THE HIGH COURT

[2023] IEHC 527

Record No. [2014/5328P]

BETWEEN

MAURA LANE

PLAINTIFF

AND

ENTERPRISE IRELAND

DEFENDANT

Judgment of Mr. Justice Heslin delivered on the 25th day of September 2023

Introduction

1. On 9 February 2022, the solicitors for the Defendant, issued a motion seeking an order dismissing the Plaintiff's claim for want of prosecution on the basis of inordinate and inexcusable delay. That motion was grounded on an affidavit sworn, on 16 December 2021, by Mr Geoffrey Dunne who avers that he is the in-house solicitor of the Defendant.

2. A replying affidavit was sworn by the Plaintiff, on 24 October 2022. An affidavit was sworn, on 27 October 2022, by Ms Ann McShane solicitor, who avers that she was the solicitor acting for the Plaintiff, from December 2013 until in or about November 2021, when she closed her legal practice.

Legal Principles

3. 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 ("*O'Domhnaill*").

4. *Primor* remains the primary approach. In *Primor*, Chief Justice Hamilton stated (at pp. 475/76 of the reported judgment):-

> *"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."

5. The *Primor* approach, or test, requires this Court to ask three questions:-

(1) is the delay inordinate?

(2) if so, is it inexcusable?

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

6. Whilst *Primor* remains the 'touchstone', it is clear from *O'Domhnaill* that the court enjoys a separate, if overlapping, jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial and/or an unjust result.

7. There are distinctions between these two jurisdictions, as made clear in *Cassidy v. The Provincialate* [2015] IECA 74 (see paragraphs 33 to 38), the two principal differences being the following. Whilst inordinate and inexcusable delay are essential elements in the *Primor* test, there does not have to be delay in a culpable sense on the Plaintiff's part, under the *O'Domhnaill* approach. Furthermore, 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. However, under the *O'Domhnaill* principles, nothing less than prejudice likely to lead to a real risk of an unfair trial or unjust result will justify dismissal.

8. In essence, the focus in *O'Domhnaill* is squarely on whether a fair trial is possible, regardless of how blameworthy, or not, a Plaintiff may be. By contrast, under *Primor*, the Court looks at the Plaintiff's actions and, depending on the answer to the first 2 questions (i.e. whether the Plaintiff's delay is inordinate and inexcusable) moves to a consideration of the balance of justice.

9. In *Cave Projects Limited v. Gilhooley & Ors.* [2022] IECA, Mr. Justice Collins set out a comprehensive analysis of the jurisprudence (in particular, at para. 36, between pages 27 and 37, inclusive). These are the principles which this Court is applying in the present application.

'Timeline'

10. From a consideration of the pleadings and evidence before the court today, the following 'timeline' of relevant matters emerges. For the sake of clarity, I have attempted to address matters in chronological order, employ certain headings, and underline certain dates.

2008 - 2012

11. In the manner presently examined in more detail, the Plaintiff's case is that she was harassed and bullied by servants or agents of the Defendant "*on divers dates from 2008 until December 2012".*

2013

12. The Plaintiff retained solicitors in late 2013. The Plaintiff was initially represented by Messrs. M.J. O'Connor Solicitors, in particular, Ms. McShane, solicitor (described as a "consultant solicitor" in that firm). This remained the position until Ms McShane served a Notice of Change of Solicitors, (dated 7 May 2019) by which her firm came on record for the Plaintiff.

13. An application was lodged with the Personal Injuries Assessment Board ("PIAB") in December 2013 after a letter from the Plaintiff's GP had been obtained. By letter dated 20 December 2013, PIAB wrote to the secretary of the Defendant confirming *inter alia* that the Plaintiff's claim was received by PIAB on 13 December 2013 and that the Statute of Limitations was put "on hold" from that date and would remain on hold for a further six months from the date of the authorisation issued by PIAB (which was dated 20 December, 2013).

14. On 20 December 2013, the Plaintiff's solicitor wrote to Dr. Stephanie Bourke, Consultant Psychiatrist, of the Blackrock Clinic, stating:

> "*We refer to the above named whom we are instructed by. Our client has advised us that she has been suffering from work related stress due to overwork and bullying in the workplace. She informs us that she began to feel unwell in early 2012 and subsequently attended her GP.*

We are bringing a personal injury claim on behalf of our client against Enterprise Ireland. Therefore we need to obtain from you a Report setting out your professional view as to our client's health, the history of her problems and your diagnostic view as well as your prognosis.

We would be obliged if you could please revert to us at your earliest convenience to confirm that you can carry out this Report. We understand that you are to see our client on the 14th January."

2014

15. Dr. Bourke indicated, on 12 February 2014, that she was not in a position to provide a report on the Plaintiff. The Plaintiff's solicitor sought a report from Dr. Mairead O'Leary, Consultant Psychiatrist, in April 2014. Dr. O'Leary assessed the Plaintiff and furnished a report, dated 25 April 2014. Later in this judgment, I will refer to a report prepared by Dr. O'Leary, dated 17 October 2022, which was requested for the purposes of the Plaintiff's opposition to the present application.

16. On 16 June 2014, the personal injury summons was issued by M.J. O'Connor Solicitors. In the indorsement of claim, the Plaintiff is described as an executive assistant and it is pleaded that, at all material times, she was employed by the Defendant.

The nature of the Plaintiff's claim

17. It is clear from the particulars of personal injury pleaded at Schedule IV of the personal injuries summons, to which I will presently refer, that *"…in early 2012…"* the Plaintiff *"…continued to experience stress and ill health…"* which she attributes to wrongs on the part of the Defendant. Bearing in mind that it is also pleaded that: *"the Plaintiff from 2009 onwards made a number of complaints …"* it seems fair to say that it was open to the Plaintiff to have sought an authorisation from PIAB and to have instituted proceedings in early 2012, as opposed to some two years later.

18. It is pleaded that *"on divers dates from 2008 until December 2012 the Plaintiff was repeatedly harassed; bullied and subject to unreasonable treatment and excessive workload and work demands by servants or agents of the Defendant and in particular…"* .

19. Three individuals are named in para 4 of Part C and these are described as the Plaintiff's supervisors. In part D, it is pleaded that as a result of the negligence; breach of duty; including breach of statutory duty; and breach of contract; the Plaintiff suffered severe personal injury; loss and damage.

20. At section G, it is pleaded that, as a result of the said harassment bullying and intimidation, the Plaintiff suffered loss and expenses including, inter-alia, medical expenses and loss of earnings.

21. Schedule one comprises pleas in relation to some 28 "*express or implied terms in relation to the Plaintiff's contract of employment with the Defendant".*

22. Schedule 2 comprises pleas with respect to "*particulars of incidents of harassment bullying and intimidation and breach of contract*". Paragraph 1 (of 17 paras.) begins as follows: "*the Plaintiff was repeatedly subjected from 2008 to 2012 to unreasonable work demands having been promoted from clerical assistant to executive assistant and was subject to criticism in front of other staff members by supervisors/managers…"* (emphasis added) and four individuals are named.

The significance of oral evidence

23. The plea that, between 2008 and 2012, the Plaintiff was "*subject to criticism in front of other staff members*" gives rise to the probability that, in order for a trial judge to make findings of fact in respect of this issue, she or he would be relying, to a material extent, on the oral testimony of those present at the time. It is a statement of the obvious that 2008 is 15 years ago and, in the manner touched on later in this judgment, this case is nowhere near being ready for trial.

24. Paragraph one of Schedule 2 continues with the plea that; *"the Plaintiff was subject to repeated demands and criticism in relation to dealing with excessive workload…".* It seems clear that a future trial court would need to rely on *oral testimony* of the alleged "*repeated demands and criticism*…" in order to determine the issue. In the manner presently analysed, the Plaintiff's replies to particulars make clear that, on her case, relevant communication took place verbally, including (i) alleged demands and/or criticism *of* the Plaintiff; and (ii) complaints by the Plaintiff. Hence, the importance of oral evidence to a future trial court.

25. Issues raised in the balance of the pleas in Schedule 2 include, inter-alia, the following claims:

- that the 4 named supervisors "*failed to take account of complaints*" made by the Plaintiff during the period 2008 to 2012;

- that the Defendant "*failed to assist"* the Plaintiff in dealing with her workload;

- that, in late January 2012, the Plaintiff "*informed"* a named individual of her excessive work duties and sought to be relieved of some, which was only done for a limited period until another employee retired in February 2012;

- that the 4 named individuals set and maintained "*unrealistic targets and workloads"* for the Plaintiff, which were unrealisable; and

- which they were *"repeatedly informed"* by the Plaintiff were an unreasonable burden, and which she was unable to complete, and were having an adverse effect on her health and well-being;

- it is also pleaded that the Plaintiff made "*repeated requests"* and "*complaints"* to her supervisors concerning the increasingly adverse effect of the increased workload on her stress levels, health and well-being;

- It is also pleaded inter-alia that named supervisors failed to deal with *"legitimate issues raised*" by the Plaintiff over a substantial period of time, from 2009 until December 2012.

26. In light of the foregoing (and in circumstances where the Plaintiff does not allege that all relevant communication was in writing, only) it seems clear that a trial judge would have to rely, to a material extent, on oral testimony, as to what was said and by whom in the period 2008-2012, for the purpose of establishing relevant facts (e.g. whether, and to what extent, the Plaintiff "*repeatedly informed*" the Defendant; and made "*repeated requests"* and "*complaints"* to the Defendant; and raised *"legitimate issues*" with the Defendant; as well as the nature of same; and whether, in the manner pleaded, there was a failure on the Defendant's part *"to take account*" of or "*deal with"* same). Schedule 4 contains particulars of personal injury.

A 'late start'

27. In circumstances where the period during which the alleged wrongs occurred is said to be "*between 2008 and December 2012"*, the Plaintiff allowed a further 2 and half years to elapse before issuing proceedings.

28. It seems to me that the Plaintiff can fairly be accused of having made what is referred to in the authorities as a 'late start', by not commencing proceedings until mid-June 2014, in respect of alleged wrongs said to go back to 2008, the last of which is said to have occurred in December 2012.

29. By making a 'late start', the Plaintiff was under an added obligation to prosecute her claim in a timely manner. That principle reflects the approval in this jurisdiction of the following dicta from *Birkett v. James* [1978] AC 297, 333:

> *"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."* (See, for example, the Court of Appeal's decision (Hogan J.) in *Tanner v. O'Donovan & Ors*. [2015] IECA 24, at para. 26) *per* Lord Diplock)

24 September 2014 – Appearance

30. An Appearance was entered on 24 September 2014 by the Defendant's solicitors, Messrs. McGrath McGrane, with an address in Dublin.

20 January 2015 – Plaintiff's affidavit of verification

31. On 20 January 2015, the Plaintiff swore an affidavit of verification.

15 January 2015 - Defence

32. The Defendant delivered a Personal Injuries Defence, dated 15 January 2015 and an affidavit of verification in relation to the Defence was sworn on 16 January 2015 by Mr Mark Christal, who avers, at paragraph 1, that he is the human resources manager of the Defendant. With the exception of the personal details of the Plaintiff and the description of the parties, the Defence puts the Plaintiff on full proof of every aspect of the pleaded claim. In addition, paragraph 3 (a) comprises a plea that the Plaintiff's claim, or a portion thereof, is 'statute-barred', having regard to the Statute of Limitations Act 1957, as amended. Without prejudice to that plea, there is a full denial of each aspect of the Plaintiff's claim.

Defendant's Reliance on the Statute of Limitations

33. Given that the alleged wrongs are said to go back to 2008, it is, perhaps, unsurprising that the Defendant pleads reliance on the Statute of Limitations. Whilst it is no function of this court to determine the substantive issue, the Defendant's pleaded reliance on the Statute fortifies me in the view that the Plaintiff made a 'late start'.

34. Returning to the contents of the Defence, paragraph 4 (a) to (g) comprises pleas of contributory negligence, and this includes the plea at para 4(c) that the Plaintiff *"failed to bring the alleged harassment, bullying, unreasonable treatment, excessive workload and/or work demands, work-related stress, intimidation, breach of the Defendant's employment obligations, and/or alleged difficulties at work to the attention of the Defendant in a manner that would have enabled the Defendant to take appropriate action.*" Given the pleas made, it is clear that the Defendant does not accept that the Plaintiff did, in fact, raise her various concerns at the relevant time, at all, or adequately. Thus, issues of *fact* which for determination at a future trial include whether, and in what manner, the Plaintiff brought her concerns to the attention of the Defendant.

35. In the manner touched on earlier, it seems clear that, to determine these issues in dispute would require a trial judge to rely on such oral evidence as may be proffered, by either side at a future trial concerning disputed matters of fact, going back as far as 2008. Whilst I will return to the topic later in this judgment, there is no prospect of a trial taking place before 2024 at the earliest (i.e. some 16 years after events in dispute).

2 February 2015 - Defendant's Notice for Particulars

36. On 2 Feb 2015 the Defendant solicitors raised a Notice for particulars. This was not a particularly lengthy document in that it ran to less than 3 pages and contained 22 queries, without sub-paragraphs. The Plaintiff delayed in providing replies.

37. On 9 September 2015, the Defendant wrote to ask when the Plaintiff's replies to particulars would be furnished. In a letter dated 14 October 2015, the Plaintiff's solicitor stated inter alia:

"*We hope that there should not be much <u>further delay</u> and would ask that you please bear with us.*" (emphasis added)

If there were any reasons to account for the Plaintiff's delay, these could have been specified. None were. It was certainly not suggested that either the Plaintiff, or her solicitor were unable, for any reason (be it personal or health-related) to progress the proceedings.

6 January 2016 - Plaintiff's Replies to Particulars

38. Despite this, it took over 11 months before replies to particulars were delivered, on <u>6 January 2016</u>**.** A comparison between the particulars raised and the replies provided also illustrates the issues arising in these proceedings and the nature of the evidence which a future trial judge would be asked to rely upon to determine those issues. For example, particular number 1 states the following: "*1. State the dates on which and the means by which it is alleged that* [4 named individuals] *subjected the Plaintiff to unreasonable work demands".* The reply to this particular states: "1*. Numerous dated* (sic) *between 2008 and December 2012 where* [4 named individuals] *subjected the Plaintiff to unreasonable work demands by email, telephone and in person and these will be a matter for evidence."* (emphasis added)

"in person"

39. Thus, the Plaintiff contends, inter alia, that named individuals subjected her to unreasonable work demands on: *"Numerous dates between 2008 and December 2012 …<u>in person</u> and these will be a matter for evidence"* (emphasis added). This makes clear that a trial judge hearing this case, no earlier than in 2024, would be asked to make determinations in relation to central issues in these proceedings, on the basis of oral evidence of *"in person*" interactions said to have taken place during period spanning 2008 to 2012 (in other words, what was allegedly *said,* and *done*, or not, on various dates, up to 16 years earlier). I am fortified in this view by the following particulars.

