THE HIGH COURT

[2023] IEHC 470

RECORD NO. 2018 1694 P

BETWEEN

JUDITA PAULKAITE-CIUMBARIENE

PLAINTIFF

AND

FAUGHAN FOODS UNLIMITED COMPANY

DEFENDANT

***Ex tempore* judgment of Mr. Justice Mark Heslin delivered on 10 July 2023**

1. I am grateful to both counsel for the clarity of their submissions today, and I propose to give a ruling now in relation to what is before the court. As will become clear, the ruling will reflect the fact that I spent several hours with the papers and considered the relevant authorities. It is a ruling that will, therefore, take some time to deliver.

2. On 1 November 2022 the Defendant issued a motion seeking to dismiss the Plaintiff's claim for want of prosecution, having regard to the provisions of O. 122 r. 11, of the Rules of the Superior Courts ("RSC"); and/or in the alternative, pursuant to this Court's inherent jurisdiction. In this ruling I will refer to *the* Defendant although, in the manner as will presently be explained, there are two other parties who were joined as co–Defendants. For reasons which will become obvious, they have not played any part in today's application.

3. I have carefully considered the pleadings and the evidence before the court, and the authorities to which counsel very helpfully directed the court. The relevant jurisprudence is well known.

4. The evidence comprises (i) the averments made by Ms. Louise McElligott finance director of the Defendant, in an affidavit sworn by her, on behalf of the Defendant on the 20 October 2022, together with the documentation exhibited, as well as (ii) the averments made and the exhibits to an affidavit of Mr. Sean Sheehan, who is the Plaintiff's solicitor, being an affidavit sworn on 8 July 2023, and made available, as I understand it, to the Defendant's side this morning, which affidavit I agreed to accept *de bene esse*.

Legal Principles

5. Before proceeding further it is appropriate to make reference to the legal principles, and there is no dispute between the parties as to the proper approach to an application of this type. The leading judgments remain those of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("*Primor*"), as well as a somewhat earlier decision by the Supreme Court in *O'Domhnaill v. Merrick* [1984] IR 151.

6. *Primor* remains the 'touchstone', and as we are all aware, Hamilton CJ set out the position (at pp. 475/76 of the reported judgment) beginning with the oft–quoted passage:-

> "*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*."

7. Indeed, that quote appears in para. 3 of a very recent judgment of Simons J. delivered on 13 February 2023 in *Sheehan v. Cork County Council* [2023] IEHC 46, and provided by the Defendant's counsel. It is these principles that will govern the court's approach to today's application.

8. I have also had regard to the passages in *Sheehan* which counsel for the Defendant drew the court's attention to. Of some note is that, whilst the court in *Sheehan* emphasised inter alia the principle derived from earlier authorities that there must be an end to "*a culture of endless indulgence*," the facts in *Sheehan* are markedly different to those in the present case, where Simons J. found that, in circumstances where the index events went back to 2006, the delay in *Sheehan* went back to 2013.

9. I also note the contents of para. 40 in the decision in *Gallagher v. Letterkenny General Hospital & Ors* [2019] IECA 156 in which it seems fair to say that the Court of Appeal made clear the difference between, on the one hand, an explanation which might attract *sympathy* and, on the other hand, something constituting an *excuse* for delay.

10. The authorities derived from *Primor* make clear that this Court today has to ask three questions in sequence:-

(1) is the delay inordinate?

(2) if so, is it inexcusable; and

(3) if the delay is both, is the balance of justice in favour of, or against, allowing the case to proceed?

11. In circumstances where alternative relief has been sought in the Defendant's motion, it is appropriate to note that, whilst *Primor* remains the primary approach, there is a separate but overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial and/or an unjust result. This is clear from the Supreme Court's decision in *O'Domhnaill v. Merrick* [1984] I.R. 151 and the authorities derived from same.

12. There are distinctions between these two jurisdictions, and because the inherent jurisdiction of this Court is also invoked, it is appropriate to note the primary differences between both approaches. These were made clear in *Cassidy v. The Provincialate* [2015] IECA 74 (at paragraphs 33 to 38), and the two principal distinctions between the *Primor* and *O'Domhnaill* approaches are as follows.

13. First, whilst inordinate and inexcusable delay are essential elements under *Primor,* what might be called the *O'Domhnaill* 'test' does not require that there has been delay in a culpable sense on the part of a Plaintiff. Second, under the *O'Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will be sufficient to justify dismissal, whereas, under the *Primor* test, a case may, depending on the particular circumstances, be dismissed where the prejudice to the Defendant falls short of so called "fair trial" prejudice.

14. Thus, the *Primor* approach focusses squarely on the Plaintiff's action (or inaction) before moving to a consideration of the balance of justice, whereas the focus in *O'Domhnaill* is firmly on whether a fair trial is possible, regardless of how blameworthy, or not, a Plaintiff may be. I regard the *Primor* approach as the correct one for the court to take in the present case, and I am deciding the matter on that basis.

