**THE HIGH COURT**

**[2024] IEHC 225**

**[Record No. 2018/2374 P]**

**BETWEEN**

**BARRY KERNAN AND ROSALEEN KERNAN**

**PLAINTIFFS**

**AND**

**PAUL SWEENEY AND BANK OF IRELAND GROUP PLC**

**DEFENDANTS**

**JUDGMENT of Mr Justice Barr delivered electronically on the 19th day of April 2024.**

**Introduction.**

**1.** The plaintiffs' claim is that due to fraudulent misrepresentations and fraudulent conduct on the part of the first defendant, acting as a servant or agent of the second defendant, they made investments that ultimately proved to be disastrous, leading to the loss of their life's savings; an inability to repay their mortgage to the second defendant, leading to entry of a judgment for €298,441.59, and costs, against them on 11 November 2019; and they face ongoing proceedings at the suit of the bank, seeking repossession of their family home.

**2.** In these proceedings, the plaintiffs seek damages for fraudulent misrepresentation, fraudulent conduct, deceit and breach of contract, in a sum in excess of €2m, in respect of the value of their lost investments; together with damages for psychiatric injury said to have been suffered by the plaintiffs as a result of the stress and anxiety caused by the loss of their money and the consequential likely loss of their family home.

**3.** The fraudulent representations were alleged to have been made by the first defendant at or about the time of the making of the investments by the plaintiffs in 2006, 2007 and 2011. It is alleged that the fraudulent conduct on his part arose when dealing with these investments in the years thereafter. The plaintiffs plead that the alleged fraud on the part of the first defendant first came to their attention in 2012.

**4.** The present proceedings issued in March 2018. A defence and counterclaim were filed on behalf of the first defendant in April 2019. The second defendant raised a detailed notice for particulars in respect of the statement of claim on 30 May 2018.

**5.** On 16 November 2022, the second defendant issued its notice of motion in the present application, which seeks an order striking out the plaintiffs' action against it on grounds of delay and want of prosecution.

**6.** On 14 June 2023, the plaintiffs furnished replies to the notice for particulars raised by the second defendant on 30 May 2018.

**Background.**

**7.** Given the response of the plaintiffs to the second defendant's application herein, it is necessary to set out the case as pleaded in some detail. In their statement of claim, delivered on 16 April 2018, the plaintiffs plead that at all material times, the first defendant was a senior portfolio manager/financial adviser, with the second defendant. It was pleaded that in or about 2006, the first plaintiff was introduced to the first defendant at the Letterkenny branch of the second defendant.

**8.** It was pleaded that in May 2006, the plaintiffs were induced by the first defendant to invest €102,598.90 in shares in a company called Scorpion Performance INC. It was pleaded that the first defendant represented to them that their investment would double within one year, to eighteen months. The plaintiffs alleged that they were informed by the first defendant that all due diligence had been carried out and that employees of the second defendant had invested in the company.

**9.** The plaintiffs allege that the first defendant also advised them that the second defendant was backing an investment known as The Lapp Plats/Cove Energy investment; on which basis the plaintiffs invested a further €200,000 in the company. It was represented to the plaintiffs that two other employees of the second defendant, being DK and IT, had also invested similar amounts in the company.

**10.** The plaintiffs plead that they were not given any information about this investment. In particular, they plead that they were not told that these stocks were known as "micro cap stocks"; nor were they informed by the defendants that in June 2011, the Securities and Exchange Commission in the USA had suspended trading in a number of micro cap stocks, including the stocks in which they had invested. Nor were they told that a fraud investigation into the sale and promotion of those stocks, had been commenced in the US.

**11.** The first plaintiff pleaded that in or about 2010, on checking the amount of shareholding that he had in this company, while he had originally been told that he had purchased 906,000 shares as of 19 September 2006; he discovered that he had only

680,000 shares and that 226,000 shares had "gone missing". The plaintiff further pleaded that he discovered that 25% of the uplift of the value of the shares had been triggered and that the first defendant had received this money.