40. Whereas particular 4 asks the Plaintiff to: *"4. Describe the form the criticism took. Give the form of words which the criticism took, whether verbal or in writing",* the reply to 4 provided by the Plaintiff states: *"This is a matter for evidence".*

"complaints were made verbally"

41. Furthermore, particular number 5 asks: *"5. What complaints were made by the Plaintiff regarding the "disorganisation of the department" and the increased workload and the different aspects of her employment she was obliged to cover",* to which the Plaintiff's reply was to state, inter alia, that: *"complaints were made <u>verbally</u> and in email by the Plaintiff*" (emphasis added). The Plaintiff goes on to state that and these were made: *"on numerous occasions during November and December 2011 and January 2012 in particular in relation to the payment schedule".*

42. Thus, the Plaintiff makes clear that her complaints were not all made in writing. On her case, certain complaints were made "*verbally"*, and this inevitably means that a future trial court would

be asked to determine matters of fact on the basis of disputed oral testimony, given no earlier than in 2024, as to what was, or was not, *said* in 2011 (with respect to the issue, the subject of Particulars/Replies no. 5).

"communicated verbally"

43. The foregoing is further underlined when one looks at particular number 8. The query and response are in the following terms:-

- Query 8 in the Defendant's Particulars: "*When did* [2 named individuals] *inform the Plaintiff that she 'had to get on and deal with it' and how was this instruction communicated to the Plaintiff?*"
- Response no. 8 in the Plaintiff's Replies*: "The Plaintiff was informed that she needed to 'get on and deal with it' by* [a named individual] *in or around December 2009 and this was communicated verbally"* (emphasis added).

Thus, a court would be asked to reach a finding of fact, as to whether the foregoing was said, or not, in 2009 based on disputed oral evidence given no earlier than in 2024.

"verbally requested" "verbally communicated"

44. It is also appropriate to note that the Plaintiff's reply no. 12 (on the topic of "*what dates and in what form did the Plaintiff request a transfer internally?"*) refers, inter alia, to what the Plaintiff "*verbally requested"* in 2010, and "*verbally communicated*" in 2012 (emphasis added).

"stated"

45. Furthermore, reply no. 19 (on the issue of "*when did the Plaintiff first bring the fact that she was suffering stress to the attention of any of her managers?"* begins "*Numerous occasions including but not limited to incidents on the 24th July 2012 during a meeting with* [a named individual] *the Plaintiff stated she was under stress having been forced to take on extra duties…"* (emphasis added)*;*

"criticism" "harassment" "bullying" "intimidation"

46. By means of Particulars 4; 14; 15; and 16, the Defendant called upon the Plaintiff to provide particulars of the alleged *criticism ; harassment ; bullying* ; and *intimidation* and it is appropriate to quote those queries, and the response given to each:

Query: "*4. Describe the form the criticism took. Give the form of words which the criticism took, whether verbal or in writing."*

Response: "*4. This is a matter for evidence".*

Query: "*14. Describe the alleged harassment to which the Plaintiff's alleged to have been subjected by servants or agents of the Defendant and specify by whom the Plaintiff was harassed, when and what form the harassment took."*

Response: "*14. This is a matter for evidence".*

Query: *"15. Describe the alleged bullying to which the Plaintiff is alleged to have been subjected by servants or agents of the Defendant and specify by whom the Plaintiff was bullied, when and in what form the bullying took.*

Response: *"This is a matter for evidence"*

Query: *"16. Describe the alleged intimidation to which the Plaintiff is alleged to have been subjected by servants or agents of the Defendant and specify by whom the Plaintiff was intimidated, when and what form the intimidation took.*

Response: *"16. This is a matter for evidence".*

47. These Replies by the Plaintiff, again, speak to the reality that a determination of issues would rely, to a material extent, on disputed oral evidence, going back to 2008, including, as regards what was said, or not, at various points in time between 2008 and 2012.

Numerous dates / complaints / occasions / requests

48. Before leaving the Plaintiff's replies to particulars, a further observation also seems appropriate. Just as the personal injury summons referred to "*diverse dates from 2008 until December 2012",* in her Replies, the Plaintiff refers, variously, to:

- *"numerous dates between 2008 and December 2012"*(Replies, para. 1);
- *"numerous complaints" and "numerous occasions"* (para. 5);
- *"various complaints"* (para. 6 and para. 11);
- *"various requests"* (para.18); and
- *"numerous occasions"* (para 19)

49. This speaks to the added difficulty facing a future trial judge, in that they would be asked to determine questions of fact, such as whether and, if so, *when*, certain wrongs involving verbal statements occurred; and/or verbal complaints; and/or verbal requests were made, without the Plaintiff having given details in relation to when same are said to have occurred (as opposed to a period of years spanning 2008 to 2012).

50. Three comments seem appropriate at this juncture. First, every Plaintiff is under a duty to progress their claim with due expedition. Second, having made a late start, this Plaintiff was under an added obligation to ensure that she prosecuted her case expeditiously. Third, this was all the more so, given the *nature* of this particular claim and the significance of oral evidence in any fair determination of it.

Plaintiff aware of the significance of oral evidence

51. In other words, although she did not give specifics (either in her 16 June 2014 Personal Injuries Summons or, in her 6 January 2016 Replies to Particulars) about *what* she, and others allegedly, said (or *when*) the Plaintiff, at all material times, knew or ought to have known that oral evidence

in relation to what was said, at various points in the period 2008 to Dec 2012, was *essential* to the determination of her claim at trial. This could not be otherwise as it is part of the very evidence the Plaintiff relies upon.

The significance of the passage of time

52. A Plaintiff in these circumstances at all material times knew, or ought to have known, that the more time the Plaintiff allowed to expire, the less reliable memories might be in relation to what was said, or not, years earlier. This common–sense proposition requires no specialist knowledge, be that legal or medical. Later I will return to it and to the manner in which relevant authorities have engaged with it.

Reasonably likely trial date

53. Before returning to the chronology of relevant events, it seems uncontroversial to say that, had the Plaintiff *not* taken over 11 months to deliver reply to particulars, but had, instead, replied reasonably promptly to the Defendant's February 2015 notice for particulars, and pressed the case forward to a trial, such a trial could well have taken place by February 2018 at the very latest. I say this bearing in mind that the proceedings issued in June 2014 and, although an Affidavit of verification was not sworn by the Plaintiff until January 2015, a Defence was delivered in January 2015. A trial within 3 years of the close of pleadings does not seem to me to be unreasonable to expect. In the manner presently explained this is certainly not what occurred. I now return to the relevant 'timeline'.

2016

54. Other than the (late) delivery of Replies to Particulars, and the swearing of an affidavit of verification, on 12 January 2016, in relation to same, the Plaintiff took no formal step to progress her claim throughout 2016. As of 2016, it was not suggested that there was any issue (personal, financial, health related, or otherwise) which prevented the Plaintiff (or her solicitor) from progressing the claim. Had there been any such issue, one would reasonably expect that it would have been 'flagged' in correspondence to the Defendant's solicitor. None was. On the contrary, in a letter, dated 06 January 2016, the Plaintiff's solicitor stated inter alia:

> "*We are now preparing to issue a notice of trial to bring the matter forward for hearing*" (emphasis added).

55. In light of the foregoing, this court is entitled to hold that there was no impediment affecting either the Plaintiff or her solicitor with respect to progressing the case. In the manner presently examined, a notice of trial was *not* issued, and the case was *not* brought forward for hearing.

2017

56. A single letter was sent by the Plaintiff's solicitor to the Defendant's solicitor in 2017 (dated 14 August 2017). It stated, inter alia:

"We had some administrative difficulties in this matter. However we are now sending papers to Senior Counsel to advise and should be issuing a Notice of Trial and setting down this matter for hearing in early course" (emphasis added)

57. Despite the foregoing explicit statement, the Plaintiff did not issue a Notice of Trial, or set the matter down for hearing. The Plaintiff took no formal step whatsoever in the proceedings in 2017. Again, this commitment to issue a Notice of Trial and progress the case to a hearing is inconsistent with there being any issue which prevented the Plaintiff, or her solicitor, from doing just that. However, in the manner presently examined, there was no 'follow through' on this commitment.

2018

58. The Plaintiff took no formal step in the proceedings throughout 2018.

2019

59. The Plaintiff took no formal step in the proceedings throughout 2019. On 3 May 2019 Anne McShane Solicitors wrote to the Defendant's solicitors and, having cited the title and record number of these proceedings, went on to state the following:

"I refer to the above and confirm that this firm has taken over conduct of the above matter. I have instructed my town agents to issue and serve a formal notice of change of solicitor on you.

I will be reverting to you shortly with updated Particulars of Injury" (emphasis added)

60. There was nothing in this letter to suggest that there is any issue whatsoever which prevented the Plaintiff, or her solicitor, from progressing these proceedings expeditiously. On the contrary, the letter makes explicit that this is precisely what will be done. No other interpretation can fairly be taken from the words " *I will be reverting to you shortly with updated Particulars of Injury".* However, this is not what happened, and almost 2 years of further delay ensued before, in the manner presently examined, the Plaintiff furnished the updated particulars, on 9 March, 2021.

61. By means of a "notice of change of solicitors", dated 7 May 2019 "Anne McShane Solicitors" came on record for the Plaintiff, instead of McGrath McGrane solicitors. A notice of change of solicitors is not a pleading and did nothing to progress the case.

2020

62. The inaction on the Plaintiff's part, which began in January 2016, continued unabated throughout the entire of 2020.

2021

63. On 22 January 2021 a "notice of intention to proceed" was filed in the central office on behalf of the Plaintiff, by Anne McShane solicitors. A notice of intention to proceed is not a pleading. On

9 March 2021 the Plaintiff's solicitor furnished a Notice of updated particulars, running to 2 pages, comprising of paragraph 18 (i) to (xxii) inclusive (hereinafter "the updated particulars"). No correspondence sent in March 2021 by the Plaintiff's solicitor to the Defendant's solicitor suggests that at any time up to that, any issue of any sort prevented the Plaintiff, or her solicitor, from progressing the claim.

Expansion of initial claim

64. The updated particulars undoubtedly expand the claim as initially pleaded, some 7 years earlier. Several new allegations, including one of sexual harassment, were articulated. In the manner I will presently come to, the Plaintiff no longer maintains the sexual harassment claim, in circumstances where the employee in question is now deceased.

Voluntary discovery request

65. On the same date, 9 March 2021, the Plaintiff's solicitor made a request for voluntary discovery. The reasons given made reference to pleas contained in the Defence which, of course, had been delivered in January 2015, over 6 years earlier.

66. Following the receipt of the Plaintiff's updated particulars and voluntary discovery request, the solicitors for the Defendant responded by letter dated 25 March 2021 stating *inter alia* the following:

> *"Our defence was delivered in February, 2015 and you have now six years later sought discovery, delivered additional particulars of claim and delivered a Reply. On the face of it, the delay is inexcusable and inordinate. If there are some factors to the contrary, please share them with us.*
>
> *The result of the delay is that there is a real risk of an unfair trial or unjust result. The Defendant's ability to defend the matter has been utterly prejudiced by the passage of time and the ability of witnesses to recollect the matters of which the Plaintiff complains.*
>
> *We note the additional particulars delivered introduce entirely new allegations into the case including a claim of sexual harassment. On any view, the case is far from ready for trial. Please note that we do not intend making discovery in this case. Rather we invite the Plaintiff to withdraw her proceedings before further costs are incurred. In default, we will bring an application to dismiss the Plaintiff's claim for inordinate and inexcusable delay. If that is necessary, we will also seek an order for the costs of the proceedings."*

On 16 December 2021, Mr Geoffrey Dunne, the Defendant's in-house solicitor swore an affidavit to ground the present motion.

Calculation of the Plaintiff's post-commencement delay

67. From 6 January 2016 (when the Plaintiff delivered replies to particulars) to 9 March 2021 (when the Plaintiff furnished updated particulars) represents a period of just over 5 years and 3 months.

It will also be recalled that it took just over 11 months for the Plaintiff to provide Replies to particulars, which the Defendant raised on 2 February 2015.

68. In the manner examined earlier, those Replies were relatively short and can fairly be described as 'light' on detail. They cannot conceivably have taken 11 months, or anything like it, to prepare. Nor is it averred that 11 months was needed by the Plaintiff to provide same. Thus, even if the Plaintiff is given as much as 3 months 'credit' (out of the aforementioned 11 months) the net result is cumulative post-commencement delay of over 6 years (i.e. 5 years and 3 months plus 8 months), for which Plaintiff is responsible.

Finding in relation to inordinate delay

69. In *Framus Ltd. v. CRH plc*. [2012] IEHC 316 (at para. 23) Cooke J stated that: "*In its ordinary meaning delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive".* 6 years of delay by the Plaintiff is, without doubt, inordinate. The Defendant has met the first of the 3 limbs of the *Primor* test. I now turn to the second limb and the question of whether the Plaintiff's inordinate delay is excused, or not.

The Plaintiff's affidavit

70. I have carefully considered the contents of the Plaintiff's 24 October 2022 affidavit, wherein she attempts to excuse delay. The following comprises a summary of matters raised by the Plaintiff (and, for ease of reference, I have used headings for the various issues canvassed).

Anti-bullying Centre ("ABC") report – 4 January 2019

71. At paragraph 6 the Plaintiff emphasises the delivery, on 9 March 2021, of updated particulars, averring that "*These updated particulars were drafted following receipt of the anti-bullying centre report by my former solicitor on 4 January 2019".* The foregoing neither explains, nor excuses the Plaintiff's 6 year delay. It is a statement of the obvious that the Plaintiff was responsible for almost 4 years of delay *prior* to receipt of the report referred to. A delay of 4 years was, in this case, of itself, inordinate. Furthermore, what role that report played and its connection to delay is simply not explained. In addition, no explanation is proffered in relation to why it took a further 2 years, and more, from the 4 January 2019 report, until updated particulars were delivered.

"*Missing*" documents

72. At paragraphs 7 and 8 the Plaintiff contends that she was delayed in setting out the particulars of her claim because, although she had some supporting documentation, she had limited access to work emails from 2012. She avers that she repeatedly requested personnel documents from the Defendant and she exhibits a 20 November 2013 email which includes a request that a copy of her personal records on file with the Defendant's HR Department be sent to her home address. It seems clear that the Plaintiff's personnel file was sent to her, *per* her request. I say this given paragraph 8 begins with the averment: "*When I received my personnel file from the Defendant I noticed important documents were missing…"* (emphasis added).

