



**UNAPPROVED  
THE COURT OF APPEAL**

**Appeal Number: 2020/154**

**Neutral Citation Number**

**[2022] IECA 115**

**Whelan J.  
Faherty J.  
Binchy J.**

**BETWEEN/**

**ALAN BARRY**

**PLAINTIFF/RESPONDENT**

**- AND -**

**RENAISSANCE SECURITY SERVICES LIMITED  
AND MATEUSZ GRZESKOWIKA**

**DEFENDANTS/APPELLANTS**

**JUDGMENT of Ms. Justice Faherty dated the 20<sup>th</sup> day of May 2022**

1. This is the defendants' appeal against the refusal of the High Court to strike out the plaintiff's claim, for want of prosecution on the grounds of inordinate and inexcusable delay. The motion Judge (Cross J.) held that while there had been inordinate and inexcusable delay the balance of justice did not warrant the dismissal of the proceedings.

2. The defendants agree with the finding of inordinate and inexcusable delay but assert that the motion Judge erred in finding that the balance of justice did not warrant the striking out of the proceedings. They contend that the Judge made a number of factual errors that vitiate his finding as to where the balance of justice lay. They submit that

matters cannot just be reduced to making findings of inordinate and inexcusable delay on the part of the plaintiff and then balancing that delay against an absence of special prejudice to the defendants, as the motion Judge appeared to do. The defendants say that contrary to the finding of the High Court, the balance of justice favoured the dismissal of the proceedings.

### **Chronology**

3. The chronology of the proceedings is as follows.
4. The incident (an alleged assault) which gave rise to the proceedings occurred on 24/25 July 2011. As can be seen therefore, the claim is of some considerable antiquity. The plaintiff made an application to the PIAB on 23 July 2013 and a grant of authorisation issued on 23 September 2013. The plenary summons issued on 20 March 2014. The plaintiff's claim is for damages for personal injuries, loss and other damage suffered by the plaintiff by reason of a trespass to the person of the plaintiff, assault and battery on the plaintiff and/or by reason of the negligence and/or breach of duty (including statutory duty) of the defendants. The plenary summons was served personally on the defendants approximately a year later on 13 March 2015.
5. The defendants' solicitors wrote on three occasions (20 April 2015, 6 May 2015 and 11 May 2015) seeking the original of the plenary summons, evidence of service of the proceedings on the defendants and the plaintiff's consent to the late filing of an appearance. This correspondence was ultimately responded to on 15 May 2015, the plaintiff's solicitors advising that the proceedings had been served on the defendants directly.
6. On 18 May 2015, the defendants' solicitors wrote again seeking consent to the late filing of an appearance, confirmation of the date of service on the defendants and sight of the affidavit of service of the plenary summons. They repeated those requests on 3 June

2015 following which the plaintiff's solicitor responded on 15 June 2015 consenting to the late entry of an appearance.

7. An appearance was entered on behalf of both defendants on 17 June 2015. A month later, on 15 July 2015, the defendants wrote to the plaintiff's solicitor seeking the affidavit of service of the proceedings on the defendants, a certified copy of the plenary summons and the statement of claim. They wrote twice on 13 August 2015 seeking this documentation and warning that in the event of the plaintiff failing to deliver the documentation within 21 days, the defendants would proceed by way of motion, without further notice, seeking to strike out the plaintiff's claim for failure to deliver a statement of claim and prove service. In their second letter, the defendants' solicitors remarked that there was considerable delay in issuing the proceedings and that their instructions were to fully defend same. They again called on the plaintiff to serve an original and true copy of the plenary summons for the purposes of endorsing service and they repeated their warning regarding the failure to deliver a statement of claim.

8. The plaintiff's solicitors responded on 17 August 2015 to the effect that they were "desperately" seeking to contact the plaintiff and had been trying for some time. The defendants' solicitors responded on 18 August 2015 noting the position and offering a further short period for the delivery of the statement of claim. They sought, however, the affidavit of personal service on both defendants and a certified copy of the plenary summons, stating that they did not see how the failure to make contact with the plaintiff was germane to the provision of this documentation. By 22 September 2015, the defendants were still seeking the affidavit of personal service and a certified copy of the plenary summons. In their letter to the plaintiff's solicitors they stated:

"Once valid service has been proved and we are in receipt of certified copy

Pleadings we will be seeking immediate delivery of a statement of claim as we are

anxious to advance these proceedings by way of a full Defence noting that the incident, subject matter of the proceedings, occurred as far back as the 25<sup>th</sup> July, 2011 and we believe that the Defendants have already been prejudiced by the Plaintiff's delays."

**9.** The defendants next wrote on 20 October 2015 noting that no reply had been forthcoming to their correspondence of 18 August 2015 and 22 September 2015. They repeated their earlier assertion that they were prejudiced by the plaintiff's delays.

**10.** They wrote again on 19 November 2015 reminding the plaintiff's solicitor that the documentation sought, including the statement of claim, remained outstanding and advising that they intended proceeding by way of motion relying on their letter of 13 August 2015. They went on to state:

"We call upon you to confirm by return that you have established contact with your client and he is proceeding with his claim and we reiterate that we are of the opinion that the case is Statute Barred and the Defendant has been significantly compromised by the delay in the Plaintiff bringing proceedings herein and same will be strenuously defended."

**11.** On 23 November 2015, the plaintiff's solicitors wrote apologising for not replying to the defendants' correspondence of August, September and October 2015. They advised that they had been unable to contact the plaintiff and opined that there must be some good reason as to why he had not responded to their letters.

**12.** This correspondence was followed up with another letter from the plaintiff's solicitors on 22 December 2015 again advising that they had been unable to obtain instructions but stating that their client had a good case and that they would revert as soon as instructions were received.

**13.** By 8 February 2016, the position remained unchanged, namely that as advised by the plaintiff's solicitors, the plaintiff remained uncontactable. As set out in their letter of 8 February 2016 the plaintiff's solicitors' position was described as "very difficult". They expected that they would have no choice but to come off record, but they were making "further urgent efforts" to obtain instructions from the plaintiff.

**14.** There, it appears, matters rested as regards correspondence between the plaintiff's solicitors and the defendants' solicitors until the latter wrote on 1 February 2017. This correspondence was replied to by the plaintiff's solicitors on 9 February 2017 wherein they advised that the "unfortunate position" was that they had been unable to communicate with the plaintiff despite "vigorous" efforts on their part. They advised that they would make a further effort to communicate with him.

**15.** It is common case that the first named defendant company went into liquidation on 12 May 2017. On 26 May 2017, the defendants issued their first motion to dismiss the plaintiff's claim for want of prosecution, the plaintiff having failed to deliver a statement of claim.

**16.** The statement of claim was delivered on 28 June 2017 followed by the plaintiff's affidavit of verification on 29 June 2017.

**17.** By Order of the High Court (Twomey J.), on 3 July 2017 the defendants' motion was struck out on consent with an order for costs in their favour.

**18.** On 4 July 2017, the defendants' solicitors raised a notice requesting further information. On 17 August 2017, they wrote seeking the replies to the request, affording the plaintiff a further 21 days to comply. The replies were not forthcoming. On 18 October 2017, the defendants issued a motion to compel the said replies. By consent Order of 4 December 2017 (O'Hanlon J.), the plaintiff was given three weeks to reply to the notice for particulars and the costs of the motion were awarded to the defendants.

**19.** The plaintiff did not furnish the replies within the stipulated timeframe. Ultimately, following a letter from the defendants on 18 January 2018 threatening a further motion to strike out the plaintiff's claim for want of prosecution, the replies were furnished on 13 February 2018. Under cover of the same correspondence, the plaintiff called on the defendants to deliver their defence. This correspondence was replied to on 9 March 2018 by the defendants' solicitors who advised that once the plaintiff's affidavit verifying his replies was received they would then "make arrangements to deliver a full Defence which has been drafted by Counsel".