15. In a decision of 20 October 2022, in *Cave Projects Limited v. Gilhooley & Ors.* [2022] IECA, Mr. Justice Collins set out a comprehensive analysis of the jurisprudence in the area, in particular at para. 36, between pages 27 and 37, inclusive, of the Court of Appeal's judgment and the *Cave* decision is referred to in *Sheehan* by Simons J.

16. Having referred to the relevant principles, I now propose to look at the evidence and the facts which emerge from an analysis of it.

<u>Relevant facts</u>

17. Having considered the evidence, the following can be said by way of facts, in chronological order.

18. The alleged accident, giving rise to the proceedings is said to have occurred on 3 June 2017. The Plaintiff caused a personal injuries summons to be issued on 23 February 2018. I pause at this stage to note that the authorities make clear that where a Plaintiff makes a "late start" to proceedings, they bear an extra burden to prosecute their claim in a timely manner. That reflects the approval in this jurisdiction of a statement by Lord Diplock in *Birkett v. James* [1977] 2 All ER 801:

> "*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 been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."*

19. For the sake of completeness, I think the point can fairly be made that there was no late start to these proceedings, on the facts before this Court.

20. The nature of the Plaintiff's claim is clear from the personal injuries summons. It seems to me from the authorities that the court is entitled to have some regard to the nature of a claim when an application of this type is made.

21. In brief, the Plaintiff claims to be an operative by occupation who was, at all material times, employed by the Defendant.

22. She pleads that on or about 3 June 2017, during the course of her employment with the Defendant, the Plaintiff was attempting to pull a tray out of a machine, when her finger became trapped, as a result of which she claims to have suffered severe personal injury, loss, damage, inconvenience and expense.

23. She pleads that the Defendant was guilty of negligence and breach of duty including breach of statutory duty and breach of contract and particulars of these alleged wrongs are pleaded at (a) to (cc) inclusive of para. 9.

24. Particulars of injury allegedly suffered are pleaded from paragraph 10 onwards and include inter-alia the following pleas:

> *"10. The Plaintiff suffered a severe injury to her left hand when it became trapped in a machine. She suffered a crush injury to the distal end of her left middle finger. She was taken to Mullingar hospital. There she was clinically assessed and x-rayed. A fracture of the distal phalanx of the right middle finger was diagnosed. Analgesia was applied and she was placed in a mallet splint. She was discharged to the care of her GP.*
>
> *11. The Plaintiff was obliged to miss work for a period of weeks.*

25. In para. 12, the male pronoun is used for the Plaintiff in what is an obvious error, so I will use the female in the following otherwise verbatim quote:

> "*12. She attended at a GP, Dr. Anthony Ryan, and was seen and examined by him on 02/08/17. At that time her main complaints were of ongoing pain in her left hand following attempted use of the finger; she reported numbness of the finger; there was marked disfigurement of the fingernail. She was suffering from pain radiating from her left wrist to her left elbow.*
> *13. On examination, there was selling* [obviously intended to be "swelling"] *of the left 3rd finger distally; there was distortion of the nail bed. The Plaintiff's manual dexterity was adversely affected as was her ability to lift and carry.*
> *14 All routine activities were rendered more difficult due to her injuries.*
> *15. The Plaintiff was recovering.*
> *16. Her enjoyment of life has been diminished and her leisure activities have been curtailed. The Plaintiff reserves the right to furnish further particulars of injury when the same come to hand."*

26. It is also pleaded in the personal injury summons that the Plaintiff sustained losses by way of special damages, and these are pleaded to comprise of medical expenses; travel expenses; loss of earnings; and other, all of which were stated to be "*Yet to be fully ascertained".*

27. On 20 April 2018, an Appearance was entered on behalf of the Defendant. At that same point, a detailed Notice for Particulars was raised by the Defendant. That pleading ran to five pages, raising queries under 21 headings, excluding sub-paragraphs. Among the queries raised was that the Plaintiff was asked to identify *witnesses* to the accident.

28. Replies to Particulars dated 17 August 2018 were provided by the Plaintiff. It is fair to say that these were in relatively brief terms and comprised a total of two pages. However, certain of the replies seem to me to be particularly noteworthy in the context of today's application, because they

seem to me to speak to the nature of the evidence which a future trial judge is likely to have available to her, or him. For example, the reply at item 3 states: "*There was no witness to the accident".*

29. The Replies to particulars also includes inter-alia the following information with respect to the alleged accident. At para. 2, it is stated inter alia "*The accident occurred at 1:30 p.m., lighting conditions were bright*". At para. 6 of the replies, it is stated inter alia that the *"Plaintiff was using the machine for the third time, approximately three to four hours of total usage*". At para. 7 it is stated "*Plaintiff first reported to the accident to the supervisor on duty…*".

