THE HIGH COURT

[2022] IEHC 725

[Record No. 2013/8018P]

BETWEEN

GARRY CULLEN

PLAINTIFF

AND

ROBERT DORE PRACTISING UNDER THE STYLE AND TITLE OF ROBERT DORE & COMPANY SOLICITORS

DEFENDANT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 21st day of December 2022.

Introduction

1. By way of a motion filed in the Central Office on 08 January 2021, the Defendant seeks an order pursuant to the inherent jurisdiction of this Court, dismissing the plaintiff's claim on the grounds of inordinate and/or inexcusable delay and/or want of prosecution on the part of the plaintiff, since the commencement of the proceedings. In the alternative, the Defendant seeks an order pursuant to this Court's inherent jurisdiction and/or the principles of constitutional justice as regards fairness of procedures, to the effect that the interests of justice require the dismissal of the proceedings on the basis that there is a real risk that it will not be possible for the Defendant to have a fair trial and/or that there is a clear and patent unfairness in asking the Defendant to defend the proceedings.

2. The foregoing comprise reliefs at paras. 2 and 3, respectively, of the Defendant's motion. It was made clear at the outset of the hearing that relief pursuant to O.122, r.11 (dismissing the plaintiff's claim for want of prosecution, on the basis that there was no proceeding for a period in excess of two years) was not being pursued.

3. The primary relief sought is pursuant to the principles outlined in the well-known decision of the Supreme Court in *Primor PLC v Stokes Kennedy Crowley* [1996] 2 I.R. 459. In the alternative, the Defendant seeks relief under the principles derived from the earlier decision of the Supreme Court in *O'Domhnaill v Merrick* [1984] I.R. 151.

Assault

4. At the outset of the hearing, the parties helpfully furnished the court with an agreed 'timeline' and the first item on same is an entry which states "*Plaintiff sustained personal injuries due to an assault at premises owned by Moran's Hotel Ireland Limited*" (hereinafter "Moran's Hotel" or "the Hotel"). In light of the foregoing, for the purposes of determining the present motion, it is not disputed that the Plaintiff did sustain personal injuries due to an assault at the Hotel in question.

Injuries/treatment

5. As to the particulars of the plaintiff's personal injuries, the following is a *verbatim* extract from a plenary summons which was issued by the Plaintiff on 17 December 2013 against the Hotel: -

> *"Particulars of wrong*
>
> *3. Negligence and breach of duty including breach of statutory duty and/or breach of contract.*
>
> *4. On or about 18th August, 2005 the Plaintiff was a visitor on the Defendant's premises when he was assaulted on the Defendant's premises, which occasioned to the Plaintiff severe personal injuries, loss damage and expense and as a result was occasioned loss, damage and expense.*
>
> *Particulars of personal injury*
>
> *The Plaintiff was vomiting the night of 19th August, 2005 and the morning of 20th August, 2005. He lost his speech and the power in his right hand. The Plaintiff went to his GP on 20th August, 2005 where he was then brought to Tullamore Hospital by ambulance and examined. The Plaintiff was an in-patient in for five days. The Plaintiff still felt sick and was re-examined in Tullamore Hospital on 26th August, 2005. He was transferred to Beaumont Hospital later that day and examined by Mr Pigeon. The Plaintiff was operated on the next day for a clot in the brain and received 12 staples in his head. He was released on 1st September, 2005. The Plaintiff was out of work for four months.*
>
> *The Plaintiff was examined by Dr Paul McAleer. He noted that the Plaintiff sustained extradural hematoma on the left side causing mild catral compression and midline shift to the right. The Plaintiff had two burn-holes and frontal and parietal evacuation of chronic subdual hematoma. The Plaintiff was taking analgesia for headaches and had scars in his frontal and parietal regions. Dr McAleer also noted that there was a possibility that the Plaintiff would have seizures in the future.*
>
> *The Plaintiff has the right to furnish further particulars of personal injury."*

Specifics

6. As can be seen from the foregoing, in the context of pleading a claim against the Hospital, the Plaintiff has given specifics, including, in relation to (i) what hospitals provided treatment, (ii) what doctors cared for him, (iii) the extent of his injuries and (iv) the nature of the treatment provided. It is uncontroversial to say that doctors and hospitals routinely keep contemporaneous records of the treatment provided to patients, which records can be consulted and spoken to by the relevant medical professional(s) at a later point. There is no evidence before this Court to suggest that no records of the foregoing were made and maintained, or that such records as were created by any of the medical professionals or hospitals referred to by the Plaintiff have been destroyed or are/will be otherwise unavailable. Nor is there any evidence before this Court that any of the individual medical professionals who examined or treated the Plaintiff would be unavailable for a future trial as a witness.

Perpetrator

7. As regards the individual said by the Plaintiff to have assaulted him, in a letter to the Defendantof 3 May 2013 the plaintiff's solicitors stated *inter alia* that, on 18 August 2005, the plaintiff: -

"…was a victim of a vicious assault perpetrated by William Gray at the Red Cow Hotel, Naas Road, Dublin. We understand that this individual was subsequently prosecuted and sentenced for this assault."

For the purposes of the present motion, there is no evidence to suggest that records do not exist in relation to the said prosecution. There is no evidence that such records of the prosecution will not identify witnesses, or that any such witnesses are or will be unavailable. Nor is there any evidence that Mr Gray is not available as a potential witness.

Engaged

8. The Defendant is a solicitor and in the course of oral submissions, counsel for the Defendant confirmed that the Defendant accepts that he was *"engaged"* by the plaintiff. This is noteworthy, in circumstances where, although the Defendant swore an affidavit on 10 December 2020 to ground the present motion, he did not confirm in that affidavit that he had been engaged by the plaintiff. Counsel for the Defendant also made clear in oral submissions that, whilst not accepting liability, his client acknowledges that no proceedings were issued within the two-year statute of limitations period (which expired as of 18 August 2007). The Defendant's counsel also indicated that, whilst the fact of engagement is not disputed, it remains to be seen whether there will be a dispute between the parties as to the scope of that engagement and the Defendant reserved his position in that regard. The forgoing is understandable given that, in the manner I will presently examine, the Defendant has not yet delivered a formal Defence to the plaintiff's claim against him, which is of the 'professional negligence' variety. Before leaving the topic of the Defendant's engagement by the Plaintiff it seems appropriate to say the following. The Defendant is a solicitor. The Plaintiff is not. The latter is someone who sustained injuries in an assault in the Hotel in question. When the Defendant's counsel confirmed that the Defendant accepts that the Plaintiff engaged him, there was no suggestion that this was other than engagement *qua* solicitor (i.e. it was not suggested that the Defendant was engaged by the Plaintiff in a *different* capacity).

The plaintiff's claim against the Defendant

9. Whilst keeping in mind that pleadings are *not* evidence, in his 14 May 2019 statement of claim, the Plaintiff pleads the following with respect to the period commencing in September 2005: -

"4. On or about 18th September, 2005 the Plaintiff consulted with Robert Dore, who was at all material times a solicitor in the firm of Dore & Co. at Mr Dore's residence at Summerhill, County Meath. Mr Dore advised the Plaintiff that he had reasonable [sic] *chance of a success in a claim against Morans Hotel Ireland Limited for personal injuries caused by Morans Hotel Ireland Limited's negligence and breach of duty including breach of statutory duty and that he would likely recover substantial damages. Accordingly, the Plaintiff instructed the Defendant to institute proceedings on his behalf in respect of those intended proceedings. The Plaintiff subsequently met with Mr Dore in or about October 2005 at a public house at Summerhill, Co. Meath to sign papers for the purpose of the intended proceedings.*

5. There were implied terms of the contract which were as follows: -

(a) that the Defendant would carry out the plaintiff's instructions with reasonable diligence;

(b) that the Defendant would exercise reasonable skill and care in the performance of his duties;

6. Further or in the alternative, the Defendant owed the Plaintiff a duty of care in Tort to the like effect.

7. The Plaintiff heard nothing more from the Defendant for some time despite repeatedly calling him. The plaintiff's father attempted to contact the Defendant on numerous occasions to no avail.

8. On or about 18th February, 2011, the Plaintiff instructed new legal representation being that of Con O'Leary Solicitors, 6 The Mall, Leixlip, Co. Kildare…"

10. The proceedings which the Plaintiff has brought against the Defendant can be described as a 'professional negligence' action, at the root of which is the claim that the Defendant permitted the plaintiff's 'personal injuries' action to become 'statute-barred'. Being a professional negligence action, there was no obligation on the Plaintiff to swear an affidavit of verification. Nor has he sworn any affidavit in respect of the present motion (the grounding affidavit was sworn by his solicitor, Mr O'Leary). Thus, the pleas made by the Plaintiff are no more than that, at this juncture, and it falls to the plaintiff, at any future trial, to prove his case on the basis of evidence.

11. For the purposes of the present application and in circumstances where no formal Defence has, as yet, been delivered, I am approaching this application on the basis that no admission whatsoever is made by the Defendant, other than (i) that he *was* engaged by the plaintiff, *qua* solicitor, and (ii) that legal proceedings were *not* issued within time. Thus, although the Defendant acknowledges that he was engaged by the Defendant, it is entirely conceivable that, if this case proceeds further, a dispute may arise in relation to the terms or extent of that engagement (in respect of which the Defendant has made no admission or concession). However, as matters stand, whether the nature of the engagement will be in dispute is unknown, no formal Defence having been delivered. Before leaving the issue, it also seems appropriate to say that, although counsel for the Defendant said nothing as regards *when* the Defendant was engaged by the plaintiff, there was no suggestion made by the Defendant's counsel that the engagement by the Plaintiff of the Defendant occurred *after* 18 August 2007 (i.e. after the expiry of the 'statute' in respect of personal injuries proceedings concerning the assault on 18 August 2005).

***Primor* test**

12. In circumstances where the primary relief is sought under the *Primor* principles, it is useful at this juncture to note that *Primor* lays down a three-part test insofar as the court must ask the following 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?

Relevant matters in chronology

13. With respect to the meaning of the term *"inordinate"*, Cooke J held, in *Framus Limited v CRH plc* [2012] IEHC 316 (at para. 23) that: *"In its ordinary meaning delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive"*. Although, later in this judgment, I will refer to additional relevant authorities, the foregoing serves as I proceed to examine the chronology of relevant events in some detail.

18 August, 2007

14. The plaintiff's personal injuries claim became 'statute–barred' as of 18 August 2007. In the present motion, no correspondence is exhibited by either side with respect to the period which expired on 18 August 2007. Given that the pleadings have not closed, discovery has not been sought by either side or made. In the context of analysing delay and having regard to the limited evidence before the court, it seems to me that there could be no valid criticism of the Plaintiff for any delay *prior* to 18 August 2007.

18 August 2007 – 18 February 2011

15. Nothing appears in the agreed 'timeline' with respect to this period which begins when the plaintiff's personal injuries claim became statute barred, and ends when the Plaintiff instructed a 'new' solicitor (i.e. his current solicitor). To make findings about what did and did not happen during this period, the court requires evidence. Unfortunately, there is none. The extract from the plaintiff's Statement of Claim which I quoted earlier in this judgment comprises a narrative of the case he makes against the Defendant. However, a narrative which includes pleas that *"the Plaintiff heard nothing from the Defendant for some time despite repeatedly calling him"* is not evidence that this is so. The same can be said of the plea that *"the plaintiff's father attempted to contact the Defendant on numerous occasions to no avail"*. First, neither the Plaintiff nor his father have made any averments to underpin the foregoing plea for the purposes of the present application. Second, and without criticising the manner in which the Statement of Claim is drafted, it is fair to say that the said pleas are not specific as to *when* attempts at contact were made (no date, month or year being pleaded).

16. Turning to the Defendant, his affidavit grounding the present motion is entirely silent in relation to the period from 2005 onwards, other than to make the following averment at para. 5 of his 10 December 2020 affidavit: *"…it is important to note that, on the plaintiff's own case, the events at the heart of the proceedings took place between 2005 and 2011".* Although, for the purposes of the present application, the Defendant acknowledges that he was engaged by the Plaintiff *qua* solicitor, and it is common case that personal injuries proceedings were not issued by 18 August 2007, the Defendant says nothing more than the foregoing, with respect to the period up to 2011.

17. In the absence of any evidence from either side, it seems to me to be safe for this Court to say the following. A point was very obviously reached by the Plaintiff where he took the view that it was appropriate to engage a *different* solicitor. This can be said, given that it is common case that the Plaintiff instructed a new (i.e. his current) solicitor on 18 February, 2011. It would not seem fair to characterise the entire of the period between 19 August, 2007 and 18 February, 2011 as pre-commencement delay for which the plaintiff, who is not a lawyer, is *exclusively* responsible. It appears to me that both the Defendant and Plaintiff must bear some of the responsibility for the delay (absent evidence of, for example, when the Plaintiff was informed by the Defendant, or otherwise learned, that the statute had expired without personal injuries proceedings having been issued on his behalf). However, approaching the matter from the perspective of what appears *objectively* reasonable (given the absence of correspondence or averments which would indicate what was *subjectively* known) it seems to me that the Plaintiff could fairly be criticised for not consulting an alternative solicitor *sooner* than he did. In other words, a time must have come when it was no longer reasonable for the Plaintiff *not* to engage, as he sees it, a different solicitor to act

for him in respect of the consequences of the 2005 assault. Even if one were to give 'credit' to the Plaintiff for a full year after the expiry of the statute of limitations, it seems to me reasonable to suggest that Plaintiff should have actively taken steps to seek alternative legal advice and assistance from, say, August 2008 onwards. I also take account of the fact that it must have taken some time (albeit measured in days, or perhaps a small number of weeks) for the Plaintiff to identify and contact a new solicitor.

30 months pre-commencement delay August 2008 – Jan 2011

18. In light of the foregoing analysis, it seems to me that the period from August 2008 to January 2011, inclusive, (i.e. 30 months) can fairly be regarded as pre-commencement delay for which the Plaintiff is exclusively responsible.

18 February, 2011

19. After the aforementioned lengthy period of pre-commencement delay by the plaintiff, on 18 February 2011, he instructed his present solicitor, Mr. Con O'Leary of Con O'Leary & Co.

11 March 2011

20. The agreed 'timeline' notes that on 11 March 2011 the "*plaintiff's solicitor wrote to Defendant seeking copy of the plaintiff's file*". For the purposes of the present application, the foregoing is not in dispute, even though neither party has exhibited a copy of this letter. It will be recalled that during the hearing before me, the Defendant, through his counsel, acknowledged that he was engaged by the plaintiff. To say the following is not to make any decision as to the *terms* of the engagement, but it seems entirely uncontroversial to suggest that a letter from a new solicitor, seeking that plaintiff's file, put the Defendant 'on notice' that another legal professional was anxious to investigate the very matter for which the Defendant had been engaged. It seems equally uncontroversial to say that receipt of such a letter might well prompt the recipient to carry out such searches and investigations as they deemed appropriate, with respect to the issue for which they had been engaged, the terms of the engagement and the status of the work done in the context of that engagement. I am also entitled to hold that the Defendant did *not* respond to this request. I say this in light of the following entry on the agreed timeline.

4 April 2011

21. According to the agreed timeline the "*plaintiff's solicitor wrote further to Defendant seeking copy of the plaintiff's file*". Two things seem appropriate to say at this juncture. First, the fact that a second letter had to be sent to the Defendant seeking the plaintiff's file means that the first request for the file was not dealt with by the Defendant. Second, it indicates that the delay with respect to addressing the request for the plaintiff's file was caused by the Defendant, not the plaintiff. For the purposes of the present application it appears that the second request was *not* addressed either. I say this given the next entry in the agreed timeline.

