UNAPPROVED JUDGMENT
FOR ELECTRONIC DELIVERY

THE COURT OF APPEAL

Neutral Citation Number: [2023] IECA 134
Record No: 78/2020

Edwards J.
Whelan J.
Faherty J.

Between/

PETER AHEARNE

Appellant

V.

TADHG O'SULLIVAN, ALEC MEDICAL LIMITED,
PEI SURGICAL,DEPUY (IRELAND),
DEPUY INTERNATIONAL LIMITED, AND
THE HEALTH SERVICE EXECUTIVE

Respondents

JUDGMENT of Mr. Justice Edwards delivered on the 31st day of May 2023.

Introduction:

1. This appeal is against the judgment of Simons J. delivered on the 6th of February 2020, and his associated order perfected on the 18th day of that same month, in which he dismissed the appellant's proceedings for want of prosecution, the respondents having

successfully invoked the High Court's overlapping jurisdictions to do so (i) where there has been inordinate and inexcusable delay and the balance of justice favours dismissal, and (ii) where there has been found to exist a real and serious risk of an unfair trial and/or an unjust result. As we will see, the High Court in this instance was satisfied that the relevant tests, being "*the Primor test"*, and *"the O'Domhnaill test"* (as they were each respectively labelled in *Cassidy v The Provincialate* [2015] IECA 74), had been met by the respondents.

2. For consistency, the appellant in this appeal, who is the plaintiff in the proceedings, will hereinafter be referred to throughout this judgment simply as the plaintiff, and the respondents, who are all defendants in the proceedings, will similarly be referred to simply as defendants (first to sixth, as the case may be).

3. The dismissed proceedings involved, *inter alia*, medical negligence/products liability claims against relevant defendants in the proceedings and were founded on events, beginning with a hip replacement operation in 1995 during which it is alleged that a defective hip prosthesis was implanted in the plaintiff resulting in a series of medical complications necessitating a number of subsequent operations and attempted revisions of the affected hip joint, and ultimately culminating in a protracted period of legal activity starting with the plaintiff issuing a personal injuries summons on the 4th of February 2011 and ending with the dismissal of the proceedings by Simons J. on the 6th of February 2020.

Background.

4. On the 17th of August 1995, the plaintiff attended the first named defendant, a consultant orthopaedic surgeon, at the Lourdes Regional Orthopaedic Hospital, Kilcreene in County Kilkenny for the purpose of undergoing a hip replacement. The operation was not the first procedure the plaintiff had undergone in relation to his right hip: indeed, as a result of his involvement in a road traffic accident on the 23rd of December 1989, the plaintiff had developed complications in his right hip and had undergone several different procedures to

treat this ranging from a manipulation under anaesthetic and traction, in the immediate aftermath of the road traffic accident, to an open reduction and internal fixation of the right hip on or about the 5th of January 1990.

5. Against this historical background, the hip replacement operation of the 17th of August 1995 was performed using a hip device that was developed/manufactured/supplied by the second to fifth named defendants. As part of this procedure, the first named defendant implanted a hip prosthesis the components of which, as pleaded in the plaintiff's Personal Injuries Summons, comprised of *"a Hylamer Ogee Cup, Elite Zirconia Head, Elite Plus Femoral Implant Flanged 4, and a Centraliser"*.

6. It is widely known, at least in legal circles, that that there has been extensive litigation, both here and abroad, involving a hip device developed/manufactured/supplied by the fifth named defendants and others. As was observed by Cross J. in his judgement in *Flynn v DePuy International Limited & Ors* [2017] IEHC 267, at paras. 1 – 2 thereof, there were approximately 1,000 personal injury cases involving defective prosthetic hip implants developed/manufactured/supplied by those defendants pending as of date of delivery of that judgment. Importantly, however, it was clarified by counsel at the appeal hearing that the impugned hip device at issue in the present proceedings is a device which is described as "the Hylamer hip" whereas the impugned implant at issue in those actions was described as "the ASR hip", a separate and distinct hip device.

7. The plaintiff's initial hip replacement operation of the 17th of August 1995 was ultimately not successful, and the plaintiff underwent a series of subsequent procedures as described below.

8. On or about the 16th of May 2001, the plaintiff was scheduled to undergo a right revision hip replacement. This revision surgery had to be carried out in two stages. The first stage, involving exploration of the affected hip joint, was conducted by the first named

defendant who noted the presence of yellow coloured fluid around the hip joint and that the components of the prosthesis implanted on the 17th of August 1995 were loose. The second stage, took place on the 30th of May 2001 and involved the plaintiff undergoing an allograft reconstruction of the acetabulum after developing loosening of the hip prosthesis. This procedure was again performed by the first named defendant and it is pleaded that it involved *"using a product/device manufactured/supplied by the second, third, fourth and fifth defendants"*.

9. The plaintiff underwent a second surgical revision of his right hip on or about the 6th of November 2002. This procedure, again carried out by the first named defendant, involved the revising of the existing acetabular allograft with fresh frozen allograft and also revision of the acetabular cup. A bacterial infection was detected as being present at the time (specifically identified in the personal injuries summons as "*a growth of Staphylococcus Epidermis*") and the plaintiff was prescribed antibiotics as treatment. It is again pleaded that the procedure involved *"using a product/device manufactured/supplied by the second, third, fourth and fifth defendants"*.

10. On or about the 12th of May 2004, the plaintiff underwent yet another revision of his acetabulum. Performed by the first named defendant, this procedure is pleaded as having involved *"using a product/device manufactured/supplied by the second, third, fourth and fifth defendants"*. In the course of the operation it was observed that the plaintiff was continuing to discharge pus from his hip joint and *Staphylococcus Epidermis* infection was again isolated.

11. On or about the 26th of April 2006, the plaintiff underwent a further second stage revision procedure which was once again carried out by the first named defendant. This procedure involved the implantation of a custom-made acetabular prosthesis, being a hip device manufactured/supplied by the second, third, fourth and fifth named defendants.

12. It is claimed that following this series of operations, the plaintiff continued to suffer from *"significant and ongoing infection requiring the treatment of intravenous antibiotics"*.

13. The Personal Injuries Summons pleads negligence and breach of duty (including breach of statutory duty) on the part of the second to fifth named defendants in and about the manufacture and supply of the hip product /device implanted in the plaintiff. Detailed particulars of the alleged negligence and breach of duty are pleaded at sub-paragraphs 25(i) to 25(xi) thereof. The breaches of statutory duty alleged are those owed to a consumer under various provisions of the Sale of Goods and Supply of Services Act 1990. It is separately pleaded that the defendants are liable to the plaintiff in damages under the Liability for Defective Products Act 1991 and/or Council Directive 85/374/EEC (on the approximation of laws, regulations, and administrative provisions of the member states of the European Communities concerning liability for defective products). Further, the Personal Injuries Summons pleads professional negligence and breach of duty, including statutory duty, on the part of the first named defendant, his servants or agents. It is pleaded that the sixth defendant is liable for the actions and omissions of the first defendant. Detailed particulars of the alleged professional negligence and breach of duty are pleaded at sub-paragraphs 27(i) to 25(vi) thereof. There are also then pleas of negligent misstatement and/or misrepresentation, of deceit, and of breach of fiduciary duty on the part of the first named defendant, his servant or agents. Finally, the Personal Injuries Summons alleges breaches of various of the plaintiff's constitutional rights / rights under the European Convention on Human Rights by the defendants, their servants or agents, including his right to bodily integrity, his right to be free from cruel, inhuman and degrading treatment, his right to privacy and his right of access to the courts.

14. The plaintiff alleges that the defendants were aware of the defects in the impugned device at the time that the various operations to revise his hip were carried out and that the

particulars of these defects were concealed from him. The plaintiff alleged that this is evident from the contents of a letter dated the 19th of September 2001 which was sent by the second and third named defendants to the first named defendant.