**12.** The first plaintiff further pleaded that five years after the original investment, the first defendant, who was again representing himself as an employee of the second defendant, advised the first plaintiff to sell all his shares in the company. This was prior to the shares rising dramatically.

**13.** The plaintiff further pleaded that in 2006 and early 2007, he was advised to invest in a company called Global Resources. He invested €86,576 in this company. The plaintiff pleaded that subsequent to making that investment, the first defendant indicated to him that he was leaving the employment of the second defendant; that he was going out on his own; and that he had taken the plaintiff's files with him. The plaintiff pleaded that he had grave concerns about this. He had a meeting with the manager of the second defendant at its Letterkenny branch, who vouched for the first defendant. The plaintiff pleaded that he was never informed that the investment in Global Resources was also a micro cap stock.

**14.** The first plaintiff pleaded that the first defendant opened an account in the first plaintiff's name, with Dolmen Securities in Dublin in April 2011, purportedly to allow the plaintiff to sell certain shares, so that he would have some money, on which to live. The plaintiff pleaded that the first defendant sought and obtained from him an irrevocable power of attorney in respect of the plaintiff's affairs.

**15.** The plaintiff further pleaded that he was induced by the first defendant to invest in a company called Regenicin. This investment was done through a brokerage known as Broadsmoore Capital in New York. It was pleaded that in the events which transpired, the plaintiff lost his entire investment, because the brokers failed to pass the money on to purchase the shares.

**16.** The plaintiff further pleaded that on diverse dates in July and August 2011, three withdrawals were made by the first defendant from the plaintiffs' joint bank account in the total sum of €155,000 and was paid into various accounts controlled by a number of parties, including the first defendant.

**17.** The plaintiff pleaded that when he required money, the first defendant had made a number of small payments into a bank account held in TSB, in favour of the plaintiffs. It was pleaded that throughout the years 2011 and 2012, the plaintiffs were continually reassured

by the first defendant that their money was safe and that the investments were improving and increasing in value.

**18.** It was pleaded that in November 2012, the first defendant allocated shares in a company called CMGO Holdings to the plaintiffs. However, no profit was made and no monies were ever paid out to them. In early 2013 and in September/October 2013, matters came to a head between the plaintiff and the first defendant. It is alleged that the first defendant closed the plaintiff's account with Dolmen Securities, without the knowledge of the plaintiffs.

**19.** It was pleaded that in December 2014, the first plaintiff severed his connection with the first defendant. He learnt upon making enquiries with the Central Bank in January 2015, that the first defendant had been delisted as a qualified financial adviser at the end of 2013.

**20.** In their statement of claim, the plaintiffs plead that all of the representations that were made by the first defendant to the first plaintiff at the time of the making of the investments, and during the currency of those investments, were all made fraudulently by the first defendant. It was pleaded that the actions taken by the first defendant in relation to the handling of those investments was also done fraudulently. In total, the losses alleged to have been incurred by the plaintiffs as a result of these investments, came to a sum in excess of €2m.

**21.** On 17 April 2019, a full defence and counterclaim was delivered on behalf of the first defendant. He admitted that he had been employed by a subsidiary of Bank of Ireland Life Holdings Limited, called New Ireland Assurance Company plc, trading as "Bank of Ireland Life". He admitted that he had been employed as a senior portfolio manager. He had been employed in that position from May 2002, until February 2007.

**22.** The first defendant admitted that he and a number of other individuals, some of whom were employed by the second defendant, had set up an informal group of investors, who shared information in relation to various investment opportunities. He stated that they invested their own money as individuals in companies that had been chosen for investment purposes. They did this having carried out their own due diligence and having regard to their own appetite for risk in relation to the investment. The first defendant accepted that upon request being made by the plaintiff, he was admitted to this investment group. The first defendant denied that the group had ever acted for or on behalf of the second defendant.