12 April 2011

22. According to the timeline the parties agree that on 12 April 2011 the "*plaintiff's solicitor wrote further* [to] *Defendant seeking copy of the plaintiff's file*". The points I made earlier apply equally here i.e. a third request for the file means that the first two requests went unanswered and the delay in this respect can fairly be laid at the door of the Defendant. Furthermore, it does not appear that this third request was addressed. By that I mean there is no averment by either party (and no entry on the agreed timeline) indicating that the Defendant ever responded to this 12 April 2011 request.

Thus, for present purposes, the state of the evidence is that, despite making three requests of the Defendant to furnish the plaintiff's file, no response has been received from the Defendant and no further response was ever made by him. I now turn to the next item on the agreed timeline.

3 May 2013

23. The parties agree that on 3 May 2013 the plaintiff's solicitor wrote to the Defendant calling upon him to admit liability. Before looking at the contents of the 3 May 2013 letter, it seems appropriate to comment on the passage of time between 18 February 2011 (when the Plaintiff instructed his present solicitor) and 3 May 2013 (when the latter called upon the Defendant to admit liability) especially given the multiple requests for the plaintiff's file, to which I have referred.

18 February 2011 – 3 May 2013

24. Counsel for the Defendant characterises this whole period as pre-commencement delay, *exclusively* caused by the plaintiff. This does not seem to me to be entirely fair. It seems to me that, in circumstances where Mr. O'Leary was instructed on 18 February 2011 as the plaintiff's new solicitor, he moved relatively quickly to take the first step of seeking the plaintiff's file (from someone who now accepts that he was formerly engaged, *qua* solicitor, by the plaintiff). To request a file from a former solicitor could hardly be seen as other than an entirely reasonable and appropriate way for the plaintiff, *via* his new solicitor, to proceed. Although there can be no 'hard or fast rule', when it comes to apportioning responsibility for delay, the following seem to me to be highly relevant factors: (i) the multiple requests for the plaintiff's file which Mr. O'Leary sent; (ii) the fact that these were sent relatively soon after the Plaintiff engaged his current solicitor; (iii) the fact that there is no letter before the court in which the Defendant *refused* to provide a file; or (iii) asserted that no file ever *existed* or that, (iv) such a file had been *lost or destroyed*. Furthermore, (v) bearing in mind that solicitors are likely to have demands on their time from multiple sources, an instantaneous response could never be expected, and any party making such a request could well expect it to take some time to be dealt with (possibly months as opposed to days or weeks). In addition to the demands of running a legal practice, holiday and Court vacation periods also have the potential to cause delay. Taking all the foregoing into account, it seems to me that it would not be fair or reasonable to consider the *Plaintiff* at fault in respect of the initial period of delay from 18 February 2011 onwards (a period which can be measured in months, in the manner I will now explain).

Defendant responsible for delay from February 2011 to September 2011

25. Whilst acknowledging that this is far from an 'exact science', it seems to me that, if, by the end of September 2011 (i.e. by the beginning of Michaelmas Term 2011), the plaintiff's current solicitor still had received *no* response whatsoever from the Defendant, with respect to the file request, (i) it ceased to be reasonable for the Plaintiff to hope that the repeated requests for his file would be answered and, instead, (ii) it behove the Plaintiff to 'press on', regardless, in such manner as they and their new solicitor considered appropriate. Thus, it seems to me that responsibility for the period from February 2011 to September 2011, inclusive, rested with the *Defendant*, not the plaintiff, whereas, from that point onwards (i.e. from October 2011) the delay became the *plaintiff's* responsibility.

Contents of 3 May 2013 letter

26. I now turn to the contents of the 3 May 2013 letter (a short extract from which I quoted earlier) which letter stated the following:

"Dear Mr. Dore

We have been instructed by Mr. Garry Cullen, date of birth 13th of July, 1987 of Apartment 21, Carraig Ean, Edenderry, Co. Offaly in relation to a Personal Injury Action arising from an incident on the 18th August, 2005 when he was a victim of a vicious assault perpetrated by William Gray at the Red Cow Hotel, Naas Road, Dublin. We understand that this individual was subsequently prosecuted and sentenced for this assault.

As a consequence of the assault Mr. Cullen sustained a serious head injury necessitating an operation on the 28th August, 2005. Since that date Mr. Cullen has suffered ongoing medical problems which have included headache and depression which regrettably has led him to make attempts on his life on a number of occasions.

We understand from our client that you were instructed as Solicitor in a timely manner to institute proceedings against the proprietor of the hotel seeking damages for personal injuries. It was no doubt clear to you on our client's instructions, and they remain, that there was negligence on the part of the proprietor by virtue of its failure to properly supervise and police the function that Mr. Cullen was attending.

It now appears that proceedings were never instituted on behalf of Mr. Cullen, no record of an application to the Injuries Board exists and therefore his action appears statute barred as against Moran's Hotel Ireland Ltd. It is therefore highly likely that any application to the Injuries Board which I am instructed to make on his behalf will be rejected by the proprietor of the Hotel. In the event of a rejection and on foot of an authorisation we then intend to issue proceedings on behalf of Mr. Cullen in the High Court seeking damages for personal injuries. The strong likelihood is that the proprietor will successfully plead the statute of limitations against him giving rise to a dismissal of his action and an inevitable order for costs against him.

The purpose of this letter is put you on notice of our client's intentions vis a vis his future intended action against the proprietor of the hotel. In the event that the Statute of Limitations is successfully pleaded against him then our client has instructed me to institute proceedings against you by reason of your negligence and breach of duty in failing to institute proceedings on his behalf within the limitation period.

In order to minimise any further distress to our client and the not insubstantial legal costs that would in our view be unnecessarily incurred in the undoubted unsuccessful pursuit at this remove of the proprietor of the Hotel, which would ultimately be included as an item of special damages in his action against you, we hereby call upon you to admit liability in open correspondence to the Plaintiff within a period of 21 days and confirm that you are prepared to compensate him for the loss and damage which he has suffered.

We would be obliged for an early response in relation to liability so that the issue of whether Mr. Cullen need first pursue Moran's Hotel Ireland Ltd can be crystallised.

We suggest that you pass a copy of this letter to your insurer." (Emphasis added).

27. The passages from this letter which I have highlighted indicate *inter alia* that certain investigations had to be carried out before it could be drafted, including (i) investigations as to

whether an application to the Injuries Board existed and (ii) whether legal proceedings had been brought, as well as (iii) a teasing out of the relevant legal issues in light of instructions which had very obviously been taken. It seems to me that basic fairness requires some 'credit' to be given to the Plaintiff for the work which had obviously done in the lead up to this letter, but which work could reasonably be measured in weeks

Plaintiff responsible for delay Oct 2011 to March 2013

28. To summarise matters thus far, it seems to me that, with respect to the period from 18 February 2011 to 3 May 2013, the first portion of same (i.e. the 8 months of February to September, 2011, inclusive,) comprises delay on the part of the Defendant who failed to address repeated requests for the plaintiff's file. Thereafter, a 'tipping point' came, when it must have appeared to the plaintiff, and his new solicitor, that they were not going to receive a response from the Defendant. In my view, that 'tipping point' surely came by the start of Michaelmas Term 2011. At that point, a period of several months had already been allowed to see if a response would be forthcoming and normal work pressures on a solicitor/holidays/the Long Vacation etc could no longer constitute reasons to hope for a response. Thus, it seems to me that the period from October 2011 until March 2013, inclusive, can fairly be regarded as pre-commencement delay for which the Plaintiff is entirely responsible. After this extended period of pre-commencement delay, it is clear that the Plaintiff and his solicitor took active steps to try and progress matters. It seems reasonable to regard this activity as having occurred from the start of April 2013, given the fact and content of the 3 May 2013 letter, to which I have referred.

Insurers notified

29. Before leaving the 3 May 2013 letter, it should also be noted that the plaintiff's solicitor explicitly suggested that the Defendant notify his insurer. It is clear that the Defendant did exactly that. I say this in circumstances where at para. 18 of Mr. Dore's 10 December 2020 affidavit he refers to his "*professional insurers"* and avers, *inter alia,* that "…*I did notify them of this claim against me when it first arose…".* Given that the Defendant does not specify a particular date, it is not clear whether he contacted his insurers upon receiving any of the letters from the plaintiff's new solicitor requesting the plaintiff's file (i.e. letters of 11 February 2011; 11 March 2011; and 4 April 2011). Notwithstanding the foregoing, what can be said with confidence is that the Defendant was fully on notice of the plaintiff's claim against him, no later than May 2013, as were his insurers. Given that, during the hearing before me, the Defendant, through his counsel, acknowledged that he was engaged by the plaintiff, it seems inconceivable that the nature, extent and terms of that engagement were not actively looked at by the Defendant, in the context of communication with his insurers, in or about May 2013 (i.e. in the wake of being notified of the plaintiff's claim). There is certainly no averment by the Defendant that he / his insurers did not investigate, at that point, why the Defendant had been engaged by the plaintiff, what the Defendant did or did not do in respect of that engagement, and make such other investigations as regards relevant issues.

No response by Defendant to 3 May 2013 letter

30. It is clear that the Defendant did not respond to the letter from the plaintiff's solicitor dated 3 May 2013.

4 June 2013

31. In the manner presently explained, it is clear that the Plaintiff made an application to the Personal Injuries Assessment Board ("PIAB") on 4 June 2013 in respect of his claim against the Hotel.

30 July 2013 'protective writ'

32. In the absence of any response by the Defendant, the plaintiff's solicitors issued a 'protective writ' by means of a plenary summons which was issued on 30 July 2013 against the Defendant in which the plaintiff's claim is stated to be for: "*1. Damages for negligence and breach of duty, breach of contract and breach of retainer".* This obviously involved briefing counsel, in that junior counsel's name appears on the relevant writ. These proceedings were issued just (i.e. 18 days) 'within time' in the context of a 6–year statute of limitations period, given that both parties acknowledge that the plaintiff's cause of action against the Defendant accrued as of 18 August 2007 (i.e. when his personal injuries claim became statute barred).

Pre - commencement delay summarised

33. In circumstances where the Defendant has made no averments in relation to the relevant period and the Plaintiff has sworn no affidavit in respect of this application, the foregoing analysis is the best attempt by the court to apportion responsibility for what was, without doubt, pre-commencement delay. The outcome of the analysis is that:-

- the Plaintiff cannot be blamed for 'delay' during the 2-year statute of limitations period which expired on 18 August 2007;
- it does not seem reasonable to attribute responsibility to the Plaintiff for the entire of the period commencing on 18 August 2007;
- it seems reasonable, however, to regard the Plaintiff as solely responsible for some 30 months pre-commencement delay (i.e. from, say, August 2008 to Jan 2011, inclusive);
- the Defendant can fairly be regarded as responsible for 8 months pre-commencement delay, thereafter (i.e. from February 2011 to September 2011, inclusive), given the repeated requests sent by the plaintiff's new solicitors to furnish the plaintiff's file;
- the Plaintiff is responsible for a further period of 18 months pre-commencement delay (i.e. from October 2011 to March 2013, inclusive);
- from April 2013, the Plaintiff took active steps to progress his claim, evidenced by the 3 May 2013 letter from the plaintiff's current solicitors which called on the Defendant to admit liability.

25 September 2013

34. In the manner presently explained, PIAB issued the relevant authorisation to the Plaintiff in relation to a claim against the Hotel, on 25 September 2013.

16 December 2013

35. On 16 December 2013, the plaintiff's solicitor wrote to the Defendant in the following terms:

> *"We refer to our letters of the 3rd May and 8th May, 2013 and are indeed surprised at not having heard from you or your insurers in relation to our letter of the 3rd May, 2013. At that*

time as we had not heard from you or your insurers in the matter ***we made application to the Injuries Board in relation to a claim against Morans Hotel Ireland Ltd but Morans Hotel Ireland Ltd have declined to have the claim assessed and the Injuries Board have forwarded us an authority to proceed and we are now issuing proceedings against the hotel.***

We have issued Protective High Court proceedings against you *and will be renewing this from time to time until such time as the proceedings against Morans Hotel Ireland Ltd have been finalised.*

We would advise you to furnish this letter to your insurers." (Emphasis added).

36. It seems clear from the foregoing that, in the absence of a reply from the Defendant to the 3 May 2013 letter from the plaintiff's solicitors, the latter took meaningful steps to progress matters by way of making an application to the Injuries Board, which ultimately produced the outcome described in the letter. The foregoing plainly took some time, as did the preparation of proceedings against the Hotel which, as of 16 December 2013, were ready to be issued (see the next entry in the 'timeline'). It is also plain from the letter that the Defendant was put fully 'on notice' that a 'protective writ' had been issued against him and it was suggested, for the second time, that he contact his insurers (which, as was seen earlier, is something he did).

37. Thus, having known since March 2011 that a new firm of solicitors was seeking the plaintiff's file, and having failed to deal with that request (made three times) the Defendant was 'on notice' of the nature of the plaintiff's claim against him from at least 3 May 2013 and also knew, as of 16 December 2013, that legal proceedings had, in fact, been instituted against him.

38. Given the Defendant's averment that he notified his insurers of the claim when it first arose, it seems inconceivable that he did not inform his insurers that a 'protective writ' had in fact been issued against him. This was a further opportunity for the Defendant to investigate the nature of his engagement by the plaintiff, and such work as was done in the context of that engagement as well as any other relevant issues concerning that engagement (including by reference to the Defendant's personal recollection and/or such notes or records as were made at the relevant time, and such other searches or enquiries as the Defendant/his Insurer deemed appropriate).

17 December 2013

39. The plaintiff's solicitors caused a Personal Injuries Summons to be issued on 17 December 2013 against the Hotel (bearing record number 2013 No. 13840P). Earlier in this judgment, I referred to the particulars of personal injury as pleaded. The final paragraph of the 'writ' appears in the following terms: *"On the 25th day of September, 2013 an Authorisation No. PL* ***06042013*** *20676 was issued by the Injuries Board under Section.14 of the Personal Injuries Assessment Board Act, 2003"* (emphasis added). Counsel for the Plaintiff submitted without objection during the hearing, that the aforesaid authorisation number denotes an application lodged in the Injuries Board on 4 June 2013, whereas 25 September 2013 is specified to be the date when the relevant authorisation issued.

April to December 2013, inclusive

40. It is fair to say that from April to December 2013, inclusive, the Plaintiff was taking active steps to progress matters and could not fairly be criticised in respect of delay. By contrast, it appears that, having failed to respond to repeated requests for the plaintiff's file in 2011, the Defendant declined to respond to correspondence from the plaintiff's solicitor in 2013. That is not to suggest for a

moment that the Defendant was under any obligation to admit liability in response to the 3 May 2013 letter. It is, however, to say that there was an opportunity for the Defendant to make his stance (whatever that might be) known, even if it was to do no more than acknowledge (as he did over 9 years later at the hearing before me) that he had been *engaged* by the plaintiff. It was also an opportunity, should the Defendant have wished to take it, to articulate his position with respect to any limitations said to apply to the engagement. Not having taken that opportunity, it was the Plaintiff who, from April 2013 onwards, was 'making the running' and could not fairly be accused of delay.

2014

41. Given that a statute of limitations defence will only be effective if relied upon, the 'state of play' as 2014 arrived was that the Plaintiff was pursuing the Hotel, against the backdrop of having instituted a 'protective writ' against the Defendant. The plaintiff, through his solicitors, had made clear that the latter proceedings would be pursued if the Hotel did raise a statute of limitations defence.