History of the Dismissed Proceedings:

15. It may be helpful at this point to set out what appears to be an uncontroversial chronology of events culminating in the dismissal of the proceedings herein by Simons J.:

7th of May 1963	Plaintiff's date of birth
17th of August 1995	Plaintiff underwent an initial hip replacement.
12th November 2008	Plaintiff requested copies of his medical records and, upon review, discovered a letter sent by the third defendant to the first defendant, dated 19th of September 2001, which he contends acknowledges the defective nature of the prosthetic hip which he received in 1995.
9th July 2010	Letter of claim sent on behalf of the plaintiff
10th November 2010	Application made to PIAB
22nd November 2010	Authorisation issued by PIAB
4th of February 2011	Personal Injuries Summons issued by plaintiff.
22nd of February 2011	Appearance entered by sixth named defendant.
11th of April 2011	Appearance entered by second to fifth defendants.
5th of May 2011	Notice for Particulars issued on behalf of second to fifth named defendants.

9th of August 2011	Appearance entered by first named defendant.
6th of February 2012	Voluntary discovery of extensive medical records of the plaintiff sought by the then solicitors for first named defendant.
25th of June 2012	Consent order directing the plaintiff to make discovery of medical records to the first named defendant ~~respondent~~.
15th of August 2012	Affidavit of discovery sworn by the plaintiff.
4th of September 2012	Plaintiff replies to Notice for Particulars issued on behalf of second to fifth named defendants.
31 October 2012	Letter from plaintiff's solicitors to the solicitors for the second to fifth named defendants seeking outstanding defence.
2nd November 2012	Letter from solicitors for the second to fifth named defendants to the plaintiff's solicitors saying papers were with counsel and undertaking to furnish defence promptly upon receipt of counsel's draft.
7th November 2012	Change of solicitors by first named defendant to solicitors also representing second to fifth named defendants.
12th of August 2013	Defence delivered on behalf of second to fifth named defendants.
24th of June 2015	Defence delivered by sixth named defendant.

27th of February 2017	Notice for Particulars issued on behalf of sixth named defendant.
7th of July 2017	Plaintiff replies to Notice for Particulars on behalf of sixth named defendant.
13th of July 2017	Inter-defendant motion (of which the plaintiff claims to have been unaware) brought by the sixth defendant pursuant to Order 25 RSC seeking trial of a point of law concerning whether sixth named defendant was entitled to an indemnity against the fourth and/or fifth named defendants. Struck out on consent, with costs to sixth named defendant against first to fifth named defendants.
14th of December 2018	Notice of Intention to Proceed served by the plaintiff's solicitors.
14th of January 2019	Change of solicitors by sixth named defendant to solicitors also representing first to fifth named defendants.
13th of March 2019	Defendants' Notice of Motion seeking to dismiss plaintiff's claim for want of prosecution and on the grounds of inordinate and inexcusable delay.
14th of January 2020	Replying affidavit filed by the plaintiff.
16/17th of January 2020	Motion to dismiss for want of prosecution and for inordinate and inexcusable delay and heard by the High Court. Judgment reserved.

6th of February 2020	Delivery of Judgment by Simons J., proceedings dismissed.
18th of February 2020	High Court order perfected.
13th of March 2020	Notice of Appeal lodged.

16. In the proceedings before the High Court the defendants pointed to the fact that no step was taken on behalf of the plaintiff between 4th of September 2012 and the 7th of July 2017. The plaintiff, in turn, pointed to the fact that the last of the defences delivered, namely that of the sixth defendant, the HSE, was not delivered until the 24th of June 2015, and that the first named defendant, had still not delivered his defence at that point. Moreover, no verifying affidavits had been filed. The plaintiff also pointed to the fact that a motion seeking a trial of a point of law concerning an indemnity had been brought by the sixth named defendant against two other defendants.

The judgment of the High Court

17. In his judgment delivered on the 6th of February 2020, Simons J. acknowledged the overlapping jurisdictions to dismiss proceedings for want of prosecution (i) where there has been inordinate and inexcusable delay and the balance of justice favours dismissal, and (ii) where there has been found to exist a real and serious risk of an unfair trial and/or an unjust result.

18. He considered in the first instance whether there had been both inordinate and inexcusable delay and, if so, where the balance of justice lay in terms of whether the proceedings should be allowed to proceed or not. In that regard he sought to apply the principles to be found in the Supreme Court case of *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 at 475/476. He was satisfied that the plaintiff had been guilty of both inordinate and inexcusable delay in the commencement and prosecution of his personal injury

proceedings. and further that the balance of justice did not favour allowing proceedings to progress to full trial.

19. The High Court judge's stated reasons for concluding that there had been inordinate delay were as follows:

> *"14. Whereas the traditional view had been that delay had to be assessed by reference only to delay in the prosecution of the proceedings, i.e. by reference to delay subsequent to the institution of the proceedings, the more recent case law indicates that both pre- and post-commencement delay can be considered. See, for example, Cassidy v. The Provincialate [2015] IECA 74, [32].*
>
> *15. The rationale for this approach is explained as follows in Connolly's Red Mills v. Torc Grain and Feed Ltd [2015] IECA 280, [29].*
>
> > *"29. The reason that the court must take into account pre-commencement delay in assessing whether or not post commencement delay is inordinate and inexcusable is that it cannot be disputed but that the longer the period that is allowed to elapse between the events the subject matter of the claim and the trial date, the greater the risk that justice will be put to the hazard. In these proceedings, the late start by the plaintiff in issuing its plenary summons and the delay in delivering the statement of claim meant that eight years were permitted to elapse between the date of the contract at issue and the date upon which the claim was fully particularised."*
>
> *16. For the reasons which follow, I am satisfied that the combination of the delay pre- and post-commencement of the proceedings in the present case is inordinate.*
>
> *17. The principal event giving rise to these proceedings, namely the initial hip replacement operation, occurred on 17 August 1995. The proceedings were not instituted until 4 February 2011, that is some fifteen years later. Even allowing that—*

notwithstanding the defendants' pleas to the contrary—the proceedings might not be statute barred having regard to the injured party's asserted date of knowledge, a period of fifteen years is nevertheless significant. The progress of the proceedings themselves has been dilatory. Nine years have elapsed since the proceedings were instituted, and even now same are not ready to be set down for trial. Prior to the events associated with the motion to dismiss the proceedings, the last substantive step taken on behalf of the injured party had been the delivery on 7 July 2017 of a reply to a notice for particulars raised by the HSE.

18. The current position, therefore, is that notwithstanding that a period of almost twenty-five years has now elapsed since the date of the initial hip replacement operation, the injured party has still not brought these proceedings to trial. Irrespective of whether one measures the delay by reference to the date of the index event, i.e. the hip replacement operation on 17 August 1995, or by reference to the date of the institution of the proceedings on 4 February 2011, the delay has been inordinate."

20. Further, in dealing with whether the delay was inexcusable the High Court judge said:

"25. For the reasons which follow, I am satisfied that the delay in the present case has been inexcusable. The proceedings relate to an event said to have occurred on 17 August 1995, but the proceedings were not instituted until 4 February 2011. It is well established that where there has been a late start to proceedings, a plaintiff is under an obligation to pursue the proceedings thereafter with expedition. (See, for example, Millerick v. Minister for Finance [2016] IECA 206, [21]). This has not been done in the present case. Following an initial flurry of activity in the period 2011 to 2012, the injured party did not pursue his proceedings with diligence thereafter. Insofar as any steps were taken prior to the events associated with the application to dismiss the

proceedings, same were reactive rather than proactive. The only substantive step taken prior to the issuing of a notice of intention to proceed on 14 December 2018 was to respond to a notice for particulars which had been served by the HSE. (I will return to address the nature of the obligation, if any, on a defendant to pursue proceedings under the next heading below). Such a reflexive approach does not indicate an intention to bring proceedings on for hearing expeditiously.

26. The principal excuse offered for the delay is that time was required to obtain expert reports. …"

"28. In summary, therefore, the submission that a period of several years was necessary to obtain expert reports in the present case, and that this excuses the delay in prosecuting the proceedings, is rejected."