30. At 11 (c) (d) and (e) it stated *"Plaintiff attended the Midlands Regional Hospital. Plaintiff continues to be troubled by ongoing pain. Plaintiff's prognosis is guarded"*. At (g) it stated, "*Plaintiff is right-handed".* At 13 (c) the reply is *"Plaintiff took three months off work*". At 14 (b) and (c) the reply is given as follows:-"*Plaintiff was employed as an operative for two and a half years, Defendant is employer*", and at para. 21 the following is pleaded *"Plaintiff is claiming for three months' loss of earnings".*

31. A Defence was delivered on 17 January 2019. Apart from not requiring proof of the description of the parties or the fact of authorisation by the Personal Injuries Assessment Board ("PIAB"), there was a full denial, and the Plaintiff was put on full proof of all allegations raised, and matters pleaded in the Personal Injuries Summons.

32. At para. 3(d) of the Defence it was pleaded that, in the alternative and without prejudice to the denial of liability by the Defendant, if the Plaintiff sustained any personal injuries, which is denied, same were caused or contributed to by the negligence or breach of duty on the part of the manufacturer and/or distributor of the machine which the Plaintiff was operating at the time of the alleged injury. These parties were named as an Italian - registered and a Monaghan based Irish - registered company, respectively.

33. On 18 January 2019, the Defendant issued a motion seeking leave to issue and serve third party notices against those two entities.

34. That application is grounded on an affidavit sworn on 18 January 2019 by Ms. Mary Purtill, solicitor for the Defendant, who averred, inter alia, that the manufacturer and distributor of the machine giving rise to the incident the subject matter of the proceedings, have a statutory obligation and a common law duty of care to ensure the said product was free from defects and safe for use.

35. She went on to aver, inter alia, that the machine was supplied with a "CE" mark on it, to indicate compliance with the health and safety requirements in the European Machinery Directive 2006/32/EC. She further averred, inter alia, that the determination as to the responsible party for the injuries allegedly suffered by the Plaintiff should be determined, not only between the Plaintiff and Defendant, but also between the Defendant and the proposed third parties. Draft third party notices were exhibited to her 18 January 2019 affidavit. Very obviously, that is an affidavit sworn

some three and a half years ago. The said motion was initially returnable before the court on 4 March 2019.

36. By letter, dated 1 March 2019, the Plaintiff's solicitors wrote to the solicitors for the Defendant indicating that the Plaintiff proposed to join the proposed third parties as co-Defendants; and indicated that they proposed to apply to the PIAB immediately. In those circumstances and adjournment was sought in respect of the motion.

37. By order made on 29 July 2019, Barr J in this Court ordered that both the Italian and Irish registered companies, respectively, be joined as co-Defendants. As the order makes clear, the Plaintiff was given a period of four weeks from the date of the perfection of that order within which to issue an amended plenary summons and to deliver an amended statement of claim. That order was perfected on 31 July 2019.

38. It is averred, at para. 6, of Ms McElligott's grounding affidavit that, since the making of the said order, no steps have been taken by the Plaintiff to serve the amended personal injury summons on the Defendants.

39. I now turn to the averments made in an affidavit made by Mr. Sean Sheehan, the Plaintiff's solicitor. From para. 10 onwards, Mr. Sheehan makes averments with respect to the period from the end of July 2019. These can be summarised by way of the following narrative:-

> *"We attempted to issue the concurrent and the amended summonses, however we ran into a number of technical difficulties in relation to the formatting of those documents"*

40. At para. 11 the following is, *inter alia*, averred:-

> *"I returned on the 23rd of October 2019 with the documents in their correct form. The time period allowed by Judge Barr had by now passed".*

41. At para. 12 it is averred, *inter alia*, that:-

> *"On 22nd of November 2019 a motion for the Master's Court to extend time was drafted but not issued or served".*

42. At para. 13 the following is, *inter alia*, averred:-

> *"The legal secretary supervising the file in my office then went on maternity leave and the application to extend time that now became necessary was not made before the commencement of the lockdown".*

43. At para. 14 it is averred that:-

> *"The Covid restrictions came into force in March 2020, and this caused further difficulties that led to a failure properly to supervise the file partly due to the fact that I had a skeleton staff".*

44. At para. 15 it is averred that:-

"The draft motion herein before referred and exhibited has not yet been issued".

45. At para. 17 the following is *inter alia* averred:-

"Reference is made in the Defendant's grounding affidavit to a failure to respond to correspondence. This was an error on my part, although at all material times hereto I intended to issue the motion to extend the time to serve the additional parties and comply with all my obligations I concede however that I ought to have acted with greater expedition".

46. Para. 18 refers to the issuing by the Plaintiff's office of a Notice of Intention to Proceed on 23 December 2022, which is referred to when produced.

47. I pause to make the obvious comment that that Notice of intention to proceed was issued *after,* not before, the present motion was issued by the Defendant.

48. At paras. 19 and 20 the following averments are made:-

"19. I do not wish to rely on any personal circumstances in relation to what follows but again I mention the following by way of an explanation rather than justification. I became ill having manifested symptoms for a number of months prior to the date just mentioned and following different tests and medical appointments, I was diagnosed in <u>March 2023</u> with paranasal cancer. I am scheduled for skull surgery on the 11th of this month.