17 July 2014

42. It will be recalled that the protective writ against the Defendant was issued on 30 July 2013. It is common case that it would 'expire' if not served within twelve months. Against that backdrop, and not yet having received a Defence from the Hotel, the plenary summons (dated 30 July 2013) was served on the Defendant on 17 July 2014. Despite submissions by counsel for the Defendant, I cannot agree that this evidences delay of almost twelve months from the date when this plenary summons was issued. Rather, in the manner examined in this judgment thus far, the plaintiff, through his solicitors, was actively and prudently progressing matters against the backdrop of silence from the Defendant.

43. It can also fairly be said that, had the Plaintiff served the plenary summons on the Defendant immediately after issuing same, there was a possibility that this would give rise to unnecessary and wasted legal costs (i.e. were the Hotel *not* to plead the statute of limitations in a Defence, however remote that prospect might have been). Furthermore, the Defendant had the opportunity to say, (but did not say) in response to the 3 May 2013 letter from the plaintiff's solicitors, that, without any admission of liability to the Plaintiff on his part, he accepted that the Hotel was highly likely to rely on the statute and, thus, did not require the plaintiff's solicitors to litigate the claim as against the hotel (thereby saving the costs associated with same). This is not to say that there was any obligation on the Defendant to take that attitude. It is, however, to say that *not* having adopted that stance, the Defendant cannot legitimately describe as *delay*, the time and efforts which the plaintiff, through his solicitors, had to go to in order to 'bottom out' the statute of limitations issue in respect of the plaintiff's claim against the hotel, before turning attention to progressing the plaintiff's claim against the Defendant. The reality that meaningful, and in the circumstances necessary, progress was made by the Plaintiff on this issue is evident from the fact that the Plaintiff in fact secured a Defence to the personal injuries claim, from the Hotel. This Defence came very shortly *after* service of the plenary summons upon the Defendant, and I now turn to same.

30 July 2014

44. On 30 July 2014, the solicitors for the Hotel delivered a Personal Injuries Defence, as drafted by counsel, which explicitly pleads reliance on the statute of limitations by way of "*preliminary*

objection". Two things can be said in relation to the foregoing. First, it self-evidently took some time to get to this point and, for the reasons explained, I cannot regard this as delay on the plaintiff's part, not least given the silence from the Defendant. Second, whatever hope there might have been that the Hotel would *not* rely on the 'statute', completely evaporated as of 30 July 2014. Thus, it behoved the Plaintiff to progress his claim against the Defendant with due expedition.

Late start

45. I have already found the Plaintiff to be responsible for (i) some 30 months pre-commencement delay (i.e. from August 2008–Jan 2011, inclusive); and (ii) a further period of 18 months pre-commencement delay (i.e. from October 2011 to March 2013, inclusive). In that context, although the proceedings against the Plaintiff were issued and served 'in time', it seems entirely fair to say that the Plaintiff made a 'late start' as regards his claim against the Defendant. The significance of a late start is clear from para. 26 of the judgment delivered by Hogan J., on behalf of the Court of Appeal, in *Tanner v. O'Donovan & Ors* [2015] IECA 24 .. –

> " *This made it all the more incumbent on the Plaintiff to proceed with expedition thereafter. As Lord Diplock observed in Birkett v. James [1978] A.C. 297, 322:*
>
> > *'A late start makes it the more incumbent on the Plaintiff to proceed with all due speed and a pace which [might] have been excusable if the action had started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.'."*

46. Armed with the foregoing statement of principle, I now proceed to look at the pace with which the Plaintiff brought his claim against the Defendant after 30 July 2014.

5 months delay - September 2014 to January 2015, inclusive

47. Having both served the plenary summons on the Defendant (17 July 2014) and received the Hotel's personal injuries defence (30 July 2014) it does not seem unreasonable to expect that, within a relatively short period of time thereafter (i.e. measured in weeks, rather than months) the Plaintiff would press his claim against the plaintiff, especially in circumstances where no Appearance was filed. Even if one allows the month of August 2014 for the Plaintiff to *begin* pressing the Defendant, it does not appear that this occurred at any stage during the period from September 2014 to January 2015, inclusive. That represents a period of five months of post-commencement delay which it seems to me can fairly be attributed to the plaintiff, notwithstanding the fact that the Defendant did not file an Appearance. Following this period of delay, the Plaintiff did take action in the form of the step I will next refer to.

16 February 2015

48. By letter dated 16 February 2015, the plaintiff's solicitors wrote to the Defendant in the following terms:

> *"As you are well aware proceedings were served on you in the above matter on the 17th July last and you have not as yet entered an Appearance thereto.* ***Please note that unless we receive an Appearance within14 days from the date hereof we will issue a Motion for Judgement*** *without further recourse to you. You will accept that* ***we have telephoned you on a number of occasions since the Summons was served on you and despite this you have failed to enter an Appearance*** *in the matter.*
>
> *We await hearing from* [you]*."* (Emphasis added).

49. Although the aforesaid letter certainly refers to telephone calls apparently made on a number of occasions since service of the summons, it nonetheless appears fair to attribute the aforesaid five months delay to the plaintiff, for the simple reason that no Plaintiff could rely on a phone call or phone calls, as a basis to seek relief in a motion. Correspondence was required and the first item of correspondence which threatens a motion in Default of Appearance was not sent until 16 February 2015. A further letter was also sent by the plaintiff's solicitors on 19 March 2015, as follows.

19 March 2015

50. By letter dated 19 March 2015 the plaintiff's solicitor wrote again to the Defendant in the following terms:

> "*We refer to the above and to our letter of the 16th February last.*
> *As solicitors for the Plaintiff we hereby* ***consent to late filing of Appearance herein for a period of twenty-one days*** *from the date hereof.*
> *Failing hearing from you within that time* ***we will have no option but to proceed by way of motion for judgment in default of Appearance*** *without further notice to you.*
> *We await hearing from* [you]*."* (Emphasis added).

51. It seems that this additional letter was sent on the understanding that consent to the late filing of Appearance should be provided. There could be no criticism of the Plaintiff for doing so. As to the status of matters once this letter was sent, the following can safely be said: (i) the Defendant was under an obligation to file an Appearance if he wished to oppose the plaintiff's claim; (ii) the Defendant is a solicitor and, thus, intimately familiar with a Defendant's obligation in that regard; (iii) notwithstanding any delay, whether pre or post-commencement, the Plaintiff was making clear that he was desirous of progressing his claim against the Defendant; (iv) the Defendant had been on notice, since early 2011, that a new firm of solicitors wanted the plaintiff's file in relation to the matter for which the Plaintiff engaged him; (v) the Defendant and his insurers had been on notice of the claim since May 2013 (see 3 May 2013 letter); and (vi) 21 days had been allowed for the filing, by the Defendant, of an Appearance (i.e. a period which would expire in mid-April 2015). I now turn to the next formal step which was taken in the proceedings, and an analysis of the relevant delay.

5 September 2018

52. The item in the agreed 'timeline' which appears immediately after reference to the 19 March 2015 letter is a 'Notice of Intention to Proceed', which was served by the plaintiff's solicitor, on 5 September 2018. Plainly a very significant amount of delay occurred between those two points. Counsel for the Plaintiff accepts that his client *"could have moved more quickly than he did"* but submits that *"the main cause of the delay was Mr. Dore's failure to enter an appearance".* This, the plaintiff's counsel characterises as *"culpable delay for which Mr. Dore bears, if not sole, then the vast majority of responsibility".* By contrast, counsel for the Defendant submits that the entirety of this period constitutes post - commencement delay for which the Plaintiff is exclusively responsible.

53. One can well understand why counsel for the respective parties seek to characterise the delay in such starkly contrasting terms. To my mind, neither are correct. The following seems to me to be the appropriate analysis.

54. By way of preliminary comments, the Defendant, as a solicitor, was well aware of the significance of an Appearance and that he was 'in default', having been called upon to furnish same. It is also

clear that throughout the entire period, from 19 March 2015 to 5 September 2018, the Defendant was 'in default' with respect to the delivery of an Appearance (which he ultimately did file in the Central Office, on 26 April 2019, on a basis which I will discuss later in this judgment). Few litigation practitioners will not have come across situations where a motion is threatened but the moving party waits (often a multiple of the time limit specified in the 'warning letter') before issuing and serving the motion in question. Indeed, a party who issues a motion immediately on the expiry of a relatively short time limit may well come in for criticism for taking the other side 'short'. This is particularly in circumstances where, as commented upon by counsel during the hearing, certain time limits in the Rules of the Superior Courts ("RSC") are breached more than observed.

To hold the Plaintiff to his word

55. Notwithstanding the foregoing observations, it seems to me that, on the particular facts of the present case (i.e. against the backdrop of (i) pre-commencement delay and a 'late start' to the proceedings; as well as (ii) post-commencement delay of some five months) the obligation on the Plaintiff to prosecute his claim was inconsistent with being overly indulgent with respect to delay on the part of the Defendant. Thus, it was reasonable to expect the Plaintiff to take active steps, in respect of the motion threatened in the 19 March 2015 letter, relatively soon after the explicit deadline given. It does not seem to me to be unfair in these particular circumstances to 'hold the Plaintiff to his word' i.e. to expect the Plaintiff to progress his claim in some meaningful way once the deadline specified in the 19 March 2015 April letter had expired. The period from mid-April (the expiry of the 21-day warning period) to the end of May 2015 is somewhat over 6 weeks and it does not seem at all unreasonable to expect *some* action on the plaintiff's part as of 1 May 2015 and thereafter.

56. The foregoing is not to set the 'bar' too high. I do not say that the Plaintiff was required to issue a motion by that date, still less to have it heard by then (even though the Plaintiff had threatened to do so upon the expiry of a deadline 21-days earlier). The action which the court expects could have taken a different form (e.g. the form of a further letter, giving a last and final deadline, after which a motion would issue). My point is that in the very particular circumstances of this case, it was not sufficient for a plaintiff, having threatened the motion, to then 'sit back' and rely on the fact that the Defendant continued to be 'in default' as regards delivery of an Appearance, which seems to be precisely what the Plaintiff did.

57. The outcome of holding the Plaintiff to his word results in 1 May 2015 being the latest date by which activity on the plaintiff's part could reasonably have been expected. The plaintiff's delay terminated three years and four months *later,* with the service by the plaintiff's solicitors of a Notice of Intention to proceed. Even if this Court's (admittedly unscientific) analysis is wildly wrong, and even if one were to take the view that the Plaintiff could adopt an entirely passive approach for a further three, six, nine or even twelve months (i.e. doing nothing to progress the threatened motion until May 2016) that still leaves a period of delay of two years and four months. For the avoidance of doubt, I do not accept that passivity beyond April 2015 would not constitute delay on the plaintiff's part, in the particular circumstances of this case. However, whether one calculates the delay as being (i) three years and four months (as I do); or (ii) two years and four months (by giving the Plaintiff additional 'credit' and the Defendant additional 'blame', for the 12 months of inaction, from May 2015 to April 2016, inclusive); or (iii) somewhere in between, I am entirely satisfied that there

has been extensive post-commencement delay on the plaintiff's part, which can did not terminate until the Plaintiff delivered a Notice of Intention to Proceed on 5 September 2018. Recalling (para. 23 of) the judgment in *Framus Ltd,* I take the view that the plaintiff's delay was, without doubt, irregular and excessive and outside of the norm.

58. Given the very particular circumstances of this case ('Covid19' restrictions having played a part in certain delays with regard to the *hearing* of the motion, but no part in the *issuing* of same) I am satisfied that the relevant period to be looked at in the context of the first 'limb' of *Primor* begins when the proceedings were issued and ends when the present motion was issued. Even if one focusses exclusively on this period of delay (of three years and four months), I take the view that it is, of itself, inordinate and, thus, the Defendant has met the first limb of the *Primor* test. Later in this judgment I will return to this topic, in light of other periods of post-commencement delay, but I now propose to continue looking at matters in sequence.

29 November 2018

59. Having brought his delay to an end with the delivery of a Notice of Intention to proceed, the Plaintiff progressed his claim with reasonable expedition, following the expiry of the relevant notice period. I say this in circumstances where, as of 29 November 2018, the plaintiff's solicitor swore an affidavit to ground a motion seeking judgment against the Defendant in default of Appearance.

30 November 2018

60. The said motion for judgment in default of Appearance was issued and filed in the Central Office on 30 November 2018, and was given a return date of 4 February 2019.

4 December 2018

61. It appears that the plaintiff's solicitor wrote to the Defendant on 4 December 2018 serving the motion and grounding affidavit.

21 January 2019

62. By letter dated 21 January 2019, the plaintiff's solicitor wrote to the Defendant in the following terms:-

> *"We refer to the above and to our letter to you of the 4th December last serving you with copy notice of motion and grounding affidavit.*
> *We are just reminding you that the motion is for hearing on the 4th prox. And our instructions are to proceed on that date."*

4 February 2019

63. On the initial return date, of 4 February 2019, the plaintiff's motion for judgment in default of Appearance was adjourned to 29 April 2019. It seems clear that this was following a request from the Defendant and on the basis that the latter would file an Appearance (see correspondence below, as well as uncontroverted averments by Mr O'Leary, referred to later in this judgment).

24 April 2019

64. By letter dated 24 April 2019, the plaintiff's solicitor wrote to the Defendant in the following terms:-

> *"As you are aware this matter was before the High Court on 4th February last.* ***Mr. Dore's secretary indicated to the writer that morning that she had been instructed to enter an Appearance and was arranging to do that on the 4th February. As you are further aware the Motion was adjourned to the 29th inst.*** *We are indeed surprised that to date*

we have not received an Appearance and on that basis we will be applying for Judgment on Monday next and will not be consenting to any further application." (Emphasis added).

65. I pause at this juncture to make a number of observations as follows:-

(i) I do not see that the Plaintiff can fairly be accused of delay *after* 5 September 2018, (when his solicitor served a Notice of Intention to Proceed and, plainly, took meaningful steps to progress the proceedings thereafter);

(ii) It is a statement of the obvious that, despite what was inordinate delay on the part of the Plaintiff which did not terminate until 5 September 2018, it was open to the Defendant to issue an application to dismiss on delay grounds *prior* to the delivery of the 5 September 2018 Notice of Intention to Proceed;

(iii) In circumstances where the plenary summons was served on 17 July 2014, the two-year anniversary of service came and went on 17 July 2016. This was in the middle of a period of utter inaction on the part of the plaintiff, but the Defendant brought no application to dismiss (be that under Order 122, r. 11 of the RSC, or otherwise);

(iv) Similarly, upon being served with the 5 September 2018 Notice of Intention to Proceed, the Defendant could have responded by means of a motion seeking to dismiss on delay grounds, but did not do so; and

(v) It appears that the Defendant's stance, as of the 4 February 2019 return date for the plaintiff's motion (seeking judgment in default of Appearance), was to seek an adjournment whilst indicating a willingness to deliver an Appearance (rather than raising any issue of delay or issuing any motion).

I now turn to the next item of correspondence in sequence.

25 April 2019

66. By letter dated 25 April 2019, the Defendant wrote to the Plaintiff as follows:-

*"**I will be filing and serving an Appearance tomorrow,** the 26th April 2019.*

*I will be doing this without prejudice to and indeed **to facilitate the issuing by me of a notice of motion seeking an order pursuant to Order 122, rule 11** of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the High Court to have these proceedings struck out in the interests of justice and **on the grounds of inordinate and/or inexcusable delay.***

These proceedings were issued on the 30th July 2013 upwards of six years ago. They were served on me on the 17th July 2014, upwards of five years ago.

Post service nothing was done to advance these proceedings until you filed a notice of intention to proceed on the 5th September 2018, some five years after you filed the plenary summons.

On the 20th November 2018 you filed a notice of motion, in excess of five years after you issued the plenary summons. In doing this you relied on a defective warning letter dated the 16th February 2015 and a warning letter dated the 9th March 2015.