**20.** The defendants wrote again on 29 March 2018 noting that the verifying affidavit remained outstanding and advising that their instructions were to fully defend the proceedings and that a draft defence was available for delivery.

**21.** They followed up with a further letter on 23 May 2018 reminding the plaintiff's solicitors that the affidavit of verification remained outstanding despite the replies to particulars having been delivered on 14 February 2018. The letter went on to state:

"As you are aware, the alleged incident the subject matter of these proceedings occurred as far back as the 25<sup>th</sup> July 2011 and it is therefore now almost seven years since the incident occurred. We remain of the view that the Defendant is being prejudiced in its ability to defend the proceedings by the delays at the Plaintiff's hand and we reserve our position to bring a Motion to strike out for delay in due course if necessary."

**22.** This correspondence was followed by a further letter of 28 September 2018 in which the defendants again sought the plaintiff's verifying affidavit and warned of a second motion to strike out the proceedings for want of prosecution.

**23.** After a hiatus of some ten months the defendants next wrote to the plaintiff's solicitors on 11 July 2019 enclosing a notice of intention to proceed and advising that once

the notice period expired they had instructions to bring a motion to strike out the claim for want of prosecution.

**24.** This was replied to on 17 July 2019 by the plaintiff's solicitors who noted the position and advised that they continued to have difficulty reaching their client. They stated that they would attempt to bring the defendants' letter to his immediate attention.

**25.** Following a further warning letter from the defendants on 23 September 2019 the plaintiff's solicitors responded on 25 September 2019 advising that they were endeavouring to arrange a meeting with the plaintiff "to explain to him the consequences of the strike out Motion". They stated that they had managed to reach the plaintiff by email and were hoping for a prompt meeting with him. They asked that the defendants take no further steps for a period of 14 days to allow the meeting to take place so that they could take the plaintiff's instructions and revert back to the defendants.

**26.** Ultimately, the defendants' second motion issued on 17 October 2019 seeking, *inter alia*, to dismiss the plaintiff's claim for want of prosecution and/or on grounds of inordinate and inexcusable delay. The motion was grounded on the affidavit of the defendants' solicitor Ms. Kerrie Dunne sworn 17 October 2019 who avers, *inter alia*, that as of the date of swearing of the affidavit "the plaintiff has failed, refused or neglected to swear an affidavit of verification in respect of his replies to particulars dated almost a year and a half ago". She states at para. 9: "I say that since 13<sup>th</sup> February 2018, no steps have been taken on behalf of the plaintiff in this claim".

Ms. Dunne goes on to aver as follows:

"13. I say and believe that the Plaintiff has been guilty of inordinate and inexcusable delay in the prosecution of proceedings and there has been a total failure on the part of the Plaintiff to prosecute the proceedings and accordingly, the

Plaintiff's claim should be dismissed for want of prosecution as against the Defendants.

14. I say and believe that the Defendants [have] been more than accommodating in affording the Plaintiff sufficient time within which to cooperate with the prosecution of the proceedings and to answer the numerous requests. I say and believe that the Defendants are entitled to have this matter litigated in an expeditious manner so that the persistent delay on the part of the Plaintiff is prejudicial to the Defendants.

15. I say that at all material times and throughout the correspondence that has been furnished from this office, the Plaintiff has been aware that the Defendants maintain that the Plaintiff's claim is statute barred so that a full Defence being drafted with liability firmly in issue.

16. I say and believe that the Plaintiff is guilty of inordinate and inexcusable delay of the prosecution of the within proceedings and that the balance of justice lies in favour of dismissing the Plaintiff's action as against the Defendants."

**27.** On 22 January 2020, following the issuing of the defendants' motion, the plaintiff's solicitors wrote calling for the defence to be delivered.

**28.** The plaintiff swore a replying affidavit on 7 February 2020. Therein, he avers, *inter alia*, that he has been advised that a notice requesting further information was not a notice for particulars and that much of the information requested in the notice requesting further information was not based on anything that arose as a result of the pleadings in the case. He further avers that he had been advised that a notice requesting further information was covered by s. 11 of the Civil Liability and Courts Act, 2004 ("the 2004 Act") and, moreover, that inasmuch as a notice requesting further information had been served on him the request had exceeded the categories covered by s. 11 of the 2004 Act. At para. 10, he



states that he was advised that what had been provided by the defendants was not a notice requiring further information but rather an impermissible attempt to interrogate his case under the guise of a notice requiring further information. He goes on to state:

“11. I say that the Defendants’ Solicitors’ complaint is that an Affidavit of Verification was not provided with my replies to the Defendants’ notice requiring further information. I say that I have suffered from depression as a result of my injuries and was treated by my GP for it. As a result of this depression, I have been slow to deal with matters relating to my claim but an affidavit of verification has now been provided to the Defendants. I apologise to this Court for my delay in delivering this affidavit of verification, however, I say that this delay is neither inordinate, nor inexcusable in these circumstances and those set out below.”

**29.** According to the plaintiff, he has been advised that the failure to provide an affidavit of verification was covered by s. 14(4A) of the 2004 Act and that any failure on his part would be met, as provided for in the section, by the Court drawing such inferences from the failure as appears proper and, where the interests of justice so require, making no order as to the payment of costs to him or otherwise deducting such amount from any costs that would be payable to him. He claims that the defendants never outlined which of the replies to their “impermissible” notice seeking further information required an affidavit of verification.

**30.** At para. 14, the plaintiff avers that no defence has been provided by the defendants nor had the defendants provided an explanation for such failure. He points to the letters written by his solicitors on 13 February 2018 and 21 January 2020 calling on the defendants to deliver their defence. At para. 15 he states:

“I therefore say and have been advised that if the Defendants wished to have this matter heard, then they should have provided their Defence and set the [matter]

down for hearing in the normal manner, however they have chosen not to do that. I say that it is not my fault that the Defendants have failed to provide their Defence, and furthermore that the Defendants have no legal basis to refuse to provide their Defence merely because of I was slow to provide an affidavit of verification in relation to my replies to their impermissible interrogation of my case under the guise of a notice seeking further information.”

At para. 18, he avers that it is the defendants who are “currently in default of their obligations in respect of the pleadings in this case, and [have] been since February 2018”.

**31.** Ms. Dunne swore a supplemental affidavit on behalf of the defendants on 12 February 2020 therein averring, *inter alia*, that insofar as the plaintiff had grievances regarding the defendants’ notice requiring further information no issue had been raised in relation to the notice at the time of its service and that, on the contrary, on 5 December 2017, an Order had been made on consent that the plaintiff would deliver the requested particulars within a period of three weeks and which said replies were furnished on 13 February 2018. Insofar as the plaintiff was relying on depression as a result of his injuries as the reason for his tardiness to deal with the matters, Ms. Dunne avers that there was no reference to depression in the plaintiff’s statement of claim or replies to particulars and that his replies had only referred to his having attended Accident and Emergency in relation to his injuries. In respect of the plaintiff’s allegation that the defendants had failed to deliver a defence, Ms. Dunne avers as follows, at para. 10:

“I note that Mr. Barry at para. 18 avers that the Defendants are in default of their obligations since February 2018 by failing to deliver their Defence. I say and believe that Mr. Barry points to two letters calling for our Defence, one dated 13<sup>th</sup> February 2018 and the second dated 21<sup>st</sup> January 2020, almost two years later but crucially after this Motion was issued. I say and believe that neither of the

aforementioned letters amount to a warning letter in respect of any Motion for judgment [in] default of Defence and furthermore no step has been taken in this regard by or on behalf of the Plaintiff other than these two letters over a period of two years. I say and believe that this only serves to highlight the lack of progress on the part of the Plaintiff.”