**23.** The first defendant admitted that the plaintiffs had made various investments, including in the three companies named in the statement of claim. The first defendant stated

that that had been done by the first plaintiff, who held himself out as being an experienced businessman with knowledge of the investment market, which he had gleaned from experience and also from a family member, who was experienced in this area in the city of London. The first defendant stated that the first plaintiff had always invested his own money, having done his own research and due diligence in respect of each proposed investment.

**24.** The first defendant pleaded that the plaintiff was aware that in making the various investments, he had no recourse to the first defendant, or to any other member of the investor group, in the event that the investment was not successful.

**25.** The first defendant denied that he had ever made any false or misleading representations to the first plaintiff in relation to any of the proposed investments. He denied that he had ever acted in a fraudulent or deceitful way, either in the manner alleged, or at all. The first defendant denied that the second defendant had any involvement in any of the equity investments. He denied that he had ever represented that they had had such an involvement.

**26.** In his defence, the first defendant dealt at length with various aspects of the various investments that had been made by the plaintiff. It is not necessary to set out the details of his defence in this regard.

**27.** The first defendant denied that he had ever sought, or had ever obtained a power of attorney over the first plaintiff's assets or affairs.

**28.** The first defendant pleaded that the second plaintiff, who had been known to him as a family friend, approached him in 2012, seeking a loan; and on that basis, he had lent various sums to the plaintiffs, amounting to a total of €100,000. It was pleaded that the plaintiffs had failed, neglected and refused to repay this loan to him.

**29.** In essence, the first defendant pleaded that all the investments that had been made by the first plaintiff, had been done in the nature of private investments, which he had made having carried out his own research and due diligence into the investment product concerned. The defence denied that the plaintiffs were entitled to the relief claimed, or to any relief against the first defendant.

**The Law.**

**30.** The law in relation to applications to strike out an action on grounds of delay and want of prosecution is well settled. The principles 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.

**32.** In *Cave Projects Limited v. Gilhooley & Ors*. [2022] IECA 245, 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. (then sitting as a judge of the Court of Appeal) 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.

**33.** 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.*"

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

> " *131. … In the absence of any reply to his alleged notice for particulars, Mr. Kirwan was not entitled to simply 'sit on his hands' and allow the proceedings to stagnate. He had tools available to him to compel the replies he sought and his status as a litigant in person does not absolve him from his responsibilities in this regard. Irvine J's observations in Flynn (albeit in that case on the failure to cooperate in seeking full and proper discovery) are apposite. She stated (at para. 33):*

> '*… the onus is on a plaintiff to prosecute their claim with reasonable diligence and if a defendant fails to co-operate, for example by ignoring correspondence in relation to discovery, the rules of court provide a method whereby that co-operation can be secured. Mr. Flynn had, as was considered material in O'Domhnaill, the ability to control any such delay*.'
>
> *132. The appellant in this case also retained the ability to control the delay that ensued. Faced with the lack of response to the notice for particulars, he was obliged to use the machinery of the rules of the court to move matters on. His failure to do so cannot be relied upon as a valid ground for excusing the delay and the trial judge was correct so to find*."

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

**36.** A more recent decision of the Court of Appeal is *Beggan v Deegan* [2024] IECA 4, where the court applied the recent jurisprudence in the delay cases as set out in the *Cave Projects* case. The court recognised that under the test in *Primor*, it had been repeatedly stated that moderate prejudice to the defendant due to a delay on the part of the plaintiff in prosecuting the case, may suffice to entitle the defendant to an order striking out the action against it.

**37.** The court noted that under this test, a case could be dismissed, even though a fair trial was still possible. The court went on to state:

> "*One would have thought that for a plaintiff to suffer the draconian remedy of having their case dismissed, notwithstanding that a fair trial is still available, the level of prejudice suffered by the defendant as a result of delay, even if described as "moderate", must be significant enough to make it unfair to the defendant for a trial to proceed*."