You never delivered a warning letter post filing the notice of intention to proceed, which you ought to have done.

As a result of this extraordinarily unwarranted inordinate and/or inexcusable delay I have clearly suffered both actual and presumptive prejudice." (Emphasis added).

67. It seems fair to say that this letter is the very first engagement by the Defendant since the plaintiff's current solicitors wrote to the Defendant repeatedly seeking a copy of the plaintiff's file (letters dated 11 March, 4 April and 12 April 2011).

'Sleeping dogs'

68. Being a solicitor, the Defendant was well aware of his entitlement to bring, at any time after 17 July 2016, an application to dismiss on the grounds of delay/want of prosecution. As previously mentioned, he did not do so during the period of the plaintiff's inordinate delay but seems, instead, to have been content to *"let sleeping dogs lie"*. When the canine awoke, as of 5 September 2018, (the Plaintiff's Notice of Intention to Proceed), the Defendant did not bring a motion to dismiss on delay grounds. Having indicated, apparently without any conditionality, on 4 February 2019, that an Appearance would be filed, it was not until his letter of 25 April 2019 that he first made reference to the plaintiff's delay and to his intention to apply to dismiss on delay grounds. However, in the manner presently examined, the Defendant did not actually issue any such application until 8 January 2021, (i.e. over 28 months *after* the sleeping dog awoke on 5 September 2018; and approaching 21 months *after* the Defendant's letter of April 2019).

Covid 19

69. It seems appropriate, at this juncture to state that COVID-19 was unknown, as of September 2018, when the plaintiff's Notice of Intention to Proceed was served. Nor did it feature at all in 2019. The restrictions in response to that virus did not take effect until March 2020. The Defendant has never asserted that COVID-19, or any other issue, caused him any delay, in relation to the bringing by the Defendant of an application to dismiss the present proceedings on the grounds of the plaintiff's delay. That motion, as I say, was not issued until 8 January 2021, despite the fact that in his 25 April 2019 letter, the Defendant stated that he was filing an Appearance *to facilitate* the issuing of such a motion. I now proceed to examine what occurred from 25 April 2019 onwards.

26 April 2019

70. The Defendant entered an Appearance on 26 April 2019 which stated, *inter alia*: *"The Defendant requires a delivery of a Statement of Claim".* As an experienced solicitor, the Defendant will, no doubt, have been aware of both the fact and significance of the foregoing. This is in circumstances where the Defendant did not retain a separate firm of solicitors in terms of representation. Rather, the Appearance was entered by Dore and Company Solicitors. Thus, even though the Defendant's 25 April letter indicated that the Appearance was without prejudice to, and to facilitate the issuing by the Defendant of, a motion seeking to dismiss the plaintiff's claim on delay grounds, the Appearance as subsequently filed was, in fact, unconditional and called upon the Plaintiff to take a step to progress the claim, by means of delivering a Statement of Claim. In the manner presently examined, this is precisely what the Plaintiff did, in circumstances where the Defendant failed to make good on his threat to bring an application to dismiss.

14 May 2019

71. The Plaintiff delivered a Statement of Claim, dated 14 May 2019. Earlier in this judgment, I made reference to certain of its terms. As regards the *"Particulars of loss and damage"*, these are pleaded as follows:-

> *"(a) The Plaintiff has lost the opportunity of recovering damages from Morans Hotel Ireland Limited, which he had a reasonable prospect of recovering. The said damages, full particulars of which appear from the particulars of the personal injuries summons attached hereto;*
>
> *(b) The cost which the Plaintiff has incurred mitigating his damage, namely the cost of seeking advice from new solicitors and counsel;"*

The nature of the plaintiff's claim and evidence likely to be required at a trial

72. The Plaintiff is not maintaining personal injuries proceedings against the Defendant. Rather, he seeks damages for professional negligence on the basis that the Plaintiff was allegedly deprived of the opportunity to recover damages for personal injuries suffered. There are two aspects to the damages claim, (a) and (b), and the following observations seem to me to be appropriate with respect to the type of evidence which is likely to be required in the event that the present proceedings were permitted to proceed to a full trial. In making these comments, I am not for a moment purporting to pre-judge the outcome of the proceedings, not least because a Defence has not even been filed and, thus, the contours of the dispute are not yet fully known. However, even assuming that the Defendant will make no concession whatsoever and assuming, for present purposes, that the Plaintiff will be put on 'full proof' the second aspect, (b), of the plaintiff's damages claim would appear relatively easy to quantify. Indeed, it is difficult to envisage any impediment, given that (b) concerns the costs of retaining the plaintiff's current solicitors and counsel.

73. As to (a), evidence would be required regarding the prospects of the Plaintiff succeeding against the Hotel. On this aspect, evidence of what occurred on 18 August 2005 will be important. Given that it would appear there was a successful *prosecution* and *conviction* of a *named* assailant, there would not appear to be any obvious impediment to identifying relevant parties in the context of records concerning that prosecution. There is certainly no evidence that such records do not exist, or that relevant witnesses cannot be identified or are unavailable to testify as to the assault in the Hotel.

74. The burden of proof to 'bring home' the case rests, of course, on the Plaintiff and, if the Plaintiff were to satisfy a trial court as to the prospects of recovering against the Hotel, it would be for the Plaintiff to prove that he engaged the Defendant and that the latter agreed to issue personal injuries proceedings for him. The Defendant now accepts that the Plaintiff did engage him and, to the extent that any dispute may arise as to the scope of that engagement, both of the essential witnesses are available (i.e. the Plaintiff and Defendant) to say nothing of such documentary evidence as may exist (something I will presently refer to in the context of an examination of prejudice). For present purposes, it is sufficient to say that there is no evidence before this court which would support a finding that no documents were ever created in respect of the Defendant's engagement by the plaintiff, or that any such documentation has been lost or destroyed.

75. Insofar as quantum is concerned, earlier in this judgment I referred to pleas made by the Plaintiff which identify specific (i) injuries; (ii) hospitals; (iii) medical practitioners; (iv) dates; and (v)

treatment, and there would not appear to be any obvious impediment to the availability of evidence, both oral and in terms of medical records, concerning quantum. There is certainly no evidence that same is not available.

76. Having made the foregoing observations in relation to the nature of the plaintiff's claim and the type of evidence likely to be required were the matter to proceed to a full trial, I propose to continue with the chronology, as follows.

2 July 2019

77. By letter dated 2 July 2019, the plaintiff's solicitors consented to the late delivery of a Defence, within a period of 21 days and went on to state that "*Failing hearing from you with your Defence within that timescale we will have no option but to issue a Motion for judgment in default of same".*

21 February 2020

78. It is clear that there was no response by the Defendant to the aforesaid 2 July 2019 'warning letter' and, as the year turned, no Defence had been delivered. I note that the 21 days specified in the plaintiff's 2 July 2019 warning letter expired as at the end of Trinity Term, 2019. However, the 'Long Vacation' does not prevent a motion from being *issued,* as opposed to being heard. Thus, even allowing for the fact that a motion could not be *heard* in the 'Long Vacation', it is surprising that the Plaintiff did not take any further step, during the remainder of 2019, to progress his claim by issuing, promptly, the motion threatened in the 2 July 2019 letter.

6 months delay – August 2019 to January 2020 inclusive

79. Again, I am satisfied that, given the facts and circumstances of this case (which included a late start; as well as post-commencement delay; and the necessity for the Plaintiff to issue a motion against the Defendant), it is not unfair to hold the Plaintiff to his word. Doing this means that positive action was required of the Plaintiff after the 21-day warning period expired, in late July 2019. The Plaintiff could have but did not issue a motion as of the start of August (nor did he 'follow up' his 2 July 2019 letter with a 'last and final' extension of time for delivery of a Defence, failing which a motion would issue). Thus, holding the Plaintiff to his word, the Plaintiff can be fairly held responsible for a further period of 6 months post-commencement delay (i.e August 2019 to January 2020, inclusive). This calculation gives 'credit' to the Plaintiff in respect of a reasonable period of time within which to prepare and issue the motion which the Plaintiff did, in fact, issue on 21 February 2020. Three further comments seem appropriate.

80. First, it has to be said that it was the Defendant who was 'in default' with respect to the delivery of a Defence throughout the period which commenced with the service by the Plaintiff of the Statement of Claim which the Defendant had explicitly called for. The foregoing does not mean that the Plaintiff did not delay as regards issuing the motion which he threatened. Plainly, he did, but it speaks to the question of litigation being a 'two way' process and this is a topic I will return to later in this judgment. Second, the Defendant had been put squarely 'on notice' of his default and of the consequences of failing to deliver a Defence, by means of the letter from the plaintiff's solicitor, dated 2 July 2019. Third, it was the Plaintiff who brought an end to his own delay by 'following through', as of 21 February 2020, on the motion which had been threatened in the aforesaid 2 July 2019 letter.

Affidavit of Mr Con O'Leary solicitor – 20 February 2020

81. The said motion of 21 February 2020 was grounded upon an affidavit sworn by Mr. Con O'Leary, on 20 February 2020, and this affidavit exhibited the 2 July 2019 letter (which had afforded the Defendant 21 days for the delivery of a Defence and threatened a motion in default). At the risk of stating the obvious, despite the contents of the Defendant's 25 April 2019 letter, he plainly did *not* 'follow through' on what had been his stated intention (i.e. to bring an application to dismiss on delay grounds, for which *purpose* an Appearance was being filed).

***Status quo* at end of June 2019**

82. Bearing in mind that it was by letter dated 2 July 2019 that the Plaintiff consented to the late delivery of a Defence and threatened a motion in default, it seems appropriate to look at the *status quo* as of, say, the very end of June 2019. It can be summarised as follows:

(i) As of 5 September 2018, the Plaintiff had issued a Notice of Intention to Proceed;

(ii) In response to the foregoing, the Defendant did not bring any application to dismiss the proceedings on delay grounds;

(iii) The Plaintiff then progressed his claim against the Defendant, by means of a motion seeking judgment in default of Appearance, returnable for 4 February 2019;

(iv) The Defendant sought and was granted an adjournment of that motion on the basis an Appearance would be filed on 4 February 2019;

(v) The Defendant did not file an Appearance at that point, or in the almost-3 months thereafter;

(vi) The Defendant subsequently indicated (in his 25 April 2019 letter) that he intended to file an Appearance the following day "*to facilitate*" the issuing by him of a motion seeking to strike out the proceedings on delay grounds;

(vii) The Defendant did not issue the said motion;

(viii) The Appearance which was in fact delivered (26 April 2019) made explicit that: "*the Defendant requires a delivery of a Statement of Claim*";

(ix) A Statement of Claim was, in fact, delivered on 14 May 2019;

(x) By the time the Statement of Claim was served, the Defendant had not issued any application to dismiss the plaintiff's claim on delay grounds;

(xi) Thus, the last exchange between the parties was a 26 April 2019 demand by the Defendant for the Plaintiff to deliver a Statement of claim, which demand was met on 14 May 2019;

(xii) To prepare and deliver a Statement of Claim involves (a) the Plaintiff incurring additional costs and (b) progressing the claim towards trial;

(xiii) Having delivered the Statement of Claim, the Plaintiff 'followed up' by demanding a Defence (letter dated 2 July 2019), which demand was met by silence from the Defendant;

(xiv) By the time this demand for a Defence was made, on 2 July 2019, the Defendant had still not 'made good' on the threat to issue any motion to strike out the proceedings on delay grounds.

'Mixed messages'

83. It seems to me than an objective observer could readily conclude that the Defendant's 25/26 April 2019 'mixed messages' (i.e. to the effect that he *both* intended to dismiss the proceedings on delay grounds *and* required delivery of a statement of claim), had, by the end of June 2019 'crystallised' into clear acquiescence on the part of the Defendant with respect to prior delay (i.e. a Defendant who plainly had *not* brought any motion to dismiss, either *before* or *after* delivery by the Plaintiff of the Statement of Claim, which the Defendant had demanded).

84. The foregoing analysis is fortified by what happened in the succeeding months i.e. bearing in mind (i) the contents of the 2 July 2019 letter and (ii) the fact that that the initial return date for the plaintiff's motion for judgment in default of Defence was 16 March 2020, the Defendant did not issue any motion seeking to dismiss the plaintiff's proceedings in July, August, September, October, November or December 2019. Nor did he do so in January or February 2020. Rather, it was the Plaintiff who continued to 'make the running' (albeit after the delay of 6 months from August 2019 to January 2020, inclusive, which I have commented on previously). I now continue the chronological analysis.

26 February 2020

85. By letter dated 26 February 2020 (referred to in the Defendant's letter, dated 10 March 2020, discussed below) the Plaintiff served the motion seeking judgment in default of Defence, which was returnable for 16 March 2020. By that return date, the Defendant had not issued any application seeking to dismiss these proceedings on delay grounds. This is despite the fact that a full 18 months had elapsed since the delivery, by the plaintiff, of a Notice of Intention to proceed (5 September 2018). It is also appropriate to note that March 2020 was approaching the first anniversary of the Defendant's threat to issue a motion to dismiss the proceedings on delay grounds (which was said to be the sole reason why an Appearance was being filed, i.e to *facilitate* the bringing of a strike out application on delay grounds). Given the Defendant's complete failure to 'follow through' on that threat, even as of March 2020, to the objective observer, it seemed clear that the Defendant had abandoned any such intention, particularly in the context of the mattes I have recently referred to (i.e. the Defendant's demand for a Statement of Claim which was made in April, and responded to by the Plaintiff in May of the previous year).

March 2020 - Pandemic restrictions

86. Few of us will not recall that the Government's response to the Covid – 19 pandemic began to take effect as of March 2010. Thus, I do not believe that the Plaintiff could fairly be accused of delay, from March 2020 onwards, with respect to the *hearing* of the motion for judgment in default of Defence. Turning to the Defendant's position, there is no evidence before this Court which would allow for a finding that anything prevented the Defendant from *issuing* a motion to strike out the proceedings on delay grounds, be that prior, or subsequent, to 10 March 2020. In the manner presently examined, the Defendant did not even attempt to issue any such motion in March 2020 (as opposed to repeating a threat to issue same, in the following manner).

10 March 2020

87. By letter dated 10 March 2020, the Defendant wrote to the Plaintiff in the following terms: -

> *"Yours of the 26th of February 2020 enclosing a Notice of Motion grounded on your affidavit refers.*

It is regrettable that an officer of the court would swear an affidavit which is misleading, and which suppresses a very important letter from the court, being mine of the 25th April 2019 addressed to you.

You will be aware that I filed an Appearance without prejudice to me issuing a notice of motion to have these proceedings struck out.

I attach copy Notice of Motion.

If it is necessary for me to issue this motion and to draft a grounding affidavit, I may well instruct a firm of solicitors and both Junior and Senior Counsel, and if I succeed in obtaining the reliefs sought I will be seeking not only the costs of the motion, but the costs of the proceedings.

If however if (sic) *these proceedings are discontinued I will not be seeking any costs".*

88. Given the above, the following comments seem appropriate. The Defendant was plainly criticising the Plaintiff for prosecuting the case against him in light of the contents of his 25 April 2019 letter. On any objective analysis, I do not regard that criticism as at all fair, particularly when one considers the following: (i) on 25 April 2019 the Defendant make clear that the reason he would file an Appearance on 26 April was to *facilitate* a motion to dismiss the plaintiff's claim on delay grounds; (ii) his 26 April 2019 Appearance made an unconditional demand for a Statement of Claim; (iii) the Defendant did absolutely nothing to progress any such motion, whereas; (iv) the Plaintiff delivered the Statement of Claim he had been called upon to furnish; (v) the Plaintiff followed this up by demanding a Defence, extending time for the delivery of a same, and threatening a motion in default, and; (vi) the Plaintiff issued this motion seeking judgment in default of Defence, against a backdrop of (vi) complete silence from the plaintiff.

