THE HIGH COURT

[2023] IEHC 68

[Record No. 2013/13623P]

BETWEEN:

PETER SNEYD

PLAINTIFF

-AND-

STRIPES SUPPORT SERVICES LIMITED T/A KAMMAC SUPPORT SERVICES, DIAGEO IRELAND LIMITED AND SHANNON TRANSPORT INTERNATIONAL LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 17th day of February, 2023.

Introduction.

1. This is an application by the first and second defendants to strike out the plaintiff's action against them on grounds of delay and want of prosecution.

2. At all material times the plaintiff was employed by the first defendant, at the premises owned and operated by the second defendant. In essence, he was a forklift truck driver, who ferried pallets of produce around the premises of the second defendant. Subsequent to the onset of the plaintiff's injuries, the business of the first defendant was taken over by the third defendant.

3. In these proceedings, the plaintiff alleges that due to the negligence and breach of duty on the part of the defendants and each or either of them, he was caused to suffer personal injury, loss and damage. In particular, his case is that due to the fact that he was required to drive an unsafe forklift truck across uneven terrain at the premises of the second defendant on a repeated basis, he was caused to suffer pilonidal sinus in his natal cleft and rectum areas. He alleges that the forklift truck was in an unsafe and dangerous condition, because it did not have adequate suspension, or protection from vibration for operatives driving the machine. He alleges that the second defendant was negligent for failure to maintain the premises in a safe and proper condition. In essence, the plaintiff's claim is in the nature of a repetitive strain injury, in that there was not one single accident, or event which gave rise to his injuries, but rather, they became manifest over time due to the conditions in which he was required to work.

4. Proceedings were commenced by personal injury summons issued on 12th December, 2013. The pleadings closed with the delivery of separate defences on behalf of each of the defendants in May and June 2015.

5. On 5th October, 2021, the first defendant issued its motion seeking to have the plaintiff's action it struck out for delay and want of prosecution. A notice of motion in similar terms was issued by the second defendant on 20th January, 2022.

Chronology of Key Dates.

12th March, 2012	The plaintiff attends with his GP due to intermittent problems with his natal cleft.
April 2013	Plaintiff is advised that his condition was as a result of the type of work that he had been carrying out.
12th December, 2013	Personal injury summons issued.
February/March/April 2014	Personal injury summons served on the defendants.
5th March, 2014	Notice for particulars raised by first defendant.
10th April, 2014	Notice for particulars raised by third defendant.
19th May, 2014	Replies furnished to first defendant.
28th May, 2014	Notice for particulars raised by second defendant.
26th August, 2014	Replies furnished to second and third defendants.
1st April, 2015	Further particulars sought by second defendant.
24th April, 2015	Further replies furnished to second defendant.
11th May, 2015	Delivery of defence by third defendant.
12th June, 2015	Delivery of defence by second defendant.
17th June, 2015	Delivery of defence by first defendant.
18th November, 2015	Discovery made by plaintiff to second defendant.
21st August, 2017	Further particulars raised by first defendant.
14th September, 2017	First defendant seeks voluntary discovery.
11th December, 2017	Further replies furnished to first defendant.
17th October, 2018	Instructions furnished to senior counsel seeking an advice on proofs.
28th January, 2019	Consulting engineer furnishes report.

22nd February, 2019	Advice on proofs furnished by senior counsel.
29th September, 2021	Letter from counsel with draft notices.
5th October, 2021	Notice of motion to strike out on grounds of delay issued by first defendant.
1st November, 2021	Reply to third defendant's defence.
1st November, 2021	Plaintiff serves further particulars of negligence and breach of duty and of personal injury.
16th December, 2021	Plaintiff seeks voluntary discovery from all defendants.
20th January, 2022	Notice of motion to strike out action on grounds of delay issued by the second defendant.
21st January, 2022	Plaintiff furnishes affidavit of discovery to first defendant.
2nd March, 2022	Plaintiff services notice of trial.

6. Some of the dates given by the plaintiff's solicitor in the chronology in his affidavit were marginally inaccurate and have been corrected in the chronology set out above.

