Plaintiff who shouted at them and who punched Mr. O'Brien several times in the face. At para. 6 (i) of his affidavit, the Plaintiff refutes this and states *inter alia* that:

> "*In fact, it was Mr. O'Brien who attacked me. I put my left hand up to push him away. I never struck Mr. O'Brien several times in the face as alleged or at all".*

18. At para. 6(j) the Defendant avers that the Gardaí arrested the Plaintiff. This is not in dispute in circumstances where the Plaintiff avers at para. 6(j) of his affidavit that:

> "*It is true that I was arrested for a breach of the peace. The subsequent criminal summons before the District Court was struck out in or around November 2009".*

19. It is not in dispute that a hearing took place before the Private Residential Tenancies Board ("PRTB") on 5 May 2009, as a result of an application by the Plaintiff. Nor is it in dispute that, at this hearing, Sgt. Duggan from Dundrum Garda Station and Mr. O'Brien gave evidence on behalf of the Defendant. The relevant PRTB report of adjudication, which is dated 18 May 2009, comprises Exhibit "GG1" to the Defendant's affidavit. At para. 9 of his affidavit, the Defendant avers that Sgt. Duggan gave evidence at length to the PRTB and stated that the Plaintiff had been arrested because he had attacked Mr. O'Brien. The Defendant also averred at para. 9 that, while in custody, the Plaintiff was examined by a Dr. Hooper in respect of a cut to his hand which he claimed to have suffered while resisting the attempts to gain access to the property, Dr. Hooper's conclusion being that any injury was superficial and no further treatment was required. With regard to these averments by the Defendant, the Plaintiff avers as follows at para. 9 of his affidavit:

> "*While it is true that I was arrested for a breach of the peace the facts surrounding that arrest have always been disputed by me. Sgt. Duggan did not and could not have seen me attack Mr. O'Brien because I did not attack him. Sgt. Duggan saw blood on Mr. O'Brien's face. This was my blood and it had come from the place on my left hand where I had sustained an injury from the chisel. The blood must have got onto Mr. O'Brien's face when I was pushing him away from me. I accept that I was taken to Dundrum Garda Station and while I was there I was examined by Dr. Hooper. It is correct that Dr. Hooper commented that my injuries were minor. However, Dr. Hooper did not know about by back injury or my anxiety that subsequently developed due to this incident".*

<u>Relevant chronology</u>

An analysis of the pleadings and affidavit evidence reveals the following chronology:

23 September 2008 – cause of action accrues

20. It is not in dispute that on the Plaintiff's case, his cause of action accrued as of 23 September 2008.

27 February 2009 – PRTB application

21. On 27 February 2009, the Plaintiff made an application to the PRTB, a copy of which comprises Exhibit "TG2" to the Defendant's 2 June 2021 affidavit. It is clear from the contents of same that the Plaintiff raised with the PRTB, not only what he described as "*primarily an illegal eviction*", but a case which, according to the Plaintiff: "*. . . involves other elements of illegal imprisonment, harassment, placed in a conceivable amount of fear, assault, ill-health, stress, intimidation, monetary loss, and bullying to name a few of my civil liberties that have been violated".* It seems uncontroversial to say that, in light of what the Plaintiff stated in his 27 February 2009 application, he took the decision to bring the entirety of his dispute to the PTRB. It is equally uncontroversial to say that he issued no legal proceedings at that juncture.

14 October 2009 – PRTB determination order

22. An initial determination was made in favour of the Defendant but, following an appeal by the Plaintiff, a final Determination Order was made in accordance with s. 121 of the Residential Tenancies Act, 2004 in the following terms:

> "*The Respondent landlords shall pay the sum of €1,150 to the Appellant tenant within 28 days of the date of issue of this Order, being €2,000 damages for the unlawful termination of the tenancy of the dwelling at 104 South Meade, Dundrum, Dublin 14, having deducted the sum of €850 for arrears of rent due and owing".*

It is clear from the relevant PRTB tribunal report, dated 5 October 2009, that the PRTB took the view that, having changed the locks, there was an obligation on the Defendant to take adequate steps to ensure that the Plaintiff received a set of keys. This is clear from internal p. 5 of the relevant report which states inter alia the following:

> *"4. Findings of fact and reasons for the determination:*
>
> *The landlords failed to take sufficient steps on changing the locks to provide a copy of the key to the tenant. It is incumbent on the landlord that the tenant is provided with a set of keys. By not providing a key the landlord unlawfully denied the tenant access to the dwelling thereby unlawfully terminating the tenancy".*

<u>8 February 2010 – payment to Plaintiff of €79</u>

23. It is not in dispute that on 8 February 2010 the Defendant paid the sum of €790 to the Plaintiff. This comprised the €1,150 specified in the PRTB determination order, less the sum of €360 which was due to the Defendant, by the Plaintiff, under a previous PRTB determination order (reference no. TR 644/2008 – DR 64 / 2008). The relevant letter which was sent on 8 February 2010 by the Defendant's solicitors to the PRTB, enclosing the sum of €790, comprises exhibit "TG 5" to the Defendant's affidavit and a receipt issued by the PRTB on 11 February 2010 comprises Exhibit "TG 6". The Plaintiff did not issue the present proceedings during the remainder of 2010.

<u>27 June 2011 – civil bill</u>

24. On 27 June 2011, legal proceedings were issued by the Plaintiff by way of a document which is entitled *both* a "Personal Injuries Summons" and a "Civil Bill". These proceedings were commenced in the Circuit Court and the wrongs alleged against the Defendant comprised assault; battery; negligence and trespass to land. The proceedings were drafted on the Plaintiff's behalf by junior counsel and were issued by his then – solicitors, being the Law Centre (Tallaght). To best understand the nature of proceedings it is useful to quote from the personal injury summons/civil bill as follows:

> *"PARTICULARS OF THE CIRCUMSTANCES*
>
> *4. On or about the 23rd/24th day of September 2008, the Defendant herein wrongfully and/or unlawfully and/or negligently and without permission forced entry into the premises in which the Plaintiff then resided at 104 South Meade, Dundrum, Dublin 14 as lawful tenant and in doing so committed an assault and battery on the Plaintiff causing him to sustain severe personal injuries, loss, damage, inconvenience.*
>
> *PARTICULARS OF THE ACTS OF THE DEFENDANT CONSTITUTING THE WRONG*
>
> *5. The Plaintiff was injured when the Defendant wrongfully and/or unlawfully and/or negligently forced open the entrance door to the premises in which the Plaintiff lawfully resided.*
>
> *PARTICULARS OF ASSAULT, BATTERY AND NEGLIGENCE ON THE PART OF THE DEFENDANT*
>
> *(a) Forcing entry into the Plaintiff's residence in such a manner as to cause the Plaintiff reasonable apprehension that immediate violence would befall him;*
>
> *(b) Putting the Plaintiff in fear of the risk of further assault by being verbally abusive;*
>
> *(c) Forcing entry into the Plaintiff's residence in such a manner as to cause the Plaintiff to sustain personal injuries;*
>
> *(d) Failing to take any or any appropriate care for the safety of the Plaintiff in forcing entry into the premises in which the Plaintiff resided;*

(e) Exposing the Plaintiff to a risk of harm in entering the premises on the aforesaid date in the manner as described;

(f) The Plaintiff will rely on the doctrine of res ipsa loquitur;

(g) The Plaintiff will rely on such further or other particulars of negligence and/or assault and battery as may be within the knowledge of the Defendant or as may be adduced in evidence.

PARTICULARS OF PERSONAL INJURIES

As a result of the Defendant's wrongful entry and assault on him the Plaintiff sustained injuries to his left hand and left big toe. The Plaintiff was shocked and medical attention was sought for him. On examination, the Plaintiff was found to have two lesions – the first being an incised puncture wound 2cm long with slight gaping at the base of the left thumb in the web space and the second bruising at the base of the left big toe. A steri-seal dressing was applied to the Plaintiff's injured hand. The Plaintiff also sustained injury to his back. The Plaintiff continues to suffer from the emotional trauma suffered as a result of the Defendant's attack. The Plaintiff has also suffered from interference in his sleep and increased anxiety. The Plaintiff remains under review. As a result of the aforesaid, the Plaintiff's domestic, social and professional life has been adversely affected. The Plaintiff reserves the right to furnish further and updated particulars of personal injuries . . .."