89. Furthermore, even as of 10 March 2020, the Defendant's letter makes clear that he had not even prepared an affidavit to ground any intended motion to dismiss the proceedings. It also seems entirely fair to say that nothing in the Defendant's 10 March 2020 letter even hints at any impediment to preparing the necessary grounding affidavit and issuing the motion in terms of the draft which was enclosed with the Defendant's 10 March 2020 letter. However, no such motion was issued. I now turn to what happened in the weeks and months thereafter.

March to December 2020

90. By reason of Covid-19 restrictions, the Plaintiff cannot be held responsible for any delay in respect of the *hearing* of his motion which, it will be recalled, was initially returnable 16 March 2020 (and still has not been heard). Having sent the Plaintiff a draft motion under cover of his 10 March 2020 letter, the Defendant appears to have done nothing whatsoever for the remainder of the year. The state of the evidence before this Court in the present application is that the Defendant did not even write a single letter to the Plaintiff after his 10 March 2020 correspondence (and very obviously did not write to complain of anything said to create a difficulty with *issuing* the motion to dismiss on delay grounds). Nor does he aver, in the context of the present motion, that there were any such difficulties. Rather, there was simply silence on his part, and no motion was issued by the Defendant in 2020. To conclude the chronology, I now turn to events of 2021.

8 January 2021

91. As of 8 January 2021, the Defendant issued the present motion out of the Central Office. The initial return date given for the motion was 19 April 2021. I do not believe it would be fair to criticise

the Defendant for any delay with respect to the *hearing* of his motion, but the following seems entirely fair with respect to the delay in *issuing* it.

- By the time the Defendant issued the present motion (on 8 January 2021) just in excess of 28 months had elapsed since the plaintiff's Notice of Intention to proceed (5 September 2018);
- None of this delay can be attributed to the plaintiff;
- None of this delay on his part is said by the Defendant to have been caused by any extraneous issue, or difficulty;
- The Defendant's letter of 25 April 2019 made explicit that the only reason he was going to file an Appearance on 26 April 2019 was to *facilitate* the bringing of a motion to dismiss on delay grounds;
- Despite this, the Defendant allowed a period of over 20 months to elapse between this first threat to issue a motion (25 April 2019) and eventually issuing same (on 8 January 2021);
- Nearly a year later, the Defendant made a second threat to issue the motion (10 March 2020), following which he allowed a period of almost 10 months to elapse before issuing it.
- Meanwhile, from 5 September 2018, it was the Plaintiff who was 'making the running' in terms of active steps to progress the case, in the manner examined in this judgment.

Delay summarised

92. Given my analysis of the evidence, I think it would be useful to summarise the various periods, as follows: -

(i) **18 August 2005** (assault) **to 18 August 2007** (expiry of statute of limitations).
No fault can be attributed to the Plaintiff in respect of delay during this 2-year period;

(ii) **18 August 2007** (expiry of statute) **to 18 February 2011** (Plaintiff instructs present solicitors).

I do not see how the plaintiff, who is not a lawyer, can fairly be expected to know precisely when the statute of limitations did or did not expire and, thus, I do not believe he can fairly be blamed for the *entire* of the period of delay commencing 18 August 2007 (expiry of the statute) and ending 18 February 2011 (when the Plaintiff instructed his new, i.e. present, solicitor, Mr. O'Leary). It will be recalled that the Defendant now accepts that (i) he was engaged by the Plaintiff and (ii) that the personal injuries proceedings were not issued within the statute of limitations. I acknowledge entirely that he has made no admission of liability but there is no evidence as to when, or if, the Defendant (who acknowledges that the Plaintiff engaged him) wrote to the Plaintiff at any stage between 18 August 2007 and 18 February 2011. In the manner examined earlier in this decision, I am not for a moment absolving the Plaintiff of responsibility for the delay during all of this period. On the contrary, there self-evidently came a point where the plaintiff's dissatisfaction prompted him to engage new solicitors and, it seems to me, entirely fair to suggest that this point could and should have been earlier. In the

manner examined, the Plaintiff is responsible for delay which I estimate as being 30 months of pre-commencement delay (i.e. August 2008 to January 2011, inclusive);

(iii) February 2011 to September 2011, inclusive

Efforts by a plaintiff, through his new solicitor, to persuade his former solicitor to furnish his file could hardly be said to be unreasonable. These efforts were clearly made by means of correspondence send to the Defendant on 11 March 2011, 4 April 2011 and on 12 April 2011. It is not unreasonable to expect that some time (certainly weeks and perhaps months) might well be involved in such a request being addressed. In other words, even some months after such a request, one might reasonably hope that it would be dealt with. Obviously, a 'tipping point' comes where the reasonable hope of a response becomes so dim that the party making the request the party is obliged to 'press ahead' regardless. The passage of time from the initial request until all reasonable hope of compliance faded to nothing, constitutes delay for which the Defendant can fairly be held responsible. For the reasons explained, responsibility for 8 months of pre-commencement delay (i.e. from February 2011 to September 2011, inclusive) rests with the Defendant, in my view.

(iv) October 2011 to March 2013, inclusive

In my view, the Plaintiff is responsible for this pre–commencement delay of 18 months.

(v) April 2013 to July 2014.

In the manner examined, I do not believe the Plaintiff can fairly be accused of delay during this period of 16 months which is 'book-ended' by (i) work done prior to the plaintiff's solicitors calling on the Defendant to admit liability (3 May 2013 letter) and (ii) the delivery by Moran's Hotel of a Personal Injuries Defence. In the manner explained, the Plaintiff took meaningful steps to progress matters, including investigations with PIAB; issuing proceedings against the Hotel; issuing a 'protective writ' against the Defendant; pressing the Hotel up to and including the delivery of a Personal Injuries Defence (to 'bottom out' the statute of limitations-defence issue); and serving the Defendant. This work was both reasonable and necessary, given the complete silence, throughout this period, on the part of the Defendant.

(vi) September 2014 to January 2015, inclusive

It seems to me that the Plaintiff can fairly be accused of five months post-commencement delay.

(vii) February 2015 to May 2015

I do not see how the Plaintiff can fairly be accused of delay during this period, which included correspondence from the plaintiff's solicitors, of 16 February 2015 and 19 March 2015, pressing for an Appearance and extending time for the delivery of same. However, it also seems fair to say that the Defendant was 'in default' throughout this period and delayed as regards the delivery of an Appearance (which he subsequently did file, 4 years later, i.e. on 26 April 2019). This represents a period of post - commencement delay by the Defendant of some 4 months.

(viii) 1 May 2015 to 5 September 2018.

This represents 3 years and 4 months of post – commencement delay by the plaintiff.

(ix) September 2018 to July 2019, inclusive

I am satisfied there was no delay on the part of the Plaintiff during this 11 month period, which commenced with the delivery by the Plaintiff of a 5 September 2018 Notice of Intention to Proceed, and ended with the expiry of the 21–day period specified in the 2 July 2019 'warning letter' from the plaintiff's solicitors (demanding delivery of a Defence, extending time for the delivery of same, and threatening a motion). It seems equally fair to say that the Defendant was 'in default' throughout the entire of this period. The Defendant's default was initially with respect to an Appearance (which caused the Plaintiff to issue a motion, which the Defendant asked to be adjourned, and which was in fact adjourned) and subsequently, the Defendant was in default as regards delivering a Defence.

(x) August 2019 to January 2020 inclusive

In my view this represents a period of 6 months of post–commencement delay by the plaintiff. Whilst the Plaintiff did not prosecute his claim with due expedition during this period, the Defendant remained 'in default' as regards the delivery of a Defence throughout.

(xi) February 2020 onwards

There was no delay on the part of the Plaintiff during this period, having regard to the work which was obviously required to issue a motion seeking judgment in default of Defence, which motion in fact issued on 21 February 2020 (and remains to be heard). As discussed, the Plaintiff cannot be held responsible for any delay with respect to the *hearing* of same. By contrast, the Defendant was in default (as regards delivery of a Defence) throughout this period.

The Plaintiff's post-commencement delay

93. Employing the same roman numerals as above, it seems to me that the Plaintiff can fairly be said to be responsible for the following post–commencement delay:- (vi) 5 months; (viii) 3 years and 4 months; and (x) 6 months, giving a cumulative total of 4 years and 3 months, or **51 months**.

The Defendant's post-commencement delay

94. In addition to a period of 4 months (see (vii) above) the Defendant delayed 28 months (i.e. from delivery of the plaintiff's 5 September 2018 Notice of Intention to Proceed) until the present motion was issued (on 8 January 2021). This represents cumulative post-commencement delay of **32 months**.

Decision

95. Having looked closely at the evidence, it is appropriate to quote from p. 475 of the decision of Hamilton C.J. in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459:

> *"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".

Inordinate delay

96. Although this Court is conscious of various periods of time which, in different cases, were found to be inordinate (e.g. eight years in *Collins v. Dublin Bus* [1999] IESC 69; five years in *O'Connor v. John Player & Sons Ltd* [2004] IEHC 99; and three years in *McAndrew v. Egan* [2017] IEHC 345), comparators are of limited assistance. This is because, as the Court of Appeal made clear in its 28 October 2022 decision in *Cave Projects Limited v. Kelly & Ors* [2022] IECA 245 (Collins J, with Ni Raifeartaigh and Pilkington JJ in agreement):-

"Each case will turn on its own facts and circumstances: "[e]very case is different. Factual resemblances are only of limited value": per Geoghegan J (Murray CJ, Denham, Hardiman and Fennelly JJ agreeing) in McBrearty v North Western Health Board [2010] IESC 27, at page 36. A period of delay that is considered inordinate in one case may not be regarded as such in another. Factors which excuse delay in one case may be ineffective in another. For that reason, the citation of previous decisions for the purpose of demonstrating that a particular period of delay was (or was not) found to be inordinate and/or inexcusable in another case involving other circumstances will rarely be helpful. Similarly, a court's assessment of the balance of justice in one case will rarely provide a useful blueprint for any other." (para. 36)

97. On behalf of the plaintiff, it is submitted that his delay is neither inordinate nor inexcusable. The only concession made is that:-

> *"The Plaintiff accepts that there was a lateness in instituting proceedings. However, that is where the delay on the part of the Plaintiff ends. The Plaintiff complied with his statutory requirement to issue proceedings within six years from the accrual of his cause of action."* (para. 17 of the plaintiff's written submissions)

98. For the reasons set out earlier in this judgment, I cannot agree that the plaintiff's delay ended with the institution of proceedings. The facts which emerge from an analysis of the evidence paint an entirely different picture. It is beyond doubt that the Plaintiff made a 'late start', but it is equally clear that, having done so, the Plaintiff did not progress his claim with anything like reasonable expedition.

99. Earlier in this judgment, I expressed the view that the period of 3 years and 4 months of post - commencement delay by the Plaintiff is inordinate delay. This is all the more true, if one looks at the cumulative delay of 51 months.

100. The period commencing on 18 August 2007 (i.e. the expiry of statute of limitations with respect to the personal injuries claim and the accrual of the plaintiff's cause of action against the Defendant) is also of relevance in terms of assessing whether post-commencement delay was inordinate (see Hogan J. in *Tanner v. O'Donovan & Ors* [2015] IECA 24). In my view, it undoubtedly was. I now turn to the question of whether the plaintiff's inordinate delay was or was not excusable.

Inexcusable delay

101. It seems to me that, for this court to address the question of whether the plaintiff's delay was inexcusable, it is first necessary to see what is offered by way of an excuse. The Plaintiff has chosen not to swear any affidavit. At para. 4 of the affidavit sworn, on 28 June 2021, by his solicitor, Mr. Con O'Leary makes the following averment:

> *"I say that the Plaintiff is opposing the motion on the grounds that there has been no inordinate or inexcusable delay in the prosecution of this matter on his part. Any delay that has occurred has been as a result of the Defendant's own actions in delaying the entry of an Appearance and delivering a Defence."*

102. Mr. O'Leary proceeds in his affidavit to refer to (i) the 3 May 2013 letter calling upon the Defendant to admit liability, to which the Defendant did not reply; (ii) the 16 December 2013 letter informing the Defendant that a 'protective writ' had been issued against him; (iii) the issuing on 17 December 2013 of proceedings against Moran's Hotel, which proceedings were served on 26 January 2014; (iv) the Defence delivered by Moran's Hotel on 30 July 2014 pleading the statute of limitations; (v) the service on 17 July 2014 of the plenary summons upon the Defendant; (vi) the letters of 16 February 2015 and 19 March 2015 consenting to an extension of time for the entry of an Appearance; and (vii) the delivery of a notice of intention to proceed on 5 September 2018, and events thereafter. I have examined all the foregoing earlier in this decision. What is entirely lacking from Mr. O'Leary's affidavit is any *reason* for the complete inaction on the part of the Plaintiff for the periods of post-commencement delay which I have highlighted in this judgment, including, in particular, the extended period of three years and four months delay (brought to an end with the service by the plaintiff's solicitors of a Notice of Intention to proceed on 5 September 2018).

103. I take full account of the fact that, throughout this period, the Defendant was 'in default' with respect to the entry of an Appearance. However, it will be recalled from my previous analysis of the relevant facts, that the plaintiff's solicitors made very clear what action would be taken if no Appearance was filed by the Defendant upon the expiry of 21 days from the 19 March, 2015. It will be recalled that the letter from Con O'Leary & Co. solicitors which were sent to the Defendant made explicit that "*Failing hearing from you within …"* the 21 days specified in that letter "*… we will have no option but to proceed by way of Motion for Judgment in default of Appearance without further notice to you"*. No reason whatsoever has been put forward by or on behalf of the Plaintiff to explain why the Plaintiff did not do what his solicitors said he would do. There was no impediment to issuing the motion threatened. The fact that the Defendant remained 'in default' with respect to the delivery of an Appearance cannot, in my view, explain or excuse the plaintiff's failure to issue the very motion which it made clear that it would issue if the Defendant remained in default.

104. The analysis which I conducted earlier in this judgment gives appropriate 'credit' to the Plaintiff and his solicitors for the time necessary to 'follow through' on the threat made in the 19 March 2015 letter (whether by way of a further and final demand for an Appearance, or with respect to the work required to prepare and issue the motion threatened). However, after giving this credit, I regard the plaintiff's inordinate delay as also being inexcusable.

105. The reality that there was no impediment to issuing the motion threatened on 19 March 2015 is perfectly clear from the fact that the motion for judgment in default of Appearance, which the Plaintiff eventually issued on 13 November 2018, relied upon only two items of correspondence, the last-in-time being the 19 March 2015 letter threatening the motion (as well as the earlier 16 February 2015 correspondence which had called for an Appearance).

106. Notwithstanding submissions on the plaintiff's behalf, I cannot accept that the fact the Plaintiff issued the present proceedings within the statute of limitations period *excuses* his inordinate delay thereafter.

107. Among other submissions made on behalf of the Plaintiff is that "*the Defendant's inactions left the Plaintiff with no room to advance his case further …"* (see para. 25 of the plaintiff's written submissions). With respect, this is plainly not so. The RSC clearly provided a method by which the Plaintiff could *advance* his case (i.e. by issuing a motion for judgment in default of Appearance, as the Plaintiff was fully aware). Indeed, the Plaintiff took the first appropriate steps, in February and March 2015, by calling for an Appearance, extending time and threatening a motion. The point is that, inexplicably - and, therefore, inexcusably - the Plaintiff then fell silent for a period which, after all reasonable allowances, I have estimated as being 3 years and 4 months.