**32.** She goes on to state:

“11. I say and believe that notwithstanding the difficulties as set out hereunder on the part of the Defendants, the Plaintiff solicitors have been advised by this office that it is proper and appropriate that the Plaintiff would verify his pleadings in the first instance and thereafter we would deliver our Defence. I say and believe that at no stage has an issue been taken with this stance and that it has been the Defendants, at all material times throughout these proceedings, who have sought to deal with matters in an expeditious manner but have been constantly met with culpable delay by or on behalf of Mr. Barry. I say that a draft Defence, as referred to in my previous affidavit has long since been drafted as of the 7<sup>th</sup> March, 2018 including preliminary pleas pursuant to the Statute of limitations and that the Plaintiff is guilty of laches and inordinate and inexcusable delay, resulting in prejudice to the Defendants. I say and believe that the Plaintiff solicitors were put on notice that a Defence has been drafted by Counsel by way of letter dated 9<sup>th</sup> March 2018 ...

12. However, I say and believe that the inordinate delay on the part of the Plaintiff has greatly prejudiced the Defendants in the defence of these proceedings as the First Named Defendant company is in liquidation since May 2017. In this regard, I say and believe that specific prejudice has been caused by the Plaintiff's delay as

there **has been/is** genuine difficulty in verifying the draft Defence and ensuring availability of our witnesses. ...” (emphasis in original)

**33.** The plaintiff’s affidavit verifying matters arising out of the Defendants’ notice requiring further information was ultimately filed on 20 February 2020.

**34.** Shortly before the defendants’ strike out motion came on for hearing, the plaintiff issued a motion for judgment in default of defence.

### **The High Court judgment**

**35.** The motion to strike out the proceedings came on for hearing before Cross J. on 7 July 2020. The principal basis advanced by the defendants for the relief sought was that there had been excessive periods of delay on the part of the plaintiff since the alleged incident in 2011 giving rise to the proceedings. Counsel for the defendants referenced the delay of three years from the date of the alleged incident until the plenary summons issued and a further period of three years and three months before the statement of claim was delivered (which was only delivered after the issuing of the defendants’ first motion). Thereafter, the replies to particulars were only forthcoming after the defendants issued their second motion. Counsel also drew to the motion Judge’s attention the fact that there followed a year and eight months of silence on the part of the plaintiff until the defendants issued the motion to strike out the proceedings. She submitted that the plaintiff had only called on the defendants once (by way of ordinary letter in February 2018) to deliver their defence prior to the issuing of the defendants’ within motion. She alluded to the defendants suffering prejudice because the first defendant company had gone into liquidation in 2017. The prejudice, she said, arose by virtue of the difficulty in getting someone to approve the defence and verify it by way of affidavit.

**36.** In his submissions in the court below, counsel for the plaintiff asserted that the inordinate and inexcusable delay was that of the defendants in circumstances where the

plaintiff's replies to particulars were provided in February 2018 following which the defence had been called for in February 2018 and the defendants had done nothing about delivering their defence (albeit they had a draft defence available in March 2018), choosing instead to bring the motion to strike out the proceedings. It was acknowledged that the plaintiff's motion for judgment in default of defence had been filed just before the hearing of the defendants' motion to strike out. Insofar as Ms. Dunne in her supplemental affidavit alleged prejudice to the defendants by virtue of their being unable to verify their defence by reason of the first defendants' liquidation, that, counsel for the plaintiff contended, did not amount to the defendants being prejudiced. He asserted that the issue of the first defendant's liquidation had only been raised for the first time in Ms. Dunne's affidavit. Counsel for the plaintiff contended that the verification of the defence was in any event a matter for the former directors of the first defendant company.

**37.** In her replying submissions in the court below, counsel for the defendants pointed to the fact that some eight years had elapsed between the alleged incident and the issuing of the motion to dismiss and that some ten to eleven years would have elapsed since the date of the alleged assault by the time the case came on for hearing. She emphasised that the defendants had not acquiesced in the plaintiff's delay, as evidenced by the three motions they had issued over the space of nine years. Relying on *Millerick v. The Minister for Finance* [2016] IECA 206, she submitted that the defendants' "silence or inactivity" in not delivering a defence was not material to the court's consideration of the application to dismiss. Counsel also impressed on the motion Judge the requirement to take account of the imperative on the courts to administer justice under Article 34 of the Constitution and that pursuant to Article 6 of the European Convention on Human Rights ("ECHR"), proceedings were to be concluded within a reasonable timeframe.

**38.** Cross J.'s *ex tempore* judgment was delivered on 7 July 2020. He commenced his judgment by noting that the application was to dismiss the plaintiff's claim for want of prosecution and on the grounds of inordinate and inexcusable delay. He noted that the first issue he had to decide (on the basis of the principles set out in *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459) was "whether there has been inordinate delay, then if the delay is inexcusable, and then where the balance of justice lies". He was required to have regard to "the nature of the proceedings in all relevant circumstances and to consider whether the plaintiff's delay is inordinate."

**39.** According to Cross J., "the effectively last step of the proceedings" was the plaintiff's reply to the notice for particulars in February 2018. He stated:

"At that stage the plaintiff requested in an ordinary letter – not a warning letter just an ordinary letter – requesting defence. I am entitled, of course and must take into account as well the fact that the date of February 2018 is not to be taken in isolation. Before that the defendant brought another motion to have the case dismissed and the incident itself goes back to some antiquity."

**40.** The motion Judge went on to state:

"The issue first of all is whether the delay has been inordinate. The fact of the matter is that I must take into account that the next step in the proceedings was the filing of the defence by the defendant. Apparently, the defendants, [the] first named defendants' company went into liquidation sometime in 2017 ... after the defence was outstanding. But the fact that the plaintiff requested the defence and then did nothing about it does not excuse the plaintiff entirely at all, as the authorities make clear. I am particularly referred to the case of *Millerick v. The Minister for Finance* decision of the Court of Appeal which sets out the law, and in

fact the law, as I said, hasn't really changed since *Primor*. It's a matter of the Courts to decide where the balance of justice lies.

Is the delay inordinate? And I believe it to be so because the plaintiff sat back and did nothing, having written one letter before this motion came but then another letter and brought a motion for judgment subsequent to this motion by the defendant. I think that is so.

The excuse given to excuse is that the plaintiff was suffering from some depression. I don't see that that is an excuse that can stand the test of time because had it been the real motivating factor for the delay, I'm sure the plaintiff's solicitor would have contacted the defendants and say would you please put in your defence again but we're having difficulty, our client is suffering from depression, and indeed could have insisted, assuming that the plaintiff still had the capacity in this, there is no suggestion that [he] didn't, could have insisted upon the defence at any stage. So I don't accept that the excuse is valid. So I think the delay is inordinate and is inexcusable.

The question then is where the balance of justice lies? This is a common assault action in which presumably the alleged perpetrator and his employer have been sued. His employer has gone into liquidation and that is the essence of the prejudice claim. It is also claimed that it has difficulty in assembling witnesses. That is not [gone] into, and I don't see that there is any specific difficulty that would justify the serious step of dismissing a claim just because witnesses may be difficult. I am sure that when this case was first notified the defendants assembled the names and addresses of witnesses and got statements from them, as would be the norm in litigation. So, the issue then is whether the fact that the defendant's

company has gone into liquidation is a matter of –that is prejudicial to the extent that it would tip the balance in favour of the granting the application.

As of course has been said, prejudice doesn't have to be shown, it is a question of the balance of justice. But prejudice is relevant if it can be demonstrated.

In a case such as this where there is no doubt that indemnifiers are concerned, I don't believe that the fact that the first-named defendant company had gone into liquidation is a real ground in relation to verification. As counsel have said, verification will not be done by the liquidator, verification will be done by the Directors or whoever in the company who was present there to give evidence as to what was or wasn't done at the time.

The fact of the matter is of course that the proceedings are going to have to be reconstituted unless there's agreement by the insurance company to allow the matter to proceed in its present title. But that will have to be done. So, the first time that the plaintiff was aware of this, and I accept that, is when the affidavit in relation to this motion was forthcoming. So, that explains why this wasn't done by the plaintiffs.