19 March 2010 – application to PIAB

25. The Plaintiff applied to the Personal Injuries Assessment Board ("PIAB") on 19 March 2010 concerning an incident which he claimed occurred at 23:45 on 22 September 2008. This was a typographical error in that the correct date was 23 September, but nothing turns on this and a second application to PIAB was made by the Plaintiff reflecting the latter date. The case as made to PIAB by the Plaintiff can be seen on internal p. 2 of the PIAB application form where, under the heading "*Brief description of how the accident occurred*" the Plaintiff stated the following: -

"*I sustained a minor cut to my hand, also injury to my foot and back, resulting from Mr. Gillen's forcible entry by breaking and entering to the apartment and criminal trespass".*

The Plaintiff's application to PIAB referred to the 13 January 2010 report issued by Prof. Conal Hooper. In that report, Prof. Hooper stated inter *alia that* on 24 September 2008 he was called to Dundrum Garda Station. He went on to state that: -

"At 1.15 a.m. I examined Adrian Caulfield, a prisoner in the station. He is not my patient normally and I have not examined him since that date".

Having referred to the history as given by the Plaintiff and to his general examination of him, Prof. Hooper's report stated the following: -

"Lesions

There were two lesions present as follows:

1. *A superficial incised puncture wound 2cm long with slight gaping at the base of the left thumb in the web space.*
2. *Slight bruising at the base of the left big toe.*

Conclusions and management

1. *There was no evidence of intoxication.*
2. *Both lesions were minor and did not require hospital referral.*
3. *I applied one steri seal dressing to the lesion on the left hand.*

> *4. I advised Mr. Caulfield to attend his general practitioner for review and to discuss tetanus prophylaxis".*

On internal p. 3 of the Plaintiff's PIAB application he indicated that he was not satisfied with Prof. Hooper's report and he stated *inter alia* the following under the heading of "*Medical Details*":

> *"The injuries sustained have become difficult to live with since the assault both physically and emotionally which are not contained or explained in the attending doctor's report nor is Dr. Hooper my attending GP nor has he ever been".*

In response to the question in the PIAB application form as to whether the Plaintiff had sustained any other injury or medical condition relevant to his claim, the Plaintiff answered: - "*Yes*" and gave the following details:

> "*Yes, I injured my back in a quarrel with a flatmate, which may have aggravated the previous injury to my back".*

23 June 2010 – PIAB authorisation

26. It is not in dispute that on 23 June 2010 PIAB issued an authorisation to the Plaintiff. In circumstances where the Plaintiff's cause of action accrued as of 23 September 2008, it was approaching three years later that the Plaintiff issued legal proceedings by means of the personal injuries summons/civil bill dated 27 June 2011. This seems to me to constitute what could fairly be described as pre-commencement delay on the part of the Plaintiff, not least because a fundamental element of his legal proceedings is to pursue damages for personal injuries allegedly suffered as a result of what occurred on 23 September 2008 in a claim which explicitly pleads *inter alia* negligence on the part of the Defendant. The relevance of pre-commencement delay was made clear by Irvine J. (as she then was) at para. 36 of the Court of Appeal's decision in *McNamee v. Boyce* [2016] IECA 19. There, she made clear that the court may have regard to any significant delay prior to the issuing of proceedings [see also *Calahane & Anor. v. Revenue Commissioners & Ors* [2010] IEHC 95; and *McBrearty v. North-western Health Board* [2010] IESC 27]. In essence, the principles which emerge from the jurisprudence is that where a Plaintiff has made a "late start", they are under a particular onus to progress their proceedings with due expedition [see also *Manning v. Benson & Hedges* [2004] 3 IR 556]. In my view a late start was made by the Plaintiff.

2 November 2011 proceedings served

27. It will be recalled that the PIAB authorisation issued on 23 June 2010, but it was not until just over a year later that the Plaintiff issued proceedings on 27 June 2011. These proceedings were not served until 2 November 2011.

4 November 2011 – appearance

28. Two days after service, the solicitors for the Defendant lodged an appearance.

30 November 2011 – notice requiring further information

29. On 30 November 2011, the Defendant's solicitors served a formal notice requiring further information in respect of matters referred to in the Civil Bill.

2012 reply to notice requiring further information

30. The court was furnished with a copy of the reply delivered by the Plaintiff's then solicitors, Law Centre (Tallaght) to the Defendant's notice requiring further information. The copy provided to the court was not signed or dated, although the year 2012 appears on same.

19 June 2012 defence

31. On 19 June 2012 a defence was delivered and, to better understand the nature of the proceedings which any future trial judge would have to determine, it is appropriate to make the following observations.

At para. 1 of the defence it is pleaded that the Plaintiff's claim is, in substance, a personal injuries action within the meaning of s. 2 of the PIAB Act 2003 and not one that it is appropriately instituted by way of Civil Bill; and it is pleaded that an application will be made to strike out the proceedings brought by Civil Bill at the hearing of the action, on the basis that it discloses no jurisdiction on its face. At para. 2 it is pleaded that the Plaintiff is barred from bringing these proceedings in circumstances where the matters about which he complains have been adjudicated upon pursuant to the Residential Tenancies Act 2004. Without prejudice to the foregoing, it is pleaded at para. 3 that, if the Plaintiff has any cause of action against the Defendant, same is statute barred pursuant to the Statute of Limitations Act 1957 as amended. Para. 4 makes clear that the only matters which the Defendant does not require proof of are the identities of the Plaintiff and Defendant, respectively, as well as the fact that the Plaintiff sought and obtained a PIAB authorisation. At para. 5 the Defendant details the matters (a) to (j) which he requires proof of and these include that the alleged or any incident occurred in the fashion alleged or at all. It is clear that the facts are entirely in dispute as is liability.

32. At para. 6 the Defendant pleads the grounds upon which the claim should be defended. These include that the claim is statute barred; that the matters of which the Plaintiff complains were adjudicated at his request by the Residential Tenancies Board; that the Plaintiff is placed on full proof of the facts of the alleged or any incident none of which are admitted; that the Defendant acting by himself or through his servants or agents, was not guilty of any wrong; that the facts do not give rise to the proper application in the proceedings of the *res ipsa loquitur* principle; that if, which is denied, the Plaintiff suffered any personal injury, it was not caused by any alleged wrong on the part of the Defendant; and that, insofar as the Plaintiff may have suffered injury, which is denied, issue is taken with the severity alleged by the Plaintiff and he is put on full proof of every allegation concerning such injury. At para. 7 there is a plea of contributory negligence and para. 8 puts the Plaintiff on full proof of each and every allegation of fact and law relied upon.

33. It is clear from the foregoing that what did or did not occur, including what was or was not said on 23/24 September 2008 is of fundamental relevance to any fair determination of the pleaded claim. It is not in dispute that, apart from the Plaintiff and Defendant respectively, those present at the time comprised of (i) a locksmith retained by the Defendant to gain access to the property owned by the Defendant in circumstances where, as averred by the Plaintiff, he was preventing such access using what he describes as "*an improvised door security bar to stop intruders from gaining access*"; (ii) Sgt. Kevin Duggan and two other uniformed Gardaí; and (iii) Mr. Paul O'Brien, who had spent the previous night in the property.

34. The starkly conflicting versions of events averred to by the Plaintiff and Defendant, respectively, mean that the evidence of the locksmith, Sgt. Duggan and Mr. O'Brien are likely to be fundamentally important to any fair determination of the matter. This is particularly so given that the evidence of a Garda sergeant who was present and who heard and saw what occurred would be the evidence of a wholly independent party. Having made those observations, I propose to continue with the chronology of relevant events as follows.

<u>June 2012 to October 2017</u>

35. From the delivery by the Defendant of his 19 June 2012 defence until 13 October 2017, no formal step whatsoever was taken to progress the proceedings. This represents a period of some five years and four months. I am entirely satisfied that this constituted inordinate delay on the part of the Plaintiff who was at that stage, legally represented. In *Framus Ltd. v. CRH plc.* [2012] IEHC 316, Cooke J. (at para. 23) held that:

"*In its ordinary meaning delay is "inordinate" when it is irregular, outside normal limits, immoderate or excessive*".

The Plaintiff's delay was all of the foregoing. It is also appropriate to note that, having considered the 42-paragraph affidavit in opposition to the Defendant's motion, in which the Plaintiff exhibited 9 documents, there is no question of the Plaintiff or his then – solicitors, ever having (i) alerted the Defendant's solicitors to any reason for the delay which was then being encountered during that period of over 5 years or (ii) seeking forbearance or (iii) indicating that, despite the utter inactivity on the Plaintiff's part with regard to progressing his claim, he nonetheless intended to maintain it. There was simply silence from the Plaintiff's side during this period.