108. At para. 25 of the plaintiff's written submissions there is an acceptance of: *"… guilt in not seeking to issue a motion for judgment in default of Appearance sooner*" which is immediately followed by the submission that *"However, as the history of these proceedings demonstrates, this was unlikely to elicit a response from the Defendant that was to progress matters…".* Again, with respect, I must reject the foregoing submission, because it ignores the ability on the part of the Plaintiff to secure an *Order* from this court which would progress matters. The Plaintiff knew it could seek such an Order as of 19 March 2015, but 'slept' on his entitlement to seek any order from the court until he 'awoke' well over three years later and served a Notice of Intention to Proceed, on 5 September 2018. In these circumstances I cannot accept that, what the Plaintiff characterises as

the Defendant's "*acquiescence"* and "*culpable responsibility"* with respect to his failure to deliver an Appearance, *caused* this three year and four month delay, on the part of the plaintiff. Nor does it explain this delay.

109. Although I have concentrated, for the purposes of the analysis, on the period of three years and four months, the cumulative total of the plaintiff's post–commencement delay is some 51 months (i.e. 4 years and 3 months). None of this is explained and all of it is, therefore, inexcusable. It will be recalled that, even after the Plaintiff took active steps to progress his claim, in the wake of his 3 year and 4 month delay, there was a further hiatus of six months (i.e. August 2019 to January 2020, inclusive). I am not suggesting that a six-month period is, of itself, inordinate but, viewed against the backdrop of both pre-commencement delay by the plaintiff, and inordinate post-commencement delay, no reason or excuse for this six month delay is proffered by or on behalf of the Plaintiff and, thus, it also comprises part of total delay which is as inexcusable, as it is inordinate. With respect to that particular period of six months, Mr. O'Leary makes only following averments (see paras. 18 and 19 of his 28 June 2021 affidavit):

> "*18. I say that a letter consenting to the late delivery of a Defence was sent to the Defendant on the 2nd July 2019. No Defence was delivered. I beg to refer to a true copy of my said letter…*
>
> *19. I say that a Motion for Judgement in Default of Defence was issued returnable for the 16th March 2020."*

110. It seems fair to say that the foregoing averments 'gloss over' the reality that the 2 July 2019 letter made clear that a motion would issue unless a Defence was delivered within 21 days (i.e. by 23 July 2019) whereas the Plaintiff did not issue his motion seeking judgment in default of defence until 21 February 2020. No explanation or excuse is offered in relation to the six months delay. The fact that the Plaintiff made a 'late start' is also relevant in the analysis as to whether his post-commencement delay (which I have already found to be inordinate) is, or is not, excusable and for the reasons set out in this decision, I am satisfied that it is, indeed, inexcusable. I now turn to an examination of the balance of justice.

Balance of Justice

111. Having established to this court's satisfaction that the plaintiff's delay is both inordinate and inexcusable, the onus is on the Defendant to establish the third limp of *Primor,* i.e. that the balance of justice weighs in favour of dismissing the claim. From paras. 15 to 18, inclusive, of his 10 December 2020 affidavit, the Defendant sets out the reasons why, in his view, the balance of justice favours the dismissal of the plaintiff's claim. These averments begin as follows: -

> *"15. In the first instance, the existence of the proceedings has caused considerable reputational damage to this firm. In circumstances where the firm is a small one, it is difficult to overstate the impact that litigation of this kind can have on the firm's viability. This concern is only heightened by the economic uncertainty arising from Covid–19. I have suffered both actual and presumptive prejudice in this regard".*

112. It is fair to say that no specifics whatsoever are provided in relation to what is described as "*considerable reputational damage*" to the Defendant's firm. For example, the Defendant does not claim to have lost any client, or any opportunity, by virtue of the existence of the present proceedings, or the delay attributable to the Plaintiff as regards their prosecution. Still less is there

any quantification of any such alleged loss. Similarly, although the averment is made that "*it is difficult to overstate the impact that litigation of this kind can have on the firm's viability"*, no specifics whatsoever are provided as to the *actual* impact which *this* case (as opposed to "*litigation of this kind*") has, in fact, had on the viability of the Defendant's firm. It is also a statement of the obvious that "*economic uncertainty arising from Covid–19"* simply cannot be 'laid at the door' of the plaintiff, irrespective of whether the Defendant's firm is big or small. Finally, although it is averred that "*both actual and presumptive prejudice"* has been suffered by the Defendant, no specifics whatsoever are provided in relation to what is said to be the "*actual*" prejudice.

113. The authorities make clear that damage to a Defendant's reputation and business *can* amount to prejudice. However, it does not seem to me that the Defendant's averments at para. 15 of his affidavit support a finding by this Court of *actual* prejudice. Rather, the nature of the prejudice which emerges from the Defendant's averments at para. 15 is such prejudice as may reasonably be assumed by reason of having the plaintiff's claim 'hanging over' the Defendant. With respect to this aspect of prejudice, it seems appropriate to quote from para. 36 (p. 31) of the Court of Appeal's recent decision in *Cave:* -

> "*Prejudice is not, however, confined to "fair trial" prejudice. It may include damage to a Defendant's reputation and business: see, for example, the observations of Barniville J. in Gibbons v N6 Construction Limited, at para 98. It is, perhaps, an issue that should be approached with a degree of caution, lest it appear that the law confers on certain categories of Defendant – and in particular professional Defendants – some form of privileged status. In any event it may be observed that in both of the authorities referred to by Barniville J – the ex tempore judgment of Noonan J (Edwards and Costello JJ. agreeing) in this Court in McGuinness v Wilkie and Flanagan Solicitors [2020] IECA 111 and the decision of the High Court (MacGrath J) in Myrmidon CMBS (Propco) Limited v Joy Clothing Limited [2020] IEHC 246, there was significant and unexplained delay and significant "fair trial" prejudice. In McGuinness v Wilkie and Flanagan Solicitors, Noonan J considered that the case "was very close to, if not actually within, the O'Domhnaill v Merrick strand of jurisprudence, where a fair trial is manifestly no longer possible" and noted that it was "uncontroverted that very significant prejudice had been and will be suffered" by the Defendant firm as a result of the delays (at para 23). That prejudice included the fact that an important witness had died at a time when, if the claim had been commenced and prosecuted "with any degree of diligence", it should have been long since concluded (para 24). The impact of the delays on the business of the Defendants had also manifested itself in a concrete and quantifiable way, in that the cost of its professional indemnity insurance had increased significantly on an annual basis (the impact of unresolved litigation on a corporate Defendant's financial accounts provides another example of how delay may produce concrete adverse impacts beyond any " fair trial" prejudice: see the observations of Fennelly J in Anglo-Irish Beef Processors Limited v Montgomery, at page 520). The facts in Myrmidon CMBS (Propco) Limited v Joy Clothing Limited were perhaps not as stark but MacGrath J. was nonetheless satisfied that "at minimum" there was likely to be general prejudice to the Defendants as regards their ability to defend the claim, particularly in light of the fact that it was likely to be some further time before the proceedings came on for hearing (at para 50). While the*

"oppressiveness" of a claim hanging over the Defendants was identified by the judge as an aspect of further general prejudice to them, it is not evident what weight he attached to it nor is there any suggestion in the judgment that, if that factor stood alone, it could have justified the dismissal of the claim".

114. With respect to certain of the issues discussed by Collins J. in *Cave*, there is no question of any important witness having died as a result of the plaintiff's delay. Nor has the impact of the plaintiff's delay on the business of the Defendant's firm been explained in any concrete or quantifiable way. Furthermore, there is no evidence before this Court that the Defendant's professional indemnity insurance has increased at all.

115. Taking all the foregoing into consideration, the very 'height' of what emerges from the averments at para. 15 of the Defendant's affidavit is *presumed* prejudice of a *general* sort arising from these proceedings 'hanging over' the Defendant. In my view, what the Defendant's averments disclose is prejudice which is marginal in nature, as opposed to being significant. By contrast, if the Defendant had lost an actual or potential client, or clients, as a result of the delayed proceedings 'hanging over' him, or had been met with increased annual professional insurance costs, and could point to such specific and material loss, the prejudice complained of might well be actual and significant, as opposed to presumed and marginal.

116. It also seems to me, in the context of a balance of justice analysis, that the Court should not ignore the Defendant's role in prolonging the prejudice of which he complains. By that I mean, the Defendant delayed for 28 months i.e., from 5 September 2018 (when the Plaintiff served a Notice of Intention to proceed), until 8 January 2021 (when the Defendant eventually issued a motion to dismiss on delay grounds). Thus, and leaving aside the reality that it was also open to the Defendant to have issued such a motion well *before* 5 September 2018 (in circumstances where the 2nd anniversary of the service upon the Defendant of the plenary summons, came and went, on 17 July 2016), it seems entirely fair to say that the Defendant contributed in a very material way to the fact that these proceedings continued to 'hang over' him.

117. On the basis that litigation is a 'two-way process', it is also appropriate to note that the lengthy period of 3 years and 4 months of post–commencement delay was brought to an end, *not* by any action taken by the Defendant, but by the delivery, on 5 September 2018, of the plaintiff's Notice of Intention to proceed. In other words, it was the Plaintiff who brought his own delay to an end, rather than the Defendant 'taking the initiative' by way of a motion to dismiss on delay grounds (even though, at all material times, the Defendant was aware that it was open to him to issue such a motion)

118. Before leaving the averments made at para. 15 of the Defendant's affidavit, it also seems appropriate to say that there is no connection whatsoever between the type of prejudice contended for at para. 15 and the question of a fair trial. In other words, the prejudice which emerges from the averments at para. 15 relates to presumed, not actual, reputational damage as a result of proceedings 'hanging over' a professional and their business (as opposed to, say, the non-availability of a vital witness at a future trial). This brings me to para. 16 of the Defendant's affidavit where the question of a fair trial is raised in the following terms: -

"Secondly, and more importantly, if this action ever makes it to trial, my prospects of being able to defend it have been severely damaged by the plaintiff's delay. My capacity to recall

accurately events dating back to 2005 is very limited. It is clear from the Statement of Claim that the plaintiff's case will rely to a large degree on his memory of events rather than documentary evidence. I am 60 years old, and in those circumstances, I believe there is no prospect of me obtaining a fair trial if I am asked to try to recollect with accuracy the precise details of my conversations with the Plaintiff so many years ago".

119. In my view, the foregoing averments are made in the most general of terms, as opposed to addressing specific issues in the particular proceedings brought by the plaintiff. For example, a key issue in the proceedings is whether the Plaintiff engaged the Defendant as solicitor. One could be forgiven from taking away from para. 16 - at least at 'first blush' - the impression that the Defendant cannot recall whether the Plaintiff engaged him. However, it is clear that the Defendant does recall that the Plaintiff engaged him as solicitor, because this was acknowledged at the outset of the hearing before me. When doing so, the Defendant's counsel reserved his client's position with respect to any dispute which might arise in the future as to the extent of that engagement. As matters stand, the contours of any potential dispute on that issue are entirely unknown, given that no Defence has yet been delivered. Why the Defendant chose not to aver, in para. 16, that he did recall the Plaintiff engaging him as solicitor is not explained. I make no criticism of this, but it is also fair to say that nowhere in para. 16 does the Defendant aver, for instance, that (i) he is unclear as to why he was engaged by the plaintiff; or (ii) that he made no notes whatsoever in relation to the fact of that engagement; or (iii) that he did not record in writing any of the instructions given in the context of that engagement; or (iv) that he did not confirm in writing the basis upon which professional fees would be charged in respect of that engagement; or that (v) he did not create any file concerning that engagement; or that (vi) no correspondence or documentation whatsoever was generated, as regards that engagement; or that (vii) any documents which did exist in respect of the engagement, have since been lost or destroyed. It is also appropriate to recall when the Defendant was first put 'on notice' of (i) the fact that new solicitors wanted him to provide the plaintiff's file (i.e. 11 March, 4 April and 12 April 2011 letters); (ii) the nature of the plaintiff's claim (i.e. 3 May 2013 letter); and (iii) the fact that a 'protective writ' had been issued (i.e. 16 December 3013 letter). It seems fair to say that each such notice provided the Defendant with an opportunity to make such searches and investigation, in particular as to the nature of his engagement by the plaintiff, which he / his Insurer deemed appropriate (bearing in mind the fact that the Defendant's Insurer was notified when the plaintiff's claim "*first arose*"). Nowhere in para. 16 does the Defendant refer to such investigations as were undertaken by the Defendant/his Insurer upon receipt of the aforesaid series of communication, nor is anything said in relation to the documentation or information discovered in response to investigations. Nor does the Defendant aver that there is any specific evidential deficit.

120. It does not seem to me that the very general averment that the Defendant's "*capacity to recall accurately events dating back to 2005 is very limited*" addresses the foregoing. This is not a situation where the Defendant will be called upon to recall wide-ranging events dating from 2005. The central question, insofar as the Defendant is concerned, is a very 'net' one. It concerns whether the Plaintiff engaged the Defendant to bring proceedings in respect of the 2005 assault, or not. It will be recalled that, without admission of liability by the Defendant, his counsel informed the court that the Defendant does not dispute that personal injuries proceedings were *not* issued. Despite the absence

of any clarity on the point in the Defendant's affidavit, it is no longer in dispute that the Defendant *was* engaged as a solicitor, and nothing averred by the Defendant at para. 16 provides a basis for this Court to conclude, for the purposes of the present motion, that a trial judge would not have available to her, or him, evidence upon which that court could fairly decide on the nature and extent of the engagement. Both of the key witnesses are available (i.e., the Plaintiff and the Defendant) and, in addition to the observations which I have made as regards the potential availability of contemporaneous documents, the Defendant has not averred that he has no recollection of the nature, extent or terms of his engagement by the plaintiff, be that with reference to documentation or otherwise.

121. Given that, in relative terms, the Defendant is far from an old man, I do not understand how reference by the Defendant to his age (now 62 years) adds any weight to the alleged prejudice. I accept, of course, the general proposition that the passage of time is likely to degrade memories, and it is certainly the case that many years have passed since the Plaintiff engaged the Defendant. However, it seems to me that the net issue of the nature of the plaintiff's engagement of the Defendant, and the role of witnesses in the fair determination of that issue, can be contrasted with, say, the role of witnesses in relation to a road traffic accident at the same remove of years.

122. In the former, the issue is a very net one and, not only does the Defendant not aver that he cannot recall accurately the nature or terms of the engagement in question, he does not aver that documentation to assist him in that regard never existed or is unavailable, bearing in mind that discovery has not yet been made in this case. Moreover, the Defendant is a member of a regulated profession, and it seems uncontroversial to say that solicitors would typically make a written record of the instructions they are given and the basis upon which they charge fees in respect of the relevant engagement.

123. By contrast, an accident which occurred years earlier involves witnesses as to fact, each of whom will have seen events from a different physical perspective or vantage point and even the 'simplest' or most innocuous of road traffic accidents can involve a number of 'moving parts', both metaphorically and physically. Plainly in a road traffic accident scenario (and unlike a professional relationship) there will be no accident-related documents to refresh memories as to what was or was not witnessed.

124. The passage of time in the latter scenario may well result in a type of prejudice which simply has not been established in the present case (where the role of witness evidence, on the question of the terms pursuant to which the Defendant was engaged by the plaintiff, is materially different, being far more net and an issue where the two essential witnesses are available and this court cannot conclude that relevant documents do not exist or are unavailable).

125. In *Comcast International Holdings Ltd. v. Minister for Public Enterprise* [2012] IESC 50 McKechnie J cited (at para. 34) from *Dowd v. Kerry County Council [1970] I.R. 27* (O'Dálaigh C.J., with whom Walsh and Budd JJ. agreed) in which the then Chief Justice made the following general observations:

> *"First, in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution. There is the provision of Order 27, r. 1, and the provision of Order 108, r. 11, where there has been no proceeding for two years. The adage about sleeping dogs*

may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a Defendant in the hope that he will "get by" without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at" [emphasis added].