20. I cannot but admit that this diagnosis caused me to exercise a level of diligence that was less than ideal and that has caused and/or contributed to the present difficulty". (emphasis added)

49. It is fair to say that it is only this morning that the Defendant has had *any* information from the Plaintiff's side with respect to events post-dating the perfection, on 31 July 2019, of the order of Barr J. permitting the joinder of two co–Defendants, which order gave four weeks for the Plaintiff to take the necessary steps, which steps have never been taken.

50. As Mr. Egan BL for the Plaintiff made clear at the outset, the affidavit which I have just quoted from was not tendered to take issue with any of the facts averred to in the grounding affidavit sworn by the Defendant's solicitor; and it seems to me that there is no issue taken, or can be taken, with the facts averred on behalf of the Defendant. I now turn to these facts, which emerge from uncontroverted averments made by Ms. McElligott.

51. Ms McElligott wrote to the Plaintiff's solicitor. The first correspondence referred to was sent approximately two years after the order of Barr J. was made. The nature of that correspondence and subsequent attempts by the Defendant's solicitor to obtain information in respect of the Plaintiff's claim and its status, are referred to at paragraphs 7 to 11, inclusive, of the affidavit

grounding today's application. It seems to me appropriate to quote these paragraphs verbatim, as follows, in circumstances where they represent uncontroverted averments:-

> *"7. By letter dated 21st July 2021, I wrote to the solicitors for the Plaintiff asking them to clarify whether or not they had now successfully served on the co–Defendants. No response was received, and a further letter was sent on the 3rd of August 2021 requesting confirmation of service of the proceedings on the co–Defendants and requesting a copy of the amended personal injuries summons. No response was received to the said correspondence. Further letters issued in the same terms on the 16th of August 2021, the 23rd of September 2021, the 19th of August 2021 and the 24th of November 2021 and again, no response was received to any of these letters.*
>
> *8. Under cover of a letter entitled 'URGENT' a further correspondence was sent on the 1st of February 2022 advising that I was coming under pressure from our client to update them. A request was made again for a response. No response was received and a further letter was sent on the 13th of June 2022 advising that the within motion would issue in default of receiving a response and an update as to whether the co–Defendants had been served with an amended personal injuries summons. I beg to refer to copies of the said correspondence upon which pinned together and marked with the letter D, I have signed my name part of the swearing hereof…."*

52. I pause to say that Exhibit D comprises of copies of letters dated 1 February 2022 and 13 June 2022, respectively, the contents of which accord precisely with what is averred at para. 8.

53. Proceeding then, para. 9 states the following:-

> *"9. As can be seen from the foregoing, the last pleading served by the Plaintiff was Replies to Particulars on the 17th of August 2018 and the last step taken was the joinder of the proposed third parties as co–Defendants on the 29th of July 2021"* (it says 2021, but should be 2019).

54. No further step has been taken notwithstanding the direction of this Honourable Court that an amended personal injuries summons be served within four weeks of the 29 July 2021. Nothing turns on the fact that it is four weeks from 31 July 2019.

> *"10. The Plaintiff's solicitor has failed to acknowledge or respond to any of the eight letters sent to him between the 21st of July 2021 and the 13th of June 2022 and did not respond to the threat of the within motion. In light of the foregoing the first Defendant has no option to issue the within motion.*
>
> *11. I say that no notice of intention to proceed has been filed by or on behalf of the Plaintiff and it appears that whereas that affidavit was sworn on the 24 October 2022 one subsequently was issued in December".*

55. Turning to the first question in the *Primor* test (namely, is the delay inordinate?) it seems fair to say that the concept of "inordinate" delay is not a difficult one. In *Framus Ltd. v. CRH plc*. [2012] IEHC 316 (at para. 23) Cooke J observed that: "*In its ordinary meaning delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive".*

56. Counsel for the Defendant asserts that the delay in the present case is four years. It is certainly true that the order of Barr J. was perfected on 31 July 2019. We are now in early to mid-July 2023, almost four years later. However, lest I be wrong not to do so, it seems to me that this Court should give what might be called 'credit' for the four weeks specified in the order, for compliance. I think the court, in fairness, must also be conscious of the reality that the order was perfected on the very last day of term, the 31 July 2019 and, out of an abundance of caution perhaps, if one gives credit both for (i) the four weeks and (ii) the Long Vacation, it takes one up to the end of October 2019. It seems to me that I can safely calculate delay on the part of the Plaintiff from that point; and from that point (the end of October 2019) until this motion issued (on 1 November 2022) is just shy of a period of three years. I am satisfied that in the sense used or described in *Framus* this delay is inordinate.