**38.** The court stated that while what constituted moderate prejudice, may be a matter of debate; it had to be prejudice that was sufficient to make it unfair to call on the defendant to meet the case at trial. If such unfairness was not established, the court stated that it was difficult to see how the balance of justice could favour dismissal of the action (see paragraph 25).

**39.** The court also considered to what extent delay on the part of the defendant in progressing the action, was relevant to the consideration of the balance of justice. It had

been submitted by counsel on behalf of the defendant in that case, that only culpable delay on the part of the defendant was relevant. The court did not accept that as an accurate statement of the law. In that case, there had been a delay on the part of the defendant in responding to a request to make discovery of documents. At paragraph 34 of the judgement, Noonan J stated:

> "*I accept entirely that there was no procedural obligation on the defendants to progress discovery at that time but their failure to respond meaningfully in accordance with their correspondence is in my view clearly something to be taken into account in weighing the balance, as it was in McCarthy. Accordingly, I reject the defendants' submission that the judge was wrong to consider that this was a factor that counted against dismissal and I agree entirely with the view she expressed in that respect*."

**40.** While there are now very many cases dealing with the issue of delay in progressing litigation, I am satisfied that the above summary accurately represents the current state of the law in this area.

**Discussion.**

**41.** In argument at the Bar, Ms Geoghegan SC on behalf of the second defendant, submitted that there had been inordinate and inexcusable delay on the part of the plaintiffs in the following way: first, there had been pre-commencement delay of approximately six years from the date upon which the plaintiffs allege that they had discovered the fraudulent conduct in 2012, to the date of issuance of the plenary summons in March 2018. Secondly, there had been a delay of five years in providing replies to the notice for particulars that had been raised by the second defendant on 30 May 2018. It was submitted that these replies had only been furnished in June 2023, subsequent to the issuance of the present notice of motion, seeking to strike out the plaintiffs' action on grounds of delay.

**42.** Thirdly, it was submitted that there had been no culpable delay on the part of the second defendant. It had raised its notice for particulars within a short period of receiving the statement of claim. It was submitted that it was reasonable for the second defendant to await replies to its notice for particulars, so as to enable it to properly understand the case that was being made by the plaintiffs against it; so as to enable it to enter a full and detailed defence on its behalf.

**43.** It was submitted that in circumstances where the plaintiffs had effectively done nothing to prosecute their case as against the second defendant subsequent to delivery of the statement of claim in April 2018, it had been clearly established that the plaintiffs were guilty of inordinate or inexcusable delay in the prosecution of their proceedings against the second defendant.

**44.** It was submitted that the third question under the *Primor* test, being the balance of justice, favoured the striking out of the action against the second defendant. Counsel accepted that there was no evidence of specific prejudice having been suffered by the second defendant due to the delay in the proceedings to date, insofar as there was no evidence of any particular witnesses having died, or being unavailable, or being otherwise incapable of giving relevant evidence; however, it was submitted that prejudice due to the lapse of time between the events alleged to constitute the cause of action and the likely date of the hearing of the action, could constitute general prejudice which would suffice to warrant the action being struck out against the defendant: see *Gibbons v N6 (Construction) Limited* [2022] IECA 112.

**45.** Counsel submitted that as the plaintiffs' action was grounded upon representations that had allegedly been fraudulently made by the first defendant and upon alleged fraudulent conduct on his part, the present action was not a "documents only" case, but was one which would necessitate oral evidence on contested issues of fact.

**46.** It was submitted that as that was the case, the court was entitled to have regard to the fact that the memories of witnesses would fade over time. In this regard counsel referred to the decisions in *McGuinness & Wilkie v Flanagan Solicitors* [2020] IECA 111 and *Doyle v Foley* [2022] IECA 193.