In those circumstances, I do not think that the defendants have made out the claim sufficiently that the balance of justice suggests that the case should be dismissed, which is a very serious remedy. And I am going to refuse this application.

However, there has been delay which I have said to be inordinate and inexcusable, and in those circumstances, I am not going to make any order as to costs of this motion.”

### **Discussion**

**41.** Before dealing with the grounds of appeal advanced by the defendants, it is apposite to have regard to this Court's appellate jurisdiction. As set out by Irvine J. in *Collins v The*



*Minister for Justice* [2015] IECA 27 (adopting the view of McMenamin J. in *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* [2013 IESC 6]), while this Court is obliged to give great weight to the conclusions of the trial judge, the ultimate decision is one for the appellate court “*untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed*”. Thus, albeit that the function of the Court is to review error in the judgment of the High Court appealed against, the Court, if error is found, is entitled in the interests of justice to exercise its own discretion in a different manner, including, for the purposes of the present case, whether or not a claim should be dismissed on grounds of inordinate and inexcusable delay.

**42.** The application to strike out the plaintiff’s proceedings was moved under the inherent jurisdiction of the court and, hence, the principles set out by Hamilton CJ in *Primor* apply. These principles have been helpfully reprised and elaborated on by Irvine J. in *Flynn v. Minister for Justice* [2017] IECA 178, at para. 19. There, Irvine J. sets them out in the following terms:

*“In the course of his judgment the trial judge set out a summary of the key principles to be considered by a court when asked to exercise its inherent jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay. He did so by reference to a number of relatively recent decisions on the issue. Given that, subject to one important exception, these are not controversial I gratefully adopt and below set forth the summary of the relevant principles identified by Barrett J. at para. 5 of his judgment. I have also taken the liberty of including one additional factor emanating from the judgment of Fennelly J. in Anglo Irish Beef processors v. Montgomery [2002] 3 I.R. 510.*

- (1) *The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.*
- (2) *The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.*
- (3) *It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.*
- (4) *In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.*
- (5) *Even when delay has been 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 case proceeding.*
- (6) *Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.*
- (7) *The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is*

*a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.*

- (8) *In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.*
- (9) *Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.*
- (10) *All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name.*
- (11) *The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its considerations, not only its own constitutional obligations but the State's Convention obligations.*
- (12) *The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations.*
- (13) *There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice*

*and basic fairness of procedures. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence).*

(14) *The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action.*

(15) *As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them.*

(16) *Where a plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed.”*

**43.** At the outset of his submissions in response the defendants’ arguments, counsel for the plaintiff took issue with the motion Judge’s finding of inordinate and inexcusable delay arguing that there was no inordinate delay on the part of the plaintiff and that if any delay was required to be considered in the course of the application it was on the part of the defendants. Counsel argued that, contrary to the defendants’ submission to this Court, the plaintiff was entitled to address the finding of inordinate and inexcusable delay given that the defendants’ notice of appeal had put in issue the entire judgment and Order of the High Court, thus negating the necessity for the plaintiff to file a cross-appeal. He asserted that there was no delay on the plaintiff’s part in issuing his proceedings. Insofar as delay arose on the part of the plaintiff between 2015 and 2017 with regard to the delivery of the statement of claim, that, it was submitted, was dealt with in the context of the defendants’ first motion to dismiss for want of prosecution having been struck out on consent and the

defendants having been awarded the costs of the motion. The delay in furnishing the replies to particulars was dealt with in a similar fashion. Counsel also argued that insofar as the plaintiff had delayed in filing his affidavit verifying the replies to particulars, that delay was accounted for by the plaintiff in his replying affidavit by the reference to his depression for which he was treated by his GP. Counsel's position was that once the plaintiff replied in February 2018 to the request for further information, all of the delay that ensued thereafter was that of the defendants, namely their failure to file their defence. It was submitted that the defendants were using their own delay in the case to ground an application to dismiss for want of prosecution, which was wrong and unfair in circumstances where the plaintiff could not set down the case for hearing absent the defendants' defence.

**44.** Without necessarily opining on the issue of the absence of any cross-appeal by the plaintiff, I do not find merit in the plaintiff's argument with regard to the finding by the motion Judge of inordinate and inexcusable delay. In my view, there was a clear basis for the finding of inordinate and inexcusable delay made by the motion Judge. In truth, in response to questions from the Court, counsel for the plaintiff did not attempt to stand over his suggestion that the manner in which the defendants' two prior motions had been dealt with, coupled with the two costs orders made against the plaintiff had somehow negated the delays on the part of the plaintiff that have permeated this case.

**45.** The issue, therefore, comes down to the question as to whether (as the defendants contend) the motion Judge erred in his assessment that the balance of justice did not weigh in favour of striking out the proceedings. The defendants point to *Millerick* where Irvine J. opined that where inordinate and inexcusable delay has been established the author of that delay has to point to some countervailing circumstances as may be sufficient to cancel out the effect of such delay. They say effectively that the onus was on the plaintiff in the

instant case to establish that the balance of justice favoured the continuation of the proceedings and in this regard cite *Carroll v Seamus Kerrigan Limited* [2017] IECA 66 and *Sweeney v. Cecil Keating Limited* [2019] IECA 43.

46. In *Carroll*, Irvine J. stated, at para.13:

*“It is ... material to remember that when a court comes to consider whether the balance of justice favours allowing the action proceed in the light of its finding of inordinate and inexcusable delay, the author of that delay is not to be absolved of their fault, unless they can point to some countervailing circumstances which the court considers sufficient to negate the effect of such behaviour: see, e.g., the comments to this effect of Fennelly J. in Anglo Irish Beef Processors Limited v. Montgomery [2002] 3 I.R 510.”*

A similar view was expressed by Irvine J. in *Millerick* (see para. 28) and *Flynn* (see para. 19, principle 16).

47. In *Sweeney*, Baker J. elaborated on the approach of a court where delay is found to be both inordinate and inexcusable, in the following terms:

*“19. If the delay is found to be both inordinate and inexcusable, the court is then obliged to consider what is frequently described as the third leg of the Primor v. Stokes test, whether the balance of justice favours the dismissal of the action. The onus of proof shifts to a plaintiff to establish the existence of countervailing circumstances which would warrant permitting the proceedings to proceed to trial. This is because the scales of justice at that point are weighed against the plaintiff who has been found guilty of inordinate and inexcusable delay. 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.”*

48. I do not consider that what is said by Irvine J. in *Carroll* or Baker J. in *Sweeney* can be read in the broad sense suggested here by counsel for the defendants. As the moving party in the application to dismiss, the onus rests on the defendants to establish that the balance of justice favours the dismissal of the plaintiff’s claim. My view that that the burden of proving that the balance of justice favours the dismissal of the proceedings lies with the defendant is reinforced by the *dictum* of Irvine J. in *Cassidy v. The Provincialate* [2015] IECA 74 where, at para. 35, she opined:

*“Having reflected upon many of the authorities in relation to the “delay” jurisprudence, I am satisfied that the third leg of the Primor test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the O’Domhnaill test.”* (emphasis added)

49. I note that in *Carroll*, Irvine J., when emphasising the requirement on a plaintiff who is the author of the inordinate and inexcusable delay to point to countervailing circumstances such as might negate the effect of such behaviour, cited Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery*. There, Fennelly J., himself citing Henchy J. in *O’Domhnaill v. Merrick* [1984] IR 151, stated that a person responsible for delay which is found to be inordinate and inexcusable “*will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration...namely whether ‘on the facts the balance of justice is in favour of or against the proceeding of the case’.*”

**50.** In my view, it is in the sense articulated by Fennelly J. in *Anglo Irish Beef Processors Limited* that the passage from *Sweeney* quoted above (on which counsel for the defendants relies in particular in support of the proposition that the burden of proof rests on the plaintiff with regard to the third limb of the *Primor* test) must be read.