73. In relation to "*missing*" documents, the Plaintiff avers at paragraph 8: "*I set out the missing documentation I noticed at that time in an email to my solicitor of 15 January 2014"* (emphasis added) which she exhibits. The following comments seem appropriate in relation to these averments. It seems clear from the Plaintiff's averments that she did, in fact, receive her personnel file and that she received it *prior* to 15 January 2014 (the date of her email to her then solicitor). There is no evidence before this Court that the Defendant (as opposed to the Plaintiff's solicitor) was informed of documents said to be missing from the Plaintiff's personnel file.

74. Thus, the absence of her personnel file, or the absence of documents from it, cannot conceivably explain, or excuse, delay which began with the service by the Defendant of a Notice for Particulars in February 2015 (8 months delay out of the 11 months taken by the Plaintiff to furnish Replies). Nor can allegedly missing documents explain or excuse the Plaintiff's delay from January 2016 to March 2021, particularly given that this was delay *after* the delivery of the Plaintiff's Replies to Particulars (and the documents are said by the Plaintiff to be relevant in terms of assisting the Plaintiff to particularise her claim).

75. When asked for particulars of the alleged criticism; harassment; bullying; and intimidation, the Plaintiff did not reply to say *"This is not possible because the Defendant has not furnished the Plaintiff's complete personnel file*" or say that, until discovery has been obtained, and relevant documents examined, the Plaintiff is unable to provide replies, or words to the foregoing effect. Rather, the Plaintiff pleaded that each these issues were "*a matter for evidence"*.

76. Furthermore, in circumstances where the defence was delivered on 15 January 2015, it was open to the Plaintiff, at that point and at all material times thereafter, to seek discovery of all relevant documents. She did not do so. Insofar as the Plaintiff avers, at para. 9, that she understands that her "*former solicitor had difficulties in obtaining these documents from the Defendant*", the Plaintiff provides no details whatsoever and no request is exhibited.

Discovery sought

77. The Plaintiff proceeds to aver, at para. 9, that "*She ultimately sought voluntary discovery on my behalf of documents which are relevant and material to my claim".* As previously noted, this was a letter dated 9 March 2021 (approaching 7 years after the Plaintiff's 15 January 2014 email to her solicitor, Ms McShane, in relation to her personnel file). The voluntary discovery request does not make any reference to prior requests, nor is it suggested that any were made. There is no evidence before this court to suggest that the voluntary discovery request to which the Plaintiff refers could not have been sent, 6 years earlier, upon receipt of the Defence. In short, issues raised with respect to documents provide neither an explanation, nor an excuse, for the Plaintiff's delay.

"*sexual harassment*"

78. At para-11, the Plaintiff makes inter-alia the following averments in relation to why the allegation of sexual harassment was only raised for the first time in updated particulars of 9 March 2021: *"I was able to obtain independent counselling between 2014 and 2015 and during the sessions we discussed the incident and my counsellor agreed that sexual harassment had occurred. It was also difficult to put together my file and this took considerable time."* The foregoing cannot conceivably explain or excuse the Plaintiff's delay which post-dates the agreement (no later than 2015) between the Plaintiff and her counsellor that sexual harassment had occurred. Nor is any explanation or detail given in relation to the nature of the difficulties encountered in putting together the Plaintiff's file.

Housing / employment / stress

79. In paragraph 11, the Plaintiff goes on to states that: "*At the time of the assessment by the anti-bullying centre, I was only able to get temping work and had applied for emergency housing accommodation as I had notice to leave my home in May 2018. I eventually obtained new accommodation in October 2018. I was quite stressed as, because I was temping, work was not regular as sometimes the agency did not have work for me. This continued until I obtained a contractual role in October 2018. In any event, para. 18(v) of the notice of updated particulars made clear that this allegation was against* [a named individual]. *By letter of 14 April 2022, the Defendant informed my solicitor that* [the named individual] *has since passed away. I confirm that in those circumstances, I am not proceeding with that aspect of my claim."*

80. The foregoing averments in relation to accommodation and employment issues and attendant stress, refer, in particular, to the period May 2018 to October 2018, inclusive. At the beginning of that period, the Plaintiff received notice to leave her home and her employment was insecure. By the end of that 6 month period, she had obtained new accommodation and a contractual role.

81. Whilst this court could have nothing but sympathy for someone encountering housing or employment difficulties, which, no doubt, can cause significant stress, it is entirely unclear how these issues during that (6 month) period are said to relate to the Plaintiff's (6 year) delay in progressing her claim. For instance, it is not averred that, at *any* stage, the Plaintiff (i) was unable to progress the claim due to employment or employment issues; or (ii) was unable to give instructions to her solicitor as a consequence of stress, due to such issues.

82. Furthermore, even if the court were to give "credit" to the Plaintiff in relation to the entire period of 6 months from 1 May to 31 October 2018 (and the evidence does not support such an approach) it still leaves the Plaintiff responsible for 5 and half years delay. In short, the foregoing averments cannot explain and, therefore, do not excuse the Plaintiff's delay.

Personal issues

83. At paragraph 12, the Plaintiff avers inter alia that: *"In 2018, my father died and my mother suffered a massive stroke which required me and family members to provide acute care for 11 months… During my time on illness benefit, I was in dire reduced financial circumstances. It was*

necessary for me at times to seek help from the Department of Social Protection in securing income and housing assistance. By January 2014, I was in rent arrears and on emergency social welfare. I made many efforts to obtain work through temping agencies and eventually secured work at the end of 2017. Between October 2018 and August 2020 I moved accommodation 5 times. Due to the precarious nature of the temping work and the rental crisis costs in Dublin, I eventually left for the UK to obtain work in 2020…". One would need to have a heart of stone not to be moved by such an account of personal loss; family care-demands ; and financial difficulties (collectively "personal issues").

84. However, it does not seem to me that there is evidence linking these personal issues to the Plaintiff's delay. For example, whilst the Plaintiff states that, by January 2014, she was in rent arrears and on emergency social welfare, it was in 2014 that she caused these proceedings to be issued. Therefore, without intending any disrespect (but in the context of trying to understand the relationship, if any, between the personal issues, on the one hand, and the delay, on the other) it can fairly be said that no personal issue prevented the Plaintiff from causing these proceedings to be issued by her then solicitor, in 2014.

85. With respect to post-commencement delay, it is not averred that any personal issue was the reason why it took 11 months to provide replies to particulars. Nor is it averred that any personal issue was the reason why no step whatsoever was taken from 6 January 2016 (the Plaintiff's Replies to Particulars) to 9 March 2021 (the Plaintiff's Updated Particulars).

86. The following is not intended to be disrespectful or heartless, but this Court is obliged to engage with the evidence before it and, taking the issue of 'accommodation moves', it is uncontroversial to say that, from January 2016 (the Plaintiff's Replies) to October 2018 (the *first* of five moves of accommodation) is 2 years and 9 months. It will also be recalled that delay of at least 8 months had arisen prior to January 2016 in terms of delivering replies to particulars. Thus, *before* the Plaintiff was required to move accommodation for the first time, there had already been post-commencement delay of at least 3 years (a period which, of itself, is inordinate, in the present case).

87. Nor does the evidence establish any causal connection between one, or more, accommodation-moves and any specific period or periods of delay (given, as I have observed, that there is no averment made to the effect that any move of accommodation rendered it impossible to provide instructions to the Plaintiff's solicitor on record). Thus, the Plaintiff's reference to personal issues does not disclose an explanation or excuse for her delay.

Sympathy

88. With respect to the averments by the Plaintiff in relation to personal issues, I consider this to be a situation where this Court has sympathy for the Plaintiff, but sympathy is, however, not the same as excusing delay which a Plaintiff has explained. In the present case, I cannot identity an explanation for the Plaintiff's delay [In relation to the foregoing, see para. 40 of the Court of

Appeal's in the decision in *Gallagher v. Letterkenny General Hospital & Ors* [2019] IECA 156, wherein the Court noted the difference between, on the one hand, an explanation which might attract *sympathy* and, on the other hand, something constituting an *excuse* for delay].

Counselling

89. During the hearing, Counsel for the Plaintiff submitted that the fact she had to go for counselling, in the manner averred at para. 11 of her affidavit, *"is very relevant in terms of her ability to progress her own case".* It was plain that the gravamen of this submission is to invite the court to presume that, because the Plaintiff attended counselling between 2014 and 2015, her mental health or emotional state was such that it was impossible for her to progress her own claim until March 2021 when, as we have seen, voluntary discovery was sought and updated particulars were delivered. Irrespective of skill with which that submission is made, I am satisfied that it is not sufficiently grounded in evidence.

90. The Plaintiff certainly attributes her alleged injuries to the Defendant (as would be the case in any legal proceedings of this type). As to the nature of the injuries, these are pleaded to include *"stress symptoms"*; *"psychological and physical symptoms of anxiety including nausea and dread in going to work"*; and it is pleaded that *"the Plaintiff continues to remain unfit for work and is suffering from an adjustment disorder and mixed anxiety depression …".* It is also pleaded that *"the Plaintiff will be required to engage in psychotherapy to enable her resolve her stress and emotions of anxiety and anger and to develop coping skills to enable her interact within the workplace in the future"* (see Schedule IV of the personal injury summons).

91. However, nowhere does the Plaintiff aver that the alleged injuries, the subject matter of these proceedings *prevented* her from progressing the proceedings themselves, at any point. Still less, does the Plaintiff identify any specific period e.g. between February 2015 (when the Defendant raised a notice for particulars) and, say, March 2021 (when the Plaintiff delivered Updated Particulars) and aver that, due to her then state of health, it was impossible for her to progress her claim, between those dates. Nor is there any medical evidence which would allow this court to reach such a finding.

92. Furthermore, the only evidence of counselling is *"between 2014 and 2015"* (see para. 11 of the Plaintiff's affidavit). This is not a situation where, for example, the clinician who provided this counselling to the Plaintiff, between 2014 and 2015, has provided a report or made an averment in which it is confirmed that the Plaintiff was unable to give instructions to progress her case at that time (or at any other time).

93. The same is true in relation to Dr. Mairead O'Leary, consultant psychiatrist, who saw the Plaintiff on 25 April, 2014 (prior to the delay) but did not see the Plaintiff again until 30 September, 2022 (after the delay). In the manner examined elsewhere in this judgment, that second appointment was obtained exclusively in relation to the present motion. In circumstances where Dr. O'Leary's report is exhibited in Ms McShane's affidavit, I deal with its contents when examining that affidavit.

94. At para. 13 of the Plaintiff's affidavit, she asserts that the Defendant "*cannot be prejudiced by the hearing of the proceedings"* because "*the Defendant has been aware of the broad outline of my claim of bullying and harassment in the workplace since the personal injuries summons was issued on 18 June, 2014".*

95. With respect, the foregoing logic is flawed. Underlying the Plaintiff's assertion is that, so long as the Defendant is made aware, in broad terms, of a Plaintiff's claim, the passage of time, regardless of how long, cannot cause prejudice. This fails to engage with key issues such as: the nature of the Plaintiff's claim; the number and range of issues of fact in dispute; the reality that the determination of disputed issue will undoubtedly depend on oral evidence based on the memories of witnesses in respect of past events; how long ago things were allegedly said or allegedly done; and the degrading of memory as time passes.

Affidavit sworn by Ms Anne McShane

96. The Plaintiff's former solicitor, Ms McShane, swore an affidavit, on 21 October 2022. What is offered in an attempt to excuse the Plaintiff's delay can fairly be summarised as follows (employing relevant headings in relation to the key themes touched on).

Replies to Particulars

97. With regard to the delay in delivering replies to particulars, Ms. McShane avers at para. 5 that: *"I recall spending considerable time clarifying dates and specifics with the Plaintiff and a number of enquiries were made in this respect. I felt it was important that the draft replies were settled by counsel."* It is fair to say that these averments are made in the most general of terms. No reference is made to any particular difficulty which resulted in it taking just over 11 months for the Plaintiff to serve what was, in relative terms, a short document. Carefully considering the averments by the Plaintiff and her solicitor, I am satisfied that they do not provide an excuse for delay. Having given the Plaintiff "credit" for 3 months (more than reasonable, in my view, to enable the Replies to have been furnished) an additional 8 months of delay remains.

Documentation

98. It will be recalled that, in response to the Defendant's request for particulars of specific dates of incidents of overwork, the Plaintiff's replies to particulars stated: *"Numerous dates between 2008 and December 2012"*. At para. 6, Ms. McShane refers to the reason for this, averring: *"The Plaintiff was unable to state with certainty precisely what days she had complained about overwork. We did not have many of her emails corresponding with her manager's as she was no longer able to access her work emails and therefore could not confirm the exact dates and the exact wording of emails…".* Ms McShane proceeds to refer to the Plaintiff having obtained her file directly from the Defendant under the Data Protection Act. She refers to instructions from the Plaintiff that the file: *"…was missing a lot of documentation, in particular emails. She attempted to get these emails herself but was unable to do so"* (emphasis added)

99. These averments mirror those made by the Plaintiff and it will be recalled that the Plaintiff received her personnel file and noted (in an email of 15 January 2014 which she sent to Ms. McShane) that certain documents were missing from her file.

100. Thus, the Defence delivered by the Defendant, dated 15 January 2015, came precisely one year *after* the Plaintiff's former solicitor was made aware that the Plaintiff regarded her personnel file as incomplete (i.e. missing items referred to in the Plaintiff's 15 January 2014 email to Ms. McShane). Despite this, no explanation whatsoever is given by the Plaintiff's solicitor for why voluntary discovery was not immediately sought upon receipt of the Defence.

101. No averment is made by Ms. McShane in relation to any impediment to seeking voluntary discovery immediately on receipt of the Defence. I say immediately because, by that stage, the lack of "missing" documents (as the Plaintiff sees it) had been a 'live' issue between the Plaintiff and her solicitor, for a year.

Discovery

102. Instead of any explanation or excuse, the following is averred by Ms. McShane at para. 6:

> *"The lack of access to documentation from the Plaintiff's perspective was dealt with by way of letter seeking voluntary discovery from the Defendant of such documents and other categories of documents on behalf of the Plaintiff on 9 March 2021."*

103. To the extent that it contended that the absence of documentation explains or excuses delay – and, in that context, averred that this lack of access was *"dealt with"* by means of a voluntary discovery request – the said request came over 7 years after Ms. McShane was notified by email (15 January 2014) that, according to the Plaintiff, documents were missing from her personnel file. It was a request for discovery made over 6 years after the close of pleadings.