The Evidence.

7. The evidence on behalf of the first defendant was contained in an affidavit sworn on 1st October, 2021, by Ms. Sinéad Connolly, the first defendant's solicitor. In that affidavit, she outlined how the pleadings had closed with her client, with the delivery of a defence on its behalf on 17th June, 2015. Thereafter, a notice seeking further and better particulars had been raised by the first defendant on 21st August, 2017, to which replies had been furnished by the plaintiff on 11th December, 2017. On 14th September, 2017, a request for voluntary discovery had been made by the first defendant to the plaintiff. By letter dated 8th November, 2017, the plaintiff, through his solicitor, had agreed to provide voluntary discovery.

8. Ms. Connolly stated that apart from those steps, no other steps had been taken in the proceedings, other than an exchange of correspondence in relation to affidavits of verification. She stated that by letter dated 10th August, 2020, she had written to the plaintiff's solicitors seeking confirmation that the plaintiff was going to proceed with the case. She stated that when no reply had been received to that letter, she issued a further reminder on 17th February, 2021, to which she received a response by letter dated 5th March, 2021 from the plaintiff's solicitor, in which it was indicated that the plaintiff intended to proceed with the action. However, she stated that no further steps had been taken in the proceedings.

She stated that the plaintiff had not taken any step in the proceedings since the middle of 2017. It was submitted that in these circumstances, the first defendant was entitled to an order dismissing the plaintiff's action against it.

9. The application on behalf of the second defendant was grounded on an affidavit sworn on 20th January, 2022 by Ms. Agatha Taylor, solicitor for the second defendant. In her affidavit she gave a chronology of the relevant interaction between the plaintiff and her client. She pointed out that pleadings had closed with the delivery of a defence on behalf of the second defendant on 12th June, 2015. Thereafter, on 7th July, 2015, the second defendant had sought voluntary discovery of the plaintiff's medical records. These had been furnished by the plaintiff on 19th November, 2015. She stated that the last correspondence between the parties, was in August and September 2016, in which a medical assessment of the plaintiff was organised for 3rd October, 2016. She stated that the plaintiff's solicitor's email of 14th September, 2016, was the last correspondence that passed between the parties.

10. Ms. Taylor stated that she heard nothing from the plaintiff's solicitors over the following five years. She stated that the next correspondence from the plaintiff's solicitor, was on 1st November, 2021, when the plaintiff purported to furnish further particulars of negligence and breach of duty and further particulars of personal injury. This was done notwithstanding that no notice of intention to proceed had been served pursuant to O.122, r.11 of RSC.

11. Ms. Taylor stated that as of the date of the swearing of her affidavit, it was almost ten years since the accrual of the cause of action and six and a half years since a defence had been filed on behalf of the second defendant. She stated that the delay on the part of the plaintiff in prosecuting his case against her client had been inordinate and inexcusable. She stated that such delay "*shall most likely prejudice the second defendant's witnesses' ability to recollect, given the passage of time with matters dating back to events prior to March 2012. Furthermore, certain witnesses of the second defendant have since retired and/or left their employment with the second defendant*". She stated that in the absence of any credible excuse for the delay on the part of the plaintiff, the plaintiff's claim should be dismissed for want of prosecution and/or as representing an abuse of process.

12. Replying affidavits were sworn by the plaintiff's solicitor on 30th March, 2022 in respect of each motion. Those affidavits were in identical terms. In his affidavits, the

plaintiff's solicitor accepted that there had been inordinate delay in relation to the prosecution of the plaintiff's case against the defendants. However, he did not accept that in the circumstances of the case, that that delay could be characterised as being inexcusable.

13. The plaintiff's solicitor very candidly admitted that the plaintiff's case had been "*effectively overlooked for a period of time*" within his office. That had been due to the fact that the solicitor, who had been handling the case, terminated her employment with the firm in late 2016. This left the firm with a substantial case load that had to be reallocated and handled by the remaining staff. He stated that his firm was a small firm and the solicitor's departure had led to a significant disruption and to increased work volumes for the remaining staff.

