

**THE HIGH COURT**

[2023] IEHC 427  
[Record No. 2016/ 6875 P]

**BETWEEN:-**

**ROSE TOYE**

**PLAINTIFF**

**AND**

**DONEGAL COUNTY COUNCIL, ELECTRICITY SUPPLY BOARD AND EIRCOM LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Barr delivered *ex tempore* on the 14<sup>th</sup> day of July, 2023.**

**Introduction.**

1. These proceedings relate to the plaintiff's claim for damages for personal injuries suffered from an alleged trip and fall incident on 18<sup>th</sup> February 2014, when the plaintiff has claimed that she tripped and fell due to the presence of a defective manhole cover, which was protruding above the surface of the footpath on Long Lane, Letterkenny, Co. Donegal.

2. This is an application brought by the first defendant seeking to have the plaintiff's claim struck out for inordinate and inexcusable delay and/or want of prosecution.

**Background.**

3. The plaintiff received authorisation from the Personal Injuries Assessment Board to proceed with her claim on 24 February 2016. The plaintiff's personal injury summons issued on 28 July 2016, seeking damages for personal injuries suffered by her in the accident.

4. The first defendant entered an appearance in the proceedings on 2 November 2016. It raised a notice for particulars on 8 December 2016. The plaintiff replied to the first defendant's notice for particulars on 31 January 2017.

5. The second defendant served a notice of indemnity and contribution upon the first defendant on 1 March 2017. The second defendant delivered a full defence on 13 March 2017.

6. The first defendant sought discovery from the plaintiff on 4 September 2017. On 31 September 2017, the plaintiff sent all three defendants a letter seeking voluntary discovery. By letter dated 25 October 2017, the first defendant replied to the plaintiff's letter seeking voluntary discovery

indicating that none of the documents sought by the plaintiff were in the possession of the first defendant.

**7.** The plaintiff swore an affidavit of discovery on 22 December 2017. The first defendant filed a full defence on 12 January 2018. On 16 January 2018, the first defendant served a notice of indemnity and contribution upon both the second and third defendants.

**8.** Between 16 April 2018 and 3 August 2018, the first defendant sent the plaintiff three letters enquiring as to the progress of the claim and requested the filing of a notice of trial. The plaintiff sent a letter on 21 August 2018, indicating that the defence of the third defendant and affidavits of discovery from all defendants were outstanding, but stated that the matter would be pressed on.

**9.** A further letter was sent by the solicitor for the first defendant to the solicitor for the plaintiff on 22 January 2019, which was replied to by the solicitor for the plaintiff on 30 January 2019.

**10.** On 9 April 2019, the first defendant served a notice of intention to proceed with the action. The third defendant filed a defence on 17 April 2019.

**11.** The third defendant furnished an affidavit of discovery on 12 March 2019. The first defendant furnished an affidavit of discovery on 26 June 2019.

**12.** Between 12 March 2019 and 3 November 2021, the solicitor for the first defendant sent a further five letters to the solicitor for the plaintiff inquiring as to the progress of the case. There was no response from the plaintiff to those letters.

**13.** The first defendant issued a notice of motion seeking discovery from the third defendant on 5 February 2020. An order was made on consent of the parties by Barrett J. on 2 March 2020, directing the third defendant to furnish an affidavit of discovery within 8 weeks.

**14.** The second defendant furnished its affidavit of discovery on 14 October 2021.

**15.** The within motion to strike out the plaintiff's claim as against the first defendant for delay and want of prosecution issued on 8 September 2022. The plaintiff issued a notice of trial on 26 September 2022.

#### **Chronology.**

Alleged accrual of cause of action	18 February 2014
PIAB authorisation issued	24 February 2016
Personal Injuries Summons issued	28 July 2016
Appearance entered by first defendant	2 November 2016

Notice for particulars by first defendant	8 December 2016
Replies to particulars furnished by plaintiff	31 January 2017
Notice of indemnity and contribution served by the second defendant on the first defendant	1 March 2017
Defence of second defendant	13 March 2017
Voluntary discovery sought by plaintiff from all defendants	31 July 2017
Voluntary discovery sought by first defendant	4 September 2017
Reply to letter seeking voluntary discovery sent to plaintiff by the first defendant	25 October 2017
Affidavit of discovery sworn by plaintiff	22 December 2017
Defence of first defendant filed	12 January 2018
Notices of indemnity and contribution served by the first defendant upon the second and third defendants	16 January 2018
First defendant requests consent from the plaintiff as to the late filing of their affidavit of verification.	11 February 2019
Notice of intention to proceed by first defendant	9 April 2019
Defence of third defendant	17 April 2019
Affidavit of discovery from the first defendant	26 June 2019
Affidavit of discovery from the third defendant	12 March 2019
Notice of motion issued by the first defendant seeking discovery from the third defendant	5 February 2020