21. The findings of inordinate and inexcusable delay are accepted by the plaintiff for the purposes of this appeal, and are not in controversy.

22. However, the High Court judge's finding as to where the balance of justice lay represents the contested ground in this appeal and it is necessary in the circumstances to review his reasons for that finding. He referred to the factors to be considered in that regard as identified in the passages from the *Primor* case, to which reference has already been made. These were:

"*(i) the implied constitutional principles of basic fairness of procedures,*

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

23. He noted that one of the principal factors to be considered was whether the ability of the defendants to defend the proceedings had been prejudiced as a result of the delay. He noted that prejudice was also a relevant consideration in any possible exercise of the court's overlapping jurisdiction to dismiss, due to the existence of a real and serious risk of an unfair trial and/or an unjust result, but observed that the threshold, in terms of the prejudice required to be demonstrated, before the latter jurisdiction (i.e., based on the *O'Domhnaill* test) could be exercised was much more demanding than that under the *Primor* test. Under *Primor* the concern for the Court would be whether the delay gives rise to "*a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant".* He observed that, in contrast, nothing short of prejudice likely to lead to a real risk of an unfair trial or unjust result would suffice to satisfy the *O'Domhnaill* test, and proof

of moderate prejudice would not be enough. He concluded that the higher threshold had in fact been met in the present case and that on the principle that the greater includes the lesser it followed from this conclusion that the lower threshold under the *Primor* test must also have been met. He stated that his analysis of the prejudicial effect of the delay leading him to the conclusion that there was a real and serious risk of an unfair trial or unjust result (and therefore that the *O'Domhnaill* test was satisfied) applied *mutatis mutandis* to his application of the *Primor* test.

24. I will be reviewing the basis on which Simons J. considered that the higher test was met later in this judgment.

25. The High Court judge also considered whether any of the other considerations identified as potentially relevant to determining where the balance of justice might lie for the purposes of the *Primor* test, arose on the facts of the case before him. He examined criticism by counsel for the plaintiff of the delay on the part of the sixth named defendant in not delivering its defence until the 24th of June 2015, and of the fact that the first named defendant had not filed any defence at all, and of the fact that verifying affidavits had not been filed. It had been acknowledged in argument before him that there is no obligation on a defendant to take positive steps to have the action against it progressed, but it was contended on behalf of the plaintiff that the principle was confined to circumstances where a defendant was not in culpable default itself. In asserting this proposition, counsel for the plaintiff had relied on *Connolly's Red Mills v Torc Grain and Feed Ltd* [2015] IECA 280. However, the High Court judge felt that the *Connolly's Red Mills* case was readily distinguishable in that many of the factors that had influenced the Court of Appeal in in favour of the plaintiff in that case had involved acquiescence on the part of the defendant and had resulted in the plaintiff incurring additional costs. He held that it could not realistically be argued that the plaintiff in the present case incurred additional costs in the litigation in reliance on acquiescence on the

part of the two of the six defendants who did not deliver defences on time. He was satisfied that the plaintiff had not demonstrated that he had taken any substantive steps to progress proceedings. The only evinced step which he took during the period 2012 to 2017 was to reply to a notice for particulars. Citing *Millerick v Minister for Finance* [2016] IECA 206, the High Court judge expressed himself as satisfied that the case law draws a distinction between acquiescence and mere inaction on the part of a defendant. In conclusion on this sub-issue, the High Court judge was satisfied that the defendants had not been guilty of conduct which amounted to acquiescence. He said that the failure of the two defendants to deliver a defence on time leant towards the "inaction" rather than the "acquiescence" end of the spectrum.

26. The High Court judge also considered possible reputational damage for a defendant, and specifically in this instance the first named defendant, the orthopaedic surgeon who carried out the various surgical procedures. He pointed to the fact that not only was it alleged that the first named defendant was professionally negligent but it was also alleged that he had been guilty of deceit and the deliberate concealment of the "allegedly" defective nature of the product. In support of the contention that there were reputational implications, he alluded to the fact that the plaintiff had also made a complaint to the Medical Council concerning the first named defendant. The High Court judge held that a plaintiff who makes such serious allegations should prosecute his or her proceedings without delay. The plaintiff having failed to do so, the balance of justice pointed towards dismissing the proceedings in order to vindicate the surgeon's right to his good name.

27. The High Court judge then turned to consider the overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial or unjust result. Originally considered by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151, this overlapping jurisdiction was the subject of detailed explication by Finlay Geoghegan J. in

Manning v. Benson and Hedges Ltd. [2004] 3 I.R. 556, quoted in turn in Simons J.'s judgment at para. 47:

> "*32. The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This, as was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss.*
>
> *33. Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution.*
>
> *34. Whilst in some of the cases the judgments have referred to matters under both these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised.*
>
> *35. The factor to be considered by the court in relation to each question may overlap. It appears to me that these may include:-*
>
> *1. has the defendant contributed to the lapse of time;*
>
> *2. the nature of the claims;*
>
> *3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;*

4. *the nature of the principal evidence; in particular whether there will be oral evidence;*

5. *the availability of relevant witnesses;*

6. *the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date.*

Further on the second question it will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

28. Recalling that the overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial or unjust result requires an applicant to meet a higher threshold than is required under the *Primor* test , Simons J. noted that the two distinguishing features of this higher threshold are (i) that whereas *Primor* necessarily requires an applicant to establish that the delay is inexcusable, *O'Domhnaill* does not require that the plaintiff must have been culpable in the delay, and (ii) that whereas, as has already been alluded to, both tests require a consideration of whether the delay has prejudiced the defendant in the defence of proceedings, *O'Domhnaill* strictly requires an applicant to demonstrate (actual or presumed) prejudice likely to lead to a real risk of an unfair trial or unjust result. Nothing short of establishing the likelihood of prejudice at that level would suffice.

29. In applying *O'Domhnaill*, Simons J. was satisfied that a fair trial would not be possible. This conclusion flowed from the facts-specific nature of the principal issues to be tried. In the first place, a trial judge would have to determine whether the impugned hip device was indeed defective. In respect of this issue, the plaintiff's case as pleaded expressly invoked the Liability for Defective Products Act 1991 and Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of

the Member States concerning liability for defective products. As Simons J. described at para. 51:

> "51. [...] *Both of these legal instruments provide that a producer shall not be liable if he proves inter alia that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered*."

30. Two practical issues arose in relation to this first issue due to the period of twenty-five years which had elapsed since the initial hip replacement operation. The first practical issue concerned the ability of the defendants to identify witnesses or documentation which could establish what the state of scientific and technical knowledge would have been at the time the impugned hip device was put into circulation, ability which was hampered by the fact that the impugned hip device was put into circulation by, at the very latest, August 1995. Moreover, the impugned device the focus of the plaintiff's claim against the defendants was not available for inspection. Simons J. also noted that the plaintiff's case as pleaded expressly raised issues relating to research and testing carried out by the defendants and in respect of this the High Court judge quoted from para. 25 of the plaintiff's Personal Injuries Summons in which the plaintiff had particularised how the second to fifth defendants were said to be liable to him in negligence and breach of duty (including statutory duty) in respect of the impugned hip device.