126. McKechnie J went on to say the following in Comcast:

"36. Whilst there can be no doubt but that the moving party has the greater obligation of expedition overall, nonetheless ***the Defendant's interaction or lack of it, as the case may be, with the delay of which he later complains, whether active or purely inactive, to use such phrase, may rightfully attract condemnation*** *by virtue of many other circumstances such as: the identity and character of the particular Defendant; the position which he holds; whether that be public or private; the standing and accountability of that position, whether it be representative of the public, of an institution which it serves or otherwise; and the nature of the issues which he is called upon to answer. Given the gravity of the charges levelled against the State Defendants in this case, I am astonished that they have not sought, with all due alacrity, an immediate opportunity to answer such charges and to vindicate their repeated assertion as to the integrity of such a hugely significant public process.* ***Whilst I readily accept that what in truth is the plaintiffs' delay should not rest on the Defendant's table, nonetheless it must be remembered that the constitutional guarantee of fair procedures and the right to a fair trial – both of which are invariably relied upon in motions to dismiss for either want of prosecution or in the interests of justice – are at the disposal of a Defendant in a host of varying circumstances, and relatively speaking from a very early stage of the proceedings. See O 27 R 1, dealing with a failure to deliver a Statement of Claim, O 36 R 12, regarding the absence of a Notice of Trial, and O 122 R 11, permitting a dismiss application for want of prosecution, of the Rules.*** *Those rules, coupled with many statutory provisions, as well as judicial precedent, are all designed to further, in an administrative, practical and operational sense, the Defendant's rights, every bit as much as the plaintiff's rights. Murphy J. declares so in Hogan and Others v. Jones and Others [1994] 1 I.L.R.M. 512 ("Hogan"), where at page 520 the learned judge states:*

> *"Insofar as the Defendants assert a constitutional right to have the litigation conducted in accordance with fair procedures, it seems to me that they and all litigants must view the Rules of the Superior Courts and the relevant legislation (including in particular the statute of limitations) as part of the structure designed to give effect to the constitutional right. The constitutional right to fair procedures is protected not only by the power of the court to dismiss a case for want of prosecution but also by the other interlocutory steps or procedures which protect either party from undue delay by the other".*

I respectfully agree with what the learned trial judge has stated."

127. In light of the foregoing, it will be recalled that (i) 17 July 2016 was the second anniversary of service upon the Defendant of the plenary summons and, despite this being during an extended

period of inactivity by the plaintiff, who had called for an Appearance and threatened a motion but failed to bring same, (ii) the Defendant took no active steps under the RSC of the sort referred to by McKechnie J.

128. It will further be recalled that, prior to 5 September 2018, the last correspondence was the plaintiff's 19 March 2015 letter extending time (by 21 days) for the delivery of an Appearance. Thus, the second anniversary of *that* letter was 19 March 2017, and the Defendant very obviously did not take any steps to seek to dismiss these proceedings on delay ground as of, say, April 2017.

129. The foregoing seems to me to be of significance because, when the Defendant did eventually write what appears to have been the very first letter sent by his office (dated 25 April 2019), he made specific reference, inter alia, to ". . . *the issuing by me of a notice of motion seeking an* ***order pursuant to O. 122, r. 11*** *of the Rules of the Superior Courts…*" (emphasis added). O. 122, r. 11 provides that where there has been no proceeding for two years, a Defendant may apply to the court to dismiss the claim for want of prosecution and, on the hearing of such an application, the court may order the matter to be dismissed or may make such other order as to the court may seem just. Thus, by virtue of his professional qualification, this is a Defendant who had a particular insight into the fact that he could apply to dismiss the present proceedings in the event of silence from the Plaintiff for a two-year period or more or, in the alternative, pursuant to this court's inherent jurisdiction. Despite this insight, the Defendant did not issue the application which at all material times (in, particular, from August 2016 to December 2020, inclusive) he knew that it was open to him to issue.

130. I certainly did not take this factor into consideration when analysing the plaintiff's delay which, without doubt, was both inordinate and inexcusable. However, it does seem to me to be a factor which can properly be taken into consideration when looking at the balance of justice. By that I mean, even if one were to give no weight whatsoever to the fact that the Defendant decided not to bring a motion of the present type at any time between, say, April 2017 and August 2018, inclusive, (a period of 17 months) it seems to me that, upon receipt of the plaintiff's 5 September 2018 Notice of Intention to Proceed, the Defendant can fairly be criticised for not promptly issuing a motion of the present type and for, instead, delaying a full 28 months before so doing. This is all the more so given that (i) the Defendant's 25 April 2019 letter made explicit his intention to bring such a motion and stated that he was filing an Appearance to *facilitate* this, yet (ii) having failed to bring that motion, the Defendant threatened the *same* motion once more on 10 March 2020 and, (iii) again failed to bring it (until the following January).

131. This 28-month delay, and its consequences, are the Defendant's responsibility and it seems to me that fairness requires that the Defendant's averments, including at para. 16, also be seen in that context. Taken at their height, I do not believe that the Defendant's averments at para. 16 go further than indicating the possibility of moderate general prejudice (i.e., not specific or actual) but certainly nothing which suggests that a fair trial is not, or may no longer be, possible. Indeed, the court does not have an evidential basis for a finding that any degrading of witness memories could not be addressed by the availability of records.

132. At para. 17 of his affidavit, the Defendant makes the following averments with respect to alleged prejudice: -

"17. Thirdly, in my defence of these proceedings, if not dismissed by this Honourable Court for want of prosecution, it will be necessary for me to call evidence from various reputable witnesses, unknown to me, to establish whether or not the Plaintiff had an action in negligence against Moran's Hotel Ireland Limited in the first instance. If Moran's Hotel Ireland Limited would have succeeded in a defence against the plaintiff's action, I could have no exposure in damages to the plaintiff. The passage of time since the events which gave rise to the personal injuries claim is so extensive there is no realistic possibility of me being able to call such evidence. I have been deprived of the opportunity to ascertain the identities of the persons present when the Plaintiff allegedly suffered his injuries, and to seek out and take statements from those persons".

133. Although he did not confirm same on affidavit, the Defendant now acknowledges, *via* his counsel, that he was in fact engaged by the plaintiff. He also acknowledges, without any acceptance of liability, that personal injuries proceedings were not issued on the plaintiff's behalf within two years of the assault of which the Plaintiff was a victim in the Hotel in question. In relation to para. 17, the Defendant makes no averments as to what efforts, at any point, he has made to identify relevant witnesses as regards the events in the Hotel in 2005. He does not, for example, aver that he made no such efforts after being engaged by the Plaintiff (and in the manner explained earlier, the Defendant's acknowledgment, through his counsel, of the engagement, certainly did not come with any suggestion that the Plaintiff engaged him *after* the expiry of the statute of limitations period). The Defendant does not aver that he made no relevant enquiries between the point at which the Plaintiff engaged him, and the point at which the statute of limitations expired. The Defendant does not aver that he made no enquiries with respect to witnesses thereafter, and it will be recalled that the Defendant has been 'on notice' of the plaintiff's claim since 3 May 2013 when the plaintiff's solicitors called upon him to admit liability (as well as having been repeatedly asked, in March/April 2011, by a 'new' firm of solicitors to furnish the plaintiff's file to them). The Defendant does not aver that, once he notified his Insurers, no investigations as to potential witnesses were made (bearing in mind the positive averment by the Defendant that he notified his Insurers of the claim when it "*first arose*"). In addition to the foregoing, the Defendant has never taken issue with the statement, made in the 3 May 2013 letter from the plaintiff's solicitor, that the perpetrator of the assault (named in the said letter) "*…was subsequently prosecuted and sentenced for this assault*". In light of the foregoing, the Defendant makes no averment as to what, if any, enquiries were made by him or by his Insurer for records in respect of the said prosecution, which, it seems uncontroversial to say, are likely to have details as to what occurred in the Hotel and who witnessed it.

134. In short, having made no averments as to what enquiries the Defendant has made or caused to be made, it is perhaps unsurprising that he has not identified a single witness who is said to be relevant, but unavailable, at a future trial (whether because they are deceased, or cannot be traced, or otherwise). In other words, the Defendant's averments at para. 17 seem to me to have been made in the most general of terms and I cannot see how they provide a basis for a finding by this Court that any actual prejudice has been incurred. Rather, it seems to me that the Defendant is inviting the court to speculate that *if* he were to conduct comprehensive searches, he would *not* be

able to identify, and secure, relevant witnesses. I cannot regard this as the Defendant having established prejudice, be that actual or presumed.

135. As well as the reality that it was open to the Defendant to make such enquiries as he deemed appropriate, in response to receiving correspondence from the plaintiff's current solicitors (in March/April 2011; in May 2013; in December 2013; and thereafter), I cannot see a causal link between, on the one hand, any alleged deprivation of an opportunity to identify and contact witnesses and, on the other, the plaintiff's inordinate and inexcusable post–commencement delay. To put it another way, in circumstances where the Defendant has been on notice of the plaintiff's claim since 3 May 2013 at the latest, he has no more been deprived of the opportunity to make investigations with respect to witnesses than if the Plaintiff had progressed his claim with alacrity from the point when proceedings were issued.

136. Turning to the final aspect of alleged prejudice, the Defendant makes the following averments at para. 18 of his 10 December 2020 affidavit: -

> "*18. Fourthly, at this juncture I do not believe that my professional insurers will provide me with an indemnity, in circumstances where I did notify them of this claim against me when it first arose, and they subsequently closed their file on foot of the plaintiff's inactivity".*

137. The Defendant does not aver that he has *asked* his insurers whether they will or will not provide such indemnity as was or was not available when the Defendant first gave notice of this claim. There is simply no evidence before this Court of the insurer's attitude. There is no evidence that the Defendant has suffered any actual loss. Nor is there any evidence that that loss can be presumed.

138. There is, however, evidence that the Defendant gave notice to his insurers when the claim "*first arose*" and that his insurer opened a "*file*". The Defendant does not specify whether the first notification to his insurer of this claim was made (i) upon receipt of the letter from the plaintiff's solicitor dated 3 May 2013, calling upon him to admit liability, or (ii) upon receipt of the 17 December 2013 letter which confirmed that a 'protective writ' had been issued; or (iii) upon being served with the plenary summons on 17 July 2014; or (iv) in response to the 3 requests in March/April 2011 to furnish the plaintiff's file to the latter's current solicitors. However, there is simply no evidence that any delay on the part of the Plaintiff has prejudiced the Defendant's insurance situation, be that in respect of potential cover, or with respect to the annual cost of insurance.

139. As noted earlier in this judgment, there is no averment to the effect that by reason of the plaintiff's delay with respect to bringing these proceedings, the Defendant has suffered any increase in his annual insurance premium, or that any such increase has been protracted in a way that it would not have been, had the proceedings been brought with due expedition. Nor does the Defendant aver when, in fact, the insurer "*closed their file*", or whether he has called upon the insurer to re-open it. Equally, and returning to the topic of documents, the Defendant made no averment as to what is on his insurer's file (insofar as the results of earlier investigations, be that for relevant documents or witnesses is concerned). In short, it does not seem to me that the averments made at para. 18 disclose any actual or presumed prejudice of any sort.

140. It seems to me that what emerges from a careful consideration of the totality of the averments made by the Defendant is general, as opposed to actual prejudice, which is not substantial in nature, and which is certainly not material prejudice insofar as it impinges on the potential for a fair trial.

141. Save for the fact that these proceedings remained 'hanging over' the Defendant during the periods of delay by the plaintiff, the Defendant has not established any causal link between the plaintiff's delay and the prejudice complained of. In addition, the circumstances given rise to the prejudice which the Defendant now asserts, were well known to the Defendant when he acquiesced in respect of the plaintiff's previous (i.e. post-commencement) delay (by (i) seeking and obtaining an adjournment on condition that he would file an Appearance and by (ii) later calling for service of a statement of claim, which was served, and (iii) failing to take any steps for 28 months to issue a motion to dismiss proceedings on delay grounds, despite previously asserting that his delivery of an Appearance was to facilitate such an application).

142. An analysis of asserted prejudice is plainly a very important aspect of any consideration of the balance of justice. However, this Court's assessment cannot have a narrow focus. On the contrary, all relevant factors must be considered and this Court has proceeded on the basis that *"a global appreciation of the interests of justice"* which seeks to *"balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation"* is required (see Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 IR 510). It might be noted that *Anglo Irish Beef Processors* concerned a situation where the plaintiff's delay deprived the Defendants of *"a witness of critical importance"* (*per* Keane C.J. at p. 515). The case before this Court is certainly not of that type.

143. In *Cassidy v. The Provincilate* [2015] IECA 74, Irvine J. (as she then was) stated (at para. 60) that: *"even moderate prejudice against a backdrop of inordinate inexcusable delay may be deemed sufficient to tip the scales of justice in favour of dismissing the proceedings"* (emphasis added). With respect to the foregoing, Collins J. stated the following in *Cave* (at p. 35, para. 36):-

> *"Cassidy does not, it seems clear, purport to establish a universally applicable standard of prejudice. Rather, where 'moderate prejudice' will warrant the dismissal of a given claim, or whether something more serious must be established, will depend on all of the circumstances, including the nature and extent of the delay involved, the nature of the claim and of the defence to it and the conduct of the Defendant."*

144. I am very clear that such prejudice as the Defendant has established in the present case is not actual, and is not specific and, thus, is of a general type, and it is prejudice which I do not regard as significant or material. However, lest I be wrong not to do so, I have conducted the analysis of the balance of justice issue on the basis that prejudice to the Defendant is *"moderate"* in the sense used in *Cassidy*. Thus, it constitutes prejudice which may (not which must) 'tip the scales' in favour of the proceedings being dismissed. However, I am entirely satisfied that there are *other* factors which, collectively, tip the scales decidedly in the opposite direction.

145. The Defendant's conduct is one such factor and it is unnecessary to repeat, at this juncture, the analysis which appears earlier in this judgment. By away of brief comment, it seems entirely fair to say that at all material times, the Defendant's attitude was to adopt what might charitably be described as a *"wait and see"* approach. This is not to be critical in any personal sense. It also seems uncontroversial to say that, as a tactical approach to litigation, it is hardly unusual. However, it is an approach which adds no weight to the Defendant's present application and, in my view, weighs against it. Certain examples of this conduct may illustrate the point.

146. As of March and April 2011, the plaintiff's 'new' solicitor wrote to the Defendant, repeatedly requesting a copy of the plaintiff's file (letters of 11 March, 4 April on 12 April 2011). There was silence from the Defendant in relation to this correspondence. It seems uncontroversial to say that, had he replied in some form, a certain amount of delay would have been avoided. Furthermore, the Defendant made no response whatsoever to the letter from the plaintiff's solicitor dated 3 May 2013. Had he, for example, indicated that, without any admission of liability, he did not require the Plaintiff to have to go to the trouble to 'bottom out' the question of whether the Hotel would raise a statute of limitations defence, a material amount of time as well as effort and cost might well have been saved. More importantly (because it relates to the situation *after* proceedings had been served) the Defendant made no response whatsoever to the letters dated 16 February 2015 and 19 March 2015 calling upon him to deliver an Appearance. It is fair to say that he was 'in default' with respect to the delivery of same for a period of several years thereafter, given the reality that he subsequently served and filed an Appearance (in April 2019) without ever taking the initiative himself and issuing any application to dismiss the proceedings on delay grounds. Had the Defendant filed, in 2015, the Appearance he ultimately filed in 2019, some delay could have been avoided and one can certainly lay the blame at the door of the Defendant in respect of 8 months delay from February to September 2015, inclusive.