57. It did not seem to me to be appropriate, for the purposes of assessing whether the Defendant's delay is inordinate, to include the time which elapsed *after* the motion issued. It would not seem fair, on a first principles basis, to fix someone with delay resulting from the realities that motions issued are not heard immediately and it takes some time for them to be listed and for a court to be devoted to hearing the matter. Even if that is so, three years seems to me to be inordinate, albeit not at the extreme end of the type of delay which sometimes is involved in applications of this type.

58. Turning to the second question in *Primor*, the court must ask: is the delay excusable? Technical difficulties of the type the Plaintiff's solicitor avers to, albeit an averment made in very general terms, but technical difficulties in issuing a concurrent summons or amended summons resulting in the Plaintiff's solicitor not issuing same within the four weeks specified by Barr J. as well as the admitted failure to issue the motion to extend time for compliance with the order of Barr J., which motion the Plaintiff's solicitor drafted but never issued, do not appear to me to comprise excuses for the Plaintiff's delay. This is not a criticism in any personal sense, mistakes can and do happen in a world inhabited by human frailty, but it does not seem to me that even taken at their height and regardless of the sympathy which one might have for any professional who makes a mistake, it does not seem that I can fairly accept these as excuses for the delay which has occurred. Similarly, a failure to supervise a file adequately does not seem to me fairly to come within the category of an excuse for delay, guided by the principles which emerge from the jurisprudence.

59. It also seems fair to say that those matters which I have referred to thus far appear to have arisen before any question of Covid–19 restrictions arising. I say this because plainly as we will all recall, Covid–19 was not on the horizon in July 2019, nor in August, September, October or November 2019, so therefore it is not the case that Covid–19 excuses in any way a failure to serve amended proceedings on the co–Defendants or to adequately supervise a file or to issue a motion

seeking extension of time which as averred to was in fact issued in November 2019, long before Covid, but not served. Turning then to the reference to Covid–19 it seems fair to say that it is not explained in any way how Covid–19 restrictions prevented the Plaintiff from, for example, issuing the motion to extend time for service upon both co–Defendants and that remains the case as I say to this day where that motion has never been issued. Insofar as Covid–19 is said to have made more difficult the task of supervising staff properly, that does not seem to me to provide an excuse within the meaning of the jurisprudence for the delay which has occurred. It is also the case that, again very fairly, the Plaintiff's solicitor acknowledges to be an error on his part that his firm did not reply to correspondence from the Defendant. I have referred to that correspondence, on any analysis there could be no criticism of the Defendant for asking time and again for information and the error on the part of the Plaintiff's solicitor in failing to provide a reply does not in my view constitute an excuse for the Plaintiff's delay, nor does serving on 23 December 2022 a Notice of Intention to Proceed comprise in any way an excuse for the delay which preceded it.

60. Turning then to the last of the issues raised, namely the very unfortunate health situation of the Plaintiff's solicitor, two comments seem to me to be appropriate. First, this Court can have nothing but sympathy in a personal sense for anyone unlucky enough to suffer health issues, in particular, serious health difficulties. Second, the averment made is that the diagnosis in question was given in March of this year, therefore, regardless of the sympathy which this Court certainly has for the Plaintiff's solicitor, this diagnosis in March of 2023 cannot conceivably explain or excuse the Plaintiff's delay, recalling that the order in question was perfected on the 31 July 2019 and some three years and eight months have elapsed between the perfection of that order and the diagnosis as averred to by the Plaintiff's solicitor. The position of the Plaintiff's solicitor was, it seems to me, fairly to suggest that his difficulties may explain, but may not justify the Plaintiff's delay. I agree, and although there was no concession made through counsel for the Plaintiff's solicitor who very professionally urged his client's case in comprehensive terms, but I take the view that there is an equivalence between a failure to justify and a failure to excuse, in short, a consideration of the evidence before the court today in my view very safely allows for a finding that the Plaintiff's delay is inexcusable as well as inordinate.

61. I now turn to the third and final aspect of *Primor*, namely, the balance of justice assessment, bearing in mind that the burden of proof rests, at all times, on the Defendant, as the Defendant is the moving party, as counsel for the Plaintiff has rightly submitted. The oral submissions made with such clarity and skill today by counsel for the Defendant reflect, it is fair to say, the averments made in the grounding affidavit, and therefore it is appropriate to look in some detail at the issues raised and contended to be why the balance of justice favours dismissal. The relevant averments comprise paras. 12 and 17 inclusive of the grounding affidavit. It is asserted at para. 12 that, by virtue of the Plaintiff's delay, the Defendant is now unduly prejudiced in the defence of the claim. As to the nature of this alleged prejudice, Ms. McElligott avers *"due to the passage of time, the availability of witnesses will have diminished"*. It is further averred "*it is inevitable that parties who were present at the time may no longer be available to give evidence in relation to the matters which are at issue in these proceedings*". At paragraph 13 it is asserted that the Plaintiff's delay has prejudiced the