12 October 2017 – updated particulars of personal injuries

36. After a delay of some five years and four months, the Plaintiff's solicitors, the Law Centre (Tallaght), served updated particulars of personal injuries. Despite the length of the delay, this was not a particularly lengthy document and it seems appropriate to quote it *verbatim* as follows:

"TAKE NOTICE that as solicitors for the Plaintiff we wish to update his personal injuries as follows:

General practitioner:

The Plaintiff attended his general practitioner on diverse occasions more recently on 14/03/13. At that time, his complaints were discomfort in his thumb and lower back pain (the Plaintiff had sustained an intervening injury to his back in January 2010). The Plaintiff's general practitioner noted that he was suffering significant stress relating to the events of September 2008 and was referred to a consultant psychiatrist.

Psychiatrist:

Following referral by his general practitioner the Plaintiff was seen in late 2012 at the outpatients' department at Mullingar Hospital. The Plaintiff complained of insomnia, hypervigilance, locking his bedroom door at night, waking easily if there was any noise, feeling anxious, poor energy and motivation and occasional flashbacks of the traumatic occurrence of September 2008. Initial assessment raised the possibility of a paranoid illness. In early 2013, the Plaintiff presented with significant anxiety symptoms, including palpitations and was prescribed anxiolytic medication. On requesting a second opinion, Dr. Enda Hayden, consultant psychiatrist, considered that the Plaintiff's presentation was consistent with an anxiety disorder and advised escitalopram and arranged further outpatient review. The Plaintiff was reviewed in November 2016. In Dr. Hayden's opinion, the constellation of symptoms precipitated by the incident in September 2008 are most appropriately described as in keeping with a diagnosis of adjustment disorder. In the Plaintiff's case, this amounted to a state of subjective distress and emotional disturbance which interfered with his social and occupational functioning and performance and was associated with significant anxiety and depressive features in addition to personal loss. The disturbance of mental state was such as to require treatment with psychiatric medication and from which he benefited. The Plaintiff was discharged from Longford/Westmeath Mental Health Services on 21 November 2016. There was no evidence of mental illness at the time of discharge and a plan was agreed with him to gradually decrease and discontinue the low dose of psychiatric medication he was taking. The prognosis for continued mental wellbeing is very good".

37. The foregoing is the entire of what was comprised in the updated particulars of personal injuries and several comments seem appropriate, as follows. This was a pleading delivered in October 2017 which made reference to the most recent attendance by the Plaintiff with his GP as being in March 2013, four and a half years earlier. It is also pleaded that, following referral, the initial psychiatric review took place in late 2012. No explanation has been given in relation to why the findings of late 2012 and March 2013 could not have been pleaded at the time. Insofar as reference is made to a second opinion, a November 2016 review, and a 21 November 2016 discharge, no explanation is given for the delay up to or following October 2017. Finally, and as I observed earlier, no correspondence was sent by or on behalf of the Plaintiff which made any attempt to keep the Defendant's solicitors informed of matters, be that to explain any difficulties then being encountered and/or to request forbearance.

38. It also seems appropriate to note that, following the delivery of the defence of 19 June 2012, the "ball" was very much in the Plaintiff's "court". In other words, there was no question of the Defendant being in default. From the Defendant's perspective it had very promptly lodged an appearance, promptly raised a notice for particulars, and, following the receipt of replies, delivered a full defence where everything was put in issue including all facts, legal responsibility and indeed the very entitlement of the Plaintiff to maintain the claim, which was said to be statute barred as well as lacking jurisdiction on the face of the writ and a claim previously brought the PRTB.

39. There was no response whatsoever to the defence, where contributory negligence was also pleaded and as weeks, months and years passed it could hardly be unreasonable for a Defendant to believe that the delivery of the defence had "seen off" the Plaintiff's claim which had been abandoned.

25 January 2018 – Defendant reserves his position regarding delay

40. On 25 January 2018, the Defendant's solicitors wrote to the Plaintiff's solicitors in circumstances where the latter were seeking consent to a trial date being fixed. It is appropriate to quote that letter *verbatim*:

> "*Dear Sirs,*
>
> *We refer to the above.*
>
> *We have now had a meeting with our client.*
>
> *As you will appreciate **the last we heard of this matter was some six years ago.***
>
> *I would be grateful **if you would explain why the matter has been allowed to lie for that length of time**.*
>
> ***We are not in a position to consent to a date being fixed** as we are not sure about the availability of witnesses at this remove – you will recall there were a number of witnesses and doctors which were involved in this matter and need to attend.*
>
> *We await hearing from you in relation to the lengthy delay and **we must reserve our client's position in relation to an application to court.***
>
> *In the meantime, we would be grateful if you could arrange to let us have the following:*
>
> 1. *Copy of the civil bill*
> 2. *Copy of the notice for particulars raised herein.*
> 3. *Copy of your reply thereto.*
> 4. *Copy of the Defence as furnished herein . . ."* (emphasis added)

41. It is clear from the foregoing that, such was the delay on the part of the Plaintiff, that the Defendant's solicitors had to ask the Plaintiff's to furnish a copy of the pleadings, terminating with the defence delivered

in 2012. Furthermore, the Defendant put the Plaintiff squarely on notice that, having regard to the lengthy delay, the Defendant reserved its position with respect to an application of the type which subsequently issued. Thus, there is no question of acquiescence on the part of the Defendant from the point at which the Plaintiff sought to "re-animate" his claim. Nor, let me be clear, was there any acquiescence on the part of the Defendant from the point at which the defence was delivered on 19 June 2012. Silence on the part of the Defendant is not acquiescence. It was the Plaintiff who chose to institute proceedings. It was the Plaintiff who bore responsibility to progress his claim towards a trial. There was a complete failure on the part of the Plaintiff to do so from the point at which he received the defence.

27 February 2018

42. On 27 February 2018 the Plaintiff's solicitors responded to the aforementioned letter of 25 January 2018 and it is also appropriate to quote same *verbatim* as follows:

> *"Dear Sirs,*
>
> *We refer to the above matter and yours of 25th ult. The matter did not progress as quickly as we would have envisaged owing to health difficulties experienced by our client which delayed his ability to give instructions. In this regard we draw your attention to the updated particulars of personal injuries we furnished you on 23/10/17.*
>
> *The writer has recently taken over the file and is anxious to progress matters. In the absence of any indication from you that you are amenable to entering into settlement talks, we will be seeking to have the matter set down for trial.*
>
> *We enclose herewith as requested:*
>
> 1. *Copy civil bill;*
> 2. *Copy notice for particulars & replies;*
> 3. *Copy of defence..."*

43. It is fair to say, that, while reference is made to "*health difficulties experienced by our client which delayed his ability to give instructions*", there is no attempt to explain (a) whether there were, in fact, periods when the Plaintiff was unable to give instructions and, if so; (b) when such period(s) began and ended; and (c) nothing in the updated particulars of personal injury which asserts that the Plaintiff was at any stage unable to give instructions to progress his claim; (d) no medical evidence accompanied that letter; and (e) any connection between the Plaintiff's health difficulties and an inability to progress his claim is not explained.

13 June 2019

44. On 13 June 2019 the Plaintiff's solicitors wrote again to the Defendant's stating, *inter alia,* that: "*In the absence of any indication from you within 21 days that you are amenable to entering into settlement talks, we will be seeking to have the matter set down for trial".* I pause here to make certain observations. Despite the fact that there had been five years and four months of delay on the part of the Plaintiff, terminating with the delivery of updated particulars of personal injuries, dated 12 October 2017, a further 20 months elapsed between the 12 October updated particulars and this 13 June 2019 letter. During that 20-month period, nothing substantial had been done by the Plaintiff in terms of progressing its case, other than to make a repeated invitation that the Defendant enter settlement talks. This additional delay was in the wake of the Defendant's solicitors explicitly reserving their position with respect to the lengthy delay.