Order of Barrett J. made on consent of the first and third defendant directing the third defendant to make discovery to the first defendant.	2 March 2020
Affidavit of discovery from the second defendant.	12 October 2021
The motion to strike out for want of prosecution at issue in these proceedings issued	8 September 2022
Notice of Trial issued by plaintiff	26 September 2022

**Submissions of the Parties.**

**16.** Counsel for the plaintiff, Mr. McGrory BL, conceded at the outset of the application that the delay in this case had been inordinate.

**17.** On behalf of the first defendant, Ms. Colgan BL, submitted that there was not sufficient excuse proffered by the plaintiff to excuse the extent of the delay in prosecuting the matter. She submitted that although the Covid-19 pandemic acted as a bar to witness trials between roughly March 2020 and June 2021, the common law motions list was running during this period. Counsel submitted that it had been open to the plaintiff to bring the relevant motions in order to progress the proceedings by obtaining orders for the delivery of any outstanding matters from the defendants. Counsel relied on the decision in *Sneyd v. Stripes Support Services Ltd t/a Kammac Support* [2023] IEHC 68, in that regard.

**18.** In relation to the balance of justice, counsel submitted that employees of the first defendant, who were relevant to the proceedings, have now moved on from their employment with the first defendant, or had moved department within the defendant's organisation. In addition, the memories of their witnesses would have diminished with the passage of time since the date of the accident. Counsel submitted that this could be classed as moderate prejudice, which was sufficient to entitle the defendant to an order striking out the proceedings against it: see *Millerick v. Minister for Finance* [2016] IECA 206. Therefore, counsel submitted that the balance of justice favoured striking out the plaintiff's claim as against the first defendant.

**19.** Counsel for the plaintiff, Mr. McGrory BL, submitted that there were some excuses offered by the solicitor for the plaintiff in his replying affidavit sworn on 15 February 2023, but that even if

it was found that the delay was inexcusable, the balance of justice favoured allowing the plaintiff to proceed with her claim.

**20.** In that regard, counsel submitted that there had been no specific prejudice pointed to by the first defendant in the affidavit grounding the motion, such as the names of the employees who had left the council, what those individuals' roles were within the council, whether they are uncontactable at this stage, or indeed why they may not be issued with a subpoena if their evidence was indeed necessary at the trial of the action.

**21.** Counsel submitted that given the draconian nature of the remedy sought by the first defendant, and the vague nature of the assertion of prejudice offered by the first defendant, the balance of justice clearly favoured allowing the matter to proceed. Counsel referred to *Cave Projects Ltd v. Gilhooley & Others* [2022] IECA 245, in this regard.

**The Law.**

**22.** The principles which the courts must apply when considering an application to strike out a plaintiff's action on grounds of delay and want of prosecution are well known. They were set out in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459. It is not necessary to set out those principles again.

**23.** Since the decision in the *Primor* case was handed down, there have been multiple decisions applying those principles to various factual situations. This has given rise to a plethora of decisions, which sometimes differ one from the other, in emphasis and tone. In *Cave Projects Limited v. Gilhooley & Ors.*, the Court of Appeal carried out an extensive review of the principles and summarised the case law on which they were based. That summary is set out at para. 36 of the judgment; which is itself, a very long paragraph. For that reason, I will not quote it in full, but instead, I will highlight some of the relevant principles that were identified by Collins J. in the course of that judgment. He outlined the following principles as being applicable in applications such as the present one before the court:

- The onus is on the defendant to establish all three limbs of the *Primor* test *i.e.*, that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim.
- An order dismissing a claim is a far reaching one; such order should only be made in circumstances where there has been significant delay and where, as a consequence of

that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed.

