

**THE HIGH COURT**

[2022] IEHC 37

**Record no. 2008/5167P**

**BETWEEN**

**WILLIAM O'REILLY**

**PLAINTIFF**

**AND**

**THE NATIONAL DOCUMENT MANAGEMENT GROUP LIMITED AND DELOITTE**

**DEFENDANTS**

**Judgement of Mr Justice Cian Ferriter delivered this 26<sup>th</sup> day of January 2022**

**Introduction**

1. This judgment addresses the defendants' application to have the plaintiff's proceedings dismissed for want of prosecution pursuant to the inherent jurisdiction of the court.

**Background**

2. In these proceedings, the plaintiff seeks damages for personal injuries in respect of injuries said to arise from an accident while performing work duties for the predecessor in title of the first named defendant (then Shreddit Ltd.).
3. The plaintiff pleads in his personal injuries summons that the accident occurred on 16 August 2005 at the premises of the second-named defendant ("Deloitte") in Harcourt Street, Dublin while he was moving shredding consoles. The defendants say there is some controversy as to the precise date and location of the alleged incident given that the plaintiff in his pre-action letter of 3 November 2006 and in other documentation claims that the accident happened in June 2005 at a time when the defendants say it could not possibly have taken place on the premises of Deloitte.

**Principles**

4. The principles applicable to an application such as this such as this are well settled. The test applicable is that enunciated in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, as subsequently developed. Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* stated as follows (at 475) in relation to the relevant principles:-

*'The principles of law relevant to the consideration of the issues raised on this appeal may be summarised as follows:*

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
- (b) it must, in the first instance, be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to:*

- (i) *the implied constitutional principles of basic fairness of procedures,*
- (ii) *whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
- (iii) *any delay on the part of the defendant — because litigation is a two-party operation, the conduct of both parties should be looked at,*
- (iv) *whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
- (v) *the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
- (vi) *whether the delay gives rise to 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 the defendant's reputation and business.'*

5. In the decision of the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. (as she then was) summarised the position as follows:-

*"17. The principles which apply on an application brought to dismiss proceedings for inordinate and inexcusable delay are fully explored in the written submissions that have been delivered by the parties. The most oft cited decision is that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where guidance is given concerning the proper approach to be adopted by the Court when met with such an application.*

*18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.*

*19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."*

6. Accordingly, if the court concludes that the delay is both inordinate and inexcusable, it must proceed to consider where the balance of justice lies and in so doing, may take into account a range of factors including the conduct of the parties to the proceedings, the number and complexity of the events and transactions required to be recalled, and any prejudice which the defendants may suffer arising from the plaintiff's culpable delay.
7. I will reference particular aspects of the jurisprudence relied upon by the parties in their submissions later in the judgment.

### **Chronology**

8. The relevant chronology in relation to the proceedings is as follows:

- 16 August 2005: accident occurred
- 3 November 2006: initiating letter sent to 1st defendant
- 24 November 2006: Form A application to PIAB submitted
- 5 June 2007: PIAB application acknowledged
- 15 August 2007: PIAB authorisation issued
- 26 June 2008: personal injuries summons issued
- 1 October 2008: plaintiff's first affidavit of verification
- 3 October 2008: appearance entered for the 2nd defendant
- 3 October 2008: notice for particulars raised by the 2nd defendant
- 12 January 2009: appearance entered on behalf of 1st defendant
- 14 January 2009: notice for particulars raised by 1st defendant
- 12 February 2009: notice of change of solicitor on behalf of 2nd defendant
- 11 September 2009: replies to 1st defendant's notice for particulars delivered
- 17 September 2009: letter from defendants' solicitors seeking to arrange joint engineering inspection and letter querying reply re-date plaintiff sought treatment for injuries
- 24 November 2009: letter from defendants' solicitors repeating request for joint inspection