14. The plaintiff's solicitor went on to point out, that while the case had not been progressed in an efficient manner, it had not been totally neglected. In particular, he referred to the detailed chronology that had been set out in his affidavits, wherein he had detailed not only the steps that had been taken *inter partes* in the litigation, such as the delivery of pleadings, *etc*; but he had also set out the correspondence that had passed, not only between the representatives of the parties on various matters, such as discovery, but also the correspondence that had passed between the plaintiff and his medical advisers in relation to his medical complaint and in particular, the causation thereof.

15. The plaintiff's solicitor also pointed to the fact that the plaintiff had been obliged to make discovery of his medical records and financial records to various defendants. He stated that there was considerable work involved in collecting the necessary documentation from the plaintiff. It was necessary to review that documentation and to collate all the relevant documentation, culminating in the swearing of affidavits of discovery. He accepted that that matter had not been attended to in the efficient manner in which such matters were normally attended to by his firm. He stated that while delays of that kind did occur in litigation, the fact that the firm had had insufficient manpower to deal with its case volume, had unfortunately resulted in the plaintiff's case being overlooked for a period of time.

16. He further pointed out that the unfortunate and regrettable delay that had occurred, had been added to by the exceptional circumstances created by the Covid-19 Pandemic. That had resulted in solicitors and staff being absent from the office for extended and repeated periods of time, which resulted in delays in progressing client's cases, particularly those involving litigation. He stated that those delays would not have occurred but for the

restrictions imposed by the Covid-19 Pandemic. In this regard, he pointed out that it was not possible to bring witness actions on for hearing during the time when the restrictions imposed by the Covid-19 Pandemic were in place. He stated that the case was now ready for hearing. The plaintiff's legal representatives would ensure that there was no further delay in having the matter set down for hearing.

17. It was submitted that when one looked at the detailed chronology in the case and having regard to the complexity of the matter and the intervening circumstances caused by the Covid-19 Pandemic, it was not an appropriate case in which to strike out the plaintiff's action against the first and second defendants.

Submissions on behalf of the Defendants.

18. The submissions made by Mr. Murray BL, on behalf of the first defendant, and Mr. Monaghan BL, on behalf of the second defendant, were largely identical. Accordingly, it is appropriate to deal with the submissions in an aggregate form. It was submitted that in this case the plaintiff's solicitor had accepted that the delay in prosecuting the action had been inordinate. It was submitted that while the plaintiff's solicitor had attempted to take the blame for that delay by pointing to the difficulties caused for his firm by the departure of the solicitor who had been handling the case in late 2016; it had been recognised in case law that delay caused by inactivity on the part of a legal representative, cannot be used to excuse the delay in failing to proceed with the action.

19. In this regard counsel referred to the decision in *Gilroy v. Flynn* [2004] IESC 98, where Hardiman J. had stated that the assumption that even grave delay would not lead to the dismissal of an action, if it was not on the part of the plaintiff personally, but was due to the inaction of a professional adviser "*may prove an unreliable one*". A similar comment had been made by Clarke J. in *Rogers v. Michelin Tyre PLC* [2005] IEHC 294, and both of those cases had been referred to by McMenamin J. in *McBrearty v. North Western Health Board & Ors* [2007] IEHC 431.

20. While the decision of Barrett J. in *Padden v. Ireland* [2016] IEHC 700, appeared to support the proposition that delay on the part of a solicitor would not be detrimental to a plaintiff's case; that decision had been overturned in an *ex tempore* decision of the Court of Appeal, as reflected in the judgment of Bolger J. in *Ryans Bakery Wexford Limited v. Harmony Row Financial Services Limited & Anor.* [2022] IEHC 242, where the learned judge stated as follows at para 38: -

"The plaintiff's primary excuse is that the delay was caused by their previous solicitors. I have found that the delay from November 2018 to July 2020, of one year and eight months, was due to the plaintiff. I do not have to determine whether the two periods of delay are to be assessed differently by reference to who was responsible as I am satisfied that any delay caused by the plaintiff's former solicitors is imputed to the plaintiff as per McMenamin J. in McBrearty v. North Western Health Board [2007] IEHC 431 where he stated:

> *"Even (as here) in the circumstances of an absence of culpability on the part of the plaintiff, culpability may nonetheless be imputed to the plaintiff by virtue of delay on the part of his solicitors in the determination as to whether or not the delay was inexcusable".*

This approach is fortified by the decision of Irvine J. in Padden v. Ireland, an ex temporare decision in the Court of Appeal on 31 January 2018 identified by the Supreme Court (Padden v. Ireland [2019] IESCDET 102 in its decision refusing the plaintiff leave to appeal the Court of Appeal's decision). Irvine J. concluded that there was "no evidence before the High Court judge which was sufficient to justify his decision that the delay could be excused." The Court of Appeal overturned the decision of Barret J. [2016] IEHC 700 in which he found that the delay which had been admitted by the plaintiff's lawyers could not be laid at a client's door."

21. It was submitted that even allowing some grace period for the fact that the solicitor dealing with the case had left the firm, that could not justify a delay of five years, in which effectively nothing was done to progress the litigation in any real sense. It was submitted that in these circumstances the delay had to be seen as being inexcusable.

22. It was submitted that if the court were of the view that the defendant had established that there was inordinate and inexcusable delay on the part of the plaintiff, then only modest or marginal prejudice was required in order to persuade the court that the action against the defendants should be struck out: see *McNamee v. Boyce* [2016] IECA 19 (paras. 34-35); *Millerick v. Minister for Finance* [2016] IECA 206 (para. 32).

23. It was submitted that given the lapse of time between the date of the events alleged to constitute the accrual of the cause of action and the likely date for the hearing of the action, witnesses would be asked to recall events that may have occurred over ten years earlier; added to that, some of the relevant witnesses may not be available to give evidence

on behalf of the defendants at the trial of the action. In addition, it was submitted that the court could have regard to the prejudice caused to a defendant that arises from the oppressiveness of a claim hanging over them for an extended period of time: see *Myrmidon CMBS (PROPCO) Limited v. Joy Clothing Limited* [2020] IEHC 246 (para. 50). It was submitted that taking all of the relevant factors into account, this was a case in which the balance of justice tilted in favour of striking out the action against the first and second defendants.

Submissions on behalf of the Plaintiff.

24. Mr. Marray BL, on behalf of the plaintiff, submitted that, while the plaintiff conceded that the delay in the prosecution of his action had been inordinate, it had in all the circumstances been excusable. It was submitted that the matters set out very candidly in the affidavit sworn by the plaintiff's solicitor justified the relatively short period of delay that had occurred. In this regard, counsel referred to the very detailed chronology that had been set out in Mr. Hutchinson's affidavits. From this it was apparent that the case was not one in which nothing had been done in any given year. In each of the years complained of by the defendants, the plaintiff's solicitor had been taking steps behind the scenes to obtain necessary medical reports from medical witnesses and in complying with the various requests for discovery that had been made by the defendants.

25. In relation to the issue of prejudice, counsel submitted that this was not a case in which there was any appreciable prejudice to the defendants. They had been made aware of the action almost immediately upon the plaintiff learning that his medical condition could be attributed to the conditions of his employment. The summons had issued within a short period of the plaintiff learning that fact. It had been served relatively shortly thereafter. Thus, the defendants were on full notice of the claim from an early stage.

26. In addition, counsel pointed out that there had been a joint engineering inspection, attended by all the engineers retained by each of the parties. That engineering inspection had been carried out on 19th September, 2014. At that time the respective engineers had had the opportunity to inspect and examine the relevant forklift truck and examine the locus at which the plaintiff had worked during the relevant period. Thus, there was no question that the defendants had been prejudiced in the conduct of their defence on the liability aspect, by any delay that had occurred subsequently due to the departure of the solicitor from the plaintiff's firm.