Defendants right of trial. Reference is made to the alleged accident having occurred approximately 5 years before Ms McElligott swore her affidavit grounding the motion and the following is also averred "*it is self-evident that, given the passage of time of such a period, the memories of the relevant parties and/or witnesses to the issue being the subject matter of these proceedings will be compromised by such inordinate and inexcusable delay".*

62. With respect, it does not seem to me that these averments reflect the fact that (in the manner touched on earlier) the Defendant's Notice for Particulars asked (at para. 3) for the *names and addresses of all witnesses to the alleged accident*, and, in response, the Plaintiff confirmed in Replies to Particulars that *there was no witness to the accident.* So the state of play emerging from the pleadings is that there was and is *no* witness to the accident, *present* at the time. It does not seem to me that the Defendant has established, or can establish on the state of the evidence before this Court, prejudice in respect of parties present at the time potentially being unavailable to give evidence or having compromised memories of what they witnessed, because as I say, the replies indicate there was no witness.

63. Even if one were to ignore the pleadings (and I do not believe that that would be legitimate as an approach for this Court today) and even if the Court ignores the plea that there was no witness to the accident, it seems to me that the alleged prejudice insofar as witnesses is concerned is made in the most general of terms. In other words, no individual has been identified as supposedly being an essential witness, no one has been identified as being present at the time of the accident, or, for that matter, if not a witness to it, on the premises floor or having any involvement, who is also said at the same time to have become unavailable as a result of the Plaintiff's delay, nor is there any such person identified who is said to have a compromised memory due to the passage of time. Nor does it seem to me that this Court can safely *presume* that there are such witnesses, i.e., who would have been available but for the delay, but who are no longer available, or who would have had clear memories but for the delay but who now have impaired memories, and that is, as I say, in the absence of the Defendant identifying any.

64. Similarly, it does not seem to me that this Court can safely presume that the Plaintiff's memory of the accident has been compromised due to the delay, or that she is not available. The fact that solicitor and counsel have appeared today contending, no doubt on instructions, that the case should not be dismissed, would seem to allow for a finding that the Plaintiff intends to appear at her own hearing and it seems again uncontroversial to say that were she to turn out to be unavailable to a future trial judge, then in circumstances where according to the Replies to Particulars there was no witness, then it would seem to spell the end of her claim with, under normal circumstances, costs consequences for a failure in that theoretical situation to bring home a claim, and let me say, making no binding decision in relation to a future trial court, and nothing I say in this ruling should be taken in any way tying the hands of any future judge in respect of any decision before her or him.

65. It seems appropriate, at this juncture, to refer to certain principles which were restated and re-emphasised in the *Cave* decision. On p. 28, Collins J made clear:-

"*Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice once the dismissal of the claim*."

66. Carefully considering the evidence before the court in this application, it does not seem to me that the Defendant has established such a *causal* connection. Later, on page 34 of the judgment in *Cave*, the learned judge stated, *"prejudice is not to be presumed*" and he went on to cite *AIG Europe Ltd v. Fitzpatrick* [2020] IECA 99, per Whelan J. (Donnelly and Power JJ. agreeing). Bearing that principle in mind it seems to me that if I were to accept, as establishing prejudice to the Defendant, the assertions made with respect to the alleged adverse effect on witnesses, or the parties, including their memories, this Court would, in reality, be impermissibly *presuming* prejudice, and breaching the principle emphasised by the Court of appeal in *Cave.* At p. 33 of Cave, Collins J also made the following clear:

"… it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the Plaintiff is responsible ought to be taken into account in this context."

I mention that in circumstances where some emphasis was laid on the Defendant's side by the period of time since the index event, whereas the delay as found by the court commences with the failure to comply with the four-week time limit in the 31 July 2019 order. Thus, the appropriate period is not from the date of the index event, but the delay beginning when two co-Defendants were joined, and the Plaintiff subsequently failed to issue and serve an amended personal injuries summons and statement of claim.

67. In *Cave*, the learned judge also made the following clear (at the foot of p. 33 and into p. 34) of the Court of Appeal's judgment:

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

This fortifies me in the views that I have expressed earlier. Guided by these principles, it does not seem that any prejudice under the heading of witnesses or parties, be that specific or general, has been established on the part of the Defendant. Furthermore, whilst fair trial prejudice has been asserted, it does seem to me that the averments made which are, it is fair to say, in general terms, go as far as meeting the burden which rests on the Defendant insofar as establishing prejudice in the context of what is of course the obligation to meet a balance of justice test. Furthermore, although fair trial prejudice has been asserted by the Defendant, it does not seem to me that this has been established on the evidence. I take the view that the evidence, carefully considered, does not allow for a finding that a fair trial no longer remains possible, or for that matter there is a real risk of an unfair trial.