29 August 2019

45. On 29 August 2019 the Plaintiff's solicitors wrote to the Defendant's, referring to their 13 June 2019 letter and giving 14 day's formal notice of an intention to set the matter down for trial. The letter also

enclosed a draft certificate of readiness in accordance with Circuit Court Practice Direction CC21 and called upon the Defendant to revert, within one month, confirming agreement to the contents of same or setting out any proposed changes. The letter concluded by giving notice that a failure on the part of the Defendant to agree the contents of a completed certificate of readiness within one month would result in an application to the Circuit Court seeking an order authorising the filing of the certificate of readiness.

4 November 2019

46. On 4 November 2019, the Plaintiff's solicitors wrote to the Defendant's again with regard to the draft certificate of readiness giving a further 14 days to agree the contents in default of which a motion would issue.

7 November 2019

47. By letter dated 7 November 2019, the Defendant's solicitors made clear that they were not in a position to consent to the matter being sent down for trial. The letter referred to the witnesses to the incident in question; flagged a concern witnesses may no longer be available; and made clear than an inability to secure witnesses would cause prejudice to the Defendant. The letter also made clear that the Defendant reserved the right "*... in relation to an Application to the Court to dismiss your client's claim on the basis of delay".* It will be recalled that this echoed the contents of the letter from the Defendant's solicitors sent a year and ten months earlier, which flagged the lengthy delay by the Plaintiff which had occurred up to that point and reserved the Defendant's rights to bring an application on delay grounds. Thus, I take the view that there was no acquiescence by the Defendant at any point. The final paragraph in the Defendant's 7 November 2019 letter (which came after the reservation of the Defendant's rights) enquired as to whether the Plaintiff was willing to make discovery of his medical reports.

<u>28 February 2019 – notice of intention to proceed</u>

48. On 28 February 2019, the Plaintiff, acting as a litigant in person, served a notice of intention to proceed on the Defendant's solicitors. At para. 5 of the Plaintiff's 17 June 2021 affidavit, he avers that this was in circumstances where "*there were problems with my legal aid at that time*".

<u>3 May 2019 – notice requiring further information</u>

49. On 3 May 2019, the Plaintiff, as a litigant in person, served a notice requiring further information on the Defendant's solicitors. That notice was in the following terms: -

> *"TAKE NOTICE that the Plaintiff acting as a lay litigant requires further information regarding the following matters referred to in the Defence delivered on the 19th day of June 2012 by John C. Walsh & Co., solicitors for the Defendant, 24 Ely Place, Dublin 2;*
>
> > *1. With respect to the Defendant requiring proof of claims made by the Plaintiff, the Plaintiff requires the Defendant to disclose the name and address of the locksmith who it is alleged accompanied and assisted the Defendant on the night of the 23rd September 2008 to the lawful dwelling of the Plaintiff of Apartment 104, South Mede, Ballinteer Road, Dublin 16, D16 RX98".*

At the risk of stating the obvious, this was a notice raised almost 11 years after the incident in question and some seven years after the delivery of the defence to which the notice referred. In the manner discussed presently in this judgment, the evidence before this Court is that, despite efforts made, it has proved impossible to identify the locksmith who attended. This is despite the fact that both of the parties to these proceedings plainly agree that he is an important witness.

<u>3 May 2019 – notice of change of solicitor</u>

50. On the same day as the Plaintiff, as a litigant in person, served a notice requiring further information, a notice of change of solicitor was issued confirming that the Law Centre (Montague Court) had been appointed to act as the Plaintiff's solicitors. Thus, the Plaintiff is someone who was legally represented at all material times from the issuing of the within proceedings in June 2011 to the dismissal of the proceedings by the Circuit Court, on delay grounds, a decade later in June 2021, apart from a relatively short period in early 2019.

27 June 2019 – Plaintiff's affidavit of verification

51. On 27 June 2019 the Plaintiff swore an affidavit of verification in which he verified, for the first time, the contents of (i) what he described in para. 1 of that affidavit as "*the personal injuries summons dated the 27th June 2011*"; (ii) the reply to notice requiring further information, no date being specified in respect of same; and (iii) the updated particulars of personal injuries dated 12 October 2017. That affidavit was filed by the Plaintiff's then – solicitors, namely the Law Centre (Montague Court).

23 November 2020 – Plaintiff's motion re: certificate of readiness

52. On 23 November 2020, the Plaintiff's solicitors issued a motion, returnable for 21 January 2021 seeking an order authorising the Plaintiff to file a certificate of readiness, or, in the alternative, an order dispensing with the requirement that the Defendant agrees with the contents of the certificate of readiness. That application was grounded on an affidavit sworn by Anne-Laure Chasse-McDermott, solicitor of the Law Centre (Montague Court). Insofar as this was a formal step to progress the Plaintiff's claim, it was a formal step taken in the proceedings (i) 12 years after the relevant incident; and (ii) over 8 years after the delivery of a defence in June 2012; as well as (iii) over 3 years after the delivery by the Plaintiff's solicitors, in October 2017, of updated particulars of personal injuries, which pleading had been served in the wake of five years and four months' delay.

53. In light of the foregoing, I do not think it unreasonable to characterise matters as involving delay piled upon delay. In other words, although the period of five years and four months from June 2012 (defence) to October 2017 (updated particulars of personal injuries) constitutes, of itself, inordinate delay, it seems to me that there was *further* delay on the part of the Plaintiff which can also be called inordinate and which arose after October 2017. To look at it another way, here was a Plaintiff, legally represented, who terminated a period of five years and four months' delay by delivering updated particulars of personal injuries (which, *inter alia*, made clear that, as of November 2016 there was no evidence of mental illness and the prognosis for continued mental wellbeing was very good). Despite this, it took another 4 years (November 2016 to November 2020) for the next significant step to be taken to try and progress the Plaintiff's claim towards a trial, in the form of the motion issued by his solicitors in November 2020 as regards the certificate of readiness. Before moving on to a decision, it is useful to summarise, in brief, the key dates in terms of a 'timeline' which are as follows:

23 September 2008 – cause of action accrues;

27 June 2011 – personal injury summons / civil bill issued by Plaintiff;

2 November 2011 – proceedings are served on Defendant;

4 November 2011 – appearance entered by Defendant;

30 November 2011 – notice requiring further information raised by Defendant;

2012 (undated) – reply to notice requiring further information;

19 June 2012 – defence delivered;

12 October 2017 – updated particulars of personal injuries:

20 February 2019 – Plaintiff's notice of intention to proceed;
3 May 2019 – Plaintiff's notice for information (seeking name and address of the locksmith who attended on the night of 23 September 2008);
27 June 2019 – Plaintiff's affidavit of verification;
23 November 2020 – Plaintiff's motion regarding certificate of readiness.

54. In the manner previously explained, both the Plaintiff's motion and the Defendant's were ultimately returnable before the Circuit Court on 25 June 2021. The Plaintiff's motion was successful on delay grounds and the Defendant's motion was dismissed. I now proceed to the decision in the present case which has involved a fresh consideration by this Court of matters. I emphasise again, as I did during the hearing itself, that a *de novo* hearing means one held anew, being the proper approach to this appeal.

Decision

55. Although the Plaintiff represented himself at the hearing before me, it was clear that he was familiar with the principal authorities. Indeed, among his oral submissions was to state that: "*Primor* and *O'Domhnaill* are the tests". The foregoing was plainly a reference to the well-known decisions in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459 and the earlier decision in *O'Domhnaill v. Merrick* [1984] IR 151. Arising from *Primor,* it is appropriate where an application for dismissal on delay grounds is made, for the court to ask three questions: -

(i) Is the delay inordinate?
(ii) Is the delay inexcusable?
(iii) If the delay is both inordinate and inexcusable, is the balance of justice in favour of, or against, the case being allowed to proceed?