**47.** It was submitted that in essence, liability in the case would turn on oral evidence in relation to what representations were made by the first defendant; what conduct was carried out by him on behalf of the plaintiffs; and what took place at the meetings that were said to have taken place between the plaintiffs and representatives of the second defendant. It was accepted by the plaintiff that there was no record of what had been said at any of the meetings where product reports were alleged to have been made by the first defendant. It was submitted that the witnesses would have to recall what was said and done at meetings that were held almost twenty years prior to the likely date of the hearing of the action. It

was submitted that that constituted general prejudice, which was moderate in nature, which was sufficient to justify the striking out of the plaintiffs' action against the second defendant.

**48.** In response, Ms McNally SC on behalf of the plaintiffs submitted that this was not a "late start" case in the classic sense; because while the fraud had been first discovered in 2012, the plaintiffs did not know the extent of the fraud and had not ended their relationship with the first defendant until December 2014. Even then, the extent of the fraud was not known until some considerable time later in 2015, when the plaintiffs' accountant had had access to the relevant records. It was submitted that in these circumstances, there had been no unreasonable delay in commencing the proceedings in 2018.

**49.** It was submitted that the second defendant had raised a notice for particulars that was wholly unreasonable. It had sought information in relation to matters that were not relevant to the matters pleaded in the statement of claim. It was submitted that the plaintiffs had not been obliged to reply to all of the matters raised in the notice for particulars, but had only done so, as a means of moving the litigation on.

**50.** It was submitted that the second defendant could not complain of the delay on the part of the plaintiffs in replying to its notice for particulars, when it had taken no steps to compel delivery of those replies. It was submitted that in this regard they had acquiesced in the delay: see *Kirwan v Connors* at paras. 131 and 132.

**51.** Counsel submitted that it was necessary to view the present application, in the context of the two other actions that had been brought by the bank against the plaintiffs. The plaintiffs had lost their life savings. They had faced summary proceedings brought by the bank, which had ultimately resulted in a consent judgment being entered in favour of the bank in November 2019. There were also extant possession proceedings being brought by the bank, seeking an order for possession in respect of the plaintiffs' family home. It was submitted that the existence of parallel and interrelated litigation was a relevant matter when considering the question of delay: see *Egan v Governor and Company of the Bank of Ireland* [2024] IEHC 26. It was submitted that having regard to the complexity of the matter and the fact that it involved allegations of fraud, there had been no inordinate or inexcusable delay in the progress of the action to date.

**52.** It was further submitted that even if there was inordinate and inexcusable delay, the balance of justice was not in favour of striking the proceedings out. This was due to the fact that there was no real prejudice to the second defendant. The plaintiff had identified all

the relevant witnesses. They were either still employed by the bank, or lived in County Donegal. It was submitted that there was no assertion that they were not available to give evidence on behalf of the second defendant. Even if they were reluctant to give evidence on behalf of the second defendant, their attendance could be secured by issuing the necessary subpoenae.

**53.** It was submitted that a vague statement of prejudice on the part of a defendant, was not sufficient to have the action against it struck out on grounds of delay: see *O'Brien v BDO Simpson Zavier* [2023] IEHC 358.

**54.** It was submitted that having regard to the fact of acquiescence in the delay on the part of the second defendant in the period from delivery of the notice for particulars, to issuance of the present notice of motion; coupled with the lack of any real prejudice to the second defendant in the conduct of its defence; the court should refuse the reliefs sought by the second defendant in its notice of motion.

**Conclusions.**

**55.** The court has considered the arguments very ably put by counsel on behalf of the parties and has considered the case law opened to the court and cited in their written submissions.

**56.** There are now so many decisions that set out various principles that should be applied when considering an application to strike out proceedings on grounds of delay, that it is possible for diligent counsel to find dicta in support of almost any proposition that they wish to advance in support of their client's case. The overriding principle, as set out in the *Cave Projects* case, is that each case must be examined in the light of its own particular facts.

**57.** In doing that, the court must ask itself whether the evidence adduced in the affidavits and on the pleadings, has established that there has been inordinate delay on the part of the plaintiff in prosecuting the action. If so, is that delay inexcusable? If so, does the balance of justice lie in favour of permitting the action to proceed; or is it in favour of striking out the proceedings against the defendant?