- Case law has emphasised that defendants also bear a responsibility in terms of ensuring the timely progress of litigation; while the contours of that responsibility have yet to be definitively mapped out, it is clear that any culpable delay on the part of the defendant will weigh against the dismissal of the action.
- The issue of prejudice is a complex and evolving one. It is central to the determination of the balance of justice. It is clear from the authorities that absence of evidence of specific prejudice, does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice.
- The authorities suggest that even moderate prejudice may suffice where the defendant has established that there was inordinate and inexcusable delay on the part of the plaintiff. However, Collins J. stated that marginal prejudice, if interpreted as being of a lesser standard than moderate prejudice, would not be sufficient.
- Collins J. noted that notwithstanding certain *dicta* in the *Millerick* case, which suggested that even in the absence of proof of prejudice, it may still be appropriate to dismiss an action, it had to be remembered that the jurisdiction was not punitive or disciplinary in character and the issue of prejudice had been acknowledged as being central to the court's consideration of the balance of justice.

**24.** Collins J. concluded his summary of the relevant principles by stating as follows at para 37: *"It is entirely appropriate that the culture of "endless indulgence" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this*

*suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant."*

**25.** Two days prior to the delivery of the Court of Appeal judgment in the *Cave* case, the Court of Appeal also delivered judgment in *Kirwan v. Connors* [2022] IECA 242. One of the issues which arose for decision in that case, was whether the plaintiff could excuse the delay in the case due to the failure of the defendant to reply to a notice for particulars that had been raised by the plaintiff. Delivering the judgment of the court, Power J. held that this was not a good excuse for some of the delay that had occurred in the proceedings. She stated as follows at paras. 131-132: -

*"... In the absence of any reply to his alleged notice for particulars, Mr. Kirwan was not entitled to simply 'sit on his hands' and allow the proceedings to stagnate. He had tools available to him to compel the replies he sought and his status as a litigant in person does not absolve him from his responsibilities in this regard. Irvine J's observations in Flynn (albeit in that case on the failure to cooperate in seeking full and proper discovery) are apposite. She stated (at para. 33):*

*'... the onus is on a plaintiff to prosecute their claim with reasonable diligence and if a defendant fails to co-operate, for example by ignoring correspondence in relation to discovery, the rules of court provide a method whereby that co-operation can be secured. Mr. Flynn had, as was considered material in O'Domhnaill, the ability to control any such delay.'*

*132. The appellant in this case also retained the ability to control the delay that ensued. Faced with the lack of response to the notice for particulars, he was obliged to use the machinery of the rules of the court to move matters on. His failure to do so cannot be relied upon as a valid ground for excusing the delay and the trial judge was correct so to find."*

**26.** 26. The court notes that on 16 March 2023, the Supreme Court allowed leave to appeal in the *Kirwan* case: see [2023] IESCDT 34.

**Conclusions.**

**27.** The court was greatly assisted by the comprehensive, yet succinct, submissions of counsel for each of the parties. In their analysis of the relevant factors that arise for consideration in this

case and in their analysis of the relevant case law, they have enabled the court to reach a conclusion on the application brought by the first defendant.

**28.** It was correctly conceded by counsel on behalf of the plaintiff, that the plaintiff was guilty of inordinate delay in this case. In attempting to excuse that delay, counsel pointed to the fact that not only had the first defendant been in breach of its obligation to furnish an affidavit of discovery, it had also delayed for a very considerable time in furnishing an affidavit of verification in respect of its defence. While the court was not furnished with the date on which that affidavit of verification was filed, the court notes that by letter dated 11 February 2019 the solicitors acting for the first defendant wrote to the plaintiff's solicitor requesting a letter consenting to the late filing of their affidavit of verification. Thus, it would appear that the affidavit of verification was ready for production in or about 11 February 2019.

**29.** The plaintiff also attempted to excuse the delay in progressing her action on account of the delay by the other defendants in the action, in both providing defences and in providing affidavits of discovery.

**30.** The court accepts the submission made by Ms. Colgan BL that a plaintiff is not entitled to sit on his hands where a defendant is in default of an obligation under the rules to take a particular step. That was clearly established in the *Kirwan v. Connors* case. In addition, the court accepts counsel's submission that while the Covid-19 pandemic prevented the holding of witness actions in the period March 2020 to June/July 2021, the common law motions list was operating on a remote basis as normal during that period. Accordingly, the court holds that it is no excuse for the plaintiff to say that she did nothing during that period due to the fact that the defendants were in default of either delivering a defence, delivering an affidavit of verification, or making discovery. If they had been in default during that period, the plaintiff had the necessary remedies available to her under the rules to bring such default to an end.