68. To attempt to better explain why I take that view, there is no suggestion, for example, that the machine in question has been lost or destroyed due to the delay. Nor is it suggested that any expert witness has died or is no longer available due to delay. It is not said for example that any vital evidence such as perhaps CCTV footage or contemporaneous records have been lost or destroyed due to the delay. This is plainly a non–exhaustive list but it seems to me that on the basis of what is before the court, the court cannot safely assume that the Plaintiff herself, the sole witness to the accident, will not be available, she can be cross examined on her testimony. Nothing has been pointed to which in specific terms allows for a finding of any missing evidence, be that witness or documentary. Therefore, I take the view that a finding by this Court that a fair trial remains possible is entirely safe to make, and that reality seems to me to argue very strongly against dismissal.

69. At para. 14 of the grounding affidavit, it is said that the delay in prosecuting a claim violates the Defendant's right to a fair trial within a reasonable time pursuant to Article 6 of the ECHR, and that issue is one which has arisen regularly in the jurisprudence and very appropriately so. Recent guidance is given, and I now quote from para. 37 of the Court of Appeal's decision in *Cave*, Collins J made the following observations on this specific issue:

> "*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 the claim is, and should be seen as, an option of last resort…".*

70. It seems to me that that is the context in which this Court must view Article 6 rights. It also seems uncontroversial to say that it is precisely because of the rights of Defendants, in particular under Article 6, that there is a preparedness on the part of this Court, in appropriate circumstances, where it would be consistent with a just result, to dismiss claims pre – trial, thereby very obviously depriving Plaintiffs of the ability to have claims determined at trial, as would otherwise be their entitlement. This, to my mind, emphasises how critical is the balance of justice assessment, in this case, as in all others. Continuing then with the issues raised in support of the proposition that the just outcome is to dismiss at this point, at para. 14 of the grounding affidavit, the following is averred with respect to another aspect of alleged prejudice said to justify dismissal:-

> *"The… Defendant is a professional company and accordingly has a professional reputation to maintain. A serious consequence of the Plaintiff's delay is that outstanding claims interfere with the first Defendant's reputation and has an ongoing effect on its professional indemnity insurance".*

71. Bearing in mind, as explained earlier, that a Plaintiff is required to establish a causal connection between the delay as found on the one hand, and the alleged prejudice on the other, it seems to me that the thrust of this averment is to suggest that the fact of the outstanding claim (this being an outstanding claim) is said to interfere with the Defendant's reputation and have an

ongoing effect on its insurance. I draw the distinction between the outstanding claim and the delay, but even if I am wrong to identify such a distinction, nothing turns on the foregoing observation in circumstances where the averments I have quoted from para. 14 seem to me to be made in the most general of terms. I say this because in that what is meant by the words "serious consequence" is not at all explained, what is meant by the word "interfere" is wholly unknown. It is not suggested that by reason of the delay, the Defendant has, for example, lost any business; lost any employees; lost any opportunity; been the subject of adverse press coverage; or sustained any prejudice whatsoever. In other words, it is a very general averment, but it is entirely devoid of detail.

72. Furthermore, it does not seem to me that this Court can safely or properly take the word "interfere" and presume that it is intended to mean damage to the Defendant's reputation. I say this particularly so in circumstances where it could hardly be said to be unique or even out of the ordinary for an employer to be a Defendant in personal injuries proceedings brought by an employee, particularly where the use of machinery is involved in the workplace. Similarly, what is meant by the words "*an ongoing effect on*" the Defendant' "*professional indemnity insurance"* is entirely unknown. Again, the extent this averment implies that this is a negative effect, the extent that this averment implies damage to the Defendant's professional indemnity insurance again brings me back to the principle that it is impermissible for this Court to presume negativity or prejudice. Furthermore, even if one were in a thought experiment to assume that ongoing effect on professional indemnity insurance means a negative effect, *how* negative is entirely unknown, in circumstances where it is not averred that the Defendant has had to pay any increased insurance premium or, if so, how much of an increase. Without directing criticism in any personal sense, but dealing with the averments as they appear, it seems to me, once again, that these are made in very general terms and constitute an invitation to the court to presume prejudice, which is not identified, and presuming prejudice is something this Court cannot do.

73. Turning then to para.15 it is averred:- "*that the two Defendants who were joined by order of the High Court on 29 July 2019 are both foreign entities and… It makes it even more complicated in terms of ensuring that all parties are before the court for the purposes of the defence of these proceedings by the… Defendant".*

74. By way of a housekeeping comment, it does not seem to be the case that both are foreign entities, given the second entity named in Barr J's order is (and I quote) "*Versatile Packaging Ltd at Silverstream Business Park, Tamalt, Silverstream, Co Monaghan*", but of more relevance, it does not seem to me that this is an averment which establishes any prejudice to the Defendant nor can I see a causal link between the delay and any alleged prejudice. It is fair to say that the grounding affidavit discloses no other issues which are said to justify dismissal in the context of the balance of justice assessment.