A comparison of the *Primor* and *O'Domhnaill* approaches suggests that *Primor* focuses on the conduct of the Plaintiff, before moving to the Defendant's position, whereas *O'Domhnaill* concentrates on the Defendant and whether they would suffer a patent injustice or unfair burden if required to meet the delayed claim. Certain features of the court's jurisdiction under the *O'Domhnaill* principles, as well as the distinction between the jurisdiction arising *per* the *Primor* approach were explained in the following terms by McKechnie J. in the Supreme Court's decision in *Comcast International Holdings Ltd. v. Minister for Public Enterprise* [2012] IESC 50 (at para. 42): -

> *"42. There are a number of features to this jurisdiction which are worthy of note: firstly that it applies even if the proceedings are instituted within the statutory period prescribed for by the Oireachtas; secondly, that a Defendant can succeed in avoiding a merit hearing even where a Plaintiff is entirely blameless for the delay, in either in a personal or a vicarious sense; and thirdly, that the time period looked at, commences from the date of the alleged wrongful acts and continues to the anticipated date of trial. In addition, however, it also has the distinct feature of its focus being on the Defendant: as appears from the descriptive nature of the test as given, the criterion essentially is Defendant directed. This is in stark contrast to the Primor principles where the positions of both are equally considered. It is therefore clear that this is a wider jurisdiction than Primor with a lower threshold to surmount before its successful invocation. That distinction, coupled with the others as identified, makes this jurisdiction one which should be sparsely used and little availed of. I fully agree with the words of Hogan J. in Donnellan v. Westport Textiles Limited (In Voluntary Liquidation) and the Minister for Defence, Ireland, and the Attorney General [2011] I.E.H.C. 11 where in this context, the learned judge, having stated that such jurisdiction permits the court in an appropriate case to "strike*

out proceedings, even though the third limb of the Primor test might not have been established", went on to caution that, "[o]f course, such cases would have to be exceptional"".

56. With regard to the nature of the test as described by McKechnie J., the learned judge put it in the following terms at para. 40 of his judgment:

"The test to be applied has been described variously such as, by reason of lapse of time or delay:

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

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

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

57. The court's jurisdiction to dismiss a claim in the interests of justice where the length of time which has elapsed between relevant events and a likely trial date is so great that it would be unjust to require a Defendant to meet the Plaintiff's claim, *per* the *O'Domhnaill* approach, was considered by Finlay-Geoghegan J. in her 30 July 2004 decision *in Manning v. Benson & Hedges Ltd*. [2004] IEHC 316. She identified two principal questions namely: -

"(i) Is there, by reason of the lapse of time (or delay) a real and serious risk of an unfair trial; and

(ii) Is there by reason of the lapse of time (or delay) a clear and patent unfairness in asking the Defendant to defend the action?"

58. Finlay-Geoghegan J. went on to provide guidance on the appropriate approach for a court to take, in circumstances where she identified factors to be considered, as follows:

"The factor to be considered by the court in relation to each question may overlap. It appears to me that these may include: -

1. Has the Defendant contributed to the lapse of time.

2. The nature of the claims.

3. The probable issues to be determined by the court; in particular, whether there will be factual issues to be determined or only legal issues.

4. The nature of the principal evidence; in particular, whether there will be oral evidence.

5. The availability of relevant witnesses.

6. The length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and probable trial date.

Further, on the second question it will be relevant to consider any actual prejudice to the Defendant in attempting to defend the claim by reason of the lapse of time".

59. Given the Plaintiff's explicit reference to *O'Domhnaill*, I felt it appropriate to set out the foregoing. It is these principles which must guide this Court in respect of an approach to the delay question *via O'Domhnaill*. However, it is fair to say that the primary approach to a delay application is *via* the *Primor* principles. Thus, I propose to set out the oft-cited passage of the judgment of the majority which was given by Hamilton C.J. in *Primor* (p. 475) and, having done so, to apply same to the facts in the present case: -

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

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the Defendant to allow the action to proceed and to make it just to strike out the Plaintiff's action,

(iii) any delay on the part of the Defendant — because litigation is a two party operation, the conduct of both parties should be looked at

(iv) whether any delay or conduct of the Defendant amounts to acquiescence on the part of the Defendant in the Plaintiff's delay,

(v) the fact that conduct by the Defendant which induces the Plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the Defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the Defendant,

(vii) the fact that the prejudice to the Defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a Defendant's reputation and business".

60. I have already found that, on the facts of this case, the Plaintiff's delay is inordinate. This is true in respect of the period from June 2012 (when the defence was delivered) to October 2017 (when the Plaintiff's solicitors delivered updated particulars of personal injuries). However, it is certainly not the case that from October 2017 onwards, the Plaintiff moved with alacrity. Apart from asking, for the first time, in May 2019, for the name and address of the locksmith who attended the premises on 23 September 2008, nothing of substance occurred by way of a formal step in the proceedings until the Plaintiff's solicitors issued a motion in November 2020 with regard to a certificate of readiness. Indeed, the Plaintiff's solicitors now make clear that the Plaintiff did not and does not require any answer to the May 2019 request for the locksmith's details. Thus, it could hardly be considered to be a step taken to progress the claim. The period from October 2017 to November 2020 is just over three years and it seems to me that, on the facts of this case, this three-year period can also be considered to be inordinate delay on the part of the Plaintiff. This is particularly so, given the repeated statements made by the Defendant's solicitors the Defendant's rights were reserved in respect of an application to dismiss the Plaintiff's claim on delay grounds.

61. I am also satisfied that the Plaintiff's delay is inexcusable. In his lengthy affidavit sworn on 17 June 2021 the Plaintiff does not explicitly acknowledge any delay, but he makes a number of averments which are plainly proffered with a view to excusing same. These can be summarised in the following terms: -

1) That from August 2008 to August 2009 he focused on his case before the PTRB:

2) That he went to Australia from August 2010 to May 2011 to pursue University studies, during which time he was in communication with the Legal Aid Board about this case and he applied for legal aid when he was in Australia;
3) That when he returned to Ireland, he was able to give his case more attention;
4) That he was not working in paid employment upon his return to Ireland and had to apply for a new medical card in order to receive treatment;
5) That he had to wait for authorisation from the Legal Aid Board and for counsel's advices on the merits, before proceeding with his case;
6) That legal aid was granted on 31 May 2011 and proceedings were issued on 27 June 2011;
7) That the Plaintiff does not believe that the statute of limitations had expired at the time his case was instituted;

62. It is appropriate to pause at this juncture to recall that the events giving rise to the proceedings occurred on or about 23 September 2008, whereas the Plaintiff's proceedings were not served until over three years later on 2 November 2011. All of the foregoing matters relate to that period. Without for a moment purporting to determine any issue in the underlying proceedings, it is uncontroversial to say that *per* S. 7 of the Civil Liability and Courts Act 2004, which amended the Statute of Limitations (Amendment) Act 1991, a limitation period of two years came into effect as of 31 March 2005, with regard to a claim for personal injuries. Whether or not the Plaintiff's claim is statute barred is very much a "live" issue in the case, as the contents of the defence which was delivered in June 2012 illustrate. None of the matters raised by the Plaintiff seem to me to alter the fact that his were proceedings which had a "late start". Nor do the matters he canvasses explain away pre-commencement delay. One specific example appears to suffice. It was the Plaintiff's choice to focus on his claim to the PTRB for the first years. Why his focus on the PTRB case rendered it impossible for the Plaintiff to progress court proceedings is not explained, nor is it asserted. Similarly, it was the Plaintiff's choice to go to Australia from August 2010 to May 2011 and the timing of his application for legal aid was also his choice.

63. With regard to post-commencement delay, the Plaintiff avers at para. 17(b) of his affidavit that: -

"*The explanation for not setting the case down for trial was that my lawyers were awaiting updated medical reports to update the particulars of my injuries before setting my case down for trial. As outlined above, I moved from Dublin to Australia and then to Mullingar and saw a number of different doctors. This slowed down the process of getting up – to – date medical reports".*

64. In my view the foregoing provides no excuse for what was inordinate delay both up to October 2017 and beyond. Several comments seem appropriate. If it was the case that, upon receipt by the Plaintiff's solicitors of the defence, they were seeking up to date medical reports with a view to updating particulars of the Plaintiff's injuries before progressing the case to trial, they plainly could have written to the Defendant's solicitors to say so. Instead, there was complete silence for five years and four months. In circumstances where the Plaintiff avers that he returned from Australia in May 2011, his move from Dublin to Australia provides no excuse for his post-commencement delay. I also fail to see how a move to Mullingar and the fact that the Plaintiff saw a number of doctors explains or excuses either the five year and four month delay up to October 2017, or the delay thereafter.

65. At para. 17 (c) the Plaintiff makes the following averments: -

"*I was working on the case between 2012 and 2017. I was receiving medical treatment and was under the care of doctors including psychiatrists. As already outlined, it was my lawyer's intention to*

obtain up-to-date medical reports and to furnish updated particulars of my injuries to the Defendant before setting the case down for trial. It is also important to note that there were a number of different solicitors allocated by the Legal Aid Board to manage my case during this time which contributed to the delay in progressing the case. By way of illustration, around 8 different solicitors began to work on my case throughout the proceedings. There was a difficulty with my legal aid and an application was made to terminate my legal aid in 2019. On the 11th February 2019, I was informed that legal aid was terminated. I appealed against the decision to terminate my legal aid. In or around the 3rd of May 2019 the Legal Aid Board overturned the decision to terminate my legal aid. Since that time I have been represented by Ms. Anne-Laurie Chase-McDermott solicitor. I requested a change in counsel at that stage. This was arranged and I now have different counsel dealing with my case".