27. Counsel further submitted that this was not a case in which oral evidence was going to be particularly important. It was not seriously in dispute that the plaintiff had been employed by the first defendant; nor that he had carried out the duties of his employment at the premises of the second defendant. Nor was it seriously disputed that in the course of those duties he had been required to drive on a continuous basis over the particular locus and in the forklift truck that had been examined by the engineers. It was submitted that in these circumstances, oral evidence as to matters of fact, was not going to prove particularly controversial.

28. It was submitted that the key evidence in the case was going to turn on expert evidence in relation to causation of the plaintiff's injuries and the liability for those injuries that may attach to the first and third defendants, as his employer, or against the second defendant, as owner and occupier of the locus. It was submitted that in these circumstances, the vague assertions contained in Ms. Taylor's affidavit did not constitute any evidential basis on which prejudice could realistically be found to exist.

29. In this regard, counsel relied on the decision of the Court of Appeal in *Cave Projects Limited v. Gilhooley & Ors*. [2022] IECA 245 and in particular, to the summary of principles set out at para. 36 of the judgment. Counsel submitted that as recognised in the *Cave* decision, an order striking out a plaintiff's action must be seen as an option of last resort. It was submitted that it should only be granted by the court, where there was some evidence that there was a risk that a defendant would not obtain a fair hearing, due to prejudice that they had encountered as a result of the delay on the part of the plaintiff. It was submitted that there was no such evidence before the court in this case. Accordingly, it was submitted that the court should refuse the applications sought by the defendants herein.

Conclusions.

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

31. Since the decision in the *Primor* case was handed down, there have been multiple decisions applying those principles to various factual situations. This has given rise to a plethora of decisions, which sometimes differ one from the other, in emphasis and tone. In

Cave Projects Limited v. Gilhooley & Ors., the Court of Appeal carried out an extensive review of the principles and summarised the case law on which they were based. That summary is set out at para. 36 of the judgment; which is itself, a very long paragraph. For that reason, I will not quote it in full, but instead, I will highlight some of the relevant principles that were identified by Collins J. in the course of that judgment. He outlined the following principles as being applicable in applications such as the present one before the court:

- The onus is on the defendant to establish all three limbs of the *Primor* test *i.e*., that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim.
- An order dismissing a claim is a far reaching one; such order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed.
- Case law has emphasised that defendants also bear a responsibility in terms of ensuring the timely progress of litigation; while the contours of that responsibility have yet to be definitively mapped out, it is clear that any culpable delay on the part of the defendant will weigh against the dismissal of the action.
- The issue of prejudice is a complex and evolving one. It is central to the determination of the balance of justice. It is clear from the authorities that absence of evidence of specific prejudice, does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice.
- The authorities suggest that even moderate prejudice may suffice where the defendant has established that there was inordinate and inexcusable delay on the part of the plaintiff. However, Collins J. stated that marginal prejudice, if interpreted as being of a lesser standard than moderate prejudice, would not be sufficient.
- Collins J. noted that notwithstanding certain dicta in the *Millerick* case, which suggested that even in the absence of proof of prejudice, it may still be appropriate to dismiss an action, it had to be remembered that the jurisdiction was not punitive

or disciplinary in character and the issue of prejudice had been acknowledged as being central to the court's consideration of the balance of justice.

32. Collins J. concluded his summary of the relevant principles by stating as follows at para 37:

> *"It is entirely appropriate that the culture of "endless indulgence" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant."*

33. Applying the principles set down in the relevant authorities, as summarised in the *Cave* decision, I have come to the conclusion that the defendants are not entitled to orders striking out the plaintiff's action against them.

34. I have reached that conclusion for the following reasons: While the delay in this case was inordinate, it was not inexcusable. In coming to that conclusion, the following facts are relevant: first, the plaintiff was pursuing a cause of action that was of some complexity on both the liability and causation fronts. This was not a simple personal injury action, such as one that might arise out of a simple RTA. It was an action in which causation and liability were going to pose considerable difficulties of proof for the plaintiff at the trial of the action. To that end, it was necessary for the plaintiff's solicitor to engage in considerable investigation of both the medical and liability aspects of the case.