- 21 January 2010: letter from defendants' solicitor regarding the plaintiff's failure to attend for medical examination and repeating request for joint inspection
- 22 March 2010: letter from defendants' solicitors requesting voluntary discovery of plaintiff's pre-and post- accident medical records
- 22 March 2010: letter from defendants' solicitors noting non-attendance by plaintiff with defendants medical expert
- 22 March 2010: letter from defendants' solicitors repeating request for joint inspection
- 18 May 2010: letter from plaintiff's solicitors requesting defence, indicating inspection will not be agreed until defence received
- 4 November 2010: defence delivered on behalf of both defendants
- 11 November 2010: letter from plaintiff's solicitors replying to defendants' request for voluntary discovery, offering 3 years pre-accident discovery
- 18 January 2011: defendants' motion for joint engineering inspection issued
- 25 January 2011: letter from defendants' solicitor agreeing to 3 years pre-accident discovery and allowing plaintiff 6 weeks to make discovery
- 10 March 2011: order for joint engineering inspection made by High Court
- 30 March 2011: letter from the defendants' solicitor offering to dispose of claim in light of discrepancies in plaintiff's pleadings
- 21 April 2011: letter from defendants' solicitor noting extraordinary delays and seeking date for joint inspection of negotiations
- 19 May 2011: letter from plaintiff's solicitors seeking date for joint inspection and answering query remedial treatment date in replies to particulars
- 29 June 2011: plaintiff obtains updated medical report of consultant neurologist
- 3 September 2011: plaintiff obtains medical report from consultant anaesthetist/pain specialist
- 22 October 2012: plaintiff's second affidavit of verification amending date of medical treatment and replies to read 18 August 2005
- 12 December 2012: engineering inspection of accident locus
- 6 February 2013: second engineering inspection of the accident locus
- March 2013: engineers report obtained by plaintiff

- 4 April 2013: plaintiff's notice of intention to proceed
- 16 July 2013: plaintiff's request for voluntary discovery
- 16 July 2013: plaintiff delivers updated particulars of negligence
- 2 September 2013: letter from defendants' solicitors stating they are liaising with clients re discovery and requesting complete medical records
- 5 September 2013: letter from plaintiff's solicitors regarding medical records and apology re failure to provide discovery affidavit
- 29 November 2013: letter from plaintiff's solicitor repeating request for voluntary discovery
- 17 February 2014: plaintiff's motion for discovery issues
- 10 March 2014: order for discovery against defendant made by High Court
- 3 June 2014: affidavit of discovery sworn by Paul Kearns on behalf of defendants
- 21 July 2014: notice of trial served by plaintiff
- August 2014: number allocated and hearing date of 12 February 2015 obtained
- 19 November 2014: defendants raise request for discovery
- 7 January 2015: motion for discovery against plaintiff issued by defendants, returnable for 26 January 2015
- 26 January 2015: order for discovery against plaintiff made by High Court
- 12 February 2015: hearing of action adjourned
- 12 October 2015: affidavit of discovery sworn by plaintiff
- 26 November 2015: plaintiff's affidavit of discovery served without exhibits
- 10 November 2016: letter sent by plaintiff's solicitors seeking consent to obtain hearing date and suggesting without prejudice discussions
- 15 December 2016: letter sent by plaintiff's solicitors seeking response to 10 November 2016 letter and again suggesting without prejudice discussions
- 16 February 2017: letter sent by plaintiff's solicitors discussing possible hearing dates seeking consents to obtaining hearing date
- 20 March 2017: letter from defendant solicitors re without prejudice discussions noting that medical exhibits from discovery affidavit still outstanding

- 28 April 2017: plaintiff signs authority permitting his former solicitors to release file to new solicitors, Tiernan and Co
- 16 September 2017: complaint made by plaintiff to Law Society regarding his former solicitors and seeking assistance in transferring the file to his new solicitors
- 19 January 2018: solicitor and own client Bill of costs presented by plaintiff's former solicitors to his new solicitors
- 25 January 2018: Law Society investigation concludes with directions given for the file to be taken over by the plaintiff's new solicitors and for the plaintiff's former solicitors to accept the undertaking proposed by his new solicitors
- January-June 2018: correspondence re negotiation of costs exchanged between plaintiff's former solicitors and his new solicitors
- June 2018: costs issues resolved and file received by the plaintiff's new solicitors
- 9 November 2018: notice of intention to proceed filed by plaintiff's new solicitors
- 9 November 2018 notice of change of solicitor filed by plaintiff new solicitors
- November 2018 - June 2019: arrangements made by plaintiff's new solicitors for plaintiff to attend various experts for the purposes of preparing actuarial report, a vocational assessor support and updated medical reports
- 17 June 2019: notice given by plaintiff new solicitors of intention to call the case of the hearing
- 20 June 2019: defendants' motion to dismiss issued