31. The second practical issue arose in the context of allegations made against the first named defendant, the consultant orthopaedic surgeon, which would, in the assessment of Simons J., require a trial judge to made findings of fact as to events that had occurred over twenty-five years previously to determine whether those allegations are well-founded. While the plaintiff was not seeking to impugn the professional services provided by the first named defendant at the time of the initial hip operation, he was doing so in respect of the four hip

revision procedures. The plaintiff's claim in that respect was pleaded under various headings including professional negligence, negligent misstatement, misrepresentation (including both intentional and negligent misrepresentation), knowing concealment and deceit. As Simons J. describes at para. 53:

> "*53. The gist of the allegation against the orthopaedic surgeon is that the surgeon had become aware, at some point, that the hip device was defective, but had concealed this knowledge from the injured party. It is also pleaded that this (alleged) concealment meant that the injured party was not in a position to give full and informed consent to the surgical procedures subsequent to the initial hip replacement operation on 17 August 1995."*

32. Simons J. noted that the exercise which a trial judge would have to undertake in order to make findings of fact in this case would include determining the nature of the pre-operation information given to the plaintiff in respect of the risks involved in that kind of surgery and would also include determining the nature of the information supplied to the plaintiff at the time of each of the four subsequent surgical procedures conducted between the 16th of May 2001 and the 26th of April 2006. Simons J. observed that such determinations would turn on the oral testimony of the plaintiff and the first named defendant. The High Court judge took judicial notice of the fact that since the events had occurred between (at that stage) fourteen and twenty-five years earlier, the passage of time would have eroded the accuracy and reliability of those individuals' memories. Accordingly, Simons J. held that what he had identified as the two principal issues in the proceedings could not be determined without there being a real and serious risk of an unfair trial and/or an unjust result.

33. Being also of the view, as regards the motion to dismiss on *Primor* grounds, that the balance of justice lay against allowing the proceedings to go to a full trial, he dismissed the

proceedings. The costs of the proceedings were subsequently awarded to the defendants, to be adjudicated in default of agreement.

The Appeal

34. A Notice of Appeal was lodged on the 12th of March 2020 and therein the plaintiff set out the grounds upon which he now appeals the judgment and order of Simons J.:

"*1. The High Court erred in concluding that the balance of justice lay against allowing the Court proceedings to go to full trial.*

2. The High Court erred in concluding that the Defendants had met the threshold of establishing prejudice likely to lead to a real risk of an unfair trail or unjust result.

3. The High Court erred in concluding that the Defendants had satisfied the sixth test: outlined in Primor as part of a consideration of the balance of Justice, namely 'whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the Defendant'.

4. The High Court failed to afford adequate weight, in assessing the potential prejudice to the Defendants in defending the Plaintiff's claim, to the centrality of documents and expert evidence in the determination of liability at trial and to the limited role and relevance of oral testimony.

a. Whereas the High Court considered that the assessment of the claim made against the manufacturers of the hip product would require findings to be made as to the state of scientific and technical knowledge at the time when the product was put into circulation, the evidence in relation to those matters would involve a combination of documentary

and expert evidence. There was no material before the High Court to establish that the accuracy of such evidence or the defendant's ability to engage with same would be affected by the passage of time. The finding of the High Court that the Defendants would have difficulty identifying witnesses or documentation which would establish what the state of scientific and technical knowledge would have been when the product was put into circulation was unsupported by evidence.

b. *The focus of the claim as pleaded against the First Defendant in the personal injuries summons relates to his failure to inform the Plaintiff of the apparent defects in the hip product addressed in the letter dated 19 September 2001 received by the First Defendant, including prior to the surgeries which are pleaded in the summons of May 2001; November 2002; May 2004 and April 2006. However, much of the evidence in relation to this will be based upon medical records, correspondence and evidence of the First Defendant's practice in relation to information provided to patients prior to surgery. Significantly, no affidavit was sword by the First Defendant averring to any specific difficulty or prejudice on his part in dealing with this evidence.*

5. *The High Court erred in relying upon presumed prejudice on the part of the Defendants, in circumstances where no evidence was adduced by those Defendants of any actual prejudice in defending the proceedings. Further, no explanation was given by the Defendants as to how the claims made in relation to the product involved in these proceedings differed from claims which they had defended in other proceedings relating to the hip device.*

6. *The High Court afforded insufficient weight to the delays on the part of the Defendants in the conduct of these proceedings. These included the delays by the Second to Fifth Defendants and by the Sixth Defendant in delivering Defences, the failure of the First Defendant to deliver a Defence and the failure to deliver verifying affidavits.*

7. *The High Court failed to afford adequate weight to conduct on the part of the Defendants which (i) amounted to acquiescence on their part in the Plaintiff's delay and / or (ii) induced the plaintiff to incur further expense in pursuing the action. This included (a) the solicitors then on record for the First Defendant seeking discovery in 2011 and 2012, (b) the solicitors then on record for the Second to Fifth Defendants seeking particulars in May 2011 (replied to in September 2012), (c) the solicitors then on record for the Second to Fifth defendants writing in January, February, March and May 2017 requesting that the claim as against the Second Defendant be discontinued, (d) the raising of particulars on behalf of the Sixth Defendant in March 2016 (replied to in July 2017), I the failure of the Second to Fifth Defendants to promptly pursue an application to dismiss the proceedings, having expressly raised a preliminary objection on the grounds of delay in their Defence of 12 August 2013, (f) the engagement between the Fourth and Fifth defendants and the Sixth Defendant in relation to a motion on behalf of the Sixth Defendant in 2017 in relation to a claimed indemnity, and (g) the correspondence from the solicitors then acting for all Defendants in January 2019 stating that they were checking whether the First Defendant delivered a Defence prior to those solicitors coming on record for him.*

8. The High Court failed to afford adequate weight to the disparity in resources available to the parties to the litigation and the seriousness of the injuries suffered by the Plaintiff."

Submissions to the Court of Appeal on behalf of the Plaintiff

35. The plaintiffs written submissions identified three issues as requiring to be addressed. These are:

1. Whether the High Court was correct in concluding that the defendants had met the threshold of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result (under the *O'Domhnaill* test)?
2. Whether the High Court was correct in concluding that the defendants had satisfied the sixth test outlined in *Primor* as part of a consideration of the balance of justice, namely, "whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant"?
3. Whether the High Court was correct in concluding that the application in this case of the other factors outlined in *Primor* as part of a consideration of the balance of justice were such that the balance of justice lay against allowing proceedings to go to full trial?

36. It was submitted, in reliance on *Cassidy v. Provincialate* [2015] IECA 74 and *Collins v Minister for Justice* [2015] IECA 27, that while the Court of Appeal must give due consideration to the conclusions of the High Court judge, it is nonetheless free to exercise its own discretion as to whether or not the claim should be dismissed, if satisfied that the interests of justice dictate such an approach.

37. While it was acknowledged that there is some degree of overlap between the separate *O'Domhnaill* and *Primor* tests, it was submitted that whichever test was applied the

defendants' case did not meet the required threshold. It was submitted that the defendants did not meet the threshold of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result (under the *O'Domhnaill* test). Neither, it was said, did they meet the threshold of establishing a substantial risk that it was not possible to have a fair trial or that the inordinate and inexcusable delay involved was likely to cause, or have caused, serious prejudice to the defendants (under the *Primor* test).

38. In the *Cassidy* case, the Court of Appeal had said:

> *"38. Considering its jurisdiction having regard to the test in O'Domhnaill, a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result."*

It was submitted that the material put before the court by the defendants did not permit a *"fulsome investigation of all the relevant circumstances"*. The only evidence as to prejudice was that contained in paragraph 22 of the affidavit sworn by the defendants' solicitor, which read:

> *"Furthermore, the defendants have, as a result of the plaintiff's delay, been prejudiced in their defence of the proceedings. The lapse of time will tend to reduce the potential of witnesses to give meaningful assistance or to act as a witness in relation to events which occurred over 23 years ago when the plaintiff had his index surgery and even longer than that the product itself was designed and manufactured."*

39. It was complained that these assertions were entirely generic, and that they ignored the nature of the proceedings, particularly the likely centrality of documents and expert evidence in the determination of liability at trial and the limited role and relevance of oral testimony.

40. It was submitted that whereas the High Court considered that the assessment of the claim made against the manufacturers of the hip product would require findings to be made as to the state of scientific and technical knowledge at the time when the product was put into circulation, evidence in relation to those matters would involve a combination of documentary and expert evidence. The state of scientific and technical knowledge at the time when the product was put into circulation (within the meaning of section 6 of the Liability for Defective Products Act 1991) involves an objective assessment of an issue in relation to which the second to fifth defendants bear the burden of proof. The plaintiff says there was no material before the High Court to establish that the availability and accuracy of evidence relating to this issue, or the defendants' ability to engage with same. The plaintiff maintains that the finding of the High Court that *"the defendants would have difficulty in identifying witnesses or documentation which would establish what the state of scientific and technical knowledge would have been some twenty five years ago"* was unsupported by evidence.