66. Although the Plaintiff avers that he was working on his case between 2012 and 2017, it is fair to say that there are little or no specifics about what this work entailed. He certainly does not aver that he was at any stage incapable on medical, or on any other grounds, of giving instructions to his solicitors to progress his case. It will be recalled that during the relatively brief period when the Plaintiff was without legal aid, he served a notice requiring further information, dated 3 May 2019, in which he called upon the Defendant to provide the name and address of the locksmith who attended the property on 23 September 2008. Insofar as the Plaintiff was working on his case between 2012 and 2017, it is entirely unclear why such a request was not made in 2012 or 2013 or in the years that followed. Had such a request been made during the period when the Plaintiff avers that he was working on his case, it seems at least possible that the identity of the locksmith could have been found.

67. Insofar as the Plaintiff avers that it was his lawyer's intention to obtain up to date medical reports and to furnish updated particulars, there is no evidence before the court of (i) the steps taken in that regard, or (ii) of any delays or difficulties encountered or of (iii) the response by the Plaintiff and/or his solicitors to such difficulties. It will also be recalled that when updated particulars of personal injuries were eventually served on 12 October 2017, they made clear that the most recent attendance by the Plaintiff with his general practitioner occurred on 14 March 2013. That being so, it is impossible to understand why particulars could not have been updated in 2013 based on what was then known arising from the most recent attendance by the Plaintiff with his general practitioner.

68. With regard to the different solicitors who began work on the Plaintiff's case throughout the proceedings, no evidence is given as to the causal link between the number of different solicitors involved and any specific delay or periods of delay. To look at the matter from a different perspective, the Plaintiff does not aver that he did not have access to legal representation for any or all of the five year and four months' delay. He does not aver that he was "let down" by any of the solicitors working on his case, nor is there any such evidence. With regard to the difficulty with the Plaintiff's legal aid, I have already observed that there was a relatively short period in 2019 when he acted as a litigant in person. This period appears, from the Plaintiff's averments at para. 17(c), to be 'book-ended' by the 11 February 2019 (when he was informed that legal aid was terminated) and 3 May 2019 (when that decision was overturned on appeal). The foregoing cannot by any means excuse the five years and four months' delay between June 2012 and October 2017. Nor, for that matter, does it explain or excuse the substantial delay from October 2017 onwards. Indeed, from 3 May 2019 (when the Law Centre (Montague Court) came on record for the Plaintiff) and 25 November 2020 (when the Plaintiff' solicitors issued a motion concerning the certificate of readiness)

represents a period of 18 months without, it has to be said, any formal step having been taken to progress the Plaintiff's case towards a trial. This is not to criticise any of the Plaintiff's legal advisors. It was the Plaintiff's choice to issue legal proceedings and it was his responsibility to ensure their progression.

69. At para. 17 (d) the Plaintiff makes *inter alia* the following averments in response to the Defendant's averment that the Plaintiff did not set the matter down for trial upon service of the 19 June 2012 defence: -

> *"I disagree with the contents of this paragraph. There were steps taken in the case. For example, investigations were carried out with the management company for the Property in February 2013 to see if any CCTV footage was available in relation to the incident. The management company replied saying there was no such footage in 2013. As appears from the motion papers relating to the certificate of readiness, on the 27th of February 2018 and again on the 13th June 2019, an open letter was sent to the Defendant's solicitors raising the possibility of settlement talks and stating that failing that the matter would be set down for trial. I say and believe that correspondence did issue from my solicitor to the Defendant's seeking their cooperation with the completion of the certificate of readiness to have the matter set down for trial, but no substantive response was received".*

The foregoing averments provide neither an explanation nor an excuse in respect of the delay between June 2012 and October 2017. Investigations in February 2013 to see if there was CCTV footage available cannot conceivably account for the Plaintiff's failure to progress his claim at that stage or in the years which followed. It is notable that having referred to February 2013, the next date to which the Plaintiff draws attention is February 2018, five years later. It also has to be said that, to seek settlement discussions in correspondence of February 2018 and again in June 2019 provides no explanation for the fact that it was not until November 2020 that the Plaintiff took the formal step of issuing a motion with regard to the certificate of readiness. That step was taken, as I have earlier observed, full in the knowledge that the Defendant was explicitly reserving its rights with respect to a motion to dismiss on delay grounds.

70. At para. 17(e), the Plaintiff avers as follows: -

> *"As a result of the Defendant's failure to engage with the process or take any steps himself, a motion was filed on the 25th of November 2020. My solicitors wrote to the Defendant's solicitors in February 2020 inviting them to make a request for voluntary discovery. No response was received to that letter. In light of the arrival of the onset of Covid-19 in March 2020, a degree of adjustment towards working remotely and managing work from home was needed. The Defendant was not pressed any further and a degree of latitude was afforded to him to make a request for voluntary discovery. I say and believe that as the months passed by, it became clear that no such request was going to arrive and that a motion was necessary. As I am in receipt of legal aid, funding must be applied for before motion papers can be drafted. This process was completed in October 2020 and counsel then drafted the motion papers. I say and believe that any delay in issuing the motion is excusable when regard is had to these circumstances".*

71. Insofar as the Plaintiff criticises the Defendant for failing to take steps, I do not regard any such criticism as fair. This is especially true throughout the five year and four-month period commencing with the delivery by the Defendant of his 19 June 2012 defence. With regard to the onset of Covid-19 restrictions in March 2020, the serious public health crisis plainly provides no explanation or excuse in respect of the Plaintiff's delay *prior* to March 2020. Whereas the Plaintiff avers that the process to obtain legal aid funding was completed in October 2020, following which the Plaintiff's motion was drafted and issued, he does not aver when that process was commenced. It will be recalled that the Plaintiff's updated particulars of personal

injuries were delivered in October 2017. Nowhere does the Plaintiff explain why steps were not taken immediately after that point to try and agree a certificate of readiness or to otherwise progress the proceedings in a formal way. Indeed, the correspondence sent by the Plaintiff's solicitors on 27 February 2018 and again on 13 June 2019 made no reference whatsoever to a draft certificate of readiness. Rather, both letters suggested settlement discussions, failing which the Plaintiff would seek to have the matter set down for trial. It is plain, however, that this threat was not followed through upon. On the contrary, a further year and four months elapsed until, by letter of 13 June 2019, the same threat was made, namely, that in the absence of the Defendant's willingness to enter into settlement talks, the Plaintiff would seek to have the matter set down for trial. In the manner examined earlier in this judgment, it was the letter from the Plaintiff's solicitors of 29 August 2019 which enclosed a draft certificate of readiness and called upon the Defendant to agree same, giving 14 days' notice of an intention to set the matter down for trial. Thus, having stated an intention to set the matter down for trial in February 2018, this was being restated by the Plaintiff's solicitors on 29 August 2019 in the wake of extremely substantial delay. Despite this, it took a further year and more before a motion concerning the certificate of readiness ultimately issued. In short, the averments made by the Plaintiff do not provide anything approaching an explanation for the delay in this case which is inexcusable. I now turn to a consideration of the balance of justice.

Balance of justice

72. It is not in dispute that the obligation to establish inordinate and inexcusable delay rests on the Applicant and, on the facts of the present case, the Defendant has discharged this burden of proof. It is equally clear, however, that the onus is a "shifting" one as the Court of Appeal explained in *Sweeney v. Cecil Keating T/A Keating Transport & McDonnell Commercials (Monaghan) Limited* [2019] IECA 43: -

> *"If the delay is found to be both inordinate and inexcusable, the court is then obliged to consider… whether the balance of justice favours the dismissal of the action. The onus of proof shifts to a plaintiff to establish the existence of countervailing circumstances which would warrant permitting the proceedings to proceed to trial (see the judgment of Fennelly J. in Anglo Irish Beef Processors Ltd v. Montgomery [2002] 3 IR 510). This is because the scales of justice at that point are weighed against the plaintiff who has been found guilty of inordinate and inexcusable delay. If the position was otherwise, there would be no point in a court engaging in an assessment as to whether the plaintiff had been guilty of inordinate and inexcusable delay. The court might just as readily commence its analysis of the application by deciding whether the justice of the case would favour permitting the action proceed to trial".*

73. In light of the foregoing, the position which pertains in the present case *prior* to an analysis of where the balance of justice lies is that the scales are already tipped in favour of a dismissal of these proceedings. As Henchy J. made clear in O'Domhnaill:

> "*. . . where, as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the Defendant, or the inability on the part of an infant Plaintiff to control or terminate the delay of his or her agent*".