**Parties' positions on the application**

9. The defendants submitted that there are three periods of inordinate and inexcusable delay in the proceedings, as follows:
  - (a) from the date of the accident in August 2005 to the date of the pre-action letter in November 2006 - 15 months
  - (b) from the date of delivery of the Defence (November 2010) to the delivery of updated particulars of negligence by the plaintiff (16 July 2013) - 2 years and 8 months
  - (c) from the date of an order for discovery of medical records by the plaintiff (12 February 2015) to the date of service of the plaintiff's notice of intention to call the case on for hearing (17 June 2019) - 4 years and 4 months.
10. The defendants submit, in short, that the balance of justice favours dismissal of the proceedings in circumstances where they maintain that they have suffered serious actual prejudice (being the death of a key witness, Mr Mick Naidoo); the unavailability of other

potentially relevant witnesses and significant general prejudice due to the lapse of over 16 years since the accident the subject of the proceedings.

11. The plaintiff, for his part, submits that, apart from a relatively short period in 2011 and into 2012, the various periods of allegedly inexcusable delay are fully excusable and that this is a case where the defendants have been culpable of delay themselves and are in fact responsible for the matter not yet having come to trial by now, in circumstances where the plaintiff had secured a hearing date for his action and which was lost as a result of the defendants leaving it until just before the scheduled hearing date to seek and obtain an order for discovery against the plaintiff.

**Delay Inordinate and if so Inexcusable?**

12. There is no doubt but that the overall lapse of time in these proceedings is inordinate. The real question that arises is the extent the delays in the three periods identified by the defendants are excusable and, if not, whether the balance of justice favours dismissal of the action. I will therefore first analyse the excusability of delay in each of the three periods below.

**(1) August 2005 – November 2006**

13. In my view, the 15 months between the date of the accident and the sending by the plaintiff of a pre-action letter cannot be regarded as inexcusable. The pre-action letter was sent, and the proceedings were subsequently issued, well within the applicable limitation period and it is not unreasonable for the plaintiff in a personal injuries matter to get medical treatment and to see how the relevant injuries pan out before taking the decision to institute proceedings and communicating that decision by a pre-action letter.

**(2) November 2010 – July 2013**

14. As regards the alleged period of inordinate delay between November 2010 and July 2013, I do not believe it can be said that this period of time involved entirely inexcusable delay on the part of the plaintiff.
15. In this period, a motion for joint inspection, issued by the defendants, was dealt with by way of order by the Master (10 March 2011). Updated medical reports were obtained by the plaintiff's solicitor in March, June and September 2011. In my view, the inspection order should have been capable of being complied with by September 2011 at the latest; however, the Order was not complied with until 12 December 2012.
16. There was a second engineering inspection on 6 February 2013 and an engineer's report obtained by the plaintiff in March 2013. A notice of intention to proceed was filed by the plaintiff in April 2013 and updated particulars of negligence were served by the plaintiff in light of the engineers report on 16 July 2013. A letter seeking voluntary discovery was also served by the plaintiff on that date. In my view, the plaintiff has sufficiently excused the lapse of time for the period December 2012 to July 2013.
17. I do not accept the defendant's contention that the relevant period of inexcusable delay in this tranche amounts to 2 years and 8 months. In my view, the inordinate and inexcusable delay on the part of the plaintiff in this phase of the proceedings is a period of

some 15 months from September 2011 to December 2012 i.e. the date of the last medical report to the date of the first engineering inspection.