41. We were referred to *Granahan v Mercury Engineering* [2015] IECA 58, as illustrating the kind of rigorous examination of assertions of prejudice the Court of Appeal has undertaken in other cases. In *Granahan,* an assertion that five potentially relevant witnesses who had left the defendant company, and were therefore unlikely to be available, was not accepted as establishing a likelihood of even moderate prejudice, the court concluding that the prejudice alleged was in the circumstances of that case more likely to be illusory than real. It was submitted on behalf of the plaintiff in the present case that the defendants have failed to identify any specific difficulty in relation to witnesses, even at a

superficial level. The plaintiff says that this prevents him and the Court from conducting any analysis of the claimed difficulties in a manner similar to that which occurred in *Granahan*.

42. The plaintiff further submitted that reliance by the High Court on issues relating to the research and testing carried out by the defendants placed insufficient weight upon the fact that extensive and detailed documentation must necessarily be in the possession of the defendants in relation to that research and testing and that no averment was made on behalf of the defendants to the contrary. In support of this point, the plaintiff has referred us to the judgment of Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27, at pages 48-49 thereof, in which the learned Supreme Court judge remarked, in the context of a medical negligence claim against the health board in question, involving doctors who had worked at a small hospital run by it and who were asserting no memory about the alleged event after more than a combined 26 years' worth of pre- and post-commencement delays, that the available medical notes were more than adequate evidence in the circumstances of the case. The plaintiff says that the documentary evidence in the form of medical notes in the present case will be of particular relevance to the claim in so far as it relates to the first and sixth defendants.

43. The plaintiff further submits that the High Court erred in relying upon presumed prejudice on the part of the defendants in circumstances where no evidence was adduced by those defendants of any actual prejudice in defending the proceedings.

44. For these reasons the plaintiff has contended that the defendants did not meet the threshold of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result (under the *O'Domhnaill* test) or that the delay gives rise to a substantial risk that is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant (under the *Primor* test).

45. The plaintiff also makes a case in the alternative that if the Court accepts that, under the *Primor* test, the defendants have established a substantial risk that it is not possible to have a fair trial or one without serious prejudice to them, that does not arise due to any period in respect of which the plaintiff was guilty of inordinate and inexcusable delay. It was suggested that the relevant period for consideration in that regard is the period from the date of the plaintiff's knowledge to the date of the issuing of the motion, i.e., the period during which delay was found to be inordinate and inexcusable, rather than a global period taking into account all pre-commencement delay. In support of this contention the plaintiff relies on *Manning v. Benson & Hedges* [2004] 3 IR 556 at 562. The plaintiff says that no evidence has been advanced of prejudice which was caused by any identifiable period of inordinate and inexcusable delay.

46. As regards other factors relevant to the balance of justice, the plaintiff says that proper account should be taken of the fact that the defendants were responsible for various delays in litigating this case. He points to the fact that the defence the first named defendant remains outstanding. While the solicitor for the defendants had stated in his affidavit grounding the motion to dismiss for want of prosecution that the failure of the first named defendant to deliver a defence was attributable to oversight in the context of a change of solicitors, the plaintiff says that the defendants cannot seek to place the onus on the plaintiff in relation to the delivery of the defence by the first named defendant. The plaintiff says the outstanding defence of the first named defendant is not an academic matter and bears upon the discovery to be sought by the plaintiff from that defendant.

47. The plaintiff also points to delay on the part of the sixth defendant in filing its defence. Further reliance is placed on the fact that neither of the two defences received has been verified on affidavit.

48. The plaintiff also referred us to *Comcast International Holdings Inc v. Minister for Public Expenditure* [2012] IESC 50, and specifically paras. 3.10 – 3.12 of Clarke J.'s judgment therein concerning the need to apply any heightened standards of expedition to defendants as well. The appellant points to the fact that the defence filed on behalf of the second to fifth defendants on the 12th of August 2013 included a twofold preliminary objection, one of which was that the plaintiff was precluded from pursuing the claim *"due to inordinate, unreasonable and inexcusable delay".* Despite this, the defendants motion seeking to dismiss the proceedings for want of prosecution did not issue until the 13th of March 2019. The plaintiff maintains that this is a significant fact having regard to how a similar issue arising in *Connolly & Sons Ltd t/a Connolly's Red Mills v Torc Feed and Grain Ltd* [2015] IECA 280 was dealt with. In that case, the defendant filed a Defence to the action raising inordinate and inexcusable delay on the part of the plaintiff as a preliminary objection. ~~o~~One of the factors which the Court of Appeal felt tipped the scales of justice in favour of allowing the action to proceed to trial was that the defendant had subsequently acted in a manner entirely inconsistent with the position it had adopted in its Defence.

49. The plaintiff further submits that there were acts of acquiescence of the part of the defendants evident from requests in correspondence for the proceedings to be discontinued against the second named defendant, and from the inter-defendant motion brought in 2017 to which reference has already been made, which were not afforded sufficient weight by the High Court judge.

50. The plaintiff accepts that potential damage to a defendant's reputation fell to be weighed in the balance, but contends that it is nonetheless significant that the first named defendant has never delivered the defence to the proceedings, nor did he swear an affidavit grounding the application to dismiss.

51. The plaintiff submits that account should also been taken of (i) the disparity in resources available to the parties involved in the litigation and (ii) the seriousness of the injury suffered by the plaintiff.

Submissions to the Court of Appeal on behalf of the Defendants

52. The defendants' submissions to the Court of Appeal comprise two principal points. First, they submit that the burden of proof rests with the appellant to *"establish the existence of countervailing circumstances which would warrant permitting the proceedings to proceed"* or to warrant reversal of the decision of the High Court, and they say that the plaintiff has failed to successfully discharge this burden of proof. Secondly, they submit that Simons J.'s assessment of the balance of justice was correct having regard to the factors of (i) the prejudice the defendants would be likely to suffer as a result of the plaintiff's delay, (ii) the defendants' conduct which was unimpeachable and (iii) the nature of the case, involving as it does serious allegations of wrongdoing and being one relating to events that transpired many years prior to the defendants' application to have the proceedings dismissed.

53. The defendants rely on a number of authorities in relation to their first point. Significantly, they draw the Court's attention to *Sweeney v. Cecil Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43, paras. 7 and 9 thereof, in which Baker J. stated that the burden of proof rests with the appellant "*[...] to demonstrate that the decision made by the High Court judge was not, on the facts of the case, decided in accordance with the prevailing principles or was unjust to the point that it should be set aside on appeal."* Such an approach is reflective of the principle, also stated in that judgment, that "*[a]n appellate court when asked to set aside an order made by a High Court judge in the exercise of his or her discretion in relation to questions of mixed face and law should do so only if the appellate court considers it necessary in order to avoid a serious injustice being visited upon the appellant."*

54. In the context of the present appeal, which is in part against a decision to dismiss proceedings for want of prosecution on grounds of inordinate and inexcusable delay, the defendants further rely on *Sweeney, supra,* at para. 19 thereof, in which Baker J. described the burden of proof on an application to dismiss for inordinate and inexcusable delay:

> *"If the delay is found to be both inordinate and inexcusable, the court is often 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. [...]*"

55. The relevance of the identity of the party who bears the burden of proof arises because, as the defendants note at para. 3.1 of their written submissions, *"[...] it is apparent that the Plaintiff is not appealing the finding that the delays were both inordinate and inexcusable for the reasons so found by the High Court."* Because the plaintiff is principally concerned on this aspect of the appeal with the High Court's assessment of the balance of justice, the thrust of the defendants' submissions is thus that the plaintiff has unsuccessfully discharged what they characterise as his burden of proof in establishing that countervailing circumstances exist which would warrant permitting the proceedings to proceed to trial.