35. Secondly, at no stage did the plaintiff's solicitor simply do nothing. It may have appeared to the defendants as if the plaintiff had simply let the action go to sleep, but I am

satisfied having regard to the detailed chronology set out by Mr. Hutchinson in his affidavits, that that was not in fact the case. In addition to attending to the causation and liability aspects of the case, the plaintiff's solicitor also had to deal with the various requests for voluntary discovery that had come in from the defendants. In this regard, there had been requests for provision of the plaintiff's medical records and also of his financial records. Thus, while on the surface it may have appeared that the litigation was not being progressed, that did not mean that behind the scenes the plaintiff's solicitor was not working to progress the case.

36. The plaintiff's solicitor has accepted that there was delay in the conduct of the litigation due to the departure from the firm of the solicitor who had been dealing with the case up to November 2016. Mr. Hutchinson candidly accepted that due to the pressure of work on the remaining solicitors in the firm, the plaintiff's case was somewhat overlooked. However, I think that that is perhaps being somewhat harsh on his firm. I am satisfied from the detail of the work done, as set out in his affidavits, that the plaintiff's solicitor did the best that he could in the years leading up to March 2020. I accept his evidence that following the rolling lockdowns that were imposed at that time and given the restrictions that existed within the medical system, which were struggling to deal with the effects of the pandemic, it was reasonable that there were delays in obtaining copies of the plaintiff's medical records and making discovery of same at that time.

37. The defendants complain of the delay in the period 2016 to 2021, this ignores the fact that from March 2020 to June/July 2021, it was not possible to set down witness actions for hearing due to the Covid-19 Pandemic. The plaintiff cannot be blamed for the action not being heard during that period.

38. Accordingly, taking all the circumstances into account, I find that the delay in this case was excusable. That being the case, it is not necessary to consider the third question under the *Primor* test.

39. Even if I am wrong in that finding, I am satisfied that the balance of justice favours allowing the action to proceed. I reach this conclusion due to the fact that I am satisfied that there will be no real prejudice to the defendants in requiring them to deal with the plaintiff's action at this remove. I have reached that conclusion for a number of reasons: first, the defendants were aware of the nature of the claim from very early on. Secondly, a joint engineering inspection was carried out in September 2014. All the engineers retained by the

parties had the opportunity to examine the locus of the accident and the particular forklift truck on which the plaintiff had carried out his duties. Thus, in the crucial area of liability and causation, they were not in any way prejudiced.

40. Thirdly, Ms. Connolly in her affidavit, does not refer to prejudice at all. One can only therefore infer that the first defendant is claiming that, at best, it may have suffered general prejudice due to the delay on the part of the plaintiff. In the affidavit sworn by Ms. Taylor, the assertion of prejudice is articulated in a vague way. She stated that the second defendant's witnesses would suffer prejudice because they would have to recall events dating back to March 2012. She goes on to state that certain unidentified witnesses of the second defendant have since retired and/or left their employment with the second defendant. She does not identify who these witnesses are; nor does she state what relevant evidence they may be in a position to give, and most importantly, she does not state that they are unavailable to the second defendant. Accordingly, I find that the defendants have not pointed to any specific prejudice as a result of the delay on the part of the plaintiff. In this regard, the court is mindful of the dicta of Collins J. in the Cave case where he stated at para. 36 (vi): -

> *"…But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis….".*

41. Fourthly, this is not an oral evidence case in the usual sense of that term. This is not a case where witnesses will be asked to recall some specific event, or conversation, that took place many years earlier, such as can occur in relation to a road traffic accident, or evidence in relation to representations that may have been made at a particular time and place.

42. Here, it is accepted that the plaintiff was employed by the first defendant at the premises of the second defendant. It is accepted that he drove a particular forklift truck in the course of his duties. In these circumstances, none of the witnesses will be asked to recall any specific event that took place at a particular time. The oral evidence on liability will simply relate to the duties that the plaintiff carried out at the locus and the number of hours per week that he was required to do those duties. It is likely that those details would have been recorded by the first and/or second defendant. An issue may also arise as to whether any complaints were made to the defendants in relation to either the forklift truck, or the locus, by the plaintiff, or his fellow employees. Thus, the memories of witnesses of specific

events, are not really an issue in this case. Fifthly, there is no allegation that any relevant documentary evidence is no longer available.