**(3) February 2015 – June 2019**

18. As regards the alleged period of inordinate and inexcusable delay on the part of the plaintiff from February 2015 to June 2019, it is necessary to break down that period into a number of different phases.
19. It must firstly be borne in mind that the plaintiff had in August 2014 secured a hearing date of 12 February 2015 and only lost that hearing date because the defendants left it until 19 November 2014 (well after the hearing date had been allocated) to raise a voluntary discovery request and where a motion for discovery was issued by the defendant on 7 January 2015 just a few weeks before the hearing date of 12 February 2015.
20. While the defendants sought to submit, at the hearing of this application, that they had been consistently raising the question of discovery (and in particular pre-accident records) since 2010, I do not find this a convincing explanation for the failure on the part of the defendants to formally make their discovery request and bring their motion for discovery well before the time it was brought.
21. The defendants left it until 19 November 2014 to raise a formal voluntary discovery request. The motion for discovery was issued by the defendants on 7 January 2015 just a few weeks before the scheduled hearing date of 12 February 2015. That hearing date had been allocated and notified five months earlier (in August 2014). The High Court then made a discovery order on 26 January 2015 with the inevitable consequence that the trial date of 12 February 2015 had to be vacated. If the defendants had progressed their discovery request and application at an earlier stage in the proceedings (such as at the time when the plaintiff sought voluntary discovery in July 2013, or some time co-extensive with the issuing by the plaintiff of his motion for discovery in February 2014), then the matter could in all likelihood have proceeded to trial in February 2015. If that had happened, the grave prejudice now alleged on the part of the defendants in the form of the unavailability through death of Mr. Mick Naidoo (the individual to whom the Plaintiff says he reported the accident the day it happened, and the individual, it appears, who filled out an accident report form on the defendants' behalf) could have been altogether avoided.
22. While I will return to this aspect of the matter in the context of the balance of justice, it seems to be that it is inescapable that the serious prejudice now alleged to be suffered by the defendant (being the death of Mr Naidu) would not have been suffered at all if in fact the defendants had been in a position to be ready for the allocated hearing of February 2015, given that Mr Naidoo did not pass away until March 2017.
23. In my view, the plaintiff has provided excusable reason for the lapse of time between the order discovery made on 26 January 2015 and the discovery affidavit being sworn on 12 October 2015, given the steps which he has averred had to be taken in that period to



source multiple medical records from a wide variety of doctors, hospitals and medical institutions.

24. There is a period of some 13 months from the swearing of the discovery affidavit in October 2015 (which affidavit was not served until 26 November 2015) to a letter sent by the plaintiff's former solicitors in 10 November 2016 (which sought consent to call the case on and suggested possible without prejudice discussions) which, in my view, is not properly excused, compounded by the fact that not all of the discovery documentation was provided despite request in this period.
25. The plaintiff seeks to rely, as an excusing circumstance in this period, on the fact that he was experiencing extremely difficult personal financial circumstances in 2016 which left him under significant pressure and in danger of having his family home repossessed. He avers that he had no alternative but to enter into a personal insolvency process in a bid to save his home. These circumstances, it is said, took a significant toll on his mental and physical health and contributed to the relative inactivity in the progression of the proceedings in 2016.
26. In my view, the 13 months or so from October 2015 to November 2016 cannot be fully excused on the principles set out in the relevant authorities. It seems clear that the fact that a plaintiff may be experiencing personal and financial difficulties does not of itself provide a good excuse for not progressing proceedings: see Stack J. in *Darcy v. AIB* [2021] IEHC 763 at paragraph 22 citing the decision of Baker J. in *O'Leary v. Turner* [2018] IEHC 7:-

*"No authority has been identified that permits a court to excuse culpable and otherwise unexplained delay on account of personal and financial circumstances of the type identified".*

(I would add that depending on the precise personal and financial circumstances involved, such circumstances might be a factor to be weighed in the scales of the balance of justice stage of the court's evaluation as to whether these proceedings ought be dismissed).

27. In November 2016, December 2016 and February 2017, the plaintiff's former solicitors wrote to the defendants' solicitors seeking their consent to call the case on for hearing and also raising the possibility of without prejudice settlement talks. There is no inexcusable delay in this period.
28. The plaintiff's relationship with his former solicitors broke down in Spring 2017 and the plaintiff approached his current solicitors, Tiernan & Co., seeking new legal representation. He signed an authority on 28 April, 2017 permitting his former solicitors to release his file to Tiernan & Co. On 16 September, 2017, the plaintiff made a formal complaint to the Law Society regarding his former solicitors and sought the Law Society's assistance in having his file transferred to Tiernan & Co. This complaint prompted an investigation by the Law Society.