104. Furthermore, whilst it is averred that the Plaintiff obtained a copy of her file under Data Protection legislation, no averments are made in relation to whether the Plaintiff pursued missing documents *via* the Data Protection Commissioner. For these reasons, Ms McShane's averments, in respect of documentation / missing documents / Discovery, provide neither an explanation nor an excuse for the Plaintiff's delay.

Dr. Mona O'Moore/Anti-Bullying Centre

105. A key submission made on behalf of the Plaintiff is that difficulties encountered by her solicitor in relation to obtaining a report by Dr. Mona O'Moore of the Anti-Bullying Centre ("ABC") explains delay. On this topic, at para. 8 of her affidavit, Ms. McShane makes inter alia the following averments: *"Following delivery of replies to particulars to the Defendant, I requested an assessment of the Plaintiff by Dr. Mona O'Moore at the Anti-Bullying Centre (ABC) and sent papers in early 2016…"* going on to aver *"To the best of my knowledge the ABC is the only available expert resource in this area and therefore there was no option except to await this expert report…"*

106. The first observations to make are that neither the Plaintiff, nor her solicitor, have explained why it was not *until* 2016 that a request was first made to the ABC for a report. Nor is there any evidence to the effect that there was any impediment to seeking such a report at a much earlier stage. I make these comments in light of the following:

(i) At all material times, the Plaintiff alleged that she had been bullied;

(ii) Ms. McShane avers (at para. 1 of her affidavit) that she was *"acting for the Plaintiff herein from December 2013"*;

(iii) Following an application to PIAB (on 13 December 2013) the Plaintiff caused the Plenary Summons to be issued (on 16 June 2014) which is replete with references to alleged bullying;

(iv) These were proceedings with a 'late start' (given that the alleged wrongs go back to 2008-2012.

Delay in *seeking* expert's report from ABC

107. Towards the end of para. 8 of Ms. McShane's affidavit, she makes the following averment in relation to the expert's report: *"It was vital in terms of establishing liability"*. If this is so, the ABC report was just as vital during the more than 2 years which elapsed between late 2013 and early 2016. In the manner presently examined, it was 3 years before the ABC report was provided. Thus, even if 3 years were considered to be a reasonable period to wait for an expert's report in this case (and I cannot accept that it is) 2 years were lost before it was even requested. To put it another way, had this expert's report been sought when the Plaintiff made her PIAB application (December 2013), even if it took (the, in my view, unreasonable period of 3 years to obtain) this "vital" expert's report would have been available by the end of 2016 (as opposed to early 2019).

108. I am fortified in these views by the contents of a letter which the Plaintiff's solicitor sent to the Defendant's solicitor, on 06 January 2016. I referred to it earlier when looking at the 'Timeline'. It will be recalled that the letter stated inter alia: "*We are now preparing to issue a notice of trial to bring the matter forward for hearing*". The foregoing statement, which was made by the Plaintiff, through her solicitor, on 6 January 2016, gave the very clear impression that there was no issue which prevented progress being made, be that (i) the lack of any expert's report; (ii) any personal or financial or health – related issue rendering it impossible for the Plaintiff to give instructions; or (iii) any issue, whatsoever, which might prevent the Plaintiff's solicitor from progressing the case with due expedition. That being so, the contents of this letter (which was, of course, sent in the absence of any report from the ABC) are impossible to reconcile with the proposition that there was such an issue which prevented (and thereby explained or excused) progress.

109. In making these comments, the court is not for a moment purporting to dictate how a Plaintiff, or any legal professional retained by them, should conduct litigation. Every case is unique and it is no function of this Court to set unrealistically high standards. All this Court is doing is engaging with the specific evidence in a very particular case in order to have a thorough

understanding of the facts, in particular, what was and was not done, or not, and when. These facts include:-

(i) The Plaintiff alleges that she was bullied between 2008 and December 2012;

(ii) She had a solicitor acting for her from December 2013 and made a PIAB application at that stage;

(iii) An expert's report which is said to be vital to liability was not sought until early 2016;

(iv) At the very same time (i.e. early 2016) the Plaintiff, through her solicitor, was telling the Defendant's solicitor that a notice of trial would be served and the case progressed to hearing (neither of which were done);

(v) The Plaintiff's solicitor received the expert's report on 4 January 2019 (but, even then, did not serve a notice of trial or bring the case on for trial).

Delay in *receiving* the ABC report

110. The reason for delay between early 2016 (report requested) and 4 January 2019 (report received) is averred to, as follows, at para. 7 of Ms. McShane's affidavit:-

> *"As is known, the Centre is extremely busy. Also, in that time period, they moved premises – a fact of which I was not aware at the time. I was not sure at that time whether we would even be able to get a report from the Anti-Bullying Centre and was not in a position to say for certain that a report would be available. This was the reason for a delay between early 2016 and the date on which I received the report, 4 January 2019, despite having followed up with the Centre on a number of occasions."*

111. Whilst it is averred that the Centre is "*known*" to be "*extremely busy*", this is an averment which is made in the most general of terms. No detail whatsoever is given which might link the workload of the ABC and any specific delay. The fact that the Plaintiff's solicitor was "*not aware"* that the Centre moved premises, between the request for a report and the receipt of same, is not an excuse for delay. With respect, it speaks to the reality that lengthy periods of time elapsed without, it appears, any 'follow-up' in relation to when the report would be available. I am fortified in this view by averments which appear in para. 8 to which I will refer presently.

112. The averment that the Plaintiff's then-solicitor *"was not sure at that time whether we would even be able to get a report"* from the ABC and that she was *"not in a position to say for certain that a report would be available"* is not an excuse for delay. It seems to me that a Plaintiff who, from early 2016 to early January 2019, found themselves in a position where it could not be said for certain that *any* report would *ever* be provided by their chosen expert, was under an obligation to ensure that, at a minimum, some efforts were made to try and contact an alternative expert.

113. To say the foregoing does not seem to me to set the 'bar' too high for a Plaintiff. Rather, it is simply a reflection of the averment that the expert's report was "*vital in terms of establishing*

liability" and marrying that averment with the duty on every Plaintiff to ensure that their case is progressed with due expedition.

114. It is unnecessary, for the purposes of deciding this application, to say when the obligation to explore alternatives, as regards expert opinion, arose. However, it does not seem unreasonable to say that if, after a full year of waiting, there was (i) no report; (ii) no appointment in relation any necessary assessment; and (iii) no clarity as to when the foregoing would be forthcoming, it behove the Plaintiff to take *some* steps to explore whether an alternative expert could advise. To my mind, the Plaintiff also bore a responsibility to make the Defendant aware of the specific difficulties being encountered in relation to obtaining their chosen expert's report. The evidence allows for findings of fact the Plaintiff in these proceedings neither took steps to retain an alternative expert, nor updated the Defendant on any difficulties experienced.

115. It will be recalled that, following service in January 2016 of her Replies to Particulars, there was no further step taken throughout the remainder of 2016 to progress the case. This remained the position in 2017. Whilst Ms McShane has averred in her 21 October 2022 affidavit (para. 8) that an expert's report from ABC *"was vital in terms of establishing liability",* the said averment is very difficult to reconcile with the contents of the letter which she sent, on behalf of the Plaintiff, over 5 years *earlier,* namely, the single letter sent in 2017. I referred to its contents when looking at the 'timeline' and, at the risk of repetition, the substantive part of this short letter, dated 14 August 2017, states the following:

> *"We had some administrative difficulties in this matter. However <u>we are now sending papers to Senior Counsel to advise and should be issuing a Notice of Trial and setting down this matter for hearing in early course.</u>"* (emphasis added)

116. It will be recalled that ABC were sent papers in early 2016. Therefore, this was a letter sent over a year and a half *after* ABC had been asked for a report (and, as we now know, a year and a half *before* the ABC report was received by the Plaintiff). It was also a letter sent on behalf of the Plaintiff before even a single reminder letter had been sent to ABC (Ms. McShane avers at para. 8 that she sent written reminders on 1 September and 16 October 2017). No mention is made in the Plaintiff's 14 August 2017 letter of either (i) the need for an expert's report or (ii) any difficulties encountered in relation to obtaining it. There is no suggestion made in this letter that the case could *not* be progressed in the absence of an expert's report. Indeed, the very opposite impression is given (i.e. that matters are sufficiently advanced such that the Plaintiff is in a position to serve a Notice of Trial and will be setting the case down for hearing *"in early course"*).

117. Any suggestion that, as of August 2017, either the Plaintiff or her solicitor were unable, for any reason, to progress the claim is also wholly undermined by the contents of this letter. In the manner noted earlier, there was simply no 'follow through' by the Plaintiff in relation to her stated intention (by means of the said August 2017 letter) to progress the case. It seems to me that, as 2017 came and went, and as weeks turned into months, and then years, without any

notice of trial being served, the Defendant could be forgiven for believing that the Plaintiff had simply abandoned her claim.

2016 "*telephone calls*"

118. In relation to efforts by the Plaintiff's former solicitor to progress matters, Ms McShane avers, at para. 8, that she made *"telephone calls to the ABC in 2016"*. No information is given about when these calls were made or how many calls were made. The content of those phone calls is not explained. Without intending any disrespect, this Court is left entirely 'in the dark' as to whether, during these calls, ABC provided *any* information such as, for example (i) confirmation that papers had been received; (ii) any indication as to how busy Dr. O'Moore then was; (iii) any indication as to when a review of the Plaintiff might be scheduled; (iv) any guidance as to when a report might be available; and/or (v) any suggestions made with respect to possible alternative expert(s) in view of any delays.

1 September/ 16 October 2017 "*written reminders*"

119. Apart from the aforementioned reference to phone-calls in 2016, the height of what is averred by the Plaintiff's former solicitor is that she sent *"written reminders on 1 September 2017 and 16 October 2017"* (para. 8). That being so, the evidence allows for a finding that it was not until early September 2017 until any written reminder was sent. This was approximately one year and eight months *after* papers had been sent (in *"early 2016"*) to Dr. O'Moore.

120. The fact that the Plaintiff did not cause even a single letter to be written, or email to be sent, at any time between early 2016 and the end of August 2017, with a view to expediting this expert's report seems to me to be a failure to progress her claim with anything like due expedition, for which no excuse is offered. For example, it is not suggested that any difficulties (personal, financial, health, or otherwise) affected either the Plaintiff or her solicitor between 2016 and August 2017, so as to prevent the case from being progressed. Nor are any mentioned in the single letter which the Plaintiff's solicitor sent to the Defendant's solicitor in August 2017, which was discussed previously.

Papers "*re-sent*" in November 2017

121. Ms. McShane proceeds to make the following averments at para. 8:-

> *"I received a response from Murray Smith, assistant to Dr. O'Moore, on 22 November 2017 stating that he could not locate the papers I sent in 2016 and requesting that they be resent. I re-sent the papers in November 2017. When speaking to Mr. Smith, he stated that Dr. O'Moore had a long waiting list and it would be six months at least before there was an appointment available for an assessment."*

122. It does not seem unreasonable to suggest that, had the Plaintiff ensured that reasonable steps were taken to 'follow up' with Dr. O'Moore's office, significant delay could have been avoided. For instance, had contact been made more promptly, the Plaintiff could have learned early in 2016 (as opposed to in late 2017) that papers either had not been received or had gone missing

in Dr. O'Moore's office. Furthermore, the Plaintiff would have learned, far sooner, about the state of Dr. O'Moore's waiting list. The state of Dr O'Moore's waiting list in early, mid, or late 2016 (or, for that matter, in early or mid-2017) is completely unknown. It is unknown because there is no evidence before the court of any 'follow-up' on behalf of the Plaintiff after sending papers to ABC in early 2016.

123. Given that the *status quo*, as of November 2017, was that it would be a further six months before Dr. O'Moore could even carry out an *assessment* of the Plaintiff, it is also somewhat surprising that no steps whatsoever were taken (before or after) to see if any alternative clinician could review and report in respect of the Plaintiff, particularly given the delay up to that point. If the foregoing observation appears unduly harsh, it is useful to contrast what occurred in respect of the ABC report with the contents of paras. 15 and 16 of her 21 October affidavit, wherein the Plaintiff's former solicitor avers that when, in February 2014, Dr. Stephanie Bourke (a consultant psychiatrist) advised that she could not provide a report, Ms McShane "*…then referred the Plaintiff to Dr Mairead O'Leary…*" (a consultant psychiatrist) who "*…provided her earliest available appointment to the Plaintiff and the Plaintiff was assessed and a report obtained within 2 weeks. Proceedings were then issued in June 2014".* The prompt 'follow up' and the speed with which a report was obtained is in very stark contrast to the position in relation to ABC and fortifies me in the view that far more could and should have been done even if – perhaps especially if - one were to accept the proposition that a report from ABC was always vital to the Plaintiff's case.

124. At the very least, it was reasonable to expect that there would be *very* active 'follow up' from November 2017, with a view to expediting the long-awaited report and also reasonable to expect that the Plaintiff would update the Defendant on any difficulties being encountered. The evidence indicates that the Plaintiff did neither of these things.

125. In the balance of para. 8, Ms. McShane avers inter alia:

> *"I sent a reminder to Mr. Smith on 24 May 2018 about that assessment. On 19 June 2018 Mr. Smith confirmed that an assessment had been arranged for 10 July 2018. The Plaintiff attended that assessment. I then received the report of Dr. O'Moore on 4 January 2019 I believed it was essential to assisting the Plaintiff in properly preparing her case to obtain this report prior to issuing a notice of trial. To the best of my knowledge, the ABC is the only available expert resource in this area and therefore there was no option except to await this expert report. It was vital in terms of establishing liability. I set out these details in my letter to the Defendant of 29 April 2021."* (emphasis added)

126. To send just a single reminder letter, on 24 May 2018, in the wake of learning (in November 2017) that the papers which had been sent to the expert (in January 2016) could not be located, does not seem to me to constitute adequate efforts to progress matters with sufficient expedition, given the circumstances of this particular case. Furthermore, and whilst it involves repetition, the above averments as to the significance of the ABC report do not sit at all easily

with the contents of the letter which the Plaintiff's solicitor sent to the Defendant's solicitor nearly a year *before* she sent the 24 May 2018 reminder (namely, the 14 August 2017 letter which stated that: *"We are now sending papers to Senior Counsel to advise and should be issuing a notice of trial and setting down this matter for hearing in early course"*).