43. In this case liability will turn on the expert evidence given by the engineers in relation to the adequacy of the forklift truck and, in particular, the adequacy of it to handle the difficult terrain that may have existed at the locus at the relevant time. The issue of causation will turn on the expert medical evidence, as to whether the injuries suffered by the plaintiff, were caused by repeated exposure to vibrations, while driving a forklift truck over uneven terrain, in the course of carrying out the duties of his employment with the first defendant. The plaintiff's pre-accident medical records will also be relevant in this regard. They are still available. Thus, the court is satisfied that all relevant evidence is still available to enable all of the parties to deal with the issues that are likely to arise at the trial of the action.

44. In these circumstances, the court is satisfied that the balance of justice lies in favour of permitting the plaintiff's action to proceed against the first and second defendants.

Relevance of the service of Notices of Indemnity/Contribution among the Defendants.

45. While not strictly necessary to the decision that I have reached in this case, I think it is desirable that I deal with an issue that has been touched upon in a number of cases and also arose in this case. It is in relation to the relevance, if any, of the fact that notices of indemnity/contribution had been exchanged between the defendants.

46. In the present case, the first defendant has not served any notices of indemnity/contribution. Counsel confirmed that the first defendant had received such notices from the second and third defendants. Counsel for the second defendant confirmed that it had served a notice of indemnity/contribution on the first and third defendants, and it had received a similar notice from the third defendant.

47. Order 16 of RSC deals with third party procedure generally. Order 16, r.12 provides as follows: -

> *12. (1) Where a defendant claims against another defendant:*
>
> *(a) that he is entitled to contribution or indemnity, or*
>
> *(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or*
>
> *(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and*

the defendant making the claim and should properly be determined not only as between the plaintiff and the defendant making the claim but as between the plaintiff and the defendant and the other defendant or between any or either of them,

the defendant making the claim may, without any leave, issue and serve on such other defendant a notice making such claim or specifying such question or issue. No appearance to such notice shall be necessary.

(2) After service of such notice either defendant shall be at liberty to apply for directions as regards pleadings between them if either considers it necessary to do so. In default of such application within twenty-eight days of service of such notice, the claim, question or issue shall be tried at or after the trial of the plaintiff's action as the trial judge shall direct.

(3) Nothing herein contained shall prejudice the rights of the plaintiff against any defendant to the action.

48. There has been very little case law on the effect of this particular provision in the Rules of the Superior Courts. In *Cole v. Webb Caravan Services Ltd* [1985] ILRM 1, it was held that the service of a notice pursuant to this provision in the rules was sufficient to entitle a defendant to recover a portion of the damages from the other defendant, without the necessity of pursuing a separate action for contribution from them. In *Mangan v. Dockery & Ors*. [2020] IESC 67, the Supreme Court, having held that there would not be a risk of injustice to the second or third defendants in allowing the action to proceed against them, went on to note that even if the applications by the moving party defendants to be let out of the proceedings on grounds of delay, were successful; both of the defendants would remain in the action pursuant to the notice of indemnity/contribution that had been issued on behalf of the first defendant. The court held that in those circumstances, it would not be justified to terminate the proceedings without a hearing on the merits (see para. 146).

49. In *Gibbons v. N6 (Construction) Limited and Galway County Council* [2021] IEHC 138, Butler J. seemed to take into account the fact that there were multiple defendants and the consequences that may ensue under the Civil Liability Act 1961, if one of the defendants were let out of the proceedings. She stated as follows at para. 31: -

"Finally, it might be noted that during the course of this hearing, I asked the parties to address me on the significance of the fact that there are two defendants to these proceedings and that this application is made on behalf of only one of them.