**58.** While this Court has considerable sympathy for the unfortunate financial circumstances in which the plaintiffs find themselves, the court is satisfied that the

proceedings must be struck out against the second defendant on grounds of delay and want of prosecution.

**59.** The court has reached that conclusion for the following reasons: first, the court is satisfied that there has been inordinate delay in this case. The court accepts the submission made by Ms Geoghegan SC on behalf of the second defendant, that this case must be seen as a "late start" case, given that the alleged fraud first came to the notice of the plaintiffs in 2012. While the court accepts that it would have taken the plaintiffs some time to employ an accountant and get to the bottom of their grievance, that did not justify waiting almost six years to institute their proceedings. Having embarked on the proceedings late in the day, it was incumbent upon the plaintiffs to proceed quickly with their action, once it had been started.

**60.** Unfortunately the plaintiffs did not do that. When the second defendant raised a detailed notice for particulars, the plaintiffs did nothing. They seemed to ignore it. In attempting to justify their silence in that regard, an assertion was made in the replying affidavit sworn by the plaintiffs' solicitor, Ms Browne, that the second defendant had raised matters that were inappropriate in its notice for particulars. That misses the point entirely.

**61.** It has often been said, that litigation is a two-way street. Once a notice for particulars is raised by one party and delivered to the other party, the onus then shifts to that other party to deal with the notice for particulars in whatever way they deem appropriate. It is not appropriate to simply do nothing. If it is felt that some of the matters raised in the notice for particulars are either irrelevant, or are matters for evidence, then the appropriate response to those questions is either: "Not relevant to matters pleaded", or "This is a matter for evidence". Once a party replies to a notice for particulars in this way, they have at least replied to the notice for particulars and the onus then shifts to the party who raised the notice for particulars, to decide whether they are satisfied with the responses that have been furnished. If they are not satisfied with the responses they have received, they can issue a motion seeking an order from the court to compel the delivery of replies to the contested matters in the notice for particulars. Such motions can be brought before the High Court in the common law motion list on a Monday, without any undue delay or expense.

**62.** What a plaintiff cannot do, is to simply ignore a notice for particulars and sit on his hands. That is what the plaintiffs did in this case, until the second defendant brought its notice of motion to strike out the action on grounds of delay; subsequent to which, the

plaintiffs belatedly furnished replies to the notice for particulars, some five years after they had received it. That is not acceptable.

**63.** Having regard to the late start of the proceedings herein, followed by the enormous delay in responding to the notice for particulars that had been raised by the second defendant, the court has to conclude that the plaintiffs have been guilty of inordinate and inexcusable delay in this case.

**64.** This brings the court to the third question in the *Primor* test, being the balance of justice. The court accepts the submission that where there is inordinate and inexcusable delay, then moderate prejudice can suffice to justify the striking out of the action against a defendant: *Millerick v Minister for Finance* [2016] IECA 206; *Cave Projects Limited v Gilhooly & Ors*.

**65.** In the present case, there is no evidence that any witnesses, who may be relevant to the defence that will be put forward on behalf of the second defendant, are dead, or are otherwise unavailable, or are incapable of giving evidence. There is no evidence that any relevant documentation has gone missing. Accordingly, I find as a fact that the second defendant has not established that it will suffer specific prejudice as a result of any delay in this case.

**66.** However, I accept the submission of counsel for the second defendant, that this is not a documents only case. The liability on the part of the first defendant will turn on whether he made the alleged fraudulent representations to the plaintiffs and/or engaged in the fraudulent conduct alleged against him. These are questions of fact, on which oral evidence will be crucial.