74. In the present case, there has been no acquiescence on the part of the Defendant at any stage. Nor does the evidence allow this Court to hold that the Plaintiff's inordinate and inexcusable delay is explained by delay on the part of his agent. I say this in circumstances where, as I observed earlier, nowhere does the Plaintiff assert that he was pressing his solicitors to take action on his behalf but found them wanting. Nor

does the Plaintiff aver that his delay can be accounted for as a result of having to wait for a specific or any medical reports. Even if this were so, I do not believe that, as a matter of principle, it is fair to a Defendant for litigation to be conducted at the pace of the slowest medical advisor. That is not at all to direct any criticism at any doctor. It is simply to make the observation that if, in a given case, a medical report was regarded as essential and its unavailability was considered by a Plaintiff as prohibiting further progress in the case, the very least a Plaintiff should do is (a) inform the Defendant of the foregoing; (b) detail what steps had been taken to try and expedite the report's availability: (c) indicate what further steps would be taken: (d) follow – through on those steps; (e) ascertain the Defendant's attitude in respect of forbearance; (f) provide updates to the Defendant at reasonable intervals; and (g) if, despite reasonable efforts, the report remained outstanding, indicate what "plan B" was being considered, whether that involved seeking advice from an alternative doctor, or otherwise.

75. In the case before this Court there is no evidence of any of the foregoing having been done. There was simply silence from the Plaintiff and, when that silence was eventually "broken" in October 2017, it took a further three years for the formal step of a motion to be issued with a view to the matter being set down for trial. To put matters more succinctly, even if there was an averment made by the Plaintiff that he was waiting for five years and four months for a particular doctor to furnish a medical report, I cannot accept, as a matter of first principles, that that would comprise an explanation which excused delay of that order. If it did, no Defendant could ever be confident of an 'end point' to the litigation in question, regardless of how lengthy a hiatus in the progress of a claim against them. This is all the truer in circumstances where, in the present case, there was simply no communication from the Plaintiff's side in the years following the delivery of the June 2012 defence, be that in relation to medical issues, CCTV, the identity of the locksmith, medical reports, or otherwise.

76. In circumstances where the Plaintiff's delay has been found to be both inordinate and inexcusable, the onus rests upon him to point to countervailing circumstances. Furthermore, as Fennelly J. made clear in *Anglo Irish Beef Processors Ltd. & Anor v Montgomery & Ors.* [2002] IESC 60: -

> "In such circumstances, when the court comes to strike that *"balance of justice"* in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find **something weighty** to cancel out the effects of the Respondents" behaviour". (emphasis added)

77. I have been unable to find countervailing circumstances or something weighty which would tip the scales in favour of the Plaintiff's claim being allowed to proceed. By contrast, there is evidence before the court of prejudice to the Defendant by reason of the Plaintiff's delay. In an affidavit sworn by Mr. Jerry O'Brien of Messrs. John C. Walsh & Company, solicitors for the Defendant, on 11 June 2021, he makes *inter alia* the following averments: -

> *"3. I say that I enquired from the Gardaí in Dundrum as to the whereabouts of Sgt. Kevin Duggan and was informed by them that as far as they knew, he was now based in Madrid. They provided me with an email address for him although they were not entirely sure if it was an extant email address or not. In any event I emailed Sgt. Duggan but have received no reply".*

78. It will be recalled that Sgt. Duggan was a witness to the events giving rise to the present proceedings. The averments made by the Defendant's solicitor comprise evidence of unsuccessful efforts to contact Sgt. Duggan. Even if it ultimately proves possible to contact the sergeant and even if this Court assumes that his attendance at a future trial is guaranteed, it seems to me self-evident that, as a consequence of the Plaintiff's delay, Sgt. Duggan's memory of what was said, or not, and precisely what occurred on 23 September 2008,

is likely to have degraded to a material extent. The earliest conceivable trial date in respect of the Plaintiff's claim would be no less than 14 years after the events giving rise to the proceedings. In his oral submissions, the Plaintiff contended that documentation would be available to the trial judge such as the transcript of the hearing which took place before the PRTB on 31 August 2009 as well as Prof. Hooper's medical report of 13 January 2010, concerning the doctor's examination of the Plaintiff in the early hours of 24 September 2008. The thrust of this submission was to suggest that this is a 'documents case' where oral testimony would not be particularly relevant. I fundamentally disagree.

79. Earlier in this judgment, I referred to what are plainly very stark differences between the accounts given in sworn affidavits by the Plaintiff and Defendant, respectively. Fundamentally important facts are entirely disputed, just one example being that the Defendant avers that the door was opened in a careful and professional manner after numerous requests made to the Plaintiff to open the door and numerous warnings made before the locksmith removed the lock. In stark contrast, the Plaintiff avers that "*nobody warned me that the lock on the door was about to be removed*". And he also avers that "*I was not asked to open the door"* (see para. 6(h) of his 17 June 2021 affidavit). Thus, this is by no means a 'documents case', but one in which a future trial judge would be required, at the remove of at least 14 years, to decide what was said, or not, in 2008 based on such recollections as the witnesses had in 2022, assuming those witnesses can be secured. In my view, this constitutes at least moderate or presumed prejudice but, more likely, actual prejudice. I am mindful, also, of the observations of Clarke J. (as he then was) in *Rogers v. Michelin Tyre plc*. [2005] IEHC 294, wherein the learned judge made clear that the court may have regard to general prejudice which could reasonably be expected to occur and reference was made to the comments of Finlay-Geoghegan J. in *Manning v. Benson & Hedges Ltd*. [2004] 3 IR 556 to the effect that:

> "Delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or act as a witness"

80. In the affidavit sworn by the Defendant's solicitor on 11 June 2021, he also made *inter alia* the following averments:

> *"4. I also made enquiries from Messrs. Crothers Locksmiths. They confirmed to me by email their records do not go back as far as 2008 and accordingly have no record of attending 104 South Meade, Dundrum, and no way of identifying the individual attending locksmith".*

Mr. O'Brien goes on to exhibit the relevant email, dated 2 June 2021, from a Mr. Martin Crothers, the director of Crothers Security Ltd.

81. The foregoing constitutes evidence that it has not been possible to identify the locksmith who attended on the night in question in September 2008. It will, of course, be recalled that it was not until May 2019 that the Plaintiff called upon the Defendant to provide the name and address of the locksmith. This was, of course, in circumstances where a formal defence had been delivered in June 2012, followed by over 5 years delay by the Plaintiff. As I observed earlier, had this issue been raised by the Plaintiff in 2012, upon receipt of the defence, it seems at least conceivable that there was some prospect of records going back to 2008 being available at that stage. Even if this is not so, the stark reality on the evidence before this Court is that a highly relevant witness in the form of the locksmith, retained by the Defendant, whose actions are said to have caused the injuries for which the Plaintiff seeks compensation cannot be identified and, thus, is not available to a future trial court. In my view, this constitutes prejudice of a specific type, given the fundamentally different accounts as to what was or was not said and done, according to the Plaintiff and Defendant, respectively.

82. Furthermore, even if it proved possible to identify and secure the attendance of the locksmith, this Court is entitled to take the view that, as a result of the Plaintiff's delay, the locksmith's ability to give meaningful assistance to the court, as a witness at a future trial, will have been reduced to a material extent. In addition to the foregoing, the Plaintiff has made the following averments at para. 13 of his 2 June 2021 affidavit:

> *"13. I say that I previously had a telephone number for Paul O'Brien but I no longer have his telephone number and am now unable to contact him. I genuinely believed that the Plaintiff had abandoned his claim in light of the manner in which he left the proceedings in abeyance for several years. His evidence would have been essential in corroborating my version of events on 23rd September 2008 and the previous day".*

83. The foregoing constitutes evidence that a third important witness is uncontactable and, thus, unavailable as matters stand. This constitutes prejudice to the Defendant, flowing from the Plaintiff's delay. Again, even if I were to assume that Mr. O'Brien could be contacted and would be available at future trial, it seems inevitable that, with the passage of 14 years, his memory of what was or was not said and done in September 2008 would have degraded to a material extent.