**51.** I also note the language used by Irvine J. at principle 8 (para. 19) in *Flynn*, which I consider to be consistent where the burden of proof lies in respect of the third limb of the *Primor* test. She states:

*“Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.”*

**52.** Clearly, however, in the absence of “weighty” (per Fennelly J. in *Anglo Irish Beef Processors Limited*) countervailing circumstances, it is likely that the defendant’s ability to meet the requirement that the balance of justice favours the dismissal of the proceedings will be a foregone conclusion.

**53.** In the present case, the motion Judge, in finding that the defendants had not made out the claim sufficiently that the balance of justice suggested that the case should be dismissed, clearly approached the matter from the perspective that the burden lay on the defendants in this regard. He was correct to approach the question as he did. Thus, insofar as criticism is laid at the Judge by the defendants for his approach, I reject that criticism. That being said, the question remains as to whether the motion Judge was correct in concluding, as he effectively did, that the countervailing circumstances in the case were such that the defendants had not made out the claim that the balance of justice favoured the dismissal of the proceedings. I turn now to the matters which, in the view of the motion Judge, tipped the balance in favour of the retention of the proceedings.



**54.** Here, the defendants appeal the judgment and Order of the High Court on the basis that the Judge did not adequately assess the third limb of the *Primor* test. They contend that the Judge's treatment of the balance of justice was unsatisfactory to the point that it should be reconsidered by this Court in the interests of the administration of justice.

**55.** The first alleged error is that the motion Judge failed to appreciate that the principles of law relevant to an application to dismiss a claim for want of prosecution as set out in *Primor* are not exhaustive and that the jurisprudence of this Court as set out above has pointed to additional factors that require to be taken into consideration. Counsel for the defendants asserts that the motion Judge's failure to appreciate that the *Primor* principles have been added to is evident from his comment that the law "*hasn't really changed since Primor*" and is suggestive of the motion Judge being dismissive of the defendants' arguments based on the Constitution and European Convention on Human Rights ("ECHR"). The defendants rely, in particular, on principles 4, 10, 11, 12 and 16 as articulated by Irvine J. in *Flynn* as support for their argument that the proceedings should be dismissed.

**56.** The second ground advanced is that the motion Judge erred when he opined in the course of ascertaining whether the plaintiff's delay was inordinate that "the next step [that was required] in the proceedings was the filing of the defence by the defendants". Counsel contends that albeit that the Judge duly found the plaintiff's delay to be inordinate and inexcusable, his erroneous finding that the required next step in the proceedings was that of the defendants had thus wrongly informed his approach to the balance of justice. She submits that contrary to the Judge's finding, the next step in the proceedings was not the filing of the defendants' defence but rather the requirement on the part of the plaintiff to file his affidavit of verification in respect of the replies to the notice for further information, as required by s. 14 of the 2004 Act. She argues that the Judge failed to have

regard to the plaintiff's solicitors' own letters of July 2019 and September 2019 which were sent in response to the defendants having called on the plaintiff to file his verifying affidavit.

57. In support of her argument, counsel points to the *dictum* of Denham C.J. in *McNamee v. Boyce* [2017] IESC 24 that irrespective of any frailty in the defendants' approach, "*the onus lies on the Plaintiff to prosecute his or her claim, an onus which is particularly heavy where there is a significant lapse of time between the events complained of and the initiation of the claim.*" At paras. 77 – 78, Denham C.J. goes on to state:

*"77. The plaintiff relies on two countervailing factors as negating the conclusion that there has been want of prosecution, and any irredeemable prejudice. First, it is suggested that the defendant's failure to enter an appearance showed that he was prepared to let judgment be entered against him and therefore had not suffered as a result of the plaintiff's want of prosecution. Second, it was suggested that the statement made by the defendant's wife and used in the criminal proceedings in 1999 could be admitted into evidence and that this would avoid any prejudice to the defendant which might otherwise arise resulting from the death of the defendant's wife in 2005. These matters were relied on by the High Court when it rejected the motion to dismiss for want of prosecution in July 2012, holding, however, that the matter could be revisited at the trial. It is indeed arguable that the High Court, on the motion, could have concluded that these matters were not sufficient to displace the want of prosecution on behalf of the plaintiff, and the prejudice which has been suffered by the defendant, but in any event, events at the trial made this conclusion clearer.*

*78. It is open to doubt that the failure on the part of the defendant to enter an appearance after belated service of the plenary summons in December 2002, could*

*give rise only to the inference that he was prepared to concede the claim and permit judgment to be entered. Certainly by the time of the motion to dismiss, any inference that the defendant did not propose to defend the case, or accepted its merit, was no longer available. In any event, the onus lies on the plaintiff to prosecute his or her claim, an onus which is particularly heavy where there is a significant lapse of time between the events complained of and the initiation of the claim. The failure of the defendant to enter an appearance in 2002 cannot be treated as somehow absolving the plaintiff's want of prosecution. In truth, by failing to enter an appearance immediately after service of the plenary summons, the defendant put himself at risk that the plaintiff might be able to bring an application, which if not resisted, might result in a judgment being obtained in default. The fact, however, that the plaintiff did not do so, is one more demonstration of the want of prosecution of the plaintiff's claim."*

**58.** Thus, the defendants' position is that Denham C.J.'s logic was required to be deployed in the present case in circumstances where the evidence pointed to either the plaintiff being uncontactable for a substantial period of time or else uninterested in pursuing or otherwise prosecuting his claim. Counsel argues that the fact that the defendants did not deliver their defence ought not to have been a factor in establishing where the balance of justice lay in this case and ought not be perceived as a fault on the part of the defendants. Rather, the focus of the motion Judge ought to have been on the plaintiff's failure to prosecute his claim. Counsel submits that the Judge failed to weigh the plaintiff's delay when assessing where the balance of justice lay and chose only to make an order as to costs against the plaintiff.

**59.** On the other hand, relying on *Hogan v Jones* [1994] 1 ILRM 512, counsel for the plaintiff submits that the defendants' delay in filing a defence was a legitimate factor to be

taken account of in an application to dismiss proceedings for want of prosecution. He points to the plaintiff's solicitors' letter of 13 February 2018 which called on the defendants to deliver their defence. That request, he says, was responded to by the defendants' solicitor on 9 March 2018 wherein it was stated that arrangements would be made to "deliver a full Defence which has been drafted by Counsel" once the plaintiff's affidavit verifying the replies to particulars was received. It is submitted, however, that the defendants were not entitled to await the plaintiff's affidavit of verification before filing their defence and that pursuant to Order 21, r.1 RSC, the defendants are in default as regards the filing of their defence since 13 March 2018. The plaintiff says that the defendants cannot blame the plaintiff for their failure to file a defence and that, moreover, the defendants have no legitimate explanation for their delay in this regard.

**60.** Turning firstly to the defendants' argument that the motion Judge failed to take account of the recent jurisprudence of this Court when assessing where the balance of justice lay. I do not find that to be the case. As is clear from the transcript, the Judge was conscious that *Millerick* "sets out the law". Moreover, there was no error on the part of the Judge when he opined that "it's a matter for the courts to decide where the balance of justice lies". I consider that counsel for the defendants makes altogether too much of the Judge's remark that "the law... hasn't really changed since *Primor*". The motion Judge was well aware that the *Primor* principles have been expanded in *Millerick* (and indeed in other recent jurisprudence from this Court), as he made clear in the course of the hearing when he opined that defendants did not have to show prejudice to succeed where there was a finding of inordinate and inexcusable delay; as he said, "it's a question of the balance of justice" (High Court Transcript p. 12 lines 24-25). In the course of his ruling, he again opined that prejudice did not have to be shown and that it was a question of the balance of justice. He stated however that "prejudice is relevant if it can be demonstrated" (High

Court Transcript p. 16). I will in due course return to how the Judge addressed the question of prejudice in the course of his assessment of the balance of justice.