56. I should interject to say at this point that, while noting the submission of the defendants as just summarised, I am not to be taken as endorsing the premise on which it is based, namely that the plaintiff must be treated as bearing a burden of proof in respect of the third limb of the *Primor* test. I regard the position in law as being considerably more nuanced, as reflected in the judgment of this Court in *Barry v Renaissance Security Services Ltd* [2022] IECA 115, at paras 42 -52 inclusive. Should it become necessary to engage with

the appropriateness of the dismissal of the plaintiff's case on *Primor* grounds, I will return to this.

57. At the hearing of the appeal, counsel on behalf of the defendants placed reliance on the fact that para. 27 of the plaintiff's affidavit of the 14th of January 2020 does not set out in any precise detail the steps he undertook to progress proceedings. He highlighted numerous failures on the part of the plaintiff: he does not exhibit the expert reports on liability and causation from two consultant orthopaedic surgeons he avers to have sourced; he does not aver to the existence of any expert material dealing with the claim against *DePuy* and the other defendants; he does not exhibit relevant documentation or indeed his medical records. As counsel submitted, "*There hasn't been full discovery in the case. So we're a long, long way from any trial in this case. And the eventual delay that there would be, if this matter was permitted to proceed, is, therefore, far longer than the delay with which we're faced at the moment*".

(Transcript 12th of May 2021, p. 37).

58. The defendants submitted in respect of the balance of justice that the High Court correctly decided that the balance of justice was against the case proceeding. The defendants submitted that this was due to (1) the prejudice likely to be suffered by the defendants as a result of the plaintiff's delay, (2) the defendants' conduct the proceedings and (3) the nature of the case.

59. In regard to the issue of prejudice we were referred to *Boliden Tara Mines Ltd v Irish Pensions Trust Ltd*, [2014] IEHC 488, as authority for the propositions that actual prejudice was not required, that it is sufficient that prejudice be likely or probable, and that the prejudice relied upon, may be either specific or general. It was submitted that the significant passage of time (decades in this case) inevitably reduces the capacity of witnesses to give meaningful assistance in relation to matters which occurred in the distant past. Reliance was

placed on judicial acknowledgement of this phenomenon in cases such as *Gorman v. Minister for Justice, Equality and Law Reform* [2015] IECA 41 and *Maxwell v. Irish Life Assurance plc* [2018] IEHC 111. Moreover, the point was made that it has been held in *Millerick v Minister for Finance* [2016] IECA 206 that *"in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings."* We were also referred to statements to similar effect in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, 521 (O'Flaherty J.); *O'Connor v. John Player and Sons Ltd.* [2004] 2 I.L.R.M. 321 (Quirke J.); and *Sweeney v. Cecil Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43 (paras 32-34).

60. With regard to the defendants' conduct it was submitted by their counsel that the only real allegation of delay being made was with respect to the first named defendant not filing his defence. It was submitted that there had been no culpable delay on the part of the first named defendant and that the circumstances in which his defence had not been filed were explained in the affidavit of his solicitor. The point is made that no correspondence had been received from the plaintiff's solicitors pressing for a defence until delivery of a notice of intention to proceed shortly before the motion to dismiss was issued. Reliance was placed on the approach of the High Court in *Caulfield v Fitzwilliam Hotel Group Ltd* [2019] IEHC 427, where Meenan J. had said:

> *"16. I must also consider any delay on the part of the first named defendant. When faced with a claim of this nature I would not criticise a defendant for failing to take steps in the proceedings when the plaintiff has not done so. I think that it was reasonable for the defendant to consider that the claim was not being pursued in circumstances where they had engaged with the plaintiff by way of delivery of a defence and a notice for particulars and received no response for a number of years. Taking a step in the proceedings after a lapse of a number of years risked reactivating*

proceedings which otherwise might have been abandoned. I therefore conclude that not only has there been inordinate and inexcusable delay on the part of the plaintiff in prosecuting these proceedings but that the balance of justice lies in favour of striking out these proceedings for want of prosecution."

61. Reliance was also placed on remarks of the Court of Appeal to broadly similar effect in *Millerick v Minister for Finance*, previously cited.

62. As regards the nature of the case, the defendants urged upon us that the first named defendant is subject to allegations that he intentionally withheld information regarding about the (allegedly) defective nature of the impugned device from the plaintiff and that he is guilty of deceit and intentional and negligent misrepresentation. The plaintiff, in his replying affidavit sworn on the 14th of January 2020, expressly referred to *"the very serious pleas of professional, ethical and moral nature that were set out at paragraph 27(i) – (vi) against the first named defendant"*. The sixth named defendant is sued by the plaintiff on the basis that it is vicariously liable for the acts and omissions of the first named defendant.

63. Counsel for the defendants submitted that it is "*axiomatic*" that allegations made against the first named defendant, a surgeon, will rely "*heavily*" upon oral evidence as opposed to documentary evidence at the trial of the action. He submitted that this gives rise to a greater likelihood of prejudice resulting from the delay, and in support of this submission cited the observations of McGuinness J. in *Carroll Shipping Ltd. v. Mathews Mulcahy & Sutherland Ltd* (Unreported, High Court, 18th of December 1996) who stated, *"where matters are at issue which are not, or not fully, covered by documentary evidence, there is a greater likelihood of prejudice resulting from delay."*

64. The plaintiff's claims against the second to fifth named defendants relate to alleged failures in *inter alia* research, testing, manufacture, marketing, supply and monitoring of the impugned device. The respondents submit that the time at which the impugned device was

initially designed, tested and monitored prior to its release to the market "*clearly*" dates back to a time preceding the index event of the 17th of August 1995 when the appellant underwent his initial hip replacement procedure. The respondents submitted that because of the relative antiquity of the impugned device, evidence cannot be solely given on documents ("*if they still exist*") thereby giving rise to what they have characterised in their written submissions as an "*absolute necessity*" to try and adduce oral evidence from individuals who worked for the second to fifth named defendants at the time that such prototypical research, testing and monitoring was conducted as to their state of scientific and technical knowledge at that time, as to what design and testing they carried out, and as to whether those respondents exercised reasonable care / breached a duty of care, prior to 1995. They further submitted that they were in a situation where primary disputes of fact would require to be resolved on oral evidence at a remove of two to three decades, and submitted that this was prejudicial to them. In this regard, we were referred to Keane J.'s remarks in *Maxwell v Irish Life Assurance plc*, [2018] IEHC 111, at para. 73 thereof:

> *"73. The fundamental difficulty for the defendants (and, hence, for Mr Maxwell in resisting the present application) is that the primary point of contention between the parties, namely whether a telephone conversation in the terms alleged took place between Ms Heffernan and Mr Fallon at an unspecified time on an unspecified date in September 2004, is one that is not covered or addressed by any documentary evidence. Thus, it is a controversy that can only be resolved by pitting the recollection of Ms Heffernan against that of Mr Fallon – that is to say, by purporting to adjudicate upon a 'swearing match' - at more than a decade's remove from the period at issue."*

Analysis and Decision

65. Although we accept that it is well established, as has been submitted on behalf of the plaintiff, that while the Court of Appeal must give due consideration to the conclusions of the High Court judge, it is nonetheless free to exercise its own discretion as to whether or not a claim should be dismissed and that it can do so if satisfied that the interests of justice require it, we feel it important to say that this is a jurisdiction which is not to be exercised lightly and to which recourse should be had sparingly. Sparingly does not necessarily imply rarely, but it does involve showing appropriate curial deference to the judgment of the lower court and affording the judge at first instance a significant margin of appreciation particularly in regard to how he/she exercised their discretion. In that regard it is helpful to reiterate what the Court of Appeal has said previously in that regard in *Sweeney v. Cecil Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43. Baker J., in giving judgment in that case (with Irvine J. and Kennedy J. concurring) stated:

> *"7. An appellate court when asked to set aside an order made by a High Court judge in the exercise of his or her discretion in relation to questions of mixed fact and law should do so only if the appellate court considers it necessary in order to avoid a serious injustice being visited upon the appellant.*
>
> *8. Giving his judgment for the Supreme Court in Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance Ltd [2013] IESC 6, MacMenamin J. considered the circumstances in which an appellate Court might review an order made by the trial judge in the exercise of such discretion:*
>
> > *"Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the*

event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental."