**67.** The liability of the second named defendant will only arise if it is established at the trial, that the first defendant made fraudulent representations and/or acted fraudulently, and that he did so in the course of his employment with the second defendant. This issue of vicarious liability, will also involve oral evidence in relation to the meetings that were allegedly held between the first plaintiff and various servants or agents of the second defendant. This will turn exclusively on oral evidence, as it has been alleged by the plaintiffs that there were no records kept of any such meetings.

**68.** In these circumstances, in order to defend itself at the trial of the action, the second defendant will have to rely on the evidence of witnesses, who will be required to give evidence in respect of meetings that took place almost twenty years prior to the likely date

of the hearing of the action. It is well settled that people's ability to accurately recall details of conversations and meetings, diminishes greatly over time.

**69.** In *McGuinness & Wilkie v Flanagan Solicitors*, the defendants were being sued in relation to an alleged breach of a partnership agreement. While some of the terms had been recorded in writing, the terms upon which the plaintiffs relied, were alleged to have been additional terms that had been agreed orally. Delivering the judgment of the Court of Appeal, Noonan J stated as follows in relation to the issue of prejudice and the recollection of witnesses over a considerable period of time:

> *"If this matter proceeds to trial, each of the witnesses to these transactions and events will be asked to recollect from memory events occurring some fifteen to sixteen years in the past. I cannot see how that could amount to other than a facsimile or parody of justice, as one judgment describes it. Furthermore, it is not a case where witnesses could even be said to have the benefit of written statements of their recollections made at an early juncture because the defendant had no idea of what case was being made against it before it received the statement of claim in March 2013, already seven to eight years after the relevant events."*

**70.** A similar conclusion was reached in the *Doyle v Foley* case, where the plaintiff was relying on terms in a management agreement concerning a horse, which were said to have been implied into the agreement, arising either from oral agreement between the parties, or from use and practice within the particular industry.

**71.** The original agreement had been concluded in 2008. The plenary summons had issued on 28 January 2013, with the statement of claim being delivered a year later, on 15 January 2014. The High Court had struck out the action against the defendant on 09 November 2021. In dealing with the issue of prejudice, Noonan J stated as follows at para. 73:

> *"I am satisfied that the defendant has met that threshold based on general prejudice arising from the passage of time. If this case were to proceed to trial, there would necessarily be a contest between the plaintiff and the defendant as to what was agreed between them in 2008. This can only be resolved on oral evidence as it is the plaintiff's case that the syndicate agreement does not comprise the entire agreement reached between the parties in 2008. Each of the parties will be required to give their evidence in respect of events which occurred fourteen years ago."*

**72.** The court went on to hold that, while some of the evidence would involve expert evidence, which may not be as susceptible to the vulnerabilities that can arise due to the passage of time; nonetheless, it could not be said to be free from or immune to such frailties. The court held that the quality of the evidence for both parties, would be impacted, with increased risk to the fairness of the trial. While the judge accepted that the requirement was that there be a fair trial, not a perfect one; the threshold of prejudice which the defendant was required to pass, was that of moderate or marginal prejudice. He held that that had been met in the case before him.

**73.** In the present case, the court finds as a fact that by having to rely on the testimony of witnesses as to events that will have occurred almost twenty years prior to the trial, the second defendant has suffered significant prejudice, certainly amounting to moderate prejudice, in the conduct of its defence.

**74.** That this prejudice, is in the nature of general prejudice, rather than specific prejudice, does not mean that it cannot constitute moderate prejudice as required under the tests laid down in the *Millerick* and *Cave Projects* cases.

**75.** The court is conscious that the decision in *O'Brien v BDO Simpson Zavier*, which was relied upon by the plaintiffs, is not in favour of striking out the action. However, when one looks more closely at that action, one sees that it concerned an allegation of merely negligent advice that was allegedly given by the second defendant, being a bank, to one of its customers, being the plaintiff, in relation to certain investments. The events complained of in the statement of claim dated back to 2007. The plenary summons had issued on 12 July 2013. A statement of claim had been delivered on 31 January 2017. The second defendant's notice of motion had issued on 10 January 2022.