Somewhat to my surprise, this is a point which does not appear to have been discussed much in any of the decided case law. Obviously, if this application is allowed, the plaintiff is not totally deprived of his opportunity to litigate as his claim against the second defendant remains extant (although subject to the possibility that a similar application may be brought). Both parties agreed that in circumstances where the claim were to proceed against the second defendant only, it would be open to the second defendant to invoke the provisions of the Civil Liability Act to limit its liability by reference to the potential liability of the first defendant to the plaintiff. The plaintiff contended that this, of itself, would result in a prejudice to the plaintiff who might not then receive full compensation for the injury done to his property. Of course, if the plaintiff suffers such a loss by reason of being unable to pursue his claim against the first defendant or recover the full value of the claim against the second defendant, then he may still have an alternative remedy available to him outside of these proceedings. These are all factors which must be taken into account in the exercise of the court's discretion and which, in the circumstances of this case tend on balance to reduce the potential prejudice to the plaintiff."

50. The decision of Butler J. in the High Court was appealed to the Court of Appeal. In the decision of that court, cited at [2022] IECA 112, Barniville J. (as he then was) delivering the judgment of the court, noted the finding that had been made in the High Court decision, but did not elaborate further on that aspect (para. 51).

51. Finally, in *Walsh v. Mater Hospital & Anor*. [2022] IEHC 126, this court adverted to the issue that could arise where an application was brought by one defendant to be let out of proceedings in which notices of indemnity/contribution had been exchanged between the defendants and the effect that such an order could have on the carriage of the proceedings generally (see para. 84). It should be noted that that decision was appealed to the Court of Appeal; which appeal has been heard and a decision is awaited.

52. In the present case, I am satisfied that it is not necessary to give a definitive ruling on the significance of the service of a notice of indemnity/contribution among defendants, to the consideration of the balance of justice under the *Primor* test. Accordingly, anything that I say hereafter, must be seen as being *obiter*.

53. Having considered the issue, I am of opinion that the service of a notice of indemnity/contribution between defendants is not relevant to the issue that the court has to

determine on an application by a defendant to strike out proceedings on grounds of delay. That is because the court is only considering the balance of justice between the plaintiff and that defendant, when considering such an application. Thus, the key question is, has there been inordinate and inexcusable delay by the plaintiff and, if so, does the balance of justice as regards that defendant, demand that the action should be dismissed.

54. When considering the balance of justice in a multi-defendant action, it is appropriate to examine the work that was necessary for the plaintiff's solicitor to do when progressing the case against all the defendants. One could have a situation where a plaintiff sues two defendants, one of whom is within the jurisdiction and the other outside the jurisdiction. The pleadings may be closed relatively quickly as far as the defendant within the jurisdiction is concerned. However, the plaintiff may encounter considerable difficulty in proceeding against the foreign defendant. Or alternatively, one or other of the defendants may be uncooperative, or demanding in relation to pretrial steps, such as making discovery. The court can have regard to these matters when considering whether there is culpable delay on the part of the plaintiff to bring the action on for hearing against all the defendants.

55. However, leaving that aside, when considering the application by one defendant to be let out of the proceedings on grounds of delay, the fact that notices of indemnity/contribution have been served between the defendants, is not relevant.

56. On a practical note, once such notices have been served, if one defendant is let out of the proceedings *vis-à-vis* the plaintiff, it will remain in the action on foot of any notice of indemnity/contribution that may have been served upon it by the other defendant. That may give rise to consequences under the Civil Liability Act 1961, as envisaged by Butler J. in her judgment in the *Gibbons v. N6 (Construction) Limited* case.

57. The court accepts that the dicta of the Supreme Court in the Mangan case and the dicta of Butler J. in the *Gibbons* case, may be construed as leaning against the conclusion that service of a notice of indemnity/contribution is irrelevant to the consideration of the balance of justice question under the *Primor* test. For that reason, the court will await a case where this point has been fully argued before it, before giving a final decision on this issue.

Proposed Order.

58. Having regard to the conclusions reached by the court in its judgment herein, the court refuses the reliefs sought by each of the defendants in their respective notices of motion.

59. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matter that may arise.

60. The matter will be put in for mention at 10.30 hours on 10th March, 2023 for the purpose of making final orders.