9. MacMenamin J.'s dictum was later applied by Irvine J. in the Court of Appeal in Collins v. Minister for Justice, Equality, and Law Reform [2015] IECA 27. She considered that the High Court judge must be accorded a significant margin of appreciation as to the manner in which he or she may exercise discretion on an application such as one to dismiss a claim for inordinate and inexcusable delay. It is not for the appellate court to provide a rehearing of the High Court application and to substitute its discretion for that of the High Court judge. It is, accordingly, for the appellant to demonstrate that the decision made by the High Court judge was not, on the facts of the case, decided in accordance with the prevailing principles or was unjust to the point that it should be set aside on appeal."

66. Accordingly, with regard to the three issues identified by the plaintiff at paragraph 32 above as requiring to be addressed on this appeal, my approach will be to consider whether it has been demonstrated that the decision made by the High Court judge was not, on the facts of the case as found by him, decided in accordance with prevailing principles or was unjust to the point that it should be set aside for appeal. In saying that, it is acknowledged that an aspect of the plaintiff's case on appeal is that the High Court judge made findings of fact particularly with respect to claimed prejudice that were unsupported by evidence, and to the extent that that is an issue that will also be appropriately examined.

Issue No 1 as identified by the plaintiff concerns, in substance, whether the High Court Judge was justified on the evidence before him in concluding that by reason of the existence of inordinate delay (both pre and post the commencement of the plaintiff's proceedings) there was a real and serious risk of an unfair trial and/or an unjust result such that the court ought to dismiss the proceedings in the exercise of its inherent jurisdiction. To put it another way, it

concerns whether his conclusion that the *O'Domhnaill* test was satisfied in the circumstances of the case was correct. Were this Court to conclude that he was justified in so concluding, it would render Issues No's 2 and 3 as identified by the plaintiff (which relate to how he applied the *Primor* test effectively moot. It would only be in circumstances where the Court of Appeal considered that a dismissal in the exercise of the court's inherent jurisdiction (i.e., on *O'Domhnaill* grounds) had been unwarranted, that it would then be necessary to go on to consider whether the decision to also dismiss on *Primor* grounds had been warranted.

Issue 1

Whether the High Court was correct in concluding that the defendants had met the threshold of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result (under the O'Domhnaill test)?

67. The thrust of the plaintiff's case on appeal in regard to this issue is that there was insufficient evidence as to prejudice put forward by the defendants to justify the High Court judge's conclusion. It was said that the assertions of prejudice were entirely generic and they ignored the nature of the proceedings, and the likely centrality of documents and expert evidence in any judicial determination of liability at trial and the limited role and relevance of oral testimony.

The Claims Against the First and Sixth Named Defendants

68. At the outset, let me say that in so far as the proceedings against the first and sixth named defendants are concerned, I am satisfied, having regard to all of the circumstances but particularly the nature of the case, that there is a high likelihood of prejudice at a level that would give rise to a real risk of an unfair trial or an unjust result were this matter to proceed to trial against those parties. The case made by the plaintiff is not just one of the breach of the duty of care owed by a medical professional towards his patient, in a context where it would

be reasonable to expect that detailed notes and records concerning the plaintiff's care at the hands of the first and sixth named defendants, their servants or agents would still exist, as was the case in *McBrearty v North Western Health Board and Ors*, cited earlier. A substantial component of the plaintiff's case against the first named defendant, and vicariously made against the sixth named defendant, is that there was intentional and/or negligent misstatement/misrepresentation by the first named defendant as to his medical situation and as to why he needed (several) hip revision surgeries. It is pleaded that until the plaintiff gained sight, on the 12th of November 2008, of the letter of the 19th of September 2001, sent by the second and third named defendants to the first named defendant, acknowledging the defective nature of the hip device at issue, the plaintiff had no appreciation that the series of hip product/device complications that he had experienced were anything other than ordinary medical consequences flowing from the hip product/device replacement procedure. The case is made that having implanted the hip device at issue in the plaintiff in the course the 1995 surgery performed by him, the first named defendant despite subsequently learning in 2001 of the (allegedly) defective nature of/unsuitability of that device, chose not to disclose that knowledge or information, and in effect actively concealed that information,from the plaintiff. It is claimed that this was in a situation where the first named defendant thereafter undertook further invasive procedures and treatments on the plaintiff in circumstances where, by reason of the withholding/concealment of the relevant information from him, the plaintiff was not in a position to give full and informed consent to those further invasive procedures and treatments.

69. Moreover the plaintiff seeks in his Personal Injuries Summons to reserve the right to further particularise the alleged intentional misrepresentation as "fraudulent" following the making of discovery. Be that as it may, both deceit and breach of fiduciary duty on the part of the first named defendant, his servants or agents, are also expressly pleaded. Further, it is

pleaded that in failing to disclose the defect in the hip product/device at issue they negligently *"and/or deliberately and consciously"* deprived the plaintiff of various of his rights, including *"his right to effectively litigate the issues in respect of the defective hip product/device either at all or at an earlier point in time"*.

70. It seems to me to be in the nature of claims of intentional misrepresentation, active withholding / knowing concealment of information, deceit, breach of fiduciary duty and deliberate and conscious breaches of fundamental rights, that notes and and/or records, even if likely to exist, are unlikely to speak definitively on those issues. The perpetrator of a deceit is inherently unlikely to have recorded the fact of his/her deceit, although he/she may have sought to cover their tracks in contemporaneous records. While such records might be collaterally relevant, for example by the possible inclusion within them of extrinsic material which, combined with oral testimony, might *prima facie* either suggest, or tend to counter any suggestion, of deceit or concealment of information, the nature of such allegations is that they will in most cases require to be both asserted and confronted primarily by oral evidence, in which relevant witnesses will be asked for their recollections of the events in controversy, and as to what exactly may have been said, and by whom, and to whom, and by what means, and in what context. Despite what has been asserted on behalf of the plaintiff, there was nothing before the High Court, and there is nothing before us, to suggest that such documentary records as may exist concerning doctor/patient interactions between the first named defendant, his servants or agents, and the plaintiff, will be central to resolving the controversial issues of fact pleaded in the plaintiff's Statement of Claim..

71. I therefore fully agree with the High Court judge's assessment that the determination of the issues raised with respect to the first and sixth defendants *"will turn largely on the oral testimony of the principals, namely the injured party and the orthopaedic surgeon"*.

72. The High Court Judge said that he was taking judicial notice that the passage of time of between fourteen and twenty five years since the events occurred would potentially impact on the accuracy and reliability of those individuals'~~'s~~ memories. I am satisfied that he was entitled to do so. Even if one were to adopt a conservative approach to determining the earliest date from which evidence might be needed insofar as the cases against these defendants are concerned and only measure time from the 19th of September 2001 rather than from the date of the original surgery in August 1995, to the date of the motion for dismissal, one still is talking about a period of 16 years. There are numerous statements in the jurisprudence of the Irish courts recognising the general proposition that memories fade and become less reliable with time. Reflecting that, Keane J. observed in *Maxwell v Irish Life Assurance plc* (previously cited) that :

> *"80. In Superwood Holdings plc v Scully [1998] IESC 37, the Supreme Court (per Murphy J; Flaherty and Lynch JJ concurring) acknowledged the general proposition that memories fade and become less reliable with time. In Robert McGregor & Sons (Ireland) Ltd & Anor. v The Mining Board & Ors. [2002] IESC 28 (Unreported, Supreme Court, 6th April, 2002), that Court (per Keane CJ; Murphy and Hardiman JJ concurring) identified the unarguable prejudice caused by delay, given the frailty of human memory. And in Manning v Benson and Hedges Ltd, Finlay Geoghegan J concluded (at 574) that delays of four to five years would, as a matter of probability, reduce the potential of persons to give meaningful assistance or act as witnesses. It need hardly be added that there was no suggestion of requiring those persons to aver to that fact to enable the court to take it into consideration."*

Indeed, one has only to state the proposition to recognise and appreciate the correctness of it.