75. In *Cave,* the Court of Appeal stated (and I quote from para. 36):- "*The suggestion that the Defendant might succeed in having a claim against them dismissed in the absence of evidence*

of prejudice is a far-reaching one…" and the court went on to state that this was a proposition (and I quote again from para. 36): "…*difficult to reconcile with the consistent emphasis in the authorities that jurisdiction is not punitive or disciplinary in character: the jurisdiction does not exist so that form of punishment can be inflicted upon a dilatory Plaintiff as a mark of the Court's displeasure".* (per Peart J in *Bank of Ireland v Kelly*, at para 52)."

76. Having looked in some granular detail at what emerges from the averments made, it does not seem to me that the Defendant has established *any* prejudice, whether specific or general as to *nature*, and whether significant or moderate as to *extent*. I have certainly taken on board the stage the proceedings have reached, and how long it might conceivably take if steps were taken with reasonable expedition, it does not seem to me that there is a realistic prospect being ready being ready much before the latter half of next year, but this factor does not seem to me to be determinative. The constitutionally guaranteed right of access to justice seems to me to make today's balance of justice assessment anything but a formulaic box ticking exercise, but something which is essential and must be rigorously carried out, and in carrying it out, the court must also be conscious of what the authorities describe as the "*terminal prejudice*" to a Plaintiff whose claim is dismissed. In my view, this seems to me to be a very weighty consideration arguing against dismissal. Added to that, and also very weighty in my view, is the fact that the evidence before the court in the present application allows for a finding that a fair trial remains possible. Again, this weighs very strongly against dismissal in the present circumstances. At this stage, it seems appropriate to recall that among the principles outlined explicitly in *Primor*, and I am referring to para. (d) (vi), is the question of whether a Defendant has established – and in my view the Defendant here has not established – that "*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".* As the Court of Appeal also made in clear in Cave, at para. 27, to dismiss a claim at this stage the court must be satisfied that there has been significant delay, and that a consequence of that delay is that the balance of justice is *"clearly against allowing the claim to proceed"*.

77. For the reasons explained in this ruling, I am not satisfied that the Defendant has established that the balance of justice is clearly against allowing the claim to proceed. That of course speaks to the Defendant having the burden of proof in respect of the third element of *Primor* just as it bears the burden of proof in respect of the first two, the *Primor* test being a unitary whole.

78. In drawing this ruling to a conclusion, it seems to me that to dismiss the proceedings at this point would in effect be punitive and disproportionate, and I say disproportionate given that there is available to the court levers in the form of appropriate orders as to costs, etc. I am satisfied that we are in a position today where the Defendant has without doubt established that the Plaintiff has been guilty of inordinate delay. The Defendant has without doubt has established that this delay was inexcusable, and the Plaintiff's claim has only been 'saved' upon a balance of justice assessment by the court, and that being so, my preliminary but very strongly held view is to say that the justice of the situation with respect to costs, and of course I will hear any

submissions if there is a different view contended for, is best met by an order for costs in favour of the Defendant and moving party. The submission was also made by counsel for the Plaintiff that it would be open to this Court to make an "unless order" in response to the present application. It does seem to me that an outcome of this application today should be an "unless order" and again I am open to further submissions on it, but my preliminary view is that an aspect of what this Court's order today should be is to order that unless an application to extend time with respect to compliance with the order of Barr J. as perfected on 31 July 2019 is made within a period of weeks, and we will come to the period of weeks, then the Plaintiff's claim stands dismissed and obviously in those circumstances the self–executing element of the "unless order" would be for costs of the proceedings to inure for the benefit of the Defendant.

79. It also seems to me that the order made by this Court in July 2019 joining two parties as co – Defendants allowed a period of four weeks from 31 July 2019 and therefore this Court could not fairly extend time today in this application. On the contrary, justice seems to me to require a separate application should the Plaintiff intend to bring it, on notice to all three Defendants, in other words, the Defendant who has moved today's application, and to the other two Defendants who were joined as of the middle of 2019 but as yet who still have not been served. I am firmly of that view, otherwise there would be a vacuum in terms of those parties who are very obviously affected by that order an inability to articulate their positions.

80. That brings me to a point made with force by counsel for the Defendant. I agree that if in the following theoretical scenario, the Plaintiff were to issue an application to extend time which must as I say be on notice to all three Defendants, and if at the hearing of that as yet theoretical application, the judge hearing the matter came to the view that justice required a refusal of the application to extend time, and if in that as I say theoretical scenario, the effect was for the Second and Third-Named Defendants to fall out of the proceedings, therefore being parties against which the First Defendant could no longer pursue alleged duties, then that would in that theoretical scenario, seem to give rise to a very obvious potential prejudice of a very concrete kind as suffered by the First Defendant at that future point. It is very obvious why I cannot hold that this constitutes prejudice today, but as I say, were that to happen, it would seem certainly, without determining anything, to give rise to an argument that prejudice has occurred, and in drawing this ruling to a final conclusion, the final word must be that nothing I have decided today would seem to me to prevent a future application being brought by the First-Named Defendant for a dismissal on delay grounds, and it would be for a court to determine that application on its merits based on such evidence as was then before the motion judge. So that is the court's ruling and the reason for it.