March 2016 – March 2017

127. At para. 11 the Plaintiff's former solicitor avers:

> "*In respect of the delay from March 2016 to March 2017, there was initially a delay following the lodging of the replies to particulars by me on 5 January 2016. I sent papers to senior counsel on 16 March 2016 for advices. I sent a reminder to her in May 2016. She responded requesting further documentation evidencing correspondence between the Plaintiff and Defendant. The Plaintiff provided some documentation but was restricted in what she could provide as she was not able to access emails. I sent further documents to senior counsel. senior counsel, who is based in Cork, returned the papers on 20 March 2017, having found herself unable to deal with the matter."* (emphasis added)

128. The following can fairly be said in relation to the foregoing averments. It will be recalled that papers were sent to the ABC in "*early 2016"*. This Court is entitled to take it that the foregoing was done on instructions from the Plaintiff. Thus, as of early 2016, no personal, financial, or health issues prevented either the Plaintiff or her solicitor from progressing the Plaintiff's claim. The fact that, subsequently, "*the Plaintiff provided some documentation"* is also consistent with the Plaintiff being in a position to progress her claim. As to the averment that she was "*restricted in what she could provide as she was not able to access emails"* it will be recalled that the pleadings had closed with the service, by the Defendant, of a defence dated 15 January 2015. Thus, it was within the gift of the Plaintiff to seek voluntary discovery of all emails she regarded as relevant, but she failed to do so.

129. At the end of para. 11 the Plaintiff's former solicitor makes averments to the effect that, when papers were returned by senior counsel on 20 March 2017 "*The report was awaited from the ABC"*. However, it will be recalled that, as of March 2017, the Plaintiff had not caused even a single email or letter to be sent to ABC to try and expedite the availability of a report, despite the fact that papers had been sent to Dr. O'Moore and an assessment of the Plaintiff had been requested over a year earlier ("*in early 2016")*.

130. In short, no reasons have been offered which excuse the Plaintiff's delay, of which the period of March 2016 to March 2017 represents a sub–set (which, even if viewed in isolation, has not been excused).

March 2017 to August 2017

131. At para. 12, Ms. McShane makes averments with respect to the period from March 2017 to August 2017 and these concern instructing an alternative senior counsel in July 2017; arranging for a consultation which was initially scheduled for 16 October 2017; the postponement of same

due to 'Storm Ophelia'; the provision by senior counsel of initial advices; her advice that it was *crucial* that Dr. O'Moore's report was obtained before any further advice could be provided; and a consultation with senior counsel which took place on 18 July 2018, the same day as the Plaintiff was assessed by Dr. O'Moore.

132. Again, these averments are made with respect to a sub–set of the Plaintiff's overall delay. It could hardly be said to be unique to this case for the need to retain an alternative senior counsel to arise and for a consultation to be postponed. However, two points seem to me to merit emphasis. First, when papers were sent to senior counsel in July 2017, the Plaintiff had permitted approximately one and a half years to elapse without sending Dr. O'Moore even a single written reminder in relation to her assessment and report. Second, it was entirely understandable that, when senior counsel provided initial advices, she stated that it was *"crucial"* that the Plaintiff's then solicitor obtain Dr. O'Moore's report before any further advices could be provided. However, as a matter of fact, the need for the report from ABC could not have come as news to the Plaintiff or her solicitor, given that it had been requested as far back as *"early 2016"* (but, in the manner the evidence illustrates, not pursued with anything like urgency).

Delay up to January 2019

133. It does not seem to me that, on the evidence before this Court, the responsibility for delay with respect to the availability of the ABC report can be placed at the door of Dr. O'Moore. There is also an unreconciled difference between, on the one hand, the Plaintiff, through her solicitor, indicating (in August 2017) an ability and intention to set the case down for trial and, on the other, the same solicitor averring 5 years later (in October 2022) that an expert's report (sought in early 2016, but not available until early 2019) was vital to the Plaintiff's case. In short, and focussing on the Plaintiff's delay up to the receipt (on 4 January 2019) of Dr. O'Moore's expert report, I am not satisfied that the Plaintiff's delay has been explained or excused.

Delay from January 2019 – March 2021

134. I now turn to the delay from 4 January 2019 (receipt of expert's report) to 9 March 2021 (Plaintiff's delivery of Updated particulars/request for voluntary discovery). In an apparent attempt to excuse this delay, the Plaintiff's former solicitor makes, *inter alia*, the following averments:-

- *"…The need for updated particulars arose from the analysis of the Anti-Bullying Centre report which was received in January 2019 and sent to the Plaintiff for further instructions"* (para. 9);
- *"…the delay in filing and serving the notice of updated particulars was inextricably linked to the delay in obtaining Anti-Bullying Centre assessment and report"* (para. 10).

135. The foregoing discloses neither an explanation nor an excuse for the *further* delay of over 2 years and 3 months, from January 2019. As a matter of basic logic, delay in obtaining the expert's report which was, in fact, received on 4 January 2019 cannot conceivably explain delay

which occurred *after* the receipt of that report, yet the foregoing seems to be the proposition advanced on behalf of the Plaintiff.

Updated Particulars – 9 March 2021

136. Furthermore, given the emphasis laid by the Plaintiff on the updated particulars of 9 March 2021, it is appropriate to look closely at what they contain. The document begins: *"TAKE NOTICE of the following updated particulars of incidents of harassment, bullying and intimidation and breach of contract in the matter herein…".* What follows is largely a setting out of matters of *fact*, as alleged by the Plaintiff. In other words, it comprises a detailing of information which, at all material times, was available to the Plaintiff.

Matters of fact

137. Dr. O'Moore was not a witness to any events within the Plaintiff's employment between 2008 and 2012 or otherwise. Thus, I find it impossible to understand how it can be said that Dr. O'Moore's expert report (received in January 2019) was required before the Plaintiff could make the following pleas, all of which comprise *verbatim* quotes from the Notice of Updated Particulars, (served in March 2021):-

- *"…regarding the 2009 Christmas payments, the department was told that there was a limited budget as to which clients were being paid, which resulted in pressure on the CORD program."* (para. i);

- *"….the Plaintiff was interrupted on the phone by* [a named individual] *a member of management of the Defendant, and told to correct instructions to client mid-connection in front of co-workers"* (para. ii);

- *"…*[a named individual] *the Plaintiff's supervisor, shouted at her when the Plaintiff and a colleague* [named] *accidentally asked to take leave at the same time"* (para. iii);

- *"…in January 2009, management of the Defendant gave five days to review and turnaround a claim. No information was given to payment officers to justify this target"* (para. iv);

- *"…*[a named individual] *stated, about the Plaintiff, to the department manager* [named] *and the inspection manager* [named] *with the Plaintiff sitting only four feet away that 'she's dangerous and tends to exaggerate'."* (para. vi);

- *"…*[a named individual] *in June 2012 blocked the meeting room door, saying that 'It was down to* [a named individual] *and that I should sign the P.D. form' as 'things were going to get worse'"* (para. vii);

- *"…the Plaintiff was repeatedly asked to cover Level A role with no expiration or consideration, juggling various workloads. No assistance was given from* [a named

individual] *or other team members. She recalled doing work for* [a named individual] *when he was late"* (para. viii);

- *"…there were comments from* [a named individual] *regarding the Plaintiff's clothing, corrections to paperwork, length of time carrying out possibilities of CORD expense claims"* (para. ix);

- *"…the Plaintiff asked to be put on the reception desk, the ESS and various roles to be transferred"* (para. x);

- *"Being contacted at home, weekends, holidays, sick leave, with 'urgent' work or unreasonable demands, e.g. the Plaintiff was asked on several occasions not to put in leave because of staff shortages. Most frequently, her requests for leave were objected to by Ms* [named] *and Ms* [named]" (para. xi);

- *"Being given deliberately ambiguous instructions and then being blamed for failure e.g. there were delays with the new changes to feasibilities because of lack of training, resulting in criticism for delay from Ms* [named] *and Mr* [named]" (para. xii);

- *"Social exclusion e.g. team members* [named] *and* [named] *did so from a work pub quiz when they heard her name"* (para. xiii);

- *"…the Plaintiff's promotion for a role was blocked in September 2008 'without reason'. Ms* [named] *had the final and subsequent transfers. She wanted to connect the claim review, but forgot to pay the increment in the performance development form"* (para. xiv);

- *"…in 2009, Ms* [named] *after the unsuccessful payment team members, regarding changes to feasibilities, told* [named] *and* [named] *that there was no need to speak at meetings as 'the Plaintiff would be taking the majority of feasibilities'"* (para. xv);

- *"…the Plaintiff raised with management of the Defendant issues of performance development regarding dis-organisation of the department, changes to guidelines and pressure to perform with poor or limited resources, but no action was taken by the Defendant"* (para. xvi);

- *"…in 2009, the Plaintiff was told to work faster by Ms* [named]; *but she was 'holding a lot of feasibilities as a level B'. The level Cs had 'more variety'. This was reported 'time and again'"* (para. xvii);

- *"…there were attempts to discuss with* [named] *the cover for the Level A role; and the Plaintiff's own number of claims were blocked. Either there was nothing Ms* [named]

could do about it or she was going to a meeting or it was a problem with [named]" (para. xviii);

- *"…when the Plaintiff asked about possible training for new claims as the CORD program was to expire in 2009, she was told in 2011 by* [named] *that 'it would require a lot of training at your grade, and you wouldn't be able to understand it'. The Plaintiff subsequently did some of the claims"* (para. xix);

- *"…emails were removed from the system.* [A named individual] *on 4 September 2012 wanted to meet the Plaintiff and Ms* [named] *but there was 'no representation for me'"* (para. xx);

- *"…*[3 named employees] *would withdraw annual leave access. Ms* [named] *brought up the matter at a team meeting saying 'it's easy for people to take sick leave for a chiropractor'. This was a deliberate reference to Ms Lane, who had received treatment for backache"* (para. xxi);

- *"…Ms* [named] *in 2009 influenced the payment system members not to stick together against the new changes in 2009. Second, Ms* [named] *went to* [named] *and* [named] *regarding the Plaintiff's performance. Third, Mr* [named] *was pre-filling the performance development form with new tasks and blocking the door. Fourth* [named] *as the whistleblowing consultant, was 'misleading deliberately his recollection of connections' with her regarding her performance development and concerns regarding her managers: Ms* [named] *and Mr* [named]. *Fifth, Ms* [named] *and HR and organizational development were 'blocking my request for promotion and transfers, especially in 2012'"* (para. xxii) (emphasis added)

138. The following can fairly be said in relation to the above:

(i) they all constitute pleas of *fact*;

(ii) the Plaintiff was the source of this information, not Dr O'Moore, who was never a witness to fact;

(iii) the evidence allows for a finding that the Plaintiff had no more relevant documentation available to her in March 2021 than she had available to her as of 15 January 2014 (I say this because (a) by 15 January, she had received her personnel file and sent an email to her solicitor indicating documents which she regarded as missing from it; (b) there is no evidence of any request, thereafter, for any allegedly missing documents; and (c) voluntary discovery was not even sought until 7 years later, i.e. 6 years after the Defence was delivered);

(iv) that being so, there is no evidence to the effect that the Plaintiff could *not* have provided this information years earlier, in particular, in response to the Defendant's February 2015 Notice for Particulars;

(v) furthermore, it is impossible to understand the suggestion that these matters of *fact*, within the exclusive knowledge of the Plaintiff, could not have been pleaded until the report of her medical *expert* was received.

Oral evidence

139. Whilst I touched on the issue earlier in this judgment (with reference to the Personal Injuries Summons and the Plaintiff's January 2016 Replies to Particulars) the pleas made in the Updated Particulars of March 2021 underline the critical importance, to any determination of the issues in dispute, of oral evidence at a future trial, including for example, in respect of the following:

- what a department was *told* (or not) regarding 2009 Christmas payments;
- whether (or not) the Plaintiff was *interrupted* on the phone by a named employee;
- whether the Plaintiff was *told* in front of co-workers to correct instructions to a client during a certain phone call;
- whether the Plaintiff was *shouted at* when she and a colleague *asked* to take leave at the same time;
- whether or not malicious rumours were spread to discredit the Plaintiff;
- whether or not a named individual said *"she's dangerous and tends to exaggerate"* whilst sitting four feet away from her;
- whether a particular individual *blocked* the door of a meeting room in June 2012 and whether or not he uttered words which the Plaintiff attributes to him;
- whether a named employee made *comments* which the Plaintiff attributes to her in relation to a range of matters;
- whether the Plaintiff *asked* to be put on the reception desk;
- whether the Plaintiff was *asked* not to put in leave because of staff shortages;
- whether her requests for leave were *objected to* by named employees;
- whether or not the Plaintiff was *blamed for delays* in relation to workplace changes;
- whether two named individuals *excluded* the Plaintiff from a work pub quiz when they *heard* her name;
- whether a named individual *told* two colleagues that there was no need to speak at meetings, said words attributed to her, and the significance of same;
- whether or not the Plaintiff was *told* to work faster by a named individual in 2009;
- whether or not the Plaintiff made attempts at *conversation* and whether or not she was met with *silence* or hostility as a response;
- whether or not the Plaintiff *asked* about possible training for new claims in advance of 2009;
- whether or not a named employee uttered words in 2011, which the Plaintiff attributes to that individual, concerning the volume of training required and that the Plaintiff would not be able to understand it;
- whether or not emails were *removed* from the system;
- whether or not named employees *withheld* annual leave access;
- whether a named individual *brought up* this issue at a team meeting;

- whether that individual uttered words attributed to her and whether this was a deliberate *reference to* the Plaintiff;
- whether, in 2009, a named individual was pre-filling a performance development form;
- whether or not that individual was also *blocking the door*;
- whether a named individual was deliberately misleading his *recollection* of certain matters.

Not a 'documents case'

140. It is clear from the foregoing that a wide range of facts are an issue, including words allegedly said up to 15 years ago. In the manner previously explained in this judgment, the Plaintiff chose not to seek discovery when the pleadings closed with the delivery of the defence on 15 January 2015 (and no explanation whatsoever has been given for that choice). Despite the fact that discovery has not been made (not having been sought until 9 March 2021) it can confidently be said that there are issues of fact in dispute, the determination of which would rely exclusively on oral evidence. In other words, regardless of what documents, including emails etc, may or may not exist, and irrespective of what assistance such documentation, if available, may provide in terms of context, the issues in dispute in these proceedings include whether certain words were, or were not, uttered a decade and a half ago and the significance of same. In short, this is not what might be called a "documents case". It is utterly unlike, for example a dispute in relation to the proper interpretation of words in a contract which both parties to the dispute accept to comprise the entire agreement between them. In certain cases, the dispute is exclusively a legal one but the Plaintiff, and her solicitor, have at all material times known that this is *not* the position in relation to the present claim, in which multiple issues of fact would have to be determined.

141. For the foregoing reasons, I am satisfied that the evidence before the court neither discloses an excuse for (i) delay between early 2016 (papers first sent to Dr O'Moore) and 4 January 2019 (Dr O'Moore's report received) nor (ii) the delay between 4 January 2019 (receipt of the expert's report) and 9 March 2021 (service of Updated Particulars / request for voluntary discovery). The latter delay of 2 years and 3 months is, in the particular circumstances of this case, inordinate of itself. It is particularly egregious given the Plaintiff's delay which preceded it.