**61.** With regard to the assertion that the Judge's reference at p.15 of the Transcript (lines 1-2) that he had to take into account that "the next step in the proceedings was the filing of the defence by the defendants" infected his assessment of the balance of justice, the first thing to be observed is that the Judge's reference was made in the context of his considering whether the delay on the part of the plaintiff was inordinate. Contrary to the defendants' argument, there is nothing in the Judge's ruling that shows that his assessment as to where the balance of justice lay pivoted solely on his observation that the next step in the proceedings, after the replies to particulars were furnished in February 2018, was the filing of the defendants' defence. It is of course implicit in his ruling in commenting on the defendants' contended-for difficulties in verifying their defence that the non-filing of the defence was a factor considered by the Judge in assessing where the balance of justice lay. In my view, he was correct to do so given the arguments actually advanced by the defendants on affidavit. I will shortly turn to those arguments.

**62.** I note that the plaintiff had advanced the argument on affidavit (relying on the provisions of s.14(4A) of the 2004 Act) that his failure to file an affidavit of verification in respect of his replies to the request for further information was not a factor that ought to be considered as weighing against him, given that, as he contended, any tardiness in that respect could be addressed by way of the drawing of inferences or by way of a costs order at a later stage. However, that particular argument was not pursued in oral argument in the court below, counsel for the plaintiff relying instead on the fact that once the replies to the request for further information were delivered in February 2018, the plaintiff had called for the defendants' defence but that was not forthcoming despite a draft defence being in the hands of the defendants by at least March 2018. As can be seen from the transcript, the

Judge did not comment on the plaintiff's claim that his tardiness in filing his affidavit of verification could be addressed by the drawing of inferences or a costs order.

**63.** Similarly, before this Court, counsel for the plaintiff did not dwell on the provisions of s.14(4A) as the reason for not having filed his affidavit of verification of his replies to the request for further information. Rather, he pointed to the contents of para. 11 of the plaintiff's replying affidavit where the plaintiff blames his depression for his tardiness in dealing with matters including swearing his affidavit of verification. As can be seen from his analysis of whether the plaintiff's delay was excusable, the motion Judge rejected the argument that the plaintiff's inaction in progressing his case could be excused by reference to his alleged depression.

**64.** From a reading of the transcript of the proceedings in the court below, it appears to me the salient issue that arose for consideration as to where the balance of justice lay was the defendants' argument regarding the plaintiff's excessive delay in progressing his case, and the factors relied on by the defendants as causing them specific prejudice were the proceedings to be allowed to proceed.

**65.** Accordingly, I am not persuaded by the defendants' argument that the defendants' failure to deliver their defence was the fulcrum upon which the motion Judge found that the balance of justice lay in allowing the proceedings to continue (albeit that it was a factor in the Judge's consideration, as was the alleged prejudice to the defendants in having the defence verified because of the liquidation of the first defendant and their argument as to the likely availability of witnesses). I also note that in the course of his analysis, the Judge specifically chides the plaintiff for having sat back and done nothing after February/March 2018 in circumstances where the plaintiff was alleging at the hearing of the motion that the defendants had failed to deliver their defence when called upon to do so in February 2018 (see High Court transcript p. 15, lines 17-24). It is thus clear that the plaintiff's tardiness in

progressing the proceedings was clearly to the fore in the court below. In those circumstances, I perceive no deviation by the motion Judge from the approach set out by Denham J. in *McNamee v Boyce*.

**66.** The motion Judge duly considered both the defendants' argument as to alleged prejudice. As noted by the Judge, the essence of the prejudice claim advanced by the defendants was that the first defendant company had gone into liquidation. Ms. Dunne in her supplemental affidavit adverted to the issue at para. 12:

“...I say and believe that the inordinate delay on the part of the Plaintiff has greatly prejudiced the Defendants in the defence of these proceedings as the First Named Defendant company is in liquidation since May 2017. In this regard, I say and believe that specific prejudice has been caused by the Plaintiff's delay as there **has been/is** genuine difficulty in verifying the draft Defence and ensuring availability of our witnesses.” (emphasis in original)

The Judge duly discounted the argument that the liquidation of the company prevented the verification of the defence on the basis that the Directors of the company or other persons in the company could verify the defence. He also rejected the claim that there was a specific difficulty regarding the availability of witnesses.

**67.** In their written and oral submissions, the defendants say that the Judge erred in his conclusions as where the balance of justice lay in focusing only on the defendants' failure (as he found) to establish that they were prejudiced as a result of the liquidation of the first defendant or that they had difficulty in ensuring the availability of witnesses.

**68.** In my view, contrary to the defendants' argument that the Judge ought not to have focused on those factors but rather on the plaintiff's delay, the fact of the matter is that the prejudice claim was specifically raised by Ms. Dunne in her supplemental affidavit. Thus, the Judge cannot be criticised for addressing the issue of prejudice. In *Comcast*

*International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50 Clarke J. opined, at para. 6.2 of his judgment, that “[i]n all cases where the court has to consider the balance of justice the extent of any prejudice to the defendant caused by delay needs to be assessed.” This is what was done by Cross J. in the present case.

**69.** In his submissions to this Court, counsel for the plaintiff refutes the contention that the defendants are prejudiced by reason of the lapse of time in this case or the current status of the first defendant company. He points to the fact that as of the date of the swearing of Ms. Dunne’s grounding affidavit, the defendants did not allege that they were prejudiced by any alleged delay on the part of the plaintiff or by the fact that the plaintiff’s affidavit verifying the replies to particulars remained outstanding for a period of one and a half years prior to the motion to dismiss. He also points to the fact that in the defendants’ letter of 28 September 2018 calling for the plaintiff’s affidavit of verification, there was no mention of any prejudice being suffered by the defendants as a result of the delay in filing the said affidavit. Counsel also highlights that the alleged specific prejudice is not found in an affidavit sworn either by the Liquidator of the first defendant company or a Director of the company but rather by the solicitor for the first defendant’s insurers. It is contended that there is no evidence that the defendants are actually suffering prejudice save the “bald” assertion by the defendants’ insurer’s solicitor that that is so. Counsel thus submits that there is no merit in the averment that specific prejudice has been caused by the plaintiff’s delay. He points to the fact that the defendants have not said that they cannot file a defence. It is also contended that there was nothing to stop the defendants filing an unverified defence.

**70.** I note that while there was reference in some of their pre-motion correspondence to the defendants being prejudiced, it is the case that it is only in Ms. Dunne’s supplemental affidavit that the defendants point to factors which they allege demonstrate the prejudice



they have suffered as a result of the plaintiff's delay. As regards the issue of the first defendant company's liquidation, I note, however, as the plaintiff points out, that while the company went into liquidation in May 2017, that event did not prevent the defendants from participating in the proceedings in circumstances where after May 2017, they took numerous steps in the proceedings including issuing letters to the plaintiff's solicitor between July 2017 and October 2019 and, in July 2017, calling on the plaintiff to reply to their notice for particulars. In October 2019, the defendants were able to instruct their solicitors to issue the within motion to strike out the plaintiff's proceedings, to advance this motion in July 2020 and, thereafter, instruct their solicitors to appeal the High Court Order of 7 July 2020 refusing the application. Moreover, as counsel for the plaintiff also contended, the first defendant's liquidation was no reason as to why the second defendant could not have filed his defence.