147. Furthermore, when the Plaintiff brought his own inordinate inexcusable delay to an end, by means of the service of a Notice of an ntention to Proceed (5 September 2018), he followed this up with a motion seeking judgment in default of Appearance (issued on 30 November 2018, grounded on the affidavit sworn by Mr. O'Leary on 29 November 2018). As regards the Defendant's conduct in response to that motion, the following is averred by Mr. O'Leary in his 28 June 2021 affidavit (sworn in opposition to the present motion):-

> *"12. I say that a notice of motion for judgment in default of Appearance was served on the Defendant on the 4th December 2018, returnable for the 4th February 2019. No correspondence was received from the Defendant in relation to this.*
>
> *13. I say that I wrote to the Defendant by registered post on the 21st January 2019 reminding him that the motion for judgment in default of Appearance was listed for hearing on the 4th February 2019. The Defendant contacted me and agreed to enter an Appearance on the basis that the motion was adjourned. On foot of this conversation, the motion was adjourned to the 24th April 2019 to allow the Defendant to enter an appearance. I beg to refer to a true copy of my said letter..."*

148. The foregoing are uncontroverted averments. Thus, for the purposes of the present application, the Defendant's response to the motion for judgment in default of Appearance was *not* to raise a delay issue, but to ask for an adjournment in return for a commitment to file an Appearance. The plaintiff's motion was, in fact, adjourned *per* the Defendant's request. The uncontested averments made by the plaintiff's solicitor, as of 28 June 2021, receive objective support from contemporaneous correspondence in the form of Mr. O'Leary's letter, dated 24 April 2019, which (although it involves repetition to set out its contents once more) states the following:-

> *"As you are aware this matter was before the High Court on 4th February last.* ***Mr. Dore's secretary indicated to the writer that morning that she had been instructed to enter an Appearance and was arranging to do that on the 4th February. As you are***

<u>further aware the motion was adjourned to the 29th inst.</u> *We are indeed surprised that to date we have not received an Appearance and on that basis we will be applying for judgment on Monday next and will not be consenting to any further application."* (Emphasis added).

149. To ask (without raising any delay point) for an adjournment of the plaintiff's motion, in return for agreeing to file an Appearance, which request resulted in the motion being adjourned is, in my view, acquiescence with respect to prior delay. Things would be otherwise if the factual position was that, in response to the plaintiff's motion for judgment in default of Appearance, the Defendant (i) promptly replied to state that he was relying on the plaintiff's delay and (ii) ensured that his Appearance was promptly followed by an application to strike out on delay grounds. However, this is not at all the factual position. It was not until the letter of 25 April 2019 (nearly 3 months *after* the initial return date for the plaintiff's motion) that the Defendant first raised the issue of delay.

From the evidence before this Court, it seems fair to say that having initially agreed, without any conditions, to file an Appearance on 4 February 2019, if the Plaintiff was willing to adjourn its motion, and having failed to deliver the Appearance promised, despite the fact that the motion was adjourned *per* his request, the Defendant then changed his position. That change of position was to say (*per* the Defendant's 25 April 2019 letter) that he would be delivering an Appearance the following day, which, according to the Plaintiff was: *"without prejudice to and indeed to facilitate the issuing by me of a notice of motion seeking..."* to have the proceedings dismissed on delay grounds.

150. I do not see how having agreed, without conditions, in February 2019, to deliver an Appearance, in return for which the Plaintiff adjourned his motion for judgment, the Defendant can 'cure' his previous acquiescence by *later* imposing conditionality with respect to the delivery of an Appearance. However, lest I be entirely wrong on that view, the following can be said. In the manner examined earlier, the Defendant plainly delivered what I referred to as 'mixed messages' as of 25/26 April in that the Appearance he filed made an explicit call for service, by the plaintiff, of a Statement of Claim. I do not say that the call for a Statement of Claim, which is contained in the 26 April 2019 Appearance, could fairly be described, of itself, as acquiescence, given the explicit statement in the 25 April letter.

151. By the same token, had the Defendant promptly followed up his 25 April correspondence and 26 April Appearance, by issuing the motion to strike out the plaintiff's proceedings on delay grounds which he had threatened, his previous call for a Statement of Claim would have to be seen in that context. In other words, if the Defendant's motion seeking to strike out on delay grounds was issued *prior* to the receipt by the Defendant of the plaintiff's Statement of Claim, the demand for the latter could hardly be regarded as acquiescence by the Defendant in respect of prior delay. This is for the obvious reason that the service of a Statement of Claim in that context would have been in circumstances where the Plaintiff knew, by words and deeds, that the Defendant was taking issue with delay. In that theoretical scenario, the last item in the chronology would have been the Defendant's motion to dismiss on delay grounds (and subsequent service of a Statement of Claim would have to be seen in that factual context). That is not, however, the facts which present here.

The Defendant has made no averment that there was any impediment which prevented him from issuing a motion of the present type at any point between 26 April 2019 (the date of his Appearance) and 14 May 2019 (when the Plaintiff delivered the Statement of Claim which the Defendant

demanded of him). Lest that be considered too harsh an observation, it is not the case that within days or weeks of receiving the Statement of Claim, the Defendant's motion issued. Rather, weeks turned to months, and a year came and went, without the Defendant issuing the application which he threatened in his 25 April 2019 letter and which, according to the Defendant, the Appearance dated 26 April 2019 was filed *"to facilitate the issuing"* of. That was, in my view, acquiescence by the Defendant in respect of the plaintiff's prior delay.

152. In short, what began as *acquiescence* by the Defendant (i.e. as of February 2019 when, without raising delay, an adjournment of the plaintiff's first motion was sought by the Defendant, and granted) was succeeded by a unilateral *change of attitude* (i.e. the raising of delay for the first time in April) following which '*mixed messages'* were given (i.e. the simultaneous threat of a motion and call for a Statement of Claim) which became further *acquiescence* on the Defendant's part (due to the complete failure on the Defendant's part to apply to dismiss on delay grounds, be that prior to or subsequent to the service of the Statement of Claim).

153. Earlier in this judgment, I held the Plaintiff to his word (i.e. insofar as the Plaintiff threatened to issue a motion but failed to do so promptly) and I can see no reason to treat the Defendant differently. Thus, holding the Defendant to his word, it was reasonable to expect a motion to dismiss on delay grounds to be issued *before* the Defendant received the Statement of Claim or, failing that, within a relatively short period thereafter (i.e. a period measured in days or weeks, but certainly not months or longer). Instead of issuing the motion which he had supposedly filed an Appearance in order to bring, the Defendant once again adopted a *"wait and see"* attitude, notwithstanding the Defendant's prior delay and he adopted this attitude full in the knowledge that the Plaintiff was, by word and deed, anxious to progress his claim against the Defendant.

154. I am fortified in the foregoing views by the fact that over ten months elapsed *after* 25 April 2019 before the Defendant even wrote a single letter. Not only had the Defendant failed, by that point, to issue the motion to dismiss on delay grounds (for which his Appearance had been filed) he was, by then, met with the plaintiff's motion for judgment in default of Defence. Despite this, the Defendant did no more than enclose a one-page draft motion (not even having prepared any grounding affidavit, as the contents of his letter makes clear). Thereafter, he took no step whatsoever until January 2021. In my view, this was to acquiesce with respect to the plaintiff's prior delay. This seems to me to be a particularly weighty factor which argues against dismissal of the proceedings, especially where no actual or specific prejudice to the Defendant has been demonstrated.

155. Another factor which in my view weighs in favour of the case proceeding is that, whilst the absence of specific prejudice does not rule out a finding that the balance of justice tips in favour of dismissal, the moderate prejudice established by the Defendant (i.e. to reputation resulting from the proceedings 'hanging over' him) does not suggest that a fair trial may no longer be possible. Nor is there a correlation between (i) the plaintiff's inordinate and inexcusable post-commencement delay and (ii) the moderate prejudice which the Defendant has established, given that the last period of delay is both extensive and is the responsibility of the Defendant. As Collins J. made clear in *Cave*:-

> *"Many of the cases appear to proceed on the basis that, once there is <u>any</u> period of inordinate and inexcusable delay, general prejudice should be assessed by reference to the <u>entire</u>*

period between the events giving rise to the claim and the date of trial. That does not appear to me to be the appropriate approach." (see p. 33/34, para. 36)

156. Cross J. in *Calvert v. Stollznow* [1980] 2 NSWLR 749 observe that:"[o]*f course justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice."* With respect to the foregoing, Collins J. stated in *Cave*:-

"...the observations of Cross J. in Calvert v. Stollznow provide a salutary warning against the application of unduly elevated and unrealistic standards of justice in this context, such that, in effect, an immediate presumption of prejudice arises whenever there is any material default on the part of a Plaintiff in prosecuting a claim. Prejudice is not to be presumed: AIG Europe Ltd v. Fitzpatrick [2020] IECA 99, per Whelan J. (Donnelly and Power J.J. agreeing)."

157. There is no evidence which would allow this Court to hold that, as a result of the plaintiff's delay, any relevant witness is unavailable. Nor is there any evidence which allows for a finding that the plaintiff's delay has resulted in the loss of documentary evidence which would otherwise have been available to the Defendant. The evidence before this Court does not establish that there is any, still less any substantial, risk that it is not possible to have a fair trial.

158. It is clear that the pleadings have not closed and, therefore, this is not a case which is ready to be set down for trial in the short term. At first blush, this might argue for dismissal. However, this is not a weighty factor in the present case. I take this view because, from 5 September 2018 onwards, the main reason for the lack of progress has been the Defendant's delay. It will be recalled that during this period the Plaintiff has brought, not one, but two separate motions and has delivered a Statement of Claim (demanded of him) all of which action involved time and cost. By contrast, after a 28-month delay for which he is entirely responsible, the Defendant ultimately issued the present motion, on 8 January 2021. Thus, whilst the primary responsibility rested on the Plaintiff to move ahead with his action, since 5 September 2018, the Plaintiff has been doing just that (save for a 6 month hiatus which I have identified). Given the particular facts in the present case, what Collins J stated in *Cave* (at p. 29, para. 36) seems particularly relevant:

"The authorities increasingly emphasise that Defendants also bear a responsibility in terms of ensuring the timely progress of litigation: see, for instance, the decision of the Supreme Court in Comcast International Holdings Incorporated v. Minister for Public Expenditure [2012] IESC 50. The precise contours of that responsibility have yet to be definitively mapped but, it is clear at least that any "culpable delay" on the part of a Defendant – delay arising from procedural default on its part – will weigh against dismissal." (p. 29, para. 36)

159. The Defendant was certainly 'in default' as regards the filing of an Appearance and this caused delay, also necessitating a motion. He was also 'in default' with respect to delivering a Defence and this, too, caused delay and necessitated a further motion (yet to be heard). Having threatened to bring the present motion, while, at the same time, calling for a Statement of claim, the Defendant was served with the latter but utterly neglected to issue the former. Therefore, even if I am entirely wrong in my previous analysis which characterised the Defendant's conduct as *acquiescence*, there has certainly been *delay* arising from procedural defaults on the Defendant's part and this (i) weights against dismissal, and (ii) is also a factor which needs to be taken into account when looking at how far away a trial is likely to be, and all of the reasons why this is so. I do not see why, with diligence on both sides, this case could not be brought to a state of readiness by the end of next year. In

short, although the fact that a trial cannot reasonably be anticipated before the end of the 2023 year constitutes a factor to be weighed in the balance, it is certainly not, of itself, or in combination with others, such as would justify dismissal of these proceedings.

160. The very far-reaching consequences of dismissing these proceedings is also a relevant factor to take into account with respect to the balance of justice. In *Granahan t/a CG Roofing and General Builders v. Mercury Engineering* [2015] IECA 58, the Court of Appeal:-

> *"…weighed in the balance the terminal prejudice to the Plaintiff in having his claim dismissed and his constitutional right of access to the court revoked against the prejudice likely to be visited upon the Defendant if the action is to be allowed proceed..."* (emphasis added).

161. Conducting that exercise in the present case, I am satisfied that the balance of justice is very clearly in favour of allowing the claim to proceed. Having conducted a global analysis of all factors and carefully weighing up them all, it would, in all the circumstances, be unjust and disproportionate to dismiss the claim, as opposed to permitting a determination of its merits, by a trial judge, after a consideration of all evidence in the normal fashion. This Court is mindful that, insofar as the *Primor* principles or tests are concerned: *"the central thread running through those principles are the concepts of fairness and prejudice, which should be at the forefront of the court's consideration as to where the balance of justice lies"* (see *Keogh v. Wyeth Laboratories Incorporated* [2005] IESC 46; (McCracken J., Geoghegan and Kearns J.J. agreeing). Taking full account of prejudice and fairness in context of applying the third element of the *Primor* test, I have no hesitation in saying that the balance of justice lies in favour of the case proceeding.

162. Having determined the matter with reference to the *Primor* principles, and being firmly of the view that the Defendant has *not* met the third aspect of the relevant test, it is now appropriate to refer to the principles derived from *O'Domhnaill*.

163. The appropriate questions for this Court to ask are set out in the Supreme Court's decision (McKechnie J) in *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50 (at para. 40):-

> *"(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?"*

164. Based on a careful consideration of the evidence before this Court, I am satisfied that the answer to all three questions is very clearly in the negative. As Irvine J. (as she then was) stated in *Cassidy* (at para. 37):-

> *"37. Clearly a Defendant, such as the Defendant in the present case, can seek to invoke both the Primor and the O'Domhnaill jurisprudence. If they fail the Primor test because the Plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than imposed by the third leg off the Primor test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice."*

165. In the present case, the Defendant has not established that there is a real risk of an unfair trial. The Defendant has not established prejudice likely to lead to a real risk of an unfair trial or an unjust result. Henchy J. stated (at p. 158) in *O'Domhnaill* that:-

> *"While justice delayed may not always be justice denied, it usually means justice diminished, and in a case such as this, it puts justice to the hazard to such an extent that to allow the case to proceed to trial would be an abrogation of basic fairness."*

The Defendant has not established anything of the sort in the present case and has fallen very far short of established any entitlement to relief *per* the *O'Domhnaill* approach.

Conclusion

166. For the reasons set out in this decision, the Defendant is not entitled to the relief claimed. I take the view that, although the plaintiff's delay was certainly inordinate and inexcusable, the balance of justice very decisively favours the case being allowed to proceed to a trial. With respect to the question of costs, my preliminary albeit strongly–held view is that the justice of the situation is best met by an order that costs be 'costs in the cause'. This view reflects the analysis in this judgment which illustrates that each side failed at various points to meet the minimum standard expected of a party to litigation, as regards the taking of appropriate steps and avoiding delay. This is not a decision which came down to fine margins. That the balance of justice favoured the claim proceeding was overwhelmingly clear from the facts which emerge from a consideration of the evidence (just as the evidence made overwhelmingly clear the plaintiff's inordinate and inexcusable delay). Whilst acknowledging fully their different roles in the litigation, it nonetheless seems fair to say that neither party has 'covered themselves in glory' with respect to the progress of these proceedings (bearing in mind that the Plaintiff and Defendant are responsible for 51, and 32, months of post–commencement delay, respectively).

167. 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."* In light of the foregoing, and taking account of the upcoming vacation, if either party contends for an order other than that costs be 'costs in the cause', short written submissions should be finished within fourteen days of the beginning of Hilary Term (i.e. by 25 January 2023). The parties should also correspond with each other, forthwith, regarding the appropriate form of order including an agreed 'timetable' of directions in respect of the onward progress of the case towards a trial, to be included in the Court's order. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within the same period aforesaid.