29. On 19 January, 2018, the plaintiff's former solicitors presented a solicitor and own client bill of costs to his new solicitors but the Law Society concluded its investigation on 25 January, 2018 and gave a direction for the file to be taken over by Tiernan & Co. and for the plaintiff's former solicitors to accept an undertaking proposed by Tiernan & Co. regarding fees due to the plaintiff's former solicitors. There then followed correspondence between the firm's solicitors to seek to resolve the question of costs. This was resolved in June 2018 and the plaintiff's file was handed over to Tiernan & Co.
30. The defendants submitted that the authorities made clear that delay on the part of a plaintiff's legal advisers would not necessarily render the relevant period of delay excusable, citing in this regard the decision of Ní Raifeartaigh J in *McAndrew v Egan* [2017] IEHC 345. In that case, Ní Raifeartaigh J stated:

*"A number of authorities show that the courts are reluctant to find sufficient excuse in the fact that delay can be attributed to a plaintiff's legal advisers. These authorities demonstrate the general rule that responsibility will rest with the plaintiff for failure to expedite matters in such circumstances, although the personal blameworthiness of the plaintiff is a matter which may be considered in the exercise of a court's discretion (see the comments of Finlay P. in *Rainsford*). Comments of similar effect were made by MacMenamin J. in *McBrearty v North Western Health Board* [2007] IEHC 431, when he said 'I consider that even (as here) in the circumstances of an absence of culpability on the part of the plaintiff, culpability may nonetheless be imputed to the plaintiff by virtue of delay on the part of his solicitors in the determination as to whether or not the delay was inexcusable. Different considerations apply, however, in the third aspect of the test, that of "balance of justice".'*

*These cases illustrate that the responsibility for advancing his or her case lies at the door of the plaintiff. Although these comments were made in circumstances where legal representation has been obtained by the litigating party, in my view they are also relevant to situations such as the present, where the difficulty lies in retaining legal representation in the first place. If there is an onus on a plaintiff to advance their proceedings even where he or she is legally represented, there must be a similar onus to do so where he or she is not, provided a reasonable period of time to find a new legal team has been allowed to pass. Much more than a reasonable period in that regard has elapsed in the present case, and the plaintiff is not entitled to stall the proceedings indefinitely while he searches for a new legal team. There comes a point where he must accept that he has to deal with the proceedings even without a legal team."*

31. In that case, the plaintiff, who originally had legal representation but lost that representation, had done nothing in almost four years to retain new solicitors. There was no suggestion that there were any difficulties of the sort presenting here i.e the plaintiff and his new solicitors having difficulty obtaining his file from his old solicitors or the plaintiff otherwise not having access to his case file.

32. In my view the facts of the case are readily distinguishable from those in *McAndrew v Egan*. I believe the plaintiff acted appropriately by seeking to change solicitors in April 2017, having taken the step of sourcing a solicitor who was prepared to act for him. The plaintiff did not allow an unreasonable period of time to pass before finding a new solicitor. In the period from April 2017 to June 2018, it seems to me that the plaintiff made all reasonable steps to obtain his file from his former solicitor. When his previous solicitors were obstructive, as he saw it, as regards transfer of his file, he took the appropriate step of complaining to the Law Society and the Law Society then investigated the matter and ruled in the plaintiff's favour, ultimately leading to the release of the file. I do not believe that it was unreasonable of the plaintiff to adopt the course he did or that he could reasonably have been expected to prosecute his case (whether through his new solicitors or on his own) without his file; indeed it is difficult to see how his new solicitors could properly have acted for him without the file. His file would have included all relevant advices, attendances and medical and other expert reports.
33. If I am wrong in that regard, in my view the exceptional circumstances which led to the delay in the relevant period (from April 2017 to June 2018) ought not be held against the plaintiff in weighing the balance of justice.
34. Having received the plaintiff's file, the plaintiff's new solicitors, Tiernan and Co, served a notice of change of solicitor on 9 November 2018 and served a notice of intention to proceed on the same date. While a reasonable period could have been anticipated for taking over the file and serving a notice of change of solicitor, it seems to me that the five months taken here was excessive and I regard 4 months of the period as inexcusable.
35. The evidence before me on this application demonstrates that extensive steps were taken by Tiernan & Co, on behalf of the plaintiff in the period from November 2018 to June 2019 to update the proofs and to get the matter ready for trial, including attending at various expert experts, and obtaining an actuarial report, a vocational assessor's report and updated medical reports. While the defendants have alleged inexcusable delay in that period it seems to be that the explanation provided on affidavit demonstrates reasonable excuse for this period.
36. The defendants' motion to dismiss issued on 20 June 2019 some 3 days after the plaintiff's new solicitors gave notice of intention to call the case on for hearing.