**31.** While the plaintiff submitted that she was unable to obtain an updated medical report, due to the fact that her GP was not giving out such reports, due to the restrictions caused by the Covid-19 pandemic, there is no evidence of what steps, if any, were taken by the plaintiff to procure the delivery of an updated medical report. As suggested by counsel for the first defendant, it may have been possible to have held the necessary review for the purposes of delivering an updated medical report remotely via Zoom, or some other platform. There is no evidence that any attempt was made to do that.



**32.** In the circumstances of this case, the court finds that the delay on the part of the plaintiff to prosecute her claim herein was both inordinate and inexcusable.

**33.** That brings the court to the third question under the *Primor* test, which is whether the balance of justice is in favour of striking out the plaintiff's action against the first defendant, or is in favour of permitting the action to proceed, notwithstanding that there has been an inordinate and inexcusable delay in the prosecution of the plaintiff's action.

**34.** The critical factor in determining this question is whether the moving party defendant has suffered prejudice as a result of the delay. The caselaw establishes that in order to be successful on its application, such a defendant need only establish moderate prejudice.

**35.** On this aspect, the court has reached the conclusion that the evidence of prejudice having been suffered by the first defendant is very weak. The only evidence of prejudice is that set out in the affidavit sworn by Mr. James Sweeney on 7 September 2022. At para. 12 of that affidavit, he stated that "*people who were involved in Donegal county council in 2014, at the time of the accident and who are responsible for the locus are no longer employed in the local authority at this stage, or have moved offices*". He stated further at para. 13: "*I say that in any case, given that it is over eight years since the date of the accident, that memories do fade with time. I am advised that personnel are no longer available.*"

**36.** The court does not find this evidence convincing. The first defendant has not identified who any of these witnesses may be; nor what position they held with the defendant at the relevant time; nor what evidence they might be in a position to give, were the matter to be called on for trial in the immediate future. Most importantly, while the defendant has stated that these witnesses "are no longer available", it is not stated why the witnesses are no longer available. The first defendant has not identified any witnesses who have died in the interim; nor any witnesses who have moved abroad; nor any witnesses who are incapable of giving evidence due to ill-health, or for some other reason.

**37.** In reality, these averments are just a bald assertion by the first defendant that some unidentified and possibly relevant witnesses are no longer available to it. In the absence of the kind of detail outlined above, this court cannot find that any relevant witnesses are in fact no longer available to give evidence on behalf of the defendant at the trial of the action.

**38.** While it is certainly true that the memories of witnesses will fade with the passage of time, one has to consider that aspect in the context of the issues that the witnesses are likely to be asked to recall at the trial of the action. Where one is dealing with evidence that concerns the happening

of an event, perhaps an event that happens very quickly, such as the circumstances leading up to a road traffic accident; it is certainly true that the passage of time can have a very serious effect on the ability of witnesses to give credible evidence.

**39.** However, the circumstances of this case are quite different. In particular, when one has regard to the broad thrust of the defence of the first defendant, which is to the effect that they had nothing to do with the manhole in question and do not have any documents within the category of documents requested in voluntary discovery by the plaintiff, it is not likely that any of the relevant witnesses would be asked to give evidence on matters of recall in respect of the event that occurred in 2014. Rather, it would appear that the thrust of their evidence will be based on documents and will be to the effect that the county council had nothing to do with this particular manhole cover. It does not appear to this court that that type of evidence would be adversely affected by the passage of time.

**40.** Thus, the court must find that in the circumstances of this case, the first defendant has not established that it will suffer even moderate prejudice due to the delay that has occurred. Against that absence of any tangible prejudice, must be weighed the fact that if the plaintiff's action is struck out against the first defendant, that will represent a very serious setback for her in her proceedings. In these circumstances, the court holds that the balance of justice lies in favour of refusing the reliefs sought by the first defendant in its notice of motion.

**41.** In passing, the court notes that notices of indemnity/contribution have been exchanged among the defendants. The significance of the service of such notices among the defendants in relation to an application that may be brought by any one of those defendants to have the plaintiff's proceedings against it struck out, was considered in some detail by this court in *Sneyd v. Stripes Support Services Ltd* [2023] IEHC 68, at paragraph 45 *et seq.* For the reasons set out therein, this court remains of the view that the fact that such notices have been exchanged between defendants, is not relevant to the consideration of the issues that arise on an application by one defendant to have the proceedings against it struck out on grounds of inordinate and inexcusable delay.

**42.** For the reasons set out herein, the order of the court shall be that the court refuses the reliefs sought by the first defendant in its notice of motion dated 8 September 2022.