84. Among the averments made by the Defendant with regard to Mr. O'Brien is to say, at para. 13 of his affidavit, that: -

> *"To the best of my knowledge, Mr. O'Brien used to be a neighbour of the* Defendant's *so it may well be possible for the Defendant to locate him notwithstanding the amount of time that has elapsed. Also, in the world we live in, people often have an online presence and given that the Defendant seemed to have personal knowledge of Mr. O'Brien in 2008 it might be possible for him to use information within his knowledge to track Mr. O'Brien down now".*

85. The foregoing averments do not comprise evidence that the Defendant (or for that matter the Plaintiff) is able to contact Mr. O'Brien. On the contrary, there is an explicit averment made by the Defendant that he was "*now unable to contact him*". Thus, the state of the evidence is that Mr. O'Brien is not contactable, but as I have already said, even if I were to go further than the evidence allows and assume that Mr. O'Brien (and, indeed, all other relevant witnesses) would be available to a trial judge, it seems to me that presumed or general prejudice has still been established.

86. Given the fundamental conflict in respect of the facts, I cannot accept the proposition advanced by the Plaintiff to the effect that the availability of a witness to the disputed events is irrelevant. This is, however, what the Plaintiff asserts by means of the averment at para. 13 of his affidavit, namely, that "[the Defendant's] *case is not necessarily stronger or better just because another person confirms his version of events".* With regard to the locksmith, the Plaintiff avers at para. 14 of his affidavit that he is formally withdrawing his 3 May 2019 notice which sought the name and address of the locksmith and he avers that *"the locksmith is not a necessary witness for my case*", also going on to aver that "*the locksmith is not necessary for the Defendant's case either. The lock was removed and this was common case. The locksmith cannot comment on what happened on the inside of the door and was not called to give evidence before the PRTB*".

87. The foregoing averments utterly ignore a number of matters, as follows. The Defendant plainly regards the locksmith as a fundamentally important witness who, according to the him, could corroborate his version of events. Furthermore, although it is common case that the lock was removed, the facts and circumstances in which this occurred are utterly in dispute, just one example being whether or not requests

were made for the Plaintiff to open the door and whether or not warnings were given before the lock was removed by the locksmith. Furthermore, the Defendant has made the following averments at para. 15 of his affidavit:

> *"15. I say that I am also not now in a position to identify the two young female students from Wexford who rented the double room in the Property who moved out because they felt continuously threatened and harassed by him. Their evidence would have been of significance in demonstrating the threatening behaviour of the Plaintiff and undermined his credibility in circumstances where he has previously denied making them upset and fearful. It would also have demonstrated that the paranoid symptoms of the Plaintiff (for which he seeks damages in these proceedings) pre – date the incident of 23rd September 2008".*

88. Again, the foregoing appears to me to constitute specific prejudice. Even if it were to prove possible to identify and secure the attendance of these witnesses at a future trial, it seems to me that the passage of 14 years gives rise to probability that their testimony as witnesses may well have degraded.

89. In short, weighing up the evidence concerning the witnesses to which reference has been made entitles me to hold that, at the very *least,* moderate prejudice arising from the Plaintiff's delay has been established. Where a Plaintiff's delay is both inordinate and inexcusable, the Defendant *"need only prove moderate prejudice arising from that delay in order to succeed under the Primor test"* (see Irvine J. (as she then was) in *McNamee v. Boyce* [2016] IECA 19 at para. 35).

90. For the reasons set out in this decision, I am satisfied that, on the particular facts of this case, it would be unfair to the Defendant for the court to allow the Plaintiff's action to proceed. I have reached this decision taking full account of the actions of both parties to the proceedings in circumstances where, as Hamilton C.J. made clear in *Primor "litigation is a two-party operation"*. I am entirely satisfied that there has been no acquiescence on the part of the Defendant. It was of course the Defendant who entered an appearance very promptly and who, following the receipt of replies to particulars, delivered a defence in June 2012. There was no delay on the part of the Defendant in this regard but in the wake of the defence delivered there was complete silence from the Plaintiff for five years and four months. That was not acquiescence on the part of the Defendant. Furthermore, after the Plaintiff sought to "resuscitate" his claim in October 2017, the Defendant made explicit that he reserved the right to apply to dismiss the proceedings on delay grounds. This was done in the context of asking for reasons to explain the delay. It is fair to say that those reasons did nothing of the sort. Furthermore, and in the manner previously analysed, the Plaintiff's delay most certainly did not cease as of October 2017, in circumstances where it took a further three years and more for the Plaintiff's motion to issue as regards a certificate of readiness. For similar reasons, I am entirely satisfied that no conduct by the Defendant induced the Plaintiff to incur further expense in pursuing his proceedings.

91. I am also satisfied that the delay has given 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. This prejudice arises as a result of the likely degrading of witness memories in respect of events going back to September 2008, even if witnesses could ultimately be secured and, on the state of the evidence, these witnesses have not been located, despite the efforts averred to.

92. It also seems to me that at least general prejudice to the Defendant has arisen as a result of the proceedings of this particular nature having been 'hanging over' him for a decade and more. Earlier in this judgment I looked at the nature of the proceedings. Commercial disputes can and frequently do arise.

Disputes between landlords and tenants are similarly common. In many cases, the mere fact of those proceedings may not give rise to any prejudice, regardless of how long they take to be determined but, given the particular nature of these proceedings, the position seems to me to be otherwise. I say this because this is a claim in which the Plaintiff alleges *inter alia* that the Defendant is responsible for his assault and battery and for causing a range of physical and psychological injuries. In this manner, having proceedings of this nature hanging over the Defendant for such a protracted period, due to the Plaintiff's delay, seems to me to amount to general prejudice which a claim exclusively concerning, say, rent, would not give rise to.

93. For the reasons set out in this judgment I am entirely satisfied that, applying the *Primor* principles, the balance of justice favours the dismissal of the Plaintiff's claim.

94. Returning to the Supreme Court's decision in *O'Domhnaill* and the factors to be considered, per the decision of Finlay – Geoghegan J. in her decision in *Manning v. Benson & Hedges Ltd.* [2005] 1 ILRM 190, I have come to the following view: -

(1) The Defendant has, without doubt contributed to the lapse of time;

(2) The nature of the Plaintiff's claims has already been discussed and of particular relevance is that there is a stark dispute in respect of the relevant facts;

(3) Thus, any future trial judge would be required to determine factual issues and this is certainly not a documents case' or a case which involves only legal issues;

(4) Oral evidence would be fundamentally important and, in truth, would constitute the principal evidence upon which a future trial court would be required to rely;

(5) As things stand, highly relevant witnesses are unavailable, in the manner discussed in this judgment;

(6) There would be at least 14 years between what was, or was not, said and done on 23 September 2008 and any likely trial date when a judge would be asked to make factual determinations.

In view of the foregoing and approaching the matter through the lens of the *O'Domhnaill* principles also seems to me to justify a dismissal of the claim. This is because it seems to me that the Defendant would suffer a patent injustice and an unfair burden if required to meet this delayed claim in circumstances where it seems to me that there is a real and serious risk of an unfair trial or of an unjust result.

95. In circumstances where I am satisfied, for the reasons set out in this judgment, that the Defendant is entitled to the relief sought at para. 1 of the 2 June 2021 motion, it is unnecessary to determine the question of whether the alternative relief sought at para. 2 should be granted. Furthermore, in circumstances where this is a case which, by reason of the Plaintiff's delay, must be dismissed, the Plaintiff's motion concerning the draft certificate of readiness falls away. I want to make clear that, in coming to this decision I have had due regard to the fact that, as the Plaintiff made clear in his oral submissions, he was neither a man of substantial means, nor a qualified lawyer. However, giving due leeway to a litigant-in-person cannot extend to the creation of an injustice and in my view, it would be a patent injustice to permit the present proceedings to proceed to trial. I say this notwithstanding the obvious commitment with which the Plaintiff prepared for the hearing and made his submissions with no little skill.

96. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then*

any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate." Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order to be made. My preliminary view in respect of costs is that the 'normal' rule (that costs should 'follow the event') applies. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.