#### **Conclusion on inexcusable delay**

37. For the reasons set out above, in my view the cumulative periods of inexcusable delay in the three tranches of delay relied upon by the defendants is 32 months. This level of inexcusable delay is also inordinate.

#### **Balance of justice**

38. In light of my conclusion that there have been periods of both inordinate and inexcusable delay, it is necessary to consider whether the balance of justice favours the dismissal of the proceedings.

39. The defendants lay particular emphasis in this regard on the fact that Mr. Mick Naidoo, who was the health and safety manager for the first named defendant's predecessor in title at the time of the accident and who the plaintiff says he reported the matter to on the date in question, is now deceased (having passed away on 28 March 2017).
40. The defendants rely on the fact that the plaintiff in his claim to his union dated 26 June 2006 states that he reported the accident to Mr. Naidoo on his return to the defendants' premises after the accident. The plaintiff in an affidavit sworn in response to the dismissal application says that he reported the accident to Mr. Naidoo upon returning to the first defendant's warehouse premises at the end of the shift on the day in question. That averment was made in the context of pointing out that a colleague, Mr. Damien Saul, was also present to witness this reporting and that Mr. Saul, according to the plaintiff, is available to give evidence in this case as a witness. He makes the point that any alleged prejudice will be alleviated by Mr. Saul's evidence. The plaintiff further points out that another colleague, Mr. Bernard Ennis, was also in the warehouse upon his return on the day in question and is also available to give evidence in the case.
41. In my view the degree of prejudice said to flow from the unavailability of Mr Naidoo has been overstated by the defendants. While I accept that Mr Naidoo would have been a potentially relevant witness for the defendants, it does not appear that the defendants regarded Mr. Naidoo as such an important witness that they took the step of taking any statement from him either at the time of the accident, or at any stage following institution of the proceedings. Indeed, the defendants do not appear to have been aware of Mr. Naidoo's absence through death when they issued this application in June 2019 as the affidavit which raised that matter was delivered on 16 March 2021, just days before this motion was first due to be heard. The delivery of the affidavit led to the hearing of the application being adjourned, as the plaintiff obviously needed to deal with this new plank of the defendants' application. It is common case that the plaintiff's accident was not witnessed; this is not a situation where a witness who could give first hand evidence of the alleged accident has become unavailable through lapse of time.
42. Furthermore, in so far as the reporting of the accident is material to the matters in issue in the case, any prejudice flowing from the absence of Mr. Naidoo is ameliorated – at least to some extent - by the apparent availability of Mr. Dermot Saul as an individual who witnessed the reporting of the accident by the plaintiff to Mr. Naidoo.
43. I do not believe, in the circumstances, that the potential prejudice to the defendants caused by the absence of Mr. Naidoo is of such a degree as to lead to a substantial risk of an unfair trial or is such as to tip the balance of justice against the plaintiff's case being allowed proceed at this point.
44. The defendants also say they are prejudiced by the unavailability of two other potentially important witnesses: Alan Kelleher who is said to have been an operations manager at the time of the alleged incident and Craig Ryan who is said to have been a colleague of the plaintiff who occasionally accompanied on collection and delivery duties in or around 2005. In my view, the defendants have not convincingly explained how the potential

unavailability of Craig Ryan or Alan Kelleher will materially prejudice the conduct of their defence of the action.