Delay from January 2019 to February 2020

142. Para. 13 of Ms. McShane's affidavit begins in the following terms:-

> "*In respect of the delay from January 2019 to February 2020, I was only able to instruct junior counsel once I had received the report from Dr. O'Moore in January 2019. There was a delay on my part in sending papers to junior counsel and requesting that he draft the replies to particulars, request for discovery and reply. This was partly because of a change in representation from M.J. O'Connor solicitors, where I had been a consultant, to Anne McShane solicitors, which I set up in March 2019, and where I was a sole practitioner. I was involved in detailed arrangements for the transfer of files and notification of the court, Defendant and professionals. Also, I spent an extensive period of time going through*

documentation provided by the Plaintiff when preparing papers for junior counsel to draft the application for discovery. I sent papers to junior counsel on 3 May 2019. I sent reminders to him in June, July and September 2019. Unfortunately, I was out of the office a considerable amount in late 2019 which further contributed to the delay. This was because of family problems, which I set out in detail below".

143. The delay in instructing junior counsel is attributed to the unavailability of Dr. O'Moore's report until January 2019. However, the evidence allows for this court finding that the report was not pursued with anything like enough urgency and reasons have not been proffered which excuse the 3 years it took for the Plaintiff to obtain an expert's report. Regarding what the Plaintiff's former solicitor describes as "*a delay on my part in sending papers to junior counsel"*, this cannot excuse the Plaintiff's delay. It could not be said to be unusual for a solicitor to move practices. Approaching matters from first principles, I must reject the proposition that delay which flows from a solicitor's decision to change practice (such as, in the present case, their involvement "*in detailed arrangements for the transfer of files"*) excuses delay in respect of legal proceedings they have been retained to progress. Irrespective of whether a solicitor instructed in legal proceedings does or does not change practice during the course of those proceedings, the standard must remain the same. By that I mean, the Plaintiff, in either scenario, is required to ensure that their proceedings are progressed with due expedition, in the way that the authorities make clear and their solicitor does not have a lesser duty to progress the proceedings with appropriate expedition.

144. In the present case, and having regard to the Plaintiff's late start and post-commencement delay, there was a heightened obligation on this Plaintiff to ensure that their proceedings were progressed expeditiously. As was stated recently by the Court of Appeal (Noonan J) in *Kenny v. Motor Network Limited & Ors* [2020] IECA 114 "*It is…by now well settled that where a Plaintiff makes a late start there is an additional onus on that Plaintiff to progress the case without undue delay".* Once Dr. O'Moore's report finally arrived in early January 2019 there was, in my view, an obligation on the Plaintiff to progress her claim with nothing less than urgency. At the very least, the Plaintiff needed to ensure that the pace was 'picked up' in a material fashion, because further delay would compound prior delay. It does not seem to me that the averments in para. 13 constitute valid excuses for the *further* delay which undoubtedly occurred.

145. It will also be recalled that, by letter dated 3 May 2019, the Plaintiff's solicitor informed the Defendant's solicitor: "*I will be reverting to you shortly with updated particulars of injury.*" This explicit commitment is impossible to 'square' with the proposition that, as of May 2019, there was any issue which prevented either the Plaintiff, or the Plaintiff's solicitor, from progressing the case with adequate expedition. Despite this, the Plaintiff delayed another 2 years before delivering, in March 2021, the Updated Particulars which we see were promised, in May 2019 (the ABC report having been received by the Plaintiff's solicitor in early January 2019).

February 2020 – March 2021

146. At para. 14, averments are made which I now set out *verbatim:-*

> "*In respect of the delay from February 2020 to March 2021, papers were returned by junior counsel originally briefed in January 2020, in circumstances where he was not in a position to deal with the matter. Aoife McMahon junior counsel was briefed in February 2020, and we had a consultation with the Plaintiff on 24 February 2020. There was a great deal of discussion between myself, junior counsel and the Plaintiff about voluntary discovery and drafts were provided by junior counsel in late July 2020. I asked senior counsel to review the voluntary discovery request and other matters in September 2020 and had considerable discussion with her and junior counsel between September and November 2020. I also emailed Dr. O'Moore several times to ask for her views on discovery – as was advised to be necessary by senior counsel. However, I did not receive a response and finally a notice of intention to proceed was issued and served on 20 January 2021. I was out of the office again for significant periods during 2020, partly because of Covid 19 restrictions and also because I became unwell in April with various problems which require medical investigation and treatment. Being a sole practitioner meant that my being unavailable caused unavoidable delay".* (emphasis added)

147. I note that, at para. 8, it was averred that papers had been sent to junior counsel on 3 May 2019 whereas, in para. 14, it is averred that junior counsel was originally briefed in January 2020. Nothing would appear to turn on this, however, in circumstances where it is averred that junior counsel returned papers in January 2020. By this stage, a year had passed since the receipt by the Plaintiff of Dr. O'Moore's report. Other than serving replies to particulars dated 6 January 2016 which, on any analysis, were 'light' on specifics (neither particularising instances of alleged bullying, nor giving dates in relation to when they were said to have occurred), the Plaintiff had taken no formal step whatsoever to progress the proceedings since the delivery, on 15 January 2015, of a Defence by the Defendant. In the manner examined earlier, the pleading for which Dr O'Moore's report is said to be necessary is, in reality, a setting out of factual matters which Dr O'Moore cannot possibly know (by means of the Updated Particulars).

148. It can fairly be said that at no stage during the period from 5 January 2019 (the day *after* Dr. O'Moore's report) to 21 January 2021 (the day *before* the notice of intention to proceed) did the Plaintiff cause any letter to be written to the Defendant in which it is claimed that any issue affecting any party was preventing the progress of the Plaintiff's case. It is useful to recall once more that, 5 months after receiving the ABC report, the Plaintiff's solicitor indicated clearly (by letter dated 3 May 2019) that: "*I will be reverting to you shortly with updated particulars of injury*". This commitment was given 9 months before the events of February 2020 and thereafter.

149. In short, the averments in para. 14 do not, in my view, explain or excuse the Plaintiff's delay which occurred from February 2020 to March 2021 (being another a sub–set of the Plaintiff's

overall delay which, in my view, has not been excused). Someone in the Defendant's position certainly had a basis, for believing that the Plaintiff had abandoned her claim.

Notice of trial

150. At para. 19 of Ms. McShane's affidavit, she avers inter alia that:-"*The notice of trial did not issue and perhaps it was an error on my part to state that it would. However, I did not know at the time whether we would be able to obtain the Anti–Bullying Centre report."* (emphasis added). The foregoing averment does not explain why, at a point where it was entirely unknown to the Plaintiff *whether* a report from the ABC would ever issue, it was indicated very clearly that a notice of trial *would*. Nor does it excuse the Plaintiff's delay in progressing her claim. I am fortified in these views by the fact that the Plaintiff did not merely commit to deliver a Notice of Trial and set the matter down for hearing on *one* occasion. She did so *twice* and on neither occasion suggested that there was any impediment to so doing.

151. The evidence before this court allows for a finding that the Plaintiff was in a position to serve a Notice of Trial and progress the case to a trial as long ago as January 2016. This finding flows from the explicit statement made by the Plaintiff, through her solicitor, in the letter dated 6 January 2016, as follows: "*We are now preparing to issue a notice of trial to bring the matter forward for hearing*" (emphasis added). That commitment was given in the absence of any ABC report and, thus, allows for a finding that the ABC report was not necessary for the Plaintiff to cause a notice of trial to be served and to progress the case to trial.

152. The same comments apply in relation to the *second* time the Plaintiff caused the same commitment to be made in relation to issuing a notice of trial and setting the case down. It will be recalled that by letter dated 14 August 2017 the Plaintiff's solicitor stated "*We had some administrative difficulties in this matter. However, we are now sending papers to senior counsel to advise and should be issuing a notice of trial and setting down this matter for hearing in early course. We will write to you again*" (emphasis added). The Plaintiff made good on neither commitment.

Updated particulars

153. At para. 20, Ms. McShane makes inter alia the following averments:-

> "*Dr. O'Moore had ascertained in her expert assessment that the Plaintiff had been subjected to a significant number of negative behaviours in her workplace, which Dr. O'Moore had deemed to constitute examples of bullying. She set these out in detail in her report, and a number were in addition to matters already pleaded, or more detailed expositions of matters already pleaded. At this stage, it was agreed that junior counsel should draft further particulars".*

154. In my view the foregoing does not take away from the fact that the Plaintiff, alone, was the *source* of all this factual information. Thus, it was open to the Plaintiff, at all material times (e.g. in her Personal Injuries Summons, which issued in June 2014; or in her Replies to Particulars,

which issued in January 2016) to plead the matters of fact which were not pleaded until she delivered Updated Particulars, in March 2021. Nor has any explanation been given for the delay. For example, nowhere is it averred that this information (i.e., allegations of fact) were not disclosed by the Plaintiff, to her solicitor when instructions were initially given (on foot of which the personal injuries summons was issued) or when the Defendant's formal Notice for Particulars, dated 2 February 2015, asked for this very information.

155. There is plainly a distinction between, on the one hand, a narrative account of matters of fact and, on the other, the view of an expert that such matters constitute bullying in the legal sense. At all material times, the former was available to the Plaintiff. In the manner examined in this judgment, the notice of updated particulars dated 9 March 2021 comprises the former, i.e., a narrative of alleged facts.

156. No excuse has been provided for the 3-year delay in securing Dr. O'Moore's report. Nor has the Plaintiff explained the additional delay of well over 2 years after Dr. O'Moore's report became available. I take this view notwithstanding the averment in para. 21 of Ms. McShane's affidavit wherein she states: "*The delays in obtaining these reports are well known within the profession, due to the specialised nature of the assessment and report".* The foregoing averment is made in the most general of terms and simply does not engage with the facts (including, for instance, why the ABC report was not even requested until early 2016? and why not a single written reminder was sent between early 2016 and the end of August 2017?).

Personal problems

157. The views expressed in this judgment have also taken full account of the averments made by Ms. McShane at paras. 22 and 23 of her affidavit. At para. 22 Ms McShane avers *inter alia* that *"from late 2019 to 2020 was a very difficult time for me due to personal problems arising from my sister's death and my own subsequent illness."* I want to state in the clearest of terms that this Court can have nothing but sympathy for someone who has lost a sibling. In circumstances where Ms McShane avers that her sister became increasingly unwell from April 2019 and that she *"travelled from Cork to Dublin to see her and help out on many occasions"*, doubtless her sister's illness, and her passing in December 2019, must have been a heavy burden for Ms McShane to bear. However, and without wishing to appear cold-hearted, the fact that *"from late 2019 to 2020 was a very difficult time"* for Ms McShane cannot conceivably excuse the Plaintiff's delay *prior* to "*late 2019*". In respect of this prior delay, it will be recalled that, as well delay (of at least 8 months) up to delivery of replies (on 06 January 2016) there was further delay of almost 3 years from that point until the end of 2019.

Dr. Paul McDonald's report

158. Ms McShane has exhibited a report dated 24 June 2022 from Dr Paul McDonald. This was obtained in the context of responding to the Defendant's motion and Dr McDonald's report states:

"Dear Sir/Madam,

Anne asked me to write to you regarding her health issues she suffered in 2020/2021.
She developed some gastro/intestinal symptoms in 2020 which required investigating over the following two years. These occurred on a background of having lost her sister to stomach cancer which heightened her concerns in relation to her own wellbeing.
Due to the trauma of her bereavement and her own ongoing physical symptoms at the time, Anne had problems keeping on top of her case load at work."

159. As to when, in 2020, the Plaintiff's former solicitor first developed symptoms, she avers that, in mid-March 2020, she became unwell with flu symptoms; that her GP suspected that she had Covid-19; that she was ill for some weeks with this and had to self-isolate at home; and that *"following this illness, I began to suffer abdominal problems and attended my GP on several occasions".* She refers to a certain diagnosis and to having *"had two sets of intensive antibiotic treatment in late 2020".* Reference is then made to investigations at certain hospitals in January 2021 and in March 2021. Ms McShane also avers that her GP prescribed medication for severe depression and anxiety in December 2020.

160. Once more, the contents of para. 23 of Ms McShane's affidavit and the contents of the report from Dr McDonald speak to matters which demand sympathy from this Court. However, it does have to be said that nowhere does Ms McShane aver that on particular dates or at any identified points in time she was *incapable* on medical grounds (be that as regards physical or mental health) from progressing the Plaintiff's claim. Thus, the state of the evidence simply does not allow this Court to hold that between one particular date and another the Plaintiff's former solicitor was medically incapable of progressing the Plaintiff's case, bearing in mind that Dr McDonald has neither said this nor identified relevant dates during which, in his view, it was impossible for Ms McShane to perform her duties as the Plaintiff's solicitor.

161. The furthest his report goes is to say that Ms McShane *"had problems keeping on top of her case load at work"* due to the trauma of her bereavement (which occurred on 20 December 2019) and to her ongoing physical symptoms (which first manifested after the Plaintiff had to self-isolate at home with flu like symptoms in mid-March 2020).

162. Few will be lucky enough to live a life untouched by the passing of a loved one, and many have to meet the challenges posed by illness. Whilst this Court can have genuine sympathy for a person dealing with both, there is a distinction between factors attracting *sympathy* and an *excuse* for the Plaintiff's delay. For example, it was not until some weeks after mid-March 2020 that the Plaintiff's former solicitor *began* to suffer abdominal problems and attended her GP. By that stage, the Plaintiff was responsible for approximately 4 years of delay. Thus, there can be no causal relationship between, on the one hand, the health difficulties encountered by her then-solicitor and, on the other, the Plaintiff's delay.

Notice of change of solicitor

163. At para. 24, Ms McShane avers *inter alia* that, on 03 May 2019, she sent a letter to the Defendant's solicitor indicating that she was setting up a new practice and informing them that a notice of change of solicitor would be served. The foregoing is not an excuse for delay, be that prior to the (03 May 2019) letter, or subsequent to the (04 May 2019) notice of change of solicitor, which Ms McShane served.

164. In short, I am satisfied that the Defendant has met the burden of demonstrating that the Plaintiff's delay is inexcusable, as well as inordinate. I have come to this view notwithstanding the submissions made with sophistication and skill by Ms Phelan senior counsel for the Plaintiff/respondent.