**71.** As to the reference in Ms. Dunne's supplemental affidavit to "difficulty" in ensuring the availability of witnesses, importantly, the defendants are not saying that any particular witness is unavailable. All that is contained in the affidavit is a general comment regarding difficulties around the availability of witnesses. The defendants have put nothing before this Court that suggests that the motion Judge was incorrect when he opined that the issue of the defendants being prejudiced *vis a vis* the availability of witnesses had not been made out in the affidavits. As said by Birmingham J. in *O'Riordan v Maher* [2012] IEHC 274, at para. 32, "[c]entral to determining where the balance of justice lies is to determine whether and to what extent the ability of the defendants to defend the case has been impaired." I am satisfied that this is what Cross J. took into account when he made his decision and held that there was no impairment that could not be overcome by the defendants in order to defend this case.

**72.** As noted by Cross J, an application to strike out is a “very serious remedy”. In *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, despite a delay of almost a decade since the cause of action had accrued, Finlay P. found that the chances of major injustice to the plaintiff if his claim for damages in respect of personal injuries was dismissed were significantly greater than the chance of such injustice being inflicted on the defendants if it were allowed to proceed. Again, as made clear by Murphy J. in *Hogan v Jones*, an action will not be struck out in order to punish a plaintiff for his delay but rather with a view to ensuring that justice is done:

*“15. The draconian penalty of dismissing proceedings as against a particular defendant in circumstances which will wholly defeat the claim of the plaintiff is not an Order which is made with a view to punishing a party for his dilatoriness in proceeding with the action or for his failure to meet some artificial regime. The Order is made only where it is necessary to protect the legitimate interests of the party sued and in particular his constitutional right to a trial in accordance with fair procedures.”*

**73.** Similar sentiments were expressed by O’Flaherty J. in *Primor*, at p. 516, when he stated that *“courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them.”*

**74.** The defendants say that the reliance the plaintiff put on *Hogan v Jones* is misconceived in circumstances where the law has moved on since that decision issued. They submit that when looked at globally, the overall impression in the present case is that the plaintiff was either uncontactable or uninterested in his case. They say that between 2015 and 2019 they were obliged to call upon the plaintiff to deliver his statement of claim and/or verify his replies to particulars. It is submitted that the motion Judge failed to take into account this blameworthiness of the plaintiff, in particular his lack of explanation for

his delays. Counsel also submits that the plaintiff put no countervailing factors before the court below such as would have warranted the tipping of the balance of justice in his favour. In effect, the defendants' position is that the Judge failed to appreciate the plaintiff's delay and its magnitude, and the prejudice thus caused to the defendants. Effectively, they say that the Judge failed to appreciate that the law has moved on from *Primor* and failed to appreciate the real possibility of an unjust and unfair trial.

**75.** Unquestionably, there is a vast body of jurisprudence, post *Primor*, both at High Court level and from this Court that refer both to the “*constitutional imperative*” to ensure timely and effective administration of justice and the obligations of the courts under the ECHR. Indeed, the judgments of Hamilton J. and O’Flaherty J. in *Primor* refer variously to “*the implied constitutional principles of basic fairness of procedures*” (Hamilton C.J. at p. 475) and the “*constitutional obligations to make sure that justice is neither delayed nor denied*” (O’Flaherty J. at p. 521). On the issue of the Convention, in *Gorman v Minister for Justice* [2015] IECA 41 Irvine J. opined:

*“the guidance from the European Court of Human Rights is clearly to the effect that the Irish courts are under a convention based obligation to ensure that proceeding including civil proceedings are concluded within a reasonable time. This means that the Irish courts must be vigilant about culpable delay and when faced with an application to dismiss a claim on grounds of delay, should factor into its consideration Ireland’s obligations under Article 6 of the Convention.”*

**76.** In *Sweeney v. Cecil Keating Limited*, Baker J. put it thus, at para. 26:

*“Material also to an application to dismiss proceedings for inordinate and inexcusable delay is the fact that the court itself is obliged, in furtherance of its constitutional obligations to administer justice and its obligation to have regard to the European Convention on Human Rights (‘ECHR’), to ensure that litigation is*

*concluded in an expeditious manner (see, for example the decision in Quinn v. Faulkner [2011] IEHC 103). A laissez faire attitude to the progress of litigation by the plaintiff cannot be tolerated given that delay may constitute a violation of Art. 6 ECHR rights.”*

**77.** The decision of the motion Judge not to accede to the application to dismiss the plaintiff's proceedings falls to be assessed by this Court with regard to the principles set out by Irvine J. in *Flynn* as quoted at para. 42 above which not only incorporate the *Primor* test but the evolution of the courts' thinking since *Primor*. Having regard to all the circumstances in this case, and notwithstanding the defendants' arguments, I am not persuaded that the motion Judge erred in his approach to the question of the balance of justice. Nor do I find that there was a deviation from the established principles including the factors articulated by this Court in *Flynn* (or indeed *Millerick* or other recent case law). I so conclude for the following reasons. Firstly, it is clear from his finding that the delay in issue here was inordinate and inexcusable that the blameworthiness of the plaintiff was not ignored by the motion Judge. Secondly, against the backdrop of inordinate and inexcusable delay, the Judge embarked upon a due consideration of where the balance of justice lay. Before this Court, the fact of the matter is that save for saying that the motion Judge took undue account of the defendant's delay in filing a defence in assessing the balance of justice (an argument that I have already rejected), the defendants have not established how the Judge erred in his assessment of the balance of justice.

**78.** As set out by the Judge in his ruling, the defendants did not make out the claim sufficiently that the balance of justice weighed in their favour such that the proceedings should be dismissed. Contrary to the defendants' argument, I do not accept that the Judge was unaware of the jurisprudence (including from this Court) which says that in the absence of weighty countervailing circumstances to which the plaintiff could point, the

balance of justice ought to weigh in favour of dismissing the proceedings. His specific reference to *Millerick* shows that he was conscious of the weighty obligation on the plaintiff to point to countervailing circumstances.

**79.** Nor do I accept the argument advanced in the defendants' written submissions that the balance of justice was not addressed on behalf of the plaintiff in the court below. The fact of the matter is that the Judge considered that there were factors that tipped the balance in favour of allowing the plaintiff's case to proceed. The issues upon which the Judge focused in assessing where the balance lay were the countervailing circumstances that had been pointed to by the plaintiff, the first of which was that the defendants could not be said to be prejudiced in respect of alleged difficulties surrounding the verification of their draft defence by reference to the first defendant's liquidation (of which the plaintiff was unaware until the within application was brought) and that in any event the liquidation could not be laid at the feet of the plaintiff. As said by the motion Judge (adopting the plaintiff's argument), either the Directors of the first defendant company or other personnel in the company familiar with the matters pleaded in the draft defence can verify the defendants' defence in the normal way.

**80.** As already referred to, the other countervailing circumstance identified by the motion Judge was undoubtedly the absence of any real evidence regarding difficulty in assembling witnesses (as had been pointed out by counsel for the plaintiff in the court below). In response to questions from this Court, counsel for the defendants agreed that no particulars of the prejudice the defendants say they suffered are set out in Ms. Dunne's affidavits. She also agreed that there was no specific claim that witnesses cannot be located and no reference to any other specific difficulties. As said by this Court in *Reilly v. Campbell Catering Ltd* [2020] IECA 222:

*“A bare assertion that the respondent ‘will encounter significant difficulty in identifying, retrieving and accessing the relevant records of cleaning schedules, staff rotas and other documentation that will be necessary to defend the plaintiff’s claim’ is no more than a self-serving prediction without any effort having been undertaken to identify, retrieve or access the relevant records. The affidavit fails to cogently demonstrate evidence to clearly support the existence of actual prejudice”.*

**81.** In my view, the same frailty attaches to Ms. Dunne’s affidavits. Albeit averring at para. 12 of Ms. Dunne’s supplemental affidavit that “specific prejudice” has been caused by the plaintiff’s delay in verifying the draft defence and ensuring the availability of witnesses the defendants have specified not pointed to any specific difficulty that has arisen such as failure to locate witnesses for the purposes of taking statements from them or the like. There is no reference to witnesses having become unavailable because of factors such as emigration or illness or that any witness is deceased. Were that the case, I would expect such matters to have been averred to, but Ms. Dunne’s affidavits are silent in this regard. In any event, as observed by the motion Judge, no doubt the defendants assembled the names and addresses of witnesses and obtained statements from them when the claim was first identified to the defendants. While I note counsel for the defendants’ reliance on the *dictum* of Irvine J. in *Gorman v Minister for Justice* [2015] IECA 41 to the effect that “*the fact that the defendants have available to them a number of witness statements taken in the aftermath of the plaintiff’s allegations, does not mean that they would not be prejudiced in meeting a claim of this nature some ten or eleven years after the events in question*”, and while I accept that some ten years or so has elapsed since the alleged incident giving rise to these proceedings, and while conscious that the passage of time in this case gives rise to a real possibility of loss of memory, there was in fact no

suggestion by counsel for the defendants to this Court that the motion Judge's surmise that the defendants had witness statements was erroneous. Moreover, no doubt the defendants' witnesses will have an opportunity to refresh their memory by reference to their statements in advance of the trial of the proceedings.