**76.** The court noted that in its grounding affidavit, the defendant had merely stated that due to the efflux of time and the turnover of staff, the defendant would be in a position where it may be difficult to find witnesses to give oral evidence at trial, if necessary. In dealing with the balance of justice and the issue of prejudice, Meenan J, (then sitting as a judge of the High Court) held that where a named individual had been identified by a plaintiff, a general assertion that a lapse of time may make the giving of evidence difficult, was not sufficient to establish even a low level of prejudice, as would warrant striking out the proceedings.

**77.** While that conclusion may well have been warranted in the case under consideration, the court is satisfied that the facts of that case were materially different to the present case. In that case, the allegation was merely that negligent advice had been given by a bank to its customer. Here there is an allegation of fraudulent representations and fraudulent conduct over a protracted period of time. On that basis, this case is materially different in relation to the nature of the evidence that will be required to be adduced on behalf of the second defendant at the trial of the action. The court is satisfied that it is justified in reaching the conclusion that due to the delay in prosecuting their action herein, the plaintiffs have caused moderate prejudice to the second defendant, such that it is appropriate and in accordance with the dictates of justice, that the proceedings against the second defendant be struck out.

**78.** In considering the balance of justice, the court finds that there was no culpable delay on the part of the second defendant. It was reasonable of them to hold off filing their defence until replies had been furnished to their notice for particulars. Having regard to the matters pleaded in the statement of claim, it was reasonable for the second defendant to require full and detailed particulars of the case of fraud being made against both them and the first defendant, before being required to deliver their defence.

**79.** I am satisfied that the second defendant did not acquiesce in the delay, because when a letter was written to them threatening the issuance of a motion for judgment in default of defence, they immediately responded pointing out that replies to the notice for particulars were outstanding. At a later stage, when the plaintiffs' solicitor wrote apologising for the delay in furnishing the replies and stating that they were with counsel for approval, it was reasonable of the second defendant to hold off pursuing the matter while the draft replies were being settled by counsel.

**80.** The plaintiffs also relied on the fact that there were other proceedings extant against the plaintiffs at the same time as they were pursuing the present action. While the existence of such proceedings might have excused some small delay on the part of the plaintiffs, it does not excuse the magnitude of the delay that has occurred in this case.

**81.** The circumstances of this case are not the same as those that arose in the *Egan* case, where the plaintiff had held off pursuing the action against one of the defendants, due to the fact that there was an appeal extant in relation to a decision of the High Court, wherein one of the other defendants had been successful in striking out the proceedings brought by

the plaintiff against it, in the same action. In such circumstances, the plaintiff could not have set the action down against the remaining defendants, while the issue in relation to the position of the other defendant had not been resolved before the Court of Appeal. Accordingly, the decision in the *Egan* case, does not materially support the position of the plaintiffs in this case.

**82.** Finally, while the plaintiffs raised the issue of the Covid pandemic as an excuse for some delay in a somewhat oblique way in the replying affidavit, the court is satisfied that there is no substance in this submission. While the existence of the Covid pandemic and the restrictions that ensued in the period March 2020 to June 2021, might have excused the failure to set an action down for hearing, due to the fact that witness actions could not be held during that period; this action was not at that stage during the relevant period. There was nothing to prevent the parties dealing with the pretrial issues, even during the height of the Covid restrictions. In particular, the existence of the Covid restrictions, provided no excuse for the failure on the part of the plaintiffs to reply to the second defendant's notice for particulars.

**83.** In all the circumstances of the case, the court is satisfied that it is appropriate to strike out the plaintiffs' action against the second defendant on grounds of delay and want of prosecution. Accordingly, the court would propose to make an order granting the reliefs sought by the second defendant at paras. 1 and 2 of its notice of motion dated 16 November 2022.

**84.** 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 matters that may arise.

**85.** The matter will be listed for mention at 10.30 hours on 15 May 2024 for the purpose of making final orders.