165. Submissions to the effect that the Plaintiff's delay has been excused are undermined by the facts which emerge from a careful consideration of the evidence before the court in this application. In submissions, particular reliance was placed on the observations of Clarke J (as he then was) in *Comcast International Holdings v Minister for Public Enterprise* [2012] IESC 50 that: *"the degree of expedition and compliance with time limits which could properly be expected of large corporations involved in commercial disputes cannot reasonably be required of poorly resourced or otherwise disadvantaged litigants who may have to resort for representation to small law firms frequently accepting instructions without any guarantee of payment"* [para. 3.10].

166. It does not seem to me that the Plaintiff has averred that any specific period, or periods, of her delay arose because, at that time, lack of finances prevented her from progressing her claim. Nor does her former solicitor make any such averments.

167. It is no role of this Court, in the present application, to inquire into the financial terms of the retainer as between the Plaintiff and her former solicitor. What can be said is that the Plaintiff's former solicitor does not aver that she accepted instructions without any guarantee of payment or that, if this be the case, it prevented her from progressing the Plaintiff's claim with due expedition. Nor does she identify any date(s) when lack of finances or other resources caused specific delay(s). Whilst certain of the submissions made on behalf of the Plaintiff could be characterised as the suggestion that there was an 'inequality of arms' at play, it does not seem to me that this submission is grounded in evidence.

168. Insofar as it is suggested on behalf of the Plaintiff that, had her former solicitor been in practice with a colleague, the Plaintiff's proceedings would have been progressed more quickly, I find that submission problematic for two reasons. First, and crucially, the Plaintiff's solicitor does not aver that her personal or health issues were such that they, in fact, prevented her from progressing the Plaintiff's claim at a particular point or during specific periods. Second, it seems to me that underpinning this submission is the proposition that a different (i.e., *lower*) standard applies to a solicitor in sole practice than to the *(higher*) standard applicable to a solicitor who

works with one or more colleagues. I feel obliged to reject that proposition. I cannot accept that a sole practitioner who is unfortunate enough to experience personal difficulties (be that a family bereavement, or ill health) is not expected to ensure that their client's case is progressed with appropriate expedition and that it is only if the solicitor has a colleague working with them in their solicitor's practice that such an expectation arises.

169. This Court is entitled to take judicial notice of the fact that a great many solicitors in this State operate as sole-practitioners. The proposition that they should be held to a lesser standard seems to me to do them a dis-service. It also fails to acknowledge that all solicitors who agree to take on work owe the same duty to the client in question, namely, to progress legal proceedings with appropriate expedition.

170. It also seems to me that if, as a matter of fact, personal or health difficulties rendered it impossible for a solicitor in sole-practice to progress their client's case (and the evidence before this Court does not allow for any such finding) certain very obvious steps could, and should, be taken. First, the solicitor in question should alert their opposite number to this fact and ask for forbearance. Second, if forbearance from the other side was not forthcoming, the solicitor should advise their client of this, and of the option of the client retaining an alternative solicitor who is in a position to progress the claim with due expedition. It does not seem to me that this is to set the bar too high.

What the Plaintiff said at the time

171. In the present case, it is a matter of fact that neither the Plaintiff, nor her then solicitor, ever suggested to the Defendant that either were, at any point in time, unable to progress the claim due to any difficulties affecting either of them. On the contrary, the opposite impression is given by means of statements made by the Plaintiff's solicitor (which the court is entitled to assume reflect the Plaintiff's instructions) at various stages during the 4 year period, 2015 to 2019:

- **14 October 2015**: "*We hope that there should not be much further delay and would ask that you please bear with us.*" (emphasis added)
- **06 January 2016**: "*We are now preparing to issue a notice of trial to bring the matter forward for hearing*" (emphasis added);
- **14 August 2017:** "*…we are now sending papers to Senior Counsel to advise and should be issuing a Notice of Trial and setting down this matter for hearing in early course"* (emphasis added)
- **3 May 2019:** "*…I will be reverting to you shortly with updated Particulars of Injury"* (emphasis added)

172. In circumstances where no impediment to progress was ever explained, no forbearance was ever sought. In truth, other than the foregoing commitments to progress the case (which the Plaintiff did not 'follow up' with action) there was silence from the Plaintiff side. Months turned into years, without any notice of trial or the case being progressed to a hearing.

173. Reliance by the Plaintiff on the decision of Peart J in *L.L. v F.X.I.S.* [2007] IEHC 171 cannot avail the Plaintiff. This is because the Plaintiff has not established that her delay in progressing her claim results from the manner in which she was (allegedly) treated by the Defendant. Although submissions were made to that effect, the Plaintiff does not aver this to be the case.

Report by Dr. Mairead O'Leary

174. Furthermore, whilst Ms McShane exhibits a report, dated 17 October 2022, prepared by Dr Mairead O'Leary, Consultant Psychiatrist, Dr O'Leary does *not* opine that, at any point from April 2014 onwards, the Plaintiff was *unable* to progress her case. Rather, Dr O'Leary (who did not see the Plaintiff between 25 April 2014 and 30 September 2022, i.e. a gap of 8 years and five months) records what: *"Maura explained to me"*; *"Maura told me"*; *"Maura also told me"*; and what *"Maura told me"*.

175. Understandable, given that Dr O'Leary did not see the Plaintiff at any point during the delay, Dr O'Leary does not opine that the Plaintiff was incapable of progressing her case at any point. She certainly expresses a view, in late 2022, but this is based on what the Plaintiff *told* her, not what Dr O'Leary found on examining the Plaintiff at any stage during the currency of the delay (no such examination took place). Nor does Dr O'Leary's opinion go as far as saying that at any particular point or points during the Plaintiff's delay, the latter was incapable of giving instructions to her solicitor, or progressing the proceedings with reasonable expedition, as a consequence of her then state of health. Still less does Dr O'Leary opine that the alleged treatment of the Plaintiff, by the Defendant, rendered it impossible for the Plaintiff to progress her claim during the delay period.

176. With regard to Ms McShane's averment at para. 15 of her 21 October 2022 affidavit that: *"…I believe and am so informed by the Plaintiff's GP that she was reluctant to provide a report because of her concerns and the impact on the health of the Plaintiff of taking proceedings…"* it is a matter of fact that Ms McShane, who was initially instructed by the Plaintiff in November 2013, lodged an application to PIAB in December 2013 after she *"had obtained a letter from the Plaintiff's GP".* Thus, whatever concerns the GP had, it did not prevent the GP from issuing a report which was required in the context of the Plaintiff's PIAB application. Nor do such concerns conceivable explain, or excuse, the Plaintiff's subsequent post-commencement delay in relation to progressing her claim.

177. The core assertion made in response to this motion (namely that issues affecting either the Plaintiff or her solicitor made it impossible for the Plaintiff's claim to be progressed) cannot be 'squared' with (i) the explicit statement that the Plaintiff's claim *would* be progressed; and (ii) the explicit statement as to *how* it would be progressed. See the 3 May 2019 letter sent by the Plaintiff's solicitor (Anne McShane Solicitors) to the Defendant's solicitors (McGrath McGrane Solicitors) which state, inter alia: *"I will be reverting to you shortly with updated Particulars of Injury"*.

178. Satisfied that the Plaintiff's delay is both inordinate and inexcusable, I now turn to the balance of justice assessment, *per* the third limb of the *Primor* test.

Balance of justice

179. Given that this Court has answered, in the affirmative, the first two questions in the *Primor* test, this Court embarks on the third question with the scales tilted in favour of delay. As the Court of Appeal put it in *Sweeney v. Cecil Keating T/A Keating Transport & McDonnell Commercials (Monaghan) Limited* [2019] IECA 43: *"If the position was otherwise, there would be no point in a court engaging in an assessment as to whether the Plaintiff had been guilty of inordinate and inexcusable delay. The court might just as readily commence its analysis of the application by deciding whether the justice of the case would favour permitting the action proceed to trial".*

180. However, this does not relieve the Defendant of the burden of proof [see Barniville J. (as the then was) in the Court of Appeal's decision in *Gibbons v. N6 (Construction) Ltd* [2022] IECA 112 (at para. 80) wherein the learned judge observed that: "*As the moving party in the application to dismiss, the Defendant also has the burden of proving that the balance of justice favours the dismissal of the claim…."]*

181. Bearing the foregoing in mind, it is appropriate to turn to the averments made on behalf of the Defendant. There was no input by Dr. O'Moore into the Plaintiff's request for voluntary discovery dated 9 March 2021. Therefore, the Plaintiff permitted over 6 years to elapse between receipt of the Defence (15 January 2015) and making any request for discovery (9 March 2021) without any excuse, and against the backdrop of indicating to her solicitor, in 2014, that her personnel file was "missing" certain documentation.

182. The following averment is made by Mr. Dunne, the in-house solicitor for the Defendant, in his affidavit, sworn on 16 December 2021:-

> "*…it would be unfair to the Defendant to allow the action to proceed being one that will depend on witness testimony regarding alleged incidents that occurred in the period from 2008 to 2012*".

183. Having looked earlier at the nature of the case, it is entirely correct to say that the Plaintiff's claim is one which depends on such witness testimony. As previously examined, irrespective of what documents may or may not be available by means of discovery, a trial judge, at some future point, would be asked to determine, inter alia, whether or not certain words were uttered; when and in what context; whether words said by the Plaintiff were or were not met with silence as a response; whether or not the Plaintiff was interrupted on the phone during a particular conversation; whether the Plaintiff's views were neglected and, to take just one further example, whether a named individual was pre–filling a form and blocking a door at some point between 2008 and 2012.

Degrading of witness memory

184. In the manner examined earlier, the issues in dispute date back to 2008. That is already 15 years ago. Taking the optimistic view, no trial could conceivably take place before the latter half of 2024, i.e., 16 years after relevant events. In a very recent decision by the Court of Appeal, delivered on 31 May 2023 in *Ahearne v. O'Sullivan & Ors* [2023] IECA 134, the Court considered an appeal against a decision by this Court (Simons J.) dismissing proceedings on delay grounds. At para. 72, Edwards J. stated:-

> *"72. The High Court Judge said that he was taking judicial notice that the passage of time of between fourteen and twenty five years since the events occurred would potentially impact on the accuracy and reliability of those individuals' memories. I am satisfied that he was entitled to do so. Even if one were to adopt a conservative approach to determining the earliest date from which evidence might be needed insofar as the cases against these Defendants are concerned and only measure time from the 19th of September 2001 rather than from the date of the original surgery in August 1995, to the date of the motion for dismissal, one still is talking about a period of 16 years. There are numerous statements in the jurisprudence of the Irish courts recognising the general proposition that memories fade and become less reliable with time. Reflecting that, Keane J. observed in Maxwell v Irish Life Assurance plc [2018] IEHC 111 that:*
>
> > *'80. In Superwood Holdings plc v Scully [1998] IESC 37, the Supreme Court (per Murphy J; Flaherty and Lynch JJ concurring) acknowledged the general proposition that memories fade and become less reliable with time. In Robert McGregor & Sons (Ireland) Ltd & Anor. v The Mining Board & Ors. ([2002] IESC 28 Unreported, Supreme Court, 6th April 2002), that Court (per Keane CJ; Murphy and Hardiman JJ concurring) identified the unarguable prejudice caused by delay, given the frailty of human memory. And in Manning v Benson and Hedges Ltd, Finlay Geoghegan J concluded (at 574) that delays of four to five years would, as a matter of probability, reduce the potential of persons to give meaningful assistance or act as witnesses. It need hardly be added that there was no suggestion of requiring those persons to aver to that fact to enable the court to take it into consideration'.*
>
> *Indeed, one has only to state the proposition to recognise and appreciate the correctness of it".*

185. In the present case, even if I am wrong in the view that this Plaintiff made a late start, she is responsible for some 6 years post–commencement delay, knowing, at all material times, that a wide range of her claims would fall to be determined primarily by oral evidence, wherein witnesses would be called upon for their recollections of who said what, and when, and in what context, at various (largely unspecified) dates between 2008 and 2012.

186. I regard myself as entitled to hold that this delay of 6 years, for which the Plaintiff is exclusively responsible has, as a matter of probability, reduced the potential of relevant witnesses to give assistance to a future trial judge as a result of the degrading of memory. This is all the more so

given the passage of time since the events complained of, irrespective of how this is calculated. By that I mean the following.

Findings in relation to prejudice

187. The personal injuries summons pleads that "*on diverse dates from 2008 until December 2012 the Plaintiff was repeatedly harassed, bullied and subjected to unreasonable treatment and excessive workload and work demands*…". The present motion was issued on 09 February 2022, namely, 14 years from the first (and 10 years from the last) of the events complained of. If calculated up to the earliest conceivable trial date, the result is 16 years from the earliest (and a dozen years from the latest) of the events. In my view, the degrading of witness memory, during the period of the Plaintiff's delay (even if measured as 'only' 6 years) in a case where the determination of crucial facts hinges on oral testimony based on witness memory of distant events, amounts to very real prejudice. I am entirely satisfied that it is, at the very least, 'moderate' prejudice *per* the *Primor* approach. However, it also seems to me to constitute 'fair trial' prejudice per the *O'Domhnaill* principles.

188. In the Court of Appeal's decision in *McNamee v. Boyce* [2016] IECA 19, Irvine J. (as she then was) at paras. 34 and 45 stated:-

> "*34. In my own decision in Cassidy v. the Provincialate* [2015] IECA 47*, I set out in some small degree of detail the difference between the Primor and O'Domhnaill tests and in doing so stated why I considered it appropriate that the burden on a Defendant who seeks to have the claim against them dismissed in the absence of any inordinate or inexcusable delay on the part of the Plaintiff should rightly have to establish nothing short of a real risk of an unfair trial or unjust result. At para. 37 I stated as follows:-*
>
> > *'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 that imposed by the third leg of 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. That this appears to be so seems only just and fair. Why should a Plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the Defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceeding if the action had been brought within a reasonable time? Likewise, why should a Plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the Defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend a claim?'*

35. Accordingly, where a Plaintiff has not been guilty of inordinate and inexcusable delay, the Defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the Defendant proves culpable delay on the part of the Plaintiff in maintaining the proceedings, the Defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test".

189. In the present case, the Defendant has met the burden of proof of establishing both inordinate and inexcusable delay. In my view, the Defendant has also established that moderate prejudice, at the very least, arises. Furthermore, it seems to me that the Defendant has established that there is a significant risk of an unfair trial or unjust result, due to the passage of time and the resultant degrading of witness memory, in the context of how essential to any fair determination of the case witness memory would be.