**82.** To my mind, there is no comparison between the present case and for example the factual matrix that presented in *McGuinness v Wilkie and Flanagan Solicitors* [2020] IECA 111. There, the case that was advanced on behalf of the defendants was that the defendant witnesses did not even have the benefit of written statements, made at an early stage, of their recollection of events because the defendants had no idea of what case was being made against them until they received the statement of claim which was delivered some seven to eight years after the relevant events. Here, as I have said, it is not suggested on affidavit that the defendants were not advised in relatively early course of the alleged incident giving rise to the proceedings. As counsel for the plaintiff stated, the defendants were on notice of the claims against them since 2013. That was not disputed by counsel for the defendants. The plaintiff made an application to PIAB on 13 July 2013 and a grant of authorisation issued on 23 September 2013. It is, I believe, reasonable to assume that the defendants would have gathered a lot of information from this process and would at that stage have put in train arrangements to obtain witness statements.

**83.** At para. 11 of her supplemental affidavit, Ms. Dunne exhibits the draft defence which the defendants say was drafted by counsel in or about March 2013. The particulars of denial set out in that draft (in particular para. 3.d) suggest a very significant degree of knowledge on the part of the defendants of the alleged incidents of 24/25 July 2011 which, in my view, lends weight to the motion Judge's surmise that the defendants would have assembled the names and addresses of witnesses and obtained statements from them.

**84.** In all of the foregoing circumstances and given the frailties in the defendants' affidavit evidence, I do not see how it can be contended that the defendants have achieved even the "*relatively modest prejudice*" threshold referred to by Irvine J. in *Flynn* (principle 9) such as might justify the dismissal of the proceedings. Nor, contrary to counsel's submission, do I find that the defendants' circumstances meet the threshold set out at principle 10 in *Flynn*. Without in any way wishing to ignore that serious allegations have been made against the defendants, or denigrate their entitlement to an expeditious disposition of the claim being made against them, the defendants' circumstances do not equate to a situation where their "professional standing" (in the sense referred to in *Flynn* or indeed in *McGuinness*) has been affected.

**85.** Counsel for the defendants also relied on principles 11 and 12 in *Flynn*, and cited *Gorman v. Minister for Justice* as authority for the proposition that pursuant to Article 6 ECHR, the Irish courts must be vigilant about culpable delay when faced with an application to dismiss for want of prosecution. She submitted that the plaintiff has been afforded more than ample opportunity to advance his claim during the eight years and three months between the alleged incident and the motion to dismiss but that he did not do so in a manner consistent with his own obligations. Her argument was that delays of the magnitude in evidence here compromise the courts' ability to fulfil their most basic constitutional mandate to administer justice and that, therefore, the significant cumulative periods of delay that have occurred in the claim could not be reconciled with the State's obligations under the Constitution or the ECHR.

**86.** I have earlier referred to the jurisprudence which highlight both the constitutional and Convention imperatives at issue here. I do not find merit in the argument that the motion Judge was dismissive of the requirement in an application such as the present to take account of the Constitution and ECHR. Clearly, he was alert to those imperatives. He



specifically refers to both the Constitution and the ECHR at the outset of his ruling. However, viewed against, what was described by the motion Judge, as the “very serious remedy” of the dismissal of the plaintiff’s proceedings, the Judge effectively found (for the reasons he gave) that the balance of justice tipped in favour of the continuation of the proceedings. Clearly the Judge, upon a consideration of the relative prejudice to both parties, took the view (albeit not expressed in these terms) that the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be disproportionate and unjust. As noted by Noonan J. in *Cavanagh v. Spring Homes Development Limited* [2019] IEHC 496, the issue of prejudice does not solely belong to a defendant. Prejudice to a plaintiff must also be considered when taking the very serious decision to strike out a plaintiff’s claim.

**87.** In concluding as I have, I am conscious of the *dictum* of Irvine J. in *Millerick* that “it is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. *Cassidy v The Provincialate* [2015] IECA 74. That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed” (at para. 32). As I understand it, the learned Judge is saying that in certain circumstances, general prejudice may suffice for the balance of justice to weigh in favour of striking out proceedings on grounds of inordinate and inexcusable delay where a significant period of time has elapsed between the event giving rise to the proceedings and the trial date. This would appear to be consistent with the view expressed by Clarke J. in *Rogers v. Michelin Tyres plc and Michelin Pensions Trust (no. 2) Limited* [2005] IEHC 294.

**88.** Indeed, in the court below, as can be seen from the comments he made in the court below, Cross J. was also conscious that even if the defendants failed to establish specific prejudice, it was open to the court to nevertheless dismiss the proceedings, in the interests

of the balance of justice, by dint of the general prejudice that the efflux of time inevitably gives rise to in cases such as these. In my view, this course would arise if the facts of the case dictated that it would be in the interests of justice to dismiss the proceedings. As we see, for the reasons he set out, Cross J. was not satisfied that the factual matrix in this case tipped the balance of justice in favour of the dismissal of the proceedings.

**89.** To my mind, in all the circumstances of the case, the Judge was within his discretion in arriving at the findings he made. He did so on the facts of the case before him, having considered same against the relevant legal principles. It cannot be gainsaid but that the relative prejudice to the plaintiff flowing from the order sought by the defendants is absolute and severe whereas the prejudice contended for by the defendants is in Ms. Dunne's supplemental affidavit is largely hypothetical and unsubstantiated (and notably, even such as it was, only contended for on affidavit by the solicitor for the first defendant's insurers). This was a consideration, and a countervailing factor, for the motion Judge to take account of (as he clearly did when he opined that the alleged prejudice was not identified save in the most general terms) in circumstances where the jurisdiction to strike out a claim for delay is clearly confined to exceptional cases. While the plaintiff's delay was as found by the court below to be inordinate and inexcusable (such that the for the future progress of the proceedings the plaintiff must be subjected to a very strict timeframe), the circumstances of the present case are not such that the plaintiff's claim should be dismissed.

**90.** For the reasons given, I would uphold the decision of the motion Judge and the Order of 7 July 2020 and, accordingly, dismiss the appeal.

**91.** As I have already indicated, the circumstances of the case are such that a strict regime is required to be put in place for the progression of the proceedings. To that end, the defendants should file their defence within three weeks of the perfection of this Order

(if not already filed). Thereafter, the plaintiff's reply is to be delivered within 10 days of the filing of the defence. Any request (by either party) for voluntary discovery to be made within two weeks of the close of the pleadings, with any court application for discovery (should the need arise) to be filed not later than 15 July 2022.

**92.** The defendants have not succeeded in their appeal. It follows that the plaintiff should be entitled to his costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the Order of the Court, including the proposed costs order, will be drawn and perfected.

**93.** As this judgment is being delivered electronically, Whelan J. and Binchy J. have indicated their agreement therewith and the orders I have proposed.