45. The defendant also says that it is inherently prejudiced by the fact of the severe lapse of time since the incident. The defendants maintain that the "headway" that they may have been able to make on inconsistencies in the plaintiff's contemporary accounts of the accident (including the date of the accident) will now be wiped out by the fact that lapse of time will allow the plaintiff to claim a lack of memory in relation to matters.
46. In my view, this point is not well made. On the defendants' case, there are documented contemporaneous inconsistencies in the plaintiff's account. I accept the submission on behalf of the plaintiff that any allegations of inconsistency in the plaintiff's account of the date or locus of the accident is a matter that can be tested on cross-examination of the plaintiff. These inconsistencies are as readily capable of being advanced to damage the plaintiff's case now as they would have been if the case were run a number of years ago. I do not see that delay is a factor which goes to this point one way or another. If the plaintiff's account was inconsistent at the time (as the defendants maintain), that remains the position today.
47. In my view, as touched upon earlier in this judgment, a very important factor in the consideration of the balance of justice on the facts of this case is the defendants' own conduct in leaving it so late with its discovery request and application that the trial date of February 2015 (which had been fixed for some five months) was lost. If the defendants had progressed their defence of the action with appropriate expedition at that time, this case would be long over and would have run at a time when Mr Naidoo was still alive.
48. In my view, the point is well made by counsel for the plaintiff that the defendant also acquiesced by its conduct in the period from November 2018 to June 2019 in not issuing any motion to dismiss thereby inducing the plaintiff to incur time and costs on updating his proofs for trial. The defendants knew from 9 November 2018 onwards that the plaintiff had changed solicitor and that his new solicitor had filed a notice of intention to proceed and yet they waited to issue their dismissal motion until just after notice was given by the plaintiff's new solicitors in June 2019 of their intention to call the case on for hearing.
49. It is clear from the judgment of Irvine J. in *Connolly's Red Mills v. Torc Grain & Feed Limited* [2015] IECA 280, that conduct on the part of a defendant that leads a plaintiff to believe that the defendant would meet the plaintiff's claim on its merits and that will also "cause the plaintiff to spend a great deal of time and money in engaging with litigation long past the point of which the application to dismiss ought to have been made" is conduct "which is very relevant to the exercise of the court's discretion as to whether the balance of justice is in favour of or against the dismissal of the proceedings" (at paragraph 43).
50. I also bear in mind the degree of prejudice to the plaintiff if, through dismissal of his action, he loses the right to seek fair compensation for injuries said to have been

sustained by him as a result of the defendants' negligence. In that regard, I have had regard to the fact that the matter is now ready for hearing.

51. Further, and as mentioned earlier, if I am wrong in relation to the excusability of the period of delay attributable to the plaintiff's attempts to obtain his file from his old solicitors (April 2017 to June 2018), in my view the exceptional circumstances which led to the delay in that period ought not be held against the plaintiff in weighing the balance of justice.
52. In my view, the appropriate balance to be struck between allowing the plaintiff the chance to be fairly recompensed for his injury and the defendants not being put on the hazard of an unfair trial on the facts of this case is in favour of the plaintiff being permitted to proceed to trial.
53. The defendants made an alternative submission that even if the court took the view that the delay was excusable, the court should dismiss the proceedings on the basis that there is a serious risk that a fair trial simply cannot now ensue citing in that regard the dicta of Donnelly J. in the recent Court of Appeal decision in *Sullivan v. HSE* [2021] IECA 287 at paragraph 54:

*"In my view, in a situation where a case is being presented on the basis that there is a real and substantial risk of an unfair trial or unjust result, an issue of unexplained delay falls away because culpable delay is not a matter the defendant needs to establish in order to succeed".*

54. Ultimately, this remains a simple case. The plaintiff will give an account of the alleged incident. The defendants will be able to challenge that account including by reliance on contemporaneous documentation, which it remains in possession of, and from which apparent inconsistencies in his account of the incident are evident. The defendants have been able to inspect the locus of the incident with experts and have had the plaintiff medically examined. In my view, on the facts of this case, there is not a real and substantial risk of an unfair trial or unjust result as a result of lapse of time.
55. It is of course the case that a trial judge retains the right to call a halt to proceedings if it becomes clear during the course of the trial that the degree of prejudice caused by delay is such as to a fair trial taking place: see in this regard the judgment of Clarke J. (as he then was) in *Nash v. DPP* [2015] IESC 32 as discussed by Donnelly J. in *Sullivan v. HSE* (para 73) citing Clarke J. (as he then was) at paragraph 2.22 of *Nash v. DPP* as follows:-

*"It remains one of the most important duties of the trial judge to assess, if the issue is raised, whether any of the lapse of time issues which emerge render it appropriate to reach a determination other than on the merits in all the circumstances of the case".*

56. The defendants accordingly retain the right to raise at trial any issue arising at trial which would bring them within the test set down in *Nash*.

57. It is important to point out that the court will not be tolerant of any further delays in the matter and that it now behoves the parties to get as early a trial date as can be obtained so that these proceedings can be brought to a close.

**Conclusion**

58. In the circumstances, I refuse the defendants' application.