190. Returning to Mr. Dunne's affidavit, he also makes the following averments at para. 34:-

"*….the Plaintiff has failed to provide dates of alleged incidents and moreover the nature of the incidents relied upon were expanded upon significantly by the Updated Particulars furnished on 9th March 2021 to include an incident of alleged sexual harassment from May / June 2012, alleged physical abuse and other allegations of spreading malicious rumours to discredit the Plaintiff; social exclusion of the Plaintiff; false claims of underperformance; silence or hostility as a response to attempts at conversation; interference or disappearance of personal items; difficulty with requests for sick leave, holidays, compassionate leave and change of shift and dirty tricks campaigns. The Defendant was only put on notice of these allegations almost seven years after the issuing of the Personal Injuries Summons which in turn was issued at the end of the period of the statute of limitations (based on the Plaintiff's case) and which related to incidents that occurred as far back as 2008. It would not be fair or reasonable to require the Defendant to defend these allegations at such a remove when the allegations are so fact based, will be dependent on witness evidence, and where the Plaintiff has failed to provide specific dates. It is the case that memories fade and become less reliable over time and if this action were to proceed the Defendant would at this point in time have to seek out witness evidence regarding the recently alleged allegations that date back to 2008 – being 13 years ago. This would be profoundly prejudicial for the Defendant*".

191. It seems to me that the foregoing averments summarise matters accurately. Nor is the prejudice to the Defendant alleviated by the fact that the Plaintiff does not intend to proceed with the allegation of "sexual harassment" which was made (for the first time) in the Updated Particulars dated 9 March 2021 (by letter dated 14 April 2022, the Plaintiff was informed that the individual named by her had since died).

192. I regard myself as obliged to reject the Plaintiff's assertions that the Defendant "*cannot be prejudiced by the hearing of these proceedings*" because "*the Defendant has been aware of the broad outline of my claim of bullying and harassment in the workplace since the personal injuries*

summons was issued on 18 June 2014" and the Updated Particulars delivered in March 2021 merely "*served to further particularise my core claims*".

193. The foregoing suggestion utterly ignores the crucial role of witness memory, given the nature of the Plaintiff's claim and the reality that memories fade over time. I feel bound to reject the proposition that, once a Defendant knows the broad outline of a Plaintiff's claim, the passage of time, irrespective of how long, cannot have a prejudicial effect on the ability of a Defendant to mount a defence at a future trial, whenever that might occur. In my view, delay has the very real potential to deliver an unjust outcome where, as in this case, witness memory is crucial to findings of fact. At para. 32 of his affidavit, Mr. Dunne makes the following averment: "*…. the Defendant's ability to defend the proceedings has been significantly impaired by the delay*". That seems to me to be entirely so.

194. At para. 35 of his affidavit, Mr. Dunne avers:-

> "*35. In addition, there will be the added difficulty of securing the attendance of the witnesses required to meet the Plaintiff's case as seven of the employees identified by the Plaintiff have left the employment of the Defendant and one of the employees identified by the Plaintiff is now deceased*".

195. I accept, as a general proposition that there is a material difference between the following scenarios:-

> (i) an employer defending proceedings who has ready access to an individual who is named in those proceedings as a witness (e. g. where that individual continues to work for the employer); and
>
> (ii) an employer faced with defending proceedings, wherein those named have long ceased to be employed and may be difficult to identify, contact, or secure ready cooperation from.

196. However, in the present case, there is no evidence that the Defendant would *not* be able to secure any relevant witness. Nor is there any evidence of such attempts, if any, as may have been made to secure the attendance of any witnesses. For these reasons, I am not satisfied that any prejudice under the heading of 'witness availability' has been established. Rather, I have approached this analysis on the basis that *all* relevant witnesses would be available to a future trial court. Notwithstanding this, very real prejudice has been established in the manner explained.

197. In an attempt to suggest that no prejudice of any kind arises for the Defendant, Ms McShane's affidavit also contains the following averment at para. 25:

> "*I understand that the majority of the Defendant's witnesses are available and <u>the delay has not prevented them from defending this case</u>*" (emphasis added).

198. For the reasons set out in this judgment, I take a different view. The prejudice does not stem from unavailability of any witness. It stems from the impact on the reliability of witness-memory

of the passage of time, in particular, the passage of 6 years of inexcusable delay on the Plaintiff's part, (within the period of 16 years, from relevant events to the earliest conceivable trial date).

199. In contending that the balance of justice does not favour dismissal, the Plaintiff, through her counsel, submits inter alia that the Defendant *"was on notice of issues"* going back to 2012 when the Plaintiff was "*absent from work, due to stress",* for a week in January and somewhat more in October 2012. The submission is made that, against this backdrop, "*the Defendant could, perhaps, have undertaken searches*" at that point. It is also submitted that "*the matter somewhat more crystallised when a PIAB application was made in late 2013*".

200. It seems to me, however, that until a Defendant is told of an intention by a Plaintiff to bring a legal claim, a Defendant is not 'on notice' of such legal claim. Leaving that issue aside, it does not seem to me to add any weight in favour of these proceedings being permitted to continue. I say this for three reasons.

201. First, the Defendant was not aware in 2012, or in 2013, of what allegations the Plaintiff would plead in a personal injuries summons which was not issued until June 2014. Even then, the allegations are extremely 'light' on detail and dates. Second, although it is the case that almost 7 years after issuing the personal injury summons, the Plaintiff pleaded additional detail in relation to the type of incidents of which she complains, her March 2021 Updated Particulars, as well as containing a range of new allegations, is extremely 'light' on when these matters are said to have occurred. Third, but most importantly, the 2021 allegations underline how essential witness memory would be to any determination of the Plaintiff's claim (something also very clear from the pleas in the 2014 Personal Injuries Summons).

Claim that the Defendant "*contributed*" to delay

202. Among the submissions made with skill and sophistication during the hearing on behalf of the Plaintiff were that:- "*On receipt of replies in 2016, the Defendant chose not to issue a motion seeking further and better particulars*". It was also submitted that:- "*The Defendant contributed to a certain extent in the delay, although the Plaintiff is not pointing the finger to a huge extent at the Defendant*".

203. Insofar as these submissions, or the fact that the present motion did not issue until February 2022, comprise any suggestion of *acquiescence* on the part of the Defendant, I reject that proposition, for the following reasons.

204. At all material times, the primary obligation to progress her claim rested on the Plaintiff. Throughout the entire period of inordinate and inexcusable delay, the 'ball' was in the Plaintiff's 'court'. By way of example, in a letter, dated 9 September 2015, the Defendant's solicitors asked when the Plaintiff's replies to particulars (outstanding since 02 February 2015) would be furnished. In response, the Plaintiff's then - solicitor sent a letter, dated 14 October 2015, which concluded as follows:-

"*We hope that there should not be much <u>further delay</u> and would ask that you please bear with us.*" (emphasis added)

205. In addition to this being an explicit acknowledgment of the Plaintiff's delay, there is no instance in which the Defendant was in delay, e.g. in relation to delivering a Defence. Far from it. There was no such delay. Nor did the Defendant ever indicate forbearance in respect of delay, or engage in any conduct which induced the Plaintiff to incur further expense.

206. Moreover, at para. 33 of his affidavit, Mr. Dunne avers inter alia that: "*Given the failure to take any steps in the case for effectively five years, it was the Defendant's belief that the Plaintiff had decided not to proceed with her claim….".* That is an uncontroverted averment, and one can well understand why the Defendant, in fact, formed this view.

207. With reference to the letter, dated 14 August 2017, sent by the Plaintiff's former solicitor, Counsel for the Plaintiff submitted that "*the Defendant could not have obtained any impression other than that the Plaintiff was intent on progressing her case".* With respect, I take an entirely different view, for the following reasons.

208. It will be recalled that the 14 August 2017 letter stated "*We had some administrative difficulties in this matter. However, we are now sending papers to senior counsel to advise and should be issuing a notice of trial and setting down this matter for hearing in early course. We will write to you again*". As well as giving no indication of what "*administrative difficulties*" was intended to refer to, the Plaintiff (i) did <u>not</u> issue a notice of trial; (ii) did <u>not</u> set down the matter for hearing in early course, or at all; and (iii) did <u>not</u> write again to the Defendant's solicitor in the manner promised.

209. Indeed, the next correspondence was not sent by the Plaintiff's solicitor until some *2 years* later and, even then, merely indicated that a notice of change of solicitor would be delivered (to reflect the fact that the Plaintiff's former solicitor had moved from being a consultant in a particular firm to setting up her own). That letter, dated 3 May 2019, also stated "*I will be reverting to you shortly with updated particulars of injury*". However, the Plaintiff did <u>not</u> do so. Indeed, 2 *more* years of delay ensued before the Updated Particulars were delivered.

210. Furthermore, and as touched on earlier, the 14 August 2017 letter (which indicated that a notice of trial would shortly be furnished) was not the first time this had been promised. On the contrary, 1 year and 8 months earlier (by letter dated 06 January 2016) the Plaintiff's former solicitor stated, inter alia: "*We are now preparing to issue a notice of trial to bring the matter forward for hearing*". Plainly, this was <u>not</u> done. Thus, the same commitment was made almost 2 years apart, but never 'followed through'. Furthermore, this was against a backdrop of delay on the part of the Plaintiff.

No acquiescence by the Defendant

211. In short, there was no acquiescence on the part of the Defendant. A consideration of the facts reveals the very opposite of what was submitted on the part of the Plaintiff, namely, the Defendant could not have obtained any impression other than that the Plaintiff was not intent on progressing her case. However, the Defendant did not encourage or convey any indication of being satisfied with the Plaintiff's delay.

212. None of the letters sent by the Plaintiff's former solicitor spanning a 6–period (i.e. letters dated (i) 14 October 2015; (ii) 06 January 2016; (iii) 14 August 2017; (iv) 03 May 2019; and (v) 09 March 2021) suggest that, at any time, either the Plaintiff or her then solicitor were unable to progress the Plaintiff's claim for any reason (be that financial, health, personal or otherwise). I looked at this issue earlier in the context of the second question in the *Primor* test. However, and for the sake of completeness, the evidence does not establish that impecuniosity, ill–health, personal loss, or any other reason, *caused* the delay and, therefore, no such issue can be relied on by the Plaintiff in the balance of justice assessment. In short, not having been established, no such issue adds any weight.

213. This Court is acutely conscious of the "*terminal prejudice*" (see *Granahan T/A CG Roofing and General Builders v. Mercury Engineering* [2015] IECA 58) which the Plaintiff will suffer if her proceedings are dismissed, and this has been given due weight in the balance of justice exercise. However, it does not 'tip the scales' against dismissal, in circumstances where the Defendant has established (at least) moderate prejudice. It is uncontroversial to say that terminal prejudice is not, of itself, a determining factor, in circumstances where it is a prospect facing every Plaintiff in an application of this nature. Hence if it outweighed all other factors, no proceedings, however delayed, would ever be dismissed *per* the *Primor* approach.

214. Barniville J. (as he then was) made clear in *Gibbons v. N6 (Construction) Limited* [2022 IECA 122] at para. 93:-

> "*. . . . while the fundamental principles to be applied have not changed since Primor, 'the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition'*".

215. There is a very obvious public interest in cases being progressed with, at least, reasonable expedition. This is also reflective of European Convention on Human Rights obligations (Article 6 (1) of the ECHR obliging courts to ensure that rights and liabilities are determined within a reasonable period of time). Conscious that efficiency cannot 'trump' justice, I note that in the Court of Appeal's decision in C*ave Projects Limited v. Gilhooley & Ors*, Collins J. (at p. 36 of 67) emphasised 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" (emphasis added).

216. In my view, the foregoing arises in the present case. Although keeping in mind that "*The dismissal of a claim is, and should be seen as, an option of last resort*" (*Cave*, p.36), I am nonetheless satisfied that the balance of justice is "*clearly against*" permitting this claim to proceed (*Cave*, p. 27).Carefully considering the nature of the case and all relevant factors, I am satisfied that:- "*the hardship of denying the Plaintiff access to a trial of his claim would, in all the circumstances, be proportionate and just*" (Gibbons para. 86).

217. Apart from terminal prejudice (which, although a weighty factor, arises for every Plaintiff facing an application of this type), it does not seem to me that the Plaintiff has established the existence of any material factor, still less "*something weighty*" (see the decision of Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] IESC 60) to place in the scales.

218. In short, for the reasons set out in this judgment, I am satisfied that the Defendant has discharged the burden of proof in respect of each of the 3 limbs of the Primor test. I take the view that the Plaintiff's delay is (i) inordinate; (ii) inexcusable; and (iii) the balance of justice favours dismissal.

219. Even if there was no culpability on the part of the Plaintiff with respect to any delay, I consider this to be a case where the *O'Domhnaill* principles, alone, require the proceedings to be dismissed.

220. In my view, the evidence establishes that there is a real and serious risk of an unfair trial or an unjust result and, in all the circumstances, it would constitute a clear injustice to require the Defendant to defend the Plaintiff's claim at this remove. That risk arises from the degrading of memories in relation to what was said, by whom, and in what context, 16 years before any trial could take place. In this regard, it seems appropriate to quote as follows from the Supreme Court's decision in *Comcast International Holdings Inc v. Minister for Public Enterprise* [2012] IESC 50 wherein (at para. 40), McKechnie J. stated the following with respect to the principles which emerge from *O'Domhnaill* (as further established in *Toal v. Duignan (no. 1)* [1991] ILRM 135 ("*Toal no. 1"*) and *Toal v. Duignan (no. 2)* [1991] ILRM 140 ("*Toal (no. 2*")):-

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

(i) is there a real and serious risk of an unfair trial, and/or of an unjust result;
(ii) is there a clear and patent injustice in asking the Defendant to defend; or
(iii) does it place an inexcusable and unfair burden on such Defendant to so defend?

The justification for the existence of this jurisdiction was described by Finlay C J. in Toal (No. 2), a case in which the Plaintiff was blameless for the delay involved and where the proceedings were issued within the permitted statutory period, as stemming from the

supremacy of the court's constitutional obligation which transcends any legislative provision to achieve justice inter partes. No specific article of the Constitution was quoted in this regard, but the administration of justice and the personal rights provisions, must have been intended".

221. As the learned judge made clear in *Comcast International Holdings Inc*, the *Primor* test remains the "*touchstone*" and the primary approach. That is certainly the manner in which this Court has approached matters. However, in light of the nature of the case; the significance of oral testimony given with reliance on memory; and the length of time which has passed since the events at the heart of the case, I am also of the view that the *O'Domhnaill* principles require these proceedings to be dismissed, due to 'fair trial' prejudice.

222. 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."*

223. My preliminary view on the question of costs is that there are no factors which would merit a departure from the 'normal' rule that 'costs' should 'follow the event' (which rule has statutory expression in s. 169 of the Legal Services Regulation Act 2015. The parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs and are invited to submit an agreed draft no later than 14 days from the start of Michaelmas Term (i.e. by 5pm on Monday 16 October 2023). In default of agreement between the parties on any matter, short written submissions should be filed in the Central Office by the same deadline.