73. Further, I accept the correctness of the submission on behalf of the defendants that actual prejudice does not need to be established and that if likely prejudice may be presumed that will suffice.

74. In conclusion, with regard to the first and sixth named defendants, I agree with the assessment of the High Court judge that the higher threshold required to be met in terms of the prejudice that must be demonstrated for the purposes of satisfying the *O'Domhnaill* test, is in fact met in the circumstances of this case. I am satisfied that this was a conclusion that was open to the High Court judge on the basis of the evidence before him and having regard to the applicable legal principles. Therefore, in so far as the first issue which the plaintiff has identified as requiring to be determined upon this appeal is concerned, I see no basis for interfering with the High Court judge's said conclusion in so far as it relates to the first and sixth named defendants respectively.

The Claims Against the Second to Fifth Named Defendants

75. I must turn then to consider whether the High Court judge was justified in concluding that, in the case of the second to fifth named defendants, prejudice on account of delay also existed at a level sufficient to satisfy the *O'Domhnaill* test. I have found this to be a somewhat more finely balanced issue, but ultimately I am again disposed to uphold the High Court judge's conclusion for the following reasons.

76. The thrust of the case pleaded with respect to the second to named defendants is somewhat different to that pleaded against the first and sixth named defendants. The case is primarily pleaded as a product liability claim framed in various ways including alleged negligence and breach of duty (including statutory duties said to be owed to the plaintiff as a consumer under the Sale of Goods and Supply of Services Acts 1893-1980, and duties owed under or arising by virtue of the Liability for Defective Products Act 1991 and/or Council Directive 85/374 EEC) in and about in the development, manufacture and supply of the

device in question. However that having been said, a subsidiary case is also pleaded to the effect that the defective nature of the hip product/device in controversy was at all material times known to the second to fifth named defendants, that *"particulars of the defect were concealed"* by them (implicitly from the plaintiff), and that evidence of this is to be found in a letter sent by the second/third named defendant to the first named defendant dated the 19th of September 2001. Again, this aspect of the claim goes further than the mere assertion of breach of a duty to warn/advise relevant persons such as the plaintiff. Rather, it again extends to a claim of not just negligent, but knowing, and accordingly conscious and deliberate, concealment of relevant information from such persons. In that regard, there is an express plea at paragraph 25(iii) of the Personal Injuries Summons that:

> "The Second, Third, Fourth and Fifth Named Defendants are liable to the Plaintiff in respect of the defective hip product/device in that they:
>
> (k) knowingly withheld from the Plaintiff information relating to the risk that the hip product/device was associated with a high failure or defective rate."

77. While unlike in the case of the claim being made against the first and sixth named defendants, the alleged concealment by the second to fifth named defendants was not expressly characterised or particularised in the pleadings as being deceitful conduct, I am nonetheless satisfied that in so far as the concealment was alleged to have been done "knowingly", that is tantamount to claiming that it was done deceitfully, and certainly that it was done recklessly, *qua* the plaintiff.

78. While there is certainly less emphasis on knowing concealment in the overall claim pleaded against the second to fifth named defendants, compared with how the case is pleaded against the first (and sixth) named defendants, unquestionably it remains part of the plaintiff's claim against them. I am less concerned than was the High Court judge about possible prejudice to the second to fifth named defendants' ability to identify or locate witnesses or

documentation which would establish what the state of scientific and technical knowledge would have been at the time the hip product/device was put into circulation, although I do not wholly discount it. What can be said is that this is a far less clear cut case than the case of *Granahan v Mercury Engineering* relied upon by the plaintiff.

79. On the one hand, the overall delay is substantially greater than it was in *Granahan*. On the other hand, the development, manufacture and supply of a product by a multinational medical devices company represents a context in which it is reasonable to infer that as a matter of likelihood there must be a substantial level of documentation in the possession or procurement of the second to fifth named defendants, concerning both the processes involved and the state of scientific and technical knowledge at relevant times, even at this remove. It is inconceivable to me that a multi-national company, developing a product for a world-wide market, necessitating interaction with numerous regulatory authorities, and likely patenting their technology, would not have documented what they were doing to a significant extent. While in the absence of hard information, one can only speculate as to the exact position with respect to the likely availability of witnesses who may have been involved at the time, the defendants in question rely on presumed prejudice rather than actual prejudice, and the High Court judge's conclusions were drawn on that basis. However, the nature of much of the claim (and I am referring here primarily to the products liability aspect of it) is such that the need for such witnesses is perhaps questionable.

80. I significantly doubt that in the development, manufacture and trialling of a product of this type in the context in which it occurred, that the product developers, manufacturers and testers would solely entrust important proprietary information, including scientific and technical knowledge gained in the process, to individual or institutional memory. Again, it seems to me, there must be a strong likelihood that documentary records still exist. It therefore seems to me that having regard to published scientific research and literature in the

public domain, and peculiar knowledge comprising proprietary information which likely exists in the records of the second to fifth named defendants and which could be briefed to any modern day expert retained by them, the degree of likely prejudice that would potentially enure to the second to fifth named defendants by virtue of being unable to secure the testimony of witnesses (with an adequate residual memory of events) who were involved at the time would be marginal to (at most) moderate.

81. However, those observations do not apply to so much of the claim as relates to knowing concealment. What in my assessment tips the scales in favour of a conclusion that these defendants also face a real risk of an unfair trial or an unjust result if the matter were to proceed, is the fact that the claim is not confined to a claim of negligence and breach of duty (including statutory duty) in and about the development, manufacture and supply of the hip product/device in question, and consequential liability for having produced and supplied a defective product. Rather, as previously observed, it extends further to a claim of having knowingly concealed the defect from the plaintiff. In my assessment, in that situation, and for the same reasons I outlined when considering a similar claim against the first and sixth named defendants, there are likely to be factual issues which will only be resolvable on oral evidence from witnesses who were involved at the time. The letter of the 19th of September 2001 on which the plaintiff relies requires to be explained and put in context. In a situation where a great deal of time has passed since the critical events (i.e., the discovery of, or the development of an awareness of, a possible problem with the product (if that be so), the supply of the product to the first named defendant for implantation in the plaintiff, the writing of the letter of the 19th of September 2001, amongst others) the recollection of witnesses who were involved at the time will likely be imperfect at best, and at worst non-existent, even assuming that such witnesses are still alive and available to testify.

82. In a situation where the defendants are entitled to rely on presumed prejudice once that reaches the level of the likelihood of an unfair trial and/or unjust result, the fact that they have not identified specific witnesses who might be unavailable, and the circumstances in which such witnesses might be unavailable or unable to provide meaningful assistance, is not fatal to their contention that the proceedings should be dismissed.

83. I would therefore, although for slightly different reasons, uphold the conclusion of the High Court judge that the defendants had met the threshold of establishing prejudice likely to lead to a real risk of an unfair trial and/or unjust result under the *O'Domhnaill* test. In my assessment the High Court was justified, and indeed obliged, to dismiss the proceedings in the exercise of the court's inherent jurisdiction.

Issues 2 & 3

84. Having regard to my conclusion in regard to Issue No 1 as identified by the plaintiff, it does not seem to me to be necessary or appropriate to proceed to consider Issues No's 2 and 3 as identified by him, both of which related to whether the High Court judge was correct in his approach to the application of the *Primor* test. Even if the plaintiff were to succeed in demonstrating that the High Court judge did not apply the *Primor* test correctly, the appeal would still require to be dismissed in circumstances where I have concluded that dismissal on *O'Domhnaill* grounds was justified.

Conclusion.

85. The plaintiff's appeal must be dismissed.

Costs

86. The plaintiff has not succeeded in his appeal. It follows that the defendants should be entitled to their costs. If